

# Implementation of the EU Common Position on the Control of Arms Brokering





**IMPLEMENTATION OF THE EU COMMON POSITION  
ON THE CONTROL OF ARMS BROKERING**

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The **South Eastern and Eastern Europe Clearinghouse for the Control of Small Arms and Light Weapons** (SEESAC) has a mandate from the United Nations Development Programme and the Regional Cooperation Council to support all international and national stakeholders by strengthening national and regional capacity to control and reduce the proliferation and misuse of small arms and light weapons, and thus contribute to enhanced stability, security and development in South Eastern and Eastern Europe.

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## **Implementation of the EU Common Position on the Control of Arms Brokering, Beograd, 2009**

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## Abbreviations

COARM	Council Working Group on Conventional Arms
DRC	Democratic Republic of Congo
EU	European Union
EUFOR	European Forces in Bosnia and Herzegovina
GGE	Group of Governmental Experts
MANPADS	Man-Portable Air Defence Systems
MFA	Ministry of Foreign Affairs
ML	Military List category
MOD	Ministry of Defence
OGTCL	Open General Trade Control Licences (UK)
OITCL	Open Individual Trade Control Licences (UK)
OSCE	Organisation for Security and Cooperation in Europe
PoA	UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in SALW in All its Aspects
SALW	Small arms and light weapons
SITCL	Standard Individual Trade Control Licences (UK)
UK	United Kingdom
UN	United Nations

## Executive summary

This report provides an overview of the implementation of the Common Position 2033/468/CFSP of 23 June 2003 on the control of arms brokering by EU member states and states in the Western Balkans. It highlights some of the approaches that have been taken by a selection of these states to implement the mandatory and optional provisions of the Common Position. The report is intended to demonstrate the range of possibilities that have been exercised at the national level to implement the Common Position. It is hoped that amongst these possibilities are approaches for implementing the provisions of the Common Position that can be utilised by the former Yugoslav Republic of Macedonia.

Governments and reputable arms manufacturing companies around the world rely on arms brokers for helping to arrange and facilitate sales. However, unscrupulous arms brokers are suspected of supplying arms to states subject to arms embargoes imposed by the UN, OSCE and EU, terrorists and insurgents, organised crime groups and other 'undesirable' end-users. Illicit arms brokering can therefore have a negative influence on national, regional and international stability and security, detrimentally impacting upon conflict prevention and resolution, crime prevention, humanitarian, health and development issues. In light of these factors, global and regional bodies have called upon their member states to implement adequate national controls over arms brokers.

## EU Common Position on the control of arms brokering

The EU Council Working Group on Conventional Arms (COARM) discussed the issue of arms brokering in relation to the EU Code of Conduct on Arms Exports and in 2001 agreed upon a set of guidelines for controlling brokering, which was considered to contain elements to be implemented in national laws. These guidelines were developed and adopted by the Council of the European Union as Common Position 2003/468/CFSP of 23 June 2003 on the control of arms brokering (Common Position). At the time of writing, 23 EU member states have national legislation that contains provisions on the control of arms brokering; with 21 of these states reporting in 2009 that they have completed implementation of the EU Common Position on the control of arms brokering.

The stated objective of the Common Position is to 'control arms brokering in order to avoid the circumvention of UN, EU or OSCE embargoes on arms exports, as well as of the Criteria set out in the EU Code of Conduct on Arms Exports'. To achieve this objective, member states are required 'to establish a clear legal framework for legal brokering activities' that conforms to the mandatory provisions of the Common Position. The mandatory and optional provisions for the control of arms brokering contained in the Common Position can be summarised as follows:

### Mandatory Provisions

- Definition of brokering activities
- Requirement to control brokering transactions within national jurisdiction
- Requirement for a licence or written authorization for brokering transactions
- Requirement for record-keeping
- Requirement for the exchange of information within the EU
- Requirement for adequate sanctions to be in place to ensure that controls are effectively enforced

### Optional Provisions

- Option for extraterritorial controls over brokering
- Option for requirement for a licence or written authorization to be a broker
- Option for establishment of a register of arms brokers

### Implementation of the Common Position on control of arms brokering by EU member states

A description is provided of the implementation of the EU Common Position on the control of arms brokering by a selection of EU member states. Examples are provided that are deemed to be of use to the former Yugoslav Republic of Macedonia, or instructive as to the variety of approaches that have been adopted by EU member states that have implemented the EU Common Position. References are made most frequently to the provisions in legislation on the control of arms brokering implemented by Bulgaria, Estonia, Germany, Spain and the UK.

The report considers common elements and the diversity of definitions for brokering activities to be controlled, goods to be subject to controls, scope and jurisdiction for countries used in national legislation. It is noted that there are a range of licensing procedures in place for controlling arms brokering. Particular attention is paid to states that employ a two-stage system of prior registration or authorisation to be a broker as a pre-requisite before an application can be made to carry out brokering activities. The fact that several states also require authorisations for entities involved in providing brokering-related services is also highlighted. The licensing assessment criteria used for licence applications for brokering activities are the same criteria used for assessing export licence applications, with references to the criteria of the EU Common Rules governing the control of exports of military technology and equipment cited alongside other national criteria. Grounds for refusals, revocations and exemptions are also illustrated with reference to national legislation. Procedures and information required by the state and brokers for record-keeping and reporting are also discussed. Some examples of the types of offences and administrative and custodial sanctions that can be used against violators of arms brokering controls are outlined. Considerable emphasis has been placed upon the importance of information exchange and international cooperation in combating illicit arms brokering and also for implementing national and extraterritorial controls on arms brokers. Although not discussed in the Common Position, COARM has discussed the prospect of greater public transparency on information relating to arms brokering and several EU member states have developed different mechanisms for making public information on registered arms brokers and licences approved.

### Implementation of the Common Position on control of arms brokering by states in the western Balkans

The current state of play is discussed with regard to legislation covering arms brokering controls, and alignment with the Common Position, for Albania, Bosnia and Herzegovina, Croatia, Montenegro and Serbia. For each country, excerpts from, and commentaries on, the legislation on the control of arms brokering with regard to the following topics are provided: definitions of brokering activities, goods to be controlled, scope and jurisdiction; licensing procedures including requirements for registration and licensing, licensing assessment criteria, record-keeping and reporting, sanctions, information exchange and international cooperation, and parliamentary and public transparency.

The report finds that while all of these states make reference to brokering controls in their export control legislation, not all states have legislation that implements all of the mandatory provisions of the Common Position. It has been recognised that the introduction of new laws on export controls in Croatia and Montenegro aligns the legislation of these countries with the Common Position. Many elements of the legislation of Bosnia and Herzegovina and Serbia are in line with the Common Position. However, more work is required before Albania can be considered to have a legal framework that fully implements the Common Position.

### Options for brokering controls for the Former Yugoslav Republic of Macedonia

There are no examples of a specific law on arms brokering controls in EU member states or states in the Western Balkans. Those states that have brokering controls have included them as amendments to existing national transfer control legislation or as part of a new law on national transfer controls. Brokering controls are either outlined in specific chapters or articles within national laws and secondary legislation on export controls, or brokering activities are treated as comparable to exporters and importers and required to fulfil the same requirements as 'entities involved in foreign trade in arms and military equipment', or words to similar effect.

**Definition of brokering activities to be controlled:** At a minimum a definition in line with the Common Position's call for controls on dealing and mediating is required. It is recommended that options for controlling related services should be considered.



**Definition of goods to be subject to control:** the same as for export and import controls.

**Definition of scope and jurisdiction:** At a minimum, controls should be in place to cover brokering activities undertaken within the territory of the former Yugoslav Republic of Macedonia in relation to a transfer of controlled goods between two third countries. The former Yugoslav Republic of Macedonia may wish to explore options for: controls on the brokering of goods from the territory of the former Yugoslav Republic of Macedonia; partial extraterritorial controls on brokering related to the transfer of a particular type of controlled goods or for particular destinations; or full extraterritorial controls on arms brokers registered in the former Yugoslav Republic of Macedonia.

**Licensing procedures for arms brokering:** The former Yugoslav Republic of Macedonia already operates with a two-stage licensing procedure for commercial exporters of controlled goods and it is recommended that this approach should be explicitly extended to arms brokers. It is for the former Yugoslav Republic of Macedonia to decide whether registered arms brokers should be included in a register for all entities permitted to engage in the export, import or brokering of arms or in a specific register of arms brokers. It is recommended that brokering licences be issued for single transfers on a case-by-case basis.

**Licensing assessment criteria:** the same criteria as used for export licence applications.

**Record-keeping and reporting:** The former Yugoslav Republic of Macedonia should legislate for records to be kept for a minimum of ten years of all persons and entities that have obtained a licence for an arms brokering transaction. Legislation should also require arms brokers to keep records of their activities for ten years and consider options for reporting on the use of licences.

**Sanctions:** The maximum size of the fines and length of custodial sentences to be awarded for violations of the law with regard to arms brokering differs between states. However, most states have provisions in their primary or secondary legislation controlling arms brokers, or contained in a national criminal code, to imprison those who have committed a serious violation

**Information exchange and international cooperation:** the former Yugoslav Republic of Macedonia could follow the examples set by other states in the western Balkans and announce its willingness and ability to share information with OSCE member states on registered brokers and licence applications that have been granted and refused.

**Parliamentary and public transparency:** Several EU member states and states in the Western Balkans have provided information on registered brokers and licences for the public. Options include:

- Providing access to brokering documents to members of parliament or the public at the licensing authority (e.g. Finland);
- Publishing information on registered brokers in a national report or on a website (e.g. Estonia);
- Publishing information on arms transfers between third countries that involved brokering activities carried out by an entity registered in your national territory - providing information on the export country, importer country, military list category of goods, description of goods, number of licences issued, their value, the value of exports, and refusals (e.g. Romania).



## 1. Introduction

In November 2004 the government of the former Yugoslav Republic of Macedonia adopted a Decision on Unilateral Acceptance of the European Union's (EU) Code of Conduct on Arms Exports, which was followed in 2005 by a commitment to implement provisions of the Common Position of the European Council No. 2033/468/CFSP of 23 June 2003 on the control of arms brokering (Common Position).<sup>1</sup> At the time of writing, the former Yugoslav Republic of Macedonia has not fully implemented the Common Position on the control of arms brokering.

Provisions are contained within the former Yugoslav Republic of Macedonia's Law on Foreign Trade (1993) and the Law Amending the Law on Weapons (2007), under which entities engaged in foreign trade, in theory including arms brokers, have to be registered with the Ministry of Economy and receive an authorization from the Ministry of the Interior.<sup>2</sup> Arms brokering activities are also covered by the Law on International Restrictive Measures of the former Yugoslav Republic of Macedonia, adopted in March 2007, which implements arms embargoes imposed by binding United Nations (UN) Security Council Resolutions. This should require Macedonia to prohibit Macedonian nationals from involvement in arms transfers to embargoed targets.

This report provides an overview of the implementation of the Common Position by EU member states and states in the Western Balkans. It highlights some of the approaches that have been taken by a selection of these states to implement the mandatory and optional provisions of the Common Position. The report is intended to demonstrate the range of possibilities that have been exercised at the national level to implement the Common Position. It is hoped that amongst these possibilities are approaches for implementing the provisions of the Common Position that can be utilised by the former Yugoslav Republic of Macedonia in the drafting of legislation to implement the Common Position.

### Defining arms brokering

The UN Group of Governmental Experts (GGE) established to consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons defined a broker as:

'a person or entity acting as an intermediary that brings together relevant parties and arranges or facilitates a potential transaction of small arms and light weapons in return for some form of benefit, whether financial or otherwise'.<sup>3</sup>

Core brokering intermediary or mediation activities include:

- Indicating business opportunities to one or more parties;
- Introductions of relevant parties;
- Assisting parties in proposing, arranging or facilitating agreements or possible contracts;
- Assisting parties in obtaining necessary documentation; or
- Assisting parties in arranging necessary payments.<sup>4</sup>

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<sup>1</sup> Republic of Macedonia 2008 Report on Implementation of the United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, Skopje, 31 March 2008.

<sup>2</sup> Republic of Macedonia 2008 Report on Implementation of the United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, Skopje, 31 March 2008.

<sup>3</sup> Report of the Group of Governmental Experts established pursuant to General Assembly resolution 60/81 to consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons, UN Doc. A/62/163, 30 Aug. 2007, Para 8.

<sup>4</sup> Report of the Group of Governmental Experts established pursuant to General Assembly resolution 60/81 to consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons, UN Doc. A/62/163, 30 Aug. 2007, Para. 9.

It has been suggested that ‘making use of telecommunications resources’ if related to an arms deal should therefore be considered a brokering activity.<sup>5</sup> However, many states operate with a broader definition of what constitutes ‘core brokering activities’, including instances of where an arms broker acts as a dealer or agent, supplying arms or military equipment that are in the possession of the arms broker but do not constitute an export because they are to be transferred from one third country to another third country.<sup>6</sup> In addition to mediating and dealing, there is a third set of brokering activities, relating to mediating for the provision of services related to an arms deal, such as technical assistance, training, transport, freight forwarding, storage, finance, insurance, maintenance, security and other services. It has been suggested that mediating and arranging contracts for transportation, technical services, financing, insurance, advertising and other services related to arms deals should also be considered core arms brokering activities.<sup>7</sup>

The provision of services is, however, not regarded as identical to brokering in the political or legal spheres.<sup>8</sup> The distinction is less clear in practice.<sup>9</sup> Therefore a system that controls core brokering activities and related services is regarded as useful for controlling specialist companies or individuals involved in the provision of services, such as logistics, transportation, freight forwarding, insurance, financial services, which might not be controlled by export or brokering controls: it is recommended by some that they should also be subject to controls because they can also be involved in the diversion of arms to undesirable end-users.<sup>10</sup> It has been recommended that this option should only be taken if the state in question believes that effective enforcement is possible.

It has been noted that arms brokering activities can take place in the broker’s country of nationality, residence, registration or in another country, with the arms or military equipment being transferred not having to pass through the territory where the broker is based or where the brokering activities take place.<sup>11</sup> Therefore, effective national controls require provisions for international cooperation, and in some cases include extraterritorial controls over the activities of brokers with citizenship, residence or registration in one country that perform activities in another country.

### Arms brokering: international concerns

Governments and reputable arms manufacturing companies around the world rely on arms brokers for helping to arrange and facilitate sales.<sup>12</sup> However, unscrupulous arms brokers are suspected of supplying arms to states subject to arms embargoes imposed by the UN, Organisation for Security and Cooperation in Europe (OSCE) and EU, terrorists and insurgents, organised crime groups and other ‘undesirable’ end-users. It is believed that they play a key role in moving shipments of arms from the licit to the illicit markets, aid governments with their covert or ‘grey’ arms transfers and make available weapons and/or materiel which are not permitted for sale on the

<sup>5</sup> Best Practice Guide on National Control of Brokering Activities, OSCE Handbook of Best Practices on Small Arms and Light Weapons, FSC. GAL/63/03/Rev.2, 19 Sept. 2003, p. 10.

<sup>6</sup> Some analysts have argued that, ‘Strictly speaking, brokering is the act of mediation and not the act of purchasing or taking possession of material items in a transaction’. Wood, B., ‘The prevention of illicit brokering of small arms and light weapons: Framing the issue’, *Developing a Mechanism to Prevent Illicit Brokering in Small Arms and Light Weapons: Scope and Limitations* (Geneva: UNIDIR, 2006), p. 12.

<sup>7</sup> Wood, B., ‘The prevention of illicit brokering of small arms and light weapons: Framing the issue’, *Developing a Mechanism to Prevent Illicit Brokering in Small Arms and Light Weapons: Scope and Limitations* (Geneva: UNIDIR, 2006), p. 13.

<sup>8</sup> Best Practice Guide on National Control of Brokering Activities, OSCE Handbook of Best Practices on Small Arms and Light Weapons, FSC. GAL/63/03/Rev.2, 19 Sept. 2003, p. 9.

<sup>9</sup> Best Practice Guide on National Control of Brokering Activities, OSCE Handbook of Best Practices on Small Arms and Light Weapons, FSC. GAL/63/03/Rev.2, 19 Sept. 2003, p. 9.

<sup>10</sup> Anders, H. and Cattaneo, S., *Regulating Arms Brokering: Taking Stock and Moving Forward the United Nations Process* (Brussels: GRIP, 2005), p. 30; Anders, H., ‘European and international developments in arms brokering controls’, Note d’Analyse du GRIP, Brussels: Group de recherche et d’information sur la paix et la sécurité, 26 November 2007; Griffiths, H. and Bromley, M., *Stemming destabilizing arms transfers. The impact of European Union air safety bans* ((Stockholm: SIPRI Insights on Peace and Security no. 2008/3, October 2008); Griffiths, H. and Bromley, M., *Air Transport and Destabilizing Commodity Flows* (Stockholm: SIPRI Policy Paper no. 24, May 2009).

<sup>11</sup> Report of the Group of Governmental Experts established pursuant to General Assembly resolution 60/81 to consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons, UN Doc. A/62/163, 30 Aug. 2007, Para. 11.

<sup>12</sup> Wood, B., ‘International initiatives to prevent illicit brokering of arms and related materials’, *Disarmament Forum*, no. 3, 2009, p. 5.

international arms market.<sup>13</sup> Illicit arms brokering can therefore have a negative influence on national, regional and international stability and security, detrimentally impacting upon conflict prevention and resolution, crime prevention, humanitarian, health and development issues.<sup>14</sup>

In light of these factors, global and regional bodies have called upon their member states to implement adequate national controls over arms brokers, with the former Yugoslav Republic of Macedonia subject to implement such provisions in line with the following international commitments:

- UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in SALW in All its Aspects (PoA) (2001);
- UN Protocol Against the Illicit Manufacturing of and Trafficking in Firearms their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (2001);
- OSCE Document on Small Arms and Light Weapons (2000);
- OSCE Principles on the Control of Brokering in Small Arms and Light Weapons (2004);
- OSCE Principles for Export Controls of Man-Portable Air Defence Systems (MANPADS) (2004).

### Elements for controlling arms brokering

The UN GGE highlighted a number of key provisions that were to be found in existing national legislation to prevent, combat and eradicate illicit brokering activities, including:

- A definition of what constitutes brokering and/or who is a broker;
- Definitions and controls for the brokering of and/or provision of activities closely related to arms brokering;
- A definition of the jurisdiction for controls;
- The registration and screening of potential brokers;
- A licensing or written authorization requirement for each brokering transaction;
- Clearly stated conditions for exemptions;
- The elaboration of criteria to be used when assessing licences for brokering transactions;
- Record-keeping by governments;
- Record-keeping by brokers;
- A list of sanctions to be imposed on those violating national legislation on brokering; and
- Provisions for international cooperation.

Controls on brokering activities are usually included in export control legislation. This is in line with the OSCE's 'Best Practice Guide on National Control of Brokering Activities', which recommends that 'brokering controls

<sup>13</sup> Mathiak, L. and Lumpe, L., 'Government gun-running to guerrillas', in Lumpe, L. (ed.), *Running Guns: The Global Black Market in Small Arms* (Zed Books, 2000), pp. 55-80.

<sup>14</sup> Report of the Group of Governmental Experts established pursuant to General Assembly resolution 60/81 to consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons, UN Doc. A/62/163, 30 Aug. 2007, Para. 3.

should complement existing export controls - ideally be integrated - avoiding duplication of controls but rather being concise and focused on cases that are not yet controlled in another way'.<sup>15</sup> In addition, 'the provisions relating to the export, import, transit and transshipment of arms, that would otherwise apply to transfers into, from or through national territory, should be applied to arms brokering activities regardless of whether the broker or shipment itself are at any time within national territory'.<sup>16</sup> The OSCE Guide and the UN GGE recommend that licence applications should be assessed against the same criteria used for assessing applications for export licences and should be considered on a case-by-case basis.<sup>17</sup>

According to a 2008 assessment of state reporting on implementation of the PoA, 52 states had legislation controlling brokering activities - although questions were raised regarding brokering controls in 18 states that did not give sufficient details of relevant provisions for controlling brokering activities.<sup>18</sup> The same assessment noted that: 22 states reported a requirement for registration with national authorities to be a broker; 28 states reported having a system of licensing for brokering activities; 20 states reported that their national laws criminalised illicit arms brokering activities and provided penalties for violations; and 14 states reported maintaining extraterritorial controls on arms brokering.<sup>19</sup>

### The EU Common Position on the control of arms brokering

The issue of monitoring arms brokering has been discussed for some time within the COARM meetings on the implementation of the EU Code of Conduct on Arms Exports.<sup>20</sup> In 2001, a set of guidelines for controlling brokering was agreed upon, which was considered a possible basis for national legislation.<sup>21</sup> The guidelines emphasised the need to prevent activities that circumvented or helped to circumvent EU, OSCE or UN arms embargoes and the export criteria of the EU Code of Conduct, as well as encourage information sharing between member states on licit and illicit brokering. The Third Annual Report According to Operative Provision 8 of the European Union Code of Conduct on Arms Exports (EU Annual report on arms exports) stated that:

'member states have thus agreed that arms brokers resident or established within the territory of the EU and/or brokering activities that take place within the territory of Member States should be controlled. Such controls should cover the activities of persons or entities who act as agents, traders or brokers in negotiating or arranging transactions that involve the transfer of arms and military equipment from one foreign country to another. These measures will also establish a clear framework for legitimate brokering activities'.<sup>22</sup>

To prevent loopholes between different national approaches, it was recommended that states require persons or entities involved in dealing or mediating in arms to possess a licence or written authorisation issued by competent authorities in the member state in which the brokering activities take place or where they are resident or legally established. A requirement for registration or written authorisation to perform brokering activities issued by the

<sup>15</sup> Best Practice Guide on National Control of Brokering Activities, OSCE Handbook of Best Practices on Small Arms and Light Weapons, FSC. GAL/63/03/Rev.2, 19 Sept. 2003, p. 2.

<sup>16</sup> UNDP, How to Guide: Small Arms and Light Weapons Legislation, Geneva: Bureau for Crisis Prevention and Recovery, July 2008, p. 46.

<sup>17</sup> Best Practice Guide on National Control of Brokering Activities, OSCE Handbook of Best Practices on Small Arms and Light Weapons, FSC.GAL/63/03/Rev.2, 19 Sept. 2003, pp. 13-14; Report of the Group of Governmental Experts established pursuant to General Assembly resolution 60/81 to consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons, UN Doc. A/62/163, 30 Aug. 2007, Para. 43 and 45.

<sup>18</sup> Parker, S. and Cattaneo, S., *Implementing the United Nations Programme of Action on Small Arms and Light Weapons: Analysis of the National Reports Submitted by States from 2002 to 2008*, (New York and Geneva: UNIDIR, December 2008), pp. 41-6.

<sup>19</sup> Parker, S. and Cattaneo, S., *Implementing the United Nations Programme of Action on Small Arms and Light Weapons: Analysis of the National Reports Submitted by States from 2002 to 2008*, (New York and Geneva: UNIDIR, December 2008), pp. 43.

<sup>20</sup> Second Annual Report According to Operative Provision 8 of the European Union Code of Conduct on Arms Exports, EU Doc. 2000/C 379/01, Official Journal of the European Communities, 29 Dec. 2000, p. 3.

<sup>21</sup> Third Annual Report According to Operative Provision 8 of the European Union Code of Conduct on Arms Exports, EU Doc. 2001/C 351/01, Official Journal of the European Communities, 11 Dec. 2001, p. 3.

<sup>22</sup> Third Annual Report According to Operative Provision 8 of the European Union Code of Conduct on Arms Exports, EU Doc. 2001/C 351/01, Official Journal of the European Communities, 11 Dec. 2001, p. 3. These guidelines were re-stated in Annex I. Compendium of Member States agreed practices within the framework of the Code of Conduct, Fourth Annual Report According to Operative Provision 8 of the European Union Code of Conduct on Arms Exports, EU Doc. 2002/C 319/01, Official Journal of the European Communities, 19 Dec. 2002, p. 5.



member state in which the broker is resident was suggested as an option, although it was recommended that individual brokering activities should be licensed and should be assessed on a case by case basis against the criteria of the Code of Conduct. The guidelines also called for records of illicit activities by the applicant to be taken into account and that effective penalties should be put in place to support legal controls. The exchange between Member States of information on legislation, registered brokers and brokers who have a history of proven involvement in illicit activities was also raised.

These recommendations and suggestions were presented as a draft Common Position during the Spanish presidency of the EU in 2002. It was adopted by the Council of the European Union as Common Position 2003/468/CFSP of 23 June 2003 on arms brokering. The Common Position requires EU member states to implement its provisions to control arms brokering activities to prevent the circumvention of UN, EU or OSCE arms embargoes or the criteria of the EU Code of Conduct on Arms Exports. The provisions include requirements for states to licence specific brokering transactions, assess licence applications for brokering as stringently as export licence applications, introduce mechanisms for information exchanges and sanctions to ensure that controls are effectively enforced. Mechanisms for the exchange of information have subsequently been developed, with template forms now available for reporting denial notifications for brokering licences and denial notifications for arms broker registration.<sup>23</sup>

The Common Position does not explicitly prescribe the integration of brokering controls into existing transfer control systems, but the provisions are comparable with those for arms export controls. The export control frameworks of EU member states differ with regard to some of their elements, and one has also witnessed different approaches to, and provisions contained within, EU member states' national controls on arms brokering. The Common Position provides general mandatory and optional provisions for controlling arms brokering, but does not provide a model or template for legislative uniformity for all member states, as will be demonstrated in chapter three of this report.

At the time of writing, 23 EU member states have national legislation that contains provisions on the control of arms brokering; with 21 of these states reporting that they have completed implementation of the EU Common Position on the control of arms brokering.<sup>24</sup>

## Methodology

The implementation of the Common Position by EU member states has received some attention from researchers in recent years, and their studies have helped to organize the structure of this report.<sup>25</sup> The review provided in this report is also able to draw upon recent changes in the legislation of several EU member states to implement the Common Position and therefore some of the cases selected in this report have not previously been the focus of attention with regard to brokering controls. The report also discusses aspects of brokering controls that are not contained in the Common Position, but which are discussed in the OSCE Best Practice Guide on National Control of Brokering Activities and the Report of the Group of Governmental Experts established pursuant to General Assembly resolution 60/81 to consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons. It was felt that insights from these materials would help provide the government of the former Yugoslav Republic of Macedonia with provisions to implement a comprehensive system for controlling transfers and arms brokering activities, that complies not only with the Common Position but also commitments to the OSCE and UN.

<sup>23</sup> Annex, Form 1 - Denial Notification under Council Common Position 2008/944/CFSP and Form 3 - Denial Notification on Arms Broker Registration under the Council Common Position 2003/468/CFSP on the Control of Arms Brokering, User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment, EU Doc. 9241/09, PESC 545, Brussels, 29 Apr. 2009, pp. 110-11 and p. 113.

<sup>24</sup> Austria, Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Finland, Germany, Hungary, Latvia, Lithuania, Malta, Netherlands, Poland, Portugal Romania, Slovakia, Slovenia, Spain, Sweden and the UK reported that they had completed implementation of the Common Position (email correspondence with Rosemary Chabanski, Office of the HR's Personal Representative on WMD, Council of European Union, 3 November 2009). France and Ireland have legislation that includes brokering controls, but are still in the process of completing implementation of the Common Position. The remaining five EU member states are preparing legislation or have submitted draft legislation to parliament are Cyprus, Greece, Italy, and Luxembourg.

<sup>25</sup> Anders, H. and Cattaneo, S., *Regulating Arms Brokering: Taking Stock and Moving Forward the United Nations Process* (Brussels: Group de recherché et d'information sur la paix et la sécurité, 2005); Anders, H., 'European and international developments in arms brokering controls', (Brussels: Group de recherché et d'information sur la paix et la sécurité, Note d'Analyse du GRIP), 26 November 2007.

The legislation of EU member states utilized in this report is unofficial translations collected from the websites of national parliaments, ministries and legislative databases. Information on the state of play with regard to the implementation of the Common Position by EU member states as of October 2009 was provided by Rosemary Chabanski of the Secretariat of the Council of the EU.

Legislation from the Western Balkans was provided by the SEESAC Arms Law Compendium, and in addition SEESAC translations of the Croatia's Law on Export and Import of Military and Non-Military Lethal Goods (2008) and Montenegro's Act on Foreign Trade in Weapons, Military Equipment And Dual Use Goods (2008). Questionnaires were also distributed to Albania, Bosnia and Herzegovina, Montenegro and Serbia for clarification with regard to points of interpretation for licensing, record-keeping, reporting and types of licences issued for brokering activities.

Legislative materials were supplemented by information on the implementation of brokering controls contained in the national reports on the implementation of the United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons (SALW) in All Its Aspects. In addition, interviews were conducted with, and questionnaires sent to, officials in Estonia, Spain, Sweden and the UK to enable a discussion of national controls on arms brokering in these countries.

These materials have been evaluated to provide an overview of the spectrum of approaches to the control of arms brokering, in line with the provisions of the Common Position, which could be considered by the former Yugoslav Republic of Macedonia when drafting legislative provisions to control arms brokering.

## Outline of the report

The second chapter of this report provides an overview of the provisions of the Common Position. It identifies those provisions that are considered mandatory requirements and those that are included in the Common Position as options for exercising more effective controls of arms brokering. The OSCE Guide and UN GGE report are also utilized for elaborating upon options for controlling arms brokering.

The third chapter provides examples from a selection of EU member states to show how they have implemented the mandatory and the optional provisions of the Common Position. It also considers elements on the control of arms brokering that are not explicitly stated in the Common Position, but are regarded as important elements of brokering controls. Legislation on the control of arms brokering should provide clarity on the key elements of the control system. This chapter therefore considers what activities EU member states have defined as brokering activities, the activities that are subject to licensing and those which are prohibited, what is required of state parties and the brokers to fulfil their obligations under the law, what kinds of actions and behaviours constitute violations of the law and are subject to sanctions, what kind of sanctions are imposed, the provisions that are legislated for international cooperation and information sharing and parliamentary and public transparency on arms brokering.

References will be made most frequently to the legislation on the control of arms brokering implemented by: Bulgaria, Estonia, Germany, Spain, Sweden and the UK. Other EU member states' approaches are also referred to where deemed appropriate. The examples selected from EU member state legislation serve on the one hand as approaches that are deemed of potential use for the former Yugoslav Republic of Macedonia's legislation on controlling arms brokers, but also serve to demonstrate the spectrum of approaches that can be taken to control arms brokering. There is no single approach that can be adopted from the legislation of one EU member state by the former Yugoslav Republic of Macedonia.

The fourth chapter considers the implementation of the Common Position by Albania, Bosnia and Herzegovina, Croatia, Montenegro and Serbia. Country profiles are provided for each of these countries, outlining their: definitions of brokering activities, goods to be controlled, scope and jurisdiction; licensing procedures including requirements for registration and licensing, licensing assessment criteria, record-keeping and reporting, sanctions, information exchange and international cooperation, and parliamentary and public transparency. A fresh look at the regional state of play is deemed useful, as there have been developments with regard to



controls on arms brokering in several of the states of the region since a comprehensive review was carried out in 2006.<sup>26</sup> The approaches taken in the Western Balkans to the control of arms brokering vary widely, with only Croatia and Montenegro having legislation that fully implements the Common Position's provisions.

The final chapter provides recommendations for national controls on arms brokering that seem most appropriate for the former Yugoslav Republic of Macedonia.

The report also provides an appendix that presents a table showing the mandatory and optional provisions of the Common Position on the control of arms brokering that have been implemented by states in the western Balkans.

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<sup>26</sup> *Analysis of National Legislation on Arms Exports and Transfers in the Western Balkans* (Belgrade: SEESAC, 2006).

## 2. Overview of the provisions of the EU Common Position on arms brokering

The stated objective of the EU Common Position on the control of arms brokering is to ‘control arms brokering in order to avoid the circumvention of UN, EU or OSCE embargoes on arms exports, as well as of the Criteria set out in the EU Code of Conduct on Arms Exports’ (now the Common Rules).<sup>27</sup> To achieve this objective, member states are required ‘to establish a clear legal framework for legal brokering activities’ that conforms to the mandatory provisions of the Common Position.<sup>28</sup>

This section describes the provisions of the Common Position and includes recommendations on the control of arms brokering from the OSCE Best Practice Guide on National Control of Brokering Activities (OSCE Guide).

### Definition of brokering activities to be controlled

The Common Position offers the following definition of the core arms brokering activities to be controlled:

- Negotiating or arranging transactions that may involve transfer of items on the Common Military List of the EU from a third country to any other third country; or
- Buying, selling or arranging for the transfer of such items that are in their ownership from a third country to any other third country.<sup>29</sup>

The Common Position therefore refers to only ‘mediation’ and ‘dealing’ as constituting core arms brokering activities.<sup>30</sup> It does not prohibit the use of a broader definition to include mediating for the provision of brokering-related services or controls on the provision of brokering-related services.

### Definition of goods to be subject to control

The Common Position explicitly states that it is the brokering of items on the Common Military List of the EU that should be subject to control.

### Definition of scope and jurisdiction

The Common Position imposes a mandatory requirement for member states ‘to take all necessary measures on controlling brokering activities that take place within their territory’ in relation to transactions between two third countries.<sup>31</sup> In the Common Position, a third country is defined as ‘non-EU’ - therefore the Common Position does not require states to control brokering activities for arms transfers from or between two EU member states. However, the Common Position allows for EU member states to define the scope of national brokering controls to include cases where controlled items are to be exported from the territory of the member state in question or from another EU member state and not just for transfers between two non-EU countries.

EU member states determine which entities are to be subject to brokering controls. The OSCE Guide recommends that brokering controls should cover any natural person or legal entity that undertakes brokering activities in the

<sup>27</sup> Council of the European Union, Common Position 2003/468/CFSP of 23 June 2003 on the control of arms brokering, Official Journal of the European Union, L 156/79-80, 25 June 2003, Art. 1(1).

<sup>28</sup> Council of the European Union, Common Position 2003/468/CFSP of 23 June 2003 on the control of arms brokering, Official Journal of the European Union, L 156/79-80, 25 June 2003, Arts. 1(2) and 2(2). The objective, and means for achieving the objective, of the Common Position are comparable to the measures adopted by the OSCE and Wassenaar Arrangement on the control of arms brokering.

<sup>29</sup> Council of the European Union, Common Position 2003/468/CFSP of 23 June 2003 on the control of arms brokering, Official Journal of the European Union, L 156/79-80, 25 June 2003, Art. 2(3).

<sup>30</sup> Some analysts have argued that, ‘Strictly speaking, brokering is the act of mediation and not the act of purchasing or taking possession of material items in a transaction’. Wood, B., ‘The prevention of illicit brokering of small arms and light weapons: Framing the issue’, *Developing a Mechanism to Prevent Illicit Brokering in Small Arms and Light Weapons: Scope and Limitations* (Geneva: UNIDIR, 2006), p. 12.

<sup>31</sup> Council of the European Union, Common Position 2003/468/CFSP of 23 June 2003 on the control of arms brokering, Official Journal of the European Union, L 156/79-80, 25 June 2003, Art. 2(1).

state in question, irrespective of whether they are a citizen of that state, domiciled, permanently resident or maintaining a registered office in the state in question. The OSCE Guide suggests that such an approach would 'ensure the indispensable congruity of control systems'.<sup>32</sup>

The Common Position also 'encourages' member states 'to consider controlling brokering activities outside of their territory carried out by brokers nationally resident or established in their territory'.<sup>33</sup> The OSCE Guide suggests that the coherence of international controls could be complicated by the fact that some states control brokering activities based upon the fact that they were carried out in their territory, while other states control activities based upon the nationality of the broker.<sup>34</sup> This is because it is not always clear which state is the competent authority for licensing or if there is a requirement for the broker to be licensed by both national licensing authorities. However, due to the fact that brokers from one country may operate in states that do not have controls on arms brokering, it has been argued that 'the extension of controls over persons and entities when operating outside their home state may be a critical element for the effective combat of illicit arms brokering'.<sup>35</sup> This is because arms brokers are mobile and if considering undertaking activities relating to a deal for which they believe that they would be unlikely to receive a licence in their home territory, they may undertake such activities in a place where controls are more lenient or non-existent.

It has been noted that some state officials are reticent about the introduction of an extraterritorial element to arms brokering controls, arguing that this would be difficult to enforce.<sup>36</sup> In some cases, there may be legal or constitutional obstacles for exercising extraterritorial controls over the activities of a state's national overseas.<sup>37</sup> Therefore, the OSCE Guide recommends that for those states interested in introducing extraterritorial controls on arms brokering they should first ensure that such measures can be carried out on constitutional grounds.<sup>38</sup>

It is possible to implement partial or full extraterritorial controls on brokering activities. For example, partial extraterritorial controls could be in place for brokering transactions for certain destinations or types of arms and military equipment. These controls could be in the form of licensing requirements or a prohibition. For example, carrying out brokering activities for an arms deal for a destination that is subject to a UN arms embargo could be subject to licensing controls or prohibited for entities subject to national law irrespective of the country in which these activities are undertaken. UN member states are already required to exercise extraterritorial controls in cases where their nationals have violated the provisions of UN arms embargoes while outside the state of their nationality, see for example the UN arms embargo on DRC contained in the box below.

#### **Extraterritorial requirements of the UN arms embargo on North and South Kivu and Ituri regions of the DRC<sup>39</sup>**

In the resolution establishing the UN arms embargo on the armed groups operating in the North and South Kivu and Ituri regions of the DRC, the UN Security Council decided that all states shall 'take the necessary measures to prevent the direct or indirect supply, sale or transfer, from their territories or by their nationals, or using their flag vessels or aircraft, of arms and any related materiel, and the provision of any assistance, advice or training related to military activities.

As will be shown below, a number of EU member states include full extraterritorial controls in their legislation relating to controls on arms brokering. It is not explained in the Common Position, nor always clear from national

<sup>32</sup> Best Practice Guide on National Control of Brokering Activities, OSCE Handbook of Best Practices on Small Arms and Light Weapons, FSC. GAL/63/03/Rev.2, 19 Sept. 2003, p. 10.

<sup>33</sup> Council of the European Union, Common Position 2003/468/CFSP of 23 June 2003 on the control of arms brokering, Official Journal of the European Union, L 156/79-80, 25 June 2003, Art. 2(1).

<sup>34</sup> Best Practice Guide on National Control of Brokering Activities, OSCE Handbook of Best Practices on Small Arms and Light Weapons, FSC. GAL/63/03/Rev.2, 19 Sept. 2003, p. 10.

<sup>35</sup> Anders, H. and Vines, A., 'Sanctions and enforcement', *Developing a Mechanism to Prevent Illicit Brokering in Small Arms and Light Weapons: Scope and Limitations* (Geneva: UNIDIR, 2006), p. 108.

<sup>36</sup> Anders, H. and Vines, A., 'Sanctions and enforcement', *Developing a Mechanism to Prevent Illicit Brokering in Small Arms and Light Weapons: Scope and Limitations* (Geneva: UNIDIR, 2006), p. 109.

<sup>37</sup> Best Practice Guide on National Control of Brokering Activities, OSCE Handbook of Best Practices on Small Arms and Light Weapons, FSC. GAL/63/03/Rev.2, 19 Sept. 2003, p. 10.

<sup>38</sup> Best Practice Guide on National Control of Brokering Activities, OSCE Handbook of Best Practices on Small Arms and Light Weapons, FSC. GAL/63/03/Rev.2, 19 Sept. 2003, p. 11.

<sup>39</sup> UN Security Council Resolution 1493, UN Doc. S/RES/1493, 28 July 2003.

legislation, how the issue of concurrent jurisdiction should be tackled – i.e. where several brokering activities are carried out in different states in the course of one transaction or where a broker subject to licensing in their home state although carrying out activities in a third state also appears to be subject to licensing in a third country where operating. This is an area in which international cooperation is essential and brokers should be advised to contact licensing authorities in at least one of the states in question for advice. The OSCE Guide provides solutions for three types of cases of concurrent jurisdiction:

- A core brokering activity partly takes place in state A and partly in state B. Only the state in which the bulk of the brokering activity takes place should be deemed competent. This requires consultation between states A and B;
- A core activity is carried out in state A and a type of secondary activity that is also controlled is carried out in state B (e.g. arranging transport). Both states could then be competent for each clearly defined activity;
- State A has implemented extraterritorial controls for its own nationals. One of its nationals carries out a brokering activity on the territory of State B, which also enforces brokering controls on its own territory for anyone active on its territory. Options are (a): a licence is required by each state; or (b) after consultation with State B, State A waives the licensing requirement because it deems State B to have adequate controls.<sup>40</sup>

### Licensing procedures for arms brokering

The Common Position acknowledges that member states may wish to use a two-stage licensing approach for controlling arms brokering activities, with the first stage requiring brokers to obtain a written authorization, permit or be registered as an arms broker before submitting an application for a licence or written authorization to carry out brokering activities in relation to a single transaction.<sup>41</sup> It is explicitly stated that a licence, authorization or registration to be a broker 'would not replace the requirement to obtain the necessary licence or written authorization for each transaction'. The first stage of a two-stage licensing approach is regarded as useful for screening potential arms brokers.<sup>42</sup> The UN GGE recommends that information to be provided at this first stage could include:

- The applicant's name, address, country of residence and citizenship;
- The applicant's ownership of any entity or involvement in relevant business that may be used to facilitate brokering activity;
- The range of small arms and light weapons that the broker may wish to be involved in brokering.<sup>43</sup>

The OSCE Guide also suggests that information should be submitted on:

- Professional and commercial activities in which the applicant is engaged;
- Information on these activities, including if known violations;
- Records of previous licences issued; and
- Other information on customers.<sup>44</sup>

<sup>40</sup> Best Practice Guide on National Control of Brokering Activities, OSCE Handbook of Best Practices on Small Arms and Light Weapons, FSC. GAL/63/03/Rev.2, 19 Sept. 2003, pp. 13-17.

<sup>41</sup> Council of the European Union, Common Position 2003/468/CFSP of 23 June 2003 on the control of arms brokering, Official Journal of the European Union, L 156/79-80, 25 June 2003, Art. 4(1).

<sup>42</sup> Anders, H. and Vines, A., 'Sanctions and enforcement', *Developing a Mechanism to Prevent Illicit Brokering in Small Arms and Light Weapons: Scope and Limitations* (Geneva: UNIDIR, 2006), p. 117.

<sup>43</sup> Report of the Group of Governmental Experts established pursuant to General Assembly resolution 60/81 to consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons, UN Doc. A/62/163, 30 Aug. 2007, Para. 38.

<sup>44</sup> Best Practice Guide on National Control of Brokering Activities, OSCE Handbook of Best Practices on Small Arms and Light Weapons, FSC. GAL/63/03/Rev.2, 19 Sept. 2003, pp. 14-15.

The Common Position requires that a broker obtains a licence or written authorization from the competent authorities of the member state where the brokering activities will take place, and where required by national legislation, where the broker is resident or established.<sup>45</sup> It also requires that applications for licences or written authorizations for specific brokering transactions be assessed against the eight provisions of the EU Code of Conduct.

#### **Criteria of the EU Common Rules governing control of exports of military technology and equipment**

##### **Member States shall**

1. Respect for the international commitments of EU member states, in particular the sanctions decreed by the UN Security Council and those decreed by the Community, agreements on non-proliferation and other subjects, as well as other international obligations
2. Respect for human rights in the country of final destination as well as respect by that country of international humanitarian law
3. The internal situation in the country of final destination, as a function of the existence of tensions or armed conflicts
4. Preservation of regional peace, security and stability

##### **Member States shall take into account**

5. National security of the Member States and of territories whose external relations are the responsibility of a Member State, as well as that of friendly and allied countries
6. Behaviour of the buyer country with regard to the international community, as regards in particular to its attitude to terrorism, the nature of its alliances and respect for international law
7. Existence of a risk that the military technology or equipment will be diverted within the buyer country or re-exported under undesirable conditions
8. Compatibility of the exports of the military technology or equipment with the technical and economic capacity of the recipient country, taking into account the desirability that states should meet their legitimate security and defence needs with the least diversion of human and economic resources for armaments

The Common Position does not provide guidance on the information that the applicant is to supply with their application for an arms brokering licence or written authorization. The OSCE Guide recommends that the core information to be submitted should include:

- Identity of applicant (address and domicile of company, person responsible, contact person);
- Representative of the applicant;
- Buyer of the goods;
- Consignee of the goods;
- Final consignee of the goods;
- Nature of the brokering activity;
- Country of origin of the goods;
- Description of the goods, including category/number from the national Military List;
- Quantity of goods;
- Value of goods;
- Precise technical information of the goods;
- Information concerning end-use;

<sup>45</sup> Council of the European Union, Common Position 2003/468/CFSP of 23 June 2003 on the control of arms brokering, Official Journal of the European Union, L 156/79-80, 25 June 2003, Art. 3(1).

- End-use assurance by the end user; and
- Contract documents.<sup>46</sup>

In addition, the OSCE Guide recommends optional information be provided on:

- Persons or entities who are or have been engaged in brokering activities for the same transaction;
- Persons or entities involved in transportation;
- Persons or entities providing technical services; and
- A description of the travel itinerary (and updates if changes are subsequently made).

The Common Position does not provide guidance on the period of time for which an arms brokering licence should be valid or grounds for refusing or revoking licences.

## Record-keeping and reporting

The Common Position contains a mandatory provision for record-keeping, requiring member states to keep records for a minimum of ten years for all persons and entities that have obtained a licence for an arms brokering transaction.<sup>47</sup> Records should be kept for internal use and information exchange. In addition, member states are given the option of establishing a register of arms brokers.<sup>48</sup>

## Sanctions

The Common Position contains a mandatory provision for member states 'to establish adequate sanctions, including criminal sanctions, in order to ensure that controls on arms brokering are effectively enforced'.<sup>49</sup> It has been suggested that brokering activities relating to transfers of arms and military equipment and technology in the following cases should be subject to criminal sanctions:

- Brokering arms for a country or recipient subject to an EU, OSCE or UN arms embargo;
- Brokering arms that are prohibited for transfer (e.g. cluster munitions or landmines);
- Brokering arms for a recipient that does not have the authority to receive such arms.<sup>50</sup>

Although it has been stated that 'there is no single approach among states for penalties for violations of arms brokering controls', national legislation generally distinguishes between administrative and criminal offences with different penalties for misdemeanours and serious offences including: revocation of licence, fine, debarment from future brokering activities or a custodial sentence.<sup>51</sup>

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<sup>46</sup> Best Practice Guide on National Control of Brokering Activities, OSCE Handbook of Best Practices on Small Arms and Light Weapons, FSC. GAL/63/03/Rev.2, 19 Sept. 2003, pp. 14-15.

<sup>47</sup> Council of the European Union, Common Position 2003/468/CFSP of 23 June 2003 on the control of arms brokering, Official Journal of the European Union, L 156/79-80, 25 June 2003, Art. 3(2).

<sup>48</sup> Council of the European Union, Common Position 2003/468/CFSP of 23 June 2003 on the control of arms brokering, Official Journal of the European Union, L 156/79-80, 25 June 2003, Art. 4(1).

<sup>49</sup> Council of the European Union, Common Position 2003/468/CFSP of 23 June 2003 on the control of arms brokering, Official Journal of the European Union, L 156/79-80, 25 June 2003, Art. 6.

<sup>50</sup> Wood, B., 'The prevention of illicit brokering of small arms and light weapons: Framing the issue', *Developing a Mechanism to Prevent Illicit Brokering in Small Arms and Light Weapons: Scope and Limitations* (Geneva: UNIDIR, 2006), p. 17.

<sup>51</sup> Anders, H. and Vines, A., 'Sanctions and enforcement', *Developing a Mechanism to Prevent Illicit Brokering in Small Arms and Light Weapons: Scope and Limitations* (Geneva: UNIDIR, 2006), p. 121.

## Information exchange and international cooperation

The Common Position requires member states, where appropriate, to establish a system for the exchange of information, among themselves as well as with third states, on: legislation, registered brokers (if applicable), records of brokers, denials of registration applications (if applicable) and licensing applications.<sup>52</sup> It was suggested that the 'notification and consultation' system should operate on a mandatory basis only for those Member States that have the required laws,<sup>53</sup> with arrangements also made for exchanging information on legislation, registered brokers and denials of applications for registering brokers.<sup>54</sup> In April 2008 EU member states agreed to exchange among themselves on a confidential basis information on brokering licences granted (including licences for transfer of brokered goods),<sup>55</sup> completing the last of the required elements of the system for exchanging information on brokering.

## Parliamentary and public transparency

There is no mention in the Common Position of whether information on a register of arms brokers or information on licences for brokering transactions should be made available for national parliaments or in national reports for the public; and also no prohibition on making this information public. In April 2008, almost five years after the adoption of the Common Position, EU member states agreed to work towards publishing information on brokering in the 11th Annual Report According to Operative Provision 8 of the European Union Code of Conduct on Arms Exports.<sup>56</sup> Several states have reportedly made information on brokering licences available for publication in the 11th Annual Report on Arms Exports.<sup>57</sup>

### Checklist of mandatory and optional provisions for the control of arms brokering contained in Common Position 2003/468/CFSP<sup>58</sup>

#### Mandatory Provisions

- a. Definition of brokering activities
- b. Requirement to control brokering transactions within national jurisdiction
- c. Requirement for a licence or written authorization for brokering transactions
- d. Requirement for record-keeping
- e. Requirement for the exchange of information within the EU
- f. Requirement for adequate sanctions to be in place to ensure that controls are effectively enforced

#### Optional Provisions

- g. Option for extraterritorial controls over brokering
- h. Option for requirement for a licence or written authorization to be a broker
- i. Option for establishment of a register of arms brokers

<sup>52</sup> Council of the European Union, Common Position 2003/468/CFSP of 23 June 2003 on the control of arms brokering, Official Journal of the European Union, L 156/79-80, 25 June 2003, Art. 5(1) and 5(2).

<sup>53</sup> Fifth Annual Report According to Operative Provision 8 of the European Union Code of Conduct on Arms Exports, EU Doc. 2003/C 320/01, *Official Journal of the European Communities*, 31 Dec. 2003, p.2.

<sup>54</sup> Eighth Annual Report According to Operative Provision 8 of the European Union Code of Conduct on Arms Exports, EU Doc. 2006/C 250/01, *Official Journal of the European Communities*, 16 Oct. 2006, p. 3; Ninth Annual Report According to Operative Provision 8 of the European Union Code of Conduct on Arms Exports, EU Doc. 2007/C 253/01, *Official Journal of the European Communities*, 26 Oct. 2007, p. 2.

<sup>55</sup> Tenth Annual Report According to Operative Provision 8 of the European Union Code of Conduct on Arms Exports, EU Doc. 2008/C 300/01, *Official Journal of the European Communities*, 22 Nov. 2008, p. 3

<sup>56</sup> Tenth Annual Report According to Operative Provision 8 of the European Union Code of Conduct on Arms Exports, EU Doc. 2008/C 300/01, *Official Journal of the European Communities*, 22 Nov. 2008, p. 3

<sup>57</sup> Email correspondence with Rosemary Chabanski, Office of the HR's Personal Representative on WMD, Council of European Union, 3 November 2009.

<sup>58</sup> Council of the European Union, Common Position 2003/468/CFSP of 23 June 2003 on the control of arms brokering, Official Journal of the European Union, L 156/79-80, 25 June 2003.



### 3. Implementation of the EU Common Position on controlling arms brokering by EU Member States

This chapter describes the implementation of the EU Common Position on the control of arms brokering by EU member states. Examples are provided that are deemed of use to the former Yugoslav Republic of Macedonia, or instructive as to the different approaches that have been adopted by EU member states that have implemented the EU Common Position. Although references are made in this chapter to more than ten EU member states, references are made most frequently to the legislation on the control of arms brokering implemented by Bulgaria, Estonia, Germany, Spain and the UK. In all of these cases, controls on arms brokering have been included as amendments to legislation relating to transfer controls on arms, military equipment and dual-use goods.

This part of the report provides excerpts from, and commentaries on, the legislation on the control of arms brokering of a selection of EU member states with regard to: definitions of brokering activities, goods to be controlled, scope and jurisdiction; licensing procedures including requirements for registration and licensing, licensing assessment criteria, record-keeping and reporting, sanctions, information exchange and international cooperation, and parliamentary and public transparency.

#### Definitions

Definitions of types of actors and brokering activities to be subject to controls, goods to be subject to controls, scope and jurisdiction of brokering controls can be laid out in an article(s) at the beginning or end of a national law dealing with transfer controls. The Common Position establishes 'core' definitions of brokering activities and goods, but also allows for states to adopt definitions that cover a wider range of activities, goods, or are broader in scope and jurisdiction than required by the Common Position.

#### Definition of brokering activities to be controlled

One can identify in EU member state legislation three types of definitions of brokering activities to be controlled.

1. Reference is made to the definition on mediation and dealing contained in the Common Position in national legislation, without including a specific definition of brokering activities to be controlled:

**Ireland:** "brokering activities" has the same meaning as it has in Council Common Position 2003/468/CFSP1 of 23 June 2003 on the control of arms brokering'.<sup>59</sup>

2. The exact definition given in the Common Position, or words to similar effect, are restated:

**Spain:** "Brokering": activities of persons and entities that: a) negotiate or arrange transactions that may involve the transfer of items on the EU Common List of military equipment from a third country to any other third country; or b) buy, sell or arrange the transfer of such items that are in their ownership from a third country to any other third country'.<sup>60</sup>

3. The definition of core brokering activities to be subject to controls is expanded beyond mediation and dealing to include mediation for the arrangement of brokering-related services:

**Belgium:** 'A broker is anyone who, against payment or free of charge, creates the conditions for the conclusion of a contract relating to the negotiation, delivery or export abroad (*mediation*), or possession for that purpose, weapons, munitions or equipment specifically intended for military use or related technology, whatever the origin or destination of these goods and regardless of whether or not on Belgian territory (*dealing*), or anyone who finds such a contract where the transport is done by a third party (*mediation for brokering-related services*)'.<sup>61</sup>

<sup>59</sup> Number 1 of 2008, Control of Exports Act 2008, 27 February 2008, Art. 1. (Ireland)

<sup>60</sup> 22437 Law 53/2007 of 28 December 2007 on control of external trade in defence and dual-use material, Art. 3. (Spain)

<sup>61</sup> Law amending the Law of 5 August 1991 on the import, export and transit of weapons, ammunition and equipment specifically for military use and related technology, 25 March 2003, Art. 10. (Belgium)



Although the Common Position does not require controls for brokering-related services, **Bulgaria, Germany and the UK** have licensing requirements for some activities undertaken by transporters and freight forwarders of arms and military equipment between third countries.

**Bulgaria:** 'Transportation of arms from the territory of a third country to the territory of another third country shall be done on the basis of an activity authorization issued by the Interdepartmental Council to natural and legal persons registered under the Commerce Act'.<sup>62</sup>

**Germany** requires any ships flying the federal flag or aircraft entered in the aircraft register of the Federal Republic of Germany to possess a general licence if involved in the transportation of 'war weapons' between two third countries.<sup>63</sup>

### Definition of goods to be subject to controls

In most cases in the EU, the types of goods for which brokering controls will apply are the same as those for which export controls apply. For example, in **Sweden** 'all goods covered by the list of military equipment, including SALW, are covered by the provisions on brokering'.<sup>64</sup> **The UK** operates with several sub-categories of military items that are subject to different levels of controls for brokering and brokering-related services.

#### The UK's categories of goods to be subject to brokering controls

**Category A goods:** cluster munitions and specially designed components; and certain paramilitary goods whose export the Government has already banned because of evidence of their use in torture (e.g. electric shock batons, electric-shock belts, leg irons and sting sticks).<sup>65</sup>

A licence is required for any company or person from within the UK (whether or not they are a UK person) or by any UK person operating overseas involved in the provision of category A goods, including 'those whose sole involvement is in transportation services, financing or financial services, insurance or reinsurance services or general advertising and promotion'. A UK guide on brokering controls suggests that 'these strict controls reflect the fact that the supply of many of these goods is inherently undesirable'.

**Category B goods:** Small Arms and Light Weapons (SALW), Long Range Missiles (LRMs) with a range over 300km, Unmanned Air Vehicles (UAVs) and Man Portable Air Defence Systems (MANPADS) and accessories, ammunition, and specially designed components therefore.<sup>66</sup>

A licence is required for any company or person from within the UK (whether or not they are a UK person) or by any UK person operating overseas involved in the brokering of category B goods. A licence is not required for category B goods if a person's sole involvement in the transaction is to provide financing or financial services, insurance or reinsurance services, or general advertising or promotion services.

**Category C goods:** All goods contained within Schedule 1 of the Export of Goods, Transfer of Technology and Provision of Technical Assistance (Control) Order 2003 that do not fall into either Category A or B, and certain substances for the purpose of riot control or self-protection and related portable dissemination equipment.<sup>67</sup>

A licence is required for brokering a deal for Category C goods between two third countries if all or part of these activities are carried out in the UK. If brokering activities for Category C goods are undertaken wholly outside the UK, then a licence is not required. A licence is not required if a person's sole involvement in a transaction is the provision of transportation services, financing or financial services, insurance or reinsurance services or general advertising or promotion services.

<sup>62</sup> Law on export control of arms and dual-use items and technologies, Promulgated, State Gazette No. 11/2.02.2007, 12 February 2007, Art. 6(3). (Bulgaria)

<sup>63</sup> Act Implementing Article 26 (2) of the Basic Law (War Weapons Control Act) as amended by the Announcement of 22 November 1990 (Federal Law Gazette I, p. 2506) (as amended by Article 3 of the law of 11 October 2002, Federal Law Gazette I, p. 3970), Section 4. (Germany)

<sup>64</sup> Section 8. Brokering, National Report by Sweden (2008) On the Implementation of the International Tracing Instrument and the United Nations' Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All its Aspects, 17 April 2008, p. 18. (Sweden)

<sup>65</sup> Review of Export Control Legislation (2007) Supplementary Guidance Note on Trade ("Trafficking and Brokering") in Controlled Goods (in effect from 6 April 2009), London: Department for Business Enterprise and Regulatory Reform, January 2009, p. 5. (UK)

<sup>66</sup> Review of Export Control Legislation (2007) Supplementary Guidance Note on Trade ("Trafficking and Brokering") in Controlled Goods (in effect from 6 April 2009), London: Department for Business Enterprise and Regulatory Reform, January 2009, pp. 5-6. (UK)

<sup>67</sup> Review of Export Control Legislation (2007) Supplementary Guidance Note on Trade ("Trafficking and Brokering") in Controlled Goods (in effect from 6 April 2009), London: Department for Business Enterprise and Regulatory Reform, January 2009, pp. 6-7. (UK)

## Definition of scope and jurisdiction

EU member state legislation controlling brokering activities differs with regard to scope and jurisdiction. **German** legislation only controls the brokering of goods that are located in a third country – i.e. non-EU member state – and are transferred to another third country.<sup>68</sup> The scope of German controls on arms brokering is therefore in line with the requirements of the Common Position. **Swedish** legislation does not make such a distinction, with controls on brokering activities for exports from Sweden or other EU member states, as well as for transactions between two third countries.<sup>69</sup>

The Common Position requires states ‘to take all necessary measures on controlling brokering activities that take place within their territory’.<sup>70</sup> In accordance with this requirement, **Spanish** legislation applies brokering controls ‘to any natural or legal person who habitually or occasionally engages in the activities described herein in Spanish territory as concerns the transfer of materials, items or technologies subject to control’.<sup>71</sup> Spain does not ‘include extra-territorial controls due to the difficulties existing in applying these controls. Transport and financial activities related to brokerage are excluded from control as well’.<sup>72</sup>

Sixteen EU member states subject to brokering controls some of the activities of brokers nationally resident or established in their territory undertaken outside their territory.<sup>73</sup> In some cases, such as **the UK**, extraterritorial controls only apply to transfers of certain types of goods or to embargoed destinations (see box above). Most of the other EU states that have extraterritorial controls do not make such distinctions.

**Finland:** ‘Finnish citizens, Finnish corporations or foreign citizens considered permanent residents of Finland under the Municipality of Residence Act (201/1994) are required to have a brokerage licence to engage in the brokerage of defence materiel between third countries outside Finnish territory’.<sup>74</sup>

It is not always clear in national legislation which state should be deemed the ‘competent’ state in cases where a broker from a state operating extraterritorial controls carries out brokering activities in a state with controls on brokering activities undertaken in that state by nationals of any other state.

## Licensing procedures for arms brokering

The Common Position contains an option for the adoption of a two-stage licensing procedure for controlling arms brokering. Sixteen EU member states have implemented a two-stage licensing procedure for arms brokers.<sup>75</sup> The first-stage consists of an application for a licence to be a broker or entry into a register of entities authorized to apply for licences to be involved in the trade in arms or military equipment (e.g. for exports, imports or brokering in controlled goods) or a register that is specifically for those entities authorized to undertake brokering activities. Once licensed or registered, the broker is then authorized to apply for a licence to undertake brokering activities related to a single transfer.

<sup>68</sup> BAFA, Information Leaflet on Trafficking and Brokering, (Eschborn: Federal Office of Economics and Export Control, 29 May 2006). p. 4. (Germany)

<sup>69</sup> Lag (1992:1300) om krigsmaterial, SFS 1992:1300, 1992-12-10, Omtryck SFS 1997:689, och Uppdaterad SFS 2008:885, §4 (The Military Equipment Act (1992:1300), §4). (Sweden)

<sup>70</sup> Council of the European Union, Common Position 2003/468/CFSP of 23 June 2003 on the control of arms brokering, Official Journal of the European Union, L 156/79-80, 25 June 2003, Art. 2(1).

<sup>71</sup> 22437 Law 53/2007 of 28 December 2007 on control of external trade in defence and dual-use material, Art. 2. (Spain)

<sup>72</sup> Personal communication to the author from Spain’s Ministry of Industry, Tourism and Commerce, 28 Sept. 2009.

<sup>73</sup> The legislation of the following EU member states contains provisions on extraterritorial controls of arms brokering: Belgium, Bulgaria, Czech Republic, Estonia, Finland, Germany, Hungary, Latvia, Lithuania, Malta, Netherlands, Poland, Portugal, Romania, Sweden and the UK.

<sup>74</sup> Act on the Export and Transit of Defence Material (242/1990, amendments 900/2002), Section 2a. (Finland)

<sup>75</sup> EU member states that have a registration scheme include: Belgium, Bulgaria, the Czech Republic, Estonia, France, Hungary, Italy, Latvia, Liechtenstein, Malta, Poland, Portugal, Romania, Slovakia, Slovenia and Spain.

There are two approaches for the registration of arms brokers: inclusion in a register of all entities permitted to export, import or broker arms or a specific register for arms brokers.

**Spain** requires arms brokers to be registered and entered into the Special Register of Foreign Trade Transactions in Defence and Dual-use Material with those involved in the export of arms.

**Estonia** maintains a state register of brokers of military goods.

### Requirements for applications to be a broker: licences and registration

Those intending to undertake brokering transactions in **Estonia** have to have been entered into the Estonian state register of brokers of military goods or in a 'register intended for monitoring brokers in a country participating in all export control regimes'.<sup>76</sup> An individual brokering licence for each transfer is also required and is limited in scope to the goods and countries indicated in the broker's registry entry. To be entered into the Estonian Register, an application form has to be completed and signed by a natural person or the legal representative of a natural person,<sup>77</sup> along with supporting documents giving information on:

- A list of employees engaged in brokerage which sets out their personal identification codes or dates of birth, addresses and telephone numbers if the applicant is a legal person;
- A description of past commercial activities of the applicant;
- A document certifying payment of the state fee; and
- Other documents which the applicant deems relevant.<sup>78</sup>

The Estonian Strategic Goods Commission, the national authority charged with evaluating applications for brokers, also meets in person with those applying to register to be brokers.<sup>79</sup> During this meeting, the applicant is asked about their plans, which persons are responsible for ensuring that customs procedures are adhered to and their knowledge and awareness of their responsibilities in accordance with the Estonian Strategic Goods Act and related secondary regulations are assessed. This meeting is used to inform the decision whether to enter the applicant into the Estonian Register. If the applicant is a new company, with no prior applications for licences for the transfer of controlled goods, the registration could be accompanied by conditions, such as a limited time period for initial registration which will be reviewed before full registration is permitted.

Bulgaria requires those seeking registration or licensing to be a broker to be 'natural and legal persons registered under the Commerce Act'.<sup>80</sup> Bulgarian legislation states that registration is for a three-year period with entities already in possession of licences for the export, import and transfer of arms subject to a simplified registration procedure – i.e. they only have to submit an application for registration in the register without supporting documentation.<sup>81</sup> Information on renewal of registration is also contained in Bulgarian legislation.

<sup>76</sup> Strategic Goods Act, 17 December 2003, entered into force 5 February 2004; amended by Strategic Goods Control Act 18 July 2004, RT I 2004, 53, 366, § 39. (Estonia)

<sup>77</sup> Strategic Goods Act, 17 December 2003, entered into force 5 February 2004; amended by Strategic Goods Control Act 18 July 2004, RT I 2004, 53, 366, § 40. (Estonia)

<sup>78</sup> Processing Terms for Individual Import Licences, Export Licences, Transit Permissions, General Export Authorisation User Certificates, International Import Certificates, End-Use Certificates and Delivery Verification Certificates for Strategic Goods, Processing Terms and Procedure for State Register of Brokers of Military Goods and List of Documents and Data to be Appended to Requests, Government of the Republic Regulation No. 61 of 9 March 2004, (RT I 2004, 14, 97), § 9. Entered into force 18 March 2004. This Regulation is established on the basis of subsection 13 (3), 23 (4), 31 (3) and 40 (3) of the Strategic Goods Act (RT I 2004, 2, 7).

<sup>79</sup> Personal communication to the author from Estonia's Ministry of Foreign Affairs, 16 Oct. 2009.

<sup>80</sup> Law on export control of arms and dual-use items and technologies, Promulgated, State Gazette No. 11/2.02.2007, 12 February 2007, Art. 6(2). (Bulgaria)

<sup>81</sup> Law on export control of arms and dual-use items and technologies, Promulgated, State Gazette No. 11/2.02.2007, 12 February 2007, Art. 20 (1) and (2). (Bulgaria)

## Requirements for applications for a licence for brokering

The listing of detailed requirements for applications for brokering transaction licences in national legislation varies between EU member states. Some states give a detailed list of requirements in their primary legislation on export controls, while other states elaborate requirements in secondary legislation (see below). In addition to requirements for applying for a licence, legislation also sets out the conditions under which licences will be refused, revoked or suspended. There should be no provisions for post facto licensing. It is also recommended that the licence should be valid for a set period of time, with possibilities for renewal also outlined.

In recognition of the fact that brokers do not always possess the same range of documents as an exporter of arms or military equipment at the time of a licence application, **the UK** advises brokers finding themselves ‘in cases where the proposed trade has yet to be fully scoped out’, to contact the Special Casework Licensing Unit for advice on the documentation to be submitted with the application for a licence for a brokering transaction.<sup>82</sup> The possibility to informally discuss possible brokering activities with national licensing authorities is also a feature of other national export control systems.

**Bulgarian** secondary legislation lists the documents to be submitted for a Broker Deal Licence:

- Completed application forms as contained in Annex No. 5;
- Four completed copies of the form contained in Annex No. 10;
- A copy and a certified Bulgarian translation of documents certifying the eligibility of the participants in the transaction to carry out the respective activities;
- A copy and a certified Bulgarian translation of documents, certifying the applicant’s participation in the deal;
- A copy or notarized copy and a certified Bulgarian translation of the Export Authorization, if required by the national legislation of the country of the exporter;
- An original end-user certificate and/or international import certificate or copies thereof, certified respectively by a competent authority of the country of the end-user or in the country of the forwarder, accompanied by a certified Bulgarian translation;
- A copy and a certified Bulgarian translation of the documents, certifying the foreign trade relations (contract, invoice, order, etc.) between the participants in the deal; and
- A document on paid state fees.<sup>83</sup>

Brokers must also have internal rules for the organisation and control of activities relating to brokering in arms and military equipment, including provisions for record-keeping and reporting (see below).<sup>84</sup>

## Types of licences

In general, there are two types of licenses that are issued to control arms brokers: individual and open (which can be either general or global). Individual licences cover one transaction involving one end-user or destination and a set type and quantity of controlled items.<sup>85</sup> Open licences cover multiple brokering transactions, usually for certain types of controlled items for specified destinations or end-users. The OSCE Guide recommends that arms brokering licences should be issued on a case-by-case basis, authorizing brokering activities covering one arms transfer for one consignee.<sup>86</sup> However, it does acknowledge that experience from export controls can be transferred to licensing arms brokers, with companies that are trusted, have well-established internal systems of control, a good record of working within the control framework and are involved in brokering transactions in ‘low risk cases’ could be issued with open licences. However, the OSCE Guide does not recommend the use of open licences for controlling arms brokering activity.

<sup>82</sup> Review of Export Control Legislation (2007) Supplementary Guidance Note on Trade (“Trafficking and Brokering”) in Controlled Goods (in effect from 6 April 2009), London: Department for Business Enterprise and Regulatory Reform, January 2009, p. 16.

<sup>83</sup> Regulation on implementation of the Law on Export control of arms and dual-use items and technologies, Adopted by Decree (CoM) No. 72 of 3rd April 2007, published in SG., ed. 32 of 17th April 2007, as amended, ed. 39 of 15th May 2007, Art. 17(1). (Bulgaria)

<sup>84</sup> Regulation on implementation of the Law on Export control of arms and dual-use items and technologies, Adopted by Decree (CoM) No. 72 of 3rd April 2007, published in SG., ed. 32 of 17th April 2007, as amended, ed. 39 of 15th May 2007, Art. 46. (Bulgaria)

<sup>85</sup> Cattaneo, S., ‘National systems of licensing and registration’, *Developing a Mechanism to Prevent Illicit Brokering in Small Arms and Light Weapons: Scope and Limitations* (Geneva: UNIDIR, 2006), p. 84.

<sup>86</sup> Best Practice Guide on National Control of Brokering Activities, OSCE Handbook of Best Practices on Small Arms and Light Weapons, FSC. GAL/63/03/Rev.2, 19 Sept. 2003, p. 14.

**Germany, Poland and the UK** operate individual and open licensing systems for arms brokers. However, Poland has stated that 'practically only individual licences are granted'.<sup>87</sup>

**The UK** has three types of licence for which arms brokers can apply:

- Standard Individual Trade Control Licences (SITCLs): specific to a named trader and covers involvement in trading a set quantity of specific goods between a specific source and destination country with a specified consignor, consignee and end-user.
- Open Individual Trade Control Licences (OITCLs): specific to a named trader and covers involvement in trading of specific goods between specific source and destination countries and/or specified consignors, consignees and end-users, but is not normally quantity specific.
- Open General Trade Control Licences (OGTCLs): permit the holder to trade in most military goods between specified countries, with an OGTCL for Category C Goods and an OGTCL for Small Arms and Light Weapons.<sup>88</sup>

### Licensing for related services

**Bulgaria** requires natural and legal persons registered under the Commerce Act to apply for authorization to transport arms between third countries,<sup>89</sup> requiring the following documentation to be submitted with their application:

- A current certificate on the registration in the commercial register or a copy of the decision on the original court registration and an original or a notarised copy of a court certificate on current state issued not earlier than 30 days before submitting the application and reflecting all changes as of the date of submitting the application;
- A document issued by the competent court that the applicant has not been declared bankrupt or is not subject to bankruptcy proceedings, as well as that no termination of operation has been registered and no declaration of insolvency has taken place when the applicant has not been re-registered under the Commercial Register Act;
- A document issued by the Ministry of Interior on clearing natural persons who participate directly in this activity;
- A list of the natural persons who participate directly in this activity, accompanied by CVs and personnel files, previous conviction certificates and notarised sample signatures and clearance for access to classified information, if any;
- A copy of a document issued by the competent authorities that the applicant has introduced conditions to protect classified information in the cases when this is required under the Classified Information Protection Act;
- A previous conviction certificate of the sole proprietor, manager, executive officer, the members of the managing and supervisory body of the legal person and in case the members are legal persons - of their representatives in the respective managing body;
- A notarised sample signature of the sole proprietor, manager, executive officer;
- A unique identification code;
- A certificate on income by the respective territorial directorate of the National Revenue Agency;
- An affidavit by the sole proprietor, manager, members of the managing and supervisory body of the commercial company that the applicant has no liquid and pending liabilities to natural and legal persons when the liability has been acknowledged before the enforcement body;

<sup>87</sup> Report of the Republic of Poland on the implementation of provisions of the Program of Action on Prevention and Elimination of Illicit Trade of Small Arms and Light Weapons in All its Aspects and International instrument to Enable States to Identify and Trade, in a Timely and Reasonable Manner, Illicit Small Arms and Light Weapons in the Year 2007, 11 April 2008, p. 4.

<sup>88</sup> Review of Export Control Legislation (2007) Supplementary Guidance Note on Trade ("Trafficking and Brokering") in Controlled Goods (in effect from 6 April 2009), London: Department for Business Enterprise and Regulatory Reform, January 2009, p. 8. (UK)

<sup>89</sup> Law on export control of arms and dual-use items and technologies, Promulgated, State Gazette No. 11/2.02.2007, Art. 6. (3). (Bulgaria)

- A statement by the sole proprietor, manager, members of the managing and supervisory body of the commercial company that they are not related to persons and organisations which have infringed upon the legislation regulating activities with arms, dual-use items and technologies in the member states and in third countries;
- A list of the items from the list of arms to be included in the activity authorization;
- A respective certificate or testimonial issued by a competent authority of the Ministry of Transport on the entitlement to perform arms transport; and
- A document on paid state fees.<sup>90</sup>

### Licensing assessment criteria

The Common Position requires brokering licence applications to be assessed against the eight criteria of the EU Common Rules. The OSCE Guide recommends that the criteria governing decisions on licensing brokering transactions should be the same as those applied to decisions on licensing exports from the territory of the given state, because 'there are no apparent reasons to apply more lenient or stringent standards in this context'.<sup>91</sup> **Sweden** assesses applications for brokering licences against the same national guidelines that are used for the export of military equipment.<sup>92</sup> The grounds for refusing the issuing of a licence or written authorization for arms brokering can also give an indication of the assessment criteria used.

Estonian legislation states that licences will be refused if there is information that the transfer of arms or military equipment:

- Are destined for a country subject to an EU, OSCE or UN arms embargo;
- May be used to commit human rights violations in the country of destination;
- May be used to endanger national, regional or international security, including for terrorist acts;
- May be diverted from their original destination or re-exported under conditions endangering security;
- Would be in conflict with the international obligations of Estonia;
- May endanger the interests or security of Estonia;
- Endangers or may endanger the interests or security of a state which is an ally to Estonia;
- Is to a region where there is an armed conflict or danger of an armed conflict;
- Is for a country of destination or end-user that is in conflict with the guidelines of any organisation for export control and non-proliferation of weapons of mass destruction of which Estonia is a member; or
- May be exported from that country or diverted from their original destination in the country under conditions endangering security.<sup>93</sup>

**Spanish** legislation states that licences will be denied or suspended for the same range of reasons as those given by Estonia, but also explicitly states that violations of the EU Code of Conduct criteria (now Common Rules) will also result in denials or suspension of licences.<sup>94</sup> UK legislation expressly prohibits brokering activities for the transfer of arms and military equipment from a third country to another third country if the destination is an embargoed territory.<sup>95</sup> However, at the same time it is acknowledged in an explanatory guide to UK legislation

<sup>90</sup> Law on export control of arms and dual-use items and technologies, Promulgated, State Gazette No. 11/2.02.2007, Art. 9. (3). (Bulgaria)

<sup>91</sup> Best Practice Guide on National Control of Brokering Activities, OSCE Handbook of Best Practices on Small Arms and Light Weapons, FSC. GAL/63/03/Rev.2, 19 Sept. 2003, p. 12.

<sup>92</sup> Section 8. Brokering, National Report by Sweden (2008) On the Implementation of the International Tracing Instrument and the United Nations' Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All its Aspects, 17 April 2008, p. 18. (Sweden)

<sup>93</sup> Strategic Goods Act, 17 December 2003, entered into force 5 February 2004; amended by Strategic Goods Control Act 18 July 2004, RT I 2004, 53, 366, §16. (Estonia)

<sup>94</sup> 22437 Law 53/2007 of 28 December 2007 on control of external trade in defence and dual-use material, Art. 8(1). (Spain)

<sup>95</sup> 2008 No. 3231, Customs, The Export Control Order 2008, Part 4, Trade Controls, Art. 20. (UK)



on arms brokering that ‘there will be very rare circumstances in which a licence might be issued, for instance for trade in military equipment for humanitarian use or peacekeeping forces’.<sup>96</sup>

### Refusals and revocations

Grounds for refusals have been stated above in relation to potential violations of the criteria of the EU Common Rules. Licence applications can be refused, and licences that have been granted can be revoked, on other grounds too. In general, these grounds relate to the eligibility of the applicant (e.g. criminal charges that are of relevance to the application), incomplete or false documentation provided with the application, non-use or misuse of the licence (for revocation).

**Estonian** legislation gives the following grounds for rejecting an application to enter a person into the Estonian Register:

- False information or documents with elements of falsification were knowingly submitted upon application for entry in the register;
- Within five years before the decision to enter the person in the register, the applicant has violated legislation relating to the import, export and transit of strategic goods or a precept issued on the basis thereof;
- Within five years before the decision to enter the person in the register, the applicant has violated an international sanction;
- Criminal proceedings have commenced concerning the applicant; or
- Other good reasons exist.<sup>97</sup>

**Belgian** legislation lists the following factors as grounds for a decision to restrict, suspend or revoke a brokering licence:

- The licence holder no longer meets the conditions for granting the license;
- The licence holder does not meet the legal and regulatory requirements;
- The licence holder has not made use of the license for more than a year;
- The licence holder engages in activities that, being performed jointly with the activities for which the license was obtained, likely to disturb public order; or
- The license was obtained on the basis of incorrect information.<sup>98</sup>

### Exemptions

It has been noted that most EU member states explicitly list classes of exemptions from brokering and export licensing controls in their national legislation.<sup>99</sup> Exemptions are usually given for government agencies, such as the Ministry of Defence or Ministry of Interior, and in some cases for trade with particular countries or for particular operations.

**Germany** exempts the Federal Armed Forces, federal police and customs administration from the requirement to apply for a brokering licence.<sup>100</sup>

**Estonia** does not require licence applications for service providers for a military or humanitarian mission, as defined by the Ministry of Defence or other government agency.<sup>101</sup>

<sup>96</sup> Review of Export Control Legislation (2007) Supplementary Guidance Note on Trade (“Trafficking and Brokering”) in Controlled Goods (in effect from 6 April 2009), London: Department for Business Enterprise and Regulatory Reform, January 2009, p. 18. (UK)

<sup>97</sup> Strategic Goods Act, 17 December 2003, entered into force 5 February 2004; amended by Strategic Goods Control Act 18 July 2004, RT I 2004, 53, 366, § 41. (Estonia)

<sup>98</sup> Law amending the Law of 5 August 1991 on the import, export and transit of weapons, ammunition and equipment specifically for military use and related technology, 25 March 2003, Art. 10. (Belgium)

<sup>99</sup> Cattaneo, S., ‘National systems of licensing and registration’, *Developing a Mechanism to Prevent Illicit Brokering in Small Arms and Light Weapons: Scope and Limitations* (Geneva: UNIDIR, 2006), p. 77.

<sup>100</sup> Act Implementing Article 26 (2) of the Basic Law (War Weapons Control Act) as amended by the Announcement of 22 November 1990 (Federal Law Gazette I, p. 2506) (as amended by Article 3 of the law of 11 October 2002, Federal Law Gazette I, p. 3970), Section 15. (Germany)

<sup>101</sup> Strategic Goods Act, 17 December 2003, entered into force 5 February 2004; amended by Strategic Goods Control Act 18 July 2004, RT I 2004, 53, 366, § 14. (Estonia)

## Record-keeping and reporting

EU member state legislation requires both the state and the broker to keep records on brokering transactions subject to controls, with provisions for brokers to report on issued licences that have been used. Registers of arms brokers can therefore also be established based upon brokering transaction licences issued, as happens in **Germany** and **the UK**. **Estonia** maintains records on brokers in its 'State Register', which contains the names and addresses of registered brokers, the military goods that they are permitted to broker, applications and other documents relating to the registration of brokers.<sup>102</sup> **Estonia** requires brokers to also keep documentation containing information on transactions for ten years and to report to the relevant national authorities every three months on the status of the transaction for which a licence has been issued.<sup>103</sup>

**Bulgaria** and **Poland** require brokers to have internal control systems to ensure good practice with regard to record-keeping and reporting on brokering activities to the relevant national authorities. **Bulgarian** legislation requires brokers to maintain a register of brokering transactions and to keep for at least ten years commercial and shipping documents containing information on the quantity and type of arms and military equipment involved in the transaction, their serial numbers, the name and address of the exporter and the recipient and the end-use and end-user of the goods.<sup>104</sup> The broker's register is then to be used for providing information to the supervisory authorities upon request.

## Sanctions

The Common Position calls for 'adequate sanctions' to be included in national arms brokering control systems as a means of dissuading entities to undertake illicit arms brokering through threat of legal action. There is no guidance or standard set of criminal, civil or administrative penalties for violations of arms broker licensing requirements. The OSCE Guide recommends that care should be taken when defining illegal actions and behaviours because illicit arms brokering has traditionally been associated with the 'grey areas' of the law and unreliable individuals.<sup>105</sup> Therefore, it is paramount that national legislation clearly defines activities and behaviours that are to be considered legal and illegal. Relevant passages defining illegal arms brokering activities and behaviours are often dispersed amongst different laws. This reflects the fact that there is no common approach within the EU with regard to sanctions against illegal arms brokering; and also reflects the fact that several states have specific legislation relating to the implementation of UN sanctions, including penalties for violations.<sup>106</sup>

**The Netherlands** regulates and sets sanctions for illegal arms brokering in the 1996 Regulation on Financial Transactions related to Strategic Goods, the 1997 Arms and Ammunition Act and the 1977 Sanctions Act.<sup>107</sup>

**Belgium** regulates and sets sanctions for illegal brokering activities and violations of arms embargoes in the Law amending the Law of 5 August 1991 on the import, export and transit of weapons, ammunition and equipment specifically for military use and related technology 2003.<sup>108</sup>

<sup>102</sup> Establishment of State Register of Brokers of Military Goods and Statutes for Maintenance of Register Government of the Republic Regulation No. 60 of 9 March 2004 (RT I 2004, 14, 96), entered into force 18 March 2004. This Regulation is established on the basis of subsection 10 (5) of the Strategic Goods Act (RT I 2004, 2, 7) and in accordance with subsection 32 (1) of the Databases Act (RT I 1997, 28, 423; 1998, 36/37, 552; 1999, 10, 155; 2000, 50, 317; 57, 373; 92, 597; 2001, 7, 17; 17, 77; 2002, 61,375; 63, 387; 2003, 18, 107; 26, 158), §1-9. (Estonia)

<sup>103</sup> Strategic Goods Act, 17 December 2003, entered into force 5 February 2004; amended by Strategic Goods Control Act 18 July 2004, RT I 2004, 53, 366, § 21, 27 and 28. (Estonia)

<sup>104</sup> Law on export control of arms and dual-use items and technologies, Promulgated, State Gazette No. 11/2.02.2007, Art. 69. (Bulgaria)

<sup>105</sup> Best Practice Guide on National Control of Brokering Activities, OSCE Handbook of Best Practices on Small Arms and Light Weapons, FSC.GAL/63/03/Rev.2, 19 Sept. 2003, p. 19.

<sup>106</sup> Report of the Group of Governmental Experts established pursuant to General Assembly resolution 60/81 to consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons, UN Doc. A/62/163, 30 Aug. 2007 Para. 49.

<sup>107</sup> Anders, H. and Vines, A., 'Sanctions and enforcement', *Developing a Mechanism to Prevent Illicit Brokering in Small Arms and Light Weapons: Scope and Limitations* (Geneva: UNIDIR, 2006), pp. 103-4.

<sup>108</sup> Law amending the Law of 5 August 1991 on the import, export and transit of weapons, ammunition and equipment specifically for military use and related technology, 25 March 2003, Art. 11. (Belgium)



**Spanish** legislation on brokering controls states that violations of the law shall be considered ‘a crime, misdemeanour or administrative infraction’ and will be governed by the provisions of the Criminal Code or special anti-smuggling legislation.<sup>109</sup> In general, states disburse fines and revocations of licences for administrative and minor offences, with custodial sentences given for violations of arms embargoes, supplying terrorists or violating EU Code of Conduct criteria. For example, **Germany** imposes fines for violations of a range of administrative provisions relating to failure to keep a correct register of transactions and late reporting to relevant authorities and a maximum sentence of ten years imprisonment for carrying out a serious violation of national law on arms brokering.<sup>110</sup> **The UK** can also impose a maximum custodial sentence of ten years.<sup>111</sup> In the **Czech Republic** and **Slovakia** the maximum custodial sentence for violating arms brokering controls is eight years and in **Finland** and **Sweden** four years.<sup>112</sup> Article 253(1) of the **Lithuanian** Penal Code allows for a maximum custodial sentence of five years for brokering without a licence.<sup>113</sup>

### Information exchange and international cooperation

The Common Position requires that EU member states establish a system for exchanging information on brokering legislation, brokers and brokering licence applications and denials. **Estonian** legislation contains provisions for granting access to databases of information on licence applications and denials to third parties.<sup>114</sup> **Spanish** legislation explicitly refers to Article 5 of the Common Position, stating that Spain shall ‘exchange information concerning arms brokering activities with European Union member states and likewise with third States, as the case may be, especially concerning applicable legislation, registered brokers (if relevant), information sheets on brokers and registration application denials (if relevant) and of authorisation requests’.<sup>115</sup> While Spain has informed other member states via COARM about brokering authorisations granted, Spain has not exchanged information contained in its Special Register of Foreign Trade Operators in Defence and Dual Use Materials with EU member states.<sup>116</sup>

Arms brokering often involves activities being undertaken in several countries, and therefore international cooperation between regulatory, law enforcement, prosecution and judicial agencies is crucial for ensuring successful prosecutions of entities that have violated laws on arms brokering. The UN GGE has suggested that, ‘national legislation may contain provisions to guide relevant authorities when they share evidentiary information for law enforcement and prosecution purposes and when they assist other national authorities to determine the eligibility of a broker or the legitimacy of a potential brokering activity’.<sup>117</sup> In other words, the legal requirements should be in place for enabling documents submitted as part of a brokering licence application to be exchanged

<sup>109</sup> 22437 LAW 53/2007 of 28 December on control of external trade in defence and dual-use material, Art. 10. (Spain) The Spanish Criminal Code currently in force defines as a criminal offence; inter alia, the unauthorised export of defence or dual-use items or export with authorisation obtained by fraudulent means. Personal communication to the author from Spain’s Ministry of Industry, Tourism and Commerce, 28 Sept. 2009.

<sup>110</sup> Act Implementing Article 26 (2) of the Basic Law (War Weapons Control Act) as amended by the Announcement of 22 November 1990 (Federal Law Gazette I, p. 2506) (as amended by Article 3 of the law of 11 October 2002, Federal Law Gazette I, p. 3970), Section 22a(7) and 22b. (Germany)

<sup>111</sup> Review of Export Control Legislation (2007) Supplementary Guidance Note on Trade (“Trafficking and Brokering”) in Controlled Goods (in effect from 6 April 2009), London: Department for Business Enterprise and Regulatory Reform, January 2009, p. 18. (UK)

<sup>112</sup> Anders, H. and Vines, A., ‘Sanctions and enforcement’, *Developing a Mechanism to Prevent Illicit Brokering in Small Arms and Light Weapons: Scope and Limitations* (Geneva: UNIDIR, 2006), p. 121.

<sup>113</sup> Report on Implementation of the United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, Republic of Lithuania, 20 March 2008. (Lithuania)

<sup>114</sup> Strategic Goods Act, 17 December 2003, entered into force 5 February 2004; amended by Strategic Goods Control Act 18 July 2004, RT I 2004, 53, 366, § 10(6). (Estonia)

<sup>115</sup> Royal Decree 2061/2008 of 12 December approving the control Regulation on foreign trade in defence material, other material and dual-use items and technologies, Art. 9(4). (Spain)

<sup>116</sup> Personal communication to the author from Spain’s Ministry of Industry, Tourism and Commerce, 28 Sept. 2009.

<sup>117</sup> Report of the Group of Governmental Experts established pursuant to General Assembly resolution 60/81 to consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons, UN Doc. A/62/163, 30 Aug. 2007 Para. 50.

with competent agencies in other states for crosschecking on a case-by-case basis – for example, checking the authentication of end-user certificates.<sup>118</sup>

**Spain:** 'In the event that several Member States participate in the control of the same brokering transaction, consultations shall be undertaken with the competent authorities of the Member State(s) in question furnishing them with all pertinent information. Possible objections lodged by the Member State(s) shall be binding in terms of the concession of authorisation for the brokering activity in question. If no objections have been lodged within ten working days, it shall be assumed that the Member State(s) consulted do not have any objection'.<sup>119</sup>

International cooperation is also deemed important for collecting evidence that can be used for the arrest or extradition, if located overseas, of an individual suspected of engaging in an illegal arms brokering transaction. It has therefore been suggested that 'efficient extradition and similar legal procedures can be a major help in the prosecution of illicit arms brokers and traffickers'.<sup>120</sup> One of the problems with extraditing a suspected arms broker to a state in which the arms broker is to stand trial is that the extraditing and requesting state have to agree that the arms broker has committed an act that is recognised by both as constituting a crime and have in place a mutual extradition agreement. Since the adoption by the EU in 2002 of a European Arrest Warrant, adopted by the EU in 2002, 'it is no longer relevant whether the states concerned share the definition of the offence as long as it is punishable by at least three years imprisonment'.<sup>121</sup>

## Parliamentary and public transparency

Although the Common Position contains a provision relating to the exchange of information with other states, it does not contain a provision encouraging the reporting to national parliaments or the public on registered brokers or brokering licences issued or denied. However, several EU member states have made such information available to national parliaments and the public.

**Finland's** Ministry of Defence (MoD) maintains a database of all licences granted, with the licences classified as public documents that are 'available for reading or photocopying at the MoD'.<sup>122</sup>

**Romania** publishes detailed information on licences issued for brokering in its annual arms export report. Information is provided on: exporter country, importer country, the military list category of the item, number of licences issued, value of licences issued in Euros, value of arms exported in Euros, number of licences refused, the EU Code of Conduct criteria on which the licences were refused and some information on the actual items. The information provided is therefore as detailed as information on export licences and actual exports from Romania. For example, in the report for 2007 it is stated that two brokering licences worth around €50 000 were granted for transfers from South Africa to Georgia for category ML10 goods, which were also exported in 2007. The description of the goods was given as 'electronic devices for military aircraft'.<sup>123</sup>

**Estonia** is legally required to maintain a public register of natural or legal persons that are registered arms brokers. Estonia reports on applications granted and refused for entry into the state register of brokers of military goods in its Strategic Goods Commission Activity Report. In its report for 2007, it stated that three applications were received, of which one was granted, one refused and a decision on the third application delayed until 2008.<sup>124</sup>

<sup>118</sup> Report of the Group of Governmental Experts established pursuant to General Assembly resolution 60/81 to consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons, UN Doc. A/62/163, 30 Aug. 2007 Para. 55.

<sup>119</sup> Royal Decree 2061/2008 of 12 December approving the control Regulation on foreign trade in defence material, other material and dual-use items and technologies, Art. 9(4). (Spain)

<sup>120</sup> Anders, H. and Vines, A., 'Sanctions and enforcement', *Developing a Mechanism to Prevent Illicit Brokering in Small Arms and Light Weapons: Scope and Limitations* (Geneva: UNIDIR, 2006), p. 127.

<sup>121</sup> Anders, H. and Vines, A., 'Sanctions and enforcement', *Developing a Mechanism to Prevent Illicit Brokering in Small Arms and Light Weapons: Scope and Limitations* (Geneva: UNIDIR, 2006), p. 128.

<sup>122</sup> Annual Report According to the EU Code of Conduct on Arms Exports: National Report of Finland for 2007, p. 2.

<sup>123</sup> Arms export controls annual report: January – December 2007, Ministry of Foreign Affairs of Romania National Agency for Export Controls, September 2008, p. 34.

<sup>124</sup> Strategic Goods Commission Activity Report Year 2007, Estonia, p. 6.

Estonia also publishes a list of registered brokers of military goods in English on the website of the Ministry of Foreign Affairs (see box below). It gives a full list of Estonian registered brokers, with each entry giving information on: the name of the registered brokering company, its registration number, the names of individuals registered as brokers, the countries for which the broker can arrange transactions as well as those for which the broker cannot be involved in brokering transactions and the date of entry into the Register.

#### **Entries from the Estonian Register of Registered Brokers of Military Goods**

MUSKET Ltd. (Reg. no. 10281833)

Broker: Mr. Raivo Susi.

Countries of Destination: All Counties.

Except countries (incl. their citizens and permanent residents) under UN, EU, OSCE or other international sanctions, which are binding for Estonia, and that are under sanctions imposed by Estonian Republic under International Sanctions Act (RTI 2002, 105, 612).

Registry entry EE/04/MLREG0001 has been made in accordance with Commissions decision no: 6-15/2004 on October 1st 2004.

ATOSTAT Ltd. (Reg. no. 11069213)

Brokers: Mr. Andrei Makarov and Mr. Aleksandr Maksimenkov.

Countries of Destination: Russian Federation, Ukraine and EU member states.

Except countries (incl. their citizens and permanent residents) under UN, EU, OSCE or other international sanctions, which are binding for Estonia, and that are under sanctions imposed by Estonian Republic under International Sanctions Act (RTI 2002, 105, 612).

Registry entry EE/09/MLREG0001 has been made in accordance with Commissions decision no: 23/2008 on January 2nd 2009.

Extracted from the website of the Estonian Ministry of Foreign Affairs, [http://www.vm.ee/eng/kat\\_153/aken\\_prindi/4920.html](http://www.vm.ee/eng/kat_153/aken_prindi/4920.html).

#### **4. Implementation of the EU Common Position on controlling arms brokering by States in the Western Balkans**

This chapter describes the implementation of the EU Common Position on the control of arms brokering by Albania, Bosnia and Herzegovina, Croatia, Montenegro and Serbia. For each country, excerpts from, and commentaries on, the legislation on the control of arms brokering with regard to the following topics are provided: definitions of brokering activities, goods to be controlled, scope and jurisdiction; licensing procedures including requirements for registration and licensing, licensing assessment criteria, record-keeping and reporting, sanctions, information exchange and international cooperation, and parliamentary and public transparency.

## Albania

Albanian brokering controls are contained in Law no. 9707 on state import-export control of military goods and dual-use goods and technologies of 5 April 2007. Albania has therefore included controls on arms brokering in its transfer control legislation.

### Definition of brokering activities to be controlled

Albanian legislation defines brokering activity as:

‘Any one action carried out by a trade entity in the Republic of Albania, either a legal or natural person, facilitating (acting as an intermediary) conduct of international transfers of goods designed for military purposes, including actions relating to financing and transportation of shipments, irrespective of the origin of these goods, and the territory in which such activity will take place’.<sup>125</sup>

The Albanian definition of brokering activity appears to apply only to mediation and not dealing as required by the Common Position. However, it appears to also apply to mediation for financing and transport, thereby including controls on activities that are not defined as core brokering activities by the Common Position.

### Definition of goods to be subject to controls

There is no distinction made in the legislation between goods subject to export or brokering controls. The list of goods subject to control draws upon the Common Military List of the EU and other international regimes on arms control.<sup>126</sup>

### Definition of scope and jurisdiction

Brokers are included in the legislation’s definition of “Entities involved in international transfers of goods”, which covers all ‘entities doing business in the Republic of Albania, duly registered by the State Export Control Authority, and their representatives, and legal or natural persons, who aim at conducting international transfers’.<sup>127</sup>

The Albanian controls on arms brokering appear to apply to Albanian ‘trade entities’ wherever they are involved in brokering transactions and irrespective of the origin or destination of the arms to be transferred. One could assume that the controls therefore apply not only to third countries but also to Albania and also contain extraterritorial controls. However, it is unclear if this reading is correct.

### Licensing procedures for arms brokering

Albania has a two-stage licensing procedure for controlling arms brokers; the same procedure as required for export licences. Brokers should be registered with the State Export Control Authority before they can apply for a licence to undertake brokering activities.

<sup>125</sup> Republic of Albania, Law no. 9707, dated 5 April 2007 on state import-export control of military goods and dual-use goods and technologies, Art. 2(24).

<sup>126</sup> Republic of Albania, Law no. 9707, dated 5 April 2007 on state import-export control of military goods and dual-use goods and technologies, Art. 10.

<sup>127</sup> Republic of Albania, Law no. 9707, dated 5 April 2007 on state import-export control of military goods and dual-use goods and technologies, Art. 2(16).

### Requirements for applications to be a broker: licences and registration

Albanian legislation requires 'those intending to be engaged in brokering activities on behalf of international transfers of goods designed for military purposes' to be registered with the State Export Control Authority.<sup>128</sup> Albanian primary legislation does not provide information on the documentation to be provided for registration. No definite period of time for the period of registration is given.

### Requirements for applications for a licence for brokering

Albanian legislation calls for applicants for a licence to carry out brokering activities to submit written applications and documents containing 'accurate data about the goods, their international transfer procedures and the original guarantee for these transfers', as well as a fee.<sup>129</sup>

### Types of licences

There are no references in Albanian legislation to brokering-specific licences. Therefore, arms brokers appear to be eligible to apply for any of the three types of licences that can be issued to "Entities involved in international transfers of goods":

- Single-use licences and authorizations: issued to conduct negotiations for specific contracts with a particular foreign country for a particular international transfer of goods. These licences are valid for a certain period of time, but not for longer than one year.
- General licences and authorizations: issued to conduct occasional negotiations for (a) signing economic agreements with foreign countries or (b) multiple transfers to specific end users, as provided for in a contract. These licences are valid for the period of the contract, but not for longer than three years.
- Unlimited licences and authorizations: issued to conduct occasional negotiations for (a) signing a contract with foreign countries, (b) multiple transfers of goods to different end users in a specific country, as provided for in the contract or (c) transfers involving countries, which are parties to international export control regimes. These licences are valid for the period of the agreement/contract, but not for longer than three years.<sup>130</sup>

It is unclear if brokers are issued with general or unlimited licences in practice. It is possible that as in Poland, the legal provisions for issuing such licences to brokers are not utilised.

### Licensing assessment criteria

Albanian legislation does not explicitly list criteria to be used for assessing brokering licences, but lists the following 'principles' to be used to guide Albanian export policy:

- Priority of national political, economic and military interests for guaranteeing national security;
- Protection of political, economic and military interests;
- Obligation to observe the international commitments made by the Republic of Albania on the non-proliferation of weapons of mass destruction, the ways for their proliferation, and to ensure state control over international transfer of goods designed for military purposes, and dual-use goods, as well as to prevent these goods from being used for terrorist acts and other illegal purposes;

<sup>128</sup> Republic of Albania, Law no. 9707, dated 5 April 2007 on state import-export control of military goods and dual-use goods and technologies, Art. 14.

<sup>129</sup> Republic of Albania, Law no. 9707, dated 5 April 2007 on state import-export control of military goods and dual-use goods and technologies, Art. 19.

<sup>130</sup> Republic of Albania, Law no. 9707, dated 5 April 2007 on state import-export control of military goods and dual-use goods and technologies, Art. 17.

- Conduct of export control to the extent required to achieve its purpose;
- Harmonisation of state export control procedures and regulations with international legal norms and practices; and
- Ensuring interaction with international organisations and foreign countries in the state export control area so as to reinforce international security and stability, including countervailing of weapons of mass destruction and the system for their proliferation.<sup>131</sup>

### Refusals and revocations

General grounds for rejecting licence applications are given in Albania's primary legislation as follows:

- The application is made by a person who does not have the correct legal status;
- Requested documents are missing or are incorrectly filed; or
- The application runs counter to existing Albanian laws or ratified international agreements.<sup>132</sup>

Licences will be revoked or suspended if any of the following conditions are met:

- An emergency involving national security needs and interests;
- In order to ensure fulfilment of the international obligations of the Republic of Albania;
- If the broker goes into liquidation;
- If the broker becomes bankrupt, and is subject to bankruptcy legal procedures;
- If the State Export Control Authority needs to conduct additional checks on the documents submitted by the broker; or
- If the broker violated the law.<sup>133</sup>

### Exemptions

Albanian primary legislation does not provide explicit exemptions from licensing requirements for arms brokering.

### Record-keeping and reporting

In line with the Common Position, the Albanian authorities are required to keep documentation provided for licences granted and denied for a period of up to ten years.<sup>134</sup>

Arms brokers are required to keep all documents relating to brokering transactions for a period of ten years, and are also required to submit written reports on actual transactions for which licences have been granted.<sup>135</sup>

<sup>131</sup> Republic of Albania, Law no. 9707, dated 5 April 2007 on state import-export control of military goods and dual-use goods and technologies, Art. 4.

<sup>132</sup> Republic of Albania, Law no. 9707, dated 5 April 2007 on state import-export control of military goods and dual-use goods and technologies, Art. 20.

<sup>133</sup> Republic of Albania, Law no. 9707, dated 5 April 2007 on state import-export control of military goods and dual-use goods and technologies, Art. 21.

<sup>134</sup> Republic of Albania, Law no. 9707, dated 5 April 2007 on state import-export control of military goods and dual-use goods and technologies, Art. 22.

<sup>135</sup> Republic of Albania, Law no. 9707, dated 5 April 2007 on state import-export control of military goods and dual-use goods and technologies, Art. 28.

## Sanctions

Albanian primary legislation states that if there is sufficient evidence of efforts to commit a criminal offence or a criminal offence has been committed in accordance with the Criminal Code, then Albanian authorities are authorised to undertake criminal proceedings. However, the Albanian export control law does not contain a list of criminal offences and penalties, but refers to the Criminal Code.<sup>136</sup> A list of violations considered to be administrative offences, and not contained in the Criminal Code, are listed as follows:

- Brokering without a licence, authorisation and state guarantee is subject to a fine of up to 150 per cent the price of the goods being transferred;
- Brokering with a licence that was obtained using false documents or documents containing false information is subject to a fine of up to 150 per cent the price of the goods being transferred;
- Carrying out a brokering transaction after having received information that the goods will be used by the country, or foreign entity, for developing and proliferating weapons of mass destruction is subject to a fine up to 150 per cent the price of the goods;
- Changing the destination, end-use or end-user of the goods without informing the relevant authorities is subject to a fine of up to 100 per cent the price of the goods;
- Withdrawing information that may impact on the decision-making of the relevant licensing authorities is subject to a fine of up to 100 per cent the price of the goods;
- Changing the names and conditions set by the exporter, importer, broker, or end-user or the goods without informing the relevant authorities is subject to a fine of up to 100 per cent the price of the goods;
- Conducting negotiations without the authorisation of the State Export Control Authority for the signing of economic agreements/contracts is subject to a fine of up to 1 000 per cent of the nationals' minimum tax-free annual income;
- Failing to submit, or delaying submission of, reports and relevant documents is subject to a fine of up to 500 per cent of the nationals' minimum tax-free annual income;
- Obstructing the performance of state bodies involved in the conduct of state export controls is subject to a fine of up to 100 per cent of the nationals' minimum tax-free annual income;
- Refusing to submit information and documents required by state export control authorities without good grounds is subject to a fine of up to 100 per cent of the nationals' minimum tax-free annual income;
- Intentionally destroying documents before the ten year time limit is subject to a fine of up to 1 000 per cent of the nationals' minimum tax-free annual income.<sup>137</sup>

## Information exchange and international cooperation

Albania's primary legislation states that information on arms transfers may be shared with international counterparts 'for the sole purpose of conducting export control and protecting national interests'.<sup>138</sup>

<sup>136</sup> Republic of Albania, Law no. 9707, dated 5 April 2007 on state import-export control of military goods and dual-use goods and technologies, Art. 29.

<sup>137</sup> Republic of Albania, Law no. 9707, dated 5 April 2007 on state import-export control of military goods and dual-use goods and technologies, Art. 30, 31 and 32.

<sup>138</sup> Republic of Albania, Law no. 9707, dated 5 April 2007 on state import-export control of military goods and dual-use goods and technologies, Art. 7.



## Parliamentary and public transparency

Albanian primary legislation does not contain provisions for submitting information on entities that have been registered to undertake brokering activities or on licences that have been granted, denied or revoked.

### Summary: implementation of the Common Position by Albania

Albania's Law no. 9707 on state import-export control of military goods and dual-use goods and technologies of 5 April 2007 contains provisions for the control of arms brokering within Albania, but does not fully implement the Common Position. The Law appears to provide a definition of brokering activities, scope and jurisdiction that covers mediating and mediating for financing and transport, thereby including controls on activities that are not defined as core brokering activities by the EU Common Position. It also *appears* to apply to exports from Albania and also includes extraterritorial controls on brokering activities undertaken by Albanian registered brokers acting outside Albanian territory – but the definition is not very clear.

The Law does not contain chapters or articles explicitly covering licensing for arms brokering. Arms brokers are required to register before applying for a licence to undertake brokering activities, but it is unclear if arms brokers are also eligible for open licences. The Law does not contain an explicit reference to the requirement for licensing applications to be assessed against the criteria of the EU Code of Conduct.

Albanian authorities are required to keep records on arms broker applications for ten years, in line with the Common Position's requirements. There is also a requirement for arms brokers to keep records for ten years. Sanctions are also provided for violations of the Law and the Albanian Criminal Code, including for offences relating to arms brokering.

There is no specific mention of information exchanges and international cooperation with regard to controlling arms brokering, but provisions are made for sharing information on arms transfers. There are no provisions for reporting to parliament or the public on registered brokers or licences granted, denied or revoked for brokering activities.

## Bosnia and Herzegovina

Bosnia and Herzegovina's brokering controls are contained in the amended Law on Export and Import of Arms and Military Equipment (2005) and its related secondary legislation.<sup>139</sup>

### Definition of brokering activities to be controlled

Bosnian legislation defines brokering as 'mediation' whereby:

'an action wherewith a physical or legal person with a permanent or temporary residence in the territory of Bosnia and Herzegovina, which serves to facilitate or arrange transfers of arms and military equipment located inside or outside the territory of Bosnia and Herzegovina to another country'.<sup>140</sup>

The definition therefore covers dealing and mediation activities, in line with the requirements of the Common Position.

### Definition of goods to be subject to controls

The items subject to brokering controls include weapons, military equipment and their spare parts as contained in the Common Military List of the EU.<sup>141</sup>

### Definition of scope and jurisdiction

Bosnia and Herzegovina's legislation covers activities undertaken by a legal or physical person temporarily or permanently resident in Bosnia relating to the transfer of arms and military equipment not only between two third countries but also from the territory of Bosnia and Herzegovina. Bosnia and Herzegovina does not provide for extraterritorial controls on its own citizens if they undertake brokering activities outside Bosnia and Herzegovina.<sup>142</sup>

### Licensing procedures for arms brokering

Bosnia and Herzegovina has a two-stage licensing procedure for controlling arms brokers; the same procedure as required for export licences. Registration is a pre-requisite for issuing an individual brokering transaction licence.<sup>143</sup>

### Requirements for applications to be a broker: licences and registration

Bosnia and Herzegovina requires arms brokers to be registered with the Ministry of Foreign Trade and Economic Affairs of Bosnia and Herzegovina.<sup>144</sup> The procedure and documents to be submitted are contained in secondary legislation, which requires an application for registration to be accompanied by the following:

- Extract from the court register;

<sup>139</sup> Law on Export and Import of Arms and Military Equipment ("Official Gazette of BiH", No 05/03, 14/03, 33/03, 14/05, 56/05 and 75/05.

<sup>140</sup> Law on Export and Import of Arms and Military Equipment ("Official Gazette of BiH", No 05/03, 14/03, 33/03, 14/05, 56/05 and 75/05, Art. 2(2); Questionnaire completed by Bosnia and Herzegovina and received by author, 27 Aug. 2009.

<sup>141</sup> Law on Export and Import of Arms and Military Equipment ("Official Gazette of BiH", No 05/03, 14/03, 33/03, 14/05, 56/05 and 75/05, Art. 3(2); Questionnaire completed by Bosnia and Herzegovina and received by author, 27 Aug. 2009.

<sup>142</sup> Analysis of National Legislation on Arms Exports and Transfers in the Western Balkans (Belgrade: SEESAC 2006), p. 23.

<sup>143</sup> Questionnaire completed by Bosnia and Herzegovina and received by author, 27 Aug. 2009.

<sup>144</sup> Law on Export and Import of Arms and Military Equipment ("Official Gazette of BiH", No 05/03, 14/03, 33/03, 14/05, 56/05 and 75/05, Art. 4.

- Authorised persons and their titles;
- Proof of registration in the register of customs payers;
- Proof of registration in the register of tax payers;
- Permit by relevant body for trade of armaments and military equipment;
- List of products for which there is a permit for trade from the EU common list of arms and military equipment;
- Proof of tax paid in the amount of 5 KM for submission of the request and 15 KM for issuance of Registration.<sup>145</sup>

No definite period of time for registration is given, it is only stated that the registration can be for 'a long or short period, or temporarily'.<sup>146</sup>

#### Requirements for applications for a licence for brokering

Entities that are registered with the Ministry of Foreign Trade and Economic Affairs of Bosnia and Herzegovina can apply for individual brokering transaction licences with the following documents:

- Specifications of the arms and military equipment to be transferred including number from the control list, customs tariff designation and unit quantities and values;
- A copy of the invoice for the export or import of arms and military equipment;
- An original end-user certificate issued by the competent state institution or end user and a copy of the import licence issued by the competent state institution for export of arms and military equipment;
- End-user certificate for import of arms and military equipment;
- Proof of tax paid in the amount of 5 KM for submission of the application and 15 KM for issuance of Decision.<sup>147</sup>

The licence is valid for a period of up to one year.<sup>148</sup> In line with the Common Position, Bosnia and Herzegovina only grants individual brokering transaction licences, which are assessed on a case-by-case basis.<sup>149</sup> The licence will include information on its expiry and conditions for revocation, as well as information on 'means of transport, the transport route, locations for crossing the border, safety and the security of the transport'.<sup>150</sup> The Ministry of Foreign Trade and Economic Relations 'shall inform EUFOR on the fact, in accordance with Amendment 24 of the Directive to the Parties, as the EUFOR's approval is necessary for the very movement of such goods through Bosnia and Herzegovina'.<sup>151</sup>

<sup>145</sup> Instruction on Registration of Persons and Legal Entities in Trade of Armaments and Military Equipment, No. 01-1-170/03, 7 March 2003, Official Gazette, 14/03, Art. 2.

<sup>146</sup> Instruction on Registration of Persons and Legal Entities in Trade of Armaments and Military Equipment, No. 01-1-170/03, 7 March 2003, Official Gazette, 14/03, Art. 4.

<sup>147</sup> Instruction on Regulating Export, Import, Transit and Mediation in Trade of Armaments and Military Equipment, No. 01-1-02-8703/05, 5 July 2005, Art. 2.

<sup>148</sup> Instruction on Regulating Export, Import, Transit and Mediation in Trade of Armaments and Military Equipment, No. 01-1-02-8703/05, 5 July 2005, Art. 3.

<sup>149</sup> Analysis of National Legislation on Arms Exports and Transfers in the Western Balkans (Belgrade: SEESAC 2006), p. 21.

<sup>150</sup> Law on Export and Import of Arms and Military Equipment ("Official Gazette of BiH", No 05/03, 14/03, 33/03, 14/05, 56/05 and 75/05, Art. 9(1)c).

<sup>151</sup> Questionnaire completed by Bosnia and Herzegovina and received by author, 27 Aug. 2009.

## Licensing assessment criteria

Bosnia and Herzegovina applies the same set of criteria for assessing arms brokering licence applications as used for export licence applications.<sup>152</sup> The Ministry of Foreign Affairs, Ministry of Security and Ministry of Defence take into account the following factors when making a decision relating to a brokering licence application:

- Embargoes and sanctions imposed by the UN Security Council;
- The international obligations, foreign policy interests and specific interests of Bosnia and Herzegovina in relation to the strategic foreign policy partners of Bosnia and Herzegovina;
- The transfer is in accordance with the EU Code of Conduct on Arms Exports (now Common Rules);
- The principle of the non-proliferation of weapons of mass destruction; and
- The issuance of a licence shall not put at risk public safety within Bosnia and Herzegovina.<sup>153</sup>

In addition to these factors, it has been stated that Bosnia also takes into account

- OSCE Common Export Control Criteria;
- Requirements of international control regimes (Wassenaar Arrangement, Australia Group, Nuclear Suppliers Group, Missile Technology Control Regime), although it is not a member of these regimes.<sup>154</sup>

## Refusals and revocations

Individual brokering transaction licence applications can be refused on the following grounds:

- If the import of arms and military equipment or the end-user is in conflict with the international obligations of Bosnia and Herzegovina;
- If the information to be supplied for the application is unavailable or incorrect;
- If the applicant violated legal provisions relating to earlier activities pertaining to trade in armament and military equipment.<sup>155</sup>

The grounds for revocation are given as follows:

- If the licence issued has been lost;
- If new facts have been obtained which, had they been known at the time of consideration of the application for the licence, would have resulted in denying the application;
- If the licence issued has not yet been used for its intended purpose.<sup>156</sup>

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<sup>152</sup> Analysis of National Legislation on Arms Exports and Transfers in the Western Balkans (Belgrade: SEESAC 2006), p. 23.

<sup>153</sup> Law on Export and Import of Arms and Military Equipment ("Official Gazette of BiH", No 05/03, 14/03, 33/03, 14/05, 56/05 and 75/05, Art. 6.

<sup>154</sup> Reporting and Implementation of the United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons (SALW) in All Its Aspects, National report of Bosnia and Herzegovina for 2007, submitted 2008, Annex, 6.1.

<sup>155</sup> Instruction on Regulating Export, Import, Transit and Mediation in Trade of Armaments and Military Equipment, No. 01-1-02-8703/05, 5 July 2005, Art. 6(2).

<sup>156</sup> Instruction on Regulating Export, Import, Transit and Mediation in Trade of Armaments and Military Equipment, No. 01-1-02-8703/05, 5 July 2005, Art. 6(1).

## Exemptions

Bosnia and Herzegovina's law does not explicitly include exemptions from the requirement to possess a brokering licence to undertake arms brokering activities.

## Record-keeping and reporting

The Ministry of Foreign Trade and Economic Affairs of Bosnia and Herzegovina 'shall establish a database of licences issued'.<sup>157</sup> No mention is made of a requirement for these records to be kept for ten years, as required by the EU Common Position.

Brokers are required to maintain a 'detailed record of trade of armaments and military equipment', which should include 'commercial documents, such as invoices, certificates and transport and other documents for shipping, which contain enough information in order to identify:

- Description of armaments and military equipment;
- Amount of products;
- Name and address of exporter or importer and recipient;
- Armaments and military equipment products' final use and end user'.<sup>158</sup>

The law requires that records should be kept for at least three years, and must be made available for the relevant government authorities upon request.<sup>159</sup> Brokers are also required to report to the Ministry of Foreign Trade and Economic Affairs 15 days after they have completed the activities for which the licence was issued.<sup>160</sup>

## Sanctions

The Law on Export and Import of Arms and Military Equipment of 2003 included provisions for a custodial sentence of up to ten years for persons who willingly

- Conducted a brokering activity without a licence; or
- Made false statements, or withholds material facts during the licence issuing procedure.<sup>161</sup>

Custodial sentences of between six months and five years were also prescribed for the following offences:

- Conducting brokering activities without a licence due to negligence;
- Makes false statements, or withholds material facts during the licence issuing procedure due to negligence.<sup>162</sup>

<sup>157</sup> Law on Export and Import of Arms and Military Equipment ("Official Gazette of BiH", No 05/03, 14/03, 33/03, 14/05, 56/05 and 75/05, Art. 11(1).

<sup>158</sup> Instruction on Regulating Export, Import, Transit and Mediation in Trade of Armaments and Military Equipment, No. 01-1-02-8703/05, 5 July 2005, Art. 5(1).

<sup>159</sup> Instruction on Regulating Export, Import, Transit and Mediation in Trade of Armaments and Military Equipment, No. 01-1-02-8703/05, 5 July 2005, Art. 5(1).

<sup>160</sup> Reporting and Implementation of the United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons (SALW) in All Its Aspects, National report of Bosnia and Herzegovina for 2007, submitted 2008, Annex, 6.3.

<sup>161</sup> Law on Export and Import of Arms and Military Equipment ("Official Gazette of BiH", No 05/03, Art. 14(1).

<sup>162</sup> Law on Export and Import of Arms and Military Equipment ("Official Gazette of BiH", No 05/03, Art. 14(3).

For misdemeanours relating to violations of the conditions of the licence issued, a fine of KM 10 000 or a custodial sentence of up to six months could have been issued.<sup>163</sup>

Provisions for illicit trafficking offences are no longer explicitly listed in the amended Law on Export and Import of Arms and Military Equipment of 2005, but are to be found in the Criminal Code of Bosnia and Herzegovina.<sup>164</sup> The Law on Export and Import of Arms and Military Equipment was amended so that only offences for minor offences now contained in the text of the law, with a maximum fine of KM200 000 for legal persons violating conditions set out in the licence and KM10 000 or up to 60 days in prison for a natural person.<sup>165</sup>

### Information exchange and international cooperation

Bosnia and Herzegovina's legislation provides for OSCE members and the OSCE Secretariat to request information on export and import licences, but gives no explicit mention of brokering licences. It does provide for the exchange of 'other data of relevance for the import and export of arms and military equipment' as required under the terms of international law and international obligations.<sup>166</sup> Provisions are also included for sharing information on licence denials. The law also states that if it is known that another OSCE member state has denied a licence for a similar transaction in the previous three years, then a consultation with that country will take place.

### Parliamentary and public transparency

The Ministry of Foreign Trade and Economic Affairs of Bosnia and Herzegovina is required to 'submit a report on the licences issued to the Parliamentary Assembly of Bosnia and Herzegovina every six months'.<sup>167</sup>

Bosnia and Herzegovina provides information on the number of entities registered as brokers of arms and military equipment in its publicly available Annual Arms Exports and Imports Report. According to the report for 2006, '162 legal and natural persons had been registered for foreign-trade operations in arms and military equipment brokering, 82 of which are permanent registrations and 80 temporary ones'.<sup>168</sup>

In its completed questionnaire for this project it was stated that: 'So far in BiH no foreign company or individual have been registered for the activity of foreign trade – brokering in the transfers of arms and military equipment'.<sup>169</sup>

### Summary: implementation of the Common Position by Bosnia and Herzegovina

Bosnia and Herzegovina's amended Law on Export and Import of Arms and Military Equipment (2005) and its related secondary legislation contains provisions for the control of arms brokering within Bosnia and Herzegovina, but does not fully implement the Common Position. The definition of brokering provided in the Law covers dealing and mediation, as prescribed by the Common Position. It also provides for controls on brokering of arms between two third countries or from the territory of Bosnia and Herzegovina.

The Law requires arms brokers to be registered with the Ministry of Foreign Trade and Economic Relations, before applying for a licence to undertake brokering activities. A licence is granted for brokering activities to be undertaken for each single transfer, with applications assessed against a variety of criteria including those of the EU Common Rules.

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<sup>163</sup> Law on Export and Import of Arms and Military Equipment ("Official Gazette of BiH", No 05/03, Art. 15.

<sup>164</sup> Analysis of National Legislation on Arms Exports and Transfers in the Western Balkans (Belgrade: SEESAC 2006), pp. 27-8.

<sup>165</sup> Law on Export and Import of Arms and Military Equipment ("Official Gazette of BiH", No 05/03, 14/03, 33/03, 14/05, 56/05 and 75/05, Art. 14.

<sup>166</sup> Law on Export and Import of Arms and Military Equipment ("Official Gazette of BiH", No 05/03, 14/03, 33/03, 14/05, 56/05 and 75/05, Art. 11(1).

<sup>167</sup> Law on Export and Import of Arms and Military Equipment ("Official Gazette of BiH", No 05/03, 14/03, 33/03, 14/05, 56/05 and 75/05, Art. 11(2).

<sup>168</sup> Annual Arms Exports and Imports Report: Information on Licences Issued for Brokering of Arms, Military Equipment and Dual-Use Products in 2006, Ministry of Foreign Trade and Economic Relations Bosnia and Herzegovina, Sarajevo, June 2007, p. 3.

<sup>169</sup> Questionnaire completed by Bosnia and Herzegovina and received by author, 27 Aug. 2009.

Bosnia and Herzegovina's authorities are required to keep records on arms broker applications, but no recommended minimum or maximum period of time is given in the Law. Arms brokers are required to keep records for a minimum of three years. Administrative and civil sanctions are provided for misdemeanours and administrative offences of the Law, with the Criminal Code providing for custodial sentences for serious offences relating to arms brokering.

The Law contains a provision for information sharing on import and export licences with the OSCE secretariat and member states, but no explicit mention is made of information sharing on arms brokering licences. Bosnia and Herzegovina has provided information on the number of entities registered as brokers of arms and military equipment in its publicly available Annual Arms Exports and Imports Report.



## Croatia

Croatian brokering controls are contained in the Law on Export and Import of Military and Non-Military Lethal Goods (2008). Croatia aligned with the Common Position on the control of arms brokering on 27 February 2009.

### Definition of brokering activities to be controlled

Croatian legislation defines brokering as:

'(a) negotiating or contracting deals involving the purchase, sale or procurement of military goods (...) from a foreign state to any other foreign state; (b) selling and purchasing military goods (...) stored in a foreign state for transfer to another foreign state'.<sup>170</sup>

A definition of a broker is also provided as 'a legal or natural person – trader with residence or temporary residence in the territory of the Republic of Croatia, engaged in brokerage business'. The law also states that 'auxiliary services' - transportation, financial services, insurance or reinsurance, and advertising or promotion – 'shall not be considered broker's services'.

Croatian legislation uses the Common Position's definition of core brokering activities for transfers of arms and military equipment between two third countries as brokering activities.

### Definition of goods to be subject to controls

The goods to be subject to controls include those listed on the Military Goods List, which is aligned with the EU Common Military List and also contains 'non-military lethal goods'.<sup>171</sup>

### Definition of scope and jurisdiction

The scope and jurisdiction of the law with regard to brokering controls fulfils the mandatory provisions of the Common Position, but does not refer to extraterritorial controls.

### Licensing procedures for arms brokering

Croatia has a two-stage licensing procedure for controlling arms brokers; the same procedure as required for export licences. Registration is a pre-requisite for issuing an individual brokering transaction licence.

Croatian legislation also provides for prospective licence applicants to seek advice from the Ministry of Economic Affairs 'prior to the conclusion of a contract' on whether a deal with a particular broker, purchaser, importer, end user or the end use state would constitute a violation of Croatian law.<sup>172</sup> Therefore, the Croatian government offers a 'sounding' service. It is not stated if the results of such enquiries would also be recorded and made available for sharing with other states. This could be an important and useful element for preventing violations of international arms embargoes and the EU Common Rules.

### Requirements for applications to be a broker: licences and registration

It is a prerequisite for an individual brokering transaction licence that the applicant be registered as a producer or broker for military goods with 'a seat, or permanent or temporary residence in the territory of the Republic of

<sup>170</sup> Act on the export and import of military and non-military lethal goods, (OG 86/08), Article 2.

<sup>171</sup> Act on the export and import of military and non-military lethal goods, (OG 86/08), Article 3 and 4.

<sup>172</sup> Act on the export and import of military and non-military lethal goods, (OG 86/08), Article 23.

Croatia, and entered in the Register of Service Providers for Military Goods'.<sup>173</sup> To register as a 'service provider of military goods' an applicant must submit a written application to the Ministry of Economic Affairs, accompanied by the following documents:

- A certified copy of the decision by the competent authority concerning the registered trade;
- A personal identification or tax number;
- A certificate issued by the competent authority confirming that the applicant or the responsible person of the legal or natural person has not been convicted of a criminal offence and is not under investigation;
- The name of the bank and a document certified by the applicant's bank;
- A declaration on the number and structure of personnel;
- A declaration by the responsible person of the legal or natural person pledging that the competent inspection service will be allowed to inspect the services provided,
- A declaration by the responsible person of the legal or natural person one or more employees to provide broker's services on behalf and for the account of the respective company.<sup>174</sup>

#### Requirements for applications for a licence for brokering

Those parties seeking to carry out a brokering transaction are required to apply for a service licence.<sup>175</sup> Service licences are issued on a case-by-case basis for an individual brokering transaction and are valid for a period of no more than a year and are non-renewable. Applications should be submitted to the Ministry of Economic Affairs, as outlined in the secondary legislation – 'Ordinance on the format and content of the service provision licence for military goods' (2009).<sup>176</sup> Neither the primary nor the secondary legislation provides a detailed list of the supporting documents to be submitted with the application.

#### Licensing assessment criteria

The grounds given for refusing to issue a licence for a brokering transaction reveal the main factors used in assessments of licensing applications. Croatian legislation states that licence applications are denied if granting the licence would be 'detrimental to the foreign policy or economic interests of the Republic of Croatia, or would contravene the principles of the European Union Code of Conduct for Arms Exports' (now Common Rules).<sup>177</sup> The following are explicitly given as grounds for refusing a licence:

- Would jeopardise the fulfilment of Croatia's international obligations;
- Would pose a risk to Croatia's security or defence interests;
- Contrary to the country's national security strategy;
- May be conducive to an outbreak or continuation of armed conflicts in the country of end use;
- May stir up violence in the country of end use;
- Would enable undesirable persons to get possession of the exported goods against the will of the exporters.

<sup>173</sup> Act on the export and import of military and non-military lethal goods, (OG 86/08), Article 29.

<sup>174</sup> Act on the export and import of military and non-military lethal goods, (OG 86/08), Article 30.

<sup>175</sup> Act on the export and import of military and non-military lethal goods, (OG 86/08), Article 32.

<sup>176</sup> Ordinance on the Format and Content of the Service Provision Licence for Military Goods (OG 1/09), 2 January 2009.

<sup>177</sup> Act on the export and import of military and non-military lethal goods, (OG 86/08), Article 37.

## Refusals and revocations

The grounds for refusing entry into the Register of Service Providers for Military Goods include:

- The provision of false information or documentation with elements of a forgery have been submitted deliberately;
- Activities in the past five years by the applicant which have infringed regulations on the import, export or transit of military goods or non-military lethal goods and on the provision of services for military goods;
- Activities in the past five years by the applicant which have violated international sanctions;
- The applicant is under police investigation for unlawful dealing with military goods or non-military lethal goods;
- An inquiry or criminal proceedings has been initiated for unlawful dealing with military goods or non-military lethal goods;
- Charges have been brought against the party or the party has been convicted of unlawful dealing with military goods or non-military lethal goods;
- Other justified reasons.<sup>178</sup>

Individual brokering transaction licence applications will be denied if in contravention of the criteria given above for assessing licence applications.

## Exemptions

Croatian legislation includes provisions for exemptions from brokering controls 'if the services are being provided for the purposes of the Armed Forces of the Republic of Croatia' or 'by virtue of a decision by the Ministry of Defence or another state authority, to perform military or humanitarian missions'.<sup>179</sup>

## Record-keeping and reporting

The Ministry of Economic Affairs is required to maintain the Register of Service Providers for Military Goods and keep a database of requested, issued, fulfilled and revoked licences, as well as rejected requests for the issuance of a brokering licence.<sup>180</sup> The information to be maintained is not outlined in Croatian legislation and there is no explicit provision on the length of time for which records should be kept.

Brokers are also required to keep a register of services rendered and to keep 'complete records and information related to the respective service for at least ten years after completing the service'.<sup>181</sup> In addition, brokers are required to report on activities carried out within the terms of the licence within 15 days of carrying out such activities or upon expiry of the licence.

## Sanctions

A prison sentence of one to five years shall be imposed on a person found by the judicial bodies of the Republic of Croatia to have carried out a brokering activity without a licence, based on a forged end user certificate or carried out a brokering activity 'that may jeopardise:

- The fulfilment of Croatia's international obligations, especially sanctions,
- Croatia's foreign policy interests'.<sup>182</sup>

<sup>178</sup> Act on the export and import of military and non-military lethal goods, (OG 86/08), Article 31.

<sup>179</sup> Act on the export and import of military and non-military lethal goods, (OG 86/08), Article 32 and 34.

<sup>180</sup> Act on the export and import of military and non-military lethal goods, (OG 86/08), Article 29 and 25.

<sup>181</sup> Act on the export and import of military and non-military lethal goods, (OG 86/08), Article 38.

<sup>182</sup> Act on the export and import of military and non-military lethal goods, (OG 86/08), Article 44.

If such actions cause death and inflicted large-scale property damage, a custodial sentence of at least five years will be delivered.

Fines are imposed for the following administrative violations:

- For violating the provisions relating to the keeping of a register of services and record-keeping and reporting a monetary fine of HRK 50 000 to 100 000 shall be imposed on a legal or natural person.<sup>183</sup>
- For acting in contravention of the provisions relating to the keeping of a register of services and record-keeping and reporting a fine of HRK 1 000 to 20 000 shall be imposed on the responsible person of the legal person or trading business.<sup>184</sup>
- For acting in contravention of the provisions relating to the keeping of a register of services and record-keeping and reporting a fine of HRK 100 000 to 200 000 shall be imposed on a legal or natural person.<sup>185</sup>
- For acting in contravention of the requirement to register as a broker a fine of HRK 10 000 to 100 000 shall be imposed on a legal or natural person.<sup>186</sup>

## Information exchange and international cooperation

Croatian legislation contains provisions for exchanging information with ‘international organisations and competent authorities of other states (...) in accordance with the obligations assumed by the Republic of Croatia’.<sup>187</sup> The law also contains a provision for exchanging information with other states on information relating to registered brokers and their activities – however, it has been stated that this provision only comes into force when Croatia joins the EU.<sup>188</sup>

## Parliamentary and public transparency

Croatia is required to produce an annual report on the export and import of military goods and non-military lethal goods for commercial purposes, for the previous year, to be submitted to the government.<sup>189</sup> Croatia is also required to publish an annual report on the website of the Ministry of Economy.<sup>190</sup> There is no explicit mention of a requirement for information on licences for brokering to be included in this report. Croatia has not yet produced a national report on the export and import of military goods.

## Summary: implementation of the Common Position by Croatia

Croatia’s Law on Export and Import of Military and Non-Military Lethal Goods contains provisions for the control of arms brokering that can be regarded as fully implementing the Common Position. Croatia uses the Common Position’s definition of core brokering activities for transfers of arms and military equipment between two third countries.

The Law contains a chapter and articles explicitly covering controls for services – i.e. arms brokering. Arms brokers are required to register before applying for a licence to undertake brokering activities. A licence is granted for brokering activities to be undertaken for each single transfer on a case-by-case basis, with applications assessed

<sup>183</sup> Act on the export and import of military and non-military lethal goods, (OG 86/08), Article 46.

<sup>184</sup> Act on the export and import of military and non-military lethal goods, (OG 86/08), Article 47.

<sup>185</sup> Act on the export and import of military and non-military lethal goods, (OG 86/08), Article 48.

<sup>186</sup> Act on the export and import of military and non-military lethal goods, (OG 86/08), Article 49.

<sup>187</sup> Act on the export and import of military and non-military lethal goods, (OG 86/08), Article 42.

<sup>188</sup> Act on the export and import of military and non-military lethal goods, (OG 86/08), Article 43 and 53.

<sup>189</sup> Act on the export and import of military and non-military lethal goods, (OG 86/08), Article 25.

<sup>190</sup> Act on the export and import of military and non-military lethal goods, (OG 86/08), Article 25.

against a variety of criteria including those of the EU Common Rules. Croatia also offers a 'sounding' service, enabling applicants to enquire whether a deal with a particular broker, purchaser, importer, end-user / end-use would constitute a violation of Croatian law.

Croatia's authorities are required to keep records on arms broker applications, but no recommended minimum or maximum period of time is given in the Law. Arms brokers are required to keep records for ten years. The Law contains details of administrative, civil and criminal offences and penalties ranging from fines to custodial sentences.

Croatia provides for information sharing on import and export licences with other states, and the Law also contains a provision for exchanging information with other states on registered brokers and their activities – although it only comes into force when Croatia joins the EU. Croatia has not yet published an annual report on arms exports and imports, but is required to provide one for activities carried out in 2008. No explicit mention is made of whether information on arms brokering activities will be contained within the report.

## Montenegro

Montenegro's brokering controls are contained in the Act on Foreign Trade in Weapons, Military Equipment And Dual Use Goods (2008). The provisions of the Act have only applied since 1 July 2009. Montenegro aligned with the Common Position on the control of arms brokering on 24 February 2009.

### Definition of brokering activities to be controlled

Montenegro's legislation defines brokering as:

'negotiation or contraction of transactions which for subject have buying, selling or supplying with controlled goods from one foreign country to another foreign country or providing information to a person who is buying, selling or supplying with those goods from one country to another, excluding the activities such as transport, financial services, insurance, re-insurance, advertising and promotion'.<sup>191</sup>

The definition used in Montenegro's law therefore corresponds with the Common Position's definition of core brokering activities. It explicitly excludes brokering-related services from its definition of brokering.

### Definition of goods to be subject to controls

The goods to be subject to controls include weapons, military equipment and technologies determined by the national control list of weapons and military equipment.<sup>192</sup>

### Definition of scope and jurisdiction

Montenegro's definition of a broker covers the activities of brokers involved in transfers between two third countries, whether they carry out brokering activities within Montenegro or in a another country.<sup>193</sup> The scope and jurisdiction of the law with regard to brokering controls fulfils the mandatory provisions of the Common Position, and also includes controls on the brokering of arms and military equipment from the territory of Montenegro as well as extraterritorial controls on brokering activities undertaken outside Montenegro.<sup>194</sup>

### Licensing procedures for arms brokering

Montenegro has a two-stage licensing procedure for controlling arms brokers; the same procedure as required for export licences. Registration is a pre-requisite for issuing an individual brokering transaction licence.

### Requirements for applications to be a broker: licences and registration

Montenegro's legislation requires an entity seeking to export, import or broker controlled goods to be entered into the 'Register of entities for conducting foreign trade in controlled goods'.<sup>195</sup> To be entered into the register an applicant must supply a written application accompanied by:

- A statement of the registered business from the Central Register of the Commercial Court;
- The name of the applicant's bank, confirmation from the bank that the applicant's account has not been blocked for the last six months and a copy of signatures on the applicant's card;

<sup>191</sup> Act on Foreign Trade in Weapons, Military Equipment And Dual Use Goods, No: 01-2113/2, "Official Gazette of Montenegro", no. 80/08 from 26 December 2008, Art. 9(11).

<sup>192</sup> Act on Foreign Trade in Weapons, Military Equipment And Dual Use Goods, No: 01-2113/2, "Official Gazette of Montenegro", no. 80/08 from 26 December 2008, Art. 9(2).

<sup>193</sup> Act on Foreign Trade in Weapons, Military Equipment And Dual Use Goods, No: 01-2113/2, "Official Gazette of Montenegro", no. 80/08 from 26 December 2008, Art. 9(2).

<sup>194</sup> Questionnaire completed by Montenegro and received by author, 1 Sept. 2009.

<sup>195</sup> Act on Foreign Trade in Weapons, Military Equipment And Dual Use Goods, No: 01-2113/2, "Official Gazette of Montenegro", no. 80/08 from 26 December 2008, Art. 10.

- Confirmation from the relevant authority that the applicant is not bankrupt;
- A certificate from the competent authority that the applicant has no outstanding obligations regarding customs duties and taxes;
- Data on the number and structure of employees;
- A statement that obliges the applicant to enable and help the Ministry and competent authorities to conduct oversight of business in the area of controlled goods as well as to control storage facilities and means of transportation;
- A written agreement on the acceptance of security checks.<sup>196</sup>

In addition, checks will be made to ensure that the applicant has not been convicted of, or is subject to, criminal proceedings regarding criminal acts against the constitutional order and security of Montenegro, violated international human rights law, or other international law provisions relating to human rights or property.

Entry into the Register is for a period of five years.

#### **Requirements for applications for a licence for brokering**

Applications for an individual licence to undertake brokering activities must include:

- Name of the broker, their address and registration number;
- Name, description, tariff code, number from the national control lists and quantity of controlled goods;
- Purpose of controlled goods use;
- Total value of controlled goods;
- Data on other actors involved in the transaction: manufacturer, seller, owner, buyer, freight forwarder, brokers and trade agents;
- End-user's name and address;
- Payments to be received;
- Proposed license validity period; and
- Other data requested to assist with the decision-making process.<sup>197</sup>

Montenegro's legislation allows for licences to be granted for a period of up to one year, although there are provisions for a licence to be valid for up to three years.<sup>198</sup>

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<sup>196</sup> Act on Foreign Trade in Weapons, Military Equipment And Dual Use Goods, No: 01-2113/2, "Official Gazette of Montenegro", no. 80/08 from 26 December 2008, Art. 11.

<sup>197</sup> Act on Foreign Trade in Weapons, Military Equipment And Dual Use Goods, No: 01-2113/2, "Official Gazette of Montenegro", no. 80/08 from 26 December 2008, Art. 14.

<sup>198</sup> Act on Foreign Trade in Weapons, Military Equipment And Dual Use Goods, No: 01-2113/2, "Official Gazette of Montenegro", no. 80/08 from 26 December 2008, Art. 24.



## Licensing assessment criteria

The approval of the Ministries of Foreign Affairs, Defence and Internal Affairs is sought before a licence can be issued for a brokering licence.<sup>199</sup> Montenegro's legislation lists the eight criteria of the EU Code of Conduct (now Common Rules) as the grounds upon which brokering licence applications should be assessed.<sup>200</sup> Particular attention is paid to:

- The international obligations of Montenegro and its obligations to enforce UN, OSCE and EU arms embargoes;
- The international obligations of Montenegro pursuant to the Treaty on non-proliferation of nuclear weapons, the Convention on biological and toxicological weapons and the Convention on chemical weapons;
- The obligation of Montenegro not to export any kind of antipersonnel mines; and
- The risks that the indicated recipient shall use the goods for aggression against another country.

Other factors that are taken into consideration include:

- The possibility of a clear risk that the goods may be used for internal repression;
- The equipment being transferred has been identified by the relevant bodies of the EU, UN or Council of Europe as having the potential for use to commit serious human rights violations;
- The existence or possibility of armed conflicts between the recipient and another country;
- The existence of territorial claims by the recipient against a neighbouring country, which the recipient has in the past tried to attain by using force or threatening to use force;
- The possibility that the goods may be used for purposes which are not related to the legitimate national security and defence of the recipient;
- The transfer could have an unfavourable influence on regional stability;
- The potential impact of the goods on the defence and security interests of Montenegro, as well as interests of the countries with which Montenegro has partnership relations, cannot influence the application of the criteria on respect of human rights, protection of peace, security and stability in the region;
- The risk that the transferred goods will be used against the Montenegro army, or against armed forces of countries with which Montenegro has partnership relations;
- The risk of an unintended technology export;
- The need to protect the interests of Montenegro army;
- The legitimate defence and internal security interests of the recipient, including their possible involvement in UN or other peacekeeping activities;
- The technical capability of the recipient to use the imported equipment;
- The capability of a recipient to conduct effective export control;

<sup>199</sup> Act on Foreign Trade in Weapons, Military Equipment And Dual Use Goods, No: 01-2113/2, "Official Gazette of Montenegro", no. 80/08 from 26 December 2008, Art. 17.

<sup>200</sup> Act on Foreign Trade in Weapons, Military Equipment And Dual Use Goods, No: 01-2113/2, "Official Gazette of Montenegro", no. 80/08 from 26 December 2008, Art. 18.

- The behaviour of the end-user country in relation to efforts to combat terrorism and international organized crime;
- The fulfilment of the international obligations, particularly in relation to non-violence, including those obligations derived from international humanitarian law, applicable to international and internal conflicts, of the recipient;
- The support for non-proliferation and other areas of arms and disarmament control, especially the signing, ratification and implementation of the relevant conventions on arms and disarmament control of the recipient;
- The risk that the weapons shall be re-exported or re-directed to terrorist organizations.<sup>201</sup>

### Refusals and revocations

A refusal to enter an applicant into the Register will occur if they fail to fulfil the criteria set out above. Entities can be removed from the Register if:

- New facts or evidence come to light;
- A responsible person within a registered legal entity or a legal entity is convicted of a criminal act;
- The entity no longer complies with the provisions of the law on the Foreign Trade in Weapons, Military Equipment and Dual Use goods;
- The entity violates international sanctions;
- The entity ceases to be in the business for which it has been entered into Register;
- The entity requests its removal from Register.<sup>202</sup>

In addition to failing to comply with the criteria described above, a licence can be refused if:

- The goods for which the authorization has been requested are subject to a legal dispute;
- An applicant provides false data in their application;
- An applicant fails to submit an international export certificate, or has submitted a certificate older than six months, or a certificate which is not translated by a sworn-in court translator;
- An applicant fails to submit evidence that they have paid an administrative fee.<sup>203</sup>

Licences will be annulled if:

- The licence was issued based on false or incorrect data;
- The conditions for issuing the licence have considerably changed, since issued;
- An entity or foreign trade transaction threatens the security and foreign policy interests of Montenegro;
- An entity fails to comply with the conditions stated in the licence.<sup>204</sup>

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<sup>201</sup> Act on Foreign Trade in Weapons, Military Equipment And Dual Use Goods, No: 01-2113/2, "Official Gazette of Montenegro", no. 80/08 from 26 December 2008, Art. 19.

<sup>202</sup> Act on Foreign Trade in Weapons, Military Equipment And Dual Use Goods, No: 01-2113/2, "Official Gazette of Montenegro", no. 80/08 from 26 December 2008, Art. 12.

<sup>203</sup> Act on Foreign Trade in Weapons, Military Equipment And Dual Use Goods, No: 01-2113/2, "Official Gazette of Montenegro", no. 80/08 from 26 December 2008, Art. 23.

<sup>204</sup> Act on Foreign Trade in Weapons, Military Equipment And Dual Use Goods, No: 01-2113/2, "Official Gazette of Montenegro", no. 80/08 from 26 December 2008, Art. 25.

## Exemptions

Montenegro's legislation does not provide any explicit exemptions from arms brokering controls.

## Record-keeping and reporting

Montenegro's legislation requires records to be kept on licences that have been issued and annulled, as well as those that have refused.<sup>205</sup> No time period is given for records to be kept in Montenegro's legislation, but in a questionnaire completed by Montenegro for this project it was stated that all documentation relating to applications and licences is kept for ten years in the official register.<sup>206</sup>

Montenegro's legislation requires brokers to:

- Keep records and documentation on brokering transactions for at least ten years from the completed foreign trade activity;
- Inform the Ministry in writing immediately, or at the latest within 15 days, of any changes relating to a particular foreign trade transaction in controlled goods;
- Inform the Ministry in writing within 15 days of completing a foreign trade transaction in controlled goods that the transaction has been completed and provide relevant documentation;
- Return licences if they have not been used, within 15 days at the latest, from the date of expiry;
- Submit a certificate issued by the final destination country or an end- user, which confirms reception of controlled goods, if requested.<sup>207</sup>

## Sanctions

Montenegro's 2005 Law on foreign trade in weapons, military equipment and dual-use goods provided for custodial sentences of between one and eight years and a fine equivalent to between the value of the goods and three times the value of the goods if the broker wilfully:

- Carried out brokering activities without being registered;
- Carried out brokering activities without a license.<sup>208</sup>

If the broker committed these acts as part of an organized group, then a custodial sentence of between two and ten years could have been imposed and fined up to four times the value of the goods. The goods shall also be forfeited.

The 2008 Law on Foreign Trade in Weapons, Military Equipment and Dual Use Goods only contains provisions relating to administrative and civil offences for which fines ranging from thirty to three hundred times the minimum salary in Montenegro shall be imposed on a legal entity or entrepreneur, or five to twenty times the minimum salary in Montenegro for a natural person in legal sense. Administrative and civil offences include:

- Failure to notify of any changes to the data submitted for entry into the Register;
- Transferring a licence or other documents received from Montenegro's authorities to another person;

<sup>205</sup> Act on Foreign Trade in Weapons, Military Equipment And Dual Use Goods, No: 01-2113/2, "Official Gazette of Montenegro", no. 80/08 from 26 December 2008, Art. 30.

<sup>206</sup> Questionnaire completed by Montenegro and received by author, 1 Sept. 2009.

<sup>207</sup> Act on Foreign Trade in Weapons, Military Equipment And Dual Use Goods, No: 01-2113/2, "Official Gazette of Montenegro", no. 80/08 from 26 December 2008, Art. 27.

<sup>208</sup> Law on foreign trade in weapons, military equipment and dual-use goods, published in the official gazette no 7, 2 February 2005, Art. 39.

- Not keeping separate records on foreign trade in controlled goods and not keeping documentation for at least ten years after completing a foreign trade transaction;
- Not informing in writing immediately, or after 15 days at the latest, of any changes related to the licensed foreign trade transaction;
- Not informing in writing, accompanied by required documentation, about a completed foreign trade transaction within 15 days of completing the foreign trade transaction;
- Not returning an unused licence within 15 days after the expiration of a license;
- Not submitting documentation issued by the destination country or end user confirming receipt of controlled goods when requested by Montenegro's authorities;
- Failing to undertake all the necessary measures aiming at preventing the disappearance of or damages to the controlled goods;
- Not informing within 24 hours in cases of the disappearance of or damage to controlled goods.<sup>209</sup>

### Information exchange and international cooperation

If Montenegro is presented with an export licence application relating to an essentially identical transfer that had been denied by another country within the previous three years, then it must first consult with the country that refused the application.<sup>210</sup> If a decision is taken to grant a licence, an explanation will be provided to the country that had previously denied the licence application. This process is explicitly described in relation to export licence applications only and it is therefore unclear if a similar process of international consultation would take place with regard to brokering licence applications.

Montenegro's Ministry of Foreign Affairs is required to inform other countries, in line with Montenegro's international obligations, if a licence is refused or annulled.<sup>211</sup>

### Parliamentary and public transparency

Montenegro's legislation requires an annual report on foreign trade in controlled goods for the previous year to be prepared and presented to the government, with a version excluding confidential and protected data to be published on the Internet.<sup>212</sup> Montenegro has already produced annual reports for 2006, 2007 and 2008, which provided information on the 17 companies that were entered into the Register for foreign trade in controlled goods in these years, detailing company names, seat, type of property (state or private) and origin of capital.<sup>213</sup> Data is provided in national reports on licences issued or exports and brokering, although these data are not separated in the report. However, one can identify brokering licences in the data by noting that the 'destination' given for export often differs to the actual list of end-users in several cases.<sup>214</sup> For example, three licences were issued for a variety of types of military equipment – including SALW and ammunition – worth €15 million with

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<sup>209</sup> Act on Foreign Trade in Weapons, Military Equipment And Dual Use Goods, No: 01-2113/2, "Official Gazette of Montenegro", no. 80/08 from 26 December 2008, Art. 37.

<sup>210</sup> Act on Foreign Trade in Weapons, Military Equipment And Dual Use Goods, No: 01-2113/2, "Official Gazette of Montenegro", no. 80/08 from 26 December 2008, Art. 29.

<sup>211</sup> Act on Foreign Trade in Weapons, Military Equipment And Dual Use Goods, No: 01-2113/2, "Official Gazette of Montenegro", no. 80/08 from 26 December 2008, Art. 29.

<sup>212</sup> Act on Foreign Trade in Weapons, Military Equipment And Dual Use Goods, No: 01-2113/2, "Official Gazette of Montenegro", no. 80/08 from 26 December 2008, Art. 32.

<sup>213</sup> Annual Report on Foreign Trade in Controlled Goods in 2007, Podgorica: Ministry of Economic Development of Montenegro, 2008, Annex 1/07.

<sup>214</sup> Questionnaire completed by Montenegro and received by author, 1 Sept. 2009.

'Cyprus' as an export destination, with Bosnia and Herzegovina, Serbia and also Montenegro as countries of origin, but with end-user countries listed as Angola, Iraq, Ukraine, Kazakhstan and Afghanistan.<sup>215</sup>

### Summary: implementation of the Common Position by Montenegro

Montenegro's Law on Foreign Trade in Weapons, Military Equipment And Dual Use Goods (2008) contains provisions for the control of arms brokering that fully implements the mandatory provisions of the Common Position. The definition of arms brokering used corresponds with the Common Position's definition of core brokering activities. The definition also explicitly excludes brokering-related services from its definition of brokering. Montenegro provides for extraterritorial brokering controls.

The Law contains articles explicitly covering controls for arms brokering. Arms brokers are required to register before applying for a licence to undertake brokering activities. A licence is granted for brokering activities to be undertaken for each single transfer on a case-by-case basis, with applications assessed against a variety of criteria including those of the EU Common Rules.

Montenegro's authorities and arms brokers are required to keep records on arms broker applications and licences for a minimum of ten years. Montenegro's 2008 Law on foreign trade in weapons, military equipment and dual-use goods does not contain provisions for custodial sentences for arms brokering violations – in contrast to the 2005 law – but does explicitly sanction fines for administrative and civil offences.

Montenegro provides for information sharing on licence denials and essentially identical transfers that have been denied by other states, but contains no explicit provisions for information sharing on arms brokers or arms brokering activities. Montenegro's Annual Report on Foreign Trade in Controlled Goods in 2007 and 2008 contained information on entities contained in the 'Register of entities for conducting foreign trade in controlled goods', which includes arms brokers. A questionnaire completed by Montenegro for this project confirmed that information on brokering activities for transfers between two third countries is also contained in the Annual Report on Foreign Trade in Controlled Goods – although this information was provided with information on exports from Montenegro.

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<sup>215</sup> Annual Report on Foreign Trade in Controlled Goods in 2007, Podgorica: Ministry of Economic Development of Montenegro, 2008, Annex 2a: Issued licences for export of controlled goods, p. 19.

## Serbia

Serbia continues to use the 2005 Law on Foreign Trade in Weapons, Military Equipment and Dual-Use Goods and relevant secondary legislation to control arms brokering.<sup>216</sup> Serbian controls on arms brokering contained in this law are not fully in line with the provisions contained in the Common Position, although most of the mandatory provisions are included in primary and secondary legislation. Serbia is currently reviewing its Law on Foreign Trade in Weapons, Military Equipment and Dual-Use Goods to ensure full implementation of the Common Position.<sup>217</sup>

### Definition of activities to be controlled

Serbian law does not define activities that constitute brokering activities or define brokers, but does include 'representing foreign companies' and 'brokering' as 'foreign trade of controlled goods'.<sup>218</sup> No reference is made to the Common Position's definition of brokering or any particular types of brokering activities to be controlled. However, Serbian licensing officers interpret 'brokering' in Serbian law as covering dealing and mediating activities.<sup>219</sup> In this section 'foreign trade entities' will also be used to refer to brokers.

### Definition of goods to be subject to controls

Weapons, military equipment and related technologies contained on the national Military Goods List, which is 'harmonized' with the EU Common Military List, are subject to controls.<sup>220</sup>

### Definition of scope and jurisdiction

The scope or jurisdiction of brokering controls is not explicitly defined in Serbian law. Serbian licensing officers report that they do subject brokering activities related to transfers between two third countries or for transfers that originate from Serbia to controls.<sup>221</sup> Serbia does not exercise extra-territorial controls on brokering activities.<sup>222</sup>

### Licensing procedures for arms brokering

Serbia has a two-stage licensing procedure for controlling all 'foreign trade entities'. Registration is a pre-requisite for issuing an export or import licence that can be utilised for undertaking brokering activities – Serbia does not issue licences specifically for arms brokering activities.<sup>223</sup>

<sup>216</sup> Annual Report on the Realization of Foreign Trade Transfers of Controlled Goods for 2005 and 2006, Belgrade: Republic of Serbia: Ministry of Economy and Regional Development, 2007, p. 1.

<sup>217</sup> Personal communication to the author from licensing officer, Serbia's Ministry of Economic and Regional Development, 1 Dec. 2009.

<sup>218</sup> Law on foreign trade in weapons, military equipment and dual-use goods, published in the official gazette no 7, 2 February 2005, Art. 6(4).

<sup>219</sup> Personal communication to the author from licensing officer, Serbia's Ministry of Economic and Regional Development, 27 Nov. 2009.

<sup>220</sup> Law on foreign trade in weapons, military equipment and dual-use goods, published in the official gazette no 7, 2 February 2005, Art. 3(1).

<sup>221</sup> Personal communication to the author from licensing officer, Serbia's Ministry of Economic and Regional Development, 27 Nov. 2009.

<sup>222</sup> Questionnaire completed by Serbia and received by author, 27 Aug. 2009.

<sup>223</sup> Questionnaire completed by Serbia and received by author, 27 Aug. 2009.

### Requirements for applications to be a broker: licences and registration

'Foreign trade of controlled goods' can only be carried out by a physical or legal person registered for conducting activities in relation to foreign trade in arms and military equipment.<sup>224</sup> Registration is valid for five years.<sup>225</sup> To register to carry out 'foreign trade in controlled goods' activities one needs to submit the following information:

- A copy of the registered activity notarized by the Trade Court;
- A registration number and tax identification number;
- A certificate of the competent authority that the applicant has not been under criminal charges and that he is not under investigation;
- Name of the applicant's bank and documents certified by the applicant's bank (copies of the latest annual balance sheet and current account balance, certificate that the account has not been blocked in the last 6 months, a copy of the applicant's signatures);
- A statement from the applicant that he is not facing bankruptcy;
- A certificate of the competent authority that the applicant does not have any unpaid debts in terms of tax and custom duties, which should be collected by means of a court decision;
- Number and structure of employees;
- A list of major jobs conducted with domestic and foreign companies;
- A statement by the applicant - obligation to provide full cooperation and assistance to the competent authority in control and supervision of activities related to foreign trade in controlled goods, storage facilities and transport vehicles.<sup>226</sup>

### Requirements for applications for a licence for brokering

In a questionnaire completed by Serbia for this project it was stated that 'a license is not required unless an arrangement has been made out in writing – either in the form of a contract and/or order and confirmation of an order'.<sup>227</sup> Although not explicitly stated in Serbian legislation, Serbia provides foreign trade entities with an opportunity for informal sounding regarding prospective brokering activities. Serbia does not issue brokering licences.<sup>228</sup> Foreign trade entities are required to apply for export and import licences to deal or mediate in 'controlled goods', even if the goods do not enter or leave Serbian territory. An application for a licence for 'foreign trade in controlled goods' should contain:

- Name, address and registry number of the applicant;
- Type, description, tariff number, category and identification number from the List of controlled goods and quantity of controlled goods;
- End-use of controlled goods;
- Total value of controlled goods;

<sup>224</sup> Law on foreign trade in weapons, military equipment and dual-use goods, published in the official gazette no 7, 2 February 2005, Art. 11.

<sup>225</sup> Law on foreign trade in weapons, military equipment and dual-use goods, published in the official gazette no 7, 2 February 2005, Art. 12.

<sup>226</sup> Law on foreign trade in weapons, military equipment and dual-use goods, published in the official gazette no 7, 2 February 2005, Art. 13.

<sup>227</sup> Questionnaire completed by Serbia and received by author, 27 Aug. 2009.

<sup>228</sup> Personal communication to the author from licensing officer, Serbia's Ministry of Economic and Regional Development, 1 Dec. 2009.



- Information about all participants in the transfer: manufacturer, seller, owner, buyer, shipping agent, transporters, brokers and agents;
- Name and address of end user;
- Manner of payment;
- Suggestion for license validity;
- An original end user certificate (EUC), not older than six months, provided by the official authority of the country of final destination, accompanied by a notarized translation of the EUC into Serbian. The EUC should contain the following information:
  - Name and address of exporter;
  - Name and address of the final user of controlled goods;
  - Country of final destination;
  - Description, quantity and purpose of controlled goods;
  - Statement that controlled goods are not going to be used for different purposes, re-exported or otherwise transferred or traded without written approval of the Competent Ministry from the country of origin;
  - Signature, name and position of the authorizing officer; and
  - Number and issuing date.
- Other required data and documents needed for making a decision.<sup>229</sup>

A licence allows the applicant to undertake a single activity for a known quantity and type of controlled goods in accordance with a contract.<sup>230</sup> A licence is limited in terms of validity for a period not exceeding one year.<sup>231</sup>

### Licensing assessment criteria

Serbian legislation requires the Ministries of Foreign Affairs and Defence to consider applications for licences for brokering. The eight criteria of the EU Code of Conduct are used for assessing licensing applications.<sup>232</sup>

The Ministry of Foreign Affairs is tasked with evaluating applications against:

- Sanctions of the UN and recommendations of the OSCE;
- Accepted international obligations and foreign political interests of Serbia and Montenegro;
- The EU Code of Conduct for Arms Exports;
- Level of violation and/or respecting of human rights and freedoms in the country of final destination.<sup>233</sup>

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<sup>229</sup> Law on foreign trade in weapons, military equipment and dual-use goods, published in the official gazette no 7, 2 February 2005, Art. 14-18.

<sup>230</sup> Law on foreign trade in weapons, military equipment and dual-use goods, published in the official gazette no 7, 2 February 2005, Art. 14.

<sup>231</sup> Law on foreign trade in weapons, military equipment and dual-use goods, published in the official gazette no 7, 2 February 2005, Art. 19.

<sup>232</sup> Decree on criteria for issuing licensed for the exporting of weapons, military equipment and dual-use goods, passed by the Council of Ministers hereby, record no. 69, 17 Mar. 2005.

<sup>233</sup> Law on foreign trade in weapons, military equipment and dual-use goods, published in the official gazette no 7, 2 February 2005, Art. 21.

The Ministry of Defence offers its opinion on the application after considering the following factors:

- Influence on the security of Serbia;
- Whether the weapons and military equipment that have been planned for exports are on the export list of weapons and military equipment;
- Whether there is a decision of the Ministry of Defence regarding weapons and military equipment from the stock of the Army of Serbia;
- Whether the Army of Serbia, in the process of transfer of technology, participates in ownership of the technology.<sup>234</sup>

### Refusals and revocations

Licence applications will be refused if the application conflicts with the criteria outlined above, Serbia's national economic, foreign and security policy interests or if an administrative procedure has not been correctly fulfilled.<sup>235</sup>

Licences will be revoked on the following grounds:

- The license has been issued on the basis of false data or the issuing conditions have been changed significantly;
- The broker has violated the interests of foreign policy, national security or economy of Serbia;
- The broker stopped complying with the conditions for issuing the license or the conditions stipulated in the license have not been obeyed.<sup>236</sup>

### Exemptions

Serbia's legislation does not provide any explicit exemptions from export controls.

### Record-keeping and reporting

Serbian authorities maintain a database of all entities that are permitted to be involved in the 'foreign trade of controlled goods' and a database of approved, denied and revoked licenses.<sup>237</sup> Records are kept for a period of ten years.<sup>238</sup>

According to the Law on foreign trade in weapons, military equipment and dual-use goods, foreign trade entities are required to keep documents relating to brokering activities for ten years and are obliged to report on brokering activities undertaken in accordance with an issued licence or if a licence has not been utilised.<sup>239</sup> Reporting is to be undertaken within 15 days of the expiry of the licence's validity.

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<sup>234</sup> Law on foreign trade in weapons, military equipment and dual-use goods, published in the official gazette no 7, 2 February 2005, Art. 22.

<sup>235</sup> Law on foreign trade in weapons, military equipment and dual-use goods, published in the official gazette no 7, 2 February 2005, Art. 25.

<sup>236</sup> Law on foreign trade in weapons, military equipment and dual-use goods, published in the official gazette no 7, 2 February 2005, Art. 26.

<sup>237</sup> Law on foreign trade in weapons, military equipment and dual-use goods, published in the official gazette no 7, 2 February 2005, Art. 11 and 28.

<sup>238</sup> Questionnaire completed by Serbia and received by author, 27 Aug. 2009.

<sup>239</sup> Law on foreign trade in weapons, military equipment and dual-use goods, published in the official gazette no 7, 2 February 2005, Art. 27 and 34.

## Sanctions

The Serbian Criminal Code provides for a custodial sentence of up to three years for selling, procuring or exchanging firearms, ammunition or explosives without authorisation; which can be between one and eight years if the quantity of weapons, ammunition, or components involved is considered large.<sup>240</sup> If the transfer involves weapons whose production or use is prohibited, then a custodial sentence of one to five years can be imposed.<sup>241</sup> If an official is involved, they can be sentenced to one to eight years imprisonment.<sup>242</sup>

In addition, fines amounting to between the value of the goods and five times the value of the goods can be imposed for foreign trade entities who:

- Carry out 'foreign trade' activities without being registered;
- Carry out 'foreign trade' activities without a License;
- Provide false data or omit material facts when applying for a license;
- Violates obligations to report on activities undertaken, record-keeping and not obstruct investigations by national authorities.<sup>243</sup>

If a foreign trade activity is undertaken without a licence, then the entity will be removed from the Serbian Register and the goods involved in the transfer confiscated.<sup>244</sup>

## Information exchange and international cooperation

Serbian legislation does not contain provisions on information exchanges with other states or international cooperation with regard to arms brokering.

## Parliamentary and public transparency

Serbian authorities produce an annual report on the foreign trade in controlled goods, which is presented to the government and the parliament and then published in the Official Gazette of the Republic of Serbia and on the website of the Ministry of Economy and Regional Development.<sup>245</sup> The 'Annual Report on the Realization of Foreign Trade Transfers of Controlled Goods for 2005 and 2006' contained a list of the entities entered in the 'Register of Entities Licensed to Perform International Trade in Controlled Goods', noting that there were 80 registered entities in 2005 with 15 more entities added to the list in 2006.<sup>246</sup> These entities are not all arms brokers and will include entities that are registered as arms exporters. The information provided on these entities includes: name, seat, type of ownership (state, private) and origin of founding capital.

The report for 2005 and 2006 provided information on licences issued - although there are no separate sections for export and brokering transactions. However, cases of brokering licences are provided for in the data because there are cases where the origin of the goods is not Serbia and the 'destination' given for export often differs to the actual list of end-users in several cases.<sup>247</sup> For example, 15 licences for SALW and ammunition worth almost USD5 million are reported as having an export destination of Great Britain, but with end-users listed as

<sup>240</sup> Criminal Code, published in the official gazette, 85/2005, 88/2005, 107/2005, Art. 348.

<sup>241</sup> Criminal Code, published in the official gazette, 85/2005, 88/2005, 107/2005, Art.377(1).

<sup>242</sup> Criminal Code, published in the official gazette, 85/2005, 88/2005, 107/2005, Art.377(2).

<sup>243</sup> Law on foreign trade in weapons, military equipment and dual-use goods, published in the official gazette no 7, 2 February 2005, Art. 41.

<sup>244</sup> Law on foreign trade in weapons, military equipment and dual-use goods, published in the official gazette no 7, 2 February 2005, Art. 41.

<sup>245</sup> Annual Report on the Realization of Foreign Trade Transfers of Controlled Goods for 2005 and 2006, Belgrade: Republic of Serbia: Ministry of Economy and Regional Development, 2007, p. 2.

<sup>246</sup> Annual Report on the Realization of Foreign Trade Transfers of Controlled Goods for 2005 and 2006, Belgrade: Republic of Serbia: Ministry of Economy and Regional Development, 2007, p. 24 and pp. 47-9.

<sup>247</sup> Questionnaire completed by Serbia and received by author, 27 Aug. 2009.

Afghanistan, Great Britain, Georgia, Iraq, Nigeria, Oman, Saudi Arabia, and SAD.<sup>248</sup> In another case, Israel is given as the export destination for almost USD9 million worth of SALW and ammunition with Iraq, Israel, Rwanda and Burkina Faso listed as end-users.

### Summary: implementation of the Common Position by Serbia

Serbia's Law on Foreign Trade in Weapons, Military Equipment and Dual-Use Goods (2005) contains provisions for the control of the activities of 'foreign trade entities' within Serbia, but does not fully implement the Common Position. No clear definition of what activities constitute arms brokering is provided and no reference is made to the Common Position's definition of arms brokering. Serbian licensing officials report that in practice, however, they operate with definitions in line with the definition contained in the Common Position. It is anticipated that definitions will be provided shortly in a revised law.

The Law does not contain chapters or articles explicitly covering licensing for arms brokering. However, 'foreign trade entities' are required to register before applying for an export and an import licence to undertake brokering activities. Licence applications are assessed on a case-by-case basis against the criteria of the EU Code of Conduct (Common Rules).

Serbian authorities are required to keep records on 'foreign trade entity' applications for ten years in line with the recommendations of the Common Position. The Law also provides for violations to be sanctioned with fines, depending for administrative or civil offences. The Serbian Criminal Code provides custodial sentences for offences related to involvement in unauthorised transfers of SALW or prohibited weapons.

There is no specific mention of information exchanges and international cooperation with regard to 'foreign trade entities'. However, the 'Annual Report on the Realization of Foreign Trade Transfers of Controlled Goods for 2005 and 2006' contained information on the entities entered in the 'Register of Entities Licensed to Perform International Trade in Controlled Goods'. As in the case of Montenegro, information appears to have been provided on brokering activities for transfers between two third countries – although this information was not provided in a separate section from information on exports from Serbia.

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<sup>248</sup> Annual Report on the Realization of Foreign Trade Transfers of Controlled Goods for 2005 and 2006, Belgrade: Republic of Serbia: Ministry of Economy and Regional Development, 2007, p. 53.

## 5. Options for brokering controls for the former Yugoslav Republic of Macedonia

As has been demonstrated in the previous chapters, there is no single approach to implementing the Common Position. It is clear that controls on arms brokering should be put in place that are in line with national transfer system and the enforcement capabilities and constitution of the former Yugoslav Republic of Macedonia. However, there are several principles that should be borne in mind by Macedonian authorities when considering introducing arms brokering controls into Macedonian legislation: clarity, awareness and capability. Macedonia's legislation on controls on arms brokering should be clear. The entities that are likely to be subject to brokering controls should be made aware of their responsibilities under the law. Macedonia should have the political will, capabilities and resources to implement and enforce controls on arms brokers.

There are no examples of a specific law on arms brokering controls in EU member states or states in the Western Balkans. Those states that have brokering controls have included them as amendments to existing national transfer control legislation or as part of a new law on national transfer controls. Brokering controls are either outlined in specific chapters or articles within national laws and secondary legislation on export controls, or brokering activities are treated as comparable to exporters and importers and required to fulfil the same requirements as 'entities involved in foreign trade in arms and military equipment', or words to similar effect.

### Definition of brokering activities to be controlled

The approach taken by Croatia, Montenegro and Spain with regard to defining brokering activities to be controlled would seem the minimum option for the former Yugoslav Republic of Macedonia: providing controls for mediating and dealing. To provide for a more comprehensive set of controls, including mediating for the provision of other services should also be considered. If deemed appropriate, the controls on transportation service providers contained in the legislation of Bulgaria should also be explored.

### Definition of goods to be subject to control

The goods to be subject to brokering controls should be the same as those that are subject to export and import controls – items contained on the national list of arms and military equipment, aligned with the Common Military List of the EU. This will also entail a commitment to updating Macedonia's control list in light of reviews and amendments of the Common Military List of the EU.

### Definition of scope and jurisdiction

Controls should be in place to cover brokering activities undertaken within the territory of the former Yugoslav Republic of Macedonia in relation to the transfer of controlled goods between two third countries. As will be discussed below, the fact that all brokers should be registered in Macedonia before being able to undertake brokering activities will also determine the scope of controls. However, the former Yugoslav Republic of Macedonia may wish to follow the Swedish example and also seek to control brokering activities carried out in Macedonia in relation to exports of arms from Macedonia also.

The former Yugoslav Republic of Macedonia's Law on International Restrictive Measures (2007) already provides for some extraterritorial controls on entities registered in the former Yugoslav Republic of Macedonia intending to undertake brokering activities in relation to transfers of controlled goods to embargoed end-users. If the former Yugoslav Republic of Macedonia only seeks to impose partial extraterritorial controls on brokering related to the transfer of controlled goods to embargoed end-users, it is advised that explicit reference is made to this in legislation covering brokering controls. It would be possible to explicitly prohibit brokers registered in Macedonia from undertaking brokering activities in relation to transfers of controlled goods to embargoed end-users, wherever brokering activities are undertaken.

If the former Yugoslav Republic of Macedonia would like to implement full extraterritorial controls on arms brokers registered in the former Yugoslav Republic of Macedonia, as in a number of EU member states and Montenegro,

then this should be clearly stated. Finland's Act on the Export and Transit of Defence Material provides a clear statement in this regard.

### Licensing procedures for arms brokering

The former Yugoslav Republic of Macedonia operates with a two-stage licensing procedure for commercial exporters of controlled goods – requiring registration to undertake activities in relation to controlled goods and an application for a licence for each transaction<sup>249</sup> Macedonia could utilise one of two approaches for the registration of arms brokers: (a) as in Spain, registered arms brokers could be included in a register for all entities permitted to engage in the export, import or brokering of arms; or, (b) as in Estonia, a specific register of arms brokers could be established.

A set time period and provisions for renewal of entries into the register should be provided in the law. It is therefore to be recommended that arms brokers should also be subject to a two-stage licensing procedure, requiring registration with the Ministry of Economy before applying for a licence to undertake brokering activities in relation to a single transaction. Arms broker applications can then be filed in a register with applications for other arms transfer activities as in Bulgaria, or in a broker-specific register as in Estonia. The documentation required for entry into a former Yugoslav Republic of Macedonia register should be comparable to that required for exporters operating in the former Yugoslav Republic of Macedonia, but the requirements of Bulgaria and Estonia should also be explored. In addition, the Register can be utilised for awareness raising, to inform registered brokers of changes to control lists, embargoed destinations and for other outreach purposes.

The Law on Foreign Trade (2003) requires entities engaged in foreign trade and performing economic activities abroad to be registered with a court.<sup>250</sup> Although the Law on Foreign Trade (2003) states that 'Foreign trade in the fields of arms and military equipment is also subjected to this Law, if not regulated otherwise by another law', it contains no explicit provisions on controlling arms brokering and does not mention the need to apply for a licence on a case-by-case basis. Considering the likely volume of applications for brokering licences in the former Yugoslav Republic of Macedonia, and the fact that only individual licences are provided for in the current Macedonian export control legislation, it is suggested that the former Yugoslav Republic of Macedonia only issue brokering licences for single transfers on a case-by-case basis. The information to be provided with an application for a licence could be presented in primary or secondary legislation, and should also outline the conditions under which licences will be refused or revoked. The maximum term of the validity of the licence could be the same as for that of export licences.

### Licensing assessment criteria

The former Yugoslav Republic of Macedonia assesses export licence applications against the criteria of EU Code of Conduct (now Common Rules),<sup>251</sup> and it is advised that arms broker licence applications should be assessed against the same criteria. Particular attention should be paid to the risk of diversion.

### Exemptions

Several of the EU member states discussed in this report, as well as Croatia, explicitly list circumstances under which brokering controls may be waived or cases in which exemptions will apply. If the former Yugoslav Republic of Macedonia is interested in taking this approach, then it is advised that an explicit provision is given.

<sup>249</sup> Republic of Macedonia 2008 Report on Implementation of the United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, Skopje, 31 March 2008.

<sup>250</sup> Foreign trade law, Published in the Official Gazette of the Republic of Macedonia, No. 45/02, 28 June 2002 and amended on 5 May 2003, Art. 3.

<sup>251</sup> Republic of Macedonia 2008 Report on Implementation of the United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, Skopje, 31 March 2008.

## Record-keeping and reporting

The Common Position requires states to keep records for a minimum of ten years for all persons and entities that have obtained a licence for an arms brokering transaction. This provision should be included in the legislation of the former Yugoslav Republic of Macedonia. Ideally, the register of the former Yugoslav Republic of Macedonia is the most suitable repository for such information. The Estonian approach of electronically storing documents could be of use in this regard, and help to facilitate international information exchanges.

National legislation outlining controls on arms brokers also requires arms brokers to keep records of their activities. In Bulgaria and Poland, registered brokers are expected to have internal control systems to provide for record-keeping of documents relating to brokering activities and also to provide for reporting to state authorities. It is advised that the types of documents to be kept are listed in the former Yugoslav Republic of Macedonia's legislation, with a minimum time period for preserving documents. There are different options with regard to reporting: reporting on a completed transaction with a set time limit after it has been completed and/or regular periodical reporting (e.g. every three months).

## Sanctions

The maximum size of the fines and length of custodial sentences to be awarded for violations of the law with regard to arms brokering differs between states. However, most states have provisions in their primary or secondary legislation controlling arms brokers, or contained in a national criminal code, to imprison those who have committed a serious violation of law – i.e. carrying out brokering activities for an arms transfer to an embargoed end-user or terrorist organization. A range of fines are also provided for administrative and civil offences with regard to the providing misleading or false information on licence applications, not complying with requirements for record-keeping, reporting or inspections etc.

## Information exchange and international cooperation

The former Yugoslav Republic of Macedonia is not a member of the EU, but it can announce a willingness and ability to share with OSCE member states information on registered brokers and licence applications that have been granted and refused.

## Parliamentary and public transparency

The Common Position does not contain provisions on the need for a report on registered brokers or licence applications that have been granted and refused to the national government, parliament or for the general public. However, as noted in previous chapters, EU member states and states in the Western Balkans have provided for information on registered brokers and licences to be made available to national parliaments and the public. Options include:

- Providing access to brokering documents to members of parliament or the public at the licensing authority (e.g. Finland);
- Publishing information on registered brokers in a national report or on a website (e.g. Estonia);
- Publishing information on arms transfers between third countries that involved brokering activities carried out by an entity registered in your national territory - providing information on the export country, importer country, military list category of goods, description of goods, number of licences issued, their value, the value of exports, and refusals (e.g. Romania).



## Appendix X: Implementation of the EU Common Position on control of arms brokering in the West Balkans

MANDATORY COMMON POSITION PROVISION	ALBANIA	BOSNIA AND HERZEGOVINA	CROATIA	MONTENEGRO	SERBIA
Control brokering taking place within national territory (Art. 2(1))	Yes	Yes	Yes	Yes	Yes
Definition of brokering activities in line with Common Position (Art. 2(3))	No	Partial; controls on mediation only.	Yes	Yes	No definition of brokering provided in legislation; licensing officers interpret as covering mediating and dealing.
Requirement for licence or written authorization for brokering activity (Art. 3(1))	Yes, but includes provision for open licences.	Yes	Yes	Yes	Yes
Applications assessed against EU Code of Conduct criteria (Art. 3(1))	Not explicit	Yes	Yes	Yes	Yes
State keeps records for 10 years of entities that have obtained a brokering licence (Art 3(2))	Yes	Provision for state record-keeping, but no time period given.	Provision for state record-keeping, but no time period given. Brokers required to keep records for 10 years.	Provision for state record-keeping, but no time period given. Brokers required to keep records for 10 years.	Provision for state record-keeping, but no time period given; in practice 10 years. Brokers required to keep records for 10 years.
Commitment to exchange information (Art. 5)	Yes	Yes	Yes	Yes	No
Adequate sanctions established (Art. 6)	Yes	Yes	Yes	Yes	Yes
<b>Optional Common Position provision</b>					
Extraterritorial controls on brokers (Art. 2(1))	Unclear	No	No	Yes	No
Brokering controls for exports from own territory (Art. 2(3))	Unclear	No	No	No	Unclear in legislation; yes in practice
Registration or authorization to be a broker (Art. 4(1))	Yes	Yes	Yes	Yes	Yes
Establish a register of arms brokers (Art. 4(1))	Unclear	Yes	Yes	Yes	Yes



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