

3 June 2011

Advice concerning the preliminary draft for a Flemish Arms Trade Act

1 Introduction

1.1 Request for advice from the Flemish Peace Institute

On 4 May 2011, the Flemish Peace Institute received a request from the President of the Flemish Parliament to provide advice on the preliminary draft Act concerning the import, export and transit of firearms, ammunition, defence-related materials, the associated technology and other equipment specifically intended for military use or for law enforcement purposes.

The present advice should be read together with the preliminary draft Act on the import, export and transit of firearms, ammunition, defence-related materials, the associated technology and other equipment specifically intended for military use or for law enforcement purposes, as approved in principle by the Flemish Government on 8 April 2011.

1.2 Background of the preliminary draft Act

Since the transfer of competence for the import, export and transit of firearms and defence-related equipment from the federal to the regional level in 2003, it has been the Flemish Government's intention to enact a Flemish Arms Trade Act. Various proposals for a Flemish Parliament Act regulating this trade and for amendments to the existing federal act of 5 August 1991¹ have been submitted and discussed in the Flemish Parliament, but not voted on.² The adoption of the European Directive on intra-Community Transfers (ICT Directive),³ which was approved in May 2009 by the European Parliament and the Council, increases the pressure to amend the federal act of 5 August 1991 or to replace it with a Flemish Act. The Directive namely establishes a new licensing regime for the trade in defence-related materials within the EU, and previous Belgian legislation is not adapted to this European licence system. Belgian legislation also needs amendment in order to give effect to the European Directives relating to intra-Community trade in firearms and explosives.

Replacing the federal act of 5 August 1991 on the import, export and transit of military equipment offers several opportunities to harmonise legislation with European legislation and norms. It also, however, demands new consultations and harmonisation between the regions, the federal government and Luxembourg - given the complicated division of competences in Belgium and the agreements in the framework of the BLEU (Belgium-Luxembourg Economic Union) - in order to arrive at a uniform export control policy, and to provide for the Flemish Act's implementation and the possibility to apply sanctions in case of violations.⁴

1.3 Structure of the preliminary draft Act

The preliminary draft Act distinguishes between two regimes: one for the foreign trade in civil firearms (title 2), and one for the foreign trade in defence-related equipment (title 3).ⁱ Within each of these regimes a distinction is also made between intra-Community trade (trade among EU Member States) which does not entail any import, export or transit but does involve 'transfer', and extra-Community trade (trade with non-EU countries). Both titles first outline the general principles and conditions that are applicable to intra-Community and extra-Community trade.

Title 1 comprises a number of general provisions (e.g. definitions) that apply to the civil as well as to the military control regime. A number of the following titles also apply equally to the civil and military control regimes. These concern measures to suspend, withdraw or limit the use of licences that have been granted (title 4), the temporary exclusion of applicants (title 5), the right to a hearing (title 6), provisions on monitoring and sanctions (title 7), reporting (title 8), and final provisions (title 9).

2 Main themes of the Flemish Peace Institute's advice

The Flemish Peace Institute believes that peace and security are well served by a proper regulation of the arms trade through strict legislation, efficient implementation and effective control. Coherent and precise controls on the arms trade also ensure legal certainty for the companies involved..

The preliminary draft Act can be seen on the whole as a balanced proposal, strongly focused on the implementation of European Directives (for both the civil and the military regime). This implementation implies a more flexible licensing system under both regimes, at least for intra-Community traffic, which should over time reduce the administrative burden both for exporters and the authorities. Nevertheless, possibilities are also provided to keep control over sensitive transactions, inter alia by control of the end use and by a catch-all clause. The preliminary draft Act has a comprehensive structure and the conditions for the trade in defence-related products and firearms are formulated more clearly than in the federal act of 5 August 1991. Most definitions are clearly drawn, the conditions for import, export, transit and transfer are listed, and sanctions have been included in the draft.

None the less, the Flemish Peace Institute has a number of general and specific observations to make, which will be explained in more detail below. In what follows, the general observations are set out first. In section 3 all the specific points will be made in greater detail.

ⁱ Elsewhere in the text the expressions 'civil control regime' and 'military control regime' will also be used for brevity's sake.

2.1 General points for attention:

- 1) It is worth noting that the preliminary draft Act leaves several implementing provisions to the Flemish Government or the competent administration.ⁱⁱ In some cases, however, it is desirable to limit the discretionary competence of the executive power because these implementing provisions may be considered essential steps in the licensing procedure. In other articles this delegation of competences is inevitable. In these cases it is important for the Flemish Parliament to monitor how the policy is implemented. It is therefore recommended that the Flemish Government should provide clear reports on the implementing measures it takes (e.g. lists of general licences, lists of products subject to a licence requirement, etc.).

Further, several articles have been formulated in a rather general way, so that broad as well as strict interpretations are possible and the impact of these provisions will only become clear once the policy is implemented. A lot depends on the administrative practices to be developed, which - depending on the competent minister - will provide a more concrete interpretation of the Act's provisions.

- 2) The difference in scope between the control regime for civil firearms and for defence-related equipment remains unclear. With a view to legal certainty, we recommend that the Flemish Arms Trade Act should distinguish more clearly between the two so that all parties involved know which law applies.
- 3) End use: over and above the applicant's obligation to provide all information relating to the end user and the end use of the goods until the moment of decision on a licence (Art. 17 §1, Art. 33 §1, Art. 38 §1), it is recommended that the applicant should have a reporting obligation for so long as the licence is valid. On the basis of this reporting obligation the applicant would have to declare to the competent services of the Flemish Government any additional information regarding changes to the end use of the goods that he may obtain during the period of validity of the licence.
- 4) General licences: the field for application of general licences is not defined. It is recommended that the Act at least outlines the criteria used to decide which (categories) of equipment (e.g., non-sensitive components) are subject to a general licence, and which (categories) of equipment are not to be handled by this procedure (e.g. finished arms systems, defence products with firing mechanisms, etc.).
- 5) Title 8 covers reporting (by the industry to the government) and transparency (of the government vis-à-vis parliament) and is not adequate in its current form. Specific reporting obligations need to be incorporated in the Act, by analogy with the detailed regulations of the ICT Directive. In terms of transparency it is recommended that as a minimum, the current practice should be enshrined in the Act. The articles relating to

ⁱⁱ Annex 1 provides an overview of implementing provisions, which are left to the Government or the Administration.

transparency have been formulated too generally; provide hardly any added value compared with the federal act of 5 August 1991; and are not attuned to the new licensing procedure.

- 6) Brokering and third-country production are topics in the federal act of 5 August 1991 that have not been included in this preliminary draft Act. Given that the Council of State has stated in various opinions that the control of brokering and of production in third countries was not transferred to the regional authorities in 2003, the reason for their omission in the draft Act seems clear. Nevertheless, attention needs to be paid to these aspects in the control regime, to avoid a situation where control of these brokering activities is not exercised by any authority in Belgium. Consultation is needed on this subject between the regions and the federal government in the interests of effective control.
- 7) The wording of some of the articles needs to be adapted. In the provisions that relate to the ex-post control of re-export, or requests for individual licences, it is unclear whether the end user or the government has to assess whether or not the export involves a sensitive transaction.

3 Article-by-article discussion

3.1 Title 1: General framework and definitions

The general framework and the definitions list a number of provisions that are applicable to all the provisions in the draft Act (both for the civil regime as well as for the military regime).

Article 2 comprises a list of definitions. The description of the concepts constitutes a real improvement over the definitions in the federal act of 5 August 1991. The following advice is offered on the definitions of 'end user', 'country of end use' as well as 'import' and 'export':

- Art. 2, 5^o. Definition of end user: "the last known natural or legal person, at the time of the decision on the licence application, that will use the goods to be transferred or exported."

This definition is too specific. A reference to the end use/end user needs to refer to the last known person or legal entity that will use the goods to be transferred or exported, even if this person or entity changes after the export or transit took place. Control of end use is, after all, aimed at charting *effective* end use in order to allow for the correct judgement ex ante during the licensing procedure, but also subsequently for as long as the licence is applicable. The insertion "at the time of the decision" has probably been added so that companies may know where they stand with regard to the law and to define the point at or by which they have to declare the end use. If necessary, it is better to specify this in the relevant article (Art. 17) rather than in the definition itself, to reflect the reality that the identity of the end user is not related to the moment of decision on the licence application.

Advice: The Flemish Peace Institute suggests deleting “at the time of the decision about the licence application” from the definition.

- Art. 2, 9^o. Definition of the recipient country: idem

“the country where the last known use of the goods to be transferred or exported will be situated at the time of the decision of the licence application”.

Advice: The Flemish Peace Institute suggests deleting “at the time of the decision of the licence application” from the definition.

- Art. 2, 7^o, 12^o. The definition of the concepts of “import” and “export” refers to customs legislation. We recommend clarifying to which act this definition refers (i.e. the relevant provisions in the EC Customs Code).

Advice: The Flemish Peace Institute proposes to add a reference to the relevant provisions in customs legislation.

We also recommend adding definitions for the following concepts: ‘equipment for military use or for law enforcement purposes’, ‘authorisation’, ‘certificate’, ‘general licence’, ‘global licence’, ‘individual licence and ‘combined licence’.

Art. 4 states that the Flemish Government grants licences when the ‘applicant’ is established in the Flemish Region. In view of the discussion among the Belgian regions about where the application needs to be filed if the applicant’s registered office is not situated in the same region as the production facility, we recommend clarifying whether the ‘applicant’ refers to the place where the registered office is situated or to the production facility.⁵ The parliamentary report to which the explanatory memorandum refers does not make clear what choice has been made on this. The competent minister has however stated, in response to a parliamentary question on March 15th, 2011, that the regions have agreed that the region in which a company’s registered office is situated is competent for issuing licences. It is recommended that this be included in the explanatory memorandum.

Advice: The Flemish Peace Institute suggests adding what is exactly meant by ‘the applicant’, i.e., which entity is designated (the applicant as a person, the registered office for companies, etc.) in the explanatory memorandum.

3.2 Title 2: Import, export, transit and transfer of civil firearms, components, accessories and ammunition

3.2.1 Chapter 1. General principles and conditions

A first comment about this second title concerns the fact that the scope of this title is not determined in any of the articles. It is crucial, however, that a Flemish Act clearly defines to whom/what it applies.

There are different ways of doing this:

- A distinction could be made based on the weapon's characteristics. It is conceivable that a list could be made (as is already the case for military equipment) of what falls under the Act's civil regime (title 2). Dealers or individuals who transfer products on this list across the border would have to comply with the rules and procedures provided under title 2 of the Act. This option is not recommended, however, given that the list of civil arms is not clearly distinguishable from the Common Military List of the European Union. There would always be some overlaps. As a consequence it would be unclear for private gun owners and dealers, wishing to transfer a firearm across the border which is both on the civil list and on the military list, whether these firearms fall under the civil or the military regime.
- Alternatively one could try to distinguish between the two regimes based on the use made of the equipment. Title 2 of the preliminary draft Act focuses on the private ownership of firearms for non-commercial purposes (e.g. hunters, sport shooters, collectors) on the one hand, and on arms dealers to whom a more flexible regime will apply in intra-Community trade (through the implementation of Council Directives 91/477/EEC and 93/15/EEC), on the other hand.

One possibility would be to place private individuals who are allowed to own an arm under the federal arms act of 2006 within the civil firearms regime, irrespective of whether the firearm is also found on the military list (e.g. arms collectors who collect military firearms). Dealers who trade arms that are not on the military list would also fall under the civil regime.

Dealers who trade civil firearms that are on the military list still would not know for certain whether they fall under the civil or the military regime. Here the solution is less obvious. When, for example, a defence company wishes to transfer firearms that are also on the military list to an EU Member State, it is currently unclear whether the company can do so under the more flexible regime for arms dealers (for trade with other arms dealers within the EU), or whether the arms dealer needs to apply for a transfer licence under the military regime. Vice versa the rules for transfer from another Member State to the

Flemish Region in such cases are quite different, depending on whether the civil or the military regimes are applicable. In this case a more flexible regime applies under the military regime and in most cases the Flemish Government will not have to issue a licence.

At the beginning of Title 3 (Art. 20) the preliminary draft Act states that Title 3 (the military control regime) does not affect the provisions under Title 2 (the civil control regime) - in line with Consideration 15 of the Transfer Directive) and that Title 2 prevails in principle. This provision also helps distinguish the scope of both regimes. Nevertheless, in view of the fact that there is no clear definition of coverage in the European Directive on firearms, and given that the consequences of Art. 20 may possibly give rise to unbalanced differences in the control regimes and to inconsistencies, it is recommended that the scope of both regimes be clarified (see also comment on Art. 20).

Advice: The Flemish Peace Institute recommends that the field of application of these provisions be clearly defined in the preliminary draft Act and further explained in the explanatory memorandum.

Art. 10. states that licence approvals (for transfers as well as for extra-community trade) may be subject to certain conditions and limitations regarding the use of these licences. The applicant shall immediately notify the recipient of any restrictions relating to end use.

The note to Art. 10 §1 states that this article has been incorporated by analogy with Art. 15 of the Act of 1991. Art. 15 however describes the obligation for all parties importing, exporting or transiting arms (including all the parties involved) to provide all the information relating to the import, export and transit to the competent authorities on request. Art. 10 §1 does not refer to this. Art. 10 §1 relates to the conditions and restrictions (on re-export) which may be associated with certain licences. As a result the explanation is more confusing than enlightening.

Advice: The Flemish Peace Institute suggests that the note to Art. 10 in the explanatory memorandum be amended.

3.2.2 Chapter 2. Transfer of civil arms, parts, accessories and ammunition within the European Union

Art. 13. This article gives authorised arms dealers the opportunity to obtain a licence permitting him/her – subject to a reporting procedure - to transfer licensable and freely available firearms, ammunition and accessories *to* an arms dealer in the EU for a period of three years. It is unclear, however, whether this regime also applies to transfers *from* other Member States (imports).

Advice: The Flemish Peace Institute recommends that the procedure to be followed for transfer to the Flemish Region (between authorised dealers) be clarified in the preliminary draft Act or at least in the explanatory memorandum.

3.2.3 Chapter 3. Import, export and transit of civil firearms, parts, accessories to and from countries outside the European Union

Art. 17 § 1 (and also Art. 33 §1 and Art. 38 § 1) establishes an absolute obligation for applicants to declare all information about the end user and the end use of the goods involved *up to the time of the decision on the licence application* for every application for the export or transit of civil arms to countries outside the European Union (Art.17 §1), the individual transfer of defence-related equipment within the European Union (Art.33 §1) and the export or transit of defence-related equipment and other special equipment for law enforcement purposes or military use to countries outside the European Union (Art.38 §1). These articles enable the competent public services to take a decision on the licence application based on the most complete information available.

In specific cases the applicant may obtain new information about the end use and the end user of the goods involved after the licence was issued. This newly available information may be useful for suspending or withdrawing a licence (e.g., if the goods may be potentially be used for an undesirable end use or if the end user's reliability is questioned). The competent public services can thus maintain maximum control over the end use of the goods and prevent potentially undesirable transactions by introducing an obligation for the applicant to report relevant additional information about the end use of the products concerned for as long as the licence is valid. The reporting obligation would be limited in time by tying it to the validity of the licence, which in turn ensures that the applicant knows where he stands with regard to the law.

Advice: The Flemish Peace Institute recommends that the following phrase be added in Art. 17 §1: "Furthermore the applicant will report any relevant additional information acquired about the end user and the end use of the goods concerned, for so long as the licence is valid."

Art. 17 §2 relates to the documentation required for purposes of control on the end use of products destined for export and transit to countries outside the EU. § 2 refers to the obligation to append documents to the application that confirm the end use of the goods. It is not made clear, however, on what occasions an international import certificate, a copy of the import licence, or a declaration by the end user is required. According to the text of the preliminary draft Act the decision is left to the applicant. A clear distinction between the documents seems highly advisable.

Under current procedures, the document that needs to be appended to the application is dependent on the recipient country. The international import certificate is used for a list of 'friendly

countries' and a declaration of end use is applicable for all other countries. Such lists could be appended to the Act, could be incorporated in an implementation decree or could be published in administrative guidelines on the documentation of licence applications.

An explanation about the differences between these three documents should at least be added to the explanatory memorandum to clarify the Act's text and the licensing procedure. Currently the memorandum only refers to the 'relevant obligations and commitments of the Flemish Region and Belgium' and to an article in the Cooperation Agreement of 17 July 2007 which states that 'national and international import certificates should be preferred at all times'. This description does not clarify matters much. Moreover, the use of a copy of the import licence from the recipient country (potentially relevant for firearms) is not mentioned. Nor does the explanatory memorandum indicate on which grounds the distinction between the documents required will be made.

Advice: The Flemish Peace Institute recommends that the text of the preliminary draft Act, or at least the explanatory memorandum, should clarify on what grounds a distinction is made between the various documents relating to the end use (e.g., based on recipient country, civil versus military regime, etc.).

Art. 17 §3 gives the competent public service the opportunity to request additional guarantees on end use (e.g., verification of the end user). The second paragraph of the article lists the specific cases in which the Flemish Government will continue to control re-exports (i.e., the further export of Flemish products by the end user, which thus takes place after the export from Flanders was licensed). The explanatory memorandum elaborates in great detail on the procedural process and the scope of this article. It also explains that an ex post control of re-exports will only take place in sensitive cases that fall under one of the criteria. In all other cases, the Flemish Government will not exercise control over any subsequent re-exports.

Although this article is sufficiently clear after reading the explanatory memorandum, we recommend that the second paragraph of the preliminary draft Act be amended because under the current wording it is unclear who should assess the export's sensitive nature.

Advice: The Flemish Peace Institute suggests that the preliminary draft Act be amended in order to clarify that the judgement on the transaction's sensitivity resides with the Flemish Government, for example as follows: "In any case, the authority designated by the Flemish Government will oblige the end user to request permission from the Flemish Government in case of potential re-export, whenever the government is of the opinion that:

1° the end use or end user gives cause for concern in terms of an undesirable change to the purpose or destination of the goods;

2° the transit or export relates to sensitive goods ;

3° the export control policy and the effectiveness of the export control system of the recipient country or the country of end use may give cause for concern.'

Art. 18 lays down the criteria to be applied to the export of firearms (as well as of military equipment) to countries outside the EU. The criteria are based on European criteria as formulated in Article 2 of the Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment. As indicated in the common position, these European norms are considered the minimum. The preliminary draft Act has formulated stricter norms for three of the eight criteria, in the process dropping the causality principle (an assessment of the risk that specific products which are exported or transited will be used for internal repression).

Art. 19 contains three additional criteria:

- 1) the external interests and international objectives of the Flemish Region and of Belgium
- 2) the rights of the child in the country of end use. For example, an application may be refused if it is established that child soldiers are deployed in the regular army.
- 3) The attitude of the country of end use to the death penalty.

These criteria do not constitute automatic grounds for refusal, but are included in evaluation of the applications. The explanatory memorandum is very brief in terms of the discussion of this article. The explanatory memorandum should elaborate in more detail on the interpretation of this article, especially in terms of the interpretation of the third criterion.

Advice: The Flemish Peace Institute suggests that the interpretation and application of the criteria of Art. 19 (especially art. 19, 3°) be clarified in more detail in the explanatory memorandum.

3.3 Title 3: Import, export and transit and transfer of defence-related equipment and other special equipment for military use or law enforcement purposes

3.3.1 Chapter 1. General principles and conditions

Art. 20. The second paragraph of this Article states that Title 3 of the preliminary draft Act (import, export and transit and transfer of defence-related equipment and other special equipment for military use or law enforcement purposes) does not affect the provisions of Title 2, Chapter 2. This provision seems designed to avoid a potential overlap between the two regimes (civil and military). In view of the ambiguities in the scope of Title 2 (see discussion title 2) a more detailed explanation of the implication of this provision is recommended - does a company that produces firearms (listed on the common military list) and trades them within the EU fall under Title 2? (see above).

Advice: The Flemish Peace Institute proposes that this provision and its implications be clarified in more detail in the explanatory memorandum, given the importance of this article for the definition of the respective fields of application of Title 2 ('civil firearms') and Title 3 ('defence-related equipment and other equipment for military use or for law enforcement purposes').

Art. 21 establishes a reporting obligation for transfers from other EU member states to the Flemish Region of specific defence-related materials. This reporting obligation does not apply to certified individuals and to persons who have obtained a pre-licence authorisation as arms trader (Art. 24). The explanatory memorandum clarifies the use of this article. The preliminary draft Act's text could state more clearly to whom this reporting obligation applies (probably the importer).

Advice: The Flemish Peace Institute suggests that the article indicate more clearly to whom this reporting obligation applies.

Art. 22 § 1 provides the Flemish Government with the opportunity to establish - in addition to the EU's Common Military List of defence-related equipment - a list of 'other special equipment for military use or for law enforcement purposes' for which a licence is mandatory for export and transit to countries outside the EU. This does not apply to trade within the EU.

- The industry has criticised this article. The criticism is motivated by the wish for an equal starting-point in competition. It is argued that strict enforcement of the European list (also for trade with countries outside the EU) would equalise trading conditions for all EU companies in terms of licensing requirements.

- On the other hand the EU list (based on the list of the Wassenaar Arrangement) is not always interpreted in the same way. Moreover, other EU Member States (such as the United Kingdom and France) have added items to the Common Military List of the European Union.
- An additional list of equipment subjected to licensing would allow a narrower application of the catch-all clause. Under the present system, the catch-all clause is used to systematically impose a licence for certain products. The possibility for the Flemish Government to place a specific product on such a list would enable a 'purer' interpretation of the catch-all clause. It would also be a transparent policy decision, an improvement on the current system which creates a sense of arbitrariness.
- The power to decide which products should be included in the list is accorded in the draft to the Flemish Government. Yet this article will determine the applicability of licensing to a significant proportion of current exports from Flanders. Given the technical considerations associated with the creation of such lists, the real question is perhaps whether it makes sense to lodge the decision about this list of products with the legislature. As the way this article will be implemented will be crucial for licensing policy and for the use of the catch-all clause, at least maximum transparency vis-à-vis the Flemish Parliament needs to be assured.

Advice: The Flemish Peace Institute recommends that the Flemish Government apply this article with great care. The use of this article will facilitate a 'pure' interpretation of the catch-all provision (Art. 22 § 2), i.e., an ad hoc application in the light of specific security considerations. Transparency regarding implementation of this article needs to be guaranteed by an explicit mention of this article's implementation in the reporting system to the Flemish Parliament.

Art. 22 § 2 formulates a catch-all clause. This only applies to trade with non-EU countries.

Products that are not on the list require a licence when they can inflict serious harm to persons or property - alone or in combination with one another – and when they can be used as a means of violence in an armed conflict or a similar situation of violence.

The added value of this clause is that it allows the government to impose a licence obligation when a transaction involves security risks (which is the essence of every catch-all clause). The fear of too wide or too restrictive an application should ideally be remedied by Article 22 § 1, which allows products that need systematic control to be added to a list or, conversely, products no longer needing control to be deleted.

Advice: The Flemish Peace Institute recommends that the Flemish Government apply this article strictly to individual cases where specific security concerns make it necessary. A systematic licensing requirement for certain products is provided for by art. 22 § 1 (additional list of products requiring a licence). Transparency on this article's implementation needs to be ensured by an explicit mention of the article (and its implementation) in the reporting system to the Flemish Parliament.

Art. 22 § 3 lays down the principles for controlling imports from countries outside the EU. The preliminary draft Act states that the Flemish Government will establish a separate list of special equipment for military use or law enforcement purposes, for which a licence is required in case of temporary or permanent import into the Flemish Region.

This article differs from the federal act of 1991 in which the list of military equipment for which an import, export or transit licence is required is established (in the corresponding Ministerial Order). No reason is given, either in the article or in the explanatory memorandum, of why a different list is required for imports. The reduction of the list of products requiring a licence for import poses potentially serious risks for our internal security. The article has far-reaching consequences for import control policy. If the article is retained, then its purpose should be explained in the explanatory memorandum; and with a view to transparency and parliamentary control it would be appropriate to include this list explicitly in the system for reporting by the Flemish Government to the Flemish Parliament.

Advice: The Flemish Peace Institute recommends that the lists of defence-related products requiring a licence be identical for import, export and transit, and thus recommends that Art. 22 § 3 be deleted.

If it is deemed necessary to retain this article, then this should be fully justified in the explanatory memorandum. In that case it would be desirable to include the implementation of this article explicitly in the reporting system to the Flemish Parliament in order to facilitate maximum parliamentary control.

3.3.2 Chapter 2. Transfer of defence-related products within the European Union

Art. 28 introduces the use of general licences for intra-Community trade.

§ 1 does not state sufficiently clearly that general licences shall be issued for specific (categories of) products. The relevant article of the ICT Directive sheds more light on this aspect: "Member States publish general transfer licences that give direct permission to suppliers located in their

territory that meet the conditions associated with the licence to perform a number of transfers of *defence-related products to be specified in the general transfer licence* (emphasis added) to a category or categories of recipients located in another Member State.” (Article 5, ICT Directive).

Without this definition in § 1 it seems as if § 2 applies to all defence-related products. If this is indeed intentional, then this maximum application entails a number of risks. This would mean that all sellers can transfer all – including even the most sensitive – defence-related products (such as firearms, combat aircraft, explosives, etc.), without licence or declaration, for example to certified companies in each EU Member State. This would, moreover, conflict with the civil control regime which imposes stricter conditions for the transfer of firearms to other EU Member States.

The ICT Directive indicates that general licences may be granted for products that are not considered to be ‘sensitive products’. Although the directive leaves the evaluation of the sensitivity of these products to the Member States, it hints at various junctures that general licences are recommended for non-sensitive components.

Only § 4 states that general licences shall specify for which products they are granted. It is possible that a general application of the general licence is not intended, as is currently implied by Art. 28 § 1. In that case, this stipulation should be included for clarity’s sake in § 1 of Art. 28.

Neither the text of the preliminary draft Act nor the explanatory memorandum specifies what criteria will be used when the decision is made to apply a general licence to a given product. It is also unclear in § 4 who determines which products require a general licence. Given the far-reaching consequences for the licensing procedure and the control regime, we recommend that the general licences be enshrined in a Ministerial Order. The text of the preliminary draft Act merely states that the general licences shall be published on the Flemish Government’s website.

§ 3 discusses the granting of certificates designed to establish the reliability and competence of individuals/companies meeting the required conditions to engage in the arms trade. The article implements Art. 9 of the ICT Directive. The EU has established common criteria for obtaining a certificate in order to generate mutual trust between Member States regarding the reliability of certified companies who can benefit (as recipients) from general licences.

It would be desirable to cover the issue of certification in a separate article. Certification is not directly linked to general licences, even if this certification is a prerequisite for receiving products under a general licence (i.e., not for transferring products under a general licence to another Member State). While the directive devotes great attention to the topic of certification, the rationale of this process is not made clear in the text of the preliminary draft Act (including the explanatory memorandum).

Advice: The Flemish Peace Institute recommends that.

- in the text of § 1 the word 'specific' and 'as specified in the licence' be added for defence-related products, thus:

"A person who meets the conditions of a general licence can transfer specific defence-related products as specified in the licence to other Member States of the European Union, in the cases mentioned in paragraph 2, based on this general licence".

- the preliminary draft Act should include a broad list of (categories of) products that are eligible for a general licence, so as to set some boundaries to the executive power's discretionary competence.
- the list of products under general licence should be established by Ministerial Order.
- Art. 28 § 3 should be included as a separate article.
- the rationale of certification should be explained in the text of the preliminary draft Act, or at least in the explanatory memorandum.

Art. 29 describes the global licence for the transfer of military equipment. According to the article no information is ever requested about the end user/end use. This, however, complicates the application of Article 34 which states that when it can be established at the time of the licence application that the end use of the goods is outside the European Union in the case of individual and of global licences, the application will be tested against the criteria set out in articles 40 and 42 and the global and individual licence may be subject to export restrictions as stated in Article 26.

Advice: The Flemish Peace Institute suggests that Art. 29 be amended so that information about the end use and the end user (if different from the recipient) may be requested in connection with applications for global licences.

Art. 30 specifies when individual licences for intra-Community trade in defence-related equipment are required. The content of the article implements the text of Article 7 of the ICT Directive. The text, however, should be amended because it is not the applicant but the government that should determine whether an individual licence is required to protect the essential security interests of the Region/Belgium and/or international obligations, and when a global licence is not allowed.

Advice: The Flemish Peace Institute suggests to amend the wording of the article as follows: replace "S/he shall at all events do this in the following cases" by "the competent public service shall issue individual licences when...". In this way it becomes clear that the Flemish Government (and not the applicant) shall assess whether an individual licence is required.

To explain the following advice on Art. 33, please see the note on the advice related to Art. 17 (Section 3.2.3).

Art. 33 §1

Advice: The Flemish Peace Institute recommends adding the following sentence in Art. 33 §1: "Furthermore the applicant will report any relevant additional information acquired about the end user and the end use of the goods involved, for so long as the licence is valid."

Art. 33 §2

Advice: The Flemish Peace Institute recommends that the text of the preliminary draft Act or at least the explanatory memorandum should make clear on what grounds a distinction is made between the various documents relating to the end use (e.g., based on recipient country, civil versus military regime, etc.).

Art. 33 §3

Advice: The Flemish Peace Institute suggests that the preliminary draft Act be amended to make clear that the judgement on the sensitivity of the given case resides with the Flemish Government, for example as follows: "In any case, the authority designated by the Flemish Government will require the end user to request permission from the Flemish Government in case of potential re-export, whenever the government is of the opinion that:

1° the end use or end user gives cause for concern in terms of an undesirable change to the purpose or destination of the goods;

2 ° the transfer concerns sensitive goods.'

3.3.3 Title 3: Import, export and transit and transfer of defence-related equipment and other special equipment for military use or law enforcement purposes to and from countries outside the European Union

To explain the following advice on Art. 38, please see the note on the advice related to Art. 17 (Section 3.2.3).

Art. 38 §1

Advice: The Flemish Peace Institute recommends adding the following sentence in Art. 38 §1: "Furthermore the applicant will report any relevant additional information acquired about the end user and the end use of the goods involved, for so long as the licence is valid."

Art. 38 §2

Advice: The Flemish Peace Institute recommends that the text of the preliminary draft Act or at least the explanatory memorandum should make clear on what grounds a distinction is made between the various documents relating to the end use (e.g., based on recipient country, civil versus military regime, etc.).

Art. 38 §3

Advice: The Flemish Peace Institute suggests that the preliminary draft Act be amended in order to make clear that the judgement on the sensitivity of the given case resides with the Flemish Government, for example as follows: "In any case, the authority designated by the Flemish Government will require the end user to request permission from the Flemish Government in case of potential re-export, whenever the government is of the opinion that:

1° the end use or end user gives cause for concern in terms of an undesirable change to the purpose or destination of the goods;

2° the transit or export relates to sensitive goods ;

3° the export control policy and the effectiveness of the export control system of the recipient country or the country of end use may give cause for concern.'

3.4 Title 7 Provisions on monitoring and sanctions

While the Flemish legislature is expressly authorised to include provisions on sanctions, the competence of Communities and Regions as regards criminal proceedings is less obvious. It should therefore be checked whether the provisions of this chapter are in accordance with prevailing legislation.

3.5 Title 8 Reporting

Title 8 contains two articles: Art. 49 relates to the obligation of persons having obtained licences to report to the competent public service. Art. 50 relates to reporting by the Flemish Government to the Flemish Parliament, which is important to ensure transparency. We recommend that this title be called "reporting and transparency".

Advice: The Flemish Peace Institute recommends changing Title 8 to 'Reporting and transparency'.

Art. 49 broadly states that individuals making use of the licences mentioned in the Act should report thereon to the competent public service. The Flemish Government shall determine the practical details of the reporting procedure. In view of the shift from ex ante to ex post control, this reporting is crucial. Although Article 8 of the ICT Directive contains a very precise formulation of what information companies need to keep and submit to the competent authorities upon request, this provision has not been transposed in the preliminary draft Act. The ICT Directive thus stipulates that specific reporting requirements shall be established for the use of general, global and individual transfer licences and that the following information is required:

- description of the product
- the quantity and value of the product
- the date of transfer
- the name and address of the supplier and of the customer
- if known, the end use and end user of defence-related equipment
- proof that any export restrictions related to the licence have been transferred to the customer.

This information shall be kept for a minimum of three years and shall be submitted upon request of the competent authorities of the Member States.

We therefore recommend that, as a minimum, the provisions of the ICT Directive be transposed into the preliminary draft Act and also that attention be paid to reporting on the trade in civil firearms and on import, export and transit licences for military equipment.

Advice: The Flemish Peace Institute recommends that specific provisions be included regarding reporting obligations, incorporating as a minimum the obligations outlined in the ICT Directive, and also that attention be paid to reporting on the trade in civil firearms and on import, export and transit licences for military equipment.

Art. 50.

As stated in the explanatory memorandum, Art.50 § 1 has been copied from the act of 5 August 1991. We feel that this is a missed opportunity to enshrine the improvements made in terms of transparency by the Flemish Government over the years in the preliminary draft Act. At present the following information is communicated for each licence:

- the nature of the goods (based on the classification of the Common Military List of the European Union, complemented by a number of 'Flemish' categories),
- the value of the goods covered by this licence (as things stand, this information does not have to be combined with the number of products when reporting to Parliament, in order to protect commercial interests)
- the country of origin and the recipient country,
- the nature of the recipient,
- the nature of the end user (if known and different from the recipient) and
- the country of the end user (if different from the recipient country).

We recommend that a reporting system for this information be included in the preliminary draft Act.

We also recommend including the following elements:

- information on renewals of licences for transactions that have already been granted, temporary transactions and all licences that fall under the system of Council Directive 91/477/EEC.
- an overview of the actual foreign trade in military equipment taking place on the basis of licences issued.
- systematic reporting of the reasons for licence denials.

Moreover, the preliminary draft Act does not indicate how the Flemish Government shall report on new types of licences. The introduction of the general transfer licence especially has implications for how the Flemish Government will report to the Flemish Parliament. The reporting

system should be geared to the new licensing system. It is important for the Flemish Government to provide sufficient information about individual, general, and global licences in its future annual reports, so that effective and accurate parliamentary control can be assured.

Given the broad delegation of powers to the executive power, it is recommended that the Flemish Government should report in detail on its actions to implement the policy (e.g., lists of general licences, a list of additional products that require a licence, the list of products requiring a licence for import, the application of the catch-all clause, etc.).

The concept of "transit" is introduced very late in the preliminary draft Act. This concept should be included in the definitions. The point relates to transparency about forms of transit that do not require licensing. According to the explanatory memorandum, this article can only be implemented according to what data the Customs are able to provide. These ambiguous limiting conditions should be dropped.

Advice: The Flemish Peace Institute suggests:

- amending § 1 to indicate in detail, for each licence type, the information that the Flemish Government is to publish for each individual licence. As a minimum, the current practice should be maintained - subject to adjustment because of the new licensing system.
- that ambiguities relating to "transit" should be clarified. If the provision is retained, then the definition of 'transit' should be included in Art. 2.
- substituting "for each country" in § 2 by "for each licence".
- explicitly referring to reporting in relation to the implementation of certain articles in the preliminary draft Act (not merely restricted to changes in procedures and regulations), more specifically for: Art. 3 § 1, Art. 7, Art. 10, Art. 21 § 2, Art. 22 (§ 1, 2 and 3), Art. 26 § 1, Art. 28 § 1 or 4).

4 Conclusions

On the whole, the Flemish Peace Institute considers the preliminary draft Act to be a balanced proposal that is strongly focused on the implementation of European Directives. It also introduces a more flexible regime for a significant proportion of Flemish exports. At the same time, the preliminary draft Act provides for the possibility to strengthen controls on sensitive transactions by enabling end use controls. The evaluation criteria are in line with the European criteria in the Common Position (2008/944/CFSP) and in some cases are even more detailed. The distinction between the more flexible regime for intra-Community trade (in implementation of the EU directives) and extra-Community trade (trade with countries outside the EU) is clear.

The Flemish Peace Institute advises the Flemish Government to consider the following points when reviewing the text of the preliminary draft Act:

- 1) The difference in scope between the control regime for trade in civil firearms (Title 2) and the control regime for defence-related equipment (Title 3) has not been clearly defined. The Peace Institute recommends that the fields of application of both these titles be distinguished more clearly.
- 2) The preliminary draft Act contains an adequate catch-all clause, which can be invoked on a case by case basis when specific security considerations so require. Combined with the option of adopting an additional list of goods requiring a licence, this catch-all clause can be applied in a 'pure' sense so that it does not have to be invoked to apply a systematic licence requirement to certain products. The planned additional list of products subject to licensing should take over this function.
- 3) The introduction of general licences for intra-community trade in defence-related equipment largely implements the provisions of the ICT Directive. Nevertheless – and contrary to the ICT Directive – the preliminary draft Act does not clearly state that general licences are issued for specific (categories of) products, nor does it list for which types of products a general licence requirement can be applied. A definition of the use of general licences has not been included in the current preliminary draft Act.
- 4) The new licensing system in part shifts the control of the trade in defence-related products for intra-Community transfer from ex ante to ex post control. Under the new licensing system it is crucial that companies report to the government on their trade transactions. A preliminary draft Act thus needs to include detailed provisions on the reporting obligation by companies to the government. The provisions of the ICT Directive can serve as a guideline for this.

- 5) Transparency on the part of the Flemish Government vis-à-vis the Flemish Parliament is equally crucial to facilitate parliamentary and public oversight of the Government's policies. We feel that the preliminary draft Act is a missed opportunity to enshrine the improvements made in terms of transparency by the Flemish Government over the years in a Flemish Act of Parliament. Moreover, it is not clear how the Flemish Government will have to report on the new licensing system. The Peace Institute's advice is that this Act should not reflect the provisions of the Belgian law of 1991 but rather, as a minimum, enshrine the current practice regarding transparency.

The preliminary draft Act includes a substantial list of implementing provisions to be decided by the Flemish Government. Moreover, several articles give the executive power much room for interpretation. It is therefore very important that all implementing measures be made known to Parliament during the reporting process and that the Government should provide detailed information on how it implements the Act.

- 6) Further, in the text of the present advice a number of rather technical - but nevertheless important – recommendations are made on a number of articles. We refer to the grey boxes in the article-by-article discussion for further details.

Some elements have not been addressed in the preliminary draft Act because of ambiguities in the division of competences between the policy levels (such as brokering, third-country production, and checks by Customs). These elements are also crucial building blocks of an effective export control policy, and thus also deserve to be taken up with the other policy levels.

5 **Annex 1: List of subsequent decisions to be taken by the Flemish Government**

- Art. 3.1 The Flemish Government shall establish a list of civil firearms, and of equipment for military use or law enforcement purposes, the import, export, transit and transfer of which are prohibited.
- Art. 7 The Flemish Government may establish a list of civil firearms that may be imported, exported and transferred without a licence.
- Art. 7 The Flemish Government shall establish the procedure for applying for and approving the licence and the associated modalities
- Art. 10.2 The Flemish Government shall determine the terms for imposing conditions and restrictions on specific licences, as provided for in paragraph 1 (restrictions in terms of end use, re-export).
- Art. 13 The Flemish Government shall establish the terms for granting a licence to arms dealers for the intra-community trade in arms, subject to reporting obligations.
- Art. 16 The Flemish Government shall establish the terms of the declaration to be made by persons in possession of a European firearms permit in order to (temporarily) export their firearms.
- Art. 17.3 The authorities may require additional guarantees in terms of end use for each export or transit, such as a verification of the end user, or relevant commitments to be made by the recipient or the end user.
- Art. 21.2 The Flemish Government shall adopt a separate list of defence-related equipment, the transfer of which to the Flemish Region requires prior declaration.
- Art. 21.3 The Flemish Government shall establish the procedure for applying for and approving these licences, as well as the modalities of approval and provision of information.
- Art. 22.2 The Flemish Government may adopt a list of other specialized equipment for military use or law enforcement purposes (in addition to the Common Military List of the European Union) which requires a licence for temporary or permanent export.
- Art. 22.3 The Flemish Government shall adopt a separate list of specialized equipment for military use or law enforcement purposes that requires a licence when imported from non-EU countries.

- Art. 22.4 The Flemish Government shall establish the procedure for applying for and approving licences and the associated modalities
- Art. 23.3 The Flemish Government shall establish the procedure for obtaining a preliminary advice and written confirmation (about whether the goods fall under the catch-all clause).
- Art. 24.1 The Flemish Government shall determine the modalities of preliminary authorisation.
- Art. 26.2 The Flemish Government shall determine the modalities for imposing conditions and restrictions (relating to end use).
- Art. 28.3 The Flemish Government shall establish the modalities of certification.
- Art. 28.5 General licences shall be published on the website of the Flemish Government.
- Art. 44 The Flemish Government shall establish the modalities for temporary exclusion of applicants.
- Art. 45 The Flemish Government shall determine the modalities of the right to a hearing.
- Art. 49 The Flemish Government shall establish the practical details of the reporting procedure by companies to the government.
- Art. 48.2 The Flemish Government shall establish the procedure and modalities for administrative sanctions.

End notes

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- ¹ Act of 5 August 1991 on the import, export and transit of arms, ammunition and special equipment for military use or for law enforcement purposes and the associated technology, as last amended on 26 March 2003, *Belgian Official Journal*, 10 September 1991.
 - ² Draft Act of the Flemish Parliament (J. ROEGIERS et al.) amending the act of 5 August 1991 on the import, export and transit of and the combating of the illegal trade in arms, ammunition and special equipment for military use or law enforcement purposes and the associated technology as regards reporting to Flemish Parliament, *Parl.Doc.* Fl.Parl. 2007-08, no. 1591/1.
Draft Flemish Parliament Act (R. VAN GOETHEM et al.) on the import, export and transit of and the combating of the illegal trade in arms, ammunition and special equipment for military use or law enforcement purposes and associated technology, *Parl.Doc.* Fl.Parl. 2007-08, no. 1555/1.
Draft Flemish Parliament Act (E. GLORIEUX et al.) on the import, export and transit of arms, ammunition and special equipment for military use or law enforcement purposes and the associated technology, *Parl.Doc.* Fl.Parl. 2005-06, no. 834/1.
 - ³ Directive No 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying procedures for the transfer of defence-related products within the Community. *OJ.L.* 10 June 2009.
 - ⁴ See also Depauw, S., Van Heuversweyn, K. (2010), *Assessment framework for a Flemish decree concerning foreign trade in military goods*, Brussels, Flemish Peace Institute, pp. 39-40.
 - ⁵ Policy paper, Economy, Entrepreneurship, Science, Innovation and Foreign Trade, arms trade section, report of the Sub-committee on Arms Trade, 12 December 2006, Flemish Parliament, Document 1001 (2006-2007) no. 7, p 5.