

Controlling the transit of controlled military items in Europe



Transit and transshipment are everyday elements of the international supply chain. But when it comes to their regulation in law, there are significant discrepancies between the scope of regulation and the means by which governments attempt to achieve the same ends – even within the EU jurisdictions, as Diederik Cops and Sophie Timmermans describe.

Transit and transshipment hubs are increasingly becoming an important feature of international supply routes, with a significant proportion of international trade transiting or transshipping at some point along the transport route from the producer to the final end user.

In general terms, ‘transit’ refers to the transportation of goods from the country of origin to the country of destination through the territory of a third country, during which the goods remain on board the transport facility (boat, plane, train or lorry) or are unloaded from one means of transport and reloaded onto the same or another means of transport (e.g., from a ship to a train).¹ Such unloading and reloading is called ‘transshipment’. Developments with respect to the volume, complexity, and speed – more and more, ever faster, and greater numbers of actors and countries involved – of international trade make it difficult to properly map the transit phenomenon, let alone control the transit of certain goods, like military items.

Controlling the transit or transshipment of conventional military items nonetheless provides an opportunity to identify illegal transactions since international trade flows, including those involving illegal products, almost always take place via routes for which, in most cases, certain administrative obligations must be fulfilled. Moreover, such controls reinforce a government’s oversight of arms at times when they are vulnerable to diversion to undesirable end users or illegal arms markets. Finally, such controls can be necessary to comply with international



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obligations such as sanction regimes or treaties such as the UN Arms Trade Treaty, or to defend vital security interests.²

The efficiency and effectiveness of the global control system depends on how states control transit and how these systems are coordinated. This article will build on an analysis of the current legislative framework of eight European transit control systems on military items – the Flemish Region and Walloon Region in Belgium,³ Denmark, Germany, France, the Netherlands, Spain and the United Kingdom – to identify similarities and differences between these systems. It will more specifically discuss how ‘transit’ is legally defined in these countries, the material and personal scope of these control systems, and the transit transactions that are effectively controlled in these systems. In this latter part, we look at how prohibited, licenced, and exempted transit of military items are defined. These different elements need to be discussed in combination to get

a comprehensive understanding of which (and how) transit transactions of military items are effectively controlled. Given the geographical proximity of sea- and airports in these countries, many of which serve as global transit hubs, a certain extent of convergence and transparency is necessary to avoid legal loopholes, undercutting and compliance issues.⁴

A legal definition of ‘transit’

A first central issue in getting a good overview of how the selected systems approach the topic of transit controls on military items is the general legal definition used for the concept of ‘transit’. Such definitions are important in outlining the scope of a control system. After all, the chosen definition helps to determine which transactions are (or can be) controlled or fall within the scope of the licensing system.

Our analysis indicates that most control systems – the Flemish Region, Denmark, France, Germany and the Netherlands – use a broad definition of transit, linking it to ‘transport of military goods’ in general. In principle, this allows them to control all transport of military goods over their territory. However, two control systems, the Walloon Region and Spain, diverge from the general rule and refer to customs regulations to legally define the concept of transit. In consequence, these systems can only control transit transactions under customs control such as customs transit and customs warehousing, and therefore have no legal basis to control mere transit transactions of military goods without transshipment on their territory. For goods staying on board during the transport

over a country's territory, in most cases no formal customs formalities need to be fulfilled.

Material and personal scope of transit controls of military items

A second crucial aspect to understand the legal and effective scope of current transit control systems in Europe is their material and personal scope. The former defines the goods to which the control system applies, and which goods are considered as military items. EU Member States must implement export controls, including for transit transactions, for all items on the EU Common Military List ('EUCML'),⁵ which is essentially identical to the Munitions List of the Wassenaar Arrangement ('WA').⁶ Our analyses indicate that each system has aligned its material scope with the EUCML, albeit in different ways. There are three main differences between the systems: the way the EUCML is incorporated into national legislation; additional national categories of controlled goods; and the use of a catch-all provision.

First, some countries include the EUCML in their own national legislation while others merely refer to it. The Flemish Region and the Netherlands directly reference the EUCML in their national legislation, meaning that the most recent version is always applicable. Other systems have incorporated the EU list in their legislation and must adapt it each time it is updated. In Denmark, the Arms and Explosives Act is interpreted to refer to all products in the EU list.⁷ France,⁸ Germany⁹ and Spain¹⁰ have their own national lists, which are similar to the EU list. Germany, however, has a dual legislative framework with a specific system for weapons of war and legislation on foreign trade, covering the remaining military goods in the EUCML.¹¹ Military goods not included in the German national list of weapons of war are, in principle, not controlled when they are transiting through German territory.¹² The UK has its own list as well, which referred to the EU list until 2019.¹³ Since Brexit, the UK list is based on the WA's Munitions List.

Second, some systems have additional national categories of controlled goods. The Flemish Region and the UK include law enforcement and torture equipment.¹⁴ France includes detection, intelligence, telecommunications and observation satellites; missiles and launchers with military ballistic capability; specific technologies; and operational training.¹⁵ The UK also controls components designed to provide ballistic protection for armoured vehicles and 'explosive-related goods and technology'.

Third, some systems apply a catch-all provision, which allows *ad hoc* control of non-listed items in certain circumstances. The Flemish Region, Walloon Region, and Denmark have an explicit provision, based on the characteristics of the goods, while Germany and the UK do this indirectly, based on the interests that could be

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jeopardised or the potential end use. The Flemish Region is the only system to have a fully fledged catch-all provision of 'other material for military use', meaning material that is 'capable of inflicting serious harm upon persons or property and which could be used as a means of violence in an armed conflict or similar situation of violence'.¹⁶ While the Walloon Region could invoke a catch-all provision in case goods could have a military end use, it does not do so in practice.¹⁷ In Denmark, a product can be controlled because of its 'nature and construction, and destination for military use'.¹⁸ Under German law, restrictions and obligations can be imposed if there is a real and sufficiently severe threat that it might harm a fundamental interest of society.¹⁹ This clause allows the German government to control the transit

of military items that are not listed in the War Weapons Act.

Regarding the issue of which actors are eligible and/or responsible to obtain a transit licence for military goods, most control systems do not explicitly define the notion of 'transit actor' in their legislation. The exception is the Flemish Region, which defines it as 'the natural or legal person, whether or not represented by a third party, who acts as a customs agent, shipping agent, forwarder or forwarding agent in the transit operation'.²⁰ In practice, the control systems all target the same profiles when controlling the transit of military goods – actors in the transport and logistics chain that arrange the physical transport, manage the logistics or arrange relevant customs formalities. The administratively approved profiles are most often the carrier or forwarding agent, the shipping agent, the shipping company or shipowner, the freight forwarder or the customs agent. It is assumed that they have sufficient information or can obtain it to judge whether the shipment is subject to licensing.

Most control systems do not require a territorial link between the transit actor and the applicant of the transit licence. Germany, the Netherlands, Spain, and the UK do not require a formal domicile in the country because of the realities associated with transit, which is by definition an international phenomenon governed by international actors. Therefore, while it is normally required for a licence applicant to be established in the UK²¹ and Germany,²² for example, it is not an absolute obligation under the German Weapons of War Control Act²³ and an exception can be made for transit and transit with transshipment under the UK Export Control Order.²⁴

The exceptions to this are the Flemish Region and Walloon Region, which both impose that the applicant has a formal base in Belgium, as a result of the formal requirement for all licence applicants to have a prior authorisation.²⁵ However, both systems foresee exceptions to this principle. The Walloon Region allows an exception if an export licence has already been

issued by the Brussels-Capital Region or Flemish Region, or by another EU Member State. In the Flemish Region, the appointment of a representative in Belgium is not required when 'the applicant is a licenced person; is a member of the EU, NATO, UN, IAEA or any other intergovernmental organisation of which the Flemish Region or Belgium is a member; is a government body or part of the armed forces of another EU Member State or NATO'.²⁶

Our study, however, identified a major challenge, i.e., knowing who is liable for a violation of transit control obligations since several actors are involved in moving the same cargo: an exporter, a freight forwarder, an airliner, a shipping company, a courier service, a customs agent and potentially other actors.²⁷ Often, it is unclear who can, may, or must apply for a transit licence. Some transit actors do this on behalf of their clients, while others consider it the client-exporter's responsibility. The complex reality of international trade flows makes it difficult to incorporate this responsibility into a legal framework. As mentioned before, the Flemish Arms Trade Decree includes a group of actors that could potentially be responsible, but it remains unclear who is the designated actor that is responsible for applying for the licence.²⁸

Effectively controlled transit: prohibited, licenced, and exempted transit

The first section of this article showed that almost all control systems apply a broad legal basis to control the transit of military goods. Except for the Walloon Region and Spain, most control systems use such wide-ranging definitions of transit that, in principle, allow them to control any transport of military goods through their territory. However, all control systems appear to have developed complex and divergent tiered systems with prohibited, licenced, and exempted transits of military goods. An analysis of differences between control systems herein will help to draw a more realistic picture of which transit transactions are effectively controlled.

First, it is important to mention that all control systems cover prohibited goods and prohibited transit to countries subject to embargoes. Goods declared illegal through international commitments – such as cluster munitions and anti-personnel mines – are also in principle considered to be goods of which the transit is prohibited.

When turning to transit transactions that are effectively being controlled and need a transit licence, our study found that transit with transshipment is systematically subject to licensing in almost all the control systems. This is, as mentioned before, certainly the case in Spain and in the Walloon Region. Transit without transshipment, on the other hand, follows different principles and is systematically controlled depending on the type of goods (e.g., in the Flemish Region and Germany), or their link with the countries of origin and destination (in the Netherlands).

However, despite the apparent similarity in controls on transshipment, the selected systems apply different licence types. Most control systems grant individual licences for a defined quantity of specified military items, in one or more consignments, to a single consignee. Some control systems employ licence types that allow greater flexibility for the transit actor, whereby not each transaction is assessed in advance by the licensing authorities. France uses global licences that are valid without volume restrictions or transit value from and to specified consignees and forwarders.

Germany, the Netherlands, and the United Kingdom issue general transit licences allowing eligible actors to transit goods specified in the licence without prior approval. The Netherlands has three general transit licences: (1) for military components originating from allies (except when destined for Ukraine, Turkey since 2016, Saudi Arabia, Qatar, Yemen or the UAE); (2) for transit destined to allies (except for Turkey); and (3) for transit under the F-35 fighter jet international cooperation programme.²⁹

Germany has a general transit licence for intra-EU transit

of war weapons and a general transit licence for the transit of war weapons (i.e., without transshipment).³⁰ The United Kingdom issues several open general transshipment licences.³¹ These last two countries have no reporting or registration requirements resulting in little or no control over transactions that take place subject to these general licences.

While the European countries that were studied already differ quite substantially in which transit transactions they control systematically and which licensing procedures are applied,

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complexity is further increased by the use of exemptions of licence obligations on the one hand, and the possibility of *ad hoc* controls on the other hand.

First, each system foresees specific regulations to exempt transit transactions from a licensing requirement. These exemptions differ greatly from one another. Most systems allow exemptions for transactions with allies, but not necessarily in the same way: There are exemptions between countries and exemptions for transit shipments from and/or to friendly countries. Some systems work only with exemptions (such as the Flemish Region) whereas some work with a combination of exemptions and a more lenient approach to friendly countries (such as the Walloon Region). This can still coincide with certain conditions, such as the previous submission of an export licence for the transiting goods.³²

Exempted from control

Some types of transit are exempt from control in almost all control systems: transit of military goods within the EU³³ and transit of NATO material by the armed forces under the

North Atlantic Treaty and regulated by EU Customs Code.³⁴ Additionally, transit without transshipment is exempted from systematic licensing in several control systems. In Spain and the Walloon Region, transit is legally exempted as it falls outside the scope of the legal definition of transit. In France, the Flemish Region, and the Netherlands, transit without transshipment is also not subject to licensing, with certain specificities. In the Netherlands this is the case when the country of origin or of destination is an EU, NATO or allied/friendly country.

In the UK, three conditions must be met for a transit or transshipment to be exempted: (1) the goods remain on board a vessel, aircraft or vehicle during the period they are in the UK, or are goods on a through bill of lading or through air waybill and in any event are re-exported within 30 days of import; (2) the destination of the goods following export from the UK was established in the country from which they were originally exported and there has been no change before the export (transit) from the UK, or the goods are transported back to that country; and (3) the goods were exported from that country in accordance with the export laws and regulations in force at the time of export.³⁵

However, even if a transaction meets these three conditions, a licence is still needed based on a combination of the goods' sensitivity and country of destination. Every transit transaction of Category A goods needs a transit licence,³⁶ while Category B goods need a licence when they are destined for countries mentioned on a list.³⁷ Category C contains all other goods included in the UK control list and are subject to licensing if a certain part of the transaction takes place in the UK and for an even more restricted list of countries.

Additional conditions to exemptions

A few systems attach additional conditions to exemptions, usually requiring demonstrating the legality of the transaction or creating the possibility to place the transaction under an *ad hoc* licence. In the Flemish Region

and the UK, the exemption is conditional upon the presentation of an export licence from the country of origin. The reasons for placing transit transactions under *ad hoc* control vary and there is consequently either a limited or a wide-ranging possibility to control free or exempted transit. Except for Denmark and the UK, the systems allow *ad hoc* control for reasons of public order or security, which provides extensive options. The Flemish Region has the most extensive list of legal grounds. Similarly, Germany has a broad legal basis, which is mainly relevant to weapons other than weapons of war.

Only the Netherlands imposes a mandatory notification for all transit without transshipment originating from or destined for other EU Member States and a limited list of other allies (NATO, Australia, Japan, New Zealand and Switzerland).³⁸ This notification obligation serves two purposes: to identify the nature and extent of the transit, and to provide a basis to make a shipment subject to licensing on an *ad hoc* basis.³⁹ The information from the notifications has only been used in a few cases to apply an *ad hoc* licensing requirement on a shipment to a destination under embargo or in violation of international obligations.

Conclusion

This article's aim was to describe how the transit of military items is controlled in eight systems across Europe. Although these systems have several similar aspects (such as the legal definition of transit and the material scope), they differ substantially in the practical implementation of such controls.

Significant differences exist in terms of the goods that are controlled in practice, the transactions that are controlled, the types of licence that can be used, and the transactions that are exempted from licensing requirements (whether or not in combination with a legal basis for *ad hoc* controls).

Consequently, the same transit transaction of a military item may be exempted from licensing requirements in one system, routinely needs an individual licence in a second system and could take

place via a general licence in a third system (and thus with many fewer controls and administrative practices compared to an individual licence), with different exceptions in each case depending on the type of goods and their countries of origin and destination.

Our analysis clearly illustrates that existing regulations and practices regarding the control of the transit of military items in these European countries is highly complex and characterised by a lack of integration. This complexity reduces the efficiency and effectiveness of controls as it inhibits seamless cooperation between agencies in different countries and threatens to increase the risk of 'shopping around' by transport and logistics actors, looking for the easiest routes to ship military items. Moreover, such

complexity is attractive to illegal arms traffickers, who are looking for loopholes to circumvent legal controls on the international trade in military items.

We equally found that the (international) transport and logistics sector in particular is struggling significantly with this complexity, as it brings about various risks, ranging from common or criminal law prosecutions and fines for (unintentional) breaches of export control laws to compensation for clients for whom the transport is carried out if goods are intercepted by control authorities, and to additional internal costs (e.g., for the temporary storage of goods and for personnel). Because of the expanding legislation and increasing liability, several international transport and logistics actors have indicated that they are less inclined to accept transactions of military

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goods or have even halted the international transport of controlled military items. The sheer impossibility of acting in compliance with highly divergent, complex and non-transparent legislations, located geographically very close to each other, was mentioned as the main reason for this decision.

Unequivocal agreements and procedures would be beneficial in moving towards a more level playing field between potential transit countries and achieving more efficient and effective controls on certain goods flows. Greater convergence is therefore important in making controls

on the transit of military goods more efficient and effective. As a first step, more transparent communication of the prevailing transit control systems in the framework of the relevant international export control regimes could be useful to identify potential opportunities for simplification and convergence in national transit control systems. While an in-depth comparison of national transit control policies and practices is crucial to identify differences between them, international action is necessary to reduce the current complexity in transit control systems.

LINKS AND NOTES

- ¹ Dunne, A. (2016), *The role of transit and transshipment in counterproliferation efforts*, Stockholm: SIPRI, p. 2.
- ² Holtom & Bromley, *Transit and trans-shipment controls*, p. 2.
- ³ After the regionalisation of the competence on strategic goods controls in 2003, Belgium has different export/transit control systems on military items in place. In our study, we included the two most important regions, i.e., Flanders and Wallonia.
- ⁴ The conclusions set out in this paper are part of a broader research report on transit controls of conventional military items. This report not only consists of a comprehensive analysis of the eight transit control systems, but also analyses opportunities and challenges for better international cooperation and information exchange with a view to strengthen transit controls. The full report can be consulted at https://vlaamsvredesinstituut.eu/wp-content/uploads/2022/04/20220425_FlemishPeaceInstitute-report-transit_ENG_WEB.pdf
- ⁵ Article 12, Common Position 2008/944/CFSP.
- ⁶ Cops, D., Duquet, N. & Gourdin, G. (2017), *Towards Europeanised arms export controls? Comparing control systems in EU member states*, Brussels: Flemish Peace Institute, p. 39.
- ⁷ §6 and Annexes 4 and 5 of the Arms and Explosives Act
- ⁸ Code de la Défense to national lists annexed to a Decree of 27 June 2012.
- ⁹ A list in English is included in Federal Ministry for Economic Affairs and Energy, Report by the government of the Federal Republic of Germany on its policy on exports of conventional military equipment in 2018 (2019), https://www.bmw.de/Redaktion/EN/Publikationen/Aussenwirtschaft/report-on-the-exports-of-conventional-military-equipment-in-2018.pdf?__blob=publicationFile&v=7, p. 38 (Annex 5).
- ¹⁰ Annex to Spanish Royal Decree 679/2014.
- ¹¹ Article 26, Constitution of the Federal Republic of Germany of 23 May 1949, <https://www.bundestag.de/gg>; Bundesministerium der Justiz, *Ausführungsgesetz zu Artikel 26 Abs. 2 des Grundgesetzes (Gesetz über die Kontrolle von Kriegswaffen) Inhaltsübersicht* (n.d.).
- ¹² Interview with representatives of the German Federal Office for Economic Affairs and Export Control, 5 May 2021.
- ¹³ Export Control Joint Unit et al., *United Kingdom strategic export controls*, p. 2.
- ¹⁴ Council Regulation 1236/2005 of 27 June 2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, *Official Journal of the European Union*, L200, 30 July 2005,

- ¹⁵ Part 2, Annex to the Decree of 27 June 2012.
- ¹⁶ Article 2 2°, Flemish Arms Trade Decree of 30 June 2012.
- ¹⁷ Oral communication from representatives of the Walloon government, 12 April 2021.
- ¹⁸ §6, paragraph 1, 3, Arms and Explosives Act.
- ¹⁹ §5, 4th paragraph, German Foreign Trade Act.
- ²⁰ Article 2, 6°/1, Flemish Decree on Arms Trade.
- ²¹ Article 11, 2, UK Export Control Act.
- ²² Article 6, 2nd paragraph, 2b, *Kriegswaffenkontrollgesetz*.
- ²³ Interview with representatives of the German Federal Ministry for Economic Affairs and Climate Action, War Weapons division, 29 June 2021.
- ²⁴ Article 27, 1, UK Export Control Order.
- ²⁵ Article 4, Flemish Decree on Arms Trade.; Article 1, 2nd paragraph, Walloon Decree 2012.
- ²⁶ Article 4, §2, subsection 2, Flemish Decree on Arms Trade.
- ²⁷ Bauer et al., *Challenges and good practices*, p. 9.
- ²⁸ Article 2, 6°, 1, Flemish Arms Trade Decree.
- ²⁹ *Brief nr. 283 van de ministers voor buitenlandse handel en ontwikkelingssamenwerking en van buitenlandse zaken van 21 november 2016 aan de Tweede Kamer der Staten-Generaal inzake het wapenexportbeleid, vergaderjaar 2016-2017*, 22 054, p. 3.
- ³⁰ Interview with representatives of the German Federal Ministry for Economic Affairs and Climate Action, War Weapons division, 29 June 2021.
- ³¹ Export Control Joint Unit, *Open general export licences (OGELs)* 29 September 2013.
- ³² In addition, there are statutory exemptions and de facto exceptions to the exemptions, such as the de facto exemptions for Turkey (the Walloon Region and the Netherlands) and Cyprus (the Netherlands) from the rule that NATO and EU Member States are exempt.
- ³³ Article 4, 1, Directive 2009/43 of the European Parliament and Council.
- ³⁴ DG TAXUD, *Guidance document on customs formalities in the EU for military goods to be moved or used in the context of military activities (use of the form 302)*, European Commission (2021).
- ³⁵ Articles 17, 1 & 4, UK Export Control Order.
- ³⁶ Article 17, 2, UK Export Control Order.
- ³⁷ An overview of the different countries is to be found at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/15217/Transit_and_Transshipment_Guidance_-_URN_10-658_-_new_logo_-_2012.pdf
- ³⁸ §3, Article 10, 1, Dutch Strategic Goods Decree.
- ³⁹ Dutch Handbook, pp. 17, 21.