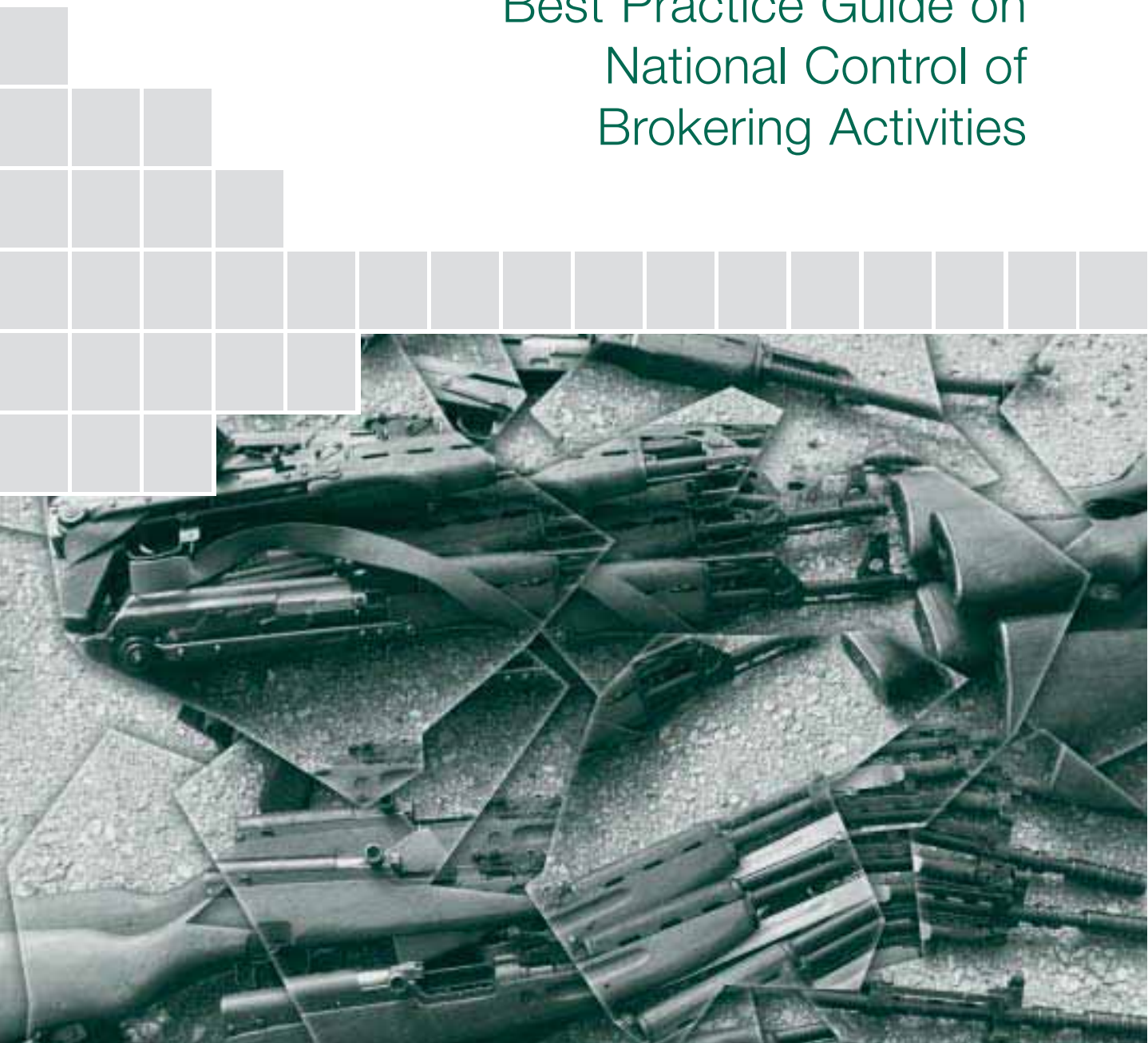




Handbook of Best Practices
on Small Arms and Light Weapons

Best Practice Guide on National Control of Brokering Activities



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I. Introduction and Methodology

At the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, held in New York in July 2001, States emphasized that Small Arms and Light Weapons (SALW) and their uncontrolled proliferation have caused profound damage world-wide, not only in terms of high human losses, but also aggravated armed conflict and regional destabilization. The easy availability of small arms also presents a serious obstacle to social and economic development.

The present document deals with the issue of brokering of SALW, building on agreements reached at the multilateral level in the United Nations and the OSCE, as well as elsewhere. In keeping with the decision of OSCE participating States to develop a set of best practice guides (OSCE, 2002c), this guide is intended to “serve as a guide for national policy-making by participating States, and as a means to encourage higher common standards of practice among all participating States.”

National controls on brokering should not exist independently from the control mechanisms established by States in other related areas, such as those of marking, manufacturing, and export of SALW. It is therefore important that controls on brokering be made consistent with those that exist in other areas, specifically export controls. Export controls and brokering controls should, with regard to their practical effects, form a coherent system

that allows for comprehensive controls on the one hand but avoids an unnecessary duplication of administrative burdens on the other hand. Both instruments therefore should not overlap but rather complement one another. To this end, the rules on brokering should be concise and focused on cases that are not yet controlled in another way. This suggests that the rules on brokering should preferably be integrated in the framework of export control regulations. (*See BPG on Export Controls*)

The primary aim of brokering controls is to allow States to identify the activities of persons who operate in grey areas or in the illegal sector, and to provide them with the means to both prevent and penalize these activities. Definitions of the activities to be controlled should therefore satisfy the criminal law dictates of legal clarity, specificity and recognizability. States should make clear, within their national systems, which activities are included in the category of brokering, and therefore are subject to screening; which actors could be considered brokers; which types of behaviour could be considered illicit, and what kinds of sanctions are available against such behaviour.

This guide summarizes the key points of the international exchange of information in the area of brokering. With the aim of preventing further divergence in national developments, this guide presents an inclusive concept, which encompasses all important issues related to licensing requirements, procedures, and criteria, as well as

to enforcement, criminalization and international co-operation. After a brief review of the relevant international commitments, this compendium lists the necessary elements for national legislation, emphasizes common guidelines for control policy and sets out effective administrative implementation and enforcement measures.

This chapter is based on a review of current existing practice on brokering regulations. However, given that at present very few States have regulations on brokering, and that the ensuing existing practices are not harmonized, the description of what already exists has been balanced with recommendations on what should be put in place for brokering to be effectively regulated. Also, aware of the difference between national legal systems, and in the interests of achieving the necessary common ground between participating States, this chapter makes a basic distinction, in the following sections,

between “core elements” and farther-reaching “optional elements.” The core elements contain all the essential points that prevailing opinion considers necessary for effective and adequate regulation. Elements that go beyond this are deemed optional here. It is up to the participating States to examine whether they are appropriate and to what extent they can be integrated into national legal regimes. Nevertheless, in some cases this chapter recommends certain optional elements where they may enhance the effectiveness of controls.

For the purposes of this chapter, and pursuant to the OSCE Document on Small Arms and Light Weapons (OSCE, 2000, Preamble, para. 3, footnote), SALW are man-portable weapons made or modified to military specifications for use as lethal instruments of war.

II. Overview of the Main Conclusions and Recommendations

This compendium comes to the following conclusions and recommendations:

Principle of consistency

For increased effectiveness, controls on brokering should be devised in a way that is consistent with the State's regulations over related areas. In particular, brokering controls should be consistent with export controls and should, wherever feasible, be integrated in the latter. Since many States already have an elaborated export control system at their disposal, it will, in practice, often be sufficient to amend the existing regulations by integrating a supplementary brokering regulation. This would also help avoid a duplication of licence requirements and make the regulatory system sufficiently transparent. An integration in the export control system would have the additional advantage of making directly available the relevant licensing criteria already developed at the national and international level for export control decisions.

Any individual subject to the controlling State's jurisdiction who intends to engage in brokering – the “broker” – shall require a licence for each brokering activity and should, if national laws and regulations so prescribe, be licensed. Applying controls on brokering activities within a State's territory irrespective of the broker's nationality would ensure indispensable congruity of control systems.

The core activity of “brokering”

As far as domestic items are concerned, in many countries arms export control procedures provide for sufficient controls. Countries with reliable arms export controls in place can thus control the end-use of these items through their export procedures. Therefore, the core brokering activities described below are those that refer to items located in a third country. These brokering cases are the most sensitive, since they are not covered by conventional export controls. States may consider, as an option, introducing brokering controls for domestic items as well, thus requiring two licences for one transaction (brokering and export licence).

The core activity includes the following:

- Acquisition of SALW located in one third country for the purpose of transfer to another third country;
- Mediation between sellers and buyers of SALW to facilitate the transfer of these weapons from one third country to another (synonyms for “mediation” are “to arrange”, “to negotiate” and “to organize” arms deals);
- The indication of an opportunity for such a transaction to the seller or buyer (in particular the introduction of a seller or buyer in return for a fee or other consideration).

The control of this core activity is indispensable for States in order to distinguish between legal and illicit brokering, and to establish penal sanctions for the latter.

Activities related to brokering that might also be regulated include the arrangement of services such as:

- Transportation, freight forwarding and charter services;
- Technical services;
- Financial services; and
- Insurance services.

The term “brokering” does not encompass the following:

- Technical services, such as manual and intellectual services, that are performed locally and aid in the manufacture or repair of a weapon;
- Transfers within one and the same country;
- Acquisition of SALW for the purposes of permanent personal use.
- Manufacture of SALW;
- The provision of, rather than the arrangement of (which *could* be covered – see above):
 - Transportation, freight forwarding and charter services;
 - Financial services;
 - Technical services;
 - Insurance services;
 - Advertizing services.

Goods covered

- Control of all SALW is imperative.
- In addition, a similar arrangement also appears desirable for the other armaments covered by the Wassenaar Arrangement.

Area of applicability of brokering controls

- Definitions of controlled activities should apply on the national territory, regardless of whether they have been conducted by nationals or non-nationals.

- An extension of brokering controls to apply extraterritorially could be desirable for certain cases, such as activities carried out abroad by nationals and permanent residents, or in the enforcement of international arms embargoes.

Licensing criteria

The international criteria and commitments governing brokering should be similar to those governing licensing procedures for arms exports, or could be applied analogously.

Licensing procedure

The procedures adopted for the licensing of brokering activities should be no less stringent than those applied to direct exports.

Registration and screening

- The reliability of the applicant and the contracted parties should be verified before a licence is granted.
- A registration procedure prior to the licensing procedure would appear sensible in this context, but not imperative.

Criminal law

Effective and credible enforcement requires the introduction of sufficiently severe criminal penalties for violations. These should, where relevant, apply to acts of nationals and/or permanent residents carried out in foreign States.

International co-operation

International co-operation in the field of export controls should be broadened to encompass the area of brokering.

III. International Commitments

At the regional and global levels, States have agreed to a number of initiatives for the control of the illicit manufacturing of and trafficking in SALW. Some of these, which will be briefly described below, deal specifically with the issue of brokering of SALW.

Of particular, global significance is the United Nations Programme of Action adopted by the UN Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (UNGA, 2001b). In the Programme, States agreed to develop “adequate legislation or administrative procedures” at the national level to regulate the activities of those engaged in the brokering of SALW deals. At the global level, they recognized the need to develop “common understandings of the basic issues and the scope of the problems related to illicit brokering.”

Again within the United Nations framework, the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition (henceforth referred to as the “Firearms Protocol”) was adopted as a supplement to the United Nations Convention against Transnational Organized Crime. The Protocol calls on States to adopt regulations on brokering activities that might, inter alia, include measures relating to licensing, registration, and disclosure requirements (UNGA, 2001a, Art. 15).

The OSCE Document on Small Arms and Light Weapons views the restriction of arms transfers as one element of an overall system to combat illicit trafficking of SALW. After stating that “the regulation of the activities of international brokers in small arms is a critical element in a comprehensive approach to combating illicit trafficking in all its aspects,” the Document puts particular emphasis on measures such as licensing of brokering activities, registration of arms brokers, and the disclosure of information on import and export licences authorizations and the names of brokers involved in transactions (OSCE, 2000, Section III.D).

The European Union has also elaborated a set of procedures and provisions on brokering within the framework of the its Code of Conduct on Arms Exports. A European Union Common Position on Arms Brokering was adopted in June 2003 (EU, 2003). The Common Position constitutes the progressive international agreement thus far, and applies not only to SALW but also to other armaments.

The Wassenaar Arrangement has thus far concentrated on compiling a set of possible elements and options for legislation to restrict arms transfers. These include, for example, conceivable definitions, licensing requirements, licensing procedures, the scope of the list of goods covered, and domestic and extraterritorial application of these restrictions as well as provisions of criminal law. During the Wassenaar Arrangement Plenary Meeting of

December 2002, Participating States adopted a Statement of Understanding on Arms Brokerage, which recognized the importance of regulating arms brokering and recommended the elaboration of common criteria for relevant national legislative measures (Wassenaar Arrangement, 2002). Further steps are currently being discussed on the basis of this document.

Other regional initiatives, such as the Southern African Development Community (SADC), the Economic Community of West African States (ECOWAS) and the Organization of American

States (OAS), have also dealt with the issue of brokering, either directly or indirectly. Overall, these initiatives point to the relevance the issue of arms brokerage has acquired within the international community. It has become increasingly clear that brokering activities are an important part of the trade in arms, and that regulation of these activities is a necessary step in the eradication of the illicit spread of SALW. This Guide represents a timely attempt to build on international agreements and national practice to recommend ways to regulate this important aspect of the trade in SALW.

IV. Content of Licensing Requirements and Licensing Criteria

1. Definition of the Terms “Brokering” and “Broker”

The term “brokering” in the international context is intended to encompass certain activities that serve to facilitate the transfer of arms between persons in different third countries, insofar as such a transfer is furthered through the assistance of a so-called “broker.” Today, international agreement is likely to converge on the idea that the actual acquisition of arms by the brokers themselves for the purpose of resale to other persons should also be included in this definition. It would, in fact, be contradictory to restrict controls to mediation and the indication of opportunities for third-party transactions and simultaneously exclude from control certain forms of *trade* in arms. While the literal definition of the term “brokering” is *a priori* too narrow, it is used here to refer to certain forms of trade in arms, including intermediary services.

(i) Core Brokering Activities

The following should fall into the category of core brokering activities:

- Acquisition of SALW located in one third country for the purpose of transfer to another third country;
- Mediation between sellers and buyers of SALW to facilitate the transfer of these arms from one third country to another;
- The indication of an opportunity for such a transaction to the seller or buyer (in particular

the introduction of a seller or buyer in return for a fee or other consideration).

Note:

The terms “transfer” and “acquisition” are to be understood in their comprehensive commercial sense. They therefore comprise all contracts concluded for the purpose of provision or procurement, such as loan for use, rental, leasing, credit purchase and similar types of contracts, insofar as they are to go hand in hand with an actual physical transfer of SALW.

(ii) Broker

The term “broker” can be defined as follows: The natural person or legal entity that carries out a brokering activity. A broker is anyone who directly performs an activity defined as a brokering activity in the exercise of his own commercial or legal relations. The acts of natural persons, especially employees, are to be ascribed to the legal entity.

Note:

Provided that brokering activities are sufficiently clearly defined, an explicit definition of the term “broker” might be dispensable.

By contrast, persons merely performing indirect support services for the broker are not themselves brokers. Such persons include providers of financial services, freight forwarders, insurers or advertising agencies, for instance.

(iii) Optional Elements

Most definitions of brokering as provided by existing national regulations focus only on the core activity of mediation. Nevertheless, some of them also cover associated activities such as financing and transportation. Also in the context of international discussions on the topic, it has occasionally been suggested that activities associated with brokering, such as transportation, technical services, financing, insurance, advertising and others be controlled in addition to the core activities. While keeping in mind that the scope of national controls should be kept at a level that is efficient, manageable and that permits stringent enforcement measures if necessary, and as long as the core activities as defined above are regulated, the following options for regulation exist.

(a) Optional Activities to Be Controlled

As mentioned, in a few instances States regulate, within the system of brokering controls, activities associated with the core activity of mediation and facilitation of arms deals. Among these related activities is the arrangement of:

- transportation, freight forwarding and charters;
- financial services;
- technical services;
- insurance services.

These activities are clearly not identical to brokering. Therefore, it is a matter for decision by States as to whether they should be subject to specific controls. To include these in a system of regulation could possibly increase States' oversight over all activities related to the trade of SALW.

Furthermore, to control both core and related activities might have the advantage of avoiding legal distinctions that might not be easily applied in

practice. At the same time, however, unmanageable administrative burdens for both governments and the civil societies should be avoided, and the scope of national regulations should be devised in a way that ensures possible and effective enforcement and implementation.

(b) Groups of Cases Not Encompassed by Brokering

The following would not be included in the scope of brokering regulations:

- The provision of technical services such as manual and intellectual services performed locally that aid in the manufacture or repair of a weapon – these should be dealt with as a separate export control issue;
- Activities that involve arms transfers within one and the same State;
- The acquisition of SALW for the purposes of permanent personal use;
- The acquisition of ownership of SALW by means other than legal transaction, in particular through the manufacture of SALW. Someone who manufactures and then transfers a weapon, for instance, does not fall under brokering controls because these activities are subject to other controls.

2. Activities Subject to Licensing

Controls of arms transfer activities can be regulated through prohibitions or licences. In the case of brokering controls, the establishment of licensing requirements could be sufficient. International arms embargoes, for example, admittedly express prohibitions as well, but are directed at States and

as a general rule are not directly applicable to companies. As in the case of export controls, the aim of an embargo could thus be achieved through the refusal to grant a licence to broker. Even if there are no strong reasons for subjecting activities to prohibitions that exist alongside or are accorded priority over licensing requirements, it remains at the discretion of each State to introduce a dual system of prohibited activities and activities subject to licensing. Such an arrangement does not seem to have obvious drawbacks.

In order for licensing requirements to be more effective, the following guidelines should be seriously considered:

- Licensing requirements should be mandatory for all core brokering activities;
- In addition, licensing requirements could be introduced for more far-reaching optional elements such as those described above (relating, for example, to the arrangement of transportation, financing and technical services).

3. Area of Application of Brokering Controls

(i) Core Elements—Territorial Jurisdiction

Licensing should be required for all relevant activities that take place on a State's own territory (territorial linkage test). Such activities would ideally consist of as little as making use of telecommunication resources, e.g. telephone calls in the transit area of an airport, facsimile transmissions or data transmission via servers located in the State in question.

This would best apply as a general rule, irrespective of whether the natural person or legal entity carrying out the activity is a national of that State or has a domicile, a permanent residence or a registered office there.

Applying brokering controls within a State's territory irrespective of the agent's nationality would ensure the indispensable congruity of control systems. It would make coherent international controls more difficult if some States were to link brokering controls to the fact that an activity is carried out on their territory and others were to link them to the nationality of the agent.

(ii) Optional Elements—Extension to Provide for Extraterritorial Jurisdiction

The question arises as to whether the basic principle of applying brokering controls to activities taking place on a State's territory should be extended to include extraterritorial jurisdiction. There are a number of substantial points in favour of this:

- Brokers could otherwise exploit unregulated areas with impunity;
- It could help to close the regulatory loopholes in those States in which corresponding regulations either do not exist or are not administered effectively enough;
- It is often in the very nature of such transactions that they involve activities on foreign territory.

Extraterritorial jurisdiction in the case of brokering controls can be advantageous, but some difficulties must be acknowledged. Importantly, many States have constitutional constraints on exercise of their sovereign rights and the application of their definitions of criminal acts to other territo-

ries. This is, of course, all the more true in the case of the enforcement of such provisions.

Licensing requirements for such activities might be waived (e.g. if countries at very low risk are involved, such as close allies, or States that have functional export controls).

This chapter therefore recommends the following to participating States:

- To examine whether it is even possible on constitutional grounds to subject extraterritorial activities to control.
- In the event of such a possibility, to examine which extraterritorial activities should be subjected to control. These could include:
 - brokering activities for the benefit of recipients in States upon which an international arms embargo has been imposed;
 - deals that might be in support of terrorists and terrorist activities;
 - activities that are likely to support existing or imminent armed conflicts or conflicts similar to civil war;
 - other activities that clearly would not be licensed in the concerned State.

In the event of extraterritorial jurisdiction over the activities to be controlled, this should be extended to encompass the nationals and permanent residents of the corresponding State.

4. Goods Covered

There is wide international agreement that brokering controls should initially cover only military

products. So-called dual-use goods and civilian goods are generally not subject to these controls.

(i) Core Elements

Since this Best Practice Guide specifically deals with SALW controls, the scope of brokering controls should encompass the entire spectrum of SALW.

According to the OSCE Document on Small Arms and Light Weapons, small arms are weapons intended for use by individual members of armed or security forces (OSCE, 2000, Preamble, para. 3, footnote). They include revolvers and self-loading pistols; rifles and carbines; sub-machine guns; assault rifles; and light machine guns. Light weapons are weapons intended for use by several members of armed or security forces serving as a crew. They include heavy machine guns; portable anti-tank guns; recoilless rifles; portable launchers of anti-tank missile and rocket systems; portable launchers of anti-aircraft missile systems; and mortars of calibres less than 100 mm.

(ii) Optional Elements

This Guide deals exclusively with the issue of brokering with regard to SALW. Consequently, for purposes of this Guide, brokering controls for military items other than SALW are optional. However, as previously mentioned, discussions within various international fora have approached brokering from a broader perspective, covering all military items. Measures to control SALW-related brokering should therefore be compatible with brokering controls for all military items, be they enacted concurrently or in several phases. While

international initiatives to address the brokering issue have emerged mainly in response to cases of illicitly brokered SALW, such cases have often involved other conventional weapons. A comprehensive approach to the goods to be licensed would also help ensure that brokers do not become involved in activities with illegitimate recipients, weapons, and/or end-uses, no matter what the category of weapons.

5. Licensing Criteria

Given their often high political content, decisions concerning criteria to grant or refuse brokering licences should remain the exclusive responsibility of individual States. However, some general guidelines could be recommended.

It is useful to emphasize again that brokering controls should be consistent with overall systems of export controls. The criteria governing decisions on export licence applications in a given State should similarly apply to decisions on the granting or refusal of licences to brokers. There are no apparent reasons to apply more lenient or stringent standards in this context.

Although States have the exclusive right to determine the content of these criteria, some indications could be drawn by international agreements such as the Firearms Protocol, or the European Union Code of Conduct on Arms Exports. Following the criteria for arms transfers listed in the OSCE Document on SALW, States should take into account, *inter alia*, the situation of peace and

stability in the region concerned, the situation in the recipient country and the potential risks of armed conflict (OSCE, 2000, Section III.A).

Finally, special attention should be given to illegally obtained SALW that cannot be clearly traced, as well as to end-uses that cannot be unequivocally verified. In this respect, the following might be considered as situations carrying potential risk of illegal diversion:

- Delivery to private individuals;
- The questionable authenticity of end-use assurances;
- Violations of commitments on previous end-use assurances;
- The danger of onward shipment to critical neighbouring countries;
- Other deliveries by circuitous routes;
- Trade in SALW that are unmarked or stem from war booty.

V. Licensing Procedure

1. Competent State

The first question that must be asked in this context is which State is competent. In practice, cases occasionally arise in which several brokering activities are carried out in different States for one and the same transaction. This can result in concurrent jurisdiction. Three groups of cases are conceivable:

- i) A core activity takes place partly in State A and partly in State B. In this case only the State in which the bulk of the brokering activity took place should be competent (consultation may be necessary). Acts of a merely preparatory or indirectly supportive nature do not fall in this category. Only the activities directly involved in intermediation, indication of opportunities for transactions and transaction for one's own purposes are relevant in this context.
- ii) A core activity is carried out in one State and an activity that has been electively subjected to control, such as the arrangement of transportation or a technical services, is carried out in another State. Both States could then be competent, each for the activity carried out on its own territory. The State in which the associated activity is carried out can provide for a partial or total exemption from the licensing requirement in such cases if the core activity is effectively controlled in the other State (consultation may be necessary).
- iii) State A has implemented extraterritorial controls for its own nationals. One of its nation-

nals carries out a brokering activity on the territory of State B, which itself enforces brokering controls on its own territory.

In this case either:

- a licence is required from each State, or
- State A waives the licensing requirement in cases where it considers the controls in State B to be adequate. This can, if necessary, be decided after consultation with State B.

2. Competent Licensing Authority

Within the relevant State, competence should lie with the licensing authority that is also responsible for the granting of export licences. This would be most practical and would ensure consistency between brokering and export control systems. Given that national licensing authorities might want to contract certain auxiliary services for brokering activities to reliable and government-monitored export companies within the framework of previously issued export licences, this solution would seem most appropriate.

3. Principle of Case-by-Case Decisions

A written licence issued by the competent authority should be required for each brokering activity that is subject to licensing. Licences should be

issued prior to the conduct of the activity that is subject to licensing. *Ex post facto* licensing should not be possible. Statutory provision should be made for revocation of the licence by the competent authority in certain cases, e.g. if the licence was obtained under false pretences, or if circumstances have changed since the licence was issued (for example, due to the imposition of an international arms embargo in the meantime).

In the light of the latter possibility, the validity of licences should be limited to a reasonable period of time. In order to compensate for such limited validity, extension options could be established, which could be exercised by the licence holder upon application to the competent authority.

(i) Core Elements

Licences should usually be issued on a case-by-case basis. One brokering activity would then be authorized for one arms transfer to one consignee. However, in certain circumstances, as set out in subparagraph (ii) below, it may be possible to depart from this principle.

(ii) Optional Elements

The uncontrolled spread of SALW can only be prevented through effective rules and transparent co-operation with the companies and individuals involved. Experience gained in the area of export controls could be used in this context as well.

Alternatives to the principle of case-by-case decision-making could be established for very low risk situations. Such conceivable alternatives to the granting of individual licences might therefore be:

- Auxiliary licences for brokering activities granted in conjunction with export licences;

- Global licences for several brokering activities relating to several specific consignees and a corresponding specific list of goods. Only particularly reliable and screened brokers should be allowed to exercise this option upon application. Possible candidates for such licences could be companies that are subject to special government oversight or comparable control mechanisms;
- Introduction of “white lists” of countries for which licensing requirements could be waived or relaxed.

The introduction of general licences, by contrast, is not recommended, given the importance of case-by-case assessments and screening of persons involved to verify their reliability.

Great care should be taken to ensure that there are no loopholes concerning procedural privileges that could be exploited and thus thwart the purposes of brokering controls. Brokering activities conducted without a requisite licence should be criminalized.

4. Registration and Screening

(i) Core Elements

Screening by State authorities is indispensable in order to ensure that licences for trade in SALW be issued to reliable persons only.

In the interests of proper administration and international exchange of information it is also highly recommended that records of all licences issued, of licence holders and of the results of government screening for reliability be kept by the competent licensing authority. Such records should contain all

relevant data, such as the broker's name and business address, professional and commercial activities in which he or she is or has been engaged, information relating to such commercial activity, such as known previous violations, licences issued, information concerning customers, and so on.

The authorities should be able to compile annual reports on the basis of these records in fulfilment of political or legal commitments regarding the international exchange of information.

Furthermore, this data should be suitable to ensure adequate co-operation between domestic authorities and preparation of materials for parliaments, as well as effective monitoring of the companies concerned.

(ii) Options

There are a number of options for achieving the aims described above as core elements.

Several States use a multistage procedure under which a separate registration of the broker is required before the latter can submit a licence application later on. In these systems, registration of relevant companies and brokers, as well as verification of their reliability, precede the actual licensing process.

In other States there is no separate registration procedure, and the licensing application is submitted once the required information on the broker has been received.

From the point of view of a best practice assessment, a multistage procedure would be useful

but not imperative. Provided the core elements are ensured, it is up to the administrative system, and at the discretion of the given State, to determine whether this will be done within the framework of the licensing procedure, or within that of a multistage procedure that starts with registration.

Irrespective of whether the procedure has one or more stages, other optional elements should be considered as well:

- An obligation on brokers to report regularly on controlled activities in which they have been engaged during a specific foregoing period of time;
- Penalties for the violation of such obligations and, if necessary, for the violation of further obligations in connection with the introduction of reporting obligations.

5. Information Requirements for Applications

The information required of applicants in the licensing procedure should be geared to the information requirements for export licence applications. (*See BPG on Export Controls*) This information should conform to international standards.

(i) Core Elements

The following information should be considered critical for the processing of a licence application:

- Information concerning the identity of the applicant, i.e. address and domicile of the company, person responsible within the company, contact person, etc.;

- Representative of the applicant in the application procedure, if applicable;
- 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 pertinent entry in the munitions list;
- Quantity of goods;
- Value of goods;
- Precise technical description of goods, if necessary in the form of an annex to the licence application;
- Information concerning end use;
- End-use assurance by the end user or an adequate assurance by the intermediate consignee annexed to the licence application;
- Contract documents.

(ii) Optional Elements

Taking into account municipal data integrity legislation, where applicable, the possibility of requiring further information from the applicant should, in addition, be seriously considered. This could in particular consist of information concerning:

- Persons who are or have been engaged in brokering activities connected with the same transaction;
- Persons involved in transportation;
- Persons providing technical services associated with the goods;
- A description of the intended itinerary, especially when the business transaction is deemed to be sensitive.

Note:

Itineraries often have to be modified at short notice for logistical reasons. Applicants should therefore only be required to provide information that is known when the application is submitted. If this information subsequently changes, the licence holders should be obligated to submit a correction notice after the transaction has taken place.

6. End-use Documentation

It is recommended that licences for brokering activities be refused without an authentic document indicating the end-use of the goods. Where the activity consists solely of an indication that an opportunity for a transaction exists, a copy from the exporter could also be sufficient. This could be an International Import Certificate (IIC) if the recipient country participates in the IIC procedure. Otherwise it could be an official (in the case of official consignees) or – by way of exception – a private (in the case of private consignees) end-use document. These end-use documents should in any case provide a high guarantee of authenticity.

- They should be written on the original stationery of the authority or, in exceptional cases, of the company;
- They should be certified with original signatures and authentic stamps;
- They should be submitted in the original; in cases where a broker has indicated that an opportunity for a transaction exists, a copy can be sufficient;
- They should conform to the specimen requirements of the licensing State.

End-use documents vary in content depending on whether they are import certificates or end-use assurances. Reference is made in the following to the content of end-use assurances. They should at least contain:

- Information concerning the identity of the supplier;
- Information concerning the identity of the broker;
- Information concerning other persons involved;
- A precise description of the goods;
- Quantity of goods;
- Value of goods;
- Information concerning end use;
- Information concerning place of end use;
- An assurance affirming the veracity of this information.

End-use assurances could also contain re-export restrictions. Finally, private end-use statements would have to be officially authenticated.

(See BPG on Export Controls)

VI. Enforcement of Controls

1. Effective Enforcement of Controls on Own State Territory

With a view to making the enforcement of controls on brokering more effective, close co-operation among the following agencies and departments should be considered:

- Licensing authorities;
- Ministries called upon to give a political assessment of licence applications;
- Corresponding inter-ministerial committees;
- Intelligence services;
- Customs authorities, to the extent they are competent;
- Authorities concerned with the screening of companies and operations of companies engaged in brokering activities;
- Other agencies involved in data administration;
- Criminal prosecution and surveillance authorities.

In addition, care should be taken to ensure functional co-operation between the licensing authority and brokers. Unambiguous, precise and transparent information concerning their legal obligations is an indispensable prerequisite for ensuring compliance with provisions and alleviating the burden on the competent licensing authorities. Industry outreach activities enable companies to install reliable internal control programs.

2. Post-shipment Controls

(i) Core Elements

Recognized measures include the issue of a Delivery Verification Certificate (DVC) or other customs import documentation as well as – by way of an exception – private delivery receipts. Additional on-site verification would only be possible on the basis of bilateral or multilateral agreements between States.

(ii) Optional Elements

In the context of post-shipment controls, in order to verify that an accomplished transaction is identical to the transaction for which an application was submitted, it could be useful to request additional documents from the broker after the transaction has taken place. The legal basis for such a request could be secured, in some cases, by imposing a corresponding obligation at the time the licence is issued. Examples of such additional documents could be:

- Transportation documents such as charter documents, air waybills, etc.;
- Customs entry receipts;
- Delivery receipts, signed by the consignee;
- Other suitable documents.

3. General Prevention Through the Threat of Criminal Prosecution

Violations of licensing requirements under a system for controlling brokering activities should be subject to effective criminal, civil, or administrative penalties at the national level, depending on the nature of the violation. Specific and legally unambiguous licensing requirements and procedures would be indispensable in this context. Only clear-cut, comprehensible requirements for the persons and companies concerned would ensure that in the event of a violation a criminal charge can also be successfully prosecuted. It should not be forgotten that the introduction of brokering controls is also intended to focus on the grey area of potentially unreliable individuals. Particular importance should therefore be attached to the area of criminal law. In the case of extraterritorial application of brokering controls, the activities carried out abroad by nationals and permanent residents should also be made subject to criminal prosecution.

A generally preventive effect on persons engaged in illegal activities within companies can only be achieved if the penalties to be incurred are of sufficient (minimum) severity. A graduated system of custodial sentences, fines and confiscation of proceeds from transactions as well as additional measures are therefore recommended. Penalties should also be imposed for the procurement of licences or registration (as applicable) under false pretences, and the attempt to commit a violation should be criminalized as well. Certain serious violations should be classified as major crimes incurring sufficiently severe minimum custodial sentences. These could include violations of embargoes; acts tending to promote the proliferation of weapons of mass destruction; acts that clearly support terrorist activities; transactions that are clearly ineligible for licensing and certain serious types of transgressions.

VII. International Co-operation

Reference must also be made here to the close connection between brokering controls and export controls. International co-operation in the area of brokering controls should correspond to co-operation in the area of export controls. All States should accordingly work to broaden the scope of political and legal commitments under relevant regimes to encompass exchange and co-operation in the area of brokering. Arrangements for the exchange of information and other forms of co-operation should accordingly be incorporated into all relevant regimes. The exchange of information could cover the following in particular:

- Information on national legislation;
- Annual reports on licences issued;
- Notification of denials.

The following measures are also possible:

- Introduction of consultation mechanisms;
- Establishment and implementation of national or multinational assistance and development programmes for foreign legislative systems.

Finally, given the agreement reached with the Programme of Action, national points of contact should also be established.

Annex

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