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Advice concerning the annual report of the Flemish Government to the Flemish Parliament on the implementation of the Act of 5 August 1991 regarding the import, export and transit of arms, ammunition and materials specifically intended for military use or for law enforcement and the associated technology

1 Introduction

The Flemish Parliamentary Act defining the operations of the Flemish Peace Institute stipulates that the latter will advise the Flemish Parliament on the annual report of the Flemish Government about licences issued and denied for arms, ammunition and materials specifically intended for military use or law enforcement and the associated technology¹. On 9 April 2010, the Flemish Government submitted its annual report on arms trade for 2009ⁱ to the Flemish Parliament.²

The present advice to the Flemish Parliament singles out a few important elements in the Flemish Government's report. These are based on previous advice and research by the Peace Institute's Arms Trade and Production research programme, where the Institute monitors the national, European and international legal framework for foreign arms trade, as well as the facts and figures on arms production and trade in Flanders. The Institute's annual report '*Flemish foreign trade in arms and dual-use items 2009*³', presented in the Flemish Parliament on 17 March 2010, has been a key source of reference for the present advice. This annual report contains figures relating to the import, export, and transit of military materials over the past year, and a comprehensive analysis of those figures. The Peace Institute also provides in the report a review and analysis of the licensed trade in dual-use goods. The annual report of the Flemish Government does not, however, mention the latter issue and it is therefore not discussed in the present advice.

The Peace Institute's starting point for the current advice is that stringent controls are needed on trade in military materials. Controlling the spread of arms is, after all, a necessary precondition for peace and stability in the world. The merits of arms exports are judged case by case on the basis of internationally agreed guidelines. Not only where, but also by whom the materials are to be used is crucial in this assessment.

Policy on controlling the trade in military materials must be transparent to enable democratic monitoring and control. With this advice, the Peace Institute aims to evaluate Flemish arms trade policy and to support and enhance parliamentary control over that policy.

ⁱ This advice note uses the terms 'arms trade' and 'trade in military materials' to refer to the import, export and transit of arms, ammunition and materials specifically intended for military use or law enforcement and the associated technology, as covered by the Act of 5 August 1991.

2 Points for attention in the Flemish Government's annual report on arms trade, 2009

2.1 The share of arms exports for which the industry is the last reported user at the time of issuing the licence has risen spectacularly over the past few years.

In 2009 a total of 326 licences were issued by the Flemish Government for the export of military equipment. These export licences had a combined value of € 282.2 million. Compared with 2008, the value of licensed exports increased by € 42.2 million (+17.6%).⁴ The annual report records the recipient and the end user of the product for each export licence. Chapter 5 of the annual report, which discusses the methodology, describes how the Flemish Government identifies the recipient and the end user of the products for each individual licence. Acknowledging the potential distinction between 'recipient' and 'end user' and, similarly, between 'country of destination' and 'country of end use' is crucial for proper control of the trade in military materials.⁵ The recipient is the first party to receive the goods, the party to whom the products are being sent. The recipient may also be the party who employs the goods for the intended end use (e.g., deployment with the armed forces), and hence will also be the end user. Sometimes this is not so: for instance when defence-related goods are integrated into larger weapon systems, 'the industry' is the recipient and the actual end user will be the party that is going to use the military end-product. Although larger weapon systems are usually manufactured to order (and the end user is hence a known party), this is not always the case or is not always made known. An analysis of the figures from the 2009 annual report of the Flemish Government shows that the categories 'industry' or 'trader' were the last known end users for 78% of the value of the issued licences, as against 60% and 73% of the value of the licences in 2007 and 2008 respectively. In other words there is a rising trend here.

From the perspective of stringent control of trade in military materials, these figures raise the question whether it is satisfactory for Flanders to assess licences on the basis of the recipient, without knowing the end user. Further, in cases where the government has information about both the recipient and the end user (assuming they are two different parties), should they then both be included in the assessment? If the assessment of a licence application only includes the recipient, this implies that the responsibility for re-export is handed over to the country of destination. This specific issue is the subject of a heated discussion in many countries and also at EU level. Too strict an approach undermines the economic interests of a country or region, notably the competitiveness of its defence-related industry; excessive leniency leads to shifting responsibilities in an area where well-targeted controls are needed precisely in order to ensure a responsible arms export policy.

With a view to an effective export-control policy and to high-quality parliamentary control, the Flemish Government needs to put together all possible information about both the recipient and the actual end user of certain exports. Judgements can then be made case per case - and be made accountable to parliament - on whether responsibility as regards the end user is to be left in the hands of the country of destination or not. Complete information on both recipient and end user is a necessary precondition for a responsible and accountable policy. Although the actual

end user cannot always be traced, it is possible to make extra efforts. First of all, the obligation on the side of industry to provide *correct and complete* information when applying for import, export or transit licences (article 9, Act of 5 Augustus 1991)⁶ must be emphasised. In addition, exchanging information with domestic and foreign intelligence services and other government institutions may help to amass knowledge about a product's end use.

As regards the control on end use, the new EU Directive on intra-community trade in military materials is also of importance. A liberalised licensing system for trade in defence-related materials within the EU, as laid down in Directive 2009/43/EC, will come into force as from the end of June 2012.⁷ The Directive will have far-reaching consequences for Flemish arms trade policy. An analysis of figures from the Flemish Government's annual report shows that almost 50% of the value of exports licensed in Flanders is destined for EU Member States. Once the aforementioned European Directive is implemented, companies will not only be able to make use of individual licences for such transfers of defence-related materials within the EU - as is the case today - but also of general and global licences. General licences are issued for certain products, and all companies located on the territory of a Member State can make use of them - no longer needing to apply for a separate licence for these goods. Global licences are granted to companies, and under such a licence companies will be able to transfer (certain categories of) products to (certain categories of) recipients within the EU. Individual licences will remain in force for sensitive or one-off transfers.⁸ Although it will be difficult to systematically chart the actual end use for general and global licences, it would seem logical to continue to do so for sensitive transfers under an individual licence. Both the recipient and the end user must be known by the Government wherever possible. Additionally, the Directive allows Member States to attach export restrictions to transfer licences and to demand guarantees concerning the end use. The Directive does not regulate the trade with countries outside the EU: individual licences will remain standard practice for those transactions.

2.2 The COARM consultation mechanism as an indicator of harmonization in European arms export policies and the transparent application of European criteria for arms exports.

In its annual report on arms trade, the Flemish Government always highlights a certain theme. This year, chapter 7 of the report focuses on the activities of the EU Council working group on conventional arms, COARM. One of COARM's main strong points is that it offers a platform for discussions between EU member states on the situation in certain recipient countries, and about applying the common evaluation criteria from Common Position 2008/944/CFSP.⁹ COARM presides over a consultation mechanism whereby member states consult each other if, for a similar licence application – and based on identical criteria - they arrive at different judgements on the application.² COARM reports on these consultations in its annual report and includes a

² Before member state A issues an export licence that is similar to a licence application that has been denied by member state B in the previous three-year period, member state A is expected to consult member state B about the reasons for the denial, since granting the licence would undermine the policy of member state B. The EU thus strives for increased harmonization of member states' export control policies.

list of recipient countries that were subject to consultations and of member states that initiated or received requests for consultations.¹⁰ The outcome of these bilateral consultations is confidential. According to the most recent figures, in 2008 Belgium³ initiated a consultation ten times (on treatment of a licence application that had been denied by another member state) and was the recipient of consultations four times (when another member state considered granting a licence that had been denied by Belgium). Additionally, the Peace Institute's report '*Flemish foreign trade in arms and dual-use items 2009*' provides an overview of recipient countries that were the subject of consultations in past years (2006-2008) and for which the Flemish Government issued licences in 2009. These recipient countries can be found on all continents, from Russia and South Africa to Colombia, the Philippines and Iraq.

Figures about the number of consultations between EU member states are an interesting yardstick of the success of Common Position 2008/944/CFSP, which includes eight criteria that all member states must apply for assessment of licence applications.¹¹ More transparency and exchange of information between EU member states about how the criteria are being applied should advance the harmonization of member states' export policies.

At the Flemish level, parliamentary control would benefit from more insight into how the criteria are applied. How are the various criteria weighed against each other? How does the Flemish Government weigh the criteria? How strictly are they being applied? Which criteria formed the basis for granting/denying a certain licence? More openness in decision-making makes for a more accountable policy. It also makes for more predictability in policy, which in turn gives companies a more secure legal foundation. A stronger focus is needed on accounting for policy decisions based on the European criteria, both in oral explanations and written reports made in and to parliament.

2.3 Licensed imports of firearms have grown strongly in the last few years, but in many cases the end users of these firearms are not mentioned.

The annual report of the Flemish Government shows that Flemish authorities issued 450 arms import licences in 2009, representing a total value of € 53.3 million. An analysis of these import licences shows that the value of licensed import of firearms (ML1.a) in 2009 increased by 35% compared with 2008. In the space of four years the value of licensed firearms imports has almost tripled: from € 1.3 million in 2005 to € 3.4 million in 2009. Licensed imports of ammunition (ML3.a) and accessories such as weapon sights (ML1.d) also saw a considerable increase. In Flanders, firearms are mainly imported by traders. Some of these weapons are intended for local police forces that use Flemish traders for their service arms purchases. Another part is intended for sales to private persons on the civil market.¹² But in most cases the annual report of the Flemish Government does not provide clarity as to where these firearms eventually end up. It

³ The EU report does not contain separate figures for Wallonia, Brussels and Flanders.

does not contain mention, either, of all import licences for firearms issued by the Flemish authorities: licences issued under the provisions of European Directive 91/477 are not included in the annual report for Parliament. These licences concern the transit of firearms within the EU (with the exception of weapons of war and military materials), inter alia between recognised arms traders.

The annual report of the Flemish Government covers the import of arms only in one summary table that gives just the number and total value of import licences issued and denied, while listing the issued and denied import licences in an annex. It does not provide an explanation of how the licence applications are dealt with and what criteria are taken into consideration by the Arms Trade Monitoring Unit.

As with controls on end use in arms exports, it is essential in the context of good-quality parliamentary control that the Flemish Government should collect all available information on the actual end users of imported firearms. This is a prerequisite for a responsible and accountable policy. Although the actual end user may not always be traceable, the Flemish authorities can make additional efforts. Here, too, the obligation of licence applicants to provide *correct* and *complete* information regarding their application (article 9, Act of 5 August 1991), must be emphasised.¹³ The Government needs to share this information with Parliament in its annual report.

2.4 Transparency in the annual reports has increased considerably over the past few years, but remains open to significant improvement

Transparency in reports on foreign arms trade is not an end in itself but should be a means, among other things, to arrive at effective and precise parliamentary control. The past few years have shown a clear trend towards more transparency in the methods used by the Flemish Government in its obligatory report on approved and denied licence applications. Reporting has gradually evolved from aggregated figures for each recipient/exporting country, merely broken down into the number of licences by category of recipients and a very rough classification of military equipment, into a report that lists the following different characteristics for *each* individual licence application: the nature of the goods (based on categories in the European list of military goods, supplemented with a number of 'Flemish' categories); the value of the goods to which the licence applies; the country of origin; the country of destination; the nature of the recipient; the nature of the end user (if known and if this party is not the recipient) and the country of the end user (if this is not the country of destination).¹⁴ Not only is this information published in the annual report of the Government to Parliament, it is also made available each month through the website of the Arms Trade Monitoring Unit.¹⁵ These Flemish annual reports are considerably more transparent than the federal reports and those produced by the other Belgian regions.

Although enhanced transparency has much improved the scope for high-quality parliamentary control, there is still room for improvement in certain areas. For instance, the annual report of the Flemish Government does not mention all licences issued and denied for foreign trade in military

materials. Information on renewals of licences already granted and temporary transactions, and on licences falling under the provisions of European Directive 91/477, and systematic reports on motivations for licence denials are all lacking. Further, it would be desirable also to include an overview of the actual foreign trade in military materials that takes place on the basis of the licences issued.

3 Advice

The Flemish Peace Institute wishes to draw attention to four key points regarding the annual report of the Flemish Government to the Flemish Parliament on licences issued and denied for arms, ammunition and materials specifically intended for military use or law enforcement and the associated technology, as submitted to the Flemish Parliament on 9 April 2010:

- The share of arms exports for which the industry was the last reported user at the time of issuing the licence has risen spectacularly over the past few years;
- The COARM consultation mechanism provides a yardstick of harmonization in European arms export policies, and the transparent application of European criteria for arms exports is of key importance here;
- Licensed imports of firearms have seen a considerable increase in recent years, but in many cases it is not reported who will be the end users of these weapons;
- Transparency in the annual reports has improved markedly over the past few years, but still leaves room for significant improvement.

With a view to these key points in Flemish arms trade policy, as covered in the report of the Flemish Government, the Peace Institute offers the following advice on how to optimize Flemish arms trade policy while supporting and enhancing parliamentary control over that policy.

The Flemish Peace Institute advises the Flemish Parliament:

- **to ask the Flemish Government to make an extra effort to collect all available information on the recipient and the actual end user if the two are different parties; to include this information in the assessment of licence applications and to inform Parliament accordingly;**
- **to ask the Flemish Government to provide more insight into how the European evaluation criteria from Common Position 2008/944/CFSP are applied, when accounting to Parliament for its policy;**
- **to ask the Flemish Government to pay adequate attention to the import of arms in its annual report for Flemish Parliament;**
- **to ask the Flemish Government to increase transparency in its annual report by including detailed information about the actual foreign trade in military materials, licence renewals, temporary transactions, licences issued under the provisions of the European Directive 91/477, and the rationale for licences denied.**

End notes

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- ¹ Act of 7 May 2004 on the founding of a Flemish Institute for Peace and the Prevention of Violence at the Flemish Parliament (Text updated as of 08-07-2009), article 6.
- ² Annual report of the Flemish Government to the Flemish Parliament on licences issued and refused for arms, ammunition and materials specifically intended for military use or law enforcement and associated technology: period from 1 January 2009 to 31 December 2009, Document 53A (2009-2010) – No. 1.
- ³ Duquet, N. (2010), *Flemish foreign trade in arms and dual-use items 2009*, Brussels: Flemish Peace Institute.
- ⁴ Duquet, N. (2010), *Flemish foreign trade in arms and dual-use items 2009*, Brussels: Flemish Peace Institute.
- ⁵ For more detailed information on end use controls and the distinction between recipient and end user, please also refer to Flemish Peace Institute (2008), [End use as a factor in the licensing procedure for arms exports in Flanders](#), Brussels: Flemish Peace Institute.
- ⁶ Act of 5 August 1991 on the import, export, and transit of, and against the illegal trade in, arms, ammunition and material specifically intended for military use and the associated technology.
- ⁷ Directive 2009/43/EC simplifying terms and conditions of transfers of defence-related products within the Community, Official Journal of the European Union L/146/1, 10 June 2009.
- ⁸ For more information on the contents of the Directive please refer to Flemish Peace Institute (2008), [The European defence package: towards liberalisation and harmonisation of the European defence market](#), Brussels: Flemish Peace Institute.
- ⁹ Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing the control of exports of military technology and equipment, Official Journal of the European Union L/335/99, 13 December 2008.
- ¹⁰ Council of the European Union, Eleventh annual report in accordance with article 8 (2) of Common Position 2008/944/CFSP of the Council in view of determination of common provisions for the control on export of military goods and technology, Official Journal of the European Union 2009/C265/01, 6 November 2009.
- ¹¹ For more information about compliance with the Common Position, see Flemish Peace Institute (2010), [The common position on arms exports in the light of the emerging European defence market](#), Brussels: Flemish Peace Institute.
- ¹² Duquet, N. (2010), *Flemish foreign trade in arms and dual-use items 2009*, Brussels: Flemish Peace Institute.
- ¹³ Act of 5 August 1991 on the import, export, and transit of, and against the illegal trade in, arms, ammunition and material specifically intended for military use and the associated technology.
- ¹⁴ For a more detailed review of this evolution towards more transparent reporting methods see Duquet, N. (2010), *Flemish foreign trade in arms and dual-use items 2009*, Brussels: Flemish Peace Institute (pp. 24-25).
- ¹⁵ <http://iv.vlaanderen.be/wapenhandel>.

The Flemish Peace Institute was founded by Flemish Parliamentary Act to serve as an independent institute for the purpose of conducting research on peace issues. The Peace Institute engages in scientific research, documents relevant information sources, and informs and advises the Flemish Parliament and the public at large on questions of peace.

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