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## Advice concerning the transit of strategic goods

Thanks to its central location and strong logistical infrastructure, Flanders is an important transit area for all kinds of products, including strategic goods (military equipment and dual-use products). Based on a comprehensive study of transit controls in Flanders and neighbouring countries, the Flemish Peace Institute has highlighted the following points:

- The Flemish Arms Trade Decree does not provide a basis for imposing a licensing requirement, and thus exercising control, in a suspicious case of transit of military equipment not involving transshipment.
- The Flemish Arms Trade Decree is not fully consistent with the provisions of the UN Firearms Protocol.
- Customs authorities must have access to full and appropriate information so that they can perform risk assessments efficiently and effectively with a view to identifying suspect transit traffic.
- The current approach to transit traffic has the main effect of placing administrative burdens on business.
- Many different parties are involved in a transit control policy; the exchange of information and cooperation between them is vital to make transit control policy efficient and effective.

**With a view to optimizing the legal framework and administrative practices for the transit of strategic goods in Flanders, the Flemish Peace Institute offers the following advice:**

- **the Flemish Government and the Flemish Parliament should amend the Arms Trade Decree so as to provide a broad legal basis for making all transit of military equipment (including transit without transshipment) subject to a licensing requirement where essential security interests are/may be at stake, or where a diversion is suspected.**
- **the Flemish Government and the Flemish Parliament should bring the Arms Trade Decree into line with the UN Firearms Protocol.**
- **the Federal Government should invest in information technology so as to reduce the administrative burden on business, and to allow the customs to control licensed transit traffic better and detect illegal transactions.**
- **the Federal and Flemish Governments should press at European level and in the World Customs Organization for the following changes to be implemented:**
  - **more information should be demanded in the case of customs transit traffic in goods that fall under a suspension of tax levies and/or commercial policy measures**
  - **the current customs nomenclature should be amended to facilitate precise and effective identification of licensed categories of goods.**
- **all stakeholders, at all levels (within Belgium, and in the European and international fields) should exchange full and appropriate information and work together.**

## 1 The legal and administrative framework for transit controls on strategic goods passing through the Flemish Region

Transit is a commercial transaction in which goods enter the territory of a state to be further transported to a destination outside the jurisdiction of the country of transit. This can either take place directly (e.g. by road or rail) or may be combined with transshipment to another means of transport (e.g., goods enter the country via a seaport or airport and are transferred to another or similar means of transport). Thanks to its central location and strong logistical infrastructure, Flanders is an important transit area for industrial products. The port of Antwerp, in particular, is a substantial transit location. Military equipment and dual-use products are also transported through Flanders to various countries of destination worldwide.

### ***Transit controls: at least a second line of defence for strict export controls***

Controls on the transit of strategic goods are part of a national export control policy. The practical feasibility of controlling transit traffic, however, is greatly complicated by the large volume of transactions and their speed. The main motive for controlling transit traffic is the risk that goods may disappear off the radar between the country of origin and destination, and end up at unauthorized destinations and with undesirable recipients located beyond national jurisdiction. To avoid this situation, controls are required from the moment the cargo leaves the country of export up to the time that the goods reach their (final) destination. Controls on transit operations are thus essentially a second-line device for the strict enforcement of export controls. First and foremost these controls must ensure that the goods continue to comply with the conditions of the authorized export license at all times, and that they are not diverted *en route* to unauthorized (domestic or foreign) recipients.

In addition, countries can also use their transit policy to extend their own export policy over transactions passing through their territory. The Flemish Region has chosen the latter option by setting up a systematic licensing requirement for transit traffic involving transshipment (see below) and by subjecting the relevant licence applications to the same assessment criteria as applications for export licences. This has been reflected *inter alia* in the denial of a transit licence for production equipment for ammunition originating from France and destined for Egypt. This transit licence was denied in May 2011 by the Flemish Region because of the tensions in the country of destination, in spite of the earlier approval of a French export licence. The Flemish Region thus goes further than simply monitoring the observance of the original export licence's terms.

### ***The international regulatory framework for transit controls is limited***

Over the past few decades, a variety of international bodies have been developing the elements of an effective control system on international trade in strategic goods. An analysis of the various international control regimes reveals that the current international framework provides little impetus for transit controls: the focus is mainly on control of exports.<sup>i</sup> International (mandatory) requirements governing transit controls are generally limited to the obligation to adopt legislative or other regulations on transit, to provide for physical control measures, and to maintain (border) checks and punishments for infringement. Most international regulations require that legislation or other measures be applied to control transit traffic, but do not concretely describe the substance of an effective national control system. Often there is no legal definition of what persons and objects constitute the field of application for such measures, and what political or legal evaluation criteria should be used to distinguish between legal and illegal transit traffic. Yet a uniform approach on these three points is indispensable to avoid national variations that rogue traders may exploit. Mandatory requirements have been developed at international level, but only in respect of the transit of small arms and light weapons (for example in the UN Firearms Protocol) and weapons of mass destruction (UN Resolution 1540).

### ***The European framework for controls on military equipment and dual-use products***

Separate legislation exists within the European Union (EU) on the control of transit of military equipment, and on the transit of dual-use products. These regulations contain provisions governing the national control systems of EU Member States.

For foreign trade in military equipment, the Common Position defining common rules for the control of exports of military technology and equipment (2008/944/CFSP) has been applicable since 2008 within the EU.<sup>ii</sup> The Common Position defines the criteria against which licence applications for export, brokering and transit throughout all EU Member States are supposed to be tested. The User's Guide to the Common Position defines the terms 'transit' and 'transshipment', but does not bind the Member States to any systematic control of a particular type of transit. This decision remains within the power of the Member States themselves. In the light of EU Directive 2009/43/EC, however, which governs trade in military equipment

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<sup>i</sup> Thus, it is clear from an analysis of international regulations and background documents that 'transit' and/or 'transshipment' are rarely referred to explicitly. Even fewer specific obligations and regulatory requirements are to be found for this type of trade, let alone precise descriptions or definitions. Different terms are also often used interchangeably to mean the same thing, without clarifying what type of transaction is involved. Most documents speak only of 'transit' and usually mention this in the same breath as export, while implying less formal obligations.

<sup>ii</sup> In terms of content, the Common Position 2008/944/CFSP largely adopts the provisions of the European Code of Conduct on Arms Exports of 1998. One important amendment is that the field of application in terms of commercial operations is extended: applications for an export licence now also include applications for 'transit' and 'transshipment' (art. 1. 2.).

within the EU, EU Member States can only monitor transit traffic in which a non-EU Member State is involved.<sup>i</sup>

The transit of *dual-use* products is regulated by Regulation 428/2009, which applies directly in all EU Member States. Also here, licensing can only be imposed in the case of extra-Community transit traffic. European provisions allow a large margin of discretion to Member States within the parameters of a common list of goods (in Annex to the Regulation), an exchange of information on denied licenses (*no undercut*), respect for international commitments as an assessment criterion, and the requirement to provide a legal basis for prohibiting suspicious transit *ad hoc* or placing it under control. Because of the large volume of transit traffic in dual-use products, systematic controls were deemed impractical and burdensome. The Regulation serves mainly to provide a legal basis for exercising *ad hoc* control if there are indications that the goods could be designed for weapons of mass destruction or for some military end-use.

### ***In Belgium, transit control is a regional competence***

In Belgium, competence to control foreign trade in strategic goods has been regionalized since 2003. In June 2012 the Flemish Region adopted its own Arms Trade Decree, enshrining its own policy in law for the first time since the transfer of competence. Besides the export and import of civilian firearms and military equipment, this decree also regulates the transit of such goods.<sup>ii</sup> To monitor compliance with its transit policy, however, the Flemish Region is largely dependent on the federal customs authorities. Information originating from other domestic and foreign government departments is also needed to implement an effective and efficient transit policy.

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<sup>i</sup> Since trade in military material is now part of the operation of the internal market, trade between two (or more) EU Member States is no longer considered to be either export or transit, but a transfer. What was previously called 'transit' between EU countries no longer requires a licence according to European legislation. .

<sup>ii</sup> Compared with the federal legislation of 1991, the Arms Trade Decree constitutes a legally much more coherent entity in which a number of inconsistencies arising out of the federal legislation have been eliminated and a number of administrative practices have been given a legal basis, such as (for instance) a legal description of transit.

## 2 Key Points on the control of the transit of strategic goods

The key points identified and guidance provided here are based on the Flemish Peace Institute's research into the regulations and administrative practice regarding the transit of strategic goods in the Flemish Region<sup>i</sup>, considered in a comparative perspective with our neighbouring countries.<sup>1</sup>

### 2.1 The Flemish Arms Trade Decree does not provide a basis for imposing a licence requirement in the case of suspected transit of military equipment without transshipment.

Transit is defined differently in different EU Member States and different types of transit are placed under control in different ways. Within the EU context, a definition can be found in Regulation 428/2009 governing trade in dual-use products. For military equipment, definitions of 'transit' and 'transit with transshipment' can be found in the User Guide to the Common Position 2008/944/CFSP. In Belgium, the transit of military equipment has always *de facto* been approached in the sense of transit involving transshipment, i.e. a change in the means of transportation. In the Flemish Arms Trade Decree transit of military equipment is limited to 'transit with transshipment'. By choosing this definition, the Flemish Region made the definition of transit coincide with the kind of transit that fell under systematic control even before the adoption of the decree. The logic behind the choice was the belief that this type of transit involves the highest risk, because there is a presumptive chance to manipulate the cargo at the time of transshipment. Thus the greatest risks for international and domestic security were expected from this type of transit.

#### ***The Flemish Arms Trade Decree is lacking in one important legal base***

In the Flemish Region, licensing is systematically required for transit with transshipment, but other transits of military equipment are not subject to licensing. In this respect the Flemish Region differs greatly from neighbouring countries where transshipment is not a decisive criterion in defining transit. By limiting transit to "transit with transshipment", the Flemish Region deprives itself of a legal base for stopping and checking any ordinary transit that is considered to be suspicious (based for instance on information from the customs, police or intelligence services). In our neighbouring countries interventions are possible at any time, so long as 'essential security interests' may be at stake. Through the narrow description in its Arms Trade Decree, the Flemish Region is thus letting slip an important legal basis for intervention in all suspicious transit operations that are not combined with transshipment. Yet it seems likely

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<sup>i</sup> Only the *general* control system on the transit of strategic goods falls within the scope of this study. Specific control measures that apply over and above the general framework are not discussed. Thus for example we do not address the sanctions against Iran, the derogations in respect of transit of military equipment for NATO forces, or weapons carried by soldiers.

that this focus on transshipment is shifting the risk because it makes transit without transshipment - not being subject to control - more attractive for rogue traders.

***Limited control, coupled with a broad legal basis***

With a view to efficiency, one might choose to apply systematic controls only to transit with transshipment for certain categories of military goods and to specific destinations. But it is vital to combine such limited control with a broad legal basis allowing intervention at any time in the event of suspicious transit traffic. This already applies for the transit of *dual-use* products, based on European regulations. The way to achieve such a broad legal base is to use a broad definition of transit (not limited to transshipment) in the Arms Trade Decree, along with a broad description of the interests that might be at stake and would justify the imposition of an *ad hoc* licensing requirement.

## 2.2 The Flemish Arms Trade Decree is not fully in line with international provisions

The adoption of the Flemish Arms Trade Decree in 2012 was a major step forward in terms of compliance with the obligations governing transit control above national level. Flanders complies fully with European agreements on the transit of military equipment and *dual-use* products. Checking the Flemish Arms Trade Decree against other international regulations shows that Flanders is broadly in line with international commitments. In itself this is not surprising, given that no exhaustive regulatory framework for the transit of strategic goods has been developed either at international or European level.

Two requirements arising out of the UN Firearms Protocol<sup>i</sup> have not currently been met, however. Firstly, there is the requirement to include information about the transit route in an application for an export licence for firearms. In future the Flemish Region intends to include information about transit countries in the export licence for civilian firearms. The UN Firearms Protocol does not, however, distinguish between civilian and military firearms in respect of this obligation, which means that the planned Flemish action – not covering military firearms - is too limited. This obligation arising out of the Firearms Protocol only applies to firearms, but applying it also to military equipment and *dual-use* products might bring added value in terms of potentially minimizing the risk of diversion. Secondly, the Firearms Protocol imposes the obligation to retain for at least 10 years all information, including information about possible licences and transit countries, that is needed for tracing and identifying illegally manufactured

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<sup>i</sup> To supplement the UN Convention on Transnational Organised Crime (November 2000), on 31 May 2011 the General Assembly of the United Nations (UN) approved a Protocol against the unauthorized manufacturing of and trade in firearms, their parts, components and ammunition (UN Firearms Protocol). The UN Firearms Protocol entered into force on 3 July 2005 and aims to promote, facilitate and strengthen the collaboration between Member States with a view to preventing, combating and eradicating the unauthorized production and trade in firearms, their parts and ammunition. The protocol lays down various requirements relating, amongst other things, to the transit of firearms. These provisions are binding under international law for the 52 Member States (including Belgium) which have ratified the protocol.

or smuggled firearms. The Flemish Region is not currently complying with this latter obligation either.

### **2.3 Customs authorities must possess full and adequate resources to be able to perform risk assessments efficiently and effectively**

To monitor compliance with Flemish transit policy, the Flemish Region depends in practice on the federal Customs authorities. They are the front-line authorities empowered to carry out physical and documentary checks on the entry and exit of goods. The large volume and speed with which transit operations take place, however, make it practically impossible to subject every transit of industrial goods to control. The front-line checks made by Customs are therefore driven by risk assessments. Only with the help of these assessments (based on information about the goods and/or the sender and/or the destination and/or other data) can suspicious transit traffic be identified and intercepted. The precision and effectiveness of the risk assessments, however, depends largely on the information made available for this purpose. A number of inherent structural limitations in the current system provide obstacles to this.

#### ***The diverging aims of export control and customs policy***

One initial problem involves the extent of information available to customs, which varies according to the type of transaction. Because of the different aims that export control and customs policy are designed to serve, in practice there are a number of limitations on the Customs' surveillance capacity. From a customs-technical viewpoint, in European customs regulations the expression 'customs transit' applies only to goods that are transported through the EU customs territory 'under suspension of tax levies and/or commercial policy measures'. Because trade in such goods is not a relevant commercial transaction from a tax point of view, customs regulations call for only limited information to be included in the declaration; more specifically, a mere description of the goods without reference to the commodity codes. This makes it unlikely that risk assessments will be successful in identifying suspicious transit traffic, because the commodity code is one of the defining criteria for the latter.

#### ***Categories in customs nomenclature are too vague for identifying strategic goods***

A second problem involves the customs nomenclature, which currently does not make it possible to identify all targeted categories of strategic goods. Even if the commodity codes are communicated to the Customs, it is very difficult to determine whether the transit of these goods is actually subject to a licensing requirement. In particular, the detection of dual-use products<sup>i</sup> and parts of weapons systems is problematic: the categories in customs nomenclature

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<sup>i</sup> In practice, however, there is little to no licensed transit of dual-use products. The focus is not on systematically controlling the transit of dual-use products, but on the *ad hoc* prevention of suspicious transit traffic.

are often too broad to *specifically* identify these goods (80% of the customs nomenclature contains categories of goods that include dual-use products, but there are no specific sub-categories with their own code number for the latter).

Because customs regulations are European-regulated, these shortcomings apply in all EU countries.<sup>1</sup> For a strict transit control policy, it is vital to address the problems that the Customs face in effectively checking goods in the field. Due to the limited information and problems with customs nomenclature, the recently introduced methods of risk assessment have not succeeded in identifying suspicious transit traffic. The Arms Trade Decree makes provision - for the first time - for dedicated surveillance powers for Flemish officials, complementing those of the Customs. However, so long as the available information is inadequate, these will also run into the same obstacles. The customs authorities also often suffer from a lack of human resources to carry out controls efficiently and effectively.

## 2.4 The current approach to transit traffic results in administrative burdens for business

In the Flemish Region, only a limited number of companies apply for licences for the transit of military equipment and dual-use products. They are mainly shipping agents operating in the port of Antwerp, who hold a prior authorization from the Ministry of Justice. The limited number of transit operators in Flanders stems from the risks associated with such work. Transit is a complex matter that calls for possessing specific, up-to-date knowledge to determine which goods are subject to a licensing requirement. This demands a continuous investment of effort. Further, transit operators - as the front-line contacts for Customs - are extremely vulnerable should anything go wrong. They may jointly and severally be liable for fines or even have to pay for additional costs, which cannot be recovered from the customer. This vulnerability is intensified because they are largely dependent on the information they receive from their customers. Lack of time, knowledge and/or physical control capabilities mean that it is usually virtually impossible for them to check the authenticity of the information provided. A number of shipping agents and other relevant key players therefore consciously choose not to handle any cases of strategic goods transit, or to limit transactions of this type.

### ***Administrative burdens lead to resentment and avoidance of shipping through Antwerp***

From discussions with the companies handling such transit cases, it seems that the administrative burdens cause particular resentment. Those concerned say that, despite the strategic location of Antwerp and the numerous transport links from the port, some customers shy away because of the bureaucratic procedures. According to the transit operators, a 'normal' transit file has a handling-time of 2-6 weeks, while difficult cases can sometimes drag on for

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<sup>i</sup> Nevertheless, this does not guarantee the uniform application of these regulations. Variations persist in terms of supervision, due to different interpretations and differences in capacity at national level.

months. The lengthy handling-time can result in additional storage costs, deferred payment and other economic disadvantages. Transit managers have the impression that comparable cases are handled faster in neighbouring countries (Hamburg and Rotterdam, in particular, are cited). According to the Flemish Region, handling times can be difficult to reduce as each licence application undergoes a complete evaluation procedure. However, the transit operators' frustration reflects two distinct causes. On the one hand it arises from the systematic licensing requirement that the Flemish Region imposes for transit with transshipment, while neighbouring countries often apply only *ad hoc* checks on the same type of goods and most transit is thus free from administrative obligations. Secondly, foreign customers feel that Belgium and the Flemish Region impose controls more rigidly and less efficiently than neighbouring countries, both in terms of export control and customs formalities. Despite identical European customs regulations, differences in interpretation and application of these regulations lead to significant differences in terms of the service provided. The concerned companies argue that the customs authorities are not currently successful in reconciling the two seemingly opposed aims of facilitating, and controlling, the patterns of trade in strategic goods.

### ***Operational interventions can provide substantial improvements***

Because the procedures relating to transit can be cumbersome, they may reduce the concerned companies' gain from each such transaction; uncertain handling periods may also incur additional charges. To a large extent these problems can be attributed to basic policy choices such as the systematic control of transit traffic with transshipment, and the problems the Customs face in exercising their control function (see above). Nevertheless, even without fundamental new policy choices, various interventions at the operational level may help substantially in removing obstacles. Such action – as seen for instance in the Netherlands, Germany and the United Kingdom - involves centralizing and introducing the digitization of declarations and electronic procedures. The introduction of differentiated handling according to the sensitivity of the file, rather than a standard procedure for all transit, is also an interesting avenue to explore.

## **2.5 The exchange of information and collaboration is crucial**

Transit policy on strategic goods affects several different fields of government. Because of the need to reconcile international and national security interests with primarily economic considerations, the government authorities responsible for Foreign Affairs, Internal Affairs (police, intelligence services, state security) and the Economy are the main interested parties in the various EU Member States. Because of their general supervisory powers, the Customs also play a crucial role in the different EU Member States.

***Regional and federal authorities are involved***

In the Flemish Region since 2003 the transit of military equipment and dual-use products has fallen within the purview of one and the same body, the Strategic Goods Control Authority. It is responsible for export control policy, including on transit traffic. When assessing transit applications, requests can be made for information held by other departments in the Department of Foreign Affairs and the Federal Ministry of Foreign Affairs. Collaboration with the Federal Ministry of Foreign Affairs is formally governed by a cooperation agreement. Informal consultation takes place with other regions, as well as with other federal authorities such as the Customs, police and intelligence services, on a regular basis.

An efficient control system must ensure that all these authorities cooperate where necessary. Such cooperation is not only important for assessing individual license applications, as happens already, but also at policy level, so that current policy can be evaluated and a targeted control system developed that allows legal transactions to be efficiently handled and illegal transactions effectively caught. From July 2012, the exchange of information and cooperation with the various government authorities has been all the more important because the Arms Trade Decree provides for Flemish officials to have a dedicated supervisory capacity. Without detailed information on criminal organizations and their *modus operandi*, it is difficult for the Flemish officials to exercise strategic oversight. This information is mainly in the hands of (domestic and foreign) Customs, police and intelligence services. Given the transnational nature of transit traffic, consultation and the exchange of information is needed it is not only at intra-national, but also international level.

## Endnotes

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- <sup>1</sup> Van Heuverswyn, K. (in collaboration with Duquet, N) (2013), *Transit of strategic goods: The legal framework and administrative practice in the Flemish Region and the neighbouring systems*, Brussels: Flemish Peace Institute, <http://www.vlaamsvredesinstituut.eu/images/manager/publicaties/onderzoeksrapporten/pdf/rapport%20doorvoer%20van%20strategische%20goederen.pdf>; Van Heuverswyn, K. (i.c.w. Duquet, N) (2013), *Transit of strategic goods in Europe: A comparative analysis of policy on the transit of strategic goods in Belgium, France, Germany, the Netherlands and the United Kingdom*, Brussels: Flemish Peace Institute, [http://www.flemishpeaceinstitute.eu/images/manager/publicaties/onderzoeksrapporten/pdf/report%20transit%20of%20strategic%20goods%20in%20Europe\\_web.pdf](http://www.flemishpeaceinstitute.eu/images/manager/publicaties/onderzoeksrapporten/pdf/report%20transit%20of%20strategic%20goods%20in%20Europe_web.pdf)