

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*

Kathleen Van Heuverswyn, in collaboration with Nils Duquet

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List of abbreviations

ADW: Algemene DouaneWet - General Customs Act (the Netherlands)
AL: Ausfuhrlist - Export List (Germany)
ATA: Arms Trade Act (Belgium)
AW Gesetz: Außenwirtschaftsgesetz - Foreign Trade Act (Germany)
AWV: Außenwirtschaftsverordnung - Foreign Trade Decree (Germany)
BAFA: Bundesamt für Wirtschaft und Ausfuhrkontrolle - Federal Agency for Economy and Export Control (Germany)
CDIU: Central Import and Export Service (the Netherlands)
CP: Common Position (European Union)
CP 2008/944/CFSP: Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, *OJ L* 335 of 13 December 2008 (European Union)
Directive 2009/43/EC: Directive 2009/43/EC of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community, *OJ L* 146 of 10 June 2009 (European Union)
Dual-use Regulation: Regulation (EC) No. 428/2009 of the Council of the European Union of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, *OJ L* 134 of 29 May 2009 (European Union)
EC Act: Export Control Act (United Kingdom)
ECO: Export Control Organization (United Kingdom)
EFTA: European Free Trade Association
EL&I: Ministry of Economic Affairs, Agriculture and Innovation (the Netherlands)
Regulation SG: Regulation on Strategic Goods (the Netherlands)
FIOD-ECD: Economic Control Service of the Fiscal Information and Investigation Services (the Netherlands)
IAEA: International Atomic Energy Agency
IE&T: Import, Export and Transit (Belgium)
KWK Gesetz: Kriegswaffenkontroll Gesetz - War Weapons Control Act (Germany)
KWL: Kriefswaffenkontroll List - War Weapons List (Germany)
MD: Ministerial Decree (Belgium)
NBC weapons: Nuclear, Biological, Chemical weapons
NPT: Non-Proliferation Treaty
OSCE: Organization for Security and Cooperation in Europe
RD: Royal Decree (Belgium)
SALW: Small Arms and Light Weapons
SG Decree: Strategic Goods Decree (the Netherlands)
SGCU: Strategic Goods Control Unit (Belgium)
Team POSS: Team Precursors, Origin, Strategic Goods and Sanctions (the Netherlands)
UK: United Kingdom
UN: United Nations
WMD: Weapons of Mass Destruction

Introduction

Trade in 'strategic goods'ⁱ is subject to controls in order to combat illegal trade and to avoid undesirable use.¹ Historically, national control regimes focused on controlling exports by their own arms producers, so as to prevent the goods from being delivered to (from a national security perspective) undesirable destinations.² Because national control regimes by definition are jurisdictionally limited to their own territory, initiatives have also been taken at international level. These international control regimes mainly focus on the need for export controls, while more attention has been paid lately to brokering.³ Much less has been done in the field of transit and import controls. The importance of a good transit control regime became clear quite recently, in early 2012, when - despite the EU arms embargo on Syria - a Russian ship loaded with military equipment sailed to Syria through the national waters of various European countries to deliver this equipment to the regime.ⁱⁱ

The limited attention devoted to transit is striking, given that national control regimes exclusively regulating exports can only be effective if all countries worldwide would impose, apply and enforce uniform export conditions. Uniformity is of prime importance since any variation in terms of the personal and material scope of control, or in the conditions for permitting trade in arms and their interpretation and application, or in the capability of prosecution and imposition of penalties, creates lacunae that dishonest dealers can exploit.⁴ Since control measures are not only aimed at private actors, but certain regimes are also among the forbidden destinations, any such complete and effective global network of national control regimes is utopic. This makes it important to look at the whole cycle of arms trade activities and consider what combination of control measures, for each of the separate activities, will enable the best possible control. Every chain is as strong as its weakest link, and the fact that the chain for foreign arms trade runs across different jurisdictions creates specific risks. In effect, national authorities lose their control over goods once these leave their own territory, they thus rely on information from elsewhere to check whether the requirements they have imposed are respected also after export. In these conditions, it is clear that control of transit is a vital link in achieving a sound and effective export control regime for strategic goods.

As transit is by definition a cross-border issue, it is worthwhile comparing the transit control regimes in different EU Member States. Despite progressive harmonization of EU Member States' export control policy, policy on transit - mainly for military equipment - is still far from being harmonized. In this report we analyse transit policies in Europe concerning strategic goods. The report focuses on the transit of strategic goods and is thus not limited to transit regulations and policy practice on conventional military goods (such as combat vehicles,

ⁱ For the purpose of this report, 'strategic goods' refers to military equipment and their components as well as dual-use items. Dual-use items are *per se* destined for civil use, but their application can also serve for military purposes or for making or using Weapons of Mass Destruction. This is true for instance for a wide range of chemical and biological substances, nuclear materials, electronics, telecommunications equipment, computers and numerous other goods. Foreign trade in these strategic goods is controlled and includes a wide range of trade activities.

ⁱⁱ When, a few months later, it appeared that once again a Russian ship loaded with military equipment (combat helicopters) was on the way to Syria, an intervention took place and the ship was prevented from docking in Syria.

military vessels or firearms) and their components. Alongside conventional arms and weapons systems, we also analyse regulatory and policy practice on the transit of a wide range of dual-use items. These are civil items that are not specifically designed, intended or *as such* suitable for military use, but which still have strategic importance due to their potential military applicationⁱ. The decision to explicitly address the control regimes for both categories of strategic goods in this report is in line with the current international, regional and national control regimes which, generally speaking, cover approximately the same categories of strategic goods.

This publication contains a detailed description of regulations and administrative practices for controlling the transit of strategic goods in the Flemish Region of Belgium, Germany, France, the Netherlands and the United Kingdom.ⁱⁱ For the five national regimesⁱⁱⁱ investigated, the description of the legal framework at national level is supplemented in each case with relevant aspects of administrative practice. Not all countries, in fact, take an equally formal legal approach. As will be shown in this report, the transit of strategic goods is a complex matter. Some countries have completely separate systems with distinct competent authorities depending on whether military equipment or dual-use items are involved; in other countries there is a single legal framework and a single competent body.

The objective of this study is to compare these five transit control regimes at national level with a view to drawing lessons about their effectiveness. Only the general control regime for transit of strategic goods falls within the scope of this investigation. Specific rules of control that apply beyond the general framework are not addressed, such as arms embargoes and other sanctions (for instance, directed against Iran), exceptional measures for transit of NATO forces' military equipment, or weapons held by armed forces.

Before we move on to describe and analyse the five national regulatory and administrative regimes, we look into the specific characteristics of transit and the implications thereof (risks, challenges) for developing an effective and efficient control regime for such transactions. Next, European provisions relating to transit control are outlined. These provisions are binding for all the countries discussed. As we shall see, the EU allows the Member States much freedom in developing their own control regimes for the transit of military equipment. This is not the case for the transit of dual-use items, where Member States only have limited room for interpretation and manoeuvre. In all countries there is a strong interconnection between export control and customs policy. Since customs procedure is regulated at the EU level, we shall also discuss the relevant provisions in the section covering the European framework for transit.

This study is based on information obtained on the basis of a literature review, legislation and administrative documents, and of a survey carried out among officials responsible for export

ⁱ This is an instrumental definition of dual-use items, for the purpose of the comparative approach.

ⁱⁱ This report is based on findings from a research project of the Flemish Peace Institute into the efficiency and effectiveness of legislation and policy practices regarding transit in Belgium. In a previous (Dutch-language) publication, the focus was on the situation in Belgium while the situation of the other four countries investigated was used as a reference point for the Belgian legislative framework and policy practices (Van Heuverswyn, 2013). In this publication, the comparative analysis of all five EU Member States takes centre stage.

ⁱⁱⁱ The Flemish regime for transit control is a part of a broader Belgian regime and is not a national regime in the strict sense. In this report it is included as a national regime to allow for a comparative approach with the neighbouring countries. .

control and customs employees. For the survey of competent authorities we worked in three phases corresponding to the Delphi method: an initial survey by telephone or in writing; a second set of questions during an interview; and feedback to all respondents about the most important findings of the analysis.⁵ We would like to thank all the people who were willing to offer their cooperation.

1 Specific characteristics of transit

Before moving on to describe the EU political and legal framework on transit of strategic goods and to analyse the five national regimes, we will first take a look at the specific characteristics of transit transactions and the international obligations concerning transit control.

The specific - practical and legal - characteristics of transit create particular challenges for policy and legislation on transit control, and to a great extent set the parameters for effective (national) controls.

1.1 No unambiguous definition of transit

Transit is not a legal concept with an unambiguous meaning. In current usage, it includes any transport of goods through a certain territory. For legal purposes its definition is tied to the territory over which the regulatory authority has jurisdiction: usually the national territory, sometimes extended on the basis of treaty-based agreements (e.g. in Germany), or several national territories where jurisdiction has been transferred to a supranational organization (currently only the case for the European Union).

Legally, a concept can be delimited for purposes of current application if the competent authority, for example, only wishes to regulate one or more specific sub-activities or aspects. This is the case for transit, which can have various meanings according to the regulating authority and the aims proper to the field of government involved:

- **At international level**, *transit* and *transshipment* are mentioned in a variety of documents (see Annex), without clarification of what should be understood by them. This is a serious problem in itself for a globally effective transit policy because it leaves the choice of defining transit to the national authorities, which leads to differences that dishonest dealers can exploit.
- **European Union regulation** uses several definitions, depending on the goals of the policy sector involved. In the context of arms trade, the User's Guide on arms control leaves the member states the choice between a general description (all traversing of EU territory, which is also the definition of the Dual-use Regulation), and transit involving transshipments or a change in the means of transport. In the context of the unified European market, the term transit does not exist in a customs-technical sense. 'External transit'ⁱ and 'customs storage' are the only 'customs procedures' at European level in which transit activities are addressed and for which customs authorities have the competence and means to conduct controls. All other forms of transit are irrelevant from a fiscal/customs viewpoint.
- **At the national level**, there is the same duality between export control and custom legislation.

ⁱ 'External transit' is a customs procedure for goods that transit the EU customs territory with exemption from fiscal and/or trade policy measures. There are three possible scenarios: 1) non-community goods enter the EU from a third country and are transported to an EU Member State where they enter free traffic (and receive the status of community goods); 2) the opposite movement: community goods are exported from an EU Member State and transported across the territory of other Member States (as community goods) before leaving the EU and becoming non-community goods upon crossing the external border; 3) non-community goods are transported from a third country via the EU to another third country - these goods do not change status and remain non-community goods. See further details below.

1.2 Ratio legis: the risk of diversion

Transit is situated between exports and imports in the arms trade process. In order to make a globally sound and effective export control regime, transit should be subject to the same conditions as exports. The initial control of a legal transfer is in principle done in the exporting country. Transit controls are therefore above all secondary and supportive, inasmuch as they serve to ensure that further transport of goods under the same conditions is guaranteed: *“Transit controls provide opportunities to strengthen state control at a stage when arms shipments are particularly vulnerable to diversion to illicit markets”*.⁶

Each type of transaction has its own specific risks. Diversion is the most significant risk for transit. Diversion means that, while en route, goods are diverted from the destination approved initially (i.e. during the export licensing procedure) to an illicit destination or end-user, whether or not in combination with common lawⁱ offences such as forgery, bribing officials, or evading physical (border) controls. In order to avoid this, in principle control is needed from the moment that the cargo leaves the country of export up to the moment that the goods arrive at their destination, i.e. their end-user. Transit control plays a crucial role in this context as a way of ensuring that:

1. the goods at all times continue to meet the conditions of the export licence;
2. they are not diverted to non-authorised recipients along the way;
3. they are not manipulated en route, e.g. so that part of the cargo enters the domestic market (an internal security concern for countries facing the threat of terrorism) or so that other, illicit goods are smuggled through with the legal cargo.

Some national control regimes focus mainly on transit involving transshipments or changes to the means of transportation, because it is assumed that this is where the greatest risk of diversion exists. There is a risk, however, that concentrating on transshipment will make transit without transshipment more attractive for manipulation by actors in bad faith, precisely because it is not subject to control.

Diversion can entail domestic as well as foreign risks. The different motivations for control determine the range of possible control measures. International and domestic concerns have a different logic and require distinct control measures (which furthermore do not necessarily come under one and the same competent authority):

1. **the international security perspective** aims to prevent the goods from ending up in undesirable destinations (a general concern of international security), and to prevent diversion (a specific issue for transit). Here the focus is on ensuring uniform export conditions, with potential scenarios being:
 - transit control as a way to maintain original export conditions if these are similar to those of the country of transit: the goods in transit (still) remain in accordance with what was licensed; no changes with regard to destination, end-use, etc;
 - the blocking of transit in order to have the possibility to impose additional (licensing) conditions in the event that no export conditions have been imposed, or if the export conditions are less strict than the national requirements in the transit

ⁱ These are crimes that do not specifically constitute a violation of export control legislation and are punishable according to general criminal provisions.

country, or because there have been changes with regard to the cargo, the destination or the end-use.

2. **Domestic and civil security perspective:** protection of one's own population is the central issue, with two possible scenarios here as well:
 - control in order to prevent the goods from disappearing from the radar within one's own borders or being stolen by organizations that are active in one's own territory - criminal organizations, terrorists or violent separatist movements that use terror;
 - physical control of the cargo, i.e. the securing of dangerous goods (e.g. explosives) which could directly threaten the security of the local population and the environment.⁷

Whereas the first two sets of goals are primarily aimed at a consistent export policy (ensuring identical conditions for one's own and transiting exports) and an image of reliability ('our territory cannot be abused'), the latter two are mainly aimed at domestic security. In a world facing the constant threat of terrorism, in which violent acts and attacks are no longer territorially confined, concerns over diversion during transit as a potential threat to domestic security should also gain in prominence. The requirements here are less of an administrative nature; they rather focus on physical controls on the physical security of the goods. Potential scenarios, each with their particular focus, are:

- the country of origin, where the initial export licence was granted, applies equally strict export control conditions: transit control then aims at ensuring that the goods **continue to satisfy** the approved conditions upon departure by checking the authenticity of the documents and the absence of manipulation;
- the country of origin applies less strict conditions: transit control aims to prohibit such transit or to formulate **additional conditions** in a transit licence;
- in the country of transit, **changes** occur with regard to cargo and/or destination and/or end use: transit control checks whether the initial export conditions still apply; if not, additional conditions are imposed by means of a licensing procedure.
- In addition, regardless of the conditions in the country of origin, there may be a need for **physical controls** to guarantee domestic security.

When considering the various scenarios or combinations of scenarios, **diplomatic considerations** may also play a role. Too much scrutiny on other countries' export policy in deliberations on *transit* licences can be perceived as a signal of distrust. Some countries therefore explicitly include diplomatic considerations in the assessment procedure, or opt for a standard approach for all countries with a *de facto* more flexible handling of transit from/to 'friendly' countries.

1.3 Control of transit agents: a legal construct

Given the territorial limits of national jurisdictions, transit countries cannot exercise any direct control over exporters who by definition are located in another country. National authorities

must find a territorial contact point, i.e. a party located within their own jurisdiction: a ‘carrier’ who bears responsibility for ensuring that the goods transit the national territory in conformity with national requirements. Carriers covered by national control regimes include mainly shipping agents, customs agents and transport companies; in other words, dealers who are not themselves actors in the arms trade.⁸ From the standpoint of controls on arms trade, the ‘carrier’ is thus a ‘legal construct’ as carriers are not arms traders. The list in the following table illustrates the profile of transit agents.

Table 1: the profile of transit agents based upon primary activities⁹

Type of organization	Activities
Shipping agent	The shipping agent is the representative or appointee of one or more shipping companies on behalf of which and on whose account he (contractually) works. Shipping agents take care of a broad range of activities for the shipping company’s ships. ¹⁰
Cargo (or Port or Transport) Agent	Agents are also called the architects of transport. They are hired by the seller or buyer to organize the transport of goods. To this end, they themselves usually call upon several intermediaries to bring the goods to their destination. Their tasks include: maintaining contact with overseas shipping agents, document legalization, drafting shipping documents, bills of lading and the like, arranging the surety bonds for customs, and so on. ¹¹
Transport commissioner	Transport commissioners are not always also cargo agents. They are responsible by contract or ‘on paper’ for transport and are obliged to transport goods for their contracting partner, but have the actual transport carried out on their behalf by third parties. ¹²
Customs agent	Customs agents form a specific category of agent. They are traditionally the link between the companies and customs. They handle the administrative process with regard to the import, export and transit of goods. According to the Belgian customs website, ¹³ the customs agent in the international delivery chain is responsible for: <ul style="list-style-type: none"> - applying the provisions on representation when submitting goods to a customs procedure; - in the event of indirect representation, submitting the customs declaration or the summary declaration correctly and on time.

The ‘legal construct’ of an extra party besides the actual dealers in arms trade (exporters) has the advantage of making bad-faith practices more difficult. Not only is the exporter controlled in the country where he is located; he also has to find a partner in each transit country who will transport his cargo of goods through that country in conformity with national requirements. In other words, dishonest exporters must find dishonest or, at least, ignorant transit agents for their illicit cargo and/or illicit destination.

The focus on transit control involving transshipment should not create particular difficulties for professional transport firms in ensuring that the cargo they carry transits the country in accordance with national requirements. Customs agents whose activities are mainly focused

ⁱ The names of the different categories of carriers is based on Dutch literature and official (customs) documents in Dutch, they might slightly differ in other countries (The profiles in Dutch are called ‘scheepsagent’, ‘expediteur’, ‘vervoersommissionair’ en ‘douane-expediteur’).

on handling the administrative formalities of a shipment are in a different position. Both kinds of actors are highly dependent on the reliability of the information about the goods that the exporter-customer provides them with.¹⁴

1.4 Practical feasibility of transit controls

Several factors significantly restrict the practical feasibility of conducting controls on the transit of strategic goods.

A first important factor concerns the **modes of transport** used in transit. Various practical problems arise according to the type of means of transport:

- It is generally accepted that transit in a nation's territorial waters or its air-space, with no stops along the way, is very difficult to control from a practical standpoint;
- For countries with 'small' territories, transit via the road or railway is difficult to control (because of limited time to intervene) if there has been no sufficient, detailed prior announcement of the transport (see also below on the difficulties of customs control).
- Ports, inland harbours and airports where the goods 'land' and are eventually transhipped are in practice the only locations where effective and systematic control is considered possible.

Secondly, most countries, in view of the **large volume of transit**, focus primarily on a certain type of transit considered problematic or sensitive. This can happen both on a systematic and *ad hoc* basis. The focus for systematic control can be on the nature of the goods, the origin or destination of the goods, the handling (transhipment or not), the transhipment location, or a combination of these aspects. Economic considerations in the context of transit control seek a compromise in addressing economic interests – notably those of ports and airports - and avoiding additional administrative burdens, such as the duplication of controls in the country of origin and in all transit countries.

A third important factor for the practical feasibility of transit control concerns the capability of **customs services** to supervise them. The competent authorities rely on the customs for monitoring compliance with export control policy. Front-line customs officials are responsible for conducting physical and document controls when goods enter and leave. Given the differing goals of export control and customs policy, in practice there are a number of limitations on the customs' inspection capacity. From a technical customs standpoint, in EU countries the category of 'external transit' applies only to goods that transit the EU customs territory under suspension of fiscal levies and/or trade policy measures. Because such goods are not of interest in financial terms, customs procedures only demand limited information in the relevant declaration. Thus the possibilities of checking strategic goods that are subject to licensing are limited, mainly because of the problems in identifying them. Because customs is an EU competence, regulated entirely at the European level, these limitations apply in all EU countries. Nonetheless, it is vital for an effective transit and export control policy to address the problems that customs services experience in the field when it comes to actually being

able to control goods. Without concrete supervision and control, a control regime only exists on paper.

1.5 Limited international focus on the transit of strategic goods

National legislation in many fields is tied or influenced by regional and international regulations, guidelines or recommendations. This also applies to the control of legal trade and combating illicit trade in strategic goods. In recent decades, conditions for an effective control regime have been elaborated in a variety of international fora.ⁱ From the analysis of various international control regimes, however, it appears that the current international framework provides very little input and incentive for the development of a national control regime. One of the reasons is the lack of a generally accepted description of transit. One could assume that all documents mentioning transfers, trade, or trafficking¹⁵ in general would not only refer to exports, but also apply implicitly to other types of *transfer* activities, such as transit. The focus, however, is mainly on export control. The analysis of international regulations and background documents shows that transit and transshipment are seldom explicitly mentioned. Even less often does one find specific obligations and regulations, or a description or definition, for this type of trade.ⁱⁱ It is important to emphasize that measures adopted within the European Union constitute an exception in this regard: there are (separate) European regulatory documents, with specific stipulations for national control regimes,ⁱⁱⁱ for the transit both of military equipment and of dual-use items

The table below gives an overview of the stipulations concerning transit in the various relevant international regimes (see also a more thorough descriptive listing in the annex). Note that some important aspects usually included in national control regimes have so far not received any international attention, for example:

- the personal scope: which persons engaged in transit are subject to controls?;
- the material scope: are these the same lists as for export control or not?;
- the assessment criteria for distinguishing legal from illicit transit: are these the same criteria as for export?

A uniform approach to these three aspects, together with the description of the type of transit, is however a vital component for any effective control regime. Recalling the earlier description of the characteristics of transit: every national variation in terms of the type of transaction

ⁱ Depending on the status of the organization and the chosen instrument, these provisions constitute either an obligation or a recommendation for the Member States or participating countries.

ⁱⁱ In international documents, various terms are used as synonyms: *trade*, *trafficking*, *transfers*, without clarification of which type of transaction they refer to. One may imagine that transit implicitly falls under such general wording. Most documents only talk about transit and generally name this in connection with export and with less formal obligations (for instance, a formal authorization or licence is not always required, or national 'measures' suffice). Only UN Security Council Resolution 1540 mentions transit as well as transshipment when defining the requirement for a national control regime to cover exports and transshipment, including appropriate legislation and regulations on exports, transit and transshipment.

ⁱⁱⁱ Initially developed for exports, in 2008 the scope of the provisions on military equipment, and in 2009 of those for dual-use items, was expanded to include transit among other things. We discuss the European framework for transit control of strategic goods extensively in Chapter 2 of this report.

controlled, the (territorial, personal and material) scope of the control measures, and the criteria for legal trade, creates legal lacunae that dishonest dealers can exploit.

It is not entirely clear why transit receives so little attention at the international level. The notable absence of specific stipulations with regard to transit could suggest that there is no political will or consensus to strictly control transit or transshipment, or to establish a legal basis for it in national legislation. It seems difficult to reconcile national views, and states have unequal capacities when it comes to the feasibility of developing, effectively implementing and maintaining a full-fledged transit control regime. Underlying, there could be the assumption that it is enough to have export controls in which end-use is monitored (possibly in combination with import control). In other words, if the start and end point (namely, the exporter and final destination) are controlled by the export licensing procedures, then the entire chain is under control and no specific monitoring in between - of transit - is needed. Such reasoning is not only reactive, limiting the possibility to check whether all the conditions have been respected until after arrival, but it also necessarily leaves violations and infringements unpunished, as a result of the lack of extra-territorial jurisdiction and an international legal system. Furthermore, such an approach fails to take into account the specific characteristics of transit and more specifically the risk of diversion, which constitutes a threat not only to international, but also to domestic security. In a world facing the constant threat of terrorism, in which violent acts and attacks are no longer subject to territorial limits, the focus on diversion during transit as a potential threat to domestic security also needs to be strengthened in international agreements.

From the analysis of various international control regimes, it appears that only for small arms and light weapons and for items related to weapons of mass destruction obligations have been developed and measures included which reflect the double goals that export control policy should aim for: non-proliferation for reasons of international security and control, and safeguarding domestic security (including control of physical security).

The importance of transit control of conventional arms was recently acknowledged for the first time in a UN General Assembly Resolution (2 April 2013). After the breakdown of the negotiations on a general Arms Trade Treaty, a sufficient consensus was achieved within the United Nations General Assembly for adopting the text of the treaty as a resolution.¹⁶ Because the resolution is currently not yet enforceable by national law (while waiting for the required number of ratifications), we will not address this further. The substantial provisions that implicitly or explicitly concern transit are discussed briefly in the overview in annex (see 8.2.2).

1.5.1 Regulations on the transit of SALW

The UN Firearms Protocol¹⁷, the UN Action Programme SALW (PoA)¹⁸ and the OSCE Document on small arms and light weapons¹⁹ are binding documents (legally, respectively politically binding) in which the transit of SALW is addressed.

The UN documents require the adoption of national measures with regard to (international) *transit*. The PoA specifies that this should be done through legislation or administrative

procedures. Both UN documents also require Member States to establish penalties, even though this is formulated more generally, for illicit trade or movements (*transfers*).

The UN Firearms Protocol further requires that, prior to issuing an export licence, transit countries should not object to the transit, the export licence itself should contain information on transit countries, and the import licence should be provided to the transit countries beforehand by way of information. The Firearms Protocol also notes a need for security measures during transit, and for border controls and cross-border cooperation between police and customs. It encourages Member States to exchange information, inter alia about transit, and to seek cooperation from the dealers involved, including transit agents.

The OSCE Document on SALW leaves it to every State independently to decide whether separate national procedures are needed in order to control transit in its territory. In the event of transit through a State that requires permission for this, it is up to the exporting State to make sure that the permission is granted. The annex attached to the Document to deal with information exchange also provides for the inclusion of information about transit countries.

Table 2: Summary of international regulations relating to transit of SALW

Item	Description	Source:	Source
Motives for regulation	- Strengthening interstate cooperation with regard to combating illicit arms trade	UN Firearms Protocol	Legally binding
	- Preventing illicit arms trade	UN Programme of Action (PoA)	Politically binding
	- Reinforcing trust and security between participating countries	OSCE Doc SALW	Politically
	- Combating diversion to undesirable recipients during transport		
Description of Transit	<i>Movement</i> and <i>transfer</i> through the national territory - no definition	UN Firearms Protocol	Legally
	Transit - no definition	UN PoA OSCE Doc SALW	Politically
Personal scope			
Material scope	Description of SALW instead of lists	UN Firearms Protocol	Legally
Prohibited transit	Illicit transit = transit without national authorization or marking	UN Firearms Protocol	Legally
	Transit in conflict with embargoes	UN PoA	Politically
Control measures for transit	- national measures with regard to transit (not necessarily legislative measures)	UN Firearms Protocol UN PoA	Legally Politically
	- Including information about transit countries in the assessment of the export licence application - When assessing the export licence, check whether transit countries do not object - Provide the information in the import licence to transit countries - Transport security measures required	UN Firearms Protocol	Legally
	- Control of the transport (<i>shipment</i>) - If a transit licence is required, the exporting country must make sure that authorization is granted	OSCE Doc SALW	Politically
Required documents	- Written notification that transit countries do not object - Information about transit countries in the export licence	UN Firearms Protocol	Legally
	- Authorized end-user certificates	UN PoA	Politically
Assessment criteria	- Nationally determined on the basis of a licensing system - Marking arms	UN Firearms Protocol	Legally
Other aspects	Keep information for 10 years, inter alia about transit countries (without clarification of who: the authorities or the carriers themselves)	UN Firearms Protocol	Legally
Supervision mechanism	- Authenticity of documents must be able to be controlled - Controls (border controls, cross-border cooperation, among others) - Interstate information exchange about, among others,	UN Firearms Protocol	Legally

	transporters and criminal organizations and their <i>modus operandi</i> - Ensure cooperation of transporters, among others, for tracing illicit activities		
	- Mutual information exchange about transit	OSCE Doc SALW	Politically
Sanctions	- To be provided in the legislation	UN Firearms Protocol	Legally
	- Need for criminal sanctions (generally formulated), and national measures for violation of embargoes - Take enforcement measures	UN PoA	Politically

1.5.2 Regulations on the transit of items related to weapons of mass destruction

In the context of non-proliferation of weapons of mass destruction, only UN Resolution 1540²⁰ pays attention to the transit of nuclear, biological and chemical (NBC) weapons related items. Member States are obliged to adopt and enforce appropriate and effective national controls for exports, transit and transshipment of WMD, their means of delivery, and related materials; and to develop, monitor, evaluate and maintain them. Such controls include appropriate laws and regulations for controlling exports, transit, transshipment, and re-exports, as well as controls on activities that provide funds and services for export and transshipment, such as financing and transport. Member States are also required to control end-use and to take effective physical protection measures. Finally, there are requirements concerning border controls and enforcement measures and the obligation to provide appropriate sanctions for violations.

For the sake of completeness, three international treaties can be mentioned that forbid the trade in weapons of mass destruction: namely the Non-Proliferation Treaty (1970)²¹ for nuclear weapons, the Biological and Toxin Weapons Convention (1972),²² and the Chemical Weapons Convention (1992).²³ Without providing specific measures for *transit*, the general provisions of these treaties are also implicitly relevant for transit.

Table 3: Summary of international regulations relating to transit of WMD, including WMD related dual-use items

Type of measure	Description	Source	Legal force
Motives for regulation	- Prevent NBC weapons from reaching illicit destinations/users	NBC treaties	Legally binding
	- Prevent weapons of mass destruction from falling into the hands of non-State actors	UN Res. 1540	Legally binding
Description transit	- Transport or movement of NBC weapons - <i>Transit</i> and <i>transshipment</i> - no definition	UN Res. 1540	Legally binding
Personal scope			
Material scope	- Lists created by export control regimes, as a complement to the NBC treaties	NBC treaties	Politically binding
	- NBC weapons, their means of delivery and related materials or materials included in national control lists	UN Res. 1540	Legally binding
Prohibited transit	- Prohibition on trade in NBC weapons	NBC treaties	Legally binding
	- Prohibition on trading in NBC weapons, their means of delivery and related materials, with non-State actors	UN Res. 1540	Legally binding
Control measures for transit	- Laws and regulations to control transit and transshipment, including financing and transport - (Physical) protection measures for transport and storage - End-use controls	UN Res. 1540	Legally binding
Required documents			
Assessment criteria			
Supervision mechanism	Effective border controls	UN Res. 1540	Legally binding
Sanctions	Effectively punish violations, under criminal or civil law	UN Res. 1540	Legally binding

2 *The European legal framework on the transit of strategic goods*

When the European Communities²⁴ were founded in the 1950s, the organization acquired a *supranational* character through the transfer of national competences to the European level. As a result, it was entitled to intervene in the national legal systems of the Member States and to adopt legislation imposing rights and duties on EC nationals without the intermediary of national legislators. In this respect the European Community distinguished itself from other regional and international organizations which can only adopt decisions that are of a (legally or politically) binding character vis-a-vis the participating states, and that must be converted into national law in order to enter into force for citizens. In recent decades, the EU has developed into a mixed structure including supranational alongside inter-governmental competences.²⁵ The number of legal instruments has also increased, with different degrees in binding character, reflecting the mixed character.

For the purpose of the present research, two distinct aspects are important at European level which correspond to two distinct policy sectors, each with their specific goals and targets. One concerns the economic perspective, regulated by the Community Customs Code; the other relates to considerations of international security (foreign policy). Since the establishment of the Single Market on 1 January 1993 there has been free movement of goods within the European customs territory, also applying – despite a few exceptions – to strategic goods. In order to safeguard the security interests of Member States, the EC Treaty valid at the time included exception clauses (Art. 30 and Art. 296) on the basis of which the Member States could take national control measures. Both aspects will be examined below, i.e. customs procedures, and the provisions on transit as a component of export control policy.

For the sake of completeness, EU embargoes and specific regulations should also be mentioned in this context. EU embargoes may be imposed by the EU itself or in implementation of a UN Security Council Resolution. The EU also uses specific regulations to impose additional control measures on the Member States for specific categories of goods or with specific restrictions applying to certain destinations.²⁶ These institute a particular regime in which any provisions diverging from general regulations (such as the Dual-use Regulation) take precedence over the latter. An instance of the first type, focusing on specific categories of goods, is Regulation (EC) no. 1236/2005 covering goods that can be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment. An instance of the second type, related to destination, is EU Regulation 961/2010 concerning sanctions against Iran.²⁷ Some countries integrate these additional provisions into their legislation on export controls; other countries adopt separate legislative measures, supplementing those on export control. Either way, the provisions form an integral part of the overall export control regime, also with regard to transit. We shall not address these specific measures in the framework of the present study, which focuses on the general transit control regime.

In discussing the legal framework on strategic goods, we shall follow the EU's own distinction between military equipment and dual-use items. Small arms and light weapons are a sub-category of military equipment. For trade in weapons of mass destruction (and related items) there is only a European Strategy, but no specific legal provisions, since the matter is regulated in international treaties (see 1.5.2). The EU does have a policy and its own regulations in this context on dual-use items, but their scope is broader than civil goods that could be used in weapons of mass destruction. A range of civil goods that could have a conventional military application also fall under the dual-use control regime: for instance encryption systems, non-military night vision equipment, unmanned aerial vehicles and more belong to this category.

2.1 EU legal framework on the transit of military equipment

Intra-community trade in military equipment is free for economic purposes (free movement of goods, no internal borders). On the basis of Article 346ⁱ of the Treaty on the Functioning of the EU²⁸, however, Member States can take their own national control measures to safeguard their essential security interests. Article 346 states that: *“any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes”*.

The willingness of the Member States to mutually align their national policies has gradually increased in recent years. On 26 June 1997, the Council adopted the EU programme for preventing and combating illicit trade in conventional arms. The EU and its Member States agreed both to act together in a coordinated way, and to assist other countries in preventing and combating illicit trade in conventional arms. The Programme was more like a general declaration of intent, but was important because of the agreement it included on monitoring the situation and evaluating it annually. Thereby, it created a framework for permanent consultation.²⁹

Against this background, the EU Code of Conduct on Arms Exports was adopted on 5 June 1998.³⁰ The Code of Conduct was politically binding on EU Member States and imposed eight common criteria for assessing licence applications for the export of military equipment. The Code of Conduct only applied to exports, not to transit. It included eleven implementing provisions prescribing how the Member States were expected to apply the Code. One of the provisions (no. 5) involved the Member States working together to draft an EU Common Military List of military equipment. This list was first adopted on 13 June 2000. It is based on the ‘Munitions List’ of the Wassenaar Arrangement and is regularly updated.³¹ The European list contains 22 categories of conventional arms and defines a number of specific concepts. The EU Common Military List is as such not legally binding for the Member States, unless cited in a document that is itself binding (see more below).

2.1.1 The Common Position 2008/944/CFSP

On 8 December 2008, the European Union adopted a Council Common Position (CP) for defining common rules governing control of exports of military technology and equipment: CP 2008/ 944/CFSP.³² The CP replaced the 1998 Code of Conduct and is a legally binding instrument for the Member States in the sense that they are obliged to adjust their national policy to conform with the provisions of CP 2008/944/CFSP.

However, there is no unanimity regarding the proper legal force of a Common Position. It may be argued that it is rather a *soft law*³³ instrument and that the wording of each provision

ⁱ The former Art. 296 of the EC (establishment) Treaty.

specifically indicates the extent to which the provision is binding, according to how much leeway is left to the Member States in implementing it.

In substance, CP 2008/944/CFSP largely reiterates the provisions of Code of Conduct, with a few refinements and extensions. An important change is that its coverage of trade transactions is extended: applications for export licences now include applications for 'transit' and 'transhipment' (Art. 1. 2.).

CP 2008/944/CFSP does not introduce a uniform licensing system in the EU Member States. Whether or not to impose a licence obligation on exports, transit and other trade transactions remains a national competence. The fifth preambular consideration clarifies the Member States' objectives and motivation: *"Member States intend to reinforce cooperation and to promote convergence in the field of exports of military technology and equipment within the framework of the Common Foreign and Security Policy (CFSP)."* For Member States that have a national control regime, CP 2008/944/CFSP requires them to use the same assessment criteria for the evaluation of national licence applications for goods that appear on the EU Common Military List (Art. 1.1.).

2.1.1.1 Description of transit

The terms transit and transhipment are used in the Common Position between quotation marks without any further description, definition or reference to another document being provided. These details are to be found in the User's Guide which provides Member States with additional information on implementing CP 2008/944/CFSP. The User's Guide describes transit as *"movements where the goods (military equipment) merely pass through the territory of a Member State"* and transhipment as *"transit involving the physical operation of unloading goods from the importing means of transport followed by a reloading (generally) onto another exporting means of transport."*³⁴

Given that CP 2008/944/CFSP does not impose a licensing system on the Member States, these definitions are to be considered as suggestions. Transit that is governed by provisions in national legislation can be regulated either in the sense of transit generally, or as transit involving transhipment. The decision rests with the national authorities.

2.1.1.2 Material scope

The above-mentioned EU Common Military List (see above, p. 21) serves as the reference for drafting national lists. It does not automatically supplant them (Art. 12); the Member States themselves must take the requisite measures to adopt the List as an area of application for their national control regime.ⁱ

2.1.1.3 Assessment criteria for licence applications

CP 2008/944/CFSP formulates eight criteria against which, from 2008, licence applications with regard to transit and transhipment must also be tested.ⁱⁱ These eight criteria are further subdivided into sub-criteria and factors. National licences for transit and transhipment of

ⁱ The EU Common Military List is however binding in defining the scope of application for Directive 2009/46/EC (see below for a clarification on the Directive).

ⁱⁱ Alongside the 27 EU Member States, there are six other countries that apply the European criteria on a voluntary basis: Bosnia-Herzegovina, Canada, Croatia, Iceland, Norway, and the former Yugoslavian Republic of Macedonia (FYROM).

military equipmentⁱ must thus be subject to the same criteria as exports, *if* the competent national authority decides to introduce such a licence: this belongs to its discretionary competence, as CP 2008/944/CFSP does not itself specify the cases in which a licence is required.

Criterion	Short description
Criterion 1	Respect for the international obligations and commitments of Member States, in particular the sanctions adopted by the UN Security Council or the European Union, agreements on non-proliferation and other subjects, as well as other international obligations
Criterion 2	Respect for human rights in the country of final destination as well as respect by that country of international humanitarian law
Criterion 3	Internal situation in the country of final destination as a function of the existence of tensions or armed conflicts
Criterion 4	Preservation of regional peace, security and stability
Criterion 5	National security of the Member States and of territories whose external relations are the responsibility of a Member State, as well as that of friendly and allied countries
Criterion 6	Behaviour of the buyer country concerning the international community, particularly its attitude to terrorism, the nature of its alliances and respect for international law
Criterion 7	Potential risk that the military technology or equipment will be diverted within the buyer country or re-exported under undesirable conditions
Criterion 8	Compatibility of exports of military technology or equipment with the technical and economic capacity of the recipient country, taking into account the desirability that states should meet their legitimate security and defence needs with the least possible diversion of human and economic resources for armaments

In terms of practical implementation, Article 10 of the Common Position allows the Member States when assessing applications to take account of the effect of the planned transaction on their economic, social, commercial and industrial interests, so long as these considerations do not influence the application of the common criteria.

CP 2008/944/CFSP contains, like the Code of Conduct, a number of operative provisions and reaffirms the freedom of the Member States to introduce stricter provisions (Art. 3). Most Member States make use of this, both in order to add goods to the EU Common Military List or by providing the opportunity for *ad hoc* licences, and/or for additional or stricter wording or application of the criteria of CP 2008/944/CFSP.

CP 2008/944/CFSP also includes stipulations on the assessment of end-use (Art. 5). Licences may only be granted on the basis of reliable prior knowledge concerning end-use. A carefully

ⁱ The assessment criteria and the consultation procedure on denied licence applications likewise apply to the list of goods specified in Annex I to Regulation 1334/2000, “*where there are serious grounds for believing that the end-user of such goods and technology will be the armed forces or internal security forces or similar entities in the recipient country*”. This stipulation (Art. 6 of CP 2008/944/CFSP) has since been consolidated by the Dual-use Regulation as revised in 2009 (Regulation 428/2009), which explicitly refers to the criteria of CP 944/2008/CFSP as ones that the assessment of licence applications for dual-use items must also take into consideration

checked end-use certificate, or similar appropriate documentation, and/or an official authorization by the country of final destination are required to this end. In the case of exports destined for armaments production in third countries, the Member States shall take due account in their assessment of the potential use of the end product and of the risk that the end product may be diverted or re-exported to an undesirable end-user.

2.1.1.4 No undercut and information exchange

Member States are required to exchange information about licences that were denied on the grounds of the prescribed criteria, and about the reason(s) for denial (Art. 4). When a Member State wishes to grant a licence for an essentially identical transaction that was denied within the previous three years by one or more other Member States, that member must engage in consultation before proceeding to issue the licence. When that licence is nonetheless issued, the Member States that previously denied it must be informed of the fact and of the justification for doing so. This is the so-called no-undercut principle which is designed to prevent Member States from undermining one another's policies. The decision whether or not to allow the transfer of military equipment and technology, however, remains a national competence (Art. 4, 2.). Licence denials and consultations on the issue remain confidential and the Member States may not derive any (commercial) advantage from them (Art. 4, 3.). The no-undercut principle ensures *de facto* a certain degree of harmonization within the EU, and was an important motivation for the Member States to adopt a European regulatory framework.

Due to the general wording of Articles 5 and 4. 1 concerning export licences, in combination with the definitions in Art. 1. 2. – where export licence applications also include applications for transit and transshipment - the stipulations on end-use and the no-undercut principle also apply to transit and transshipment. This interpretation is confirmed in the User's Guide which provides the Member States with details on how to apply CP 2008/944/CFSP.³⁵ CP 2008/944/CFSP further contains a number of stipulations on cooperation and information exchange between Member States, but this only concerns exports, not transit.

2.1.1.5 The importance of CP 2008/944/CFSP

The importance of CP 2008/944/CFSP can be summarized as follows:

- Overall policy regarding cross-border trade in arms, and particularly the decision to demand a transit licence, remains a national affair. CP 2008/944/CFSP does not specify the cases, including the type of transit, for which a licence is required.
- Where there is a national licensing obligation, the Member States are committed to apply the eight commonly-agreed criteria for the assessment of licence applications. This applies to licensing applications for goods that appear in the EU Common Military List.ⁱ The Member States can go further in this, for instance by applying stricter criteria or extending the material coverage.
- In order to avoid Member States undermining each other's policy (no undercut), they have agreed to exchange information and to consult one another with regard to licences denied.
- As a result of its scope being extended (compared with that of the Code of Conduct) to other arms trade activities, including transshipment and transit and also brokering and immaterial transfer, CP 2008/944/CFSP promotes a more consistent approach to various successive or concurrent phases in arms trade transfers.

2.1.2 Directive 2009/43/EC on the transfer of defence-related items

Although the Member States, on the basis of Article 346 of the EU Functioning Treaty, have reserved the right – in view of security considerations - to implement a national arms policy, in 2009 consensus was nevertheless reached to adopt a directive on transfers of defence-related items. Directive 2009/43/EC³⁶ aims “to simplify the rules and procedures applicable to the intra-Community transfer of defence-related products in order to ensure the proper functioning of the internal market” (Art. 1). The underlying aim is to strengthen the European defence industry.

Directive 2009/43 targets intra-Community trade and provides for administrative simplification. It emphasizes that, in doing so, in no way does it seek to limit the Member States’ competence to determine their own policy, and it does not intend to infringe on the national competence for assessment in relation to export policy (introductory considerations 6 and 7). It is relevant in the context of this research because it gives a definition of transit (in order to distinguish it from transferⁱⁱ) and because it *de facto* has an impact on the scope of Common Position 2008/944/CFSP previously discussed. Transit, in the wording of the Directive ‘passage through’ concerns “the transport of defence-related products through one or more Member States other than the originating and receiving Member States (Art. 3.7.).ⁱⁱⁱ

ⁱ This also applies to the EU List of dual-use items in annex to Dual-use Regulation 428/2009.

ⁱⁱ The Directive describes transfer as “any transmission or movement of a defence-related product from a supplier to a recipient in another Member State” (Art. 3.2.), in other words, exports and imports between Member States.

ⁱⁱⁱ Introductory consideration 9 clarifies: “This Directive should not apply to defence-related products which only pass through the territory of the Community, namely to those products which are not assigned a customs-approved treatment or use other than the external transit procedure or which are merely placed in a free zone or free warehouse and where no record of them has to

Article 4.1. lays down the following with regard to transit and transfer: *“The transfer of defence-related products between Member States shall be subject to prior authorisation. No further authorisation by other Member States shall be required for passage through Member States or for entrance onto the territory of the Member State where the recipient of defence-related products is located, without prejudice to the application of provisions necessary on grounds of public security or public policy such as, inter alia, the safety of transport”*. This means that from 1 July 2012 (Art. 18), authorization may no longer be required for intra-Community imports and transit, but only prior authorization for transfer (intra-Community export) to another Member State. It remains permissible for nations to define requirements for the security of transport on their territory.

2.1.3 EU policy on SALW

Just as on the international level, the EU also provides for specific treatment for small arms and light weapons. Several documents have been adopted to this end and for completeness' sake we give a summary here. Most instruments do not contain any concrete provisions related to transit, or do not apply to military small arms, but they do display the parameters of the relevant European policy which implicitly also creates a framework for transit.

- Joint Action 1999/34/CFSP of 17 December 1998 on the European Union's contribution to combating the destabilising accumulation and proliferation of small arms and light weapons³⁷ provides a framework for coordinating and strengthening EU policy with regard to SALW; it was replaced in 2001 by Joint Action 2002/589/CFSP.
- the EU Strategy with regard to small arms and light weapons of 15 and 16 December 2005³⁸ contains a joint declaration of intent by the Member States in which they express the will to contribute to the implementation of the UN Programme of Action on SALW. In the general vision as well as the concrete measures, the focus is on exports and brokering. Transit and transshipment are not mentioned.
- Directive 91/477/EEC of 18 June 1991 on control of the acquisition and possession of weapons,³⁹ amended by Directive 2008/51/EC of 21 May 2008.⁴⁰ This Directive aims at an intra-Community regulation covering the acquisition, the possession and the transfer of weapons among the Member States. It does not apply to weapons for armed forces and police or to commercial transfers of weapons and ammunition of war (Art. 2). The Directive does not apply to military small arms and there are no provisions with regard to transit and transshipment.
- On 14 March 2012, the so-called Firearms Regulation was adopted,⁴¹ intended to implement Article 10 of the UN Firearms Protocol. Regulation nr. 258/2012 includes a number of general requirements with regard to a national control regime. This Regulation also does not apply to small arms and ammunition destined for military use. It is however interesting in the context of this research because of two definitions. Transit is described as: *“the operation of transport of goods leaving the customs territory of the Union and passing through the territory of one or more third countries with final destination in another third country”* (Art. 2. 12.); transshipment as *“transit involving the physical operation of unloading goods from the importing means of transport followed by a reloading for the purpose of re-exportation, generally onto another means of transport”* (Art. 2. 13.).

be kept in an approved stock record “. See below for an explanation of the concept of external transit procedure in the discussion of European customs procedures.

2.2 EU legal framework concerning weapons of mass destruction and the transit of dual-use items

2.2.1 EU policy with regard to the proliferation of weapons of mass destruction

In June 2003, the EU launched its first Action Plan against the proliferation of Weapons of Mass Destruction (WMD), the so-called *Thessaloniki Declaration*,⁴² and on 12 December 2003 the EU Strategy combating the spread of WMD was adopted.⁴³

The aim of the EU Strategy is to "*prevent, deter, halt and if possible eliminate programmes of proliferation*". In addition to generally reviewing the problem and the most effective and efficient ways of tackling it in the EU's view, it also includes a list of specific measures that the EU especially wishes to focus on. It is meant to serve as a kind of 'Living Action Plan', whose application in practice will be very closely monitored.

The Action Plan comprises six measures to make multilateralism more effective through forceful intervention against those guilty of proliferation. Measure 6 concerns improved identification, control and interception of illicit trafficking. Three points of action fall under this measure:

- 1) Adoption of common policies by the Member States with regard to criminal sanctions for illicit exports, brokering and smuggling of WMD related materials;
- 2) *Consideration for* measures for controlling the **transit** and **transshipment** of sensitive materials;
- 3) Support for international initiatives aimed at identifying, controlling and intercepting illicit shipments.

According to the EU Strategy, transit and transshipment of WMD related materials do not necessarily need to be compulsory or systematic (they should be 'considered'). This view can also be found in the so-called Dual-use Regulations.

2.2.2 EC Dual-use Regulations

Since 1994 there has been a Community Regulation on dual-use products and technology.⁴⁴ Export controls on such items are designed particularly to prevent the proliferation of WMD. Even before the UN adopted Resolution 1540 with the same objective in 2004, Europe had thus developed a legal framework on the issue in order to meet international treaty-law obligations (a.o. the Non-Proliferation Treaty).⁴⁵

Control policy for trade in dual-use items is *in se* a European competence. Since Regulations take direct effect in the national legal systems of Member States (without needing transposition measures), legislating by this method is only possible where the EC has full

competence. This competence for civil goods is in principle not disputed. Article 36 of the EU Functioning Treaty⁴⁶ does provide for the possibility of taking national measures for reasons of public security, but its scope is much more limited than in Article 346 which creates a broad field of exceptions for armaments.ⁱ

Precisely because of the dual nature of some civil items, which makes them eligible for use in Weapons of Mass Destruction or for military purposes, the Member States have long resisted Community legislation. Starting in 1994, however, an increasing number of aspects relating to trade in dual-use items have gradually been regulated at European level.⁴⁷ The most recent Regulation of 2009 expresses the motivation as follows: *“The institution of a control regime relates to concerns about international security; the need for a common regulation has become a necessity because of the free movement of goods and the need to ensure a level playing field and equal rules within the Community.”*⁴⁸

Since 2009, transit and transshipment also fall under the scope of the Dual-use Regulation, i.e. to bring it in line with UN Resolution 1540 which covers both aspects.⁴⁹ Various options were considered for transit. Due to the large volume of transit through the EU, it was decided not to establish systematic pre-authorisation requirements, which were considered *“impracticable and excessively burdensome”*⁵⁰. Instead, it was decided to create an option for controlling transit when there are reasonable indications of illicit proliferation.⁵¹ The decision how to concretely implement transit controls remains in itself a national competence, just as for the transfer of goods on the list of sensitive products in Annex IV.⁵²

2.2.2.1 Description of transit

The Dual-use Regulation describes transit as *“a transport of non-Community dual-use items entering and passing through the customs territory of the Community with a destination outside the Community”* (Art. 2. 7.). This applies to *“items which only pass through the territory of the Community, that is, those items which are not assigned a customs-approved treatment or use other than the external transit procedure or which are merely placed in a free zone or free warehouse and where no record of them has to be kept in an approved stock record”*.⁵³

The reference is thus to extra-Community transit of non-community goods from or destined for a third European country. Whether or not transshipment or a change in the means of transportation occurs is of no importance as a criterion for the delimitation of the scope of the legislation. Through this broad description, the Dual-use Regulation thus creates a wide legal base for controlling transit (although on an *ad hoc* basis, see below).

2.2.2.2 Material scope

Article 2, 1. of EC Regulation 428/2009 describes ‘dual-use items’ as follows: *“items, including software and technology, which can be used for both civil and military purposes, and shall include all goods which can be used for both non-explosive uses and assisting in any way in the manufacture of nuclear weapons or other nuclear explosive devices”*.

ⁱ Art. 36 Functioning Treaty (former Article 30 of Treaty of Rome): *“The provisions of Articles 34 and 35 (with regard to quantitative import and export restrictions) shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.”*

Material coverage for the provisions on transit is specified in Annex I of the Regulation. The list is based on the lists of the Wassenaar Arrangement, the Missile Technology Control Regime, the Nuclear Suppliers Group and the Australia Group, and on the Chemical Weapons Convention. Any update to these lists requires an update to the dual-use items list in Annex I, so that it may be brought in line with the latest developments (Art. 15, 1.).

2.2.2.3 Control measures

The Regulation establishes the possibility for the Member States to *“prohibit on a case-by-case basis the transit of non-Community dual-use items, where they have reasonable grounds for suspecting from intelligence or other sources that the items are or may be intended in their entirety or in part for proliferation of weapons of mass destruction or of their means of delivery.”* (introductory consideration 16).

Regarding transit of items from Annex I, Member States can prohibit them if they are destined, or could be used, for certain purposes - namely for WMD.ⁱ When Member States decide to impose such a prohibition, they have to comply with international obligations with regard to non-proliferation. Member States may also decide, instead of a prohibition, to impose licensing in individual cases (Art. 6.2.). The Regulation further provides for a catch-all clause with regard to transit (Art. 6.3.): Member States can broaden the transit prohibition to include items that do not appear in Annex I in the case of military end-use or military destinations under embargo (as stipulated in Art. 4, section 2). Member States that take such decisions shall inform the Commission about the measures adopted, and indicate the precise reasons for the measures (Art. 8.2.). They shall also notify the Commission about any later modifications (Art. 8.3.). These measures are published by the Commission in the C series of the Official Journal of the European Union (Art. 8.4.).⁵⁴

Two aspects indicate that it was not Europe’s intention to develop a fully-fledged framework for national transit control. Firstly, the assessment criteria for licence applications do not apply to transit, but only to exports and brokering.ⁱⁱ Secondly, a number of supporting provisions e.g. on customs procedures, administrative cooperation and record-keeping are not applicable to transit.ⁱⁱⁱ From this, one may deduce that the EU mainly wanted to create the possibility (a legal base for) conducting national transit controls, without the intention to exhaustively develop such a scheme or impose it uniformly on the Member States. Consistent with this, the EU opted for *ad hoc* control of suspect transit rather than systematic control of a certain type of transit. The lack of encouragement for customs cooperation is a missed opportunity though, because transit, from a technical customs perspective, is a difficult transaction to control (see detailed explanation below).

ⁱ The Dual-use Regulation describes it as follows: *“for use in connection with the development, production, handling, operation, maintenance, storage, detection, identification or dissemination of chemical, biological or nuclear weapons or other nuclear explosive devices, or the development, production, maintenance or storage of missiles capable of delivering such weapons”* (Art. 4, section 1).

ⁱⁱ These criteria concern 1) international obligations with regard to non-proliferation, 2) international sanctions, 3) considerations of foreign and security policy, including the eight criteria of CP 2008/944/CFSP, and 4) considerations with regard to the intended end-use and the risk of diversion. Article 12 describing the criteria to which legal trade must be subjected only mentions exports and brokering. The fact that the Commission did not explicitly make the conditions for legal export applicable to transit suggests that it sought mainly create a legal foundation for Member States to control transit, without meaning to apply the export control regime in its entirety to transit.

ⁱⁱⁱ This refers i.a. to customs procedures (Art. 16-18); administrative cooperation and exchange of information (Art. 19); and specific control measures, including the obligation for exporters and brokers to keep records or files of their transactions (Art. 20-21).

2.2.2.4 No undercut principle

EC Regulation 428/2009 obliges the Member States, prior to granting authorizations, to take account of previous denials by other Member States for an '*essentially identical transaction*' (Art. 13.5.).ⁱ Where there are such denials, there shall first be consultation between the competent authority that is considering the application and the competent authority(ies) of the Member State(s) that previously refused to grant authorization. In the event that the authorization is granted regardless, the other Member States and the Commission shall be so informed and all relevant information shall be provided to explain and justify the decision. The goal of this provision is to avoid, so far as possible, that a Member State grants authorization for activities that were previously (at a recent date) denied by other Member States. As a number of criteria imply subjective assessment, such a risk is not imaginary. The provision aims to ensure that countries using a flexible interpretation do not undermine the stricter policies in force in other states.

This provision applies explicitly to transit as well as exports and brokering. In general, preventing Member States from undermining one another's policy has been an important motivation for adopting Community legislation. In practice, the importance of the no-undercut principle is much less for transit than for exports to the extent that, and so long as, not all Member States have a national transit control policy.

2.2.2.5 Sanctions

Article 24 states in general terms that the Member States must take appropriate measures to guarantee proper application of all the provisions of this Regulation, including sanctions for violations. These sanctions must be effective, proportional, and dissuasive. This is the responsibility of the Member States because the EU has no competence for criminal aspects.

2.3 European customs legislation

Customs procedures are relevant in the context of transit control because, at the national level, supervision of compliance with export control regulations is in the hands of the customs services. Since all the countries covered in this study are bound by the Community Customs Code⁵⁵, for the transit of military equipment as well as of dual-use items, we will here discuss relevant aspects of the Code.

2.3.1 Various customs procedures: customs warehouse and customs transport

Goods are under customs control from the moment they enter a European port. This occurs on the basis of a summary declaration of the cargo that must be submitted on entry to the port.ⁱⁱ The declaration provides limited information such as the number of goods, the gross weight, and a summary description of the goods according to the current trademark and/or

ⁱ "*Meaning an item with essentially identical parameters or technical characteristics to the same end-user or consignee*".

ⁱⁱ Advance notification must also take place before these goods enter the port. An initial risk analysis can be conducted on the basis of this advance notification.

commodity code. The goods can be provisionally stored in the port itselfⁱ before they receive a customs-approved treatment.

For a proper understanding of transit in the customs legislation, we need to clarify two specific customs procedures: customs warehouse and external transit.

Customs warehouse is the customs procedure whereby goods can be stored until they are assigned to a definitive customs procedure (for instance, enter into free movement, further transit under external transit, or leave the Customs Union again to be transported to a destination in a third country). This procedure is followed if, upon entry into the port, the goods have yet to receive a definitive destination. Under the procedure known as customs warehouse, they are temporarily exempt from duties and other measures. There is no time-limit for storage in a customs warehouse.

External transit⁵⁶ (Art. 91 of Community Customs Code) concerns goods that enter the Customs Union from a third country with their destination being an EU Member State, or from an EU Member State to an EFTAⁱⁱ country,ⁱⁱⁱ or passing through the EU customs territory from a third country to another third country. The external transit procedure is used for transporting these goods to the place of destination or the last exit office at the external border. This procedure focuses on the transit of non-Community goods exempt from import duties and other charges or commercial policy measures. So-called T1 documents are used for the external transit declaration. For a few years now, processing of these documents has taken place under the New Computerized Transit System (NCTS). The T1 declaration contains data such as the description of goods, the customs office of dispatch and destination, who submitted it, the means of transport, the term of duration and so on.

A guarantee is demanded in order to ensure correct implementation of this customs transport.⁵⁷ As soon as the conditions of the external transit are fulfilled, the guarantee is released again by customs (this is when the goods enter into free movement in an EU recipient country or when the goods leave the customs territory at the external border). The guarantee mainly serves as a warrant in case the goods should be 'pulled out' from external transit, for instance by bringing them into the EU exempt from taxes in order to then sell them in a EU country without observing the formalities for bringing them into free movement, and notably without paying import fees or other duties.

2.3.2 Possibilities for transit control by customs services

The summary declaration upon entry to the port as well as the T1 document for customs transport of non-Community goods contain little precise information about the goods. This is because the goods fall under an exemption regime: so long as they do not have a destination that makes them subject to duties, this information is irrelevant for the customs services. The purpose of customs legislation is in fact primarily fiscal and economic, particularly where import fees, duties and so forth are due, or where import restrictions or other trade measures

ⁱ 45 days (sea transport) or 20 days (other transport)

ⁱⁱ The European Free Trade Association, which currently consists of Iceland, Liechtenstein, Norway and Switzerland

ⁱⁱⁱ When leaving from a EU Member State with the destination in third countries, this applies to exports and not transit.

apply. Such provisions do not apply to non-Community goods. Conditions may however be imposed upon 'entry of goods into the Community' in other legislative contexts, for instance for reasons of public health and environment, or - as in the context of the present study - due to considerations of national or international security.

The complexity of enforcing such non-fiscal measures mainly arises from the fact that not all transactions under customs regulations require equally precise information to be provided. A relatively precise description and flow of information must be provided to the customs when the goods are, for instance, brought into free movement. For other customs procedures a summary description of the goods usually suffices. For goods in transit, the requirements are even more reduced and a simple trademark on a summary declaration suffices. This information, however, is inadequate for determining whether a transit licence is required. The European Commission also acknowledged in a recent communication that the expansion of the control function of the customs services with non-fiscal objectives runs into particular challenges, and that the current procedures are not optimally designed for these purpose (see also below).⁵⁸

This may be illustrated by means of the following scenarios for strategic goods that fall under free movement from an economic (and fiscal) perspective, but are subject to a national licensing policy from the perspective of export control.

Scenario 1: goods originating from third countries, which 'transit' via e.g. Belgium to a destination inside the EU		
Third country	Transit through Belgium	Destination other EU Member State
Non-Community goods (whether under export licence in the country of dispatch or not)	Non-Community goods with a status of external transit T1 Document – limited customs control (including guarantee)	Enter into free movement in the EU Member State of destination, become Community goods
Customs control When goods are brought into the EU territory, they fall under compulsory customs control first on the basis of a summary declaration, and later on the basis of a declaration relating to their actual customs-approved treatment. In this case, external transit applies to the goods' transport until they arrive at their destination in the EU recipient country, where they are cleared and enter into free movement (end of external transit). ⁱ Based upon the T1 document, Customs has limited information about the goods (description) and about the destination (EU Member State). For each modification concerning the goods or the destination, new documents must be provided. Each time, this provides an opportunity for verification (see also below).		
Requirement for a transit licence (export control policy): <ul style="list-style-type: none"> - If military equipment is involved, an <i>ad hoc</i> or systematic licence is required according to the national policy. - If dual-use items are involved, an <i>ad hoc</i> licence is required if there is suspicion of possible use for WMD or military end-use 		

Scenario 2: goods originating from an EU Member State, which are exported via Belgium to a third country		
Here two sub-scenarios can be distinguished: <ul style="list-style-type: none"> - The goods are exported from the country of origin but retain the status of Community goods until they actually leave the Customs Union at the external border => export scenario, EU Member State - If the goods are exported to EFTA countries, this occurs under the external transit procedure 		
'Export' EU Member State	Transit through Belgium	Destination third country
Departure from the EU Member State as Community goods under the export regime	'Transit' as goods in export (T2 Document due to Community status) Limited customs control, no guarantee	Leave the EU as non-Community goods
Customs control & requirement of a transit licence (export control policy): Same as Scenario 1		

ⁱ A surety bond is required for the entire period that the goods are under customs transport, but is released as soon as the goods are discharged.

Scenario 3: goods coming from and going to third countries, transiting through Belgium		
Third country	Transit through Belgium	Third country
Non-Community goods, with or without an export licence	Remain non-Community goods In case of customs warehouse, only a summary declaration. In case of external transit, only a T1 declaration. Limited customs control, including guarantee	Non-Community goods
<p>Customs control</p> <p>Preceding the entry of goods, for purposes of security, an Entry Summary Declaration (ENS) is submitted by the carrier or his appointed representative. Upon entry, a summary declaration is drawn up to place the goods under the temporary storage procedure.</p> <p>Next, the goods can be placed, for instance, in a customs warehouse in order to later depart as re-export in the direction of a third country. The re-export declaration is in most instances combined with an external transit declaration so that customs control (with guarantee) is possible for the transport between the warehouse and the port of embarkation.</p> <p>Goods may also be 'immediately' (within 20 to 45 days' decision time) transited to third countries; they then fall under the controls described in scenario 1.</p> <p>If the destination is outside the Customs Union, there are no fees or duties to pay and the customs control is thus limited to checking that the goods were not withdrawn from the external transit procedure with a view to circumventing fiscal duties.</p>		
<p>Requirement for a transit licence (export control policy):</p> <p>Same as Scenario 1</p>		

The Customs Regulation also provides the possibility to carry out checks when (un)loading or transferring the goods: such actions may not be undertaken without authorization from the customs authorities (Art. 46). For every transshipment and every change to the means of transport, new trade documents must be provided (and where appropriate, the applicable trade measures are adjusted).

For some years now, front-line customs controls - control of the regularity of the transaction and legal compliance – have been guided by risk analyses. This occurs electronically on the basis of a number of parameters such as the goods code, the recipient country, and so forth. For the electronic declarations for 'transit' submitted to the NCTS, such risk analyses are of little use given that there is no obligation to fill in the goods code. At most, the system can register that there is no data about the goods in the event that a box on the form is left empty, or that the wrong goods code has been filled in.

2.3.3 Differences in the possibilities for customs transit control according to the nature of the strategic goods

The application of the Community Customs Code does not provide for different treatment of the various categories of strategic goods, military equipment and dual-use items. The free movement of goods applies to both categories within the Customs Union. Customs control of strategic goods for security purposes, as provided for in the export control regulations does differ for the two categories, for three reasons: 1) the existence of various definitions with regard to transit, 2) the amount or lack of detail in the relevant goods codes, and 3) differences between the national policies. These three aspects illustrate the practical complexity of executing controls on the transit of strategic goods.

2.3.3.1 Definitions of transit in the export control regulations

While in customs parlance the same definition applies throughout the whole European Union, various national definitions apply for military equipment as well as for dual-use items, *de lege* or *de facto*. Firstly, the Common Position 2008/944/CFSP with regard to military equipment does not define 'transit' and leaves the decision to the Member States. Secondly, the description of transit in the Dual-use Regulation is broadly formulatedⁱ and there is no obligation for Member States to control transit systematically. In this context too it is up to the Member States to decide specifically whether to conduct controls and on what conditions (e.g., for which type of transit and using which assessment criteria). We may conclude that systematic control in the broad sense of the Regulation is actually not possible, for practical reasons. The large volume of dual-use items in transit simply makes systematic control of these transactions unfeasible. The Commission itself uses the expressions “*impracticable and excessively burdensome*”.⁵⁹

2.3.3.2 The use of goods codes from the customs nomenclature

For the transit of weapon systems, the coding in the customs nomenclature as such is in principle sufficiently detailed to determine whether or not the goods are subject to transit control. This customs nomenclature is also used in summary declarations and T1 declarations, but only on a voluntary basis.

For components of weapons systems and dual-use items, the codes in the customs nomenclature are too broadly defined to determine with certainty whether or not, within a particular category, certain goods are eligible for control from the perspective of illicit arms trade. From a customs-technical perspective (on the basis of the available goods codes), the categories that matter for the licensing authorities often cannot be identified.

2.3.3.3 Differences in national policy

Military equipment as well as dual-use items enter into free movement if they are destined for application or use within the Customs Union. At the level of control policy, there is nevertheless a substantial difference between both categories of strategic goods. For dual-use items, the EU has more or less full competence to establish a uniform policy with which the Member States must comply, whereas this has remained a national competence for military equipment (based on Article 346 of the EU Treaty). As a result, every Member State conducts

ⁱ In principle, every passage of goods from and to third countries, through the territory of one of the Member States qualifies as transit, regardless of whether or not it stops or is transhipped en route.

its own national policy on military equipment (with specific conditions) and requires the customs services to implement the controls, but without providing any additional resources (customs agents) available at the internal borders. For European-regulated dual-use items, the same problem applies to conducting *ad hoc* controls when there is a suspicion of use for WMD or military end-use.

2.3.3.4 European initiatives to optimize customs control

The three observations made above, considered for a customs perspective, illustrate the practical complexity of executing controls on the transit of strategic goods. The weaknesses identified in the current system were recently summarized in a Communication by the Commission: notably the difficulty of precisely identifying goods within the current nomenclature, and the lack of appropriate information to enable the electronic system of risk assessment and evaluation to function properly. Other points the Commission cites concern, inter alia, the need to identify the real responsible parties behind the transactions; unequal capacity within the EU to apply customs procedures uniformly; the need for exchange of information and alignment with other authorities – within the EU as well as internationally; and the need for cooperation with the economic operators (inter alia on the basis of certification as an *Authorized Economic Operator*)^{i, 60}

2.4 Summary and conclusion

Within the European Union, the Member States have long resisted the idea of the EU imposing a common control regime for strategic goods. Several provisions in the original EC Treaty that – in view of security interests – provided for exceptional treatment of such goods, could be invoked in favour of national control measures. As a result of the abolition of internal borders in the Single Market (1993) however, systematic (customs) controls on the internal borders were also removed. Consequently, the need for a more harmonized policy on strategic goods found gradually more acceptance. The initial rules for military equipment and dual-use items only targeted export control. In 2008 and 2009, respectively, the control regime was expanded to include transit, without however creating an obligation for systematic controlling it. The European regulation rather chose to create a legal basis enabling transit control.

2.4.1 Military equipment

The Member States themselves determine whether or not they control the transit of military equipment. If they decide to do so, then they are obliged to take the requisite steps in their policy,

ⁱ At European level (for this purpose also including China, Japan, Switzerland and Norway), companies can have themselves certified as an Authorized Economic Operator (AEO). The certificate implies that customs services consider them as a 'safe' and 'reliable' company. The AEO concept was introduced by the European Commission in 2005 in Regulation No. 648/2005 as a counterpart to the American C-TPAT programme (Customs and Trade Pact Against Terrorism). C-TPAT was launched after 9/11 as one of the measures to make the entire logistical chain safer by taking steps to ensure that products susceptible for use in terrorism were not taken on board. It calls for cooperation between the American and local customs services.

The most important advantage of the certificate is currently the faster clearance of goods. The risk analyses recently used by customs services to conduct more targeted controls also take AEO status into account as one of many criteria. And where there is mutual AEO recognition, such as between the EU and Japan, certified operators can exploit a so-called 'green lane', whereby the flow of goods moves more quickly and with fewer controls.

in order to follow the harmonizing measures that Europe prescribes. These primarily concern the following aspects:

- A common list of goods;
- Uniform assessment criteria;
- Control of end-use
- Exchange of information on denied licences (no undercut).

Conventional weapons - Common Position 2008/944/CFSP	
Legal force	Binding (required to include in the national policy), <i>Soft law</i>
Motives for regulation	<ul style="list-style-type: none"> - Closer cooperation (general) - Specifically with regard to transit: strengthen European policy with regard to export control
Description of transit	<p>Transit and transshipment – no definitions</p> <p>Two possible descriptions in the User's Guide (choice is up to the Member States):</p> <p>Transit :<i>“movements in which the goods (military equipment) are merely transported through the territory of a Member State”</i></p> <p>Transshipment: <i>“transit involving the physical operation of unloading goods from the importing means of transport followed by a reloading (generally) onto another exporting means of transport ”</i></p>
Territorial Scope	<p>The territory of the Member States</p> <p>Exclusion of intra-Community transit on the basis of Directive 2009/43/EG</p>
Personal scope	-
Material scope	National lists, for which the EU Common Military List serves as a reference, and the list in Annex I to the EC Dual-use Regulation 428/2009
Prohibited transit	-
Transit control regime	The Member States themselves determine whether or not they place transit under control, and which type of transit
Required Documents	<ul style="list-style-type: none"> - end-user certificate, - or appropriate documentation, - and/or official authorization by the country of final destination.
Assessment criteria	<p>If there is a national licensing requirement, the Member States when assessing applications:</p> <ul style="list-style-type: none"> - are bound by the same eight criteria which also apply to exports and concern, inter alia, security and human rights; - may take into account economic, social, commercial and industrial interests without prejudice to the eight criteria; - must demand proof of permissible end-use; - must take into account earlier refusals by other Member States (no undercut).
Control mechanism	-
Sanctions	-

2.4.2 Dual-use items

For the transit of dual-use items, EC Regulation 428/2009 primarily aims to create a legal basis for conducting *ad hoc* controls if there are indications that the goods could be used for weapons of mass destruction or for military end-use. Here also, the EU provisions leave a wide margin of decision to the Member States, who must principally conform with:

- The obligation to provide a legal basis for prohibiting or placing suspect transit under control *ad hoc*;
- The common list of goods in annex to the Regulation;
- The no-undercut principle which obliges them to exchange information about denied licences;
- International agreements as part of the assessment criteria.

Dual-use items - Dual-use Regulation 428/2009	
Legal force	Directly applicable within the Member States
Motives for regulation	<ul style="list-style-type: none">- preventing the proliferation of weapons of mass destruction (need for regulation)- guarantee a level playing field in the internal market (need for a common approach)
Description of transit	Transit = “ <i>transport of non-Community dual-use items entering and passing through the customs territory of the Community with a destination outside the Community</i> ”
Territorial scope	Community customs territory
Personal scope	
Material scope	<ul style="list-style-type: none">- Dual-use items, defined in Art. 2, and listed in Annex I- Catch-all clause
Prohibited transit	The Regulation provides a legal basis for prohibiting transit if it is destined for certain purposes: <ul style="list-style-type: none">- for weapons of mass destruction;- or for military end-use or destined for countries under embargo.
Transit control regime	The Regulation provides a legal basis for subjecting transit to licensing on an <i>ad hoc</i> basis if it is destined for ‘strategic purposes’.
Required documents	
Assessment criteria	International obligations The Member States must take each other's denials into consideration (no undercut)
Control mechanism	The Member States must take appropriate measures to guarantee application of the Regulation
Sanctions	The Member States must provide effective, proportionate and dissuasive sanctions for violations

2.4.3 Limited harmonization

While harmonization and a level playing field within the unified market were important motivations for the Member States to go along with European legislation with regard to export control, in practice the harmonizing impact of these is rather limited. This is, first, because there is no obligation to implement systematic controls: for military equipment, the decision whether or not to conduct controls is left entirely to the discretion of the Member States, while for dual-use items EC Regulation 428/2009 establishes a uniform legal basis for *ad hoc* controls. Because the Member States retain their own leeway, the playing field within

European Union is *de facto* uneven. The second reason is that the EU only obliges Member States operating a transit control regime to achieve uniformity on a limited number of points (see 2.4.1 and 2.4.2). In particular, the freedom of the Member States to define the notion of transit leads to major differences in the policies implemented at national level, as will become apparent later, with the description of the national regimes. Because of this, the scope of the control policies differs significantly. Thirdly, the impact and effectiveness of the specific provisions, such as in particular the no-undercut principle for transit, is rather limited and asymmetrical so long as all Member States do not have a national control policy: in the absence of a control regime, logically there can only be unilateral exchange of information about denials; furthermore, in the non-controlling countries, there is also no legal framework available for taking those denials into account. This observation primarily applies to military equipment. Mutual differences on the national level will be further clarified by the discussion of the control regimes in the 5 EU Member States (see chapter 3), all of which nevertheless have the same European provisions as a frame of reference.

2.4.4 Interdependence of export control and customs control

Besides European legislation on international security, the Community Customs Code also has an important impact on national export controls in general as well as on transit controls. In practice, it is customs services who actually monitor compliance to transit control policy, and the monitoring potential available at national level is directly determined by European customs procedure. As the latter still has a mainly fiscal focus, the possibilities for controlling the transit of strategic goods appear limited. On the one hand, different definitions of transit are used for customs and export control purposes, and on the other hand, customs nomenclature currently does not enable the identification of all targeted categories. In particular, tracing components of military equipment and dual-use items is problematic. The most important obstacle, however, is the fact that transit declarations do not contain enough information to identify suspect transit, because there is no obligation to declare the goods according to customs nomenclature; a mere description of the goods suffices. Further, when discussing the national control regimes, it will also become clear that application of the customs procedures – though these are uniform and obligatory for all Member States – in practice does not take place uniformly. This is also a serious problem for the harmonizing function for which the European legislation is designed.

3 Overview of legislation and policy practices in five EU Member States

In this chapter we analyse the national control regimes on transit of strategic goods in five EU Member States: Belgium, France, Germany, the Netherlands and the United Kingdom. For each of these countries we provide an overview of applicable legislation and current policy practice. For Belgium – where the competence for foreign trade in strategic goods is largely devolved to the three Regions (Flemish, Walloon and Brussels-Capital Region) - we limit our analysis to legislation and policy practice in the Flemish Region.

As explained in the previous chapter, control policies in the countries investigated are bound by international and European provisions on the transit of strategic goods, among which EU legislation is the most binding and specific. Despite these identical ‘supra’-national obligations, it appears that each of the five national regimes investigated emphasises different elements. This is mainly the case for the transit of military equipment. Despite the adoption of Common Position 2008/944/CFSP, which aims to generate a more harmonized policy in foreign arms trade, EU Member States still to a large extent decide for themselves whether and how far to place transit transactions systematically or *ad hoc* under a licensing requirement. Furthermore, the Member States can place additional items under licence, and may use stricter criteria for their assessment than the eight European criteria (which furthermore leave some margin for interpretation). The actual implementation of transit controls at national level is closely related to the specific national context. Policy on foreign arms trade indeed always involves balancing between national and international security interests, and economic considerations.

For the transit of dual-use items, EC Regulation 428/2009 aims mainly to provide a legal base for conducting *ad hoc* controls if there are indications that the goods could be used for weapons of mass destruction or for military end-use. Here as well, the European provisions leave a wide margin of decision to the Member States.

The following factors also play an important role, specifically for transit:

- The characteristics of the national defence industry: is it private and thus dependent largely on commercial competition without government support (the Netherlands), or in (large) part government-owned and thus of greater national importance (France)?;
- The political will to play a leading role in international security at an European or global level;
- The central location as a transit territory and the economic importance of certain airports and seaports (the Ports of Antwerp, Rotterdam, Hamburg, Le Havre, Schiphol Airport)
- The size of the transit territory, including the surface area (Germany) and the length of the coastline and territorial waters (France);
- Internal threats due to terrorist or separatist movements (France, UK).

In the description of each of the five national regimes, the following elements will be systematically addressed: the legal framework, the competent authorities, the definition or description of transit, the scope, which transactions are prohibited and/or subject to a

licensing requirement, the assessment criteria, the procedural aspects, modalities, supervision, and sanctions for violation.

3.1 Belgium (Flemish Region)

Together with imports, exports and brokering, transit forms part of the foreign trade in strategic goods.⁶¹ This was exclusively a federal competence until 2003, established by the Act of 5 August 1991. In August 2003, export control was partially regionalized and since then, the 3 Regions have been competent for foreign trade in military equipment and dual-use items. Imports and exports of military equipment destined directly for armed forces and the police have remained a federal matter (Ministry of Economy). Exports of nuclear dual-use items require the authorization of both the federal authorities (Ministry of Energy), and the regional authorities for export control. Further, the federal level (Ministry of Justice) was competent until 2013 for the screening of arms traders, based on a preliminary licensing procedure.

In the Flemish Region, 235 licences, with a combined value of 1,162 million euro have been issued for the transit of military equipment since the summer of 2003. The number of licences issued annually for the transit of military equipment via the Flemish Region has shown a remarkable trend over the last 13 years. While in 1999, 136 licences were still requested for the transit of military equipment, in 2011 this number was only 31. The number of transit licences since 1999 has thus experienced a continuous decline.

3.1.1 Legal framework

3.1.1.1 Military equipment

Until June 2012, the legal basis for control of the transit of military equipment in Belgium was exclusively regulated by the Import, Export and Transit Act of 5 August 1991 and the related Decree of 8 March 1993.ⁱ Despite the regionalization of the competence in 2003, this federal legislation remained in force for arms control exports from the three Belgian Regions, until they adopted their own legislation.

On 15 June 2012, the Flemish Region adopted its own legal framework for the control of the import, export and transit (IE&T) of military equipment.ⁱⁱ The Flemish Arms Trade Actⁱⁱⁱ (ATA^{iv}) is meant to offer a coherent and comprehensive set of rules enabling the effective control of arms trade. According to the Government of Flanders, while developing the Act, ethical and economic parameters were taken into account as much as possible.⁶² The Act entered into force on 30 June 2012. On 20 July 2012, the Government of Flanders approved the so-called Arms Trade Decree, covering the Act's operative provisions.⁶³

ⁱ The Act of 5 August 1991 introduced a licensing requirement for the import, export and transit of military equipment and described the assessment criteria against which licence applications had to be evaluated. The Royal Decree of 8 March 1993 laid down the technical and procedural details.

ⁱⁱ In 2012, the Walloon Region also adopted its own Arms Trade Act; in the Brussels Region, legislation was under preparation.

ⁱⁱⁱ A regional Act is called 'Decreet' but has the same legal value as a law, it is called differently in order to distinguish from federal laws. The equivalent of a Royal Decree, is in the Flemish region a Government Decree.

^{iv} In full: the Decree of 15 June 2012 on the import, export, transit and transfer of Defence-related items, other equipment for military use, law enforcement equipment, civil small arms, components and ammunition (B.O.G. 4 July 2012).

3.1.1.2 Dual-use items

Since 1994, a Community regime imposed by a Regulation for dual-use items and technology has been in force.⁶⁴ Since 2009, the Dual-use Regulation provides for the first time for an (*ad hoc*) control regime on transit. Belgium had already decided after the first Community regime (1994) to apply the European provisions on export controls of dual-use items in an identical manner to transit as well. In 1995⁶⁵ as well as in 2000,⁶⁶ a Ministerial Decree was adopted to this end.

Since the regionalization in August 2003, the Regions and no longer the federal authorities are competent for transactions with regard to dual-use items. Just as for military equipment, so long as the Regions had not adopted their own legislation, they were bound by federal provisions. It was thus up to the Regions to make a policy decision in 2009 concerning the transit of dual-use items: they could either opt to continue to apply the export regime to transit in an identical manner (the Regulation allows for extra national measures), or they could opt - by using Implementation Acts - for the less extensive control regime envisaged in the Regulation. The adoption of the Flemish Arms Trade Act in June 2012 altered nothing concerning the Flemish control of dual-use items (because of its scope, i.e. military equipment). The Implementation Acts, supplementing the Dual-use Regulation, are still being prepared. *De facto*, the *ad hoc* control prescribed by the Dual-use Regulation is applied.

Summary of the most important legislation in the Flemish Region (Belgium)

Military equipment

- Flemish Region: Decree of 15 June 2012 on the import, export, transit and transfer of defence-related items, other equipment for military use, law enforcement equipment, civil small arms, components and ammunition (abbreviated: Arms Trade Act), *B.O.G.* 4 July 2012.
- Decree of the Government of Flanders of 20 July 2012 for the implementation of the Arms Trade Act of 15 June 2012, *B.O.G.* 9 October 2012

Dual-use items

- EC Dual-use Regulation 428/2009

3.1.1.3 The BLEU and Benelux

Belgium is a member of two unions in which specific rules apply and which take precedence over international agreements: the Belgian Luxembourg Economic Union (BLEU) and the Benelux Union.⁶⁷ Complete freedom of trade applies within both unions, including for arms trade.ⁱ

Since 1921, the BLEU has comprised, inter alia, a customs and excise-duty union, with entirely common legislation and regulations. As a result, legally there is no foreign trade between Luxembourg and Belgium. IE&T were defined in function of the common territory of both Member States. Because of the common regulations, the same conditions and implementation modalities apply within the common customs territory.

ⁱ In this respect these unions are more far-reaching than the European Union which, based on Art. 36 and 346 of the Treaty, allows exceptions inter alia to the Single Market for reasons of security.

The Benelux Economic Union was established in 1958 for a duration of 50 years. In 2008, a new treaty was signedⁱ creating the Benelux Union as of 1 January 2012. With the Benelux Union, Belgium, the Netherlands and Luxembourg are committed to cooperate mainly in areas where no cooperation is foreseen by the European Unionⁱⁱ. The Benelux Union is in general less far-reaching than the BLEU. The focus is more on common policy than on uniform legislation. In the original treaty of 1958, there was a specific stipulation concerning arms trade, namely that *“the licensing and quota systems for the import, export and transit are equal”*. In the context of the objectives of the Benelux, this was interpreted in such a way that the systems of both countries were aligned and substantially interchangeable.⁶⁸ The Benelux Treaty of 2008 no longer explicitly mentions a common objective with regard to import, export and transit.

In concrete terms, we may conclude that trade, including trade in military equipment, is free between the three Benelux countries as a result of the Economic Union. Foreign trade from or to one of the Benelux countries is also not subject to control or a licensing requirement by the other two countries. The Flemish Region is involved in the two unions. For the BLEU, this has applied since 2002 on the basis of a modified protocol. For Benelux, this has been the case since 1994, via the consultation mechanism that was agreed in a Cooperation Agreement.⁶⁹

The relevance of the BLEU and the Benelux for transit can be summarized as follows:

- Based on the treaties, a uniform policy must be implemented with Luxembourg and a harmonized policy with the Netherlands. From this follows the implicit obligation for the three Regions to conduct a uniform policy;
- There is free movement of strategic goods among the three countries; there is mutual recognition of one another's export and transit licences; in other words, once a licence has been issued at one of the external borders, this is respected by the other countries.

3.1.2 Competent authorities and consultation mechanisms

3.1.2.1 Competent authorities

In the Flemish Region, the Strategic Goods Control Unit (SGCU) is responsible for handling all licence applications for foreign trade in strategic goods, including transit. This Unit forms part of the Flemish Department of Foreign Affairs at the Flemish Ministry of Economy, Foreign Policy, Agriculture and Rural Policy.ⁱⁱⁱ The licences are approved by the competent minister. Under a delegated authority, the Secretary General of the Flemish Department of Foreign Affairs can issue a number of licences himself, such as import licences and extensions of import, export and transit licences.⁷⁰

Despite the regionalization of the competence for foreign trade in strategic goods, the federal government is still involved for some aspects related to the control of transit of strategic

ⁱ In general, the new treaty is rather a framework treaty with fewer detailed stipulations and fewer specific agreements.

ⁱⁱ More specifically, “a) the continued existence and further development of an economic Union which includes free movement of persons, goods, capital and services and which concerns a aligned policy in economic, financial and social matters, including a common policy in the economic relations with third countries; b) sustainable development (...); c) cooperation in the areas of justice and Internal Affairs” (Art. 2). To realize these objectives, Common Multi-annual Work Programmes will have to be agreed. The Common Work Programme concerns, inter alia, “the completion of the internal Benelux market and realization of the Benelux Economic Union”

ⁱⁱⁱ In the Walloon Region, the competence belongs to the *Direction des Licenses d'armes* of the Walloon Ministry of Economy, SMEs, Foreign Trade and New Technologies. In the Brussels-Capital Region, the competence belongs to the Licences Cell of the External Affairs Service of the Ministry of External Affairs.

goods. For instance, the issuing of preliminary authorizations that allows a person or organization to export and transit goods remained a federal competence of the Ministry of Justice from 2003 up to 2012.ⁱ Further, trade in nuclear materials for peaceful use falls under the competence of the federal Ministry of Energy. The federal Ministry of Foreign Affairs also plays a role based on its general competence for foreign policy and international security. For the assessment or transit applications, the Regions can call upon information that Foreign Affairs has available (see also below).

Finally, the competences of the Ministry of Finance are also important in this context. Based on their general competence, the Customs services are responsible for monitoring the (legal) conformity (legislation and licences) of trade transactions involving military equipment and dual-use items. Within the Ministry of Finance, the central and regional services of the Customs and Excise-duty Administration are responsible for monitoring and detection of illegal activities. The recently adopted Arms Trade Act of 2012 also provides for Flemish officials of the Strategic Goods Control Unit to establish their own monitoring capabilities (see below).

3.1.2.2 Consultation

In the Flemish Region, there is no provision for an external advice procedure, the composition of the Strategic Goods Control Unit is supposed to ensure that all requisite expertise for the assessment of the application is present internally.ⁱⁱ

Consequent upon the regionalization of export control, a number of agreements between the federal level and the three licensing authorities in the Regions were formalized in a Cooperation Agreement in 2007.⁷¹ The agreement covers, inter alia, the exchange of information with regard to country analyses (Foreign Affairs); the forwarding of information about denied licences from and to other EU Member States (following the European no-undercut principle); cooperation with Belgian diplomatic posts for the authentication of end-use certificates, and the representation of Belgium in European working groups and regional export control regimes. Since the end of 2007, other modalities of collaboration have been stipulated in the Cooperation Agreement related to the implementation of the Chemical Weapons Convention.⁷²

Informal consultations also take place among the three Regions. The officials from the three regional authorities meet informally on a bi-monthly basis for consultation, and there is telephone contact between them on a weekly basis. There is also informal consultation with numerous other authorities, depending on the case: i.e. with customs, police, security and/or intelligence services.

For nuclear dual-use items, the federal government as well as the Flemish Region has competence. On the federal level, there is a formal consultation procedure for exports of these products based on a prior authorization procedure. This prior authorization is issued by the competent Minister for Energy,⁷³ after taking advice from an inter-ministerial advisory committee (*Advisory Committee on the Non-proliferation of Nuclear Weapons – CANVEK*).⁷⁴ CANVEK is composed of representatives of the federal ministries of Energy, Economy, Foreign

ⁱ Starting in July 2012, this became a Flemish competence on the basis of the Flemish Arms Trade Act.

ⁱⁱ The SGCU is composed of one head of the department, three lawyers, a political analyst, two engineers, a chemical expert, and three administrative staff (Annual Report 2010)

Affairs, Foreign Trade, Science Policy, Public Health, Defence, and the Environment, plus in the nuclear domain, the Federal Agency for Nuclear Control and State Security. Customs have also been a member since 2008, and the regional authorities have attended meetings as observers since 2004. Although the CANVEK procedure is in principle legally limited to exports,ⁱ cases regarding the transit of nuclear dual-use items are *de facto* also discussed by CANVEK.

3.1.3 Description of transit

3.1.3.1 Transit of military equipment

There was no description of the notion of transit in the federal legislation (1991), which only referred to customs rules. As explained earlier, the technical customs definition of (external transit) does not cover all forms of transit relevant for international security. The focus has always been *de facto* on transit with transshipment or with a change of the means of transport, as was the case for dual-use items (see below).

The ATA (2012) opted to apply an instrumental definition of transit that perpetuates the existing practice. Transit is defined as:

“the transport of goods that enter Belgian territory exclusively in order to be transported from that territory to another country, with the exception of transfer between two EU Member States, and whereby the goods are transported in one of the following manners: a) they are transhipped from one means of transport to another means of transport; b) they are unloaded from a means of transport and are then again loaded onto the same means of transport;”⁷⁵

It follows from the definition that the pure transit of strategic goods (passage through the territory of the Flemish Region without unloading and loading or transshipment) is not subject to the application of the Act.ⁱⁱ Transfer between two EU Member States with passage through the Flemish territory (whether or not with unloading and loading/transshipment) also does not fall under this definition. The only transit that is controlled is that in which at least one third country is involved and where there is transshipment on Flemish territory.ⁱⁱⁱ

3.1.3.2 Transit of dual-use items

In response to the Dual-use Regulations adopted from 1994 onwards, the European control regime on exports was extended by Ministerial Decree (MD)⁷⁶ to include transit. In the MD, the notion of transit was defined and limited to transit with transshipment or transit with a change of the means of transport.⁷⁷

Since EC Regulation 428/2009 itself provides a control regime for transit, the European definition of transit applies: “*transport of non-Community dual-use items entering and passing through the customs territory of the Community with a destination outside the Community*” (Art. 2.7). In practice, the focus is still mainly on transit with transshipment. The advantage of

ⁱ The Ministerial Decrees have only extended European regulations to transit and not national legislation on this matter.

ⁱⁱ The control of transit during i.e. road transport, over flight of air cargo without landing, and passage through territorial waters are considered as practically impossible.

ⁱⁱⁱ With this description, the ATA sets right a number of weaknesses in the federal legislation.

the European definition is that there is always a legal base available to allow the *ad hoc* control (prohibition or licensing) of dual-use items in transit without transshipment.

3.1.4 Scope

3.1.4.1 Territorial scope

As a general rule, a State can only exercise jurisdiction in its own territory. Since Belgium was transformed into a federal structure in 1980, the Regions have acquired territorially circumscribed competences. Since the regionalization of arms trade policy in 2003, the Regions are competent for export control policy on strategic goods, within the limits of their respective territories.ⁱ

The ATA draws a distinction between two scenarios (Art. 4):

- The applicant is located in the Flemish Region and has his residence or registered office there: then the transit licence must be applied for from the Government of Flanders;
- The applicant does not have a residence or registered office in Belgium: then the transit licence must be sought from the Government of Flanders if the transit takes place on the territory of the Flemish Regionⁱⁱ.

It follows from Directive 2009/43/EC that it is no longer possible to subject intra-Community transit (between EU Member States) of military equipment to control; there must be at least one third country involved in the transit.

The Dual-use Regulation defines transit as extra-Community transit from an EU third country to another EU third country.

3.1.4.2 Personal scope

By definition, for transit, the primary party responsible for the goods - the exporter - is a person or organization based abroad. In order to control transit, it is necessary to find a contact-point within one's own territory. Transporters, shipping, cargo, port or customs agents may be eligible to this end.

Some months before the regionalization of this competence, a distinction was made in the Federal Law of 1991 between control of arms trade (to which import, export and transit belong) and combating illicit arms trade. A new Title III introduced a preliminary licence for persons involved in arms trade, with a view to combating illicit activities.⁷⁸ Transit agents of military equipment are also subject to this obligation. This pre-licence is issued by the federal

ⁱ If it should be decided to control all (suspect) transit - cf. the definition in the Dual-use Regulation - it is currently unclear who is competent for transit control through territorial waters along the Flemish coast. This is federal territory and the Regions have no jurisdiction over it. On the other hand, the federal level only has exclusive competence for arms trade destined directly for the army and police. This scenario was not taken into account during the regionalization in 2003 because, at the time, 'transshipment' was the valid criterion for control, both for military equipment and dual-use items. Should it now be considered to make use of the broad legal base of the Dual-use Regulation to control suspect transit of dual-use items - for which transshipment is not an important criterion - it is not clear whether the Flemish Region can do this on the basis of an implicit competence, or whether it is a matter for the federal government (and for which federal public service?) on the basis of its residual competence.

ⁱⁱ In reality, the omission of the requirement for a registered office is largely cancelled out by the fact that the preliminary licence is in fact still linked to an establishment in the Flemish Region.

justice authorities, but on the basis of the ATA the competent Flemish service will from now on assume the task.

In practice, there seem to be two types of organizations qualified to obtain the preliminary licence: organizations responsible for transporting goods (shipping agents, (air) cargo transporters, expeditors) and customs agencies (responsible for fulfilling customs and other formalities). In other words, the persons or organizations dealing with transit, in this study referred to as transit agents, are as a rule not engaged in the arms trade business as such.ⁱ

For dual-use items, the same profile is targeted as for military equipment; there are no specific requirements (nor do they exist in the Dual-use Regulation) about who may apply for a transit licence for dual-use items. Transporters as well as customs agents may be involved and the contact-point also for dual-use items is the registered office of the transit agent.

3.1.4.3 Material scope

3.1.4.3.1 Military equipment

The ATA distinguishes four separate categories of military strategic equipment: (1) defence-related items, (2) law enforcement equipment, (3) other materials especially intended for military use, and (4) civil small arms, components and ammunition.ⁱⁱ The licensing regime for the last category is not within the present study's focus. For the sake of convenience, in the following discussion we will conflate the three categories of goods relevant to our investigation under the usual term 'military equipment'.

Defence-related items are those items, including software and technology, that are included in the Common Military List of the European Union (Art. 2., 5°). As a result of this cross-referencing, the EU List is automatically the most recent applicable list.

According to the ATA, law enforcement equipment includes goods specially designed or adapted for law enforcement or riot control (Art. 2., 15°). The list of law enforcement equipment for which a transit licence is needed is laid down in the Arms Trade Decree (Art. 8, §1, 2nd section) and is based, inter alia, on the list of equipment that could be used for domestic repression, as provided in the Council directives on the implementation and evaluation of restrictive measures in the framework of the EU's Common Foreign and Security Policy.

The Government of Flanders may subject non-listed items to licensing on an *ad hoc* basis by invoking the catch-all clause that refers to 'other materials for military use'. This category is described in the ATA as: "*Products, used alone or in combination with one another or with other goods, substances or organisms, that can inflict serious harm to persons or goods and that can be used as a means of violence in an armed conflict or a similar situation of violence*".⁷⁹ At the core of the definition is the possible use of the products, rather than the

ⁱ In the Walloon region there is one important exception to this, namely the small arms manufacturer Smith & Wesson, which has a European distribution centre on Walloon territory.

ⁱⁱ Civil small arms, components and ammunition are distinguished from 'military small arms' on the basis of a qualified destination criterion, taking into account the 'activity' and 'working method' (Art. 2., 4°) (Explanatory Memorandum, ATA, p. 7).

end-user. Foreign trade in goods that are not listed can thus still be subjected to a licensing requirement, if they meet the conditions above.ⁱ

3.1.4.3.2 Dual-use items

The material coverage for controls of dual-use items is established in Annex I of EC Dual-use Regulation 428/2009.

The Regulation further provides for a catch-all clause specifically for transit (Art. 6.3). If the goods are intended for weapons of mass destruction, the Member States can broaden the transit prohibition to include items that do not appear on the List in Annex I, as well as dual-use items for military end-use or military destinations under embargo (as stipulated in Art. 4, section 2). Member States that take such decisions shall inform the Commission about the measures adopted and indicate the precise reasons for them (Art. 8.2.). They shall also inform the Commission of any subsequent modifications (Art. 8.3.). The Commission shall publish these measures in the C series of the Official Journal of the European Union (Art. 8.4.).⁸⁰ The Flemish regional authorities have not so far formally made use of this possibility.⁸¹

3.1.5 Prohibited transit and transit subject to a licensing requirement

3.1.5.1 Military equipment

Transit in the Flemish Region is prohibited for any military equipment in which tradeⁱⁱ is forbidden by, or pursuant to, international obligations and agreements binding upon the Flemish Region and Belgium (Art. 3, §1, 1st section). The list of prohibited equipment is established by the Arms Trade Decree (Art. 3, §1, 3rd section).

The Flemish Region has always *de facto* relied on the European List, supplemented by two categories that do not appear on the European List:

ML 23: Rifles and ammunition, as not specified in ML 1, ML 2 and ML 3

ML 26: law enforcement equipment

Two further categories have been added⁸²:

ML 24 (catch-all): visualisation screens

ML 25 (catch-all): a) airport lighting b) gear boxes, c) telecommunications, d) masks and components for masks, e) software, f) cut and thrust weapons, g) components and accessories for vessels, vehicles and aircraft, h) construction materials, i) electronics

Transit of non-prohibited military equipment is subject to a licensing requirement (Art. 3, §1, 4th sectionⁱⁱⁱ and §2), except for material that is destined for the Netherlands or Luxembourg^{iv}

ⁱ With this definition the Flemish legislature aims to create greater legal certainty compared with the provisions of the Royal Decree of 1993, so as to ensure that 'objects for everyday use' are not necessarily restricted for export or transit, only because they are destined for a military end-user (Explanatory Memorandum ATA, pp. 5-6).

ⁱⁱ Summary equivalent of "the use, production, development or transfer"

ⁱⁱⁱ The 4th section focuses on the situation in which foreign trade in prohibited goods can still be allowed for certain purposes. In these instances, a licensing requirement also applies (see Explanatory Memorandum ATA, p. 11)

^{iv} Such transit is permitted subject to presentation of the licence issued for the import, export and transfer of these goods by the competent Dutch or Luxembourg authorities (Art. 3, §4, 2nd section). This is a consequence of the BLEU and BENELUX agreements.

(see 3.1.1.3). Transit between two EU Member States is also exempt from the licensing requirement based upon the definition of transit (see above)ⁱ.

3.1.5.1.1 Type of licence

An individual licence is required for the transit of military equipment subject to a licensing requirement, (Art. 21). This means that a transit licence always applies to one specific instance of transit for a certain amount of specified military equipment (in one or more shipments) to a specific recipient (Art. 22). The procedure for applying for and awarding these licences is described in the Arms Trade Decree (Art. 8, §4).

3.1.5.1.2 Additional condition: preliminary authorisation

Since 2003 there has been an obligation in Belgium for persons involved in arms trade to obtain a personal authorization prior to trade licensing. This preliminary licence is only required as a prior condition for obtaining a transit licence for military equipment, and not for dual-use items. These preliminary licences were until recently issued by the Federal Minister of Justice. The conditions mainly concern the reliability and morality of the applicant: for instance, the applicant may not have a criminal record.ⁱⁱ The competent Minister can restrict, suspend or revoke this preliminary prior licence with a reasoned decision, or have the guarantee confiscated if the party concerned - for instance - does not observe the regulations or has received the licence on the grounds of incorrect information (Art. 10, 4th section).ⁱⁱⁱ By analogy with customs legislation, in some instances the law provides for depositing a financial guarantee that serves as surety to ensure the correct execution of the operation in question and compliance with the applicable legal provisions.^{iv} In practice, this guarantee has never been requested in connection with a transit case.

With the adoption of the ATA, the required preliminary licence from the Federal Minister of Justice was replaced by a preliminary Flemish authorization (Art.10), with the same objective: to achieve the first-line evaluation of persons involved in arms trade. The preliminary authorization is valid indefinitely, but a new feature as of 2012 is that it will be evaluated every three years (Art. 10, §3). The Flemish Strategic Goods Control Unit takes over competence in this context from the federal authorities. Pre-licences issued previously by the federal justice authorities remain valid (Art. 52), and as from 2012 will be evaluated (also every three years) by the competent Flemish body.^v

This authorization is not only required for exports of military equipment from the Flemish Region, but also for transit through Flemish territory. The important criteria for pre-licensing concern the moral quality of the applicant. This is assessed by, inter alia, taking note of criminal offences committed by the applicant as recorded in an official report or for which he has been criminally sentenced (Art. 10, §2, 2nd section). Advice can also be obtained from the

ⁱ For the Netherlands and Luxembourg, this stipulation is also restricted to transit in which a third EU country is involved.

ⁱⁱ 'The applicant' covers both the organization (the legal entity), as the individuals within the organization. If the applicant conducts activities that fall under the Weapons Act of 2006, he is also obliged to acknowledge the provisions of this Act.

ⁱⁱⁱ Other reasons to limit, suspend or revoke the licence are if the applicant is no longer in conformity with the required licensing conditions; has not used the licence for more than a year; or engages in other activities that, in combination with the licensed activities, threaten to disturb public order.

^{iv} The amount of the guarantee differs depending on whether it concerns a licence of indefinite duration (EUR 10,000) or for a specific transaction only (% of the value, with a minimum of EUR 1,000).

^v The preliminary authorization is one of a number of aspects that is clearly superior, and in particular more coherently organized, in the ATA than in the former federal legislation.

Public Prosecutor's Office of the district where the applicant is located, from the (federal) State Security Service and from the Federal Police. The ATA has made prior authorization redundant in a number of cases where reliability has been established, since the trader has already been screened based upon another procedure.ⁱ The ATA no longer links a surety bond to the grant of prior authorization.ⁱⁱ

The new requirement for a three year evaluation undoubtedly brings added value. Since both the organization and its directors undergo a moral investigation, the review offers greater certainty when there is turnover of staff. It also provides a way for the competent authority to keep an eye on active transit agents - the federal justice authorities used to have no insight into whether previously recognized exporters and transit agents were still active. The Explanatory Memorandum to the ATA refers to Art. 9, fifth section of Directive 2009/43/EC as concerns the *ratio legis* of the evaluation procedure: namely, the need to verify whether the customer still fulfils the requirements for obtaining prior authorization and the associated conditions.

3.1.5.2 Dual-use items

The applicable practice for dual-use items in Belgium since 1995 has been that transit with transshipment may be prohibited or subjected to a licensing requirement.ⁱⁱⁱ Despite the wording of the MDs of 1995 and 2000, the intention was only to create a possible basis for controlling transit with transshipment, without imposing a systematic licensing obligation like that for exports. All licensing authorities share the judgement that controlling the transit of all dual-use items, or even just those involving transshipment, is not feasible because of their volume and would anyway serve no purpose.

Since 2009, the provisions of the EC Dual-use Regulation apply directly. Transit can be prohibited or placed under licence *ad hoc* on this basis.

3.1.6 Assessment criteria

3.1.6.1 Military equipment

Every application for the transit of military equipment is tested against the same eight European assessment criteria that apply also to the assessment of exports, as stipulated in Article 2 of the Common Position 2008/944/CFSP. The ATA fully incorporates the European criteria, but on certain points they are more strictly formulated. These tighter provisions are

ⁱ This is the case for arms dealers who are recognized on the basis of the Weapons Act, certified persons, the EU, NATO, the UN, the IAEA or other intergovernmental organizations of which the Flemish Region or Belgium is a member, government bodies, or components of the armed forces of another Member State or the EU or NATO (Art. 10 §4).

ⁱⁱ This is in line with former practice – the federal law had such a provision, but a guarantee was never requested by the federal justice authorities in the period 2003-2012.

ⁱⁱⁱ Art. 2 of the MD of 28 September 2000 stipulates that the transit of dual-use items is subject to the same regulations as those which Regulation 1334/2000 provides for exports, and that “a licence is required for transit under the same conditions as those provided for exports.” Art. 3 makes three exceptions to this:

- 1) transit to Luxembourg and the Netherlands;
- 2) transit without transshipment or change of the means of transport, and
- 3) transit of items for which there is a Community export licence.

Art. 3 further mentions that “Applications for a transit licence must be accompanied by an obligation in which the applicant commits to giving the dual-use items and technology a destination which is in conformity with his application for authorisation.”

sometimes designed to limit the scope for the competent authority's discretion by casting a prohibition in more absolute terms (e.g. in the case of a violation of human rights or involvement in an armed conflict); creating a more extensive obligation for risk analysis; adding an extra ground for denial (e.g. in the case of the risk of diversion); or a general obligation to exercise caution, e.g. for countries or regions where there are tensions.⁸³

Further, the ATA adds six own assessment criteria (Art. 28):ⁱ

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;
4. The prevalence of a high level of deaths as a result of small arms violence in the country of end-use;
5. The prevalence of gender-related violence, in particular rape and other forms of sexual violence;
6. The presence of peace-building initiatives and reconciliation processes.

The ATA defines the notion of end-userⁱⁱ, prescribes the manner in which the evidence of end-use can be provided, and lays down specific conditions in case of a change of purpose or destination. For each application, the applicant must share all information about the end-user and the end-use of the goods in question and add a document to his application that confirms the end-user and the end-useⁱⁱⁱ (Art. 24). The more detailed the information about the final destination, the more quickly the competent administration can make an assessment. If the voluntarily provided information is not sufficient, additional data can be called for e.g. in the form of a declaration by the customer.⁸⁴ For transit of goods intended for EU, UN, IAEA activities or humanitarian assistance in case of a disaster, the requirement of an end use certificate does not apply (Art. 24, §4).

ⁱ Except for the requirement with regard to child soldiers, all the other stipulations - given their generalized and broad formulation - should be considered not as true criteria or absolute reasons for exclusion, but as considerations that must be taken into account when analyzing the case. These considerations are always applied in a manner taking account of the specificity of the actual transit transaction and of their direct or indirect relevance to the final destination of the end-user (Explanatory Memorandum ATA, pp. 26-27, Presentation of the Strategic Goods Control Unit, Explanation of the Arms Trade Act for the defence and security sectors, June 2012).

ⁱⁱ According to Art. 2, 7°, the end-user is: "*the last known natural or legal person, at the time of the decision about the licence application, who will use the goods to be transferred or exported*".

ⁱⁱⁱ This can be an international import certificate or a copy of the import licence of the recipient country or a declaration by the end-user (Art. 24, §2). If the country of end-use is not a Member State of the EU or NATO, the applicant must always present a declaration from the end-user in which this user commits itself to request authorization from the Government of Flanders for any re-export if the competent body judges that there are reasons for concern. The ATA defines three potential scenarios for imposing such authorization:

- 1) due to concern about an undesirable change in the goods' purpose or destination, or an undesirable re-export;
- 2) in the case of sensitive goods; or
- 3) when the export policy and the effectiveness of the export control regime of the recipient country or the country of end-use may give rise to concern (Art. 24, §3).

In the first two instances, the Government of Flanders also reserves the possibility of imposing control on intra-Community traffic (Art. 19, §3, 2nd section). For third countries there is the added scenario of uncertainty or concern about the export control policy or the effectiveness of the export control regime of the recipient countries (Art. 24, §3, 2nd section).

The SGCU can require additional guarantees in terms of end-use for each export or transit, such as a verification of the end-user or relevant commitments on behalf of the recipient or the end-user. For countries of end-use that do not belong to the EU or NATO, the Government of Flanders can, in certain instances - for instance if the transit of sensitive items is involvedⁱ - require a declaration from the end-user in which it commits itself to request authorization from the Government of Flanders for any re-export. As long as the transit licence is valid, the applicant remains obliged to inform the competent body about any changes of purpose or destination or re-export for goods that were effectively transited on the basis of the licence (Art. 24, §5).

In implementing CP 2008/944/CFSP, the ATA furthermore establishes a **consultation procedure** for export and transit licences that were denied by other EU Member States. This obligation is only (formally) required for denials based on the European criteria, not for denials based upon the respective Flemish criteria. Denials and their reasons are reported to the other EU Member States. Consultation takes place with another Member State (or Member States) on any application for an essentially identical transaction that has been denied within the last three years by one or more EU Member States. Based on this consultation, it is then decided whether to award the licence nonetheless or to deny it. When the licence is awarded, the Member States involved are informed and a detailed justification is provided. Denials and consultations remain confidential (Art. 27). As there have been three competent governments in Belgium since the regionalization in 2003, they have mutually agreed to apply the no-undercut principle also to their own decisions.⁸⁵

3.1.6.2 *Dual-use items*

EC Dual-use Regulation 428/2009 does not extend the assessment criteria of Art. 12 for exports and brokering to the evaluation of transit licences. It is thus up to the national authorities to determine whether or not they use the same criteria as for exports. In the Flemish Region, for the assessment of dual-use transit, the substantial considerations are based on the same criteria.

The EC Dual-use Regulation further imposes international obligations to be observed for a transit licence and also requires the Member States to take one another's denials into account (no undercut). Just as for military equipment, the Regions also respect the no-undercut principle as an obligation vis-à-vis each other.⁸⁶

3.1.7 Procedural aspects

3.1.7.1 *Military equipment*

Applications for Flemish transit licences for military equipment are submitted to the SGCU. This application must consist of a completed application form and several documents.⁸⁷ Specifically with regard to transit, the following items are relevant:

ⁱ Other instances are:

- if the end-use or end-user could give rise to concern in terms of an undesired change of the goods' purpose or destination, or undesirable re-export;
- if the export control policy and the effectiveness of the export control regime of the recipient country or the country of end-use could give rise to concern

- personal data on the applicant and whether or not he is acting through a representative;
- data on the sender, the recipient and the end-user of the equipment;
- the country of dispatch or provenance (or from where the equipment is sent) and the country of origin (where the goods were manufactured), the recipient country (to where the goods are exported), and possibly the country of end-use (if there is re-export from the recipient country);
- technical data on the equipment, mentioning in which ML category (and sub-category) of the European List they belong; the applicant must also provide a description of the goods;
- the goods code, the number, the value and the weight;
- the purpose for which the goods will be used by the recipient and/or the end-user;
- the use for which the goods are designed;
- a mention of whether the applicant has a preliminary licence from the federal justice authorities, also indicating the term of validity;
- additional evidence, including:
 - a copy of the export licence delivered by the government of the country of dispatch;
 - a copy of the end-use certificate, drawn up by the recipient, or a copy of the import licence;
 - a copy of the preliminary licence delivered by the federal justice authorities;
- a signed declaration by which the applicant commits to:
 - observe the legal and specifically imposed conditions (of the licence);
 - give the goods a destination in conformity with this application;
 - provide evidence to the SGCU of arrival in the recipient country, when the transit licence is sought for a destination outside the European Union;
 - declare that all the information in the application form is truthfully completed, and confirm the correctness of the contents of all documents added.

Applications must be accompanied by a document in which the competent authorities of the goods' country of origin declare that they approve the export to the indicated recipient country (ATA Art. 24, §4, 1st section)ⁱ.

The ATA further provides for a prior (non-binding) **advice procedure**. A company may request preliminary advice from the competent body concerning the permissibility of a certain transit (Art. 9). The advice is provisional, indicating that the details of the transit have been investigated. The advice is purely informative, is non-binding for the Government of Flanders, and cannot be considered as formal consent. The added value of such advice is that it gives an indication whether or not a transaction is permissible and, on this basis, gives the company a stronger position in commercial negotiations or foreign public contracts.⁸⁸

In addition, companies can also request for information whether their goods, although not appearing on the Flemish lists, may possibly come under consideration for application of the catch-all clause (Art. 9, §2). This 'written confirmation' of the competent authority is valid for

ⁱ This document is not required in certain instances: for transit in the framework of missions for the EU, NATO, the UN, the IAEA or another intergovernmental organization of which the Flemish Region or Belgium is a member, or if the transit is linked with humanitarian assistance for a disaster or constitutes part of a gift in an emergency (Art. 24, §4, 2nd section).

one year and serves as an official document that can be presented to customs. This may avoid the customs services blocking certain goods when, based upon the goods code, they have doubts or a suspicion as to whether or not a licensing requirement exists.⁸⁹

In the Flemish Region, transit agents can expect to wait an average of 4 to 6 weeks to obtain a transit licence for 'normal' cases. Difficult cases can take months.

3.1.7.2 Dual-use items

The Strategic Goods Control Unit indicates on its website that dual-use items in transit can be blocked by customs if there is a suspicion of use for WMD. In practice, some transit agents make their own judgements on to whether a (portion of a) cargo may be eligible for dual-use. When in doubt, they present the question to the competent authority. Once certainty has been established that the goods are subject to a licensing requirement, *mutatis mutandis* the same documents and the same procedures are followed as in the procedures described above for transit of military equipment.ⁱ

3.1.8 Modalities

3.1.8.1 Military equipment

Additional conditions and restrictions may be imposed on the applicant in connection with the grant or use of the licence. The *ratio legis* for this is to ensure that possible reservations about a certain application do not automatically lead to a denial.⁹⁰ These conditions and restrictions are communicated at the latest at the time of issue of the licence, and may concern the end-use and re-export (see above); the transport and the inward and outward clearance of the goods; physical verification of the goods; and reporting about the use made of the licence. The applicant must immediately notify the recipient of restrictions on the end-use of the goods (Art. 12). Possible conditions concerning the transport and inward/outward clearance can relate to the means of transport, the clearance office and the day, hour, and place of departing the territory.⁹¹

Transit licences and the preliminary authorisation can be **suspended, revoked** or restricted in use if:

1. the conditions for granting them are no longer fulfilled or the conditions of use and restrictions are not observed;
2. the circumstances have changed since the initial grant in ways that may significantly affect assessments;
3. security interests or reasons of public order or safety so require (Art. 43. §1).

In special circumstances when urgent measures are required, the validity of current licences can be provisionally suspended for a maximum of sixty days by means of a simple notification (Art. 43, §2). This provision is designed for a situation in which there is sufficient information available to indicate that one of the three scenarios mentioned applies, and an immediate reaction from the government is needed in order to prevent or halt illicit transit.⁹²

ⁱ No further directives or clarifications of the procedure for transit of dual-use items are to be found, either in the form of publications, or as information on the competent services' website.

Persons may also be **temporarily excluded** (for a period from 1-6 months) from any transit licence or preliminary authorization if they have performed certain activities (Art. 44 §1):

- transit without the requisite licence, or an attempt to that end;
- transit of prohibited goods, or an attempt to that end;
- transit in conflict with the conditions of use of the issued licence or in conflict with the legislation;
- providing false and incomplete information with a view to obtaining a licence;
- not providing information and documents or providing them in false or incomplete form;
- being guilty of crimes under other legislation that can impact the objectives of the ATA (arms legislation, violent crimes or forgery).

In the event of a criminal investigation or conviction, the period of exclusion may be extended (Art. 44, § 3). The exclusion may be general, or limited to specific transit activities or specific categories of goods (Art. 44, § 4).

3.1.8.2 Dual-use items

Comparable stipulations are not provided for dual-use transit licences. EC Regulation 428/2009 only provides the possibility to refuse, annul, suspend, modify or revoke licences for exports and brokering.

3.1.9 Monitoring and sanctioning

3.1.9.1 Monitoring

Monitoring the compliance with export control legislation for strategic goods, including transit, is mainly the competence of the Federal Customs, based on its general competences as well as on specifically assigned tasks. Two different entities within the General Administration of Customs and Excise-duty (under the federal finance authorities) are responsible for monitoring compliance with the legislation and the investigation of illicit practices. One is the front-line Monitoring Service at the external borders, and the other is the Investigation Service.

The front-line monitoring entails verifying compliance with legislation by means of physical controls and checks on documents (declarations and accompanying documents). When the Customs services note that a required transit licence is missing or when they suspect that a transit licence is required, they contact the competent regional services and detain the goods until they receive a definitive answer regarding the transit licence. For some years now, such controls are steered by risk analysis techniques, designed to allow more targeted checks on the multitude of declarations.ⁱ The results of the risk analysis indicate whether goods may be loaded or whether they should be detained or subject to verification.

The specific job of the Customs' Investigation Service is to trace, investigate and prosecute fraud'. They do this based on confidential information passed to them through direct

ⁱ There are +/- 14,000,000 declarations per year (import, export and transit together) in Belgium; goods traffic through Antwerp for instance amounts to c. 8,000,000 containers annually.

operational contact with foreign colleagues, via the customs attachés of EU Member States or third countries accredited in Brussels, via intelligence services, and/or from the office of the public prosecutor.ⁱ In principle, they could also receive such information from their monitoring colleagues on the basis of their front-line findings. From interviews it appears that this seldom happens in practice.

Both the Customs' Monitoring and Investigation Services should be considered as the external implementing arms not only of the federal finance authorities, but also *de facto* of other public services that do not have their own control structure at the external borders, such as the Flemish authorities responsible for export control. The Customs services are not involved in legislative policy on such matters and have no margin of interpretation in this context, since the ultimate right to decide - for instance - whether or not to issue a licence rests with the minister in charge of the department under whose jurisdiction these responsibilities fall. The services competent for monitoring and the Investigation Service have, first and foremost, a backstop function to detain suspect trafficking. Thus, the Customs have a purely general monitoring competence based upon customs procedures. In addition, the ATA creates the option of appointing Flemish officials to monitor compliance with the ATA, who would be granted limited monitoring rights to that end such as viewing documents, having matters investigated, and gathering information (Art.46, §2). Since the Customs services will continue to play a crucial role in practice, there is provision to make arrangements with them through a cooperation agreement.⁹³ Thus, in the near-term perspective, complementary monitoring roles will be played by officials from the SGCU and customs officials.

3.1.9.2 Sanctions

Prosecuting violations of the Act is not a Flemish competence and thus, in the first instance, rests with the offices of the public prosecutor and also to a limited extent with the Investigation Services of federal Customs and police. In 2009, the competent minister at the time declared that illicit transit transactions do not often occur. According to her, the chance of catching them is very high. At the same time, there is no mention of heavy sanctions: findings of transit without licences are generally settled amicably.⁹⁴

For customs crimes the Customs and Excise-duty Administration itself has the right to initiate prosecution, which is exercised by the regional directors. Thus, the Customs do not have to resort to the office of the public prosecutor. For other crimes, the office of the public prosecutor remains the competent instance for initiating prosecution.ⁱⁱ Customs services also have the potential to handle settlements on their own. In principle a settlement is offered when there is no question of an intentional plan to commit fraud, for instance if an existing export licence was not presented in time due to mistakes by one of the parties involved in the logistical chain.

ⁱ Based upon police regulations, the police services have no obligation to pass information to the Customs services in the event of suspected illicit activities.

ⁱⁱ When there is a combination of fiscal and economic crimes, it is often 'easier' to prosecute on the basis of customs legislation, firstly because of the Customs' special right to initiate prosecution, and secondly because (inter alia) the export control legislation does not always have sufficient legal grounds for effective prosecution.

The ATA provides for a multi-tier system of possible sanctions⁹⁵ according to the severity of the offence against legal arms trade.ⁱ In addition to fines and a prison sentence, legal persons may receive a ban on conducting transit activities (even on behalf of someone else) for all or certain categories of military equipment for up to ten years.

ⁱ Transit of goods whose trade is prohibited by national law and transit to embargo countries is considered a crime and accordingly is severely punished, by imprisonment for 5-10 years and a fine ranging from 750 to 750,000 euro or double the value of the goods in question, if greater (Art. 47, §1, 2nd section). Violations of Belgian and Flemish regulations, in particular on prohibited goods, non-licensed transactions, licensing conditions, and so forth, are punished as misdemeanours, with a prison sentence of no more than five years and/or a fine of 250 to 250,000 euro or double the value of the goods in question, if greater (Art. 47, §1, 3rd and 4th section). If the offence is repeated, all punishments mentioned are doubled (Art. 47, §1, 6th section). Attempted violations are also punished (Art. 47, §2).

3.2 France

In the White Paper of 2008 on the French defence and security policy⁹⁶ the main parameters of French export control policy are laid down: defence, internal security, foreign policy and economic policy - each with its own specificity and yet mutually intertwined - underpin national security policy. Policy guidelines can also be found in the annual reports to the Parliament on arms exports: the policy aims to balance support for the national economy and export promotion with strict export requirements for reasons of international security.⁹⁷ A number of factors shape the French export control policy to a significant degree, including the domestic threat of terrorism - and consequently, the connection between domestic and foreign security;⁹⁸ the major economic interests of the French defence industry, and the French Government's political will to maintain its own, autonomous defence industry and to safeguard its immediate economic value;⁹⁹ and French diplomatic ambitions at the European and global level.¹⁰⁰ Specifically for transit, France's centrally-located territory and long coastline (in other words, a large transit area) is also important.¹⁰¹ The most important transit locations in France are the ports of Le Havre, Dunkirk and Marseilles and the Charles de Gaulle International Airport near Paris.

To give an idea of the scope of transit licences in France, in 2010 328 'autorisations' were issued for intra-Community transit.¹⁰² No figures could be found on other transit.

3.2.1 Legal framework

France makes a legal distinction between "*le matériel de guerre, armes et munitions (matériel de guerre et matériels assimilés)*" (hereinafter 'military equipment') and '*des biens à double usage*' (dual-use items). The country has separate competences for these two categories of strategic goods.

3.2.1.1 Military equipmentⁱ

The *Code de la Défense*¹⁰³ has been the basic legislation in France on the trade in military equipment since 2004, based on an Ordinance from 2004 (*Ordonnance* 2004-1374, 20 December 2004¹⁰⁴). The most important provisions can be found in Title III, which, inter alia, lists eight categories of military equipment distinguishing between war materials and other equipment,¹⁰⁵ and contains a number of provisions on imports and exports of military equipment.¹⁰⁶ Title IV of the *Code de la Défense* includes provisions on prohibited arms: biological, toxin and chemical weapons (Art. L 2341-1 et seq).

An earlier Decree no. 95-589 of 6 May 1995ⁱⁱ is still applicable and, includes - besides a more detailed mention of the eight weapons categories from de *Code de la Défense* (in Art. 2) - some material (satellites and missiles) that does not belong to military equipment but are subject to export restrictions or to a specific procedure in practice (Art. 3). The list of items

ⁱ Domestic arms trade is regulated by the Domestic Security Code (*Code de la Sécurité Intérieure*, see Art. L2331-2 *Code de la Défense*).

ⁱⁱ Implementation decision to the *Décret-loi* of 18 April 1939.

subject to special procedures is included in annex to the Decree of 27 June 2012. The EU Common Military List can also be found [here](#).

The most important provisions with regard to the licensing conditions and modalities for transit are described in Decree no. 2011-1467 of 9 November 2011.ⁱ Procedures relating to licences are described in an *Arrêté* of 2 October 1992, Title IV, with specific provisions for “*autorisations de transit par route*”(Art. 23-26-1). The Customs Code describes transit (Art. 125) and contains certain provisions applying to this (Art. 120 et seq).

Other relevant legislation includes:

- provisions on the monitoring capacity of the Ministry of Defence, in an *Arrêté* of 30 November 2011;
- The functioning of the inter-ministerial committee for investigating exports of military equipment, established by the Decree of 10 June 1949 and reorganised by Decree no. 55-965 of 16 July 1955.

Summary of the most important legislation with regard to military equipment

- Code de la Défense
- Décret n°. 95-589 du 6 mai 1995 relatif à l'application du décret du 18 avril 1939 fixant le régime des matériels de guerre, armes et munitions, JORF n°108 du 7 mai 1939
- Décret n° 2011-1467 du 9 novembre 2011 relatif aux importations et aux exportations hors du territoire de l'Union européenne de matériels de guerre, armes et munitions et de matériels assimilés et aux transferts intracommunitaires de produits liés à la défense, JORF n°0261 du 10 novembre 2011
- Arrêté du 27 juin 2012 relatif à la liste des matériels de guerre et matériels assimilés soumis à une autorisation préalable d'exportation et des produits liés à la défense soumis à une autorisation préalable de transfert, JORF n° 0151 of 30 juin 2012
- Arrêté du 2 octobre 1992 relatif à la procédure d'importation, d'exportation et de transfert des matériels de guerre, armes et munitions et des matériels assimilés, JORF n°232 du 6 octobre 1992
- Arrêté du 30 novembre 2011 fixant l'organisation du contrôle sur pièces et sur place effectué par le ministère de la défense en application de l'article L. 2339-1 du Code de la Défense, JORF n°0284 du 8 décembre 2011
- Décret n°55-965 du 16 juillet 1955 portant réorganisation de la commission interministérielle pour l'étude des exportations de matériels de guerre, JORF du 21 juillet 1955

ⁱ The most important provisions from Act no. 95-589 of 6 May 1995 on transit (Art. 73 and Art. 112) have been, as from 30 June 2012, replaced by the Act no. 2011-1467 of 9 November 2011 (only Art. 66 remains).

3.2.1.2 Dual-use items

The legal basis for controls of transit of dual-use items is the current EC Dual-use Regulation 428/2009. National provisions complementing the Regulation concern, inter alia, the establishment of a specific inter-ministerial committee for dual-use items and the establishment in 2010 of a specific service with national competence. The competent administration also publishes a guide for exporters of dual-use items. Other legal provisions deal particularly with imports and exports, without express mention of transit.

Summary of the most important (general) legislation with regard to dual-use items

- EC Dual-use Regulation 428/2009
- Loi n° 92-1477 du 31 décembre 1992 relative aux produits soumis à certaines restrictions de circulation et à la complémentarité entre les services de police, de gendarmerie et de douane (Titre Ier : Dispositions relatives aux armes, munitions, matériels de guerre et biens à double usage civil et militaire), JORF n°3 du 4 janvier 1993
- Décret n°2001-1192 du 13 décembre 2001 relatif au contrôle à l'exportation, à l'importation et au transfert de biens et technologies à double usage, JORF n°291 du 15 décembre 2001
- Arrêté n° 1192 du 13 décembre 2001 modifié, relatif au contrôle à l'exportation, à l'importation et au transfert de biens et technologies à double-usage, JORF du 15 décembre 2001
- Décret n° 2010-294 du 18 mars 2010 portant création d'une commission interministérielle des biens à double usage auprès du Ministre des Affaires étrangères et européennes, JORF du 20 mars 2010
- Arrêté du 18 mars 2010 portant création d'un service à compétence nationale dénommé "Service des Biens à Double-Usage", JORF du 20 mars 2010
- Bulletin Officiel des Douanes n° 6590 du 26 janvier 2004, « Marchandises stratégiques, réglementation relative aux biens et technologies à double usage"¹⁰⁷
- Avis aux exportateurs de biens et technologies à double usage, JORF du 31 mars 2010

3.2.2 Competent authorities and consultation mechanisms

France has, by analogy with the legislation, separate competences depending on whether military equipment or dual-use items are involved. Military equipment belongs to the Ministry of Defence, while dual-use items belong (since 2010) to the competence of Economic Affairs. The Customs (Ministry of Finance) not only play an important role because of their monitoring

function, but – as an exception to the general competence of Defence - are also the competent authority for processing applications for the transit of military equipment.ⁱ

3.2.2.1 Competent authorities

3.2.2.1.1 Military equipment

Since end-2009,ⁱⁱ the *Direction générale de l'armement, Direction du développement international* (DGA/DI) of the Ministry of Defence has been responsible for all procedures concerning trade in military equipment¹⁰⁸, with the exception of licences for imports and transit. These licences belong to the competence of the *Direction générale des Douanes et Droits indirects* (DGDDI) of the *Ministère du Budget, des Comptes publics et de la Réforme de l'Etat*.

Applications for a transit licence are submitted to the Minister of Defence and issued by the Minister competent for customs (DGDDI), after advice from the Prime Minister, the Ministers of Economy, Foreign Affairs, Defence and Internal Affairs.¹⁰⁹

The DGA/DI of Defence centralizes most procedures and also functions as a central information point for dealers, including for transitⁱⁱⁱ. Customs also monitor the observance of regulations as part of their general competence founded on the Customs Code.

3.2.2.1.2 Dual-use items

Since 1 April 2010, competence for dual-use items falls under the *Ministère de l'Economie, de l'Industrie et de l'Emploi, Direction Générale de la Compétitivité de l'Industrie et des Services* (DGCIS).¹¹⁰ The *Service des Biens à Double Usage* (SBDU) issues dual-use licences.¹¹¹

Previously, competence for dual-use items belonged under the *Service des titres du commerce extérieur* (SETICE) of the *Direction Générale des Douanes et Droits Indirects*. The shift of licensing competence from Customs to Economy is in line with the vision of the French Government, which approaches dual-use items from an economic perspective (compétitivité) rather than based upon 'hard' security.¹¹² Control of cross-border movements of dual-use items for purposes of investigation, observation, and punishing violations has remained the responsibility of the Customs services, based on their general competence as specified in the Customs Code.¹¹³

3.2.2.2 Consultation

Since 1949, France has had an inter-ministerial committee with the specific task of investigating exports of **military equipment**.¹¹⁴ the *Commission interministérielle pour l'étude des exportations de matériels de guerre* (CIEEMG). This Commission is attached to the Council of Ministers or to the Minister competent for policy coordination on national security. It is composed of members from the Ministries of Defence, Foreign Affairs, Finance and Economic Affairs. Persons from other departments may also be invited to the meetings. The Commission

ⁱ Just as in the Netherlands, there is thus a closer linkage between customs services and the authority competent for export control (see 3.4).

ⁱⁱ Previously it was the *Délégation aux affaires stratégiques* (DAS) of the Ministry of Defence.

ⁱⁱⁱ For instance, the Memorandum of 2012 refers explicitly to information that can be obtained from the DGA/DI on modifications introduced in the course of 2012 regarding transit (p. 26)

meets as often as necessary and at least every 15 days. The Commission also has a broader task as a deliberative organ.¹¹⁵

In 2010, a specific interministerial committee was established for **dual-use items**, the *Commission interministérielle des biens à double usage* (CIBDU).¹¹⁶ It is attached to the Minister of Foreign and European Affairs and is informed of all applications that the SBDU receives. The Committee is composed of representatives from the Ministries of Defence, Industry, Energy, Internal Affairs, Foreign Trade, Research, Public Health, Agriculture, Customs and a representative from the Atomic Energy Commission. Other persons may also be invited. The Committee issues advice (inter alia) on the legislation and licence applications, including for transit, laid down in the EC Dual-use Regulation 428/2009. This advice is directed to the Minister of Economic Affairs and Industry.

3.2.3 Description of transit

3.2.3.1 Transit of military equipment

France uses two different concepts for the transit of military equipment: *transit* and *transbordement* (transshipment). This distinction is made in order to determine which form of transit is subject to a licensing requirement; the two notions are not defined in the specific regulations on military equipment.

The Customs Code (Art. 125) describes transit as follows: “*Le transit consiste dans la faculté de transporter des marchandises sous douane soit à destination, soit au départ d'un point déterminé du territoire douanier*”. Just as in other countries, however, the customs qualification is of no importance in determining whether or not transit falls under (export) controls.

3.2.3.2 Transit of dual-use items

For the transit of dual-use items, the definition from the EC Dual-use Regulation 428/2009 applies; it concerns general transit through the customs territory of the EU.

3.2.4 Scope

3.2.4.1 Territorial scope

The territorial scope for military equipment comprises the French territory.

Based on the European Directive 2009/43/EC, it is no longer possible to subject intra-Community transit (between EU Member States) of military equipment to controls; there must be at least one third country involved in the transit. The Dual-use Regulation defines transit as extra-Community transit from a third (non-EU) country to another third (non-EU) country.

3.2.4.2 Personal scope

A transit licence can only be requested by a ‘*commissionnaire de transport*’ or a ‘*commissionnaire en douane*’.¹¹⁷ Both are regulated professions in France.

3.2.4.3 Material scope

3.2.4.3.1 Military equipment

The description of military equipment can be found in several legislative documents. In the first instance, Art. L2331-1 of the *Code de la Défense* provides a summary of eight categories of 'arms', of which only the first three categoriesⁱ concern military equipment. Article 2 of the Act 95-589 of 6 May 1995¹¹⁸ states what types of equipment are included in each category.

The Decree of 27 June 2012 includes the list of military equipment to which specific control procedures apply, including for transit. The annex contains the 22 ML categories of the Common Military List of the EU, and adds two categories to it: observation satellites for military use and space systems, and other satellites, including their ground-base and equipment, if they are specially designed or adapted for military use.¹¹⁹

3.2.4.3.2 Dual-use items

The material scope for dual-use items is that of Annex I of the EC Dual-use Regulation.

3.2.4.3.3 Catch-all

The French legislation has no catch-all clause for military equipment. For dual-use items, the catch-all clause of the EC Dual-use Regulation applies (Art. 6, section 3 and Art. 6, section 4). According to the latest communication to the Commission (2012)¹²⁰ France has not made use of this.ⁱⁱ

3.2.5 Transit which is prohibited and subject to a licensing requirement

3.2.5.1 Military goods

Title IV of the *Code de la Défense* includes provisions with regard to prohibited arms: biological, toxin and chemical weapons (Art. L 2341-1 et seq).

Based on the *Code de la Défense*, imports of military equipment are in principle prohibited unless an exception is provided by decree (Art. L2335-1). In such instances, authorization (*autorisation*) is required.¹²¹ Transit falls under the import exception regime (Art. 4 Décret 2011-1467)¹²²:

A different regime applies for military equipment depending on whether it involves ordinary transit (Fr. *transit*) or transit with transshipment (*transbordement*), and depending on the means of transport: by rail, ports and airports, or by road. As of 1 July 2012, an additional distinction applies according to the origin or destination of the goods. No authorization is required in the following instances (Art. 4 Décret 2011):

- transit by rail from border to border;
- transit with transshipment at ports and airports without the goods landing (*'mise à terre'*);

ⁱ Category 1 : small arms and their ammunition, designed or destined for warfare (land, sea, air)

Category 2: equipment intended to carry or use small arms in combat situations

Category 3: protective equipment against gas attack

ⁱⁱ For export licences, the figures show that less than 1% of dual-use export licences have been granted applying the catch-all clause, see: S. PAILE, 'France', in MICHEL Q. (ed.), *Sensitive Trade, the Perspective of European States*, Brussels, P.I.E. Peter Lang S.A., 2011, p. 63

- transit with transshipment at ports and airports in which the goods do land (*'mise à terre'*)
 - in the case of arms carried by physical persons who transfer to another aircraft or another boat, and who have obtained authorization for this from their authorities;
 - in the case of certain categories of arms not belonging to military equipment.

In other instances, authorization is in principle required.ⁱ This applies to transit by road from border to border and transit with transshipment that involves landing (*'mise à terre'*) at ports and airports. Since 30 June 2012, however, the licensing requirement for intra-Community transit has also lapsed (under the *Décret* of 2011 in a separate section regulated by new provisions). The transit licensing requirement now applies only to transit in which at least one third country is involved.¹²³

Concerning the authorization needed for transit, the term used is not a *'licence'* (the usual French term for licence), but an *'autorisation de transit de matériel de guerre'* (transit authorization for military equipment, ATMG). These licencesⁱⁱ are also sometimes referred to as *'autorisations de passage'*.¹²⁴ The licence can be issued globally or for a specific transaction. The term of validity is respectively 1 year and 6 months (from date of issue). Global licences can be automatically renewed.ⁱⁱⁱ Licences for transit by road must accompany the goods during the entire transport. They must be available for presentation to the competent authorities at all times.¹²⁵

ATMG required	No transit licence required
<ul style="list-style-type: none"> - transit by road from border to border - transit with transshipment and landing (<i>'mise à terre'</i>) at ports and airports 	<ul style="list-style-type: none"> - transit by rail from border to border - transit with transshipment but without landing (<i>'mise à terre'</i>) at ports and airports - transit with transshipment and landing (<i>'mise à terre'</i>) of arms that are carried by physical persons and certain arms not considered as military goods

3.2.5.2 Dual-use items

France makes use of the *ad hoc* possibilities of the Dual-use Regulation to prohibit certain transit or to place it under licence. The SBDU publishes a guide (*'Guide pour l'exportateur'*), but this only includes minimal clarification on transit. It simply mentions that the application forms (European type) for transit can be found on the website of the competent body. Further information that must be supplied according to the Guide concerns the localization of the goods in the country of origin, the end-user, and the current location of the goods (with a view to control).¹²⁶

ⁱ A limited category of military equipment (§1-4, 1st category) may not stop for longer than 24 hours at a station or airport, or for less than 72 hours in a port. A specific provision is provided for securing the goods (this is the only remaining relevant Article, Art. 66, of the *Décret* of 1995).

ⁱⁱ By way of description, we call this a transit 'licence' (the French word would also be 'license'), whereas the legislation speaks of an *'autorisation'* (equivalent of authorization in English).

ⁱⁱⁱ Art. 47 *Décret* n° 2011-1467: "*La durée de validité de l'autorisation de transit revêtant une forme globale est fixée à un an à partir de la date de délivrance. Cette autorisation est renouvelable par tacite reconduction.*"

There is thus little specific information to be found about the transit control regime for dual-use items, either in the legislation, or in administrative documents and on the competent body's website. This is probably an indication that, in practice, transit control of dual-use items in France does not occur very often.

3.2.6 Assessment criteria

The political criteria to which licence applications for **military equipment** are subject are not included in the French regulations. The European criteria are *de facto* applied, as appears from the annual reports to the Parliament¹²⁷, but they are not incorporated in formal legislation.ⁱ

The criteria may be found in the '*directives du haut level*' intended for the ministries responsible for handling applications (Customs and Defence). A distinction is made according to the recipient country and the type of goods.¹²⁸ Requirements related to the verification of the destination are regulated by separate implementation decisions, and were recently amended for military equipment.¹²⁹ From enquiries to the administration, it appears that the criteria are not published because they involve political considerations. The no-undercut principle is also applied, but without being included in legislation.¹³⁰

Assessment criteria and modalities for **dual-use items** can be found in EC Regulation 428/2009. The French legislation includes no distinct provisions to this end.

3.2.7 Procedural aspects

It is notable that most provisions in the legislation only concern exports, even if the title sometimes mentions *transit* and brokering.ⁱⁱ Some authors speak of a '*merged approach*' which is typically French and which views trade transactions from the perspective of entering or leaving the French territory.¹³¹

3.2.7.1 Military goods

The French regulations do not mention what conditions transit agents are subject to for their application. This only emerges from documents issued by the competent administration, notably the application form on the French Customs' website (see also below regarding the procedure).¹³²

An application for transit of military equipment is submitted by the '*commissionnaire de transport*' or the '*commissionnaire en douane*' to the DGA/DI of the Ministry of Defence, and is then processed by Customs. The competent Minister may request that the application first be investigated by the competent inter-ministerial commission (see above). In that case the licence is approved by the Prime Minister and the minister competent for Customs informs the applicant.¹³³ When there is no intervention by the inter-ministerial commission, Customs

ⁱ CP 2008/944/CFSP which imposes the Community criteria only requires that these be included in the policy of the Member States, without a formal obligation to do so via legislation.

ⁱⁱ This is also the case for the approach to dual-use items. For instance, the CERFA document that Customs prescribes for the application for a transit licence refers explicitly to an *Arrêté* of 13 December 2001 relative to "*contrôle à l'exportation vers les pays tiers et au transfert vers les Etats membres de la Communauté européenne de biens et technologies à double usage*", whereas the Decree does not mention transit even once. The Memorandum of 2012, which is a manual to help exporters and importers in drafting their applications regarding exports, imports and transit, also dedicates only one paragraph to transit.

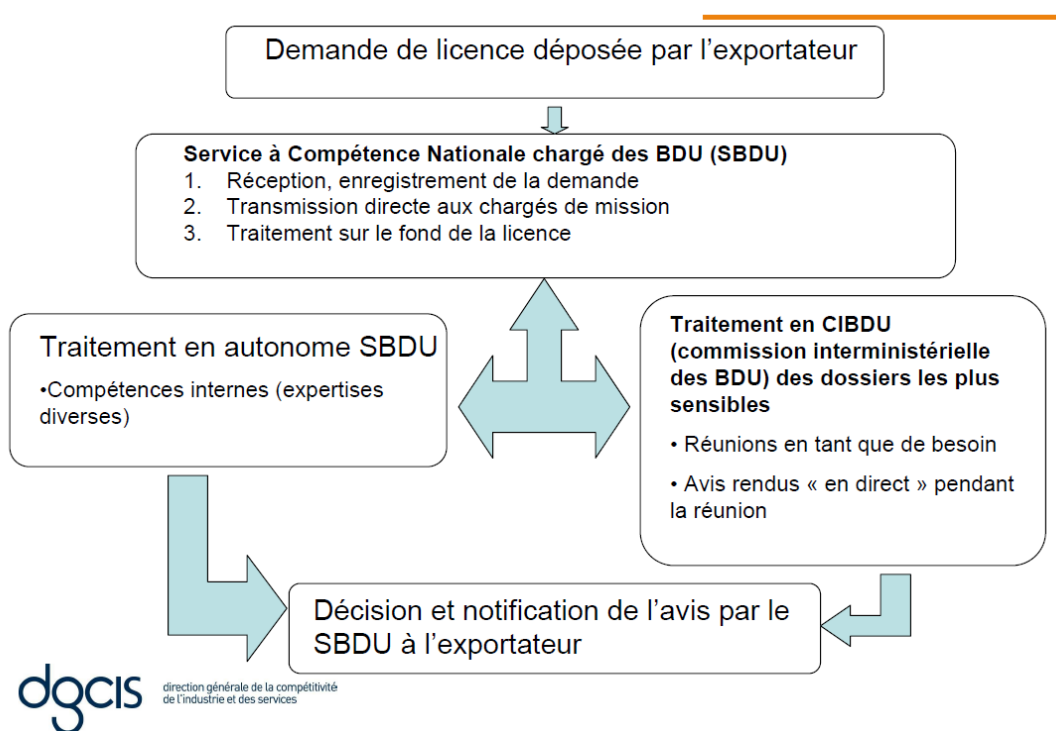
handle the application, make the decision themselves, and then communicate the decision. The same procedure applies to transit licences by road and to transit with transshipment in ports and airports.¹³⁴

The administration is working on a system to process the applications electronically in order to guarantee faster handling and to make the system better adapted for companies' as well as the administration's needs (*Système d'Information pour la Gestion Administrative des Licences d'Exportation* – SIGALE). The objective is to have the entire process (from application to issuing of the licence) processed electronically. SIGALE is expected to be operational by 2014.¹³⁵

3.2.7.2 Dual-use items

According to the competent body, the *ad hoc* procedure for transit is based *mutatis mutandis* on the schematic representation valid for exports of dual-use items.

Figure 1: Diagram of the procedure for dual-use items from 2010¹³⁶



3.2.8 Modalities

The *Arrêté* of 1992 provides for the possibility of suspending a transit licence (Art. 26-1). The Prime Minister is competent to this end, possibly after consultation with the interministerial Committee. Suspension may be necessary if the licence carries the risk of infringing the fundamental interests of the nation, or of harming national or public security, foreign security or the international obligations of France. Suspension is also possible if the conditions under which the licence was issued no longer apply, or if the beneficiary no longer engages in the licensed activity.

Since 30 June 2012, the Décret of 2011 has further added that a transit licence may also be modified, suspended, revoked or withdrawn by the Prime Minister after advice from the ministries that are permanent member of the Interministerial Committee. In case of urgency, the licence can also be suspended with immediate effect. Those involved have the right to be heard before a decision is taken. The Minister competent for Customs informs those concerned about the decision.

3.2.9 Monitoring and sanctioning

3.2.9.1 *Monitoring*

Monitoring compliance with the regulations concerning the transit of strategic goods, just as in other countries, is the responsibility of French Customs (based on their general competence in the Customs Code).

No published information could be found on the specific functioning of the Customs services for purposes of conducting (general) monitoring and tracking down fraudulent practices relating to (transit of) strategic goods. Neither the reports to the Parliament on strategic goods policy, nor publications by Customs themselves,ⁱ contain any clarification about how the controls are implemented in practice, specifically for strategic goods.

3.2.9.2 *Sanctions*

Specific sanctions for violation of these regulations may be found respectively in the legislation on military equipment and that on dual-use items.

ⁱ For instance, performance reports, annual reports or general publications about their functioning.

3.3 Germany

Over the years, Germany's trade policy has evolved from one primarily based on prohibitions and restrictions (post-WW2, under the occupying powers) to a policy of - in principle - unrestricted exports.¹³⁷ Trade in strategic goods falls under a regime exempting it from the general rule that trade in goods and services is not restricted (Section 1, (1) Foreign Trade ACT – AW Gesetz). Just as in other countries, strategic goods cover both military equipment or civil goods that may be used for military purposes (the notion 'strategic goods' is not commonly used in Germany).¹³⁸ Germany is also the only country (out of those analysed in this report) that provides for a separate regime for 'war weapons' (*Kriegswaffen*), a specific sub-category of military equipment.ⁱ

Trade in war weapons is in principle prohibited and is only very exceptionally permitted under licence. The War Weapons Control Act (*Kriegswaffenkontrollgesetz* - KWKG) expressly mentions that there is no entitlement to the granting of a licence (Section 6, (1), KWKG). Trade in other military and dual-use items is subject to a licensing requirement or prohibition (Section 1, (1), 2nd sentence in AW Gesetz). Trade restrictions, however, must be proportional to the intended objective (Section 2, (3) AW Gesetz) and must serve a legitimate interest, as specified in the AW Gesetz (Section 7).¹³⁹

The main concern regarding transit is international security. The most important element in the assessment is the final destination of the goods. The risk of diversion to the internal market and potential threat to domestic security are of less importance. The distinction between war weapons and other strategic goods also finds expression in the German approach to transit. Instead of opting for systematic control of potentially problematic transit of strategic goods, German legislation provides a broad legal base that enables the prohibition and monitoring of transit *at any time*. This is precisely why the competent authority regards it as unnecessary to systematically subject a certain type of transit to licensing obligations, that would only hamper and slow down legal trade. The regulations impose a systematic licensing requirement only for war weapons. In practice, this means that most transit through Germany is free of any obligation. In recent years, neither dual-use items nor other military equipment (other than war weapons) in transit have been licensed. Transit of dual-use items has, however, been prohibited on a few occasions.

The most important transit location in Germany is the Port of Hamburg. Other transit locations are the airports of Frankfurt and Cologne. There are no known data on transit licences for war weapons; reports to the Parliament only publish data about exports.

ⁱ In France, 'matériel de guerre' is the term used for all military equipment in the legislation; in Germany it constitutes a sub-category of military equipment, for which the legislation imposes specific restrictions.

3.3.1 Legal framework

The *Außenwirtschaftsgesetz* (AW Gesetz) or Foreign Trade Act of 28 April 1961 states as a general principle that foreign trade is not restricted (Section 1). However, there are a number of exceptions to this (Sections 5 and 7):

- to guarantee the vital security interests of the Federal Republic of Germany;
- to prevent disruption of the peaceful coexistence between nations;
- to prevent serious damage to German foreign relations;
- to observe international obligations.

The possibility of monitoring transit is regulated in Section 7, (2), 1. of the AW Gesetz.

Restrictions on foreign trade in strategic goods – in the form of prohibition and licensing requirements – are regulated in the Foreign Trade Decree, the *Außenwirtschaftsverordnung* of 1986 (AWV). The goods to which the Act and the Implementation Decree apply are listed in the Export List (Ausfuhrliste - AL) in annex to the Decree.

Germany has separate regulations concerning war weapons. Their export is regulated by the War Weapons Control Act, the *Kriegswaffenkontrollgesetz* of 1961 (KWK Gesetz). The War Weapons List, the *Kriegswaffenliste* (KWL), specifies which goods belong to this category. These weapons also appear on the Export List, so that they are subject to double control (see below).¹⁴⁰

In the discussion below we shall use ‘military equipment’ to mean ‘all military equipment other than war weapons’.

The legal base for handling exports of dual-use items is the EC Dual-use Regulation 428/2009. Supplementary national provisions can be found in the AW Gesetz and the AWV (Section 38 for transit).

Summary of most important legislation in Germany

Only for war weapons:

- War Weapons Control Act, the *Kriegswaffenkontrollgesetz* – KWK Gesetz 1961

Only for dual-use items:

- EC Dual-use Regulation 428/2009
- Foreign Trade Decree, de *Außenwirtschaftsverordnung* – AWV 1986

For all strategic goods (military equipment, including war weapons and dual-use items):

- Foreign Trade Act, *Außenwirtschaftsgesetz* – AW Gesetz 1961
- Foreign Trade Decree, *Außenwirtschaftsverordnung* – AWV 1986

ⁱ Other legislation relevant for export control but not for transit is the small arms law and regulations radiation protection.

3.3.2 Competent authorities and consultation mechanisms

3.3.2.1 Competent authorities

Competences regarding strategic goods differ according to the type of goods. Depending on the category, a general and residual competence applies, plus a shared competence for specific aspects.

For **war weapons**, the Federal Ministry of Economics and Technology (*Bundesministerium für Wirtschaft und Technologie* - BMWi) has a general and residual competence to grant licences. When licences concern the armed forces, the Ministry of Defence is competent; for licences related to law enforcement and prisons: the Ministry of the Interior. Customs matters belong to the Ministry of Finance (Section 11 (2) KWK Gesetz).¹⁴¹ The Ministry of Transport, in cooperation with Foreign Affairs, has a specific competence to issue licences for the transport to and from certain destinations outside Germany in which German ships or airplanes are involved (Section 11 (3) in combination with Section 4 (1) KWK Gesetz). These competences should be considered as delegations, ultimately the licensing policy is the responsibility of the German Federal Government (Section 11 (1)). The handling of licence applications is carried out by the Ministry of Economy (VB8 Division¹⁴²) when it concerns war materials.

For **other military equipment and dual-use items**, the Federal Ministry of Economics and Technology (*Bundesministerium für Wirtschaft und Technologie* - BMWi) is competent for regulation as well as the application of export control policy.¹⁴³ For a number of aspects there is a joint competence with other ministries. Thus, for instance, the Ministries of Economics, Foreign Affairs and Finance can jointly impose new export restrictions (Section 2(2) AW Gesetz). This provision is aimed at rather exceptional circumstances in which security interests or foreign relations would be threatened. In such an event, restrictions could be applied to all possible goods and for all potential destinations.¹⁴⁴

The processing of licence applications for other military equipment and dual-use items belongs to the competence of the Federal Agency for Economics and Export Control (*Bundesamt für Wirtschaft und Ausfuhrkontrolle* – shortened to BAFA hereinafter).¹⁴⁵ BAFA is an autonomous agency operating under the jurisdiction of the Federal Ministry of Economy.¹⁴⁶ In addition to receiving, assessing and granting licences, BAFA is also responsible for, inter alia:

- The administrative implementation of international embargoes;
- The control of stocks of war weapons (not as a licensing but as a monitoring authority);
- Granting licences for nuclear fuel, other radioactive substances and radioactive waste.¹⁴⁷

The **Customs** are responsible for monitoring compliance with the legislation. They check documents for legal conformity and conduct physical controls at the border and in the territory. The *Zollkriminalamt*, the Customs' Investigation division, can initiate and coordinate investigations. The office of the public prosecutor is also involved in these instances.

The **Chambers of Commerce** play a role as a contact-point for providing information and organizing conferences on issues related to export control.¹⁴⁸

3.3.2.2 Consultation

For politically sensitive cases, BAFA must consult with other authorities (the Federal Ministries of Economy and Foreign Affairs) before making a decision whether or not to grant a licence.¹⁴⁹ When major interests are at stake, the Federal Security Council gets involved. This is chaired by the German Chancellor and consists of representatives from the Ministries of Economy, Foreign Affairs, Defence, Finance, Internal Affairs, Justice, Economic Cooperation and Development and the Federal Chancellery.¹⁵⁰ The criteria that determine the sensitivity of a case under consideration pertain to the recipient country, the type of goods and the volume of the transaction.¹⁵¹

3.3.3 Description of transit

3.3.3.1 Transit of military equipment

In the AW Gesetz (Section 4 (2), 5), transit is described as the transport of goods from foreign economic territories through the (German) economic territory, without their entering the market of the economic territory.

There is no definition of transit of war weapons in the KWK Gesetz.

3.3.3.2 Transit of dual-use items

For dual-use items the broad definition from the EU Dual-use Regulation serves as the reference, particularly the three criteria provided for in preambular consideration 16 of the Regulation: *“those items which are not assigned a customs-approved treatment or use other than the external transit procedure or which are merely placed in a free zone or free warehouse and where no record of them has to be kept in an approved stock record”*.

In practice, dual-use transit is considered as the passage across German territory from a third country to a third country, in which no interruption, handling, or any other action occurs on German territory. If the latter does occur, the transaction is considered as a re-export, and may be subject to prohibition or control in that context.

3.3.4 Scope

3.3.4.1 Territorial scope

The territorial scope of the export control legislation is described in Section 4 (1), 1. of the AW Gesetz; namely, the German economic territory, including the Austrian villages of Jungholz and Mittelbergⁱ.

It follows from Directive 2009/43/EC that it is no longer possible to subject intra-Community transit (between EU Member States) of military equipment to control; there must be at least one third country involved in the transit.

The Dual-use Regulation defines transit as extra-Community transit from a third (non-EU) country to another third (non-EU) country.

ⁱ These are on Austrian territory but can only be reached via German roads. Because of their enclosed nature, they form part of the scope of the German customs territory

3.3.4.2 Personal scope

German regulations do not prescribe who must apply for a transit licence. By analogy with the definition of an exporter (Section 4c AWV), they use the criterion of who has decision-making power over the goods. If it appears from the contract serving as basis for the export that the person is not located in Germany, the contractual partner with offices in Germany becomes the exporter, *mutatis mutandis* considered as transit agent. Licences for war weapons can also only be awarded to German citizens, or to persons who are located in Germany or have their habitual residence there (Section 6 (2) 2b KWK Gesetz).

3.3.4.3 Material scope

3.3.4.3.1 Control lists

Germany uses three lists in which strategic goods are mentioned.

Together, the List of military equipment and the List of dual-use items constitute the Export Control List, which is included in annex to the AWV.¹⁵² This list is composed as follows:

- Part I, Section A: arms, ammunition and other military equipment (items 0001-0022 of AL). This list is nearly identical to the Common Military List of the EU¹⁵³;
- Part I, Section C: dual-use items. This list uses Annex I of the Dual-use Regulation and adds a number of items to it.ⁱ The legal basis for adding national items is contained in Section 2 (2) and Section 7 (1) of the AW Gesetz.

War weapons are also mentioned in the list of military equipment (Part I, Section A). The entire list is included in the annex to the KWK Gesetz. War weapons include nuclear, chemical and biological weapons, and a few other categories such as (i.a.) projectiles, combat aircraft, and combat helicopters.ⁱⁱ Because war weapons appear on both lists, a double control regime applies to them (see also below).

It is up to the applicant to determine whether or not his goods appear on the control lists. For war weapons he can ask advice from the Ministry of Economy, and for all other goods from BAFA. The question can be put to BAFA electronically via ELAN K2 (see also below for the procedure).¹⁵⁴

The administration also makes a kind of ‘conformity list’ (*Umschlüsselungs-verzeichnis*) available. Based upon indicators from the Customs Codes, it shows whether or not the goods in question may fall under a control regime.¹⁵⁵

3.3.4.3.2 Catch-all

The AW Gesetz contains several provisions that, with a view to protecting vital interests, enable expansion of its scope - including the material coverage (Section 5, 6 and 7). Section 7 (2) explicitly mentions transit.

ⁱ The national list of dual-use items under control uses a -900 numbering and includes, inter alia, more specifically Industrial goods such as vehicles, helicopters and transmitters.

ⁱⁱ Part A: I. Nuclear weapons, II. Biological weapons, III. Chemical weapons Part B (other war weapons) I. Projectiles, II. Combat aircraft and helicopters, III. Vessels of war and special ship equipment, IV. Combat vehicles, V. Barrel Weapons V. Light anti-tank weapons, military flame-throwers, mine-laying and mine-throwing systems, VII. Torpedoes, mines, bombs, independent ammunition, VIII. Other ammunition, IX. Other essential components, X. Dispensers, XI. Laser weapons

For the transit of dual-use items, the catch-all clause of the European Regulation applies (Art. 6). According to the latest communication to the Commission, Germany has not so far made use of this.¹⁵⁶

3.3.5 Transit which is prohibited and subject to a licensing requirement

Prohibition measures as well as licensing requirements apply to transit (Section 2 (1) AW Statute). The control regime differs according to whether it concerns the transit of war weapons, military equipment or dual-use items.

3.3.5.1 *Transit which is prohibited and subject to a licensing requirement*

3.3.5.1.1 Prohibited transit

A prohibition can arise from the UN, OSCE and EU embargoes¹⁵⁷ and from the KWK Gesetz, namely, for chemical and biological weapons (Section 18 KWK Gesetz), anti-personnel mines (Section 18a KWK Gesetz) and nuclear weapons (Section 19 KWK Gesetz). In principle there can be no exception made in this regard, unless as a result of obligations under the NATO Treaty (Section 16 KWK Gesetz).

3.3.5.1.2 Transit subject to a licensing requirement

As mentioned earlier, in principle, trade in war weapons is prohibited and is only exceptionally permitted (with licence) under certain conditions. The KWK Gesetz imposes a transport licence: war weapons can only be imported, exported and transited or brought into German territory in some other way if a licence for transport has been issued (Section 3 (2) KWK Gesetz). Whoever receives a licence for the transport of war weapons is obliged to take all necessary measures to secure them and to prevent diversion of the goods. A copy of the licence must be available for presentation to the competent authorities at all times (Section 12 KWK Gesetz).

Given that the list of war materials forms an integral part of the export control list, it may happen that goods are obliged to conform with the obligations of the KWK Gesetz as well as the with the AW Gesetz. In that case, two licences are indeed required, each with their separate and different procedures. An application must be submitted to the Ministry of Economy as well as to BAFA. In practice, the Ministry of Economics is the first to issue a 'war weapons licence', after which, if necessary, BAFA can include additional conditions for awarding a 'foreign trade licence'.

A general transit licence can be granted when no change in customs status is anticipated and the goods are not transhipped (Section 3 (4) KWK Gesetz). The Federal Ministry of Economics and Technology, Department VB8, processes these licences.

3.3.5.1.3 Transport licence with extra-territorial function

While this is not directly relevant for the transit control regime, in this context it is interesting to mention the transport licence for war weapons issued by the Ministry of Transport (Section 4 KWK Gesetz). The licence is required for German ships and aircraft that do not enter German territory. This extraterritorial function makes it possible, for instance, to exercise controls on ships located in territorial waters or (theoretically) aircraft that overfly without landing. The

extraterritorial function is restricted to ships and aircraft that come under German jurisdiction because they sail under the German flag or have a German owner. The purpose is thus mainly to prevent the involvement of German subjects in illicit activities.

3.3.5.2 Transit of other military equipment and dual-use items that are prohibited or subject to licensing

In contrast to war weapons, transit of other military equipment and dual-use items is not restricted. The principle of German transit policy is that a systematic licensing requirement for all, or a certain type of, transit is not needed because the possibility exists at all times to prohibit suspect transit or to place it under control/licence. The regulations provide for several possibilities:

- For other military equipment, Section 7 (2) of the AW Gesetz offers the possibility to licence transit of military equipment inter alia for reasons of safeguarding the security and external interests of Germany.
- A legal base creating the possibility to prohibit transit of dual-use items or to place it under licence, for goods on the List as well as other goods, can be found in the Dual-use Regulation. This legal base is enshrined in the AWW in Section 38, which provides the competent authority specific means to act in individual instances.¹⁵⁸
- Further, the possibility exists to prohibit goods in either category in individual instances based on Section 2 (2). The BAFA Administration calls this the '*individual interdiction action*'.ⁱ

According to the competent officials (at BAFA), in recent years the possibility to place transit of other military equipment and dual-use items under licence has never been used.¹⁵⁹

3.3.6 Assessment criteria

3.3.6.1 Assessment criteria for war weapons and other military equipment

The AW Gesetz and KWKG Gesetz summarize in general terms a number of circumstances in which a licence can be denied. These may involve security, foreign relations and also the reliability of the applicant. Economic considerations may also play a part in the deliberations (Section 3 AW Gesetz). These general provisions are further elaborated in the so-called Federal Government policy principles for exports of war weapons and other military equipment (19 January 2000).¹⁶⁰ The document includes the concrete list of assessment criteria for export control policy on strategic goods, which also apply to transit. It is a political document, not anchored in formal legislation. The political principles are included in an annex to the annual report to the Parliament on arms exports, and were last updated in 2000. The EU criteria form an integral part of them; they are also included in annex, with an explicit reference made to them in the actual policy principles.¹⁶¹ The formulation of the German criterion with regard to human rights is stricter than the European wording.¹⁶² The assessment of end-use is included in Criterion V.¹⁶³

The Policy Principles provide for a more flexible approach to the EU Member States, NATO countries, and NATO equivalent countries (these include Australia, Switzerland, Japan and New

ⁱ In the past, this provision has been used to prohibit exports involving unlisted dual-use items. Six months after the ban, the competent administration must evaluate the ban; if the decision is upheld, the export control list is adjusted. According to information from the competent officials at BAFA, in recent years a dozen products have been added to the List on this basis.

Zealand). All other countries belong to the so-called 'third countries'. As a general rule, the special treatment for friendly countries means that (export) licences are approved and denials are the exception. For third countries, a full assessment under the licensing procedure applies.¹⁶⁴ The Policy Principles provide for a stricter approach to these third countries and pay stricter attention to the situation in the recipient country regarding human rights.

The no-undercut principle is not enshrined in the formal legislation, but is applied in practice at least as concerns denials of export licences, according to the commentary in the annual report.¹⁶⁵ No information is published about transit licences issued and denied.

3.3.6.2 Assessment criteria for dual-use items

The assessment criteria of Article 12 of the EC Dual-use Regulation serve as a reference for the assessment of transit applications for dual-use items.¹⁶⁶ The requirement to observe international obligations, and the no-undercut principle as found in the Regulation, also apply. All these criteria are broadly covered in the German Government's policy principles which apply to all strategic goods. Given that in the past, no dual-use transit has been placed under licence, there is still no administrative practice about this.

3.3.7 Procedural aspectsⁱ

The application for war weapons is submitted to the Ministry of Economics. For all other strategic goods, the application can be submitted electronically to BAFA, via the online application system ELAN K2.

Documents that must be appended to the application include;

- a document that confirms the end-useⁱⁱ;
- technical documents that prove the nature of the goods;
- documents regarding the underlying contract.

Prior to a formal application, informal advice can be gained from the competent authorities in order to discover whether or not a transaction is subject to a licensing requirement. The procedure runs parallel to that of an application, including consultation with other ministries or submission of the question to the Federal Government. The answer does not entail formal authorization; an official licence is always required for this.¹⁶⁷

3.3.8 Modalities

There are a variety of modalities provided for in the AW Gesetz (Section 30) and the KWK Gesetz (Section 6-9). These modalities apply to export licences as well as to transit licences. Suspension, revocation and so forth are among the possibilities. A licence may be revoked for a variety of reasons, for instance:

ⁱ A description of the procedure for a transit application cannot be found in the information notes of the competent administration, but the process is analogous to that for an export licence. From information on the latter (BAFA, *Brief Outline, op. cit.*, p. 17), we can establish the cited elements with regard to transit.

ⁱⁱ This may be in the form of a private end-use certificate, an official end-use certificate or an international import certificate.

- if the (transport) licence damages good relations with other countries (Section 8 (2) KWK Gesetz);
- if there is a risk that the licensed transport constitutes a threat to peace (Section 8 (3), 1. KWK Gesetz);
- due to a violation of international obligations (Section 8 (3), 2. KWK Gesetz);
- due to the untrustworthiness of the person or organization (Section 6 (3), 3. KWK Gesetz).

3.3.9 Monitoring and sanctioning

Germany exercises strict monitoring and imposes heavy sanctions on violations, due to some export scandals in the past.¹⁶⁸

3.3.9.1 Monitoring

The Customs authorities have a general monitoring competence based on customs legislation as well as specific competences based on export control legislation (Section 14 (2) KWK Gesetz). In practice, just as in other countries, it is the Customs services that have the authority to monitor and the capacity to identify suspect transit. The export control service does not itself take active steps to detect suspect transit. When Customs suspect that the transit entails risks, they can detain the goods until BAFA has decided whether or not a prohibition is appropriate or a licence is required. It is the task of Customs to determine whether or not a transit is permitted (Section 39 AWV). Every customs agency can make checks at the external borders as well as on German territory and may demand additional information, such as cargo documents, from those who are responsible for the transit or those responsible for the goods.

Complementary to the Customs' responsibility for monitoring compliance, the *Zollkriminalamt* is competent specifically for detecting and investigating fraudulent practices.

3.3.9.2 Sanctions

There are a variety of prison sentences for non-observance of the provisions on nuclear weapons (1 to 5 years or a minimum of 2 years according to the type of crime, Section 19 KWK Gesetz); chemical and biological weapons (minimum 2 years, Section 20 KWK Gesetz); anti-personnel mines (1 to 5 years, Section 20a KWK Gesetz); and the transport of war weapons (1 to 5 years, Section 22a KWK Gesetz). Prison sentences can be increased to 15 years based upon a provision in the General Criminal Code (Section 38 (2)). Additional penal provisions for trade without the required licence are included in Section 34 (1) of the AW Gesetz.

The administration knows of no instances of criminal prosecutions due to illicit transit.

Administrative sanctions can also be imposed (Section 23 KWK Gesetz).

3.4 The Netherlands

The Dutch policy on foreign arms trade is primarily aimed at guaranteeing international, regional and national security. Economic, political and defence interests are also important considerations.¹⁶⁹ At the procedural level, the Dutch Government is aware of the administrative burdens that controls entail, and of the logistical problems that may arise as a result.ⁱ Particularly when it comes to the major ports for international goods traffic – more specifically the Port of Rotterdam and Schiphol Airport – the concern is to avoid unnecessary pressure on the processing speed of goods passing through.¹⁷⁰ Especially for dual-use items, the government tries to keep obstacles for the private sector to the very minimum.¹⁷¹

The Dutch Government publishes monthly reports on its website about exports of military equipment. Communications about transit are published separately (monthly transit reports); these also mention the means of transport and the transit location. Licensed transit is included in the monthly reports on exports of military equipmentⁱⁱ. From the 2011 data, it appears that 35 transit licences for military equipment were issued for a total value of 4.26 million euro. For dual-use items, only statistics on exports are available.¹⁷²

3.4.1 Legal framework

The Dutch User's Guide on strategic goods and services describes strategic goods as: *“products that, for security reasons or due to international agreements, are considered to be of such strategic importance that their export is either prohibited altogether or subject to specific conditions. Such goods are generally suitable to be used for military purposes or for the production of weapons of mass destruction (WMD).”* The Netherlands legally distinguishes ‘military equipment’ from dual-use items in separate provisions.¹⁷³ In 2001, the Dutch legislation was adapted so that transit control of (all) strategic goods across Dutch territory became possible. Since then, the legal framework and policy practice on transit control have been repeatedly reviewed and revised. Since 2008, the General Customs Act (*Algemene Douanewet* - ADW) has been the general, legal basis for regulating trade in strategic goods.ⁱⁱⁱ The Decree on strategic goods (Decree SG)¹⁷⁴ contains most of the important operative provisions for both categories of strategic goods, thus implementing the ADW for military equipment and supplementing the EC Dual-use Regulation 428/2009 for dual-use items.

ⁱ In October 2009, the results of an investigation by Developmental Cooperation and Policy Evaluation were published. The review covered both legislation and practice regarding foreign arms trade over the period 2004-2008. The most important findings from the report are the following (*NL Beleidsdoorlichting wapenexportbeleid 2009, op. cit.*, pp. 46 et seq) :

- Although implementation of the control policy is organized in a ‘hybrid’ way, the system functions adequately and to the satisfaction of those concerned;
- The Dutch policy needs to be aligned internationally in order to ensure impact;
- The ideal situation combines international alignment and national specifications, and implementation of the export control and arms export policy by the national government.

Further, the limited personnel available remains a particular concern. The report emphasizes that the flow of goods at the borders of the Netherlands is substantial and that border controls in general (and not only for arms trade) could bear strengthening.

ⁱⁱ Indicated by Code 3 in the column exports/transit

ⁱⁱⁱ The ADW describes, among others, the competences and specific tasks of customs services with regard to controlling trade in strategic goods.

Together with the ADW it provides a new legal base for controlling the transit of military equipment as well as dual-use items. The previous distinction between 'fast transit' and 'slow transit' has been abandoned.ⁱ Since then, there has been a general licensing requirement for all transit of military equipment, subject to a number of exceptions, the most important of which is transit where at least one allied nation is involved - in practice the major part of all transit through the Netherlands.¹⁷⁵ For dual-use items, the licensing requirement was abandoned and replaced by the possibility to carry out transit control *ad hoc*. For the transit of military equipment not subject to licensing, there has been a general notification requirement in place since 2004. Initially only for small arms, it was extended to military equipment in 2008. With this, the Netherlands in the first instance aims to keep an overview of the type and scale of goods being transported on and through its territory. It's also an instrument to place the transit of military equipment (not subject to licensing) *ad hoc* under licence.

The most recent revisions to the legal framework date from 2011 and 2012. On 30 September 2011, the Decree on Strategic Goods was modified, primarily in order to implement Directive 2009/43/EC. Substantially, nothing changed regarding transit; there was only a reorganization of the relevant provisions.¹⁷⁶ The newer Decree entered into force on 30 June 2012. As from 1 July 2012, transit from and to friendly countries ceased to be exempt from control. In view of the persistent criticisms of this exemption¹⁷⁷ and of recent events in the Middle East and North Africa, the Decree on Strategic Goods generalised the licensing requirement for transit involving transshipment. By analogy with export policy, two kinds of general licences for certain less sensitive goods were introduced for transit from and to friendly countries, so that most transit is quasi-automatically approved. But the key point is that, in light of recent developments, the possibility remains to control such transit on an individual basis whenever deemed necessary.

For **military equipment**, the Decree SG implements the ADW. With regard to these goods, the Decree SG provides the definitions (Art. 1) and the principles of licensing and notification requirements for, among others, transit and imports (Art. 5 et seq).¹⁷⁸ Numerous specific operative provisions concerning how licences must be applied for, their modalities and conditions are laid down in Ministerial Regulations. As from 30 June 2012, the relevant document is the Strategic Goods Implementing Order of 28 October 2011 (hereinafter Implementing Order SG 2012).¹⁷⁹

The general legal basis for **dual-use items** is contained in the EC Dual-use Regulation 428/2009 of 5 May 2009. For dual-use items, the Decree SG supplements this Regulation. With the adoption of the Decree SG, the licensing requirement for dual-use items was abandoned and in its place came the possibility of controlling transit *ad hoc*. The Decree SG includes, inter alia, a prohibition on trade that is in conflict with the provisions of the EC Dual-use Regulation (Art.

ⁱ In 2001, the Import and Export Act for strategic goods was drastically modified as concerns transit. The intention was to control 'slow transit' by means of a licensing procedure according to the methods and criteria of the export policy valid at the time. Slow transit was the transit of goods that underwent economically relevant processing in the Netherlands, i.e. processing adding value to the product. A notification requirement applied to 'fast transit'. Fast transit was transit of goods that stayed on Dutch territory no longer than 45 days (if transported by sea) or no longer than 20 days (if transported otherwise). For an explanation of the policy decision to drop the distinction between fast and slow transit, see the Letter of the Secretary of State for Economic Affairs 11.02.2008, *loc. cit.*, p. 2.

2).ⁱ The Decree SG further appoints the authorities competent for implementing the Regulation (Art. 3.1.), a catch-all clause enabling a prohibition on transit *ad hoc* for goods that do not appear on the list (Art. 4a.1.), and a provision to prohibit transit to destinations under embargo in the case of military end-use (Art. 4a.2.).ⁱⁱ

Violations of the relevant provisions with regard to arms trade are considered economic crimes in the Netherlands. The legal base for this is found in the Act on Economic Crimes which, besides penalties, also designates the Customs services and the FIOD-ECD as competent authorities (see below).

Other relevant legislative documents are the Implementation Act (1995) and the Implementation Decree (1997) to the Chemical Weapons Convention, that include, inter alia, prohibition measures regarding chemical weapons.

Summary of the most important legislation with regard to military equipment

- Decree on Strategic Goods of 24 June 2008, Stb 2008, 252 (amended)
- Strategic Goods Implementing Order of 28 October 2011 (Implementing Order 2012), Stb 2011, No. 19960
- Regulation by the Secretary of State for Economic Affairs, Agriculture and Innovation of 29 May 2012, No. WJZ / 12065785, containing rules with regard to the general transit licence NL007 for military equipment originating from allies (Regulation for general transit licence NL007), Stcrt 5 June 2012, No. 11112
- Regulation by the Secretary of State for Economic Affairs, Agriculture and Innovation of 29 May 2012, No. WJZ / 12063076, including rules with regard to the general transit licence N008 for military equipment with allies as a final destination (Regulation for general transit licence NL008), Stcrt 5 June 2012, No. 11117

3.4.2 Competent authorities and consultation mechanisms

3.4.2.1 Competent authorities¹⁸⁰

Since the most recent cabinet formation in October 2012, the Ministry of Foreign Affairs and more specifically the Export Control Office, is the primary political and legal competent authority for controlling the foreign trade in strategic goods, at the level both of regulation and implementation. This competence previously belonged to the Ministry of Economic Affairs, Agriculture & Innovation (hereinafter EL&I)ⁱⁱⁱ.

ⁱ Including Art. 6, 1st and 2nd section of the EC Dual-use Regulation which provides the possibility to prohibit transit or to place it under licence.

ⁱⁱ With these provisions, the Netherlands explicitly takes up the optional controls from Art. 6, section 3 of the EC Dual-use Regulation, namely: 1) a possible prohibition on goods that do not appear in the list in Annex I and which may be destined for weapons of mass destruction (cf. the description in Art. 4, section 1 of the EC Dual-use Regulation) and 2) controls on goods from Annex I that could be destined for military end-use in a country subject to an international arms embargo.

ⁱⁱⁱ Until October 2012, the Ministry of Foreign Affairs played a rather supporting role. For specific countries, Economic Affairs (EL&I) could appeal to them to assess the country in question and the application, based on the eight criteria of CP 2008/944/CFSP. Together with a list of sensitive countries, potential end-use was also an important criterion. For decisions about sensitive export and transit transactions, the advice from Foreign Affairs was of decisive importance for the EL&I. Further, Foreign Affairs has an obligation to consult with other countries that previously denied an application (implementation of the no-undercut principle).

At the procedural level, there is cooperation with the Taxation Office/Customs services of the Ministry of Finance. The Central Import and Export Service (CDIU), which is a part of these, receives all applications and has a mandate from the competent authorityⁱ for export control to handle a portion of the applications entirely on its own for given profiles. In practice, the CDIU mainly handles the notifications.ⁱⁱ From the moment that there is concern or a reason to place the transit under licence, the Export Control Office (within the Ministry of Foreign Affairs) is contacted and the file is passed to them for assessment.ⁱⁱⁱ

Also within the Ministry of Finance's Taxation Office/Customs services is Team POSS^{iv} which is responsible for monitoring the situation on the ground. This team supports the Customs in conducting controls and risk analysis and provides them with relevant information. When POSS discerns irregularities, a warning can be given or a charge drawn up. When the Customs discern irregularities, Team POSS is also informed about them and POSS decides how to follow up. If a preliminary investigation is desirable or necessary, the Economic Control Service of the Fiscal Information and Investigation Service (FIOD-ECD) is informed. This service can decide whether or not to conduct further investigations. If the FIOD-ECD conducts no further investigation, POSS again decides on the further handling of the irregularity.

Information may also be obtained from the General Intelligence and Security Service (AIVD) and the Military Intelligence and Security Service (MIVD). Since 2008 both services have been integrated in the Counter-Proliferation Unit.¹⁸¹ Technical information about equipment and its deployment can be obtained from the Ministry of Defence.

3.4.2.2 Consultation¹⁸²

The competent authorities regularly consult informally and meet formally on a bi-monthly basis to discuss new policy developments and ongoing cases. The competent minister is the chairman and secretary of this body, known as 'Carré overleg'^v or 'Square' consultation – the national consultative group. The other participants are (Foreign Affairs^{vi}), Finance, several Customs agencies (CDUI, Customs North, Customs Information Centre and Team POSS), the FIOD-ECD, and Internal Affairs. The consultation aims at ensuring a coherent policy, politically as well as operationally. At policy level, it addresses aspects such as new regulations, implementation and enforcement. Operationally, the members discuss, inter alia, trial licence procedures (*sondage*), imposed catch-all decisions, noteworthy occurrences (e.g. detained transports), problem areas for implementation, ongoing investigations of the FIOD-ECD, contacts with the economic operators, requests for information or legal assistance from other countries, perceived trends, and experience gained in connection with sanctioning. Within Dutch administrative practice, such a formal consultation is exceptional. It is primarily motivated by what the Dutch themselves call the 'hybrid' nature of the export control policy,

ⁱ Until October 2012 from the EL&I, thereafter from Foreign Affairs

ⁱⁱ Until 1 July 2012, this notification particularly concerned all transit from and to Allied nations. Since 1 July 2012, it mainly concerns general transit licences and notifications of transit without transhipment from and to Allies.

ⁱⁱⁱ Transit agents can call upon several organizations for information on arms trade policy, e.g. concerning the strategic nature of goods and the regulations applying to strategic goods. In the first instance this involves the CDIU (customs), to whom applications are also submitted. For Dutch and foreign companies respectively, the Chambers of Commerce and NL EVD International (formerly Economic Information Service) of the NL Agency serve as contact and information points.

^{iv} POSS stands for Precursors, Origin, Strategic Goods and Sanctions.

^v 'Carré overleg' (Square consultation) because there were originally four participants

^{vi} Until October 2012

namely, the close procedural interconnection between several departments, based on their general competence.¹⁸³

3.4.3 Description of transit

3.4.3.1 *Transit of military equipment*

Since 2008, Dutch legislation defines transit as “*the transport of goods that enter Dutch territory only to be transported via that territory to a destination outside Dutch territory*” (Art. 1 Decree SG).

3.4.3.2 *Transit of dual-use items*

The European description of transit is used for dual-use items, cf. Art. 2.7. of the Dual-use Regulation.

3.4.4 Scope

3.4.4.1 *Territorial scope*

Article 1 of the Decree SG restricts the validity of the control regime to “*the territory of the Kingdom of the Netherlands in Europe*”, thus excluding the overseas areas over which the Netherlands has jurisdiction, namely the Caribbean territories of Bonaire, Sint Eustatius and Saba.

A second restriction on the territorial scope follows from European regulations: based on European Directive 2009/43/EC, it is no longer possible to subject intra-Community transit (between EU Member States) of military equipment to controls; there must be at least one third country involved in the relevant transit. The Dual-use Regulation defines transit as extra-Community transit from one third (non-EU) country to another third (non-EU) country.

3.4.4.2 *Personal scope*

The point of departure for the personal scope of trade in military equipment is found in Art. 1 of the Decree SG, which specifies the ‘beschikkingsbevoegde’ as the party responsible for observing the legal requirements. The ‘beschikkingsbevoegde’ is defined as “*a natural person or legal person who has decision-making power over the military goods*”. Because the primary responsible person (the exporter) is by definition located abroad, the legislation indicates the person in the Netherlands who is designated as a ‘beschikkingsbevoegde’ transit agent: this is the person who executes the customs transit formalities on behalf of the ‘beschikkingsbevoegde’, or the person who transports the goods if there are no customs formalities.¹⁸⁴ Since 1 July 2012, the Decree SG expressly lays down the condition that the ‘beschikkingsbevoegde’ must be established in the Netherlands.¹⁸⁵ The legislation does not establish a fixed hierarchy: as soon as one of the named parties has submitted the application or notification, the other is relieved of responsibility. If notification is not received at all, not on time, or not fully completed, this is grounds for an economic crime in the sense of the Economic Crimes Act.¹⁸⁶

The Dutch legislation provides no clarification as to who should be considered as a transit agent of dual-use items.

3.4.4.3 Material coverage

3.4.4.3.1 Control lists

For **military equipment**, Implementing Order SG 2012 refers to the list to which CP 2008/944/CFSP applies. In practice, this comes down to the Common Military List of the EU.¹⁸⁷ A number of military goods are exempted from the licensing requirement as well as from the notification requirement, namely:

- those destined for the Dutch Armed Forces;
- military equipment which is the property of or is destined for NATO Armed Forces and the Joint Force Command in Brunssum;
- military equipment belonging to the European Space Agency in Noordwijk;
- military vehicles used by foreign armed forces for demonstrations, etc.¹⁸⁸

The list of **dual-use items** is established in Annex I of the EC Regulation and is thus also directly applicable in the Dutch legal order.ⁱ

Determining whether or not an item appears as a strategic product on one of the lists is in the first instance the responsibility of the traderⁱⁱ in question.

3.4.4.3.2 Catch-all

Only for dual-use items does the Netherlands have a legal basis for controlling goods that do not appear on a the lists **on an *ad hoc* basis**, in case of potential end-use for weapons of mass destruction.¹⁸⁹ There is no comparable provision for military goods, where reference is made only to the European List. In practice, however, military equipment that is not subject to licensing may be placed under licence on an *ad hoc* basis; the notification procedure (see below) plays a decisive role in this context.ⁱⁱⁱ The military catch-all clause provides for the possibility to subject goods that appear on the military list, but are not subject to a licensing requirement, to licensing, but does not offer the legal possibility of *ad hoc* control on goods that do not appear on the list.

ⁱ The CDIU provides for an adjusted dual-use items list for dealers' information. It supplements the European coding with a letter referring to the relevant export control regime so that those concerned know, based on the code, under which control regime the items fall: [W]- Wassenaar Arrangement, [M]- MTCR, [N] - NSG dual-use list, [T] - NSG trigger list (cat. 0), [A] – AG, [C1]- CW list 1- substances (military), [C2]- CW list 2- substances (dual-use), [C3]- CW list 3- substances (dual-use).

ⁱⁱ The User's Guide only mentions exporters.

ⁱⁱⁱ The User's Guide on Strategic Goods mentions the following in this regard: *"The main purpose of the notification is to collect information on the nature and scale of military goods transit volumes crossing Dutch territory, but it may also generate information leading to an ad-hoc licence requirement. The option to impose an ad-hoc licence (on goods exempt from the licensing requirement) can be employed:*

- *if there are indications that a transaction is not under the effective control of the country of origin, for instance, if the export licence is missing or the documentation accompanying it is incomplete, or*
- *if, during transit through Dutch territory, a shipment appears to acquire a different destination than intended upon issuance of the export licence, or*
- *if the interest of the international legal order or an international agreement related to this requires so, or*
- *if the Secretary of State for the EL&I(now Foreign Affairs) deems this necessary for protecting the essential interests of national security, or*
- *if there is information, for instance, from security and intelligence services, such that the Secretary of State for the EL&I (now Foreign Affairs) sees a reason for instituting an ad hoc license."*

As a legal base for these *ad hoc* licences, the User's Guide refers to the Decree SG, whereas Art. 5.3., taken strictly, only explicitly provides for this in the final three instances. A broad interpretation of Art. 5.3. must be invoked for the first two.

3.4.5 Transit that is prohibited and subject to a licensing requirement

3.4.5.1 Military equipment

Since 2008, it is prohibited for military equipment to transit the Netherlands without a licence (Art. 5 Decree SG). Two exceptions applied to this up to 1 July 2012: 1) for transit across territorial waters or through the airspace and, 2) for transit originating from or destined for 'friendly countries', namely, transit of military equipment through the Netherlands originating from or with final destination in Australia, Japan, New Zealand, Switzerland, a EU Member State or one of the members of the North Atlantic Treaty Organization.

For transit from and to Allies, there was thus in principle no licensing requirement unless the interests of the international legal order or an international agreement, or the vital interests of national security, so required. These instances were determined by Ministerial Regulation.

There was also no notification requirement for transit through territorial waters and airspace, which was not subject to a licensing requirement (Art. 7 Strategic Goods Implementing Order). This exemption from the notification requirement did not apply to transit that was already exempt from licensing by virtue of its destination – including for transit to Belgium and Luxembourg.

The exemption for friendly countries expired as of 1 July 2012: transit with transshipmentⁱ from and to Allies is now also subject to a licensing requirement.¹⁹⁰ The motive for this step came from persistent criticisms of the systematic exempting of transit control from and to friendly countries. Recent developments in the Middle East and North Africa (Arab spring) provided the immediate trigger for the change.¹⁹¹

The systematic licensing requirement for transit with transshipment, regardless of the country of origin or destination, in practice signifies a substantial expansion of the licensing requirement. For Allies, however, the working rule is still that in principle, they can be trusted in their export policy. Therefore, general transit licences are provided for this type of transit. The Explanatory Note on the change in legislation argues as follows: *"because the allies are fully capable on the basis of their export control instruments to responsibly make decisions about exports of military equipment, the expansion of the licensing requirement will go together with creating a basis for a general transit licence"*.¹⁹²

For transit without transshipment that is subject to notification, *ad hoc* control by means of a licence can still be implemented on grounds of international interests or vital interests of national security (Art. 5.3).

3.4.5.1.1 Type of licence

For transit of military equipment, two types of licences are used in the Netherlands: individual and general transit licences. An individual transit licence is a licence awarded upon application by a 'beschikkingsbevoegde' established in the Netherlands. A general transit licence is an authorization under ministerial regulation (Art. 1 and Art. 6 Decree SG). The individual licensing requirement applies to all shipments that do not fall under the application of a

ⁱ Transit "which leaves the Netherlands by the same means of transport as by which it entered without transshipment in the Netherlands" is not subject to a licensing requirement. The Explanatory Note clarifies: "The licensing requirement not only exists if the means of transport changes, for instance after transshipment from train to aircraft, but also if transshipment occurs within the same mode of transportation, for instance because the goods are temporarily stored before they leave the Netherlands by the same means of transport."

general transit licence. This particularly concerns categories of goods excluded from the general licence procedure (see below). Furthermore, restrictions, regulations and conditions can be attached to the general transit licence. For reasons of vital security interests, public order or public security, a 'beschikkingsbevoegde' can also be excluded from the use of a general licence. Such an order is an individual decision and includes no general prohibition on transiting military equipment. The 'beschikkingsbevoegde' involved may still obtain authorization via an individual transit licence.¹⁹³

Since 1 July 2012 there are two types of general transit licenceⁱ:

- **General transit licence NL007**¹⁹⁴ is a general transit licence for transit with transshipment of military equipment *originating from* Allies (to non-Allies). All military equipment may be transited under this licence except for those categories of goods that NL007 excludes from this procedure (the so-called 'negative list'ⁱⁱ). During assessment of these applications, a check is first made on whether an export licence has been provided by the Ally: if this is the case, then the Dutch transit licence is simply granted. Among the general conditions to be eligible for a general transit licence are: a valid export licence from the country of origin, a valid registration number (see below), and there being no arms embargo in place on the recipient country.
- **General transit licence NL008**¹⁹⁵ is a general transit licence for transit with transshipment of military equipment *destined for* Allies. Here also, certain goods are excluded. The list of excluded goods, however, is much more limited than that of NL007: it only concerns very sensitive goods, more specifically cluster ammunition (ML3 and ML4) and anti-personnel mines (ML4). The only applicable general condition for NL008 is that the user must have a valid registration number.

For both general transit licences, registered users are obliged to keep all documents pertaining to the delivery for 7 years and are required to make a summary report on the use of the licence bi-annually.

3.4.5.1.2 Additional conditions: notification requirement and registration

In the Netherlands, there is a **notification requirement** for all transit not subject to a licensing requirement.ⁱⁱⁱ In practice, until 30 June 2012 transit from and to friendly countries only required notification. As of 1 July 2012, this is limited to transit without transshipment from and to friendly countries and an initial notification of the use of a general transit licence for transit with transshipment from and to friendly countries (see below).

ⁱ The use of a general transit licence is not compulsory. It is expected that parties that regularly transit military equipment will register in order to benefit from the general licences and that those who only transit sporadically will apply for an individual transit licence for each shipment.

ⁱⁱ This refers to the EU categories:

- ML1 to ML3;
- ML4, component a;
- ML6, where it concerns complete vehicles;
- ML9, where it concerns complete vessels;
- ML10, where it concerns the complete aircraft or unmanned aircraft;
- ML12, where it concerns complete systems;
- ML19, where it concerns complete systems;

ⁱⁱⁱ As mentioned earlier, the purpose of the notification requirement is to obtain a view of everything that passes through the territory and to allow an *ad hoc* decision to subject certain transit to a licence nevertheless. In the event of doubt or concern regarding the shipment, it makes it possible for the Customs to contact the country that issued the export licence. See Explanatory Note to the Decree of 24 May 2012, *op. cit.*, p. 8.

Notification of transit must take place at the latest at the moment of entry to Dutch territory.ⁱ The notification must be made in writing by the same parties who submitted an application for a licence: i.e. the 'beschikkingsbevoegde' or the person who completes the customs formalities on his behalf, or the person responsible for the transport. There is no standard form for notifications. Given the objective of the notification procedure, certain information needs to be made clear. The notification includes as a minimum:

- the recipient country;
- the name of the recipient of the military equipment;
- a detailed description of the military equipment which this notification concerns, including a reference to the corresponding number code, cf. the Common Military List;
- the place where the military equipment is located at the moment of notification.

Further, the User's Guide notes that it is important to also provide information about the country of origin (something that the export control legislation does not formally require), and whether an export licence has already been issued there. Information about the place where the goods are located serves to enable them to be investigated.¹⁹⁶ Failure to mention a shipment does not make the transit illicit in itself, and confers no title on customs to halt the intended transit. It is, however, a violation of the legislation and an official report may be made on it.¹⁹⁷

Given the primary objective of the notification requirement, namely to gain an overview of all relevant movements in and through Dutch territory, a number of applications and declarations are considered as equivalent to a notification. In order to avoid double work and additional administrative burden, these documents suffice without additional formal notification being required. They are:

- an application to receive consent for entryⁱⁱ;
- a summary declaration upon entryⁱⁱⁱ;
- a summary declaration for temporary storage^{iv};
- a customs declaration as prescribed in Article 182bis of the Community Customs Code.

As a result of the extension in July 2012 of the licensing requirement for transit with transshipment to and from friendly countries, and the introduction of general transit licences, new, additional measures were provided concerning **registration and an initial notification**. Upon the first use of a general transit licence, the 'beschikkingsbevoegde' must simultaneously submit a request for registration and a notification (Art. 6b Decree SG). The request must be submitted to the inspector, in writing, at least two weeks beforehand (Art. 9 Regulation NL007). The Explanatory Note to Regulation NL007 expressly mentions that only parties established in the Netherlands are eligible for registration.¹⁹⁸ The purpose of the first notification differs from the general notification requirement. It is not intended to gain a view

ⁱ For exports/transfer to Belgium and Luxembourg, no later than one day before the departure of the outgoing means of transport

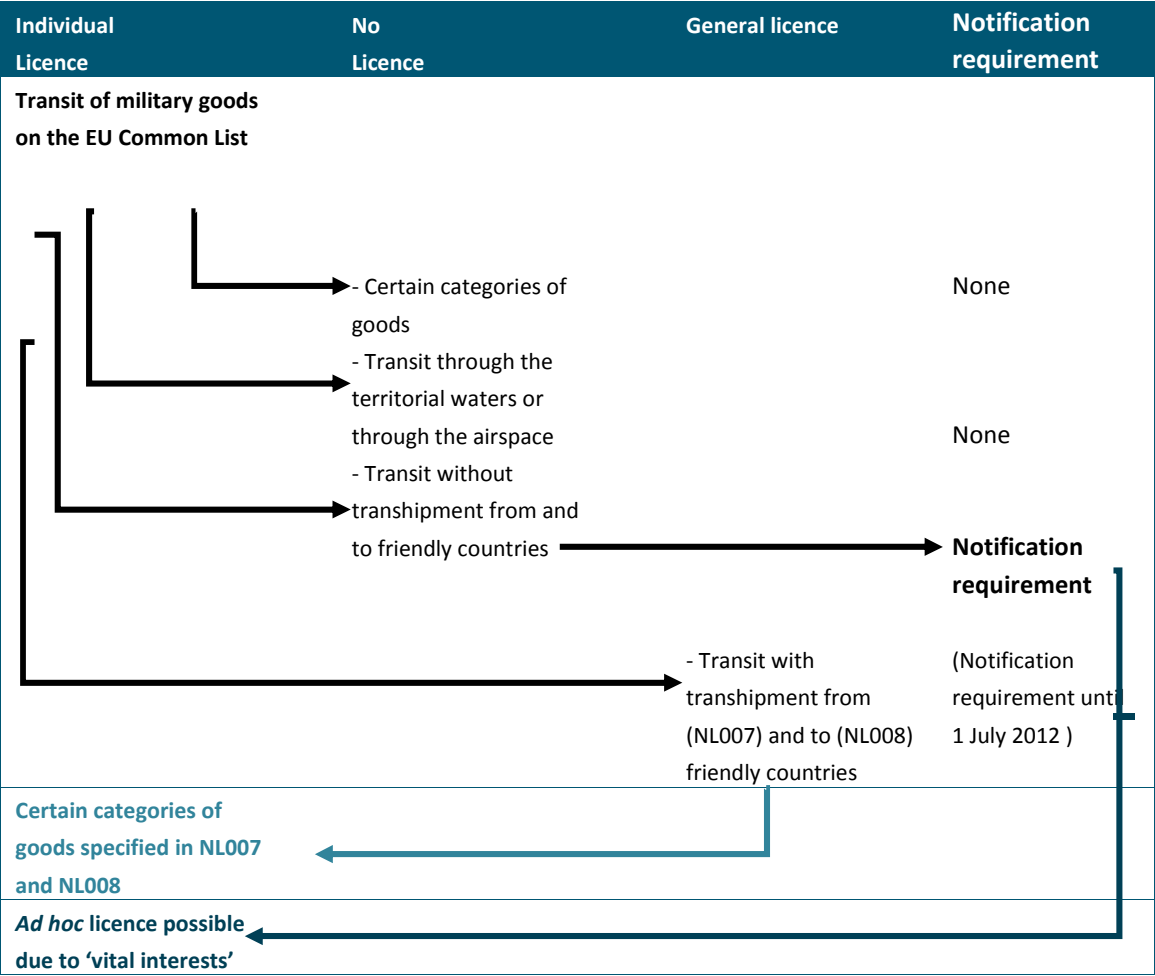
ⁱⁱ cf. Art. 14 of the Weapons and Ammunition Act

ⁱⁱⁱ cf. Art. 36bis of the Community Customs Code

^{iv} cf. Art. 186 of the Community Customs Code

of every transaction, but rather to map out who uses general transit licences and to be able to supervise the lawful use of such licences.¹⁹⁹

Figure 2: Summary of licensing requirements for military equipment from 1 July 2012:



3.4.5.2 Dual-use items

A general prohibition on transit can be found in the Implementation Act of the Chemical Weapons Convention (Art. 3).

Until 2008, a general licensing requirement for ‘slow transit’ⁱ applied to dual-use items. Since 2009, the EC Dual-use Regulation 428/2009 does not provide for a systematic licensing requirement but only for the possibility to forbid transit in individual instances (Art. 6, 1.), to subject it to an individual licensing requirement (Art. 6, 2.), or to prohibit it under the catch-all clause for dual-use items that do not appear on the list in Annex I (Art. 6, 3.). The Netherlands actually follows the EC Regulation and have thus abandoned its previous stricter policy. The Strategic Goods Implementing Order 2012 provides for the same formalities and modalities as for military equipment.

ⁱ Slow transit was the transit of goods that underwent economically relevant processing in the Netherlands, i.e. processing adding value to the product.

3.4.6 Assessment criteria

3.4.6.1 Military equipment

Transit applications for military equipment are, just as for exports, tested against the eight criteria of CP 2008/944/CFSP. These criteria are not enshrined in Dutch legislation, but their use for assessment is mentioned in several policy documents, such as policy statements (Ministerial letters to Parliament),²⁰⁰ annual reports, the audit document, and communications from the administration.

The Netherlands further includes the criterion of 'participation or non-participation in the UN Register of Conventional Arms' as an assessment element, without this constituting an grounds for denial as such.ⁱ It is the Foreign Ministry that makes this evaluation.²⁰¹

The end-use of the goods is a key element in the assessment, the objective being to prevent diversion to undesirable destinations.²⁰² Based on CP 2008/944/CFSP, the Netherlands - like all other Member States - is required to take into account the licences denied by other Member States. This also happens in practice, but no provisions or modalities on the application of the no-undercut principle are to be found in the Dutch regulations on this point.

3.4.6.2 Dual-use items

The assessment criteria for transit applications for dual-use items are established by the Dual-use Regulation. The binding criteria are:

- Observance of international obligations;
- The no-undercut provision. As with military equipment, Dutch legislation does not include procedural provisions on this point.

The assessment criteria for exports from Art. 12 of the Dual-use Regulation are also applied for transit applications.

3.4.7 Procedural aspects

3.4.7.1 Military equipment

Licences are applied for at the Central Import and Export Service (CDIU) of the Ministry of Finance (the legislation refers to 'the inspector'). The application form is available online.²⁰³ The following documents can be required for the licence application (Art. 4 UR SG 2012):

- the contract on which the transit is based;
- a declaration with regard to end-use.

In practice, a copy of the export licence is also always requested.

Issuing the licence can be subject to the following conditions (Art. 8 Strategic Goods Implementing Orde2012):

- the inspector receives an invoice indicating the number of the licence, the data from the recipient, and a description of the goods mentioning the corresponding code on the list;

ⁱ The Netherlands has tried to make this a ninth criterion at the European level. Because the other Member States did not follow suit, it is also no longer imposed at the domestic level.

- a document that can demonstrate to the inspector that the goods have reached their licensed destination, either by means of a certificate of receipt, or an officially certified copy of an import document or end-user declaration.

For the transit of military equipment to less sensitive (but not ‘friendly’) countries, the CDIU itself can process the application. Up to October 2012, applications were forwarded to the export control service (within EL&I) in only a minority of cases.ⁱ

As from October 2012, the entire procedure takes place internally at the Foreign Ministry, following the transfer of the competence and the competent service from Economic to Foreign Affairs.

With the online application form, potential clients can also seek information on whether or not they are subject to a licensing obligation (*‘sondage’*). When assessing the request, in principle the same procedure is followed as with an application. In the answer from the competent minister, however, the reservation is always made that the actual assessment will take place at the time of the application and in light of the circumstances at that moment.²⁰⁴

3.4.7.2 Dual-use items

For dual-use items, since EC Regulation 428/2009 there is longer a systematic licensing requirement in the Netherlands. Foreign Affairs (previously EL&I) can decide to place a specific transit under licence. In that case they follow the procedural modalities with regard to exports.

3.4.8 Modalities

Licences that are issued based upon false or incomplete information, or which do not respect the legal provisions and the conditions of the licence, may be revoked by the competent minister.

By ministerial regulation, exemptions and dispensations may also be granted – with or without conditions - from the licensing and notification requirements.

3.4.9 Monitoring and sanctioning

3.4.9.1 Monitoring

Verification of conformity and the truthfulness of the information provided may take place during several phases of the procedure, even independently of the licence application:

- in the assessment procedure responding to an application;
- Customs may verify the documents as well as conduct physical inspections of the cargo; in the Netherlands, front-line controls are also triggered by risk analysis.²⁰⁵
- Team POSS (from Customs), may carry out preventative investigations at companies,²⁰⁶ whether or not based upon suspicion of a crime or violation . To this end they can draw on

ⁱ EL&I then asks Foreign Affairs for advice. This advice is based on an assessment of the criteria of the Code of Conduct; if necessary, Foreign Affairs can also consult Defence and AIVD/MIVD. If there are no objections to the exports, EL&I issues the licence.

information received from other authorities, such as customs, ministries or foreign sister organizations, or visit companies on their own initiative or on a thematic or programmatic basis. If there is a suspicion of large-scale fraud, the case is transferred to the FIOD-ECD.²⁰⁷

As in other EU member states, Dutch Customs use the method of risk management, and more specifically of risk analysis, in order to be able to conduct more targeted controls. In practice, applying customs controls to transit is difficult especially because of the limited information available, and the limited time to act given the – by definition – short stay of the goods on Dutch territory.²⁰⁸ There is no system for *ex post* control (spot checks): something that the Policy Review noted as a point of criticism, because it makes insight into the effects of policy implementation incomplete.²⁰⁹

3.4.9.2 Sanctions

Violation of the regulations on export control is an economic crime in the Netherlands. The maximum sentence is 6 years if intent can be proven. Without proof of intent, the sentence is much shorter. Under certain conditions, such as genocide, crimes against humanity, war crimes and torture, the International War Crimes Law (WIM) can be invoked, which provides for a lifetime prison sentence.²¹⁰ Up to the present there have been no known cases of criminal sentencing for transit.

3.5 United Kingdom

Until 2004, the legal basis for UK export controls was the Import, Export Customs (Defence) Act. The Act was passed in 1939 as emergency legislation on the eve of WW II. It gave extensive powers to the responsible minister with regard to imports and exports of specific goods. Despite its emergency nature, at that time justified by the war situation, this law remained in place until 2004.²¹¹ Under pressure from criticism because of the lack of democratic control (notably in view of the broad discretionary competences), the 1939 law was abolished in 2002 and replaced in its entirety by a new legal basis, The Export Control Act 2002 (hereinafter the EC Act), which came into force on 1 May 2004.

The EC Act, like its main implementing order, the Export Control Order 2008 (hereinafter the EC Order), applies to both military equipment and dual-use items. The legal distinction between the control regimes for military equipment and dual-use items is thus more limited than in the other countries under study. And also the primary competent body, the Export Control Organization is responsible for controlling all strategic goods.

The essence of British export control policy is summarized in the Explanatory note to the Export Control Order 2008: *“The Government is committed to a responsible, effective, open and transparent strategic export control regime. The intended effect is to maintain an effective system of controls to ensure that UK involvement in strategic exports does not contribute to internal repression, regional instability, external aggression and serious undermining of the development of poor nations, but to do so in a way that does not place unnecessary or disproportionate burdens on legitimate business”*.²¹² In view especially of the scale of its own – strong – defence industry, the UK has a tradition of supporting exports.²¹³ This makes the balancing act between economic and security interests often difficult and delicate. Further, in the past, policy has often varied according to the government in power.²¹⁴

The significant legislative changes that were made in 2002, under pressure from a variety of commissions and pressure groups, thus aimed not only at limiting the government's discretionary competences, but also at creating a clear legal framework for industry regarding the conditions on which decisions about export are taken.

Transit of strategic goods is not explicitly addressed in the EC Act 2002. For controls of military equipment, in principle a general licensing requirement applies to transit, coupled with rules on exemption that in practice exempt most transit from controls. The fundamental principle for transit and transshipment of strategic goods forms an exception to the principles of export control: transit through the UK is exempted for most goods and to most destinations, only certain types of goods, and all goods for certain destinations, are subject to control.²¹⁵ The annual number of transit licences issued is accordingly limited: between January 2008 and June 2012, only 32 individual transit licences for military equipment were issued by the British Government.²¹⁶ Based on the provisions of EC Dual-use Regulation 428/2009, dual-use transit control is carried out *ad hoc*. Thus, just as in most other countries discussed, only a limited number of transit transactions with regard to strategic goods are subject to a licensing requirement.

3.5.1 Legal framework

Provisions with regard to transit form part of the legislation on export control of strategic goods. The most important documents are:

- Export Control Act 2002: the basic legal document for export controls, applicable since 1 April 2004
- Export Control Order 2008: the most important Implementing measure for the EC Act, in force as of 6 April 2009ⁱ

The EC Act 2002 applies to all strategic goods (military equipment and dual-use items)ⁱⁱ and to all types of trade activities, including transit, brokering and technical assistance. The general competence to implement export control legislation through implementation orders is allocated by the Act to the Secretary of State, including the listing and classification of goods to which a specific export regime applies. The EC Act 2002 gives authority to the Department for Business, Innovation and Skills to adopt implementing provisions on export controls and to regulate strategic exports.

In the text of the EC Act 2002, there is no specific mention of transit, but only general rules with regard to export controls. The basis for transit controls on strategic goods is enshrined in Art. 17 of the EC Order 2008. The EC Order provides an exemption for transit and transshipment in the sense that passage across UK territory is in principle free if a number of conditions are met. The exemption comes with a number of important restrictions: it does not apply to certain types of goods, for certain destinations (see below).

For dual-use items, in the first place the provisions of the EC Dual-use Regulation 428/2009 apply (which essentially leaves it to the member states to apply transit controls). The national provisions supplementing the Regulation so as to guarantee its effective implementation at national level can be found in the EC Order 2008, Article 8 applies specifically to dual-use transitⁱⁱⁱ.

As a final observation when reading the British legislation: in contrast to France, which explicitly views the control regime on transit as a distinctive aspect of import legislation, the UK treats transit as a specific form of export. Many provisions that apply in general to ‘exporters’ therefore also implicitly affect transit agents. Numerous Guidance documents confirm this approach.

ⁱ The EC Order of 2008 currently draws together most provisions relating to export controls. It replaced numerous specific orders on the export, trade, and control of trade in military and dual-use items that had been adopted since 2002 in implementation of the EC Act, including inter alia: the Export of Goods, Transfer and Technology and Provision of Technical Assistance (Control) Order 2003 (in 2008 replaced by the Trade in Goods (category of Controlled Goods) Order 2008), the Trade in Controlled Goods (Embargoed Destinations) Order 2004, and the Technical Assistance Control Regulations 2006.

ⁱⁱ Including software and technology. It also applies to items that could be used for the death penalty, torture or other cruel, inhuman or degrading treatment or punishment, and thereby includes the supplementary provisions to EC Regulation No. 1236/2005 of Council of 27 June 2005

ⁱⁱⁱ Other articles, such as the possibility of modifying, suspending and revoking licences and challenges (Art. 32-33), the description of potential violations of the licences (Art. 37-38), and the customs competences and the application of customs legislation (Art. 39-42), again apply to all strategic goods.

3.5.2 Competent authorities and consultation mechanisms

3.5.2.1 Competent authorities

Competence for export controls on strategic goods, including transit, currently rests with the State Secretary for Trade and Innovation. The competent body is the Export Control Organization (hereinafter, ECO), which forms part of the Department For Business, Innovation and Skills (BIS).²¹⁷ ECO is responsible for implementing the legal framework relating to export controls and is the only body competent to handle licence applications for strategic goods. The tasks of the ECO include, among others:

- Participating in shaping a global policy on arms control, and contributing to non-proliferation activities (under the leadership of Foreign Affairs);
- Development of the export licensing policy and related legislation in consultation with various stakeholders from the industries and NGOs;
- Organizing outreach activities to promote good practice with regard to export controls in other countries;
- Updating the UK Export control lists;
- Keeping statistics about licence applications;
- Supporting exporters by giving advice, among other activities;
- Contributing to achieve the objectives of the Public Service Agreements about counter-proliferation and the safeguarding of free and equitable market.²¹⁸

In summary, ECO is responsible for all aspects of export control policy, including legislation as well as processing and issuing licences for military equipment and dual-use items. It is the competent minister who takes the formal decision to issue, refuse, revoke or suspend a licence.

Other departments that give advice during the licensing procedure are: the Foreign and Commonwealth Office (FCO), the Ministry of Defence (MOD) and the Department for International Development (DFID). Her Majesty's Revenue and Customs (HMRC) and the UK Border Force are, among their general duties, in charge of monitoring legal compliance. The six authorities involved comprise the most important actors of the so-called Export Licensing Community. Their common mission is "*Promoting global security through strategic export controls, facilitating responsible exports*".²¹⁹ When ECO was set up as the sole competent body, staff from other authorities were assigned to it, particularly from Defence, Foreign and Commonwealth Affairs, and International Development.

3.5.2.2 Parliamentary scrutiny and consultation

In 1999, a Committee on Strategic Export Controls was established – also called the Quadripartite Committeeⁱ – in the House of Commons. As an intra-departmental body, this Committee had an overarching monitoring function (scrutiny) as an advisory body supplementing the functioning of the departmental 'select committees' for departments involved in the licensing procedure. It was established with a view to monitoring the work of the departmental committees, to exchange mutual information, and to jointly discuss specific issues. They also jointly review annual reports.²²⁰ Over the years, the Committee itself

ⁱ This is because four departments were represented therein - Trade and Industry, Defence, Foreign Affairs and International Development.

published a number of reports on specific aspects of export control policy. The government never accepted the Committee's proposal to confer on it the function for pre-scrutiny of export licence applications.ⁱ Since March 2008, the Quadripartite Committee has been renamed Defence Committee.ⁱⁱ The work of the Defence Committee still includes scrutiny and *ex post* assessment of licensing decisions, but is much broader. The entire policy in this field is critically scrutinized – that of the government as well as the competent executive bodies. In the process, the Defence Committee also takes into account the positions of other stakeholders such as, for example, the UK Working Group on Armsⁱⁱⁱ ²²¹.

The same departments are involved in the preliminary consultations that forms part of the licensing procedure: depending on the case, Trade and Industry asks the advice of Defence, Foreign Affairs and/or International Development.²²² The consultation procedure varies according to the nature of the case and applications are forwarded to other departments in accordance with their general responsibilities. Specific consultation mechanisms are provided for each assessment criterion.²²³ A more detailed explanation of this is provided below in the discussion of evaluation criteria.

3.5.3 Description of transit

3.5.3.1 Transit in the export control legislation

Art. 2 of the EC Order 2008 describes transit and transshipment as follows:

- *"'in transit' means imported into the United Kingdom for transit or transshipment"*
- *"'transit or transshipment', in relation to goods, means transit through the United Kingdom or transshipment with a view to re-exportation of the goods or transshipment of the goods for use as stores"*.

Mention of 'transit or transshipment' in both definitions (and particularly the use of 'or') is typical of the British legislation, which make no sharp distinction between the two forms of transit.

The definitions of the EC Order 2008 apply to military equipment as well as to dual-use items, whereby the description of this latter category differs from that of the EC Dual-use Regulation in Art. 2.7.^{iv} Since both forms of transit (general and with transshipment) come under the scope of the British regulations, in practice this does not signify a narrowing of application in comparison with the Regulation. Transshipment as a distinct criterion is only of importance in relation to the type of control measure (see below).

ⁱ The Committee proposed a two-phase approach: 1) all applications would be notified to the Committee, 2) applications on which the Committee received more information could be discussed with a view to advising the government. The government did not agree with this proposal, arguing that it was not feasible for the +/- 12,000 applications received per year (see J.F. McEldowney, *loc. cit.*, p. 145)

ⁱⁱ The composition has remained the same.

ⁱⁱⁱ This is a non-governmental pressure group in which representatives from non-governmental organizations participate, such as Amnesty UK, the British American Security and Information Council (BASIC), Oxfam GB and Saferworld.

^{iv} *"Transport of non-Community dual-use items entering in the customs territory of the Community and passing through that territory with a destination outside the Community"*.

3.5.4 Scope

3.5.4.1 Territorial scope

The memorandum accompanying the EC Order 2008 states that the territory to which the legislations applies is that of the United Kingdom. The Guide relating to transit clarifies that this means the territory of Great Britain and Northern Ireland.²²⁴ This description applies to military equipment and dual-use items.

Just as in the other countries discussed, it follows from Directive 2009/43/EC that it is no longer possible to subject intra-Community transit (between EU Member States) of military equipment to control; there must be at least one third country involved in the transit. For dual-use items, the definition from EC Dual-use Regulation 428/2009 applies, namely, extra-Community transit from a third (non-EU) country to another third (non-EU) country.

3.5.4.2 Personal scope

British legislation does not define who is considered as a transit agent.ⁱ Section 27 of the EC Order provides a number of guidelines for determining who can or should apply for an export licence, and by analogy a transit licence. The principle is that it must be a person residing in the UK, and that this person is most closely involved in and/or bears responsibility for the goods in the UK. Who submits the application is of no concern to ECO as long as it happens.²²⁵ The requirement to have a registered office in the UK is important with a view to potential prosecution in the event of criminal acts.

3.5.4.3 Material scope

3.5.4.3.1 Control lists

The material coverage of export control policy is determined by seven different lists. For military equipment, these are mainly based on the lists of the Wassenaar Arrangement and the Common Military List of the EU. For dual-use items, the main basis consists of the control list included in annex to the EC Dual-use Regulation 428/2009. The UK adds goods for both categories.²²⁶

To clarify the whole picture for those concerned, ECO publishes a so-called Consolidated List that includes a compilation of all relevant lists.²²⁷ The composition of this List is as follows:

- **UK Military list:** a list of military equipment, software and technology, included in annex (Schedule) 2 of the EC Order 2008. The list follows the European classification in ML categories. The EU List is included in the British legislation, which implies that European updates do not automatically apply in the UK and require an adjustment of the legal framework. Specific items under national control that the UK has added are indicated with a PL code.²²⁸
- **EU Dual-Use List:** a list of dual-use items as included in Annex I of EC Dual-use Regulation 428/2009.
- The list of **sensitive dual-use items** as included in Annex IV of EC Dual-use Regulation 428/2009.
- **UK Dual-use list:** a list of items, software and technology, included in annex (Schedule) 3 to the EC Order 2008. This list only includes dual-use items that the UK places under control, making use of the EC Dual-use Regulation 428/2009.

ⁱ The legislation also does not prescribe who is considered an exporter.

- **EU Human Rights list:** a list of goods that could be used for the death penalty or torture. This is a copy of Annexes II and III of EC Regulation 1236/2005.
- **UK Security and Paramilitary List:** the list of Art. 9 of the EC Order 2008, of prohibited goods that could be used for the death penalty or torture.
- **UK Radioactive Sources List:** a list of highly radioactive sources included in the annex to the Export of Radioactive Sources (Control) Order 2006.

These are the basic lists to which the British export control regime applies. Specific restrictive measures that affect certain categories of goods are included in separate Sanctions Orders. Together they form the complete scope of the British export control policyⁱ.

Which control regimes apply to which goods is determined by the Trade in Goods (categories of Controlled Goods) Order 2008, which entered into force on 1 October 2008 and in December 2008 was integrated into the EC Order 2008ⁱⁱ. Whether or not a licence is needed - for trade as well as brokering - and how strict the conditions are is determined on the basis of a division of the goods into category A, B or C. This distinction is also relevant for transit. We will address the licensing regime for transit in greater detail below.

It is the responsibility of the applicant to determine whether or not his goods appear on the control lists. ECO assists him in this by:

- providing an online Control List Classification Search Tool via the ECO's SPIRE export licensing database, to help establish whether an item appears on the Control List and under which rating number;
- the Goods Checker on the Checker Tools website, where a search can be made using keywords;
- answering a Control List Classification Service request, which may be submitted online via the SPIRE database. The answer is not binding and serves purely as an indication.

3.5.4.3.2 Catch-all

If an item does not appear on the lists, this does not provide certainty that no licence is required. Depending on the destination, a licence may still be required on an *ad hoc* basis. The British catch-all clauses are linked exclusively to potential end-use. British Guidance documents do not speak of catch-all, but of End-Use Controls. Such items may be labelled 'LR End': Licence Required because of End-use.²²⁹ Within this, a distinction is made between:

- WMD End-Use
- Military End-Use.²³⁰

These two catch-all clauses are inspired by the European dual-use catch-all clauses. The legal basis for WMD end-use control is Art. 4.1. (general) and Art. 6 (transit) of the EC Dual-use Regulation 428/2009,²³¹ and Art. 6 (general) and Art. 8 (specifically for transit) of the EC Order 2008. A licence is required if the 'exporter' knows or is informed by the competent authority that the goods may be used for WMD purposes.

The legal basis for military end-use control is Arts. 4.2-4.4. (general) and Art. 6 (transit) of the EC Dual-use Regulation 428/2009.²³² There are two types of military end-use control: (1) for

ⁱ As mentioned earlier, this study only addresses the general transit control regime and specific sanctions are not addressed

ⁱⁱ The new Trade in Goods Order replaced the previous two-tier with a three-tier approach.

dual-use items that are or may be destined for military purposes in a country on which an (UN, EU or OSCE) arms embargo is in force, and (2) for dual-use items destined as part of military equipment and which are exported illegally from the UK, regardless of their destination. In these instances, a licence is required if the 'exporter' is informed by ECO about the potential military end-use of the items. If the 'exporter' knows about the military end-use, he must inform ECO about it, so that they can decide whether or not to place the items under licence.

As mentioned above (when explaining the legislation, p. 91), the wording of the Guidance documents focuses essentially on exports and is intended for exporters. The ECO confirms that these provisions also apply to transit under equivalent conditions.

3.5.5 Transit that is prohibited and subject to a licensing requirement

The British licensing policy rests on a number of pillars, for both military equipment and dual-use items²³³:

1. The type of transaction: in this case transit or transshipment;
2. The type of goods: whether mentioned in control lists or not;
3. The destination (including countries under embargo or sanctions), and the end-use/the end-user.

3.5.5.1 Transit of military equipment that is prohibited or subject to a licensing requirement

Prohibited transit is often linked to bans in specific legislation, for instance on anti-personnel mines.

Transit and transshipment of military equipment is in principle subject to a licensing requirement for all items that appear on the control lists. By way of exception to this general licensing requirement, Art. 17 of the EC Order 2008 sums up a number of conditions in which an exemption applies:

- The goods remain on board a vessel or an aircraft for the entire period that they remain in the UK, or they are goods that are transported "*on a through bill of lading or through air waybill*" and stay on British territory for no more than 30 days, commencing from the date of import;
- The destination of the goods after passage through the UK is established by the country from which they were initially exported, and since then no changes have occurred with regard to the destination, or the goods are being returned to the exporting country
- The goods were exported from that country conform to the applicable export control legislation and regulations there in force at the time.

The three criteria must be observed cumulatively. As soon as one of the conditions is not met, a transit licence is required. In practice, most transit meets these conditions and is thus exempt from the licensing requirement. Further, with the application of Art. 17, intra-Community transit since July 2012 has also been exempt from licensing.

There are a number of important exceptions to the exemption regime of Art. 17.²³⁴ The basis for this is the division into categories, which has been in force since 1 October 2008.ⁱ The division is as follows:

- **Category A**ⁱⁱ includes goods the trading of which is ‘inherently undesirable’, and is therefore prohibited in principle and only licensed very exceptionally under the strictest control regime. Transit and transshipment of these goods always require a licence, regardless of the destination. Further, this also applies to extra-territorial shipments of Category A goods. Trade in these is not only prohibited for their respective subjects inside UK territory, but also for “*UK persons anywhere in the World*”.
- **Category B**ⁱⁱⁱ includes goods for which trade is in principle not restricted but on which there is international consensus that they gave rise to concern because of their destination. In that case they fall under the same regime as category A goods, including the extra-territorial function, albeit for a more limited number of activities (for instance, not for transport²³⁵). There are currently 74 destinations to which such controls apply: the 22 embargo destinations named in category C, and 52 other countries.²³⁶
- **Category C** goods^{iv} only require a transit licence for the 22 destinations under embargo.²³⁷

No licence is required for goods that do not fall under one of these categories, provided they can show that they meet the previously mentioned exemption conditions under Article 17.

A licence can still be required *ad hoc* for items that do not appear on the control lists (see above).

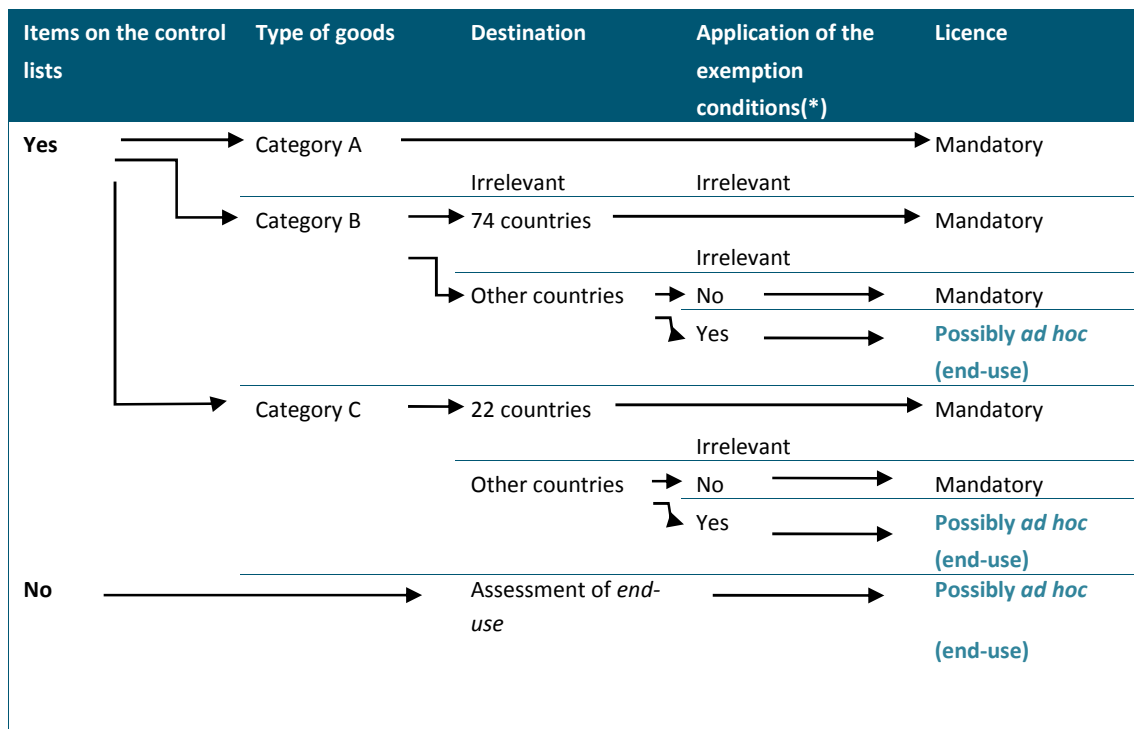
ⁱ These exceptions have been valid since the entry into force on 1 October 2008 of the Trade in Goods (categories of Controlled Goods) Order 2008. The previously existing division was at that time expanded from 2 to 3 categories (BIS, *Explanatory Memorandum, op. cit.*, pp. 3 et seq). Specifically with regard to transit and transshipment, the new categorization has resulted in a substantial increase in transit needing a licence because now, all category B goods (to certain listed destinations) are also required to be placed under a transit licence (see explanation in BIS, *Explanatory Memorandum, op. cit.*, p. 12).

ⁱⁱ Among others, this includes cluster munitions (and components especially designed for them) and certain paramilitary equipment

ⁱⁱⁱ SALW, MANPADS and accessories, ammunition and components specially designed for them, long-distance missiles with a reach of more than 300 km, including Unmanned Air Vehicles (UAV).

^{iv} Goods on the control lists that do not belong to category A and B, certain substances for riot control, self-defence and related material for defence.

Figure 3: Summary view of transit/transshipment subject to a licensing requirement



(*) Subject to three cumulative conditions:

- no transshipment, maximum 30 days in the UK
- no changes (with regard to the initial licence conditions)
- export licence in the country of origin

3.5.5.2 Dual-use items that are prohibited and subject to a licensing requirement

The possibility of placing transit of dual-use items under licence is included in British legislation in Article 8 (section 1) of the EC Order 2008, enabling an *ad hoc* licence in the event of possible WMD end-use (see above with the description of WMD End-Use Control). The exemption rules of Article 17 also apply to dual-use transit.

A transit or transshipment licence for dual-use items is currently only required when the destination is Iran or North Korea.²³⁸

3.5.5.3 Types of licences

Exporters in the UK must be pre-licensed personally. This requirement does not apply to transit and transshipment.²³⁹ If a transit licence is required, this may be in the form of an Open General Transshipment Licence (OGTL) or a Standard Individual Transit Licence (SITL).ⁱ

An OGTL can only be awarded for Category C items and is time-bound. The items must leave the UK territory within 30 days; if not, the transit/transshipment qualification expires and an export licence must be applied for. Additionally there are three specific OGTLs: the OGTL Dual-Use Goods: Hong Kong Special Administrative Region, the OGTL Postal Packets and OGTL Sporting Guns.²⁴⁰

SITLs are required for the remaining transit transactions that are subject to licensing. SITLs are issued in the name of a transit agent and apply to transit or transshipment of an amount of

ⁱ Open Individual Transit Licences do not apply to transit/transshipment

specified goods, transiting between a specific place of origin and a specific destination with a previously identified sender, recipient, and end-use. Such SITLs are generally valid for two years.

3.5.6 Assessment criteria

The considerations that ECO takes into account when processing applications for a transit licence include security considerations together with the intent to support and encourage the British industry and business sector.²⁴¹ The same assessment criteria apply to military equipment and dual-use items. The list of criteria is not included in the formal legislation. They are announced via Ministerial Statements.²⁴²

Since 2000, the list of criteria includes the EU criteria. The wording is largely parallel to that of the European criteria, though not identical: the UK adds its own emphasis here and there. Additionally, the UK makes use of the possibility, where appropriate, to take into account the impact of the transaction on economic, social, commercial and industrial interests, without detriment to the application of the criteria.²⁴³ These aspects are mentioned in the list as ‘other factors’. The criteria that the British Government applies on this basis are:

- the potential impact on its own economic, financial and commercial interests, including the long-term stability of democratic regimes with which the UK has trade relations;
- the potential effect on future diplomatic relations with the recipient country;
- the potential impact on defence cooperation projects (production or procurement) with friendly countries or EU partners;
- protecting the ‘essential strategic base’ of the UK.

Further, since July 2002, the British Government has applied criteria for the assessment of ‘incorporation issues’, i.e. trade in items that are to be integrated into other products.²⁴⁴

Application of the criteria occurs on a case-by-case basis, ‘using judgment and common sense’. There is an ongoing debate about their application, particularly concerning how the British version chimes with the EU criteria and the wording in the Common Position. There has been persistent criticism that the British formulation is weaker – particularly on Criterion 6 relating to human rights. According to the British Government, despite the difference in wording, there is no difference in application. Nevertheless, from a report by the Defence Committee it seems that the criticism relates i.a. to decisions that are made in concrete cases. There have been repeated requests for greater transparency about these.²⁴⁵ The British Government promised to review the criteria by the end of 2011 and to ensure better alignment with the EU criteria.²⁴⁶ The target date of end-2011 was not met, but the review is still ongoing.

Specific consultation mechanisms are provided for each assessment criterion.²⁴⁷

Criterion	Department or body consulted
Criterion 1	International Organizations Department (IOD) of the Foreign and

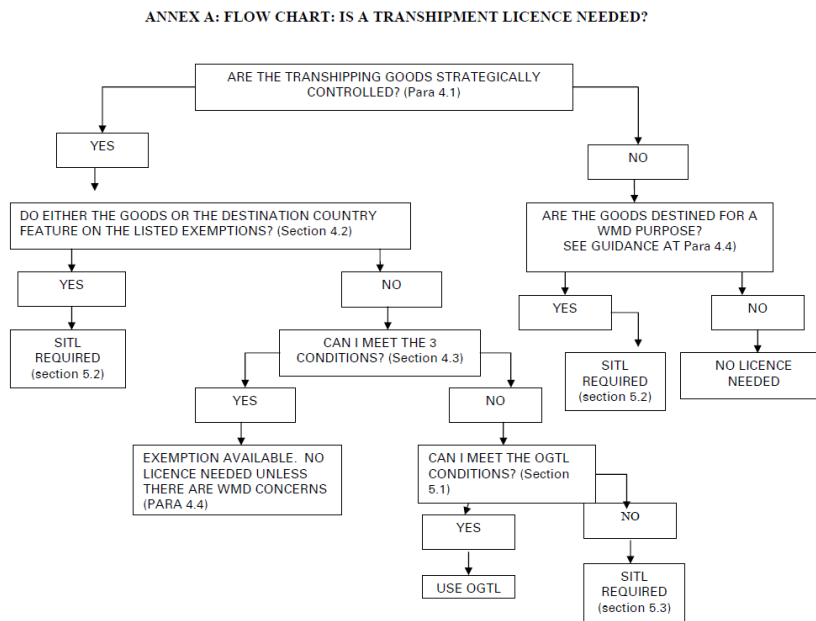
	Commonwealth Office
Criterion 2	British diplomatic posts, regional services (Geographical Desks) and the Human Rights and Democracy Department (HrdD) of the Foreign and Commonwealth Office (FCO)
Criterion 3	British diplomatic posts and regional services (Geographical Desks) of the FCO
Criterion 4	The opinion of the staff of British diplomatic posts in the recipient country and in regional services (Geographical Desks) of the FCO
Criterion 5	Ministry of Defence
Criterion 6	The Foreign and Commonwealth Office
Criterion 7	Staff of the Ministry of Defence and the Foreign and Commonwealth Office
Criterion 8	Department for International Development

British legislation contains no specific provisions on end-use or about including denials by other EU Member States in the assessment phase. However, in practice, both types of considerations are in fact applied. End-use in particular is a core element of the assessment. The destination assumes an important place in the British control regime, as made clear inter alia by the classification in Categories A, B and C, in which the destination provides a second distinguishing criterion along with the nature of the goods. More relaxed treatment of transit licences is not prescribed for friendly countries; but in the assessment, the country of origin is taken into consideration when applying the UK's own criteria (the 'other factors', see above).

3.5.7 Procedural aspects

The Guide that clarifies the policy with regard to transit and transhipment provides a systematic view of how the procedure is implemented.

Figure 4: Procedure for transshipment licence



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Since September 2007, applications for a transit licence must be submitted online via SPIRE. This is the electronic processing system for licence applications, managed by ECO.²⁴⁸ An application can be submitted from anywhere in the world using the online application. It does not matter who submits the application: as mentioned earlier, there is no (formal) requirement to be located in the UK. Once an application has been received, it is tested by the ECO against the Criteria list and other departments are asked for advice according to their general competence (see above).

Supporting documents must be sent along with the application; these include technical specifications and the End-User Undertakings. There are also a variety of tools available on the website to guide the applicant through the procedure. In the first instance, it is the responsibility of the exporters or transit agents themselves to determine whether their goods are on the Control Lists. ECO makes several instruments available to this end:

- Control List Classification Search Tool;
- Goods Checker;
- OGEL Checker;
- SPIRE online application system;
- Notices to Exporters;
- Rating Enquiry Service: a free service from the Technical Assessment Unit (engineers and scientists) who provide technical advice to exporters and officials.²⁴⁹

3.5.8 Modalities

Various licensing modalities can be found in EC Order 2008 (Art. 32-33). Licences may, inter alia, be revoked or suspended.

In view of recent developments in North Africa and the Middle East, and under pressure from criticism over previous deliveries to countries in these regions, the competent minister has announced improved methods for checking deliveries that initially meet the conditions but may later turn out to be problematic due to new developments in these countries. The possibilities include an immediate retraction of the licence for such countries. It is unclear whether this only applies to export licences or also to transit.

3.5.9 Monitoring and sanctioning

3.5.9.1 Monitoring

Trade in strategic goods without a valid licence is punishable in the UK. Obtaining a licence by false statements or failure to comply with the licence conditions is also punishable.²⁵⁰ Customs legislation and export control legislation contain provisions to this effect.

The Customs services (HM Revenue and Customs - HMRC) are in charge of supervision, and as in other countries, there are separate bodies which complement one another. The UK BF (Border Force) verifies compliance with the legislation by means of physical controls. The HMRC National Clearance Hub (NCH) conducts document checks on declarations and commercial documents. They can ask support from specialized services. The BF National Counter-Proliferation Team is specialized in detecting illicit activities and works together to this end with other customs services. The HMRC Criminal Investigation team undertakes investigations into suspected breaches. If punishable offences are established during the investigations, the case is transferred to the Revenue and Customs Prosecution Office (RCPO), which may initiate prosecution.²⁵¹ Furthermore, ECO has its own inspectors to oversee compliance in preventative mode. These compliance inspectors may also provide information to customs services concerning any irregularities they have found.

3.5.9.2 Sanctions

A summary of violations, measures, sanctions, and so forth, is published in the annual reports.²⁵² There was no mention of convictions for illicit transit in 2010 and 2011.

Potential sanctions available under British legislation are: denial of the application, suspending or revoking the licence, blocking or seizure of the goods by the customs services. On summary conviction, a person found guilty of an offence shall be liable to a fine (maximum 1000€) or prison sentences for a term not exceeding 6 months; for conviction on indictment to a fine (of an unlimited amount) or prison sentence not exceeding 10 years, or both and the suspension or rescinding of the licenceⁱ.

The UK has considered providing further civil sanctions for violations of export control legislation. Ultimately it opted to revise the criminal legislation by including more extensive possibilitiesⁱⁱ for reaching amicable settlements (compound penalties).²⁵³ Compound penalties are not considered by the authorities as a softer punishment - the fines can also become very expensive - but as a form of administrative simplification.

ⁱ British legislation provides for a distinction between 'summary conviction' and 'conviction on indictment', reflecting a specific common law division between lighter and serious crimes, to which separate procedures apply (including specific courts) and distinct penalties.

ⁱⁱ Section 152 of the Customs and Excise Management Act 1979

4 Analysis

Current international provisions only provide a very limited impetus for transit control, *inter alia* because there is no generally accepted definition of transit and because obligations are only defined for small arms and light weapons and for weapons of mass destruction related itemsⁱ. International documents seek to prescribe legislation or other measures for controlling transit, but provide no concrete provisions in terms of how to elaborate a legal framework for an effective national control regime, e.g. regarding personal scope (who is eligible as a transit agent?), material scope (whether or not the same lists as for export control apply?), and assessment criteria for distinguishing legal from illicit transit (the same criteria as for export or not?). A uniform approach to these three aspects is nevertheless vital to avoid national variations that actors in bad faith may exploit.

The European regulations do focus on these elements, without however imposing a uniform regime on the Member States. The European provisions still leave room for national differences. For the analysis we have taken the common European framework as the starting point for comparing national control regimes in the countries discussed, supplemented by two aspects for which international provisions go further: transit control in the country of export and the physical securing of goods in transit.

At the European level, foreign trade in military equipment and dual-use items are guided by separate legislative documents. While both categories of strategic goods fall under the same control regime in a number of EU Member States (for instance the United Kingdom), in this analysis we have followed the European distinction for national transit control regimes.

4.1 Policy on transit control

4.1.1 Differing European approaches to military equipment and dual-use items

4.1.1.1 *Military equipment*

On 8 December 2008, the Council of the European Union adopted a Common Position (CP) defining common rules governing the control of exports of military technology and equipment: CP 2008/944/CFSP. This legally binding instrument for EU Member States also includes a number of provisions on transit. An important observation is that the Common Position imposes no uniform licensing regime on EU Member States: it remains a national competence to choose whether or not to create a transit licensing requirement. The Common Position does oblige the Member States, within their respective national control regime, to use the same eight assessment criteria for processing national licence applications for goods listed in the EU

ⁱ The ATT Resolution (April 2013) for the transit of conventional arms recently imposed a number of obligations, but pending the required number of ratifications, these provisions are still not enforceable at a national level.

Common Military List. Member States, however, can decide for themselves whether to add their own different and stricter assessment criteria, or to extend the material scope beyond the common list. Our analysis shows that among the countries investigated, only in the Netherlands and the Flemish Region have the European assessment criteria been enshrined in national legislation – and with a stricter interpretation. In the other countries under study, the European criteria are not included in formal legislation; they are political principles applied in practice to evaluate transit licence cases.

Another important point is that with the adoption of Directive 2009/43/EC concerning the transfer of defence-related products, EU Member States may no longer require authorization for intra-Community transit.

4.1.1.2 Dual-use items

Control policy on trade in dual-use items is *in se* a European competence. The EU Member States only have very limited room for interpretation and manoeuvre.

Based on the EU Strategy against the proliferation of weapons of mass destruction (2003), Member States must consider taking steps to control transit and transshipment of sensitive materials. Compulsory or systematic control is however not prescribed. This approach is also reflected in the European rules on transit in dual-use items, contained in EC Dual-use Regulation 428/2009. The Regulation directly addresses the national legal order of the Member States.

Due to the large volume of transit in dual-use items, systematic controls are considered “*impracticable and excessively burdensome*”²⁵⁴, and the choice was therefore made only to resort to control if there are reasonable indications of illicit proliferation. The transit of non-Community dual-use items may be prohibited by the competent authorities of the Member (transit) State, if items are or may be intended in whole or part for the development, manufacture or use of weapons of mass destruction. All the countries discussed here apply the prescribed *ad hoc* regime.

4.1.2 Different national services involved

Transit policy for strategic goods touches on several policy sectors. Given the need to reconcile international and national security interests with primarily economic concerns, the authorities competent for Foreign Affairs, Internal Affairs (police, intelligence, state security) and Economy are interested parties. Monitoring compliance with the legislation in all the countries is the responsibility of Finance (Customs).

In most countries investigated, different ministries have the primary competence for transit of military equipment. In the Netherlands and in the Flemish Region, the competent bodies in this regard are from the Ministry of Foreign Affairs; in Germany and the United Kingdom they are part of the Ministry of Economy. In France, the transit of military equipment falls under the competence of the Ministry of Defence.

For dual-use items, the competence with regard to transit control in Germany, France and the United Kingdom belongs to the Ministry of Economy. In the Flemish Region (Belgium), and also recently in the Netherlands, the Ministry of Foreign Affairs is competent.

Some countries (France and the Netherlands), it is the customs services who receive applications for a transit licence, partially handle them themselves, and when sensitive cases are involved, forward them to the competent body for export control. Because of their general monitoring competence, customs services from the Department of Finance in practice play a crucial role in all EU Member States. These services are responsible for monitoring compliance with the legislation: they check the documents provided for legal conformity and conduct physical controls. Within the customs services, one or more specific anti-fraud service(s) are competent for initiating, undertaking and coordinating of investigations and the initiation of prosecutions.

An efficient control regime must ensure that all of these authorities cooperate where necessary. Such cooperation is not only important for the assessment of individual licence applications, but also in terms of policy with a view to developing a targeted control regime that meets the actual needs. This includes creating legal certainty not only for legal trade, but also notably for control measures aimed at addressing illicit trade. In most countries under study, the formal consultation procedures with other public authorities are limited to assessing the licence application. To this end, there is often a gradual approach according to the sensitivity of the file. The British model may be cited as a good practice, where a distinction is made according to the criterion that is crucial to assessing the current case: for each criterion in CP 2008/944/CFSP, there is an indication of who must provide advice (i.e. which authority, based on its respective competence). In some other countries (Germany, France), an inter-ministerial committee is convened to address sensitive licensing cases.

Given the cross-border nature of transit, not only intra-State, but particularly also inter-State consultation and exchange of information is required. In order to avoid EU Member States undermining each other's control policy, in certain instances they have committed to exchange information with and to consult one another. This is more specifically the case when licences are denied based on the common assessment criteria (the no-undercut principle). Thus far, the application of this principle to military equipment is asymmetrical so long as not all EU Member States have a national transit policy (because there is no framework available in these countries, to take denials by other countries into account).

4.1.3 Description of transit and the rationale for the control regime

4.1.3.1 *Military equipment*

The legal definition delimits the scope to which legislation applies. The Common Position 2008/944/CFSP gives no definition of transit for military equipment. The accompanying User's Guide does describe transit, but because the Guide only has the status of a recommendation, and because the Common Position imposes no licensing requirement, the Member States may interpret this description as a suggestion. Member States can decide for themselves how they define the transit of military equipment. This may be done on the basis of a broad description combined with a clarification (narrowing) of the type of transactions to which concrete control

measures apply, or by means of a specific definition corresponding to the type of transit to be controlled.

For the transit of military equipment, Belgium has opted for a specific definition corresponding to the transit to be controlled. Transit in Belgium has always been understood as transit with transshipment or change of the means of transport.ⁱ This is the kind of transit that has always been *de lege* or *de facto* subject to systematic control. This approach is motivated by the assumption that this is where the greatest risk of diversion exists. The other countries investigated take a very different approach: they provide a broad legal base for controls on military equipment (based on a broad definition of transit), but with a much more limited systematic control. The main advantage of this latter approach is that a broad definition, coupled with the possibility of imposing licensing *ad hoc* for all non-systematically controlled transit, offers the competent authority the possibility of intervening at any time whenever there are suspicions of dubious trade. In Germany for instance, a systematic licensing requirement is only specified for transit of the most sensitive goods ('war weapons'). Further, in certain instances (no modification of customs status and no transshipment) a general licence may suffice. Transit across German territory of the other military equipment is in principle not restricted, but may always be placed under licence *ad hoc* - for instance in view of a threat to German external interests or possible use for weapons of mass destruction. The Netherlands and the United Kingdom take a similar approach to military equipment. If certain conditions are met - destination, type of equipment - the licence is a formality (general transit licences in the Netherlands) or transit is exempt (United Kingdom). For both countries, the largest proportion of exports fall under this more flexible regime; but they can continue to intervene at any time whenever there is a suspicion of problematic transit. In France, the legislation targets transit as well as transshipment, so that France also has a broad legal basis for any potentially suspect transit.

The underlying reasoning in Germany, the Netherlands, France and the United Kingdom is to avoid unnecessarily obstructing legal trade by means of systematic controls, but to keep all possibilities in hand for problematic transit. The specific definition of transit in Belgium also has the effect that a legal base is no longer available for stopping and controlling possible suspicious transit of military equipment without transshipment. In consequence, the control regime there is burdensome (more controls on legal trade), less agile (fewer possibilities for tackling other suspect transit), and does not necessarily obtain better results in combating illicit transactions.

4.1.3.2 Dual-use items

In contrast to military equipment, the EU Member States have been left no freedom of choice for the transit of dual-use items. The EC Dual-use Regulation 428/2009 provides (directly into the national legal order of the Member States) a broad legal basis for controlling transit (*ad hoc*): whether or not transshipment or change of the means of transport occurs is of no importance as criteria for transit control. This broad definition is coupled to a catch-all clause that enables Member States, for instance, to impose licensing on items that may possibly be

ⁱ For dual-use items, the Flemish Region *de facto* uses a narrower description of transit (limited to transshipment) than the definition in the Regulation (general transit). Because the Regulation applies directly, the broad legal basis of the Regulation remains intact, including the possibility to intervene in all problematic cases (also without transshipment).

destined for weapons of mass destruction. All the control regimes under study adhere to the prescribed European policy. By combining a broad description of transit, broad material scope and a broad legal basis for intervention, the EU creates many opportunities to place suspect transit (destined for WMD or countries under embargo) under control. The practical feasibility of identifying dual-use items is developed below, when analysing the options for monitoring legal compliance.

4.2 Differences in scope

The territorial, personal and material scope are important building-blocks for an effective national control regime. For a transaction such as transit, which by definition is cross-border, a well-considered and preferably uniform delimitation is crucial.

4.2.1 Territorial and personal scope

Delimitation of the territorial and personal scope must create legal certainty regarding the persons or organizations to whom these legal obligations apply. From a perspective of efficiency, it is logical that those who are economically responsible for the goods should also bear the legal responsibility. In the case of transit, the primary responsible party, the exporter, is by definition established abroad. The competent authority is thus obliged to find a party within its respective jurisdiction to enforce compliance with the legislation. In all the countries under study, the transporters, expeditors, port agents, cargo agents, shipping agents, customs agents and so forth, are those who go through the formalities related to transit.

The requirement to be established in the territory where transit occurs is an interesting point in relation to combating illicit arms trade, because in this way an additional responsible party is created who can be held to account when anything goes wrongⁱ. The positive aspect is that this makes it more difficult for dishonest exporters, because they have to go in search of a dishonest partner (an accomplice transit agent in every transit country). The other side of the coin is that it makes bona-fide agents all the more attractive for dishonest dealers. Because of their solid reputation with customs (whether or not they are certified organizations) such agents are particularly vulnerable to exploitation, while they actually have little control of the transport except for handling the formalities (customs agencies) or bringing the goods to their destination (transport agencies). Their core business is in fact not the 'arms trade' and they are dependent on the information that the customer (the exporter) gives them (see also below on material scope).

There are also ways to target dishonest exporters. For instance, German legislation enables prosecution of German subjects guilty of illicit activities outside their own jurisdiction. Such a

ⁱ An increasing number of transit agents uses contract clauses designed to pass on responsibility to the owner of the goods, thus acting only as go-betweens. There are standard clauses in shipping by which the responsibility for the authenticity of the declared goods is placed upon the customer ('said to contain'). Further, some transit agents ask their customers to sign a declaration in which they state that the goods are not eligible for dual-use. However, as an objective and distinct accountability rests on the transit agents, they are still the first to be targeted by Customs when irregularities are discovered. In case of prosecution (involving penalties, as no criminal prosecutions are known), the indemnification clauses only help in later making a civil claim to recover the damages paid.

generalized extra-territorial function could prevent dishonest dealers from walking away free under cover of the agents whom they use as front-men. Another way to specifically target the most responsible party could consist of making an *ex ante* judgement on exporters in the country of dispatch (i.e. during the export licence application) on the basis of their transit routes. This would at the same time provide a legal basis to evaluate them *ex post* and to prosecute them in case for irregularities during transit. Further, this would allow the international obligation (for small arms only^j) to assess transit starting from the time of application for a export licence to be met.

4.2.2 Material scope

A clear delimitation of the material scope of legislation is important in order to ensure legal certainty: it must unambiguously establish to which types of goods the transit control regime applies.

Common Position 2008/944/CFSP specifies that Member States must use the Common EU List for **military equipment** as a reference for drawing up their respective national lists. The Member States themselves must take the requisite measures to adopt the List as the basis for defining the field for application of their respective national control regimes. An analysis of the material scope with regard to transit of military equipment shows that in all countries under study, the European Common List forms the foundation for transit controls. Reference to this list is included in the national regulations of a number of countries. The advantage of this is that it automatically refers to the most recent (regularly updated) version of the control list. In a number of countries, this European control list is supplemented by a 'national' control list. Further, a number of countries also provide a military catch-all clause.

The material scope for controls of **dual-use items** is established in Annex I of EC Dual-use Regulation 428/2009, which has direct effect in the legal order of the Member States. The same items are listed for transit as for exports. The EC Dual-use Regulation 428/2009 further provides for a catch-all clause specifically for transit: if the goods are intended for weapons of mass destruction, a Member State may broaden the transit prohibition to include items that do not appear on the List in Annex I, as well as dual-use items for military end-use or military destinations under embargo. All the control regimes under study adhere to the prescribed European policy.

4.3 Control measures

From the previous findings, it appears that the key to an effective control regime is to make a number of internally coherent choices on 1) the definition of the targeted transaction(s), 2) the choice for a systematic or *ad hoc* control (which may or may not coincide with the definition), 3) whether or not controls apply to all or only certain categories of goods, according to their destination, 4) whether or not transshipment is involved and (for practical reasons) whether or not limited to certain modes of transportation and/or certain

ⁱ An obligation under the UN Firearms Protocol

transshipment locations (such as seaports and airports) . Together with these fundamental choices, a number of complementary control measures may contribute to a sound and effective control regime. A mixture of measures, mutually strengthening each other in aiming to achieve the desired objectives, is required for effectiveness.

At the national level, this approach is most concretely developed for military equipment.

4.3.1 Possible additional control measures for military equipment

4.3.1.1 Preliminary licence requirements

In a number of countries, additional controls are imposed on those who wish to conduct transit transactions. For instance, transit agents of military equipment in France belong to a regulated profession (commissioner of transport or customs commissioner), whereas in the Flemish Region (Belgium) they must possess prior authorization from the Flemish Region or a prior licence from the Federal Ministry of Justice. This prior licence does not focus on the legality of the transaction - this happens while assessing the application for a transit licence - but aims to screen the moral quality and reliability of applicants for transit licences. As from 2012, this assessment is reviewed every three years. The complementarity between the preliminary licence and the transit licence in the Flemish Region can be considered as best practiceⁱ.

4.3.1.2 Notification requirement for transit not subject to a licensing requirement

France is the only one of the five countries controlling road transit. The main objective is to obtain an overview of what enters French territory. The size of the French territory, the long coastline and the presence of domestic separatist movements and terrorist organizations might explain this requirement. The Netherlands takes a different approach, namely by imposing a notification requirement. This applied until June 2012 for all transit from and to friendly countries; since July 2012, the notification requirement is limited to transit without transshipment from and to friendly countries. The *ratio legis* of this requirement is, as in France, to maintain an overview of this type of transit. The other countries have no notification requirement.

4.3.1.3 More flexible assessment of friendly countries

All EU Member States under study pay attention to avoid unnecessary administrative burdens to transit, therefore it is not surprising that most of them give formal or informal preferential treatment for transit from or to Allies. In the Netherlands, a general licence applies to the transit of most military equipment from and to Allies. Germany, France and the United Kingdom also employ a more relaxed approach to transit involving Allies.

The reason for this is that it is assumed that the policy of Allies can be trusted. Where this more flexible assessment is on a *de facto* basis, the intervention in the case of suspect transit from or to Allies remains possible at any time, since the legal framework makes no formal exception. And even the Netherlands – which until recently demanded no licence from friendly countries (only a notification requirement) - has systematized the more relaxed demands by

ⁱ In July 2012 the Netherlands introduced prior registration of carriers who want to make use of a general transit licence (from/to friendly countries), but in this case no evaluation of the carrier is included.

introducing general licences, but at the same time (legally) preserved the possibility of intervening on an *ad hoc* basis. The free passage for Allies had in fact long been under criticism in the Netherlands.

Only the Flemish Region has no relaxed standards for friendly countries, neither *de lege* nor *de facto*.

4.3.1.4 Securing transport

The UN Firearms Protocol for small arms and light weapons and UN Resolution 1540 for weapons of mass destruction emphasize the need for physical security, a point that is important in order to avert diversion.

Only France and Germany have a legal obligation to secure transport at all times.ⁱ With this, they *de facto* emphasize an important specific (policy) goal of transit control, namely ensuring safe transport across their territory, without defining it as a policy objective as such. In the Netherlands as well, domestic security is *de facto* a significant concern; by requiring notification for transit not subject to licensing, the competent authority aims to keep an eye on what is circulating there.

In all the countries investigated, securing the transport of goods belongs to the competence of a different entity (Mobility, Transport, Nuclear Control, Economic Affairs ...). Even though it belongs to the explicit competence of authorities other than the export control organisation, consultation on this matter may also benefit export control policy, both as input for the policy as well as at the level of monitoring and enforcement.

4.3.1.5 Procedural aspects

The Netherlands, Germany and the United Kingdom make electronic application systems available to users. These serve to inform them whether or not goods are subject to a licensing requirement, and for the processing of applications. France is working on a system which it expects to be operational by 2014. The use of electronic procedures does not exist in Belgium.

4.3.1.6 Keeping information about transit countries

The UN Firearms Protocol prescribes to collect information about transit countries for at least ten years. Only the Netherlands has provided for this (for seven instead of ten years) since the introduction of general transit licences from and to friendly countries (July 2012). The users of such licences must register in advance, and one of the conditions for using a general transit licence is the obligation to keep all documents concerning deliveries for seven years. Users are further obliged to report bi-annually about the use made of the licence. There is no comparable obligation for individual licences.

A generalized practice for collecting information by the users and/or by the competent authorities may nevertheless be very relevant for, for instance, creating risk profiles, not only on transit agents but also on the preferred transit countries and popular transit routes for illicit traffic. It also offers the possibility for verifying the actual use of a licence, and provides a basis for intervening when diversions or irregularities are noted.

ⁱ The terminology in France and Germany for a transit licence is furthermore 'autorisation de passage', or transport licence.

4.3.1.7 Exchange of information on transit

Only the UN Firearms Protocol includes stipulations in its rules about gathering information on illicit activities: by mutual information exchange in general, by inter-State exchange of information on transporters, on criminal organizations and their *modus operandi*, and even by ensuring the cooperation of transit agents themselves to track down illicit activities.

At the European level, only the obligation exists to exchange mutual information about denied licences. From the last published annual report (2011) concerning military equipment and the application of CP 2008/944/CFSP, it appears that only information about exports, and not about transit, was exchanged and published by the EU Member States. In practice, at the European level, information about the transit of military equipment is exchanged among the Member States informally.

The exchange of information and consultation with other authorities, intra-State as well as inter-State, seems to be generally limited to the assessment procedure for transit applications. Some export control organizations expressly state that proactively gathering information about illicit activities or organizations does not belong to their competence, and is reserved to the police and intelligence services. Nevertheless, this information is also relevant as input for political decision-making in order to guarantee the effectiveness of the chosen control measures (taken into account the profile of illegal traders and their *modus operandi*).

4.3.1.8 Modalities for changing (internal or external) circumstances

After a transit licence has been issued the circumstances may change, justifying a review of the conditions of the licence. These may be external factors, such as a change in the political situation of the recipient countries, or internal factors related to the use of the licence, the reliability of the transit agent, and so forth.

All countries have legal provisions (modalities) for intervening when there are changes with regard to internal factors. In practice, these provisions do not appear to be used very often. The very existence of the legal possibility to intervene at any time, however, is important. The countries that have a broad legal basis to conduct controls *ad hoc* also have the potential to intervene in the event of changing external circumstances.

4.3.2 Control measures for dual-use items

In contrast to military equipment, the EU Member States have been left no freedom of choice for the transit of dual-use items. The EC Dual-use Regulation 428/2009 provides a broad legal basis for controlling transit (*ad hoc*) that directly applies in the national legal order: whether or not transshipment or a change of the means of transport occurs is irrelevant as a criterion for transit controls. This broad definition is coupled to a clause that enables Member States, for instance, to place items that may possibly be destined for weapons of mass destruction under a licensing obligation (see above). All the control regimes investigated adhere to the prescribed European policy. By combining a broad description of transit, a broad material scope, and a broad legal base for intervention, the EU provides many opportunities to place suspect transit (destined for WMD or countries under embargo) under control. The practical

feasibility of identifying dual-use items will be taken into account below, when discussing the monitoring approach.

Two specific aspects in the Dual-use Regulation reveal that Europe, also when it comes to dual-use items, is (still) not fully committed to developing and imposing a uniform framework for national transit control. One is the fact that the common assessment criteria for licence applications are only valid for exports and brokering, and secondly the fact that numerous supporting measures such as customs procedures, administrative cooperation and record-keeping, are not applied to transit. In particular, the lack of encouragement for customs to cooperate is a missed opportunity because transit is a difficult activity to control from a customs-technical perspective (as explained below). From this we may deduce that the EU mainly seeks to create the possibility and legal base for a national transit control regime for dual-use items, without aiming at uniformity.

Control of the financing of transit

Only UN Resolution 1540 on weapons of mass destruction prescribes control of financial transactions. In practice, transit in all countries is assessed on the basis of the information that transit agents provide via the application form, possibly supplemented by additional information, requested by the competent administration. Information about financial transactions is not taken into account.

4.4 Monitoring

4.4.1 Limited possibilities for monitoring

A legal framework alone is insufficient in itself for conducting an adequate transit control policy. The effectiveness of the control regime depends largely on the possibilities for ensuring compliance with the legal provisions. In all the countries under study, this is not a task for the authority competent for export control policy; rather, the customs services are responsible for front-line monitoring as well as for detecting and monitoring punishable offences. Because customs procedure is regulated at the European level, the characteristics of customs control are largely equivalent in all countries under study. They only introduce different emphases at the level of interpreting and applying the European-regulated provisions.

The possibilities for monitoring compliance with export control policy are extremely limited for a variety of reasons: first and foremost because of the volume of transit and the speed with which transit transactions take place. Especially for dual-use items it is plainly impossible to check all potentially high-risk goods. The customs services thus rely upon selective controls. For several years now they have been guided by risk analyses in order to work in a more focused manner. The parameters used for this are confidential for obvious reasons, but include, inter alia, the type of goods, the sender and the recipient(s). For the transit of strategic goods, the specific problem arises that the information that has to be given in

customs declarations is unsuitable for risk analyses. In summary declarations as well as in T1-documents for external transit (the term used for transit in the customs procedure) there is a requirement to describe the goods, but not to apply the goods codes from customs nomenclature. For this reason, the system is incapable of identifying suspicious goods: at most it can note that false, or no, information has been given about the goods, e.g. when a field is left empty. The explanation for the limited information requested in customs procedures for (external) transit may be found in the aim of the controls: external transit is in fact the status that goods hold when they transit EU territory 'with an exemption from duties or commercial policy measures'. Because no duties are owed, transit is fiscally less interesting for the customs services. The duality between, on the one hand, the fiscal purpose and, on the other hand, the non-fiscal purpose of (international) security and the corresponding monitoring tasks lies at the heart of the inadequacy of the current instruments available to customs services.

Even if goods codes were of mandatory use in declarations, the problem in practice is that the categories of the customs nomenclature are too broad to serve the identification of specific goods subject to licensing. This is primarily the case for military components and dual-use items. An enquiry at the Belgian customs services revealed that an estimated 80% of goods codes include sub-categories that are eligible for dual-use. For items such as those summarized in Annex I of the EC Dual-use Regulation 428/2009, however, there is no *specific* code within the customs nomenclature.

In the Flemish Region, a new provision since June 2012 grants officials from the competent authority issuing the licence (in this case the SGCU) to take on various rights of supervision - for instance, inspection of documents - in order to verify compliance with the Flemish control regime in a complementary way to the Customs. Creating the officials' own competence may allow them to supplement the supervisory work of the Customs services, but so long as there is no investment in *specific* resources to detect illicit transit, they will face the same obstacles and problems in future as the Customs do. The main issue is a lack of information about illicit trafficking (for all strategic goods), and lack of possibilities for identifying dual-use items that may be used for WMD and military purposes.

4.4.2 Problematic border controls

Another example that illustrates the duality between fiscal and non-fiscal purposes is the absence of controls at the internal borders of unified Europe (under economic logic), while national measures with regard to international security are still allowed on the basis of the EU Functioning Treaty. Since there are no longer any customs agents at internal national borders, control of road and rail traffic is in practice no longer possible. For practical reasons, most countries therefore limit transit controls (*de lege* or *de facto*) to controls at the external borders, in airports or seaports. Only France has systematic controls for transit by road.

4.4.3 Lack of uniform application

A final important point regarding the monitoring capabilities of customs services is the experience reported by transit agents that, despite the uniform legal framework provided by

the Community Customs Code, major mutual differences at the level of national application remain in practice. Different interpretations, different procedures and processing times, and different priorities (every EU country works with its own risk assessment profiles) ensure that the same categories of goods will not be equally strictly controlled in all EU countries. The European Commission attributes this, among others, to a difference in capability at the national level.²⁵⁵

4.4.4 Need for cooperation

A legal framework that loses sight of the possibilities of enforcing compliance undermines its own effectiveness. One of the challenge for verifying compliance with export control policy lies in the separation of competences: policy-making and monitoring compliance belong to two separate authorities, each pursuing a different goal. So long as the goal of the customs services is primarily fiscal – despite the increasing number of non-fiscal monitoring tasks imposed on them by other domains (environment, food safety, etc.) – and the instruments available to customs are tailored to support this fiscal purpose, there is little chance that 'suspect' transitⁱ will show up on the radar. Getting access to the correct information, having means to conduct controls on national measures in a unified market, and uniform application inside Europe present the major challenges for efficient customs control. These challenges transcend the national level and can only be addressed at the European level.

Cooperation between all the competent authorities - each of them dealing with a specific partial aspect based on their general competence - is essential. Together with export controls and customs services, the police and intelligence services and the authority competent for transport (for aspects of physical security) are the most important parties involved. This kind of cooperation is not only necessary at the stage of assessing licence applications, but is structurally indispensable '*en amont*', i.e. in order to map out an adequate policy taking all relevant aspects into consideration, so as to institute the most appropriate and adequate control measures.

4.4.5 Need for information on illicit transit

All the countries investigated prescribe criminal sanctions for violations. Up to the present, however, there have been no known cases of criminal sentencing for illegal transit. The effectiveness of a transit control regime should nevertheless be reflected in the statistics on it, in respect both of legal and illicit trade.

Given the focus on international security, and particularly on the objective of preventing illicit trade, it is important to keep in mind the characteristics of illicit trade and the criminal organizations involved in it: the profile of illicit dealers, their *modus operandi* and so on. The present study, focussing on the legal framework and administrative practices, has not brought to light any data on this. This is a significant observation. The fact that, for instance, there have been no criminal prosecutions can hardly been seen as confirmation that there is no illicit

ⁱ 'Suspect' from the perspective of export control

transit. It is rather an indication that the control regime has not succeeded in detecting it. In order to obtain a full picture of the effectiveness of the transit control policy, one would need an overview of illicit trade. That, however, demands a different type of research. In contrast to exports, and recently brokering, there are currently few international or national studies or research reports that illuminate the characteristics and problems of transit and the *modus operandi* of dishonest dealers. A couple of examples of valuable publications in this context are the case studies by SIPRI, allowing profiles and *modus operandi* to be traced, and the recent publication by IPIS describing illicit trafficking.²⁵⁶ More of this kind of research is needed to permit an effective analysis of the current control regime, and is structurally necessary as an input to policy-making. In its absence, current statistics can give no clear indication about the effectiveness of the system.

In summary, we may conclude that the current transit control regimes 'succeed' in subjecting legal trade to controls, but that no conclusions can be drawn with regard to preventing illicit arms trade.

5 Recommendations for a fully-fledged transit control regime

What follows is a summary of recommendations, on each important feature, for a fully-fledged control regime. Where relevant, it will be indicated when intra-State or inter-State consultation and alignment are desirable.

This summary list is to be considered as a roadmap with all the relevant aspects and components to be considered across the whole process of developing a control regime, from (input to) policy to effective enforcement for non-compliance. It is a generic list, suitable for military equipment as well as for dual-use items

Motivation to regulate, policy objectives

- The perspective of international security: strengthening a sound export control regime
- The perspective of civil security: ensuring security on the national territory, protecting the environment and the population, i.a. by physically securing transport
- The perspective of domestic security: preventing diversion within the national territory because of the threat of international terrorism (thus, diversion is not limited to faraway destinations)

Intra-State consultation and alignment is desirable with other authorities competent for Foreign Affairs, Homeland Security, Civil Security and Transport



Input for political decision-making

- Choices In line with the regulated aspects of export control: the same material scope, the same assessment criteria, etc.
- The characteristics of transit should be taken into account
 - o by definition a cross-border phenomenon, with a primary responsible party (the exporter) located outside one's own jurisdiction;
 - o the volume and the speed of transit transactions.
- The *modus operandi* of criminal organizations should be taken into account;
- The impact of measures of physical security on monitoring and control possibilities should be taken into account

Intra-State consultation with other competent authorities is desirable:

- o Foreign Affairs, because of their information on international security and the policy of other countries;
- o Police, intelligence, fraud and prosecution services, because of their information on criminal, illicit activities;
- o Mobility, Transport, and Nuclear Security, etc., in view of their policy responsibilities for physical security of transports (inc. *lessons learned* from their controls);
- o Customs services, responsible for monitoring and enforcement.

Inter-State consultation is desirable for purposes of policy alignment

Legal framework

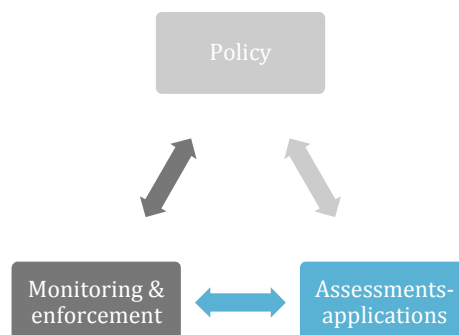
Control measures must be legally embedded in order to create legal certainty. *Ab initio* it is important to ensure:

- A proportional legal framework corresponding to the objectives, i.e. successfully restricting illicit trade without unnecessarily burdening legal trade. Internally this means proportional and efficient procedures; externally, the need for cross-border consultation to avoid duplication;
- Monitoring/enforcement and the practical feasibility of controls;
- Uniform application at national level of common obligations and formalities



Competent authorities

- Transit belongs to the competence of the competent body for export controls
- Consultation with other competent authorities is necessary at three important stages in the transit control process:
 - o To obtain input for policy-making (see above): intra-State as well inter-State
 - o When assessing licence applications (see also below)
 - o With a view to monitoring and enforcement (see also below), intra-State as well as inter-State



Description of transit

Preferably a broad description (in combination with a legal foundation that enables intervention at all times):

- Broad description: transport through the national territory, with or without transshipment and regardless of the means of transport.
- *Ratio legis* of the broad description: exclude nothing *de lege* for making control of suspect transit possible at all times

As a second step, systematic controls *de lege* or *de facto* can be restricted, more focused, for instance:

- to certain goods;
- certain destinations;
- the handling (transshipment);
- certain types of means of transport (sea/water, rail, road, air);
- and/or transshipment location (seaports and airports).

Personal scope

Preferably working on several tracks in order to hold all responsible parties accountable:

- Transit agents, in order to have an immediately accountable party within one's respective jurisdiction;
- in combination with holding the exporter accountable for the selection of his transit routes (requires cross-border consultation and alignment to avoid double controls);
- and possibly in combination with extra-territorial function for one's own subjects who commit punishable offences (no licence, non-observance of embargoes, etc.)

Material scope

- Preferably kept as broad as possible, with the starting point being the same lists as for export control: EU Common Military List + national items + catch-all clause;
- Preferably cross-border as uniform as possible to avoid 'shopping'

Control measures

Ideally a *mix* of complementary measures:

- Prior screening of transit agents as to moral quality and reliability, cf. the Belgian approach
- Prohibitions:
 - o Certain categories of goods;
 - o Certain destinations;
 - o Certain end-users (e.g. non-State actors);
 - o Certain end-use (e.g. dual-use for WMD, in countries under embargo).
- Possible control measures in the transit country:
 - o Limited systematic control by means of a licensing requirement, e.g. focused to transshipment of certain categories of goods;
 - o Broad legal base in order to enable *ad hoc* controls/placing under licence for all other transit(in view of security interests, assessment criteria at risk, illicit end-use, etc.)
 - o The same assessment criteria for transit licences as for exports (common EU criteria, no-undercut, international obligations);
 - o Possibly a notification requirement for certain categories of transit not subject to a licensing requirement;
 - o Possibly record-keeping for licensed transit in order to be able to monitor the use of the licences;
 - o (Physical) security measures for transport
- Control measures on transit when applying for an export licence (in the country of dispatch), possible measures:
 - o Including information about transit countries in the assessment of the export licence application;
 - o Possibly investigating whether the transit countries do not object;
 - o Possibly, the exporting country must make sure that the transit licence is granted if required;
 - o Possibly providing the information in the import licence to transit countries;
 - o Keeping information (records in the country of export) about transit agents and transit countries (for 10 years).

Required documents

- Upon application for a transit licence:
 - o Information about the goods;
 - o Information about the end-user;
 - o Information about the end-use.
- Upon application for an export licence:
 - o Possibly, written notification that transit countries do not object
 - o Information about transit routes.

Assessment criteria

- Preferably in line with the assessment criteria for exports and preferably (cross-border) as uniform as possible in order to avoid 'shopping':
 - o International obligations and the common EU criteria
 - o Preferably minimal use of national criteria
 - o Denials by other countries (no-undercut)
- A more relaxed treatment of friendly countries is among the possibilities, provided a legal foundation is maintained to allow intervention in case of changed circumstances. This can be done *de facto*, or *de lege* as in the Dutch model using general transit licences coupled with a notify and report requirement and a legal base for intervening if necessary.

Preferably modular, intra-State consultation when processing assessment applications and testing them against assessment criteria, cf. the British approach.

Procedural aspects

Preferably customer-friendly, so as not to unnecessarily encumber legal trade and to take account, so far as possible, of the speed with which international trade transactions occur.

Possible measures are:

- A 'single window' approach for fulfilling the administrative formalities when several competent authorities are involved;
- Attaching advantages to certification (based on certified trust), for instance, no additional moral investigation for those who are AEO or C-TPAT certified;
- Electronic procedures for fluid processing;
- Transparent processing of applications.

Modalities

Provide a legal foundation that makes intervention possible after the licence is granted, for instance, in the event of changing circumstances or when irregularities are noted.

Monitoring & enforcement

Adequate information is needed about transport (goods, destination, etc.), together with insight into the *modus operandi* of illicit activities (as an input to risk assessment techniques), in order to make actual monitoring possible:

- Checking the authenticity of the documents;
- Physical controls on the goods;
- Border controls.

Intra-state consultation with police and customs intelligence for detection, consultation with customs and the offices of the public prosecutor for prosecution.

Inter-State consultation and cooperation needed to obtain a view of the relevant information:

- On transporters;
- About criminal organizations and activities: their profile, their *modus operandi*;
- On popular transit routes for illegal traffic.

Sanctions

- Preferably a legally-embedded mix of civil law and criminal law sanctions;
- Sufficient dissuasive;
- Preferably, in the case of transit, targeted at the primary responsible party (the exporter), who is by definition established abroad.
- Holding transit agents accountable as second-line responsible parties;
- Preferably a multi-tier system of sanctions according to the seriousness of the violation;
- Possibly an extra-territorial function for one's own subjects;
- Publishing information on prosecutions and convictions in order to promote transparency about what is (not) permissible.

6 Conclusions

Transit is a trade transaction whereby goods enter the territory of a State in order to be transported further to other destinations outside the jurisdiction of the transit country. This may occur either directly, for instance by road or rail, or can be combined with transshipment to another means of transport, e.g. goods that enter the country by a seaport or airport and are loaded onto a different or similar means of transport.

Transit of strategic goods is one of the trade transactions that is governed 'supra' nationally as well as nationally by export control policies. Central to the process are export controls, other trade transactions that are targeted include imports, brokering and services. Export control policy in general is first and foremost motivated by purposes of international security, namely, to prevent certain categories of goods (given their strategic nature) from ending up in illicit destinations or with undesirable recipients. Transit control has the same goal, and is considered by the competent authorities as a transaction that needs to be controlled to strengthen export controls. In this sense it is a secondary measure, supporting a sound export control regime.

The specific and particular characteristics of transit, differing from those of export, demand particular attention not only when choosing adequate control measures, but also in terms of policy. Its particular characteristics involve, firstly, the volume and the speed of transit transactions, which impacts on the practical feasibility of controls whether systematic or not. On the other hand, from a security perspective, transit also entails specific risks that must be taken into account in terms of policy. A core objective with regard to exports is preventing diversion, i.e. limiting the risk that the goods should end up in countries or with dealers who constitute a threat to international security. Potential diversion to faraway destinations is a substantial part of the risk assessment for transit, additionally however, there are two specific risks for one's own territory: the threat to the environment and population during the transit of dangerous goods, and the risk of diversion to the domestic market. This latter concern in particular needs to be given more weight when determining policy objectives in a context of international terrorism. Terrorist threats are indeed not always territorially defined and cannot be predicted according to territory, nor are they limited to distant areas of conflict.

The current study has explained the various systems (international, European, and national in the countries under study) based on a detailed description and analysis of their most important features. On the basis of the analysis, recommendations have been formulated for each of the distinct elements that jointly form a coherent and fully-fledged control regime.

At an **international level**, two of the three objectives apply: international security and also civil security, to the extent that some international texts require transport to be secured physically. In general, however, it must be remarked that transit does not receive much attention at international level; there are few specific obligations, and these are restricted to small arms and light weapons and weapons of mass destruction related items (in the UN Firearms Protocol and UN Resolution 1540, respectively).

An effective control regime must include a coherent set of measures, aiming at specific policy objectives, that take account of the characteristics of the transactions to be regulated, and are preferably laid down in a legal framework so as to offer legal certainty and to guarantee a framework for legal trade. They should include control measures, making it possible to intercept suspect transactions at all times; personal coverage that places the responsible party(ies) under control and holds them accountable; material coverage aligned with and preferably identical to that of export controls; uniform assessment criteria for licence applications; legally-defined modalities allowing intervention for licensed transit in the event of changing circumstances; and monitoring and enforcement mechanisms that can guarantee compliance with the control regime, including sanctions so as not to let illicit dealers go unpunished - ideally with deterrent effect.

Binding international regulations relating to transit control are *grosso modo* limited to the need to take measures, whether legally regulated or not; the need for physical control measures; and the need for (border) controls and sanctioning. No description is given of transit, nor are there detailed provisions for the personal and material scope.

It is noteworthy that the UN Firearms Protocol does not limit transit control on small arms and light weapons only to control in the transit country, but includes the assessment of transit countries at the time of application for an export licence, and prescribes authorization of transit countries as a control measure. The control measures also include maintaining information about transit in registers and the inter-State exchange of information, inter alia about transit agents. These measures could also strengthen the control regime for other strategic goods (military equipment other than small arms and light weapons, and weapons of mass destruction related items).

At the **European level**, the situation differs according to whether military equipment or dual-use items are at issue. Europe imposes no uniform control regime for military equipment, including small arms and light weapons. The decision whether or not to carry out controls remains with the Member States. Those who do create a control regime are bound by the European provisions with regard to the material scope (EU Common Military List) and the assessment criteria for licence applications (CP 2008/944/CFSP). There is no mandatory description of transit and there are no European provisions with regard to other possible control measures (notification requirement, record-keeping, etc.). For dual-use items, with EC Dual-use Regulation 428/2009, Europe does impose a uniform control regime including a European legal description of transit (transit through the EU customs territory), which is however limited to creating a broad legal basis so as to allow *ad hoc* controls of suspect transit. Other provisions that apply compulsorily to exports, such as the assessment criteria for licence applications, the exchange of information, etc., are not required to be applied for transit and may be taken up optionally by the Member States.

As a consequence of the absence of compulsory and uniform supranational framework means that, at **national level**, considerable variations in control measures can be observed, notably for military equipment. This is apparent from the descriptions of the control regimes in the Flemish Region (Belgium), the Netherlands, France, Germany and the United Kingdom.

By opting for a *definition* of transit involving transshipment, the description of transit in the Flemish Region coincides with the type of transit under systematic control. This is the largest difference in comparison to its neighbouring countries, where transshipment is not a determining criterion for the description of transit and is only important for delimiting which type of transit is subjected to systematic control. With this narrow description, the Flemish Region has deprived itself of a legal basis allowing intervention for all other suspect transit that is not associated with transshipment.

For the *personal scope*, all countries under study make use of a legal construct, in that they need a contact-point within their respective jurisdiction because the actual responsible party, the exporter, is by definition established abroad. Transit agents include organizations that deal with transport or with completing customs formalities; none of them have arms trade as their core business. Governments' choices are motivated by pragmatic considerations, i.e. to have a party available within their own jurisdiction who can be addressed and held accountable for fulfilling the formalities, or if necessary, for prosecution and punishment of irregularities.

For the *material scope*, all countries investigated use the Common Military List of the EU as the reference-point for the national lists of goods under control. The differences observed in each country concern, on the one hand, the respective national items that they add to the list, and on the other hand, certain categories of goods that are exempted from control (the Netherlands) or a limited number of which are systematically controlled (war weapons in Germany). The United Kingdom has a differentiated control regime based on dividing the goods, in combination with their destination, into three categories (A, B, and C Goods). The Flemish Region (Belgium) uses the same list for transit as for export controls.

There are also major differences at the level of *control measures*. All countries prohibit the transit of certain goods, mainly NBC weapons. The Flemish Region (Belgium) is the only one to have a procedure for screening the moral quality of arms dealers, including transit agents, before they can apply for a licence for a specific transaction. The Netherlands has a notification requirement for transit that is not subject to a licensing requirement; France is the only one to control road transit.

The greatest difference lies at the level of the previously-mentioned *systematic control*, in combination with the description of transit. In Belgium, the focus is on the type of transit that is considered the most high-risk, namely transit with transshipment, because it is assumed that this is the time when the most opportunity arises to manipulate the cargo (risk of diversion). Therefore the scope of the transit control regime is restricted to transshipment, requirement systematically a licence. The Netherlands, Germany and the United Kingdom combine a broad description of transit with limited systematic controls and a broad legal base in order to be able to intervene in all cases of suspect trade. The Netherlands, for instance, places most transit from and to friendly countries under a more relaxed regime of general transit licences. Only a limited number of categories of goods are excluded from this and are subject to an individual licensing requirement. The United Kingdom provides for a similar approach, based on a division into three categories (A, B, and C Goods), plus a broad exemption rule whereby most transit is free of formalities. Germany only has systematic controls on transit of war weapons. In these three countries, intervention remains possible at all times if there are

indications (based on information deriving from a variety of services) of activities that could put 'essential security interests' at risk. None of the countries under study currently follows the second track, as prescribed by the Firearms Protocol, of assessing transit during the application for an export licence.

The Flemish Region also lacks provision for the *de lege* or *de facto* more relaxed treatment of transit from and to friendly countries, generally considered less problematic. This does take place in the other control regimes (*de facto* in Germany and the United Kingdom; *de lege* in the Netherlands). The Netherlands is also the only country to require record-keeping concerning transit.

All the countries foresee criminal *sanctions* for violations, but there have been no known convictions. This is probably an indication that illicit transit agents are difficult to catch. Our study shows that greater insight is needed into the profile and *modus operandi* of illicit dealers in order to be able to evaluate the effectiveness of the current control regimes.

In any event, *monitoring* compliance is not an easy task. We mentioned earlier the volume of transit transactions and the speed with which they occur as intrinsic characteristics. An additional problem for guaranteeing compliance is that currently, monitoring (in all countries investigated) is the responsibility of the customs services, which only have limited information available on transit since, from a fiscal viewpoint, it is not a relevant trade transaction. Transit of goods in fact means that the goods are transported across the national (and European) territory under 'exemption from fiscal (or trade policy) measures', which makes them a low priority for customs services. Due to limited information, the recently introduced risk analysis methods do not succeed in identifying suspect transit. This problem arises in all the countries studied, given that customs procedure is uniformly regulated by Europe - which is nevertheless no guarantee of its uniform application. Mutual differences remain at the level of monitoring due to differing interpretations and differences in capability at the national level.

This finding with regard to monitoring compliance is not only limited to military equipment. For dual-use items also and above all, correct identification of the goods is difficult in practice. The most important reason here is that the categories used in the customs nomenclature are too broad for identifying dual-use items. In practice, however, only limited transit control of dual-use items is attempted. All the countries under study apply the system of EC Dual-use Regulation 428/2009, which provides a broad legal foundation for controlling suspect transit *ad hoc*. In reality there is little if any licensed transit of dual-use items. This does not detract from the fact that the advantage of the current regime lies in giving the possibility (legal basis) of intervening whenever necessary.

To conclude, we can summarize the following most important findings. Transit can best be controlled by limiting systematic controls to transit with transshipment of certain categories of goods to certain destinations; this is the type of transit where the greatest risk lies of threats to international as well as domestic security. Limited systematic controls should however be combined with a broad legal base that enables intervention in suspect transit at any time. This broad foundation is obtained by a broad definition of transit (not restricted to transshipment), in combination with a broad description of the interests that may possibly be under threat. A second key point is the cross-border nature of transit, which can only be placed under control

efficiently and effectively by means of cross-border consultation and alignment. This holds good both from a policy perspective (identical objectives, a uniform legal framework, with identical control measures and assessment criteria), and in the operational perspective in terms of uniform application. Every divergence opens the way for shifting trade in a way that dishonest dealers can exploit. A final aspect concerns the need for insight into the practices of dishonest dealers (criminal organisations) in order to be certain that the control measures are correctly aligned with the desired objectives, i.e. combating illegal traffic.

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German legislation and related documents

War Weapons Control Act, Kriegswaffenkontrollgesetz 1961

Foreign Trade Act, Außenwirtschaftsgesetz 1961

Foreign Trade Decree, Außenwirtschaftsverordnung 1986

Unofficial English translations of German export control legislation are available online at:
http://www.bafa.de/bafa/en/export_control/legislation/index.html

Report of the Government of the Federal Republic of Germany on its Policy on Exports of Conventional Military Equipment covering the Year 1999, 25 September 2000, 120 pages, available online at:
http://www.sipri.org/research/armaments/transfers/transparency/national_reports/germany/germany_99_eng

FEDERAL MINISTRY OF ECONOMICS AND TECHNOLOGY, Report by the Government of the Federal Republic of Germany on Its Policy on Exports of Conventional Military Equipment in 2010, 2010 Military Equipment Export Report, Berlin, December 2011, 92 pages, available online at:
<http://www.bmwi.de/English/Redaktion/Pdf/2010-military-equipment-export-report,property=pdf,bereich=bmwi,sprache=en,rwb=true.pdf>

British legislation and related documents

Export Control Act 2002

Export Control Order 2008

British legislation is available at: <http://www.legislation.gov.uk/>

United Kingdom Strategic Export Controls Annual Report 2010, UK, Stationary Office, 18 July 2011, 60 pages

United Kingdom Strategic Export Controls Annual Report 2011, UK, Stationary Office, 13 July 2012, 67 pages

Annual reports on British export control policy are available on:

<http://www.fco.gov.uk/en/publications-and-documents/publications1/annual-reports/export-controls1>

DEFENCE COMMITTEE (UK), *Scrutiny of Arms Export Controls (2011): UK Strategic Export Controls Annual Report 2009, Quarterly Reports for 2010, licensing policy and review of export control legislation*, 22 March 2011, available online at:

<http://www.publications.parliament.uk/pa/cm201011/cmselect/cmdfence/686/68602.htm>

Websites of the national competent authorities:

Belgium, Flemish Strategic Goods Control Unit: <http://www.vlaanderen.be/int/artikel/controle-strategische-goederen>

Belgium, Walloon Region, Direction des Licences d'armes of the Walloon Ministry of Economy, SMEs, Foreign Trade and New Technologies:

http://economie.wallonie.be/Licences_armes/contacts/Contacts.html

Belgium, Brussels-Capital Region, Licences Cell of the External Affairs Service of the Ministry of External Affairs: <http://www.brussel.irisnet.be/werken-en-ondernemen/vergunningen-licenties-toelatingen/wapens-en-technologieen-voor-tweeerlei-gebruik>

The Netherlands, export control: <http://www.rijksoverheid.nl/onderwerpen/exportcontrole-strategische-goederen>

The Netherlands, Taxation Office/Customs, Central Import and Export Service (CDIU):

http://www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/belastingdienst/douane_voor_bedrijven/veiligheid_gezondheid_economie_en_milieu_vgem/cdiu/

France, Defense: www.defense.gouv.fr/cga

France, Customs: <http://www.douane.gouv.fr/menu.asp?id=139>

France, Service des Biens à Double Usage (Economy): <http://www.dgcis.redressement-productif.gouv.fr/biens-double-usage/accueil>

Germany, BAFA (Export control): http://www.bafa.de/bafa/en/export_control/index.html

United Kingdom, Export Control Organisation: <http://www.bis.gov.uk/policies/export-control-organisation>

All hyperlinks were last checked on 21 February 2013

8 Annex:

Transit in international control regimes

Various international fora are involved in trade in strategic goods based on their general or specific aims and functionsⁱ. In this section follows a summary of legal obligations and recommendations made at the international level. We discuss the role of transit in the export control regimes of the following organizations: the United Nations (UN), the Organization for Security and Cooperation in Europe (OSCE), the Wassenaar Arrangement (WA), the Australia Group (AG), the Nuclear Suppliers Group (NSG) and the Zangger Committee (ZC).²⁵⁷

Most organizations focus *either* on military equipment *or* on weapons of mass destruction and related items.²⁵⁸ As a result of the different issues at stake²⁵⁹ and the approaches consequently needed, two largely separate legal control regimes have been developed at international and national level according to whether the issue is trade in conventional arms (with small arms and light weapons as a separate subcategory), or weapons of mass destruction, including related items, such as dual-use items. In what follows we address the measures concerning conventional arms, and those on weapons of mass destruction related items, in separate sections. However, we first begin with a discussion of the Wassenaar Arrangement, which is the only control regime taking an interest in both categories. The obligations described apply to all countries discussed above (Belgium, Germany, France, the Netherlands and the United Kingdom). Given its lack of focus on transit, we shall not address the activities of the *Missile Technology Control Regime*. Relevant provisions can also be found in the following treaties: the Non-Proliferation Treaty, the Chemical Weapons Convention, and the Biological and Toxin Weapons Convention. The recent UN Resolution (April 2013) on an Arms Trade Treaty is mentioned for the sake of completeness.

8.1 Mixed scope: the Wassenaar Arrangement

The Wassenaar Arrangement focuses on export controls of military equipment as well as on dual-use items. It is the only control regime that targets both categories. The WA is primarily of importance for the control lists that it elaborates, which constitute the most important source for control lists both at European and national level and also hold good for determining the material scope of transit control regimes. Only two - non-binding – WA documents focus on the issue of transit.

ⁱ The notion of 'strategic goods' is not well established at the international level given that most organizations concentrate on conventional arms *or* on weapons of mass destruction and dual-use items, or develop regulations for these in separate documents. An important exception to this is the Wassenaar Arrangement which focuses on export controls for both conventional arms and dual-use items. Further, two recent Resolutions of the UN Security Council also concern conventional arms together with weapons of mass destruction and/or dual-use items: UN Resolution 62/26 (of the General Assembly) on National legislation on transfer of arms, military equipment and dual-use goods and technology, 5 December 2007, A/RES/62/26 of 10 January 2008, and UN Resolution (of the General Assembly) 63/67 on Preventing and combating illicit brokering activities, 2 December 2008, A/RES/63/67 of 12 January 2009.

On the occasion of the WA Plenary Meeting in 2004, a declaration was adopted referring to UN Security Council Resolution 1540 (see below). It stressed that the provision contained therein which encourages Member States to establish, develop and maintain appropriate and effective controls on export and transit with transshipment is also one of the main objectives of the Wassenaar Arrangement:

“Participating States noted that the resolution rules that all states shall establish, develop and maintain appropriate and effective export and transshipment controls, which is also a primary objective of the Wassenaar Arrangement.”

Despite this statement, control of transit with transshipment only appears in one other WA document. In 2007, the Plenary Meeting adopted a document on *Best Practice to Prevent Destabilising Transfers of Small Arms and Light Weapons (SALW) through Air Transport*. As the title of the document indicates, the focus is on trade of SALW using air transport. In one of the provisions, the participating States are asked to take steps to counter the circumvention of national controls, including the voluntary exchange of information on transit and transit with transshipment that could contribute to a destabilizing increase of SALW or to a possible threat to security and stability in the recipient region. The WA thereby emphasizes that measures on transit are needed to strengthen export control .

*1.4. Participating States may take appropriate action to prevent circumvention of national controls and scrutiny, including **exchange of information on a voluntary basis** about exporters, air carriers and agents that failed to comply with the requirements of 2.1 and 2.3 above when requested to do so, and about **cases of transit or transshipment by air of SALW that may contribute to a destabilising accumulation or be a potential threat to security and stability in the Region of destination.***

This document was taken over in its entirety in November 2008 by the Forum for Security Co-Operation of the OSCE.²⁶⁰

8.2 Transit of conventional arms

Until recently no explicit international obligations existed for controlling transit of conventional arms in general - with the exception of the two previously mentioned WA documents . Transit is implicitly contained in the UN Register of Conventional Arms, but its implementation is unclear.

The transit of military equipment is covered in arms embargoes²⁶¹ which include a prohibition on the export of certain type(s) of conventional arms to one or more specific region(s), or on delivering them to a certain recipient (a state) or a public or private organization. Embargoes are not automatically applicable or enforceable at the national level. For transit, as for other arms trade activities, national legislation needs to ensure that such trade complies with arms embargoes. The latter must be incorporated into national legislation in order to achieve their effect.²⁶² The legal importance of an arms embargo lies in the fact that it makes a certain type of transaction, defined by the type of arms and the recipient – illicit. Converted into national legislation, the definition of arms embargoes provides a criterion for distinguishing between legal and illicit arms trade.

In the specific context of controls on Small Arms and Light Weapons (SALW), more attention is actually paid to the problem of transit (see below).

8.2.1 Exchange of information based on the UN Register of Conventional Arms

Information about transactions for the transit of conventional arms is collected on the basis of the UN Register of Conventional Arms. This specific instrument centralizing information was introduced in 1991, based on UN Resolution 43/36L of the General Assembly.²⁶³ The Resolution encourages Member States to forward data annually to the Secretary General of the Uon specified imports and exports of conventional arms N. This data is kept in a Register.ⁱ

Data are communicated in a specific format²⁶⁴ and include, in the case of imports, information about the country of origin. Data on exports, if there is transit, are provided both by the recipient country and the country of origin. This includes general transit as well as transit with transshipment.

An important observation drawn from the reporting on transit is that, despite the existence of directives, vagueness and contradictions about the reported 'transfers' still persist. For this reason, the data also cannot be evaluated unambiguously. Differences at national level in the description or definition of transfers or transactions are responsible for this.²⁶⁵ Therefore, reporting states have been requested to clarify their national criteria with regard to transit.

8.2.2 The International Arms Trade Treaty

In December 2006, the United Nations General Assembly approved Resolution 61/89, *Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms*.²⁶⁶ This laid the foundation for the preparation of a general and binding Arms Trade Treaty, with common international standards for the import, export, and transfer of all types of conventional arms.

Negotiations were held in New York from 2 to 27 July 2012 with a view to signing such a treaty. The UN Conference, however, did not succeed in getting all world leaders to back the same text. Various states, including the United States, Russia and China, blocked the signing of the proposed text on the last day of the conference.²⁶⁷ In November 2012, it was decided to hold a new UN Conference in March 2013. Further negotiations continued in the meantime.²⁶⁸

In April 2013, sufficient consensus was reached within the United Nations General Assembly to adopt the text of the treaty as a Resolution.²⁶⁹

In the text, transit and transshipment are addressed equally with other arms trade transactions. All general provisions concerning 'transfers' thus explicitly apply to transit and transshipment. Specific provisions relating to transit concern, inter alia, the obligation for exporting countries to share information about the licence upon request from the transit countries, and to take

ⁱ The information requested concerns seven categories of heavy conventional arms: 1. combat tanks; 2. armoured combat vehicles; 3. heavy artillery systems; 4. combat aircraft; 5. combat helicopters; 6. warships; 7. missiles and missile launchers.

steps for regulating transit across their respective territory in accordance with international obligations. Transit countries are also required to cooperate in preventing the risk of diversion. The participating countries are further required to keep records of information on transit and transshipment for ten years.

Because the Resolution is currently not yet enforceable by national law, pending the required number of ratifications, we will not address this further.

8.2.3 Transit of small arms and light weapons

There is a significant focus in international fora on SALW. Two UN initiatives that are specifically aimed at SALW contain explicit provisions with regard to transit: the UN Firearms Protocol and the UN Programme of Action on SALW. The OSCE has also developed provisions in this regard.

8.2.3.1 *The UN Firearms Protocol (2001)*

Various reports by experts²⁷⁰ have pointed consistently to the connection between illicit arms trade and other forms of transnational organized crime, such as drugs trade, human trafficking, smuggling of immigrants and money laundering. Because of this link, on 31 May 2001 a resolution was adopted by the UN General Assembly that adds a protocol to the UN Convention on Transnational Organized Crime (15 November 2000²⁷¹): the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition.²⁷² The Supplementary Protocol entered into force on 3 July 2005. As with the Convention to which it is appended, it is binding under international law for the 52 Member States that ratified it. The provisions are also formulated in mandatory terms ('shall adopt'). The Protocol enjoys great moral authority, given that numerous other regional and international texts consistently refer to it. It is thus an important international instrument in the battle against illicit arms trade.

The Protocol takes as its objectives the promoting, facilitating, and reinforcement of cooperation among Member States with a view to preventing, combating, and eradicating illicit manufacturing of and illicit trafficking in arms, their parts and components and ammunition (Art. 2). The Protocol describes illicit trade as imports, exports, purchase, sale, delivery, or movement or transfer from or through the territory of a Member State to that of another Member State, for which one of the Member States has not granted authorization in accordance with this Protocol, or when the arms are not marked in the way that the Protocol prescribes (Art. 3, e). Without explicitly mentioning the term transit, two of the summarized trade activities in fact correspond to the meaning of transit: 'movement' and 'transfer through the territory of a Member State'.

The Protocol targets prevention of illicit production and trade as well as the detection and prosecution of trans-national punishable offences committed by organized criminals (Art. 4, 1.). The Protocol obliges the Member States to take the requisite legislative or other measures in order to, inter alia, make intentional illicit trade in small arms punishable, including the attempt to participate in various activities as an accomplice (Art. 5). Further, to work against impunity, the Protocol demands that provision be made in national legislation for measures

enabling confiscation and disposal of the illegal goods seized (Art. 6). Part II of the Protocol is dedicated to prevention and includes measures such as record-keeping (Art. 7), general requirements for export, import and transit licensing or authorisation (Art. 10), security and preventative measures (Art. 11), exchange of information (Art. 12), and bilateral, regional and international cooperation (Art. 13).

Specific regulations on transit can be found in a variety of provisions:

- The obligation to keep information for at least ten years, i.a. on transit countries (Art. 7). The Protocol imposes this obligation on the Member States without clarifying whether it is the responsibility of the competent authorities themselves or that of the exporters and transit agents to keep this information. This decision falls to the Member States.
- Each Member State must develop or maintain an effective authorization or licensing system for export and import, and take ‘measures’ with regard to international transit. The requirements on transit, in other words, are less formal (Art. 10, 1.).
- Before granting an export licence or authorization, or giving authorization for shipment, the Member States must i.a. check whether the transit states have confirmed, as a minimum in written form, that they have no objection to the transit (without prejudice to bilateral or multilateral agreements favouring landlocked states) (Art. 10, 2.).
- The export and import licence or authorization, together with the accompanying documents, must contain as a minimum the following information: the place and date of issue, the date of expiration, the country of export, the country of import, the ultimate recipient, a description of the goods including the quantity, and transit countries if appropriate. The information contained in the import licence must be provided in advance to the transit countries (Art. 10, 3.).
- Each Member State shall, within its capacity, take such measures as may be necessary to ensure that licensing or authorization procedures are trustworthy and that the authenticity of licensing documents can be verified or validated (Art. 10, 5.).
- Simplified procedures may be provided for temporary import, export and transit of certain types of goods for verifiable lawful purposes, such as hunting, sport shooting, exhibitions and so on (Art. 10, 6.).
- The Protocol prescribes two types of security and preventative measures with a view to detecting, preventing and eliminating theft, loss or diversion, as well as illicit manufacturing and trade: the Member States must take appropriate measures 1) to secure the goods at the time of manufacture, import, export and **transit** and 2) to increase the effectiveness of import, export and transit controls including, where appropriate, border controls and police and customs cross-border cooperation (Art. 11).
- The Member States must exchange case-specific information among themselves (consistent with their respective domestic legal and administrative systems) on licensed manufacturers, dealers, importers and exporters, and if possible on carriers; on organized criminal groups of whom it is known or suspected that they are involved in illicit manufacture and trafficking; and on various operational aspects such as ways and means used by organized crime, points of dispatch, and routes customarily used.
- Member States shall seek the support and cooperation of arms dealers, including commercial transporters, in order to prevent and detect illicit activities (Art. 13).

8.2.3.2 The UN Programme of Action on SALW (2001)

The Programme of Action to prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects was adopted at the UN Conference held in New York between

9 and 20 July 2001.²⁷³ The Programme of Action is not a legally binding document for the states participating at the conference. It is rather a declaration of intent with political commitments, which are indeed morally binding, but on the other hand provide no sanctions for non-compliance.

The UN Programme of Action largely reiterates the provisions on transit from the UN Firearms Protocol, albeit with less mandatory wording. A few provisions go substantially further than the Protocol, namely:

- An explicit mention of the use of authorized end-use certificates as a measure to enable effective export and transit control (II.12.);
- The explicit reference to embargoes imposed by the UN Security Council and the requirement to take appropriate steps against violations at a national level (II.15.).

As with the UN Firearms Protocol, the UN Programme of Action includes provisions on ‘transit’ but without further definition or description.

8.2.3.3 OSCE Document on small arms and light weapons (2000)

Over the same period, the Organization for Security and Cooperation in Europe adopted a number of documents, aimed at combating illicit trade in SALW. On 24 November 2000, the Plenary Meeting of the OSCE Forum for Security Cooperation adopted the OSCE Document on Small Arms and Light Weapons.²⁷⁴ In it, the participating states undertake to combat the illicit trade in SALW in all of its aspects by means of national controls. These include controls on production, the marking of arms, and the keeping of a register in order to be in a position to detect and trace arms at any and all times; effective export controls, border and customs control mechanisms; and cooperation and information exchange on the national, regional, and international levels. The SALW Document contains a series of political decisions intended to reinforce the security and mutual trust of the participating states.

The Document mentions transit in the same breath as import and export²⁷⁵ in relation to procedures and documentation under the heading “*combating illicit trafficking in all its aspects, common export criteria en export controls*”. With regard to procedures, the participating states agree that all transport (shipments) of SALW imported or exported to or from their territory must be subject to effective national licensing or authorization procedures with a view to effective control of such transfers and to preventing the diversion of SALW to other recipients than those indicated. With regard to transit, the Document leaves it to the discretion of every State to decide independently whether separate national procedures are needed to control transit on their territory (III, (B), 2.). In the event of transit through a State which requires authorization for this, it is up to the exporting State to make sure that the authorization is provided (III, (B), 3.). In the Annex to the Document with a view to information exchange, there is also provision for the inclusion of information about transit countries.

8.2.3.4 Recommendations in the OSCE User's Guide to Best Practice on SALW (2002)

A general feature of the instruments discussed so far is that little attention is given to transit at international level, at least, no specific attention for its particular characteristics (differing from export) and not enough specific obligations are imposed on national authorities to create a worldwide transit control system. As is the case with export, it is also true for transit that national control regimes will be effective if, in principle, all countries apply controls following the same conditions. Given the lack of international obligations in this regard, it is useful to

look at international recommendations which may go further in this regard than the legally binding prescriptions. To date, only the OSCE has developed recommendations on transit in the *User's Guide to Best Practice on Small Arms and Light Weapons* of 2003²⁷⁶. The Guide is intended to provide the participating countries with a guide for their national policy (legislation, control, administrative implementation and enforceability), and also intends to promote a higher common standard for national practices (pp. 2-3).

The Guide refers to numerous other international and regional obligations and agreements adopted within the UN (the Firearms Protocol, the Programme of Action), the European Union, the Wassenaar Arrangement, and the Organization of American States (OAS), but adds no substantial innovative elements itself. The value of the Guide lies mainly in the structured summary of all relevant aspects that an effective export policy, including for transit, should include. It is a collection of best practices with no binding nature, either legal nor political, for participating states. Transit is addressed in Chapter 5, where the Guide covers best practices for export controls on SALW. With regard to export control, the Guide contains directives concerning export, extended where relevant to import and transit.

What follows is a summary of the relevant provisions, generally and implicitly applicable to transit, and specific provisions that are explicitly applicable to transit.

— National legislation:

- must comply with international obligations;
- with regard to export control and transit, must include the following aspects:
 - instances in which a licence is required;
 - possible exceptions;
 - the circumstances in which the licence is issued;
 - the licensing procedure;
 - the rights and responsibilities of the national competent authority and of the exporter;
 - the mutual relations between the authorities involved in the licensing procedure;
 - the list of goods to which the system applies;
 - effective sanctions with a punitive and deterrent effect for violations.
- The same assessment criteria that apply to export should apply to transit (the criteria that the Guide presents can also be found in other, more binding documents, e.g. in the EU Regulations).

— Procedures:

- Export and also transit may only be permitted if they are licensed by a competent body. The Guide summarizes three possible scenarios for demanding a licence: 1) in order to commence negotiations or to make an offer, 2) for export and/or import, and 3) for transit. In other words, it is left to the licensing state's judgement to determine in which instances a transit licence applies.
- In their licence applications, exporters must submit a number of documents to the licensing authority. This may include: a written application, an original end-

user certificate, a valid import licence or other official authorization, a valid authorization for transit, et. al.

- The Guide recommends providing a single contact point at the competent authority for the exporter. The licensing procedure must be considered as an inter-agency process. It also implies that mechanisms should be developed to coordinate policy and decisions at national level, and cooperation must be assured between the bodies that are involved in export and transit procedures.
- The Guide also summarizes a number of procedural conditions, including in the case of *transit*: obtaining an authorization from the transit state, or at least informing that state about the planned transit.
- The licence itself must include certain information, such as the place and date of issue, the date of expiration, the country of export and the country of import, the ultimate recipient, a description of the quantity of goods, the value of the goods and, if possible, also the transit countries.
- The Guide further contains a number of directives concerning an end-use certificate, re-export, information and training for exporters.

– Enforcement of export controls:

- The customs authorities play a crucial role in the enforcement of export and transit controls.
- National legislation must include measures enabling the investigation, prosecution and punishment of violations concerning export control.
- Effective sanctions with a deterrent as well as a punitive effect must be provided in the event of violations.

8.3 Transit in the framework of combating the proliferation of weapons of mass destruction

There are no separate documents at the international level with regard to dual-use items. As the discussion in the following sector shows, concern about dual-use is focused on goods that may be used in weapons of mass destruction. Hereinafter, in each case it is indicated which specific legislation applies in this regard.

8.3.1 Prohibition on trade in weapons of mass destruction and preventing diversion of sensitive materials for peaceful use

Three international treaties impose a ban on trade in weapons of mass destruction: the Non-Proliferation Treaty (NPT)ⁱ, the Biological and Toxin Weapons Convention (BTWC)ⁱ and the

ⁱ Since 5 March 1970, the Non-Proliferation Treaty has created a general framework for preventing the proliferation of weapons of mass destruction. The Treaty rests on three objectives: 1) preventing the proliferation of nuclear weapons by banning the transfer of knowledge and material for nuclear weapons to non-nuclear countries, 2) an obligation for nuclear states to disarm and 3) access to nuclear energy/technology for peaceful purposes. In order to realize the NPT's objective of prohibiting transfer to non-nuclear states, the emphasis is mainly on effective export controls. Various organizations are active in this field, aiming both to define the material coverage (lists of goods to which the NPT applies), and to develop

Chemical Weapons Convention (CWC)ⁱⁱ. The prohibition aims to prevent such weapons ending up with ‘illicit’ recipients and end-users. The provisions are formulated in general terms and thus also apply to transit (no treaty makes explicit mention of transit).

Trade in nuclear materials, chemical and biological agents for peaceful use is permitted, but under conditions and controls because of concern about possible diversion. The NPT for instance, establishes its own control regime on trade in nuclear material for peaceful purposes. Exports may be permitted, subject to appropriate guarantees. The International Atomic Energy Agency (IAEA) verifies that nuclear material for peaceful purposes is not diverted to military use, i.e. is not removed from the cycle of nuclear fission. For the purpose, the IAEA inspection system controls installations (which are under ‘safeguard’), and does not control the movement of goodsⁱⁱⁱ.

The Australia Group – AG - was established for controlling trade in chemical and biological agents. The AG comprises 41 countries that have signed both treaties and meet on an informal basis. The organization's primary focus is on an effective licensing system in order to ensure that chemical and biological agents and dual-use chemical and biological production installations and equipment do not fall into the hands of would-be proliferators, thus allowing them to potentially contribute to the proliferation of chemical and biological weapons programmes. The emphasis is mainly on export licences, with a view to their harmonization.²⁷⁷ One outcome of discussions within the AG is a common control list including goods for which a strict control policy is deemed necessary.²⁷⁸

From the explanation on the website, the AG also appears to be concerned about transit with transshipment: *“The Australia Group is an informal arrangement which aims to allow exporting or transshipping countries to minimise the risk of assisting chemical and biological weapon (CBW) proliferation”*. The AG does not go so far as to prescribe or recommend licences for transit. The *Guidelines for Transfers of Sensitive Chemical or Biological Items* (January 2009) only mention that the participating countries in the evaluation of export applications should take into account a non-prescriptive list of factors, including: *“the extent and effectiveness of the export control regime in the recipient state as well as any intermediary states”*. Due to the

measures for effective export control: the Nuclear Suppliers Group (NSG), the Zangger Committee (ZC) and the International Atomic Energy Agency (IAEA). From reports from the first NSG international conference on the role of export controls in nuclear non-proliferation (1997), it appears that the organization was interested in the issue of transit, but it did not go beyond interest. Directives or recommendations on transit are not to be found in the documents published by the NSG, and even less for the Zangger Committee, where there is no reference to transit in any official document, statement or article about the organization's functions. The focus is exclusively on export control.

ⁱ The *Biological and Toxin Weapons Convention* of 1972 is a legally binding treaty that includes a ban on biological and toxin weapons and their means of transfer, development, manufacture, stockpiling or use and possession. The parties to the Treaty do reserve the right to possible exchange of equipment, materials and information about them for peaceful objectives. The Convention talks in general about *transfers*, and makes no explicit reference to any type of trade activity (also not export). There is not even a completed summary of the products referred to in the BTWC. The applicable information can be found in the Common Military List of the EU (category ML 7), in the control lists of the Australia Group and in Annex I of the EC Dual-use Regulation 428/2009.

ⁱⁱ The *Chemical Weapons Convention* of 1992 is also a legally binding treaty that prohibits the development, manufacture, stockpiling and use of chemical weapons, and demands that these weapons be destroyed as soon as possible. The treaty expressly states that the states (party to the treaty) have the right to participate in international exchange of scientific information, substances and equipment for purposes that the treaty does not prohibit. The wording of the CWC is also general, without explicit mention of the type of transfer.

ⁱⁱⁱ The IAEA has published directives that also apply to transit: on *“the physical protection of nuclear material and nuclear facilities”*. The recommendations concern the physical security of nuclear material during transport and suggest taking steps, inter alia, to review the national regulations and the licensing system. Since this instance only concerns transport of materials for peaceful use, we will not address it further.

informal basis of the AG, the Guidelines do not have a mandatory nature for the participating countries.

8.3.2 UN Resolution 1540

An important document in combating the proliferation of weapons of mass destruction is Resolution 1540 of the UN Security Council.²⁷⁹ It was adopted on 28 April 2004 and explicitly focuses on trade in weapons of mass destruction by non-State actors, which the Resolution (in a footnote) describes as any *“individual or entity, not acting under the lawful authority of any State in conducting activities which come within the scope of this resolution”*. The adoption of this Resolution should be viewed in the light of the ‘post-9/11’ context and the worldwide concern about terrorist threats.

UN Resolution 1540 obliges the Member States to abstain from any form of support to non-state actors that intend to develop, acquire, manufacture, possess, **transport, transfer** or use nuclear, chemical or biological weapons (NBC) and their means of delivery (Art. 1). The Member States must, in accordance with their national procedures, prohibit such activities by non-state actors as well as attempts to engage in these activities, to participate in them as an accomplice, assist or finance them. To this end the Member States must adopt and enforce the appropriate effective laws (Art. 2).

8.3.2.1 Obligations on transit

Aside from legislation prohibiting such activities, Member States are required to take and enforce effective measures to establish domestic controlsⁱ to prevent the proliferation of NBC weapons, their means of delivery, and related materials (Art. 3). With a view to such controls, the Member States are required to take steps:

- to **secure the transport**, production, use and storage of such materials (Art. 3(a);
- to develop and maintain effective **physical protection measures** (Art. 3 (b);
- to develop and maintain effective **border controls and law enforcement efforts** in order to detect, deter, prevent and combat illicit trafficking and brokering (3 (c);

Art. 3 (d) describes in great detail the type of national controls, and emphasizes in several ways the importance of transit control and the control of transit with transshipment. The following obligations rest on the Member States:

- to provide appropriate and effective national controls on exports and transshipment, and to develop, monitor, evaluate and maintain them;
 - this includes appropriate laws and regulations for controlling exports, transit, transshipment and re-exports, as well as control of activities that provide funds and services for exports and transshipment, such as financing and transport.
- to impose controls on end-use;
- to punish violations with appropriate criminal or civil penalties.

ⁱ Related materials are (cf. footnote to UN Resolution 1540): equipment and technology covered by relevant multilateral treaties and arrangements, or included on national control lists, that could be used for the design, development, manufacture or use of nuclear, chemical and biological weapons and their means of delivery.

8.3.2.2 Scope of UN Resolution 1540

In the preparatory phase there was much concern about the scope and the international legal implications of Resolution 1540²⁸⁰, mainly because the Resolution has a regulatory nature and the UN Security Council was thereby setting itself up as an international legislator, imposing binding prescriptions on UN Member States. Some countries favoured including such provisions in a treaty, because they would be preceded by extensive negotiations and the text would then only be binding for countries that ratified. The adoption of the Resolution has been preceded by an open Security Council (which is an exceptional procedure) in which more than 30 countries had their say. The Resolution was adopted unanimously by the Security Council's 15 members. It is based on Chapter VII of the UN Charter which makes it binding for all UN Member States. Still, according to some authors, it remains²⁸¹ an atypical Resolution of the Security Council because it was a reaction to a social phenomenon, namely terrorist threats, rather than to a concrete manifestation thereof, e.g. a recent attack or act of terrorism. Only in 2001 was a similar resolution adopted, namely Resolution 1373, which was adopted shortly after 9/11, but also goes wider than a reaction to a specific event. The anti-terrorism measures included therein go further and have a broader, anticipatory character.

8.3.2.3 Follow-up to the Resolution

In order to ensure the monitoring of compliance with the Resolution, a Committee was set up and given a two-year mandate (Art. 4), which has by now been renewed three times. The latest extension is valid for a term of 10 years, until 25 April 2021.²⁸² The Member States were asked to provide the Committee with information on their compliance with the Resolution. Since 19 May 2006, a legislative database has been made available on the Committee's website with information on national regimes and other measures related to the Resolution.²⁸³

The Committee has already published 3 reports on the observance of Resolution 1540.²⁸⁴ The second report clarified the distinction between transit and transshipment:

“A number of States also reported addressing the issue of goods in transshipment, which varies slightly from transit in that the trans-shipment of goods involves a change in the means of transport during the journey.”

That there is in fact a legal distinction between transit and transshipment is also apparent from the report on statistics. The reports provide a summary of the number of countries that have developed measures, and therein make a distinction between the two types of transit.

The most recent report from 2011 shows that since 2008, an increasing number of countries have taken steps to subject not only exports, but also general transit and transit with transshipment, to controls.²⁸⁵ With the exception of enforcement measures for transshipment of biological weapons, for all other aspects there has been a perceptible increase in the number of national measures.

Table 4: Development of national control measures in 2008-2011 according to the 2011 report (S/2011/579)

Type of goods ⇒ Type of measure ↓	Nuclear weapons		Chemical weapons		Biological weapons	
	2008	2011	2008	2011	2008	2011
Transit legislation	81	100	80	104	81	100
Transit enforcement	52	80	56	91	52	80
Transshipment legislation	62	77	66	84	62	77
Transshipment enforcement	35	65	43	72	36	35

8.3.2.4 Importance of the Resolution

The importance of Resolution 1540 (in general and with regard to transit) lies in the following features:

- It is the first UN Resolution by the UN Security Council that is aimed specifically at preventing WMD deliveries to non-State actors;
- In a single document not only NBC weapons, but also their means of delivery and related materials are targeted;
- It is the only international document on WMD that explicitly mentions transit and transshipment alongside exports, and in doing so emphasises that arms trade control is more than export control alone;
- Together with the primary objective, namely non-proliferation, there is also a focus on the need for physical security;
- The binding nature of the Resolution for all UN Member States.

The great merit of Resolution 1540 is undoubtedly that it fills a lacuna in international treaty law, on the one hand by targeting non-State actors, and on the other hand by providing a broader description of the targeted items, namely not just NBC weapons (the object of existing treaties), but also their means of delivery and related materials. At the same time, it appears from the description of the material and personal scope of application that the international community is still not of one mind on the matter. The three key concepts - non-State actors, means of delivery and related materials - are in fact not clarified in the text itself, but are described in footnotes, which is rather unusual. Further, it will be the concrete implementation that in practice reveals the true scope of Resolution 1540. The provisions are indeed binding for all UN Member States, but many of the countries so bound are not parties to the NBC treaties and the export control regimes attached to them. It is doubtful not only whether a legal basis exists in all the countries not bound by treaty law, but also - even when it does exist - whether the knowledge and the capacity are available to guarantee compliance. The descriptions in the Resolution itself are in fact too vague to be able to deduce whether or not there are specific elements for a national control regime²⁸⁰.

8.3.2.5 Recommendations in the OSCE User's Guide to Best Practice regarding Resolution 1540 (2009)

On 30 September 2009, the OSCE Forum, by analogy with the SALW Guide of 2003, adopted a Guide to Best Practice specifically aimed at weapons of mass destruction and dual-use items.²⁸⁶ The full title of the Guide is: *Best Practices Guide on UN Security Council Resolution (UNSCR) 1540 export controls and transshipment*.²⁸⁷ The directives in the Guide largely agree with those for export controls on SALW in the OSCE User's Guide of 2003. In a number of general provisions referring to current international obligations and procedures, for instance in the introduction, the Guide mentions transit and trans-shipment as components of effective export controls on WMD and dual-use items. The focus, however, is clearly on exports.

Guide 5 contains key elements that are each elaborated separately, and which concern: (1) creating jurisdiction, (2) the competence for controlling exports, (3) sanctions, investigation and prosecution (4 and 5), the responsibilities of governments and parties. Only the first element mentions that the provision of a legal framework must also apply to transit and transshipment, but without further details. This is similar to the stipulation in the SALW User's Guide that exporters, when submitting an application, must provide information about the amount of goods and the value of the goods. Provision of information on potential transit countries, however, is again not prescribed. Also when speaking of the information in the licence itself, in the case of WMD and dual-use items, there is no recommendation to include information about transit countries (p. 12).

This Guide does target transit more explicitly in the title, but is ultimately less far-reaching in its specific recommendations for best practice than the SALW Guide.

End notes

- ¹ S. TULLIU and T. SCHMALBERGER, "Chapter 2, the big picture on 'Security by other means'" and "Part II, Arms Control and Disarmament Agreements", in UNIDIR, *Coming to Terms with Security: A Lexicon for Arms Control, Disarmament and Confidence-Building*. Geneva, 2003, p.15 et seq; *UN Report of the Panel of Governmental Experts on Small Arms*, UN Department of Disarmament Affairs, 7 August 1999, A/52/298, available online at: <http://www.un.org/disarmament/HomePage/ODAPublications/DisarmamentStudySeries/PDF/SS-28.pdf>
- INTERNATIONAL LAW ASSOCIATION, "Arms control and disarmament Law, Final report of the Berlin Conference 2004", 17 pages, available online at: <http://www.ila-hq.org/>
- ² R. STOHL and S. GRILLOT, *the International Arms Trade*, Polity Press, Cambridge, UK, 2009, pp.10 et seq
- ³ For a full explanation, see K. VAN HEUVERSWYN, *International framework on brokering*, Brussels, Vlaams Vredesinstituut, March 2010, 165 p.
- ⁴ K. VAN HEUVERSWYN, *International framework on brokering*, op.cit., p.14 and p.114
- ⁵ December 2012 - January 2013
- ⁶ P. HOLTOM and M. BROMLEY, 'Transit and trans-shipment controls in an arms trade treaty', SIPRI Background paper, SIPRI, July 2011, p.1, available online at: http://books.sipri.org/product_info?c_product_id=427
- ⁷ See also S. FINARDI and P. DANSSAERT, *Rough Seas - Maritime Transport and Arms Shipments - Transport Services under an Arms Trade Treaty*, TransArms (USA), 10 July 2012, p.36, available online at: http://www.ipisresearch.be/publications_detail.php?id=387
- ⁸ T. KEGELS, 'Inleiding tot de douanerechtelijke problematiek voor tussenpersonen in het goederenverkeer', April 2001, in E. VAN HOOYDONK (ed.), *Expeditie en scheepsagenten: het gewijzigde juridische landschap*, Antwerp-Apeldoorn, Maklu, 2003, p.11
- ⁹ Course material, certificate of competence, security guard-port security, Antwerp Port Authority. See also S. FINARDI and P. DANSSAERT op.cit., p.5 on the type of cargo ships used for the transport of military equipment
- ¹⁰ See also the Royal Decree of 11 April 2005 on border control at the external maritime border, B.O.G. 4 May 2005, Art. 1., 8°: "shipping agent" : the natural person or legal person mandated in Belgium to represent the shipping company," see also the explanation on the website zeerecht.be: <http://www.zeerecht.be/2-3-6-betweenpersons.aspx>
- ¹¹ See also the explanation on the Belgian customs website: <http://fiscus.fgov.be/interfdan/nl/aeo/welke.htm> and on the website zeerecht.be: <http://www.zeerecht.be/2-3-6-betweenpersons.aspx>
- ¹² See the explanation on the website zeerecht.be: <http://www.zeerecht.be/2-3-6-betweenpersons.aspx>
- ¹³ See the explanation on the Belgian customs website: <http://fiscus.fgov.be/interfdan/nl/aeo/welke.htm>
- ¹⁴ On this, T. Kegels writes: "People will repeat what the legal subject involved in customs and similar formalities has to do, what he certainly cannot do and how he has to do it. Whether or not he is able to do it is hardly mentioned.", T. KEGELS, loc. cit., p.15
- ¹⁵ Such as, for instance, Resolution 57/66 of the United Nations General Assembly on national legislation on transfer of arms, military equipment and dual-use goods and technology, A/RES/57/66 of 30 December 2002: "1. Invites Member States that are in a position to do so to enact or improve national legislation, regulations and procedures to exercise effective control over the transfer of arms, military equipment and dual-use goods and technology, while ensuring that such legislation, regulations and procedures are consistent with the obligations of States parties under international treaties"
- ¹⁶ The text of the ATT Resolution can be found at: [http://www.un.org/disarmament/ATT/docs/ATT_text_\(As_adopted_by_the_GA\)-E.pdf](http://www.un.org/disarmament/ATT/docs/ATT_text_(As_adopted_by_the_GA)-E.pdf)
- ¹⁷ UN Resolution 55/255 of the General Assembly on the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, 31 May 2001, A/RES/55/255 of 8 June 2001, 11 pages
- ¹⁸ UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, A/CONF.192/15, July 2001, 8 pages.
- ¹⁹ OSCE Document on Small Arms and Light Weapons, 24 November 2000, FSC.DOC/1/00, 16 pages, available online at: <http://www.osce.org/fsc/20783>
- ²⁰ UN Resolution 1540 (2004) of the Security Council on non-proliferation of weapons of mass destruction, S/RES/1540, of 28 April 2004, 4 pages
- ²¹ Signed 1 July 1968, in force as of 5 March 1970, extended for indefinite duration in 1995. The text is available online at: <http://www.iaea.org/Publications/Documents/Infrcircs/Infrcirc140.pdf>
- ²² The text of the Convention is available online at <http://www.opbw.org/>
- ²³ The text of the CWC is available online at: <http://www.opcw.org/chemical-weapons-convention/>
- ²⁴ Aside from the European Economic Community, Euratom (treaties of Rome) was also established in 1957; in 1952 the European Coal and Steel Community was established. In 1965, in the wake of the Merger Treaty, the institutions of the EC and

- of Euratom were merged. The ECSC ceased to exist in 2002, 50 years following its formation, as foreseen in its founding treaty; see PH. KOOIJMAN, *International publiekrecht in vogelvucht*, Kluwer, 2003, pp.222-223 and p.256
- ²⁵ For an explanation of the distinction and scope thereof, see Q. MICHEL, 'The European Union Dual-use Export Control Regime', in *ESARDA Bulletin*, n° 40, December 2008, p.41, available online at: http://esarda2.jrc.it/db_proceeding/mfile/B_2008_040_10.pdf
- ²⁶ For an explanation of EU embargoes, see EUROPEAN COMMISSION, 'Restrictive measures', 2008, 13 pages, available online at: http://eeas.europa.eu/cfsp/sanctions/docs/index_en.pdf#2.1
- ²⁷ Regulation (EC) no. 1236/2005 of the Council of 27 June 2005 concerning trade in certain goods which could be used for the death penalty, torture or other cruel, inhuman or degrading treatment or punishment *OJ L* 200 of 30 July 2005; Regulation (EU) no. 961/2010 of the Council of 25 October 2010 concerning limiting measures with regard to Iran (and until repeal of Regulation (EC) no. 423/2007), *OJ L* 281 of 27 October 2010
- ²⁸ The former Art. 296 of the Treaty establishing the European Community. Since the entry into force of the Treaty of Lisbon on 1 December 2009, the Treaty establishing the European Community has been re-named the Treaty on the Functioning of the European Union, or in short the Functioning Treaty.
- ²⁹ The Programme was dissolved in 2002 by the Common Position 2002/589/CFSP of 12 July 2002 on the European Union's contribution to combating the destabilizing accumulation and proliferation of small arms and light weapons, and the repeal of the Common Position 1999/34/CFSP and the EU programme of June 1997 aimed at preventing and combating illicit trade in conventional arms, *OJ C* 191 of 19 July 2002.
- ³⁰ The EU Code of Conduct has not been officially published; it can be consulted on a variety of websites, such as: <http://www.consilium.europa.eu/uedocs/cmsUpload/08675r2en8.pdf>
- ³¹ User's Guide, *op. cit.*, p.109; the most recent list was established on 27 February 2012, *PB C* 85 of 22 March 2012
- ³² *OJ L* 335 of 13 December 2008
- ³³ For an explanation of *soft law*, see: K. VAN HEUVERSWYN, *International framework brokering*, *op. cit.*, p.65
- ³⁴ User's Guide 2009, *op. cit.*, p.33
- ³⁵ User's Guide 2009, *op. cit.*, p.17.. The User's Guide of 2008 attached to the Code of Conduct already provided for the procedures in the framework of the no-undercut principle (notification or denial) to apply also to licences for brokering, transit, transshipment and immaterial transfer where there was an applicable licensing system, even if the scope of application of the Code of Conduct itself did not cover these transactions; see User's Guide version 29 February 2008, p.17
- ³⁶ *OJ L* 146 of 10 June 2009, 36 pages
- ³⁷ *OJ L* of 15 January 1999, 5 pages
- ³⁸ Council document 5319/06. 15-16 December 2005 of 13 January 2006, 15 pages
- ³⁹ *OJ L* 256 of 13 September 1991, p.51
- ⁴⁰ European Parliament and Council Directive 2008/51/EEC of 21 May 2008 amending Council Directive 91/477/EEC on control of the acquisition and possession of weapons, *OJ L* 179 of 8 July 2008
- ⁴¹ Regulation (EU) No. 258/2012 of the European Parliament and the Council of 14 March 2012 for implementing Article 10 of the United Nations Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (UN Firearms Protocol), and for the establishment of export licences for firearms, their components, parts and ammunition, and measures concerning their import and transit, *OJ L* 94 of 30 March 2012, 15 pages
- ⁴² Adopted at the European Council of Thessaloniki on 19 and 20 June 2003, see: <http://abolition2000Europe.org/index.php?op=ViewArticle&articleId=121&blogId=1>
- ⁴³ Council of the European Union, Fight against the proliferation of weapons of mass destruction - EU Strategy against proliferation or spread of weapons of mass destruction, Brussels, 10 December 2003, Doc. no. 15708/03, 13 pages, available online at: http://europa.eu/legislation_summaries/foreign_and_security_policy/cfsp_and_esdp_implementation/l33234_en.htm
- ⁴⁴ EC Regulation No. 3381/94, *OJ L* 367 of 31 December 1994, pp.1 et seq, amended in 1995; Resolution 94/942/CFSP, *OJ L* 367 of 31 December 1994, p.8 et seq, last amended in 2000
- ⁴⁵ COMMISSION OF THE EUROPEAN COMMUNITIES, Proposal for a Council Regulation amending and updating Regulation (EC) No. 1334/2000 setting up a Community regime for the control of exports of dual-use items and technology, Brussels, 11 September 2008, COM/2008/0541 def., 11 pages
- ⁴⁶ Former Art. 30 of the EC Convention, see introductory consideration 12 of the Dual-use Regulation: "*Pursuant to and within the limits of Article 30 of the Treaty and pending a greater degree of harmonization, Member States retain the right to carry out controls on transfers of certain dual-use items within the Community in order to safeguard public policy or public security. Where these controls are linked to the effectiveness of controls on exports from the Community, they should be periodically reviewed by the Council.*"
- ⁴⁷ On 22 June 2000, the initial Community Regulation of 1994 was replaced by Regulation no. 1344/2000, with a view to further harmonization of export licences for dual-use items within the European Community: EC Regulation No. 1334/2000 of the Council of 22 June 2000 setting up a Community regime for the export controls of dual-use items and technology, *OJ L* 159 of 30 June 2000, pp.1 et seq

After repeated amendments to Regulation 1334/2000, for reasons of clarity (see also: COM(2006) 829 def., *op. cit.*, pp.8 et seq), it was replaced in its entirety on 5 May 2009 by a new Council Regulation no. 428/2009 of 5 May 2009 setting up a Community regime for export controls, transfer, brokering and transit of dual-use items, *OJ L* 134 of 29 May 2009. This Regulation has been in force since 27 August 2009 (Art. 27-28). The recent amendments on the one hand involve aligning the Regulation with various international commitments and obligations, and on the other hand aim to increase the effectiveness of the control regime, inter alia by a substantial expansion of the type of activities to which the Regulation applies and by refining the current prescriptions, including updating the list of items to which the Regulation applies.

48 Introductory consideration 18, Dual-use Regulation 428/2009

49 COM(2006) 829 def., *op. cit.*, p.17

50 COM(2006) 829 def., *op. cit.*, p.5

51 COM(2006) 829 def., *op. cit.*, p.5

52 See introductory consideration 5, Dual-use Regulation 428/2009

53 This description appears in introductory consideration 16 of Dual-use Regulation 428/2009, and is identical to the description in the introduction to Directive 2009/45/EG

54 See: Information Notes, Notices from member states on Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for export controls, transfer, brokering and transit of dual-use items: Information on measures adopted by Member States in conformity with Articles 5, 6, 8, 9, 10, 17 and 22, *PB C* 67 of 6 March 2012 and *PB C* 283 of 19 September 2012

55 The relevant provision relating to customs can be found in European Regulation no. 2913/92 of the Council of 12 October 1992 establishing the Community Customs Code.

56 J. DE BACKER, *De aansprakelijkheid of the expediteur/aangever voor de betaling of the douaneschuld in het kader van de regeling extern communautair douanevervoer, Een visie van de administratie*, September 2001, in E. VAN HOOYDONK (ed.), *op. cit.*, pp.50 et seq

57 J. DE BACKER, *loc. cit.*, pp.70 et seq

58 Communication from the Commission to the European Parliament, the Council and the European Economic Social Committee on customs risk management and security of the supply chain, COM(2012) 793 final of 8 January 2013, 17 pages (Henceforth abbreviated as COM(2012) 793 final) At global level, in 2012 similar observations were made by the World Economic Forum, see: World Economic Forum, *New Models for Addressing Supply Chain and Transport Risk*, 2012, 26 pages, available online at: http://www3.weforum.org/docs/WEF_SCT_RRN_NewModelsAddressingSupplyChainTransportRisk_IndustryAgenda_2012.pdf

59 COM(2006) 829 def., *op. cit.*, p.5

60 COM(2012) 793 final, *op. cit.*, 17 pages

61 The control of arms trade and the combating of illicit arms trade address a series of activities that are directly or indirectly related to it: directly related are import, export and transit activities; indirectly related are (1) support and similar activities for import, export and transit, such as technical or financial services, training, and so forth, (2) trade between third countries that is organized from Belgium, i.e. brokering, (3) support and similar activities for brokering, see K. VAN HEUVERSWEYN, *The Belgian regime for the control of brokering in military and dual-use items*, Brussels, Flemish Peace Institute, March 2010, p.92, available online at: <http://www.flemishpeaceinstitute.eu/index.php/publications/overview>

62 Explanatory Memorandum, ATA, p.4

63 Decree of the Government of Flanders of 20 July 2012 on implementation of the Arms Trade Act of 15 June 2012, *B.O.G.* 9 October 2012

64 Council Regulation (EC) No. 3381/94 of 19 December 1994 setting up a Community regime for export controls of dual-use goods, *OJ L* 52 of 1.3.1996

65 Ministerial Decree of 19 May 1995 concerning the procedure governing the transit of dual-use items, *B.O.G.* 27 June 1995, repealed as of 1 October 2000 (Ministerial Decree 28 Sept. 2000)

66 Ministerial Decree of 28 September 2000 concerning the procedure governing the transit of dual-use items and technology, *B.O.G.* 20 October 2000

67 For a more extensive explanation of the BLEU and the BENELUX, see: G. CASTRYCK, S. DEPAUW and N. DUQUET, *op. cit.*, pp.58-64

68 This interpretation also follows from an agreement concluded in 1969 which stipulates that licences issued by one of the Benelux authorities, upon use in another Benelux State, have the same value as if it was issued by an authority in that country itself. See the agreement of 29 April 1969 on cooperation in administrative and criminal law in the field of regulations connected to the realization of the objectives of the Benelux Economic Union and three additional protocols, Art. 3.

69 Framework agreement of 30 June 1994 on cooperation between the State, the Communities and Regions on representing the Kingdom of Belgium in international organizations whose activities concern mixed competences, *B.O.G.* 19 November 1994

70 Ministerial Decree of 21 September 2012 on the delegation of some competences regarding the import, export, transit and transfer of defence-related items, other equipment for military use, law enforcement equipment, civil small arms, components and ammunition and with regard to the export and transfer of dual-use items to the Secretary General of the Flemish Department of Foreign Affairs, *B.O.G.* 9 October 2012

71 Cooperation Agreement of 17 July 2007 between the Federal State, the Flemish Region, the Walloon Region and the Brussels-Capital Region on the import, export and transit of arms, ammunition, and materials specifically intended for military use or law enforcement purposes and associated technology, as well as dual-use items and technologies, *B.O.G.* 20 December 2007.

- ⁷² Adopted by the Flemish Parliament on 4 July 2008: Decree of 4 July concerning consent to the Cooperation Agreement of 2 March 2007 between the Federal State, the Flemish Region, the Walloon Region and the Brussels-Capital Region on the implementation of the agreement prohibiting the development, production, stockpiling and use of chemical weapons, and concerning the destruction of these weapons, drawn up in Paris on 13 January 1993, *B.O.G.* 29 August 2008.
- ⁷³ Art. 1 Law of 9 February 1981
- ⁷⁴ Art. 1 Law of 9 February 1981 and Art. 6, §1 of the Royal Decree of 12 May 1989
- ⁷⁵ Art. 2.6°
- ⁷⁶ Ministerial Decree of 19 May 1995 concerning the transit of dual-use items, *B.O.J.* 27 June 1995; Ministerial Decree of 28 September 2000 on the transit of dual-use items and technology, *B.O.G.* 20 October 2000
- ⁷⁷ Art. 1. “*Transit of dual-use items is subjected to the same prescriptions as those that are provided for by the previously mentioned Regulation (EC) No. 3381/94 for exports of dual-use items. A licence is required for transit subject to the same conditions as those provided for exports.*”
- Art. 2. “*Article 1 also does not apply to : a) the transit of dual-use items originating from or destined for the Grand Duchy of Luxembourg or the Netherlands; b) the transit of dual-use items without transshipment or change to the means of transportation. Unloading the items intended on the quay from a boat or airplane with a view to resending the cargo is not considered as transshipment or change of means of transport so long as these items are reloaded into the same boat or airplane.*”
- ⁷⁸ Law of 25 March 2003 amending the Law of 5 August 1991 on the import, export, and transit of arms, ammunition, and materials specifically intended for military use and associated technology, *B.O.G.* 7 July 2003.
- ⁷⁹ Art. 2., 2
- ⁸⁰ See: Information Notes, Notices from Member States on Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the export controls, transfer, brokering and transit of dual-use items: Information on measures adopted by Member States in conformity with Articles 5, 6, 8, 9, 10, 17 and 22, *PB C* 67 of 6 March 2012 and *PB C* 283 of 19 September 2012
- ⁸¹ S. DEPAUW, *Juridisch kader voor de controle op handel in dual-use producten in Vlaanderen*, Brussels, Flemish Peace Institute, 25 May 2011, p.18
- ⁸² GOVERNMENT OF FLANDERS, Sixteenth half-yearly report of the Government of Flanders to the Flemish Parliament on licences issued and denied for weapons and ammunition and equipment specially designed for military use or for law enforcement and related technology, from 1 January 2011 to 30 June 2011, p.4, available online at: http://www.vlaiothern.be/iv/div/Export/Halfannual%20report_January%20tot%20June%202011.pdf
- ⁸³ For an explanation, see Explanatory Memorandum ATA, pp.21 et seq
- ⁸⁴ See explanation on the website under ‘Additional documents’: <http://www.vlaiothern.be/int/Article/bijkomende-documenten>
- ⁸⁵ Art. 10 of the Cooperation Agreement of 17 July 2007 between the Federal State, the Flemish Region, the Walloon Region and the Brussels-Capital Region, concerning the import, export and transit of arms, ammunition and equipment specially designed for military use or law enforcement and its related technology as well as for dual-use items and technologies, *B.O.G.* 20 December 2007
- ⁸⁶ Art. 10 of the Cooperation Agreement of 17 July 2007 between the Federal State, the Flemish Region, the Walloon Region and the Brussels-Capital Region, concerning the import, export and transit of arms, ammunition and equipment specially designed for military use or law enforcement and its related technology as well as for dual-use items and technologies, *B.O.G.* 20 December 2007
- ⁸⁷ According to the website of the Strategic Goods Control Unit: <http://www.vlaiothern.be/int/Article/buiten-benelux>
- ⁸⁸ Explanatory Memorandum ATA, p.14
- ⁸⁹ Explanatory Memorandum ATA, p.14
- ⁹⁰ Explanatory Memorandum ATA, p.16
- ⁹¹ Explanatory Memorandum ATA, p.16
- ⁹² Explanatory Memorandum ATA, p.33
- ⁹³ Explanatory Memorandum ATA, p.38 and p.47
- ⁹⁴ Report on behalf of the sub-committee for arms trade published by Mr. Piet De Bruyn, 14 April 2009, Exhibit 33-A (2008-2009) – No. 2
- ⁹⁵ Cf. recommendations in the investigation with regard to brokering, K. VAN HEUVERSWYN, *Belgian control regime brokering*, *op. cit.*
- ⁹⁶ The White Paper contains the conclusions from a commission made up of officials, public representatives, academics, industry representatives and independent experts. Numerous other stakeholders were consulted or heard. J.-CL. MALLET, *Défense et Sécurité, Livre blanc*, Odile Jacob/La documentation française, June 2008, 350 pages, available online at: <http://www.defense.gouv.fr/portail-defense/enjeux2/politique-de-defense/livre-blanc-2008>
- ⁹⁷ X, *Rapport au Parlement, Les exportation d'armement de la France en 2009*, Délégation à l'information et à la communication de la Défense, August 2010, 150 pages and X, *Rapport au Parlement, Les exportation d'armement de la France en 2010*, Délégation à l'information et à la communication de la Défense, August 2011, 84 pages (hereinafter, *Rapport au Parlement* 2011); see also: J. de ROHAN, *op. cit.*, pp.24 et seq
- ⁹⁸ J.-CL. MALLET, *op. cit.*, pp.49-50 and pp.57-58

⁹⁹ J.-CL. MALLET, *op. cit.*, p.9, p.262 and p.279; J. de ROHAN, *op. cit.*, p.9

¹⁰⁰ J.-CL. MALLET, *op. cit.*, p.81

¹⁰¹ J.-CL. MALLET, *op. cit.*, p.61

¹⁰² J. de ROHAN, *Rapport n° 306, fait au nom de la commission des affaires étrangères, de la défense et des forces armées sur le projet de loi relatif au contrôle des importations et des exportations de matériels de guerre et de matériels assimilés, à la simplification des transferts des produits liés à la défense dans l'Union européenne et aux marchés de défense et de sécurité*, Sénat, 15 February 2011, p.76

¹⁰³ This replaced the earlier basic legislation of the 'décret-loi' of 18 April 1939 establishing the system of war equipment, arms and ammunition.

¹⁰⁴ L'ordonnance n° 2004-1374 du 20 décembre 2004 relative à la partie législative du code de la défense ayant abrogé le décret-loi du 18 avril 1939 fixant le régime des matériels de guerre, armes et munitions

¹⁰⁵ Chapter I, Art. L 2331

¹⁰⁶ L2335, modified in 2011 by Act no. 2011-702 of 22 June 2011 (in force as of 30 June 2012)

¹⁰⁷ See: <http://www.douane.gouv.fr/data/dab/pdf/03-077.pdf>

¹⁰⁸ Le portail de l'armement: <http://www.ixarm.com/-control-des-exportations->

¹⁰⁹ MINISTÈRE DE LA DÉFENCE, *Memento pour l'application des procédures d'exportation et de transfert de matériels de guerre et matériels assimilés et produits liés à la défense*, Paris, February 2012, p.26 (hereinafter, Memento); J. de ROHAN, *op. cit.*, p.76

¹¹⁰ See also: <http://www.industrie.gouv.fr/pratique/bdousage/sbdu-controls.php>

¹¹¹ Cf. Avis aux exportateurs du 31 mars 2010

¹¹² S. PAILE, 'France', in MICHEL Q. (ed.), *Sensitive Trade, The Perspective of European States*, Brussel, P.I.E. Peter Lang S.A., 2011, p.64

¹¹³ DIRECTION GENERALE DES DOUANES ET DROITS INDIRECTS, *Guide sur les exportations de biens et technologies à double usage*, Ministère du Budget, 15 April 2010, p.3 (hereinafter, DGDDI, *Guide biens à double usage/Guide to dual-use items*)

¹¹⁴ Décret n° 55-965 of 16 July 1955

¹¹⁵ J.CL. SANDRIER, C. MARTIN, A. VEYRET, report d'information n° 2334 de la Commission de la Défense nationale et des forces armées, sur le contrôle des exportations d'armement, Assemblée nationale, 25 April 2000, available online at : http://www.assemblee-nationale.fr/rap-info/i2334.asp#P320_27945

¹¹⁶ Act no. 2010-294 of 18 March 2010

¹¹⁷ Arrêté 1992, Art. 25

¹¹⁸ Last modified by Act no. 2011-618 of 31 May 2011, in force as of 30 June 2012

¹¹⁹ Rapport au Parlement 2011, *op. cit.*, p.25

¹²⁰ See: Information note to Regulation No. 428/2009, information deriving from the Member States, *PB C 67* of 6 March 2012, p.9. For export licences, the figures show that less than 1% of dual-use export licences have been granted in application of the catch-all clause, see: S. PAILE, *loc. cit.*, p.63

¹²¹ Article L2335-1 Code de la Défense (for imports)

¹²² The text of Art. 4 Décret No. 2011-1467 is identical to the Art. 73 Décret 95-589, which was in force until 30 June 2012, on the obligation to obtain authorization for transit between EU countries. This obligation was cancelled under Art. 4 of Directive 91/477/CEE; transfer between Member States is covered in a separate section in the Décret of 2011.

¹²³ Memento, *op. cit.*, p.26

¹²⁴ MINISTÈRE DE LA DÉFENSE, *Lettre d'Information, Contrôle des exportations d'armement*, Octobre 2010 n° 1, p.2

¹²⁵ Art. 23 Arrêté 1992 – Art. 44 Décret 2011

¹²⁶ DGDDI, *Guide biens à double usage*, *op. cit.*, p.8

¹²⁷ Rapport au Parlement 2011, pp.33 et seq

¹²⁸ J. de ROHAN, *op. cit.*, p.27

¹²⁹ Arrêté du 20 juin 2012 relatif à la délivrance d'un certificat international d'importation et d'un certificat de vérification des livraisons pour l'importation des matériels de guerre et matériels assimilés, JORF n°0146 du 24 juin 2012; Arrêté du 13 décembre 2001 relatif à la délivrance d'un certificat international d'importation et d'un certificat de vérification de livraison pour l'importation de biens et technologies à double usage, JORF n°291 du 15 décembre 2001

¹³⁰ Rapport au Parlement 2011, p.35

¹³¹ S. PAILE, *loc. cit.*, p.63

¹³² The application form is available online at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000005631831>

¹³³ Art. 24-25 Arrêté 1992 - Art. 45-46 Décret 2011

¹³⁴ Art. 1 and 8 Arrêté 1992 - Art. 13 Décret 2011

¹³⁵ Rapport au Parlement 2011, *op. cit.*, p.51

¹³⁶ PowerPoint Presentation by the DGCIS - Direction Générale de la Compétitivité, de l'Industrie et des Services, 2nd Forum des Exportateurs de Biens à Double Usage, 21-24 June 2011, available online at: <http://www.industrie.gouv.fr/pratique/bdousage/cr-forum-juin-2011.pdf>

- ¹³⁷ I. DAVIS, *the Regulation of Arms and Dual-Use Exports Germany, Sweden and the UK*, SIPRI, Stockholm, Oxford University Press, 2002, pp.155 et seq, available online at: <http://books.sipri.org/files/books/SIPRI02Davis.pdf>
- ¹³⁸ BAFA, *Foreign Trade*, 1 September 2006, p.2, available online at: http://www.bafa.de/bafa/en/the_office/publications/ausseiwirtschaft_en_internet.pdf
- ¹³⁹ FEDERAL MINISTRY OF ECONOMICS AND TECHNOLOGY, *Report by the Government of the Federal Republic of Germany on Its Policy on Exports of Conventional Military Equipment in 2010*, 2010 Military Equipment Export Report, Berlin, December 2011, p.7 (hereinafter, 2010 Military Equipment Export Report), available online at: <http://www.bits.de/public/documents/Ruestungsexport/2010-military-equipment-export-report.pdf>
- ¹⁴⁰ 2010 Military Equipment Export Report, *op. cit.*, p.7
- ¹⁴¹ 2010 Military Equipment Export Report, *op. cit.*, p.7
- ¹⁴² BAFA, *Brief Outline*
- ¹⁴³ 2010 Military Equipment Export Report, *op. cit.*, p.8; BAFA, *Brief Outline Export Controls*, Eschborn, Federal Office of Economics and Export Control, 25 July 2009, p.6, available online at: http://www.ausfuhrkontrolle.info/bafa/en/export_control/publications/export_control_brief_outline
- ¹⁴⁴ CL. TOPP, *loc. cit.*, p.38
- ¹⁴⁵ 2010 Military Equipment Export Report, *op. cit.*, p.8
- ¹⁴⁶ 2010 Military Equipment Export Report, *op. cit.*, p.8, I. Davis, *op. cit.*, p.174
- ¹⁴⁷ BAFA, *Foreign Trade*, *op. cit.*, p.4
- ¹⁴⁸ CL. TOPP, *loc. cit.*, p.42
- ¹⁴⁹ 2010 Military Equipment Export Report, *op. cit.*, p.8, BAFA *Foreign Trade*, *op. cit.*, p.4, X, Report of the Government of the Federal Republic of Germany on its Policy on Exports of Conventional Military Equipment covering the Year 1999 , 25 September 2000, p.9 and pp.24-25, available online at: http://www.sipri.org/research/armaments/transfers/transparency/national_reports/germany/germany_99_eng; (Shortened to 1999 Military Equipment Export Report hereinafter forward), Ministry of Economics and Technology, *Schlagrichter der Wirtschaftspolitik*, Monthly report February 2011
- ¹⁵⁰ 2010 Military Equipment Export Report, *op. cit.*, p.8
- ¹⁵¹ 2010 Military Equipment Export Report, *op. cit.*, p.8
- ¹⁵² BAFA, *Brief Outline*, *op. cit.*, p.9
- ¹⁵³ 2010 Military Equipment Export Report, *op. cit.*, p.52
- ¹⁵⁴ BAFA, *Brief Outline*, *op. cit.*, p.19. ELAN is available online at: <http://www.ausfuhrkontrolle.info/ausfuhrkontrolle/de/>
- ¹⁵⁵ BAFA, *Brief Outline*, *op. cit.*, p.21, the list is available online at: <http://www.ausfuhrkontrolle.info/ausfuhrkontrolle/de/gueterlisten/umschluesselungsverzeichnis/index.html>
- ¹⁵⁶ See: information note to Regulation No. 428/2009, information coming from the Member States, *PB C 67* of 6 March 2012, p.9
- ¹⁵⁷ BAFA, *Brief Outline*, *op. cit.*, pp.6-7
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- ¹⁵⁹ According to information from the BAFA Administration, nothing was published about this in the annual report.
- ¹⁶⁰ BAFA, *Brief Outline*, *op. cit.*, p.6, see the Political Principles in annex to the 1999 Military Equipment Export Report, *op. cit.*, pp.22-31
- ¹⁶¹ The previous version of the Political Principles dated from 28 April 1982 and formed, together with the EU criteria, the assessment framework for arms exports.
- ¹⁶² 1999 Military Equipment Export Report, *op. cit.*, p.8, 2010 Military Equipment Export Report, *op. cit.*, p.9
- ¹⁶³ Bundesministerium für Wirtschaft und Technologie, Bericht der Bundesregierung über ihre Exportpolitik für konventionelle Rüstungsgüter im Jahre 2011. Rüstungsexportbericht 2011, p.36, available online at: <http://www.bmwi.de/BMWi/Redaktion/PDF/Publikationen/ruestungsexportbericht-2011,property=pdf,bereich=bmwi,sprache=de,rwb=true.pdf>
- ¹⁶⁴ 1999 Military Equipment Export Report, *op. cit.*, p.8, 2010 Military Equipment Export Report, *op. cit.*, p.9
- ¹⁶⁵ 2010 Military Equipment Export Report, *op. cit.*, pp. 11-12
- ¹⁶⁶ BAFA, *Brief Outline*, *op. cit.*
- ¹⁶⁷ 2010 Military Equipment Export Report, *op. cit.*, p.8
- ¹⁶⁸ CL. TOPP, *loc. cit.*, p.43
- ¹⁶⁹ NL Policy Review, Arms Export Policy 2009, *op. cit.*, p.63
- ¹⁷⁰ Letter from the Secretary of State for Economic Affairs 11.02.2008, *loc. cit.*, p.2. The Explanatory Note to the amendments also includes systematic clarification concerning the impact of the new provisions on the administrative burdens for the business world.
- ¹⁷¹ NL Policy Review, Arms Export Policy 2009, *op. cit.*, pp.63-64
- ¹⁷² All the reports available online at http://www.national government.nl/underwerpen/export_control-strategische-goederen/reportages-strategische-goederen

- ¹⁷³ Ministry of Economic Affairs, LANDBOUW EN INNOVATIE (NL), *Handboek strategische goederen en diensten*, June 2012, p.11, available online at:
<http://www.nationalgovernment.nl/documents-en-publications/reports/2006/10/23/handboek-strategische-goederen.html>
 (hereinafter, *Handboek SG*)
- ¹⁷⁴ Decree of 24 June 2008 containing rules on the import, export and transit of dual-use items and military equipment (Stb 2008, 252).
- ¹⁷⁵ Letter from the Secretary of State for Economic Affairs, TK 2007-2008, 22 054, No. 138, 11 February 2008, 5 pages
- ¹⁷⁶ Decree of 30 September 2011 amending the Decree on Strategic Goods in connection with the implementation of Directive 2009/43/EC
- ¹⁷⁷ A motion in this sense was already submitted in 2006: Motion of the section Blom, TK 2005-2006, 22 054, No. 103, 11 April 2006, p.1. For the reasoning behind the policy decision, see also: Letter from the Secretary of State for Economic Affairs, TK 2007-2008, 22 054, No. 138, 11 February 2008, 5 pages
- ¹⁷⁸ The articles cited refer to the modified version which is applicable since 30 June 2012.
- ¹⁷⁹ Order from the Secretary of State for Economic Affairs, Agriculture and Innovation of 28 October 2011, No. WJZ/11134677, on a revised Implementing Order SG (Strategic Goods Implementing Order 2012), Stcrt. 2011, 19960
- ¹⁸⁰ See, inter alia: *Handboek SG, op. cit.*, pp.8-10 and NL Policy Review, Arms Export Policy 2009, *op. cit.*, p.47
- ¹⁸¹ NL Policy Review, Arms Export Policy 2009, *op. cit.*, p.54
- ¹⁸² NL Policy Review, Arms Export Policy 2009, *op. cit.*, p.57
- ¹⁸³ NL Policy Review, Arms Export Policy 2009, *op. cit.*, p. 54
- ¹⁸⁴ Art. 3., 1. and Art. 6., 1. Implementing Order SG 2012
- ¹⁸⁵ This follows from the definition of individual and general transit licences, which states that a licence as such is awarded upon application or by ministerial regulation to “a ‘beschikkingsbevoegde’ established in the Netherlands”: see Decree of 24 May 2012 amending the Decree on Strategic Goods with regard to the transit of military equipment, Stcrt 2012, 225
- ¹⁸⁶ See the explanation in Art. 6 of the Strategic Goods Implementing Order SG 2012
- ¹⁸⁷ The latest revised version of the Implementing Order SG 2008 still refers explicitly to the European List of February 2010. The Netherlands had to regularly adapt the Order to allow up-to-date reference to the most recent European List. By referring to the scope of CP 2008/944/CFSP in the Strategic Goods Implementing Order 2012, from 1 July 2012 the most recent EU List is automatically applicable. See: Explanation of the Regulation from the Secretary of State for Economic Affairs, Agriculture and Innovation of 29 May 2012, No. WJZ / 12063088, amending the Strategic Goods Implementing Order 2012, the National General Export Licence NL002, the Strategic Goods Implementing Order Customs and Excise Act and the General Transfer Licence Order NL003 t/m NL006 (amending the regulation on strategic goods), Stcrt 2012 of 5 June 2012, No. 11107, p.2
- ¹⁸⁸ Art. 5 and 7., b. Implementing Order SG 2012
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- ¹⁹⁴ Regulation by the Secretary of State for Economic Affairs, Agriculture and Innovation of 29 May 2012, No. WJZ / 12065785, containing rules with regard to the general transit licence NL007 for military equipment originating from allies (Regulation for general transit licence NL007), Stcrt 5 June 2012, No. 11112
- ¹⁹⁵ Regulation by the Secretary of State for Economic Affairs, Agriculture and Innovation of 29 May 2012, No. WJZ / 12063076, containing rules with regard to the general transit licence N008 for military equipment with allies as the final destination (General transit licence Regulation NL008), Stcrt 5 June 2012, No. 11117
- ¹⁹⁶ *Handboek SG, op. cit.*, p.36
- ¹⁹⁷ Explanatory Note to the Decree of 24 May 2012, *op. cit.*, p.8
- ¹⁹⁸ Explanatory Note for the general transit licence regulation NL007, *op. cit.*, p.5
- ¹⁹⁹ Explanatory Note to the Decree of 24 May 2012, *op. cit.*, p.8
- ²⁰⁰ See, inter alia, the stated position of the Minister of Foreign Affairs in: MINISTER OF FOREIGN AFFAIRS, Letter from the Minister of Foreign Affairs to the Chairman of the House of States-General, 11 Feb. 2009, House Documents, 2008-2009, 22054, No. 144, p.2.
- ²⁰¹ NL Policy Review, Arms Export Policy 2009, *op. cit.*, p.54
- ²⁰² NL Policy Review, Arms Export Policy 2009, *op. cit.*, pp.52 et seq
- ²⁰³ See:
http://download.belastingdienst.nl/douane/docs/application_licence_uit_transit_strategische_goederen_iud0291z1folre.pdf
- ²⁰⁴ *Handboek SG, op. cit.*, p.34

Information on this is available online at the following Belgian customs website:
http://www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/belastingdienst/douane_voor_bedrijven/binnenbrengen/processtappen_binnenbrengen/risk_analysis_en_selectie_op_ens_en_sal/

See Explanatory Note to the Decree of 24 May 2012, *op. cit.*, pp.5-6

NL Policy Review, Arms Export Policy 2009, *op. cit.*, p.63

Explanatory Note to the Decree of 24 May 2012, *op. cit.*, p.5

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BIS, *Introduction to ECO*, *op. cit.*, p.4

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J.F. MCELLOWNEY, *loc. cit.*, p.141

DEFENCE COMMITTEE (UK), *Introduction to: Scrutiny of Arms Export Controls (2011)*, *op. cit.*

See, inter alia: UK Annual Report 2010, *op. cit.*, p.4

UK Annual Report 2010, *op. cit.*, pp.13-14

BIS, *Explanatory Memorandum*, *op. cit.*, p.3 and BIS, ECO, *Supplementary Guidance Note on Transit and Transshipment*, *op. cit.*, p.3

BIS, ECO, *Supplementary Guidance Note on Transit and Transshipment*, *op. cit.*, p.13

For an explanation of the British lists, see, inter alia: UK Annual Report 2010, *op. cit.*, p.3

And BIS, *UK Strategic Export Control Lists, the consolidated list of strategic military and dual-use items that require export authorization*, January 2012, 266 pages, available online at: <http://www.bis.gov.uk/assets/biscore/eco/docs/control-lists/12-1014-uk-strategic-export-control-list-consolidated.pdf>

For the latest update of the list, see: Export Control (Amendment) (No. 2) Order 2010

In order to put the importance of *WMD End-Use* into perspective: between 2002 and 2004, 270 (export) licences were denied on the grounds of *WMD End-Use* out of a total of 822 denials in the same period, which constitutes more than 30% of the denials. See: BERR, ECO, *Guidance on the WMD End-Use Control*, *op. cit.*, p.5

See, inter alia, the ECO, *Compliance Code of Practice*, *op. cit.*, p.33 and the specific *Guidance documents* with regard to End-Use control: BERR, ECO, *Guidance on the WMD End-Use Control*, April 2009, 12 pages, available online at: <http://www.bis.gov.uk/files/file50850.pdf> and the BIS, ECO, *Guidance on the supplementary WMD End-Use Controls (including Provision of Technical Assistance)*, March 2010, p.16, available online at: <http://www.bis.gov.uk/assets/BISCore/eco/docs/supp-wmd-controls-tech.pdf> and X, *Military End-use Guidance Notes*, 6 pages, available online at: <http://www.bis.gov.uk/files/file35817.pdf>

See the *Military End-use Control Guidance Notes*, *op. cit.*

See the *Military End-Use Control Guidance Notes*, *op. cit.*

M. TSUKANOVA, *loc. cit.*, pp.50-51

BIS, ECO, *Supplementary Guidance Note on Transit and Transshipment*, *op. cit.*, 27 pages

See explanation in BIS, *Explanatory Memorandum*, *op. cit.*, p.4

See the list of recipient countries in Annex 4, Part 2 of the *EC Order 2008*

See explanation in BIS, ECO, *Supplementary Guidance on Transit and Transshipment*, *op. cit.*, pp.10 et seq

Annex 4, Part 1, *EC Order 2008*

Art. 14 *EC Order 2008*

BIS, ECO, *Supplementary Guidance on Transit and Transshipment*, *op. cit.*, p.8

- 241 M. TSUKANOVA, *loc. cit.*, p.49
- 242 See (e.g.) Standard Note SN/IA/2729, 15 pages. The actual list of criteria applicable as of 10 January 2012 is included in annex.
- 243 UK Annual Report 2010, *op. cit.*, p.37
- 244 See (e.g.) J. LUNN, Standard Note SN/IA/2729 of 10 January 2012, UK arms export control policy, International Affairs and Defence Section, publication in the House of Commons Library, p.4, available online at: www.parliament.uk/briefing-papers/SN02729.pdf
- 245 On this discussion, see the Report of the Defence Committee at <http://www.publications.parliament.uk/pa/cm201011/cmselect/cmdfence/686/68609.htm>
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- 247 UK Annual Report 2010, *op. cit.*, pp.13-14
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- 250 Art. 34 et seq EC Order 2008
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- 254 COM(2006) 829 def., *op. cit.*, p.5
- 255 COM(2012) 793 final, *op. cit.*, pp.14 et seq
- 256 P. HOLTOM and M. BROMLEY, 'Transit and trans-shipment controls in an arms trade treaty', SIPRI Background paper, SIPRI, July 2011, 12 p., available online at: http://books.sipri.org/product_info?c_product_id=427 and S. FINARDI and P. DANSSAERT, *Rough Seas - Maritime Transport and Arms Shipments - Transport Services under an Arms Trade Treaty, TransArms (USA)*, 10 July 2012, 84 p., available online at: http://www.ipisresearch.be/publications_detail.php?id=387
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- 258 Among the few exceptions to this are two recent Resolutions by the UN Security Council concerning conventional arms and weapons of mass destruction:
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 - 2) UN Resolution (of the General Assembly) 63/67 on Preventing and combating illicit brokering activities, 2 December 2008, A/RES/63/67, 12 January 2009, p.3
- 259 UN Report on General and Complete disarmament: International Arms Transfers, Study on ways and means of promoting transparency in international transfers of conventional arms, 9 September 1991, A/46/301, pp.20 et seq, available online at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N91/289/95/PDF/N9128995.pdf?OpenElement>
- 260 OSCE FORUM FOR SECURITY CO-OPERATION, Decision 11/08 introducing best practices to prevent destabilizing transfers of small arms and light weapons through air transport, and an associated questionnaire, FSC.DEC/11/08 of 5 November 2008, p.6
- 261 See also P. HOLTOM and M. BROMLEY, *loc. cit.*, p.3
- 262 B. WOOD, 'Strengthening enforcement of UN arms embargoes', Amnesty International, p.1, available online at: <http://www.iansa.org/un/documents/Strengthening-enforcement-of-UN-armsembargoes.pdf> and UN Report to the Security Council on Small Arms, S/2005/69, 17 February 2005, p.4
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COLOPHON

Authors:

Kathleen Van Heuverswyn
in collaboration with Nils Duquet

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Flemish Peace Institute
Leuvenseweg 86
1000 Brussels
tel. +32 2 552 45 91

vredesinstituut@vlaamsparlement.be
www.flemishpeaceinstitute.eu