

**From laws to practice – options for regulatory controls over arms brokering**

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This paper provides an overview of options available to governments considering implementing, or revising, controls over arms brokering. It does not provide a single model of regulation but instead offers a 'toolkit' of various regulatory approaches which have been implemented by governments. Those elements which governments wish to consider will be influenced by their existing export control system, their laws and constitution, and their conception of the nature of brokering activities that need to be controlled in their region.

In many cases, arms brokering can be a key component of legitimate arms transactions. Therefore the focus of international commitments, and NGO campaigning, has concerned the introduction of controls over brokering activities (rather than to ban them). Differing national legal and constitutional traditions ensure that the exact detail of each countries' legislation and regulations are likely to differ. However, as this paper argues, controls can be based upon some common principles which, if implemented, should provide states with the means to prevent illicit trafficking, fulfil their international commitments (including preventing violation of UN arms embargoes), and ensure compliance with their national laws and policies. To summarise the following points made in this paper, effective brokering regulations are those that include the following elements:

- licensing authorities include brokering as an integral part of their export control systems;
- each brokering activity should be licensed;
- brokering licence applications should be assessed using the same criteria as for arms exports;
- brokers should be registered; and
- all parties keep adequate records.

By integrating brokering controls into existing arms export control systems, governments can significantly limit the cost and bureaucratic burden incurred by both companies and bureaucracies.

### **Purpose of brokering regulation**

The primary purpose of brokering regulation is to prevent illicit trafficking in arms. Numerous reports have indicated that brokers play a key role in facilitating illicit transfers of arms which may violate UN sanctions, undermine international agreements (such as the OSCE document on small arms and light weapons), and contravene national laws and policies. All states have a responsibility to ensure respect for UN Security Council resolutions, and therefore they should ensure that their citizens or companies are not involved in the violation of arms embargoes through acting as brokers. Brokering regulations also allow a State to improve its export licensing system and so ensure that it can properly control the movement of military material over its borders.

Furthermore, states have, on numerous occasions, entered into international agreements which encourage to better control over arms brokering. The commitments which may affect some, or all, OSCE members include:<sup>1</sup>

- the OSCE Principles on the Control of Brokering in Small Arms and Light Weapons;
- the EU Common Position on the Control of Arms Brokering;
- the OAS Model Regulations for the Control of Brokers of Firearms, their Parts, Components and Ammunition;
- the Wassenaar Arrangement Elements for Effective Legislation on Arms Brokering;
- the 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; and
- the UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects.

### **The relationship between legislation and regulation.**

Experience shows that the best relationship between legislation and regulation is to develop broad and wide-ranging laws which are then further defined by regulation. This relationship is necessary to provide licensing and enforcement authorities with sufficient flexibility to carry-out their roles. Illicit brokers have shown themselves to be adept at exploiting loopholes in national legislation (indeed, they appear to be very capable of innovating and changing their practices). It can sometimes be a difficult and lengthy process to amend national laws. Therefore, allowing the regulatory authorities to define the finer points of control over arms brokerage should build into the control system sufficient flexibility to respond to innovations by brokers.

For this reason (and of course depending upon national legal systems), legislation need not concern itself with issues such as defining exactly which activities should be covered by controls over brokering, or what equipment the controls should concern. Instead, the legislation could just comprise a broad outline of the control system – such as defining the scope of the jurisdiction (particularly whether extra-territoriality applies), and specifying the maximum criminal sanctions that could be enforced. If such a broad brush approach to legislation is not possible, states may wish to introduce primary and secondary legislation (with the secondary legislation adding a degree of flexibility).

### **Principles of effective brokering regulation**

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<sup>1</sup> For more information see Marsh, Nicholas. 2005. *Brokering of Small Arms and Light Weapons*. Paper presented at a meeting of the Small Arms Working Group, 13 April 2005. New York. Available from <[www.nisat.org](http://www.nisat.org)>.

The most important aspect of brokering regulations is that they should be clear and unambiguous. This requires that:

- There need to be clear *obligations* and *procedures*.
- It should be clear *who* has to register as a broker, *how* a licence for brokering activities is obtained, and *what* administrative entities should be dealt with.
- The system must be designed with enforceability in mind.<sup>2</sup>

The last point is probably the most important, as without the threat of effective sanctions, brokers engaged in illicit activity may not have sufficient incentive to change their behaviour.

Brokering regulation can be implemented into existing export control systems. It should therefore not be necessary to set up separate, and parallel, systems. Many elements of an export control system can be used in controlling arms brokering (these are outlined below). Indeed, brokering regulation should be seen as an integral part of a transfer control system.

### **Definition of brokering activity**

Brokering concerns the facilitation of arms transactions, usually for a fee or other compensation (such as payments in kind or reciprocal favours). Brokers may not own the arms that are being transacted (they may just bring together the buyers, sellers, and procure other services such as finance or transportation). Furthermore, the arms being brokered may never enter the national territory of the state in which the broker operates.

It is unwise for primary legislation to specify in too much detail precisely what activities should be covered by brokering legislation. Illicit brokers have shown themselves to be adept at exploiting loopholes, and closing them in primary legislation is likely to be a very time consuming process. Brokering regulations could therefore cover such activities as:

- facilitating;
- arranging (particularly transportation and finance);
- consulting partners;
- financing; and
- marketing and promoting (arms to potential suppliers).

### **Licensing**

The OSCE Best Practice Guide on brokering notes that:

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<sup>2</sup> These points are developed from remarks made by Peggy Mason. See Marsh, Nicholas (ed.) 2003. *Dutch – Norwegian Initiative on Further Steps to Enhance International Co-operation in Preventing, Combating and Eradicating Illicit Brokering in Small Arms and Light Weapons. Oslo, 23-24 April 2003. Conference Report.* <[www.nisat.org](http://www.nisat.org)>

“A written licence issued by the competent authority should be required for each brokering activity that is subject to licensing.”<sup>3</sup>

A similar provision was also included in the ‘OSCE Principles On The Control Of Brokering In Small Arms And Light Weapons’. These documents emphasised the need for a separate licence for each brokering activity because without this provision it would be very difficult for states to effectively control the activities of arms brokers operating under their jurisdiction. Indeed, failure to adopt such an approach would allow little opportunity to refuse to licence brokering activities which might run contrary to national policies or international obligations.

Therefore, specific brokering activities should be licenced in a similar fashion to physical exports of military equipment. Each brokering transaction should be evaluated on a case by case basis before it takes place. In addition, brokers should also be registered before they can apply for licences (this requirement is dealt with in greater detail below).

States might not wish to restrict themselves to one type of licence. Indeed, given that the sensitivity of certain types of equipment or transactions may be greater than for others, introducing several types of licences may allow for a stronger system. Furthermore, governments could also introduce different types of brokering licence for the various stages of a brokering transaction. Therefore a broker may need a licence to begin negotiations, and a separate licence before the transaction could be completed.

An example of a country that has case by case licensing, and several types of licences is Hungary, whose regulations state that:

“...a register of arms brokers is established, but the registration or authorisation to act as broker does not in any case replace the requirement to obtain the necessary licence or written authorisation for each transaction.”

“...in order to act as a representative, agent, broker or intermediary in respect of military equipment or technical assistance, whether within or outside the territory of the Republic of Hungary, the licences required are: activity licence, negotiating licence and contract licence.”<sup>4</sup>

## **Open licences**

Some countries also provide ‘open’ brokering licences, which permit acting as a broker under certain circumstances without the need to obtain a separate licence for each

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<sup>3</sup> Organization for Security and Co-operation in Europe. 2003. *Handbook of Best Practices on Small Arms and Light Weapons. Best Practice Guide on National Control of Brokering Activities*. Vienna: OSCE. p 13.

<sup>4</sup> Vezer, Zoltan. Undated. *Summary of the Government Decree 16/2004 (Ii. 6.) On The Licensing Of The Export, Import, Transfer And Transit Of Military Equipment And Technical Assistance*. Available at <[http://www.exportcontrol.org/library/conferences/1379/Hungary\\_Summary\\_for\\_2004.pdf](http://www.exportcontrol.org/library/conferences/1379/Hungary_Summary_for_2004.pdf)>

individual brokering activity. Such ‘open’ licences may be introduced to reduce the bureaucratic burden for both brokers and governments. They may just be issued to brokers that have proved their trustworthiness, cover less sensitive transactions (perhaps transfers where an ally is the end-user), or perhaps just concern less sensitive technologies.

It is important to note that such ‘open’ licences could potentially undermine the effectiveness of brokering regulations. If issued too often they risk preventing the detailed scrutiny of the ramifications of individual transactions that is undertaken when licences have to be applied for on a case by case basis. Therefore, if implemented at all, ‘open’ licences should only be used on a strictly limited basis.

### **Licensing criteria**

Many governments that have introduced brokering legislation evaluate licence applications by the same criteria as are used for arms exports. Again, there is no need to set up separate systems for brokering – it can be integrated into existing export licensing procedures.

National policies and security concerns will clearly influence whether brokering licences will be granted. In addition, the OSCE Principles on the Control of Brokering in Small Arms and Light Weapons suggest that licences should be assessed according to Section III of the OSCE Document on Small Arms and Light Weapons (which concern factors such as respect for human rights and the risks that arms could be diverted to illegitimate end users ). OSCE member states may also consult other documents, such as the EU Code of Conduct on Arms Exports, when assessing brokering licence applications. Governments should ensure that brokering licence decisions ensure, and promote, respect for international law, especially International Humanitarian law, and International Human Rights Law.

Brokering licence applications should not be viewed in isolation. Instead, the record of the broker, and all other parties involved in the transaction, should be examined.

### **Types of equipment covered by brokering licences**

Internationally, the main impetus for introducing brokering regulations has come from states’ commitments concerning small arms and light weapons. For OSCE member states the most important commitment may be the OSCE Principles on the Control of Brokering in Small Arms and Light Weapons. In addition, as noted above, commitments that affect some or all OSCE member states include: the UN Programme of Action on the illicit trade in small arms and light weapons, the UN Firearms Protocol, the EU Common Position on arms brokering (which covers all types of military equipment), the OAS Model Regulations and the OSCE Document of Small Arms. There is therefore a wide

range of commitments OSCE members have made regarding developing national regulations to control brokering of small arms and light weapons.

However, states also have commitments concerning other types of equipment. For example, they may seek to introduce brokering legislation to ensure compliance with UN Security Council Resolution 1540 on preventing the proliferation of nuclear, chemical and biological weapons. Similarly, UN arms embargoes cover a wide variety of equipment, and brokering controls are a key component of states' means of ensuring respect of such UN Security Council resolutions. There are therefore other types of material that may require controls over brokering in addition to small arms and light weapons.

States introducing brokering legislation have predominantly used the same lists of equipment for brokering licences as they already use for their normal export control system. Again, this approach limits the complexity and bureaucratic load of introducing new brokering legislation. An example of a State which uses this approach is Finland:

“Provisions on controlling arms brokering are incorporated into the Act on the Export and Transit of Defence Materiel. The guiding principle is simple; the same controls apply to brokering as apply to export and transit of defence materiel. Authorisation for export, transit or arms brokering will not be granted if it jeopardises Finland's security or is in contradiction with Finland's foreign policy”<sup>5</sup>

### **Information requirements**

Licence applications for brokering activities can require similar information to export licence applications. Taking this approach would ensure that brokering regulations could be administered by existing export control departments, and that brokering regulations have the same safeguards as existing arms export regulations. Depending upon national practices and legislation, brokering licences could therefore include, at the very least, the exporter, importer, type of equipment and its ultimate end-user. For example, the Polish application for an individual brokering license requires that the broker supply information on the: exporter, importer, end-user, value of the transaction, and a detailed description of the brokering service to be carried out.<sup>6</sup>

In addition, a brokering licence application could require supplementary information on the transaction, such as: transport agents, shipping routes, other brokers, and financing arrangements. This information would improve the licensor's ability to spot potentially illicit transactions (perhaps by spotting a party with a dubious track record). Moreover, requesting such information would assist export licensing authorities' efforts to build up a

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<sup>5</sup> Finland. 2005. *Annual Report According to the EU Code of Conduct on Arms Exports NATIONAL REPORT OF FINLAND FOR 2004*. Available at: <<http://www.defmin.fi/files/645/Lisa7.pdf>>

<sup>6</sup> Copies of license documentation are available at:  
<http://www.mgip.gov.pl/GOSPODARKA/DKE/English/Laws/ExportControl/p26.htm>

comprehensive picture of the activities and networks of the various parties involved in all aspects of arranging arms transactions (not just brokers and exporters). In so doing, they would be better placed to spot potentially illicit transactions. If such information is not available when a licence application is submitted, then a requirement could be made that it is supplied as soon as it is available.

## **Registration**

Registering brokers can simplify the licensing procedure and allow for licensing authorities to pre-screen potential brokers. However, some countries do not require that brokers be registered, and just licence specific activities. Combined with record keeping this policy will, over time, build up a store of information on arms brokers which could have many of the same functions of a register. One reason for avoiding registration is the concern that registration may confer upon a broker a degree of legitimacy – a broker may advertise their registration as being an endorsement by their government. Such a situation may be problematic if the broker then attempts to arrange illicit transactions in other countries.

Many countries, however, do register brokers, and there are several strong reasons for this. Registration allows licensing departments to ‘pre-screen’ licence applicants. If they have all the relevant information on the broker already on file they may be able to process licence applications more quickly. Perhaps more importantly, removal from a register (or refusal to accept an initial registration) can be used as an alternative to assessing license applications for individual brokering activities. Removal from a register could therefore be used as an ‘administrative sanction’.<sup>7</sup>

Brokers could be removed from a register, and therefore barred from engaging in brokerage, in cases where formal criminal prosecution might be difficult, or inappropriate. If licensing authorities had information that a broker was engaged in illicit activity, but were not confident that a criminal prosecution would be successful (perhaps because information came from intelligence sources), then removal from a register may offer a more practicable option. Conversely, if a broker were to be just guilty of more minor administrative offences (such as bad record keeping) then removal from a register may be preferable to a criminal prosecution.

Last, a requirement that all brokers should be registered could be accompanied with an outreach and awareness raising initiative after the introduction of new legislation. Therefore, brokers may be more likely to be aware that they are covered by new legislation and so might be less likely to inadvertently violate the law.

If a registration system has been introduced, brokers should be required to register before they are entitled to apply for a licence to carryout a specific brokering transaction. If it is

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<sup>7</sup> However, some countries, such as the USA, do not have the option of removing a broker from their register.



to be used as a means of providing ‘administrative sanctions’, then the status of registered brokers should be regularly reviewed.

Akin to licensing, states may wish to register for more than one type of activity. For example, according to Estonian regulations, parties must register not just to act as brokers, but also for the specific categories of defence material they wish to broker.<sup>8</sup>

## **Record keeping**

Adequate record keeping is essential if licensing authorities are to manage the information generated by the registration and licensing procedures. Many countries have set up databases to meet this need. However, as information on brokering will often be very similar to information required for general export licensing, in many cases brokering can be integrated into existing information systems. In addition to keeping information obtained directly from brokers (during registration or licensing) records could also be kept based upon information from other sources, which could include: information provided in the course of other export licence applications (exporters may be asked to list the brokers they use); reports from police or intelligence services; press reports and information from other open sources; and information on brokers provided by friendly governments.

Brokers themselves should also be required to keep records and documents related to their activities. This information could concern the type and quantity of the arms brokered, other parties involved in the transaction, and the end-user of the equipment. Some countries also require that brokers provide a regular written report of their activities. At the very least, brokers should be required to keep this information (for several years at least) and pass these records onto the licensing authorities when requested. For example, in Slovenia:

“To be eligible for carrying out brokering activities with military material, the authorised person must be granted a permit from the Ministry of Economy. The authorised person to which the permit has been granted must keep detailed records of each case of its brokering activity (for not less than five years) and inform the Ministry of Economy of the number and the scope of brokering activities over a given period.”

## **Information exchange**

Brokering is a transnational activity, and governments face many challenges in when they attempt to control the activities of brokers operating within their jurisdiction. A very important means of international assistance is for governments to share information on brokering. The 2004 OSCE Principles on the Control of Brokering in SALW state that:

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<sup>8</sup> Check if a quote

- “1. The participating states will consider establishing, in accordance with national legislation, a system for exchange of information on brokering activities among themselves, as appropriate.
2. Information that may be considered could include, *inter alia*, the following areas:
  - Legislation;
  - Registered brokers and records of brokers (if applicable);
  - Denials of registering applications and licensing applications (as appropriate).”

At the time of writing (April 2006) such a system had not been developed. Governments may, though, be able to exchange information of subjects such as national legislation via the confidential OSCE information exchange on SALW. States can, of course, exchange information bilaterally. In addition, other fora may provide opportunities for some OSCE members to share information, for example the Wassenaar Arrangement or under the auspices of the EU Common Position on brokering. Furthermore, states should, at a minimum, include information on their brokering legislation, and control systems, in their reports to the UN on their implementation of the UN programme of Action.

In addition to such intergovernmental organisations, states could share information via enforcement organisations, such as Interpol or the World Customs Organisation. A final, but no less important, mechanism would be to publish information via the internet. Many countries publish their laws and regulations, and some provide much more information – Estonia publishes a list of registered brokers,<sup>9</sup> and the US has published a list of individuals or companies that have been convicted of violating, or conspiracy to violate, the Arms Export Control Act.<sup>10</sup>

### **Extra-territorial jurisdiction**

In order to prevent the possibility that brokers could avoid regulations by conducting their activities abroad, many countries have included extra-territorial jurisdiction in their brokering legislation. In addition to this legislative tool, several regulatory mechanisms can also assist in preventing brokers undertaking illicit activities abroad.

First, whether or not a state has extra-territorial jurisdiction over brokering, brokers can be compelled to keep records on all of their activities, whether or not they were covered by national jurisdiction. This obligation can be reinforced by a requirement that brokers regularly report their activities (wherever they take place). Failure to provide a full and accurate report, or to properly keep adequate records, could therefore be punished with criminal or administrative sanctions.

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<sup>9</sup> List available from [http://www.vm.ee/eng/kat\\_153/4920.html](http://www.vm.ee/eng/kat_153/4920.html)

<sup>10</sup>List available via <http://www.pmdtc.org/debar059intro.htm>

Second, states that have decided against extra-territorial jurisdiction could take steps to extend, as far as possible, the limits of their national jurisdiction. One means of doing this is to ensure that regulations cover all brokering activities in which any part of a transaction is conducted within national jurisdiction (therefore receiving a commission or other compensation would potentially bring the rest of a brokering transaction under the control of national regulations even if it were conducted abroad).