Fight against illicit brokering activities of items related to WMD and of conventional weapons: Tandem or oxymoron?

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To answer this question it is necessary to compare the definition of “illicit brokering activities” used by international instruments dedicated to DU and to CW: do they control the same transactions?

Two constitutive elements:

- Brokering activities
- Illicit brokering
1. “Brokering activities”

Three elements:

- It is a **service** (negotiation, arrangement)
- It has to be **linked** to a transfer of items (export, import, transit, transhipment)
- It concerns a transfer between **two States**
Lack of commonly accepted definition

“Brokering activities” are mentioned in

- Two international instruments, one dedicated to dual-use items (DU) and one dedicated to conventional weapons (CW)

- Several regional instruments
UNSCR 1540 on non-proliferation of weapons of mass destruction

- No definition of “broker” neither “brokering activities”

- Indirect reference: controls on providing funds and services related to such export and transhipment
Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition

- No definition of “broker” neither “brokering activities”
- Essentially a commitment to regulate the activities of those who engage in brokering
International export control regimes

- **No reference** in the NSG guidelines neither in the MTCR
- **Mentioned** by the Australia Group as an element to consider in the export authorisation assessment
- **Defined** by the Wassenaar Arrangement for CW
The Wassenaar Arrangement

**Definition** of arms brokering but **none** of DU brokering

“Activities of **negotiating or arranging** contracts, selling, trading or arranging the **transfer of arms** and related military equipment controlled by Wassenaar Participating States from one third country to another third country”
2. “Illicit Brokering”

Lack of commonly accepted definition for both DU and CW

“Illicit brokering” is **indirectly** included in term “illicit trafficking” used by the Firearms Protocol and other regional agreements
UN Protocol against the Illicit Manufacturing of and Trafficking in Firearms...

“import, export, acquisition, sale, delivery, movement or transfer of firearms (...) from or across the territory of one State Party to that of another State Party if any one of the States Parties concerned does not authorize it”

Which transactions shall be considered as illicit?

All transactions which have not been authorized are therefore acknowledged as illicit
Two opposite principles…

Conventional weapons
Principle: Prohibition
Exception: authorisation (positive)
No transfer without authorisation

Dual-use items
Principle: unrestricted trade
Exception: prohibition, authorisation (negative)
Free movements except authorisation requirement
Dual-use items : scope of control

Two categories of controls
- **List of dual-use items** adopted by international export control regimes and implemented by Participating States
- **Catch-all clause** which extends the control to non-listed items if a supplier and/or a broker
  - Has been informed…
  - Is aware…
  - Has grounds for suspecting … that items could contribute directly or indirectly to a WMD program
Two categories of transactions

Goods, equipment and technology transferred in a **tangible form**

Mostly similar to conventional weapons

Technology and technical assistance transferred by **intangible means**

One of the most sensitive questions for DU and not as much for CW
Additional difficulties linked to catch-all clause

Scope of control is different to that used for weapons, and particularly for SALW

- Necessity to control brokering transactions of industrial activities linked to dual-use items when there is a risk of diversion of such items to WMD

- Necessity to control the potential end use and not only the potential end-user
Illicit brokering for DU related to WMD would be:

- Brokering activities without authorisation of both listed and non-listed items when the broker has been informed of the necessity to apply for such authorisation.

- Brokering of non-listed items when the broker is aware or has grounds for suspecting but he did not inform the authorities.
Difficulty to identify brokers of dual-use items

- Brokers usually do not limit their activities exclusively to dual-use items
- Most of them are or might be exporters/manufacturers occasionally acting as broker
- No broker’s registration except in a little number of States, nor trade association/federation
- Especially when brokering activities concern two third States
Regional implementation: The European Union legislation: clearly separate control systems
When a brokering authorisation shall be required by a Member State?
Council Common Position
2003/468/CFSP – CW

1. For brokering activities, a licence or written authorisation should be obtained from the competent authorities of the Member State where these activities take place, and, where required by national legislation, where the broker is resident or established.
For Conventional Weapons

- No common approach, Member States decide whether to require an authorisation
- Indirect reference to the Code of conduct arms list but no common list of reference
- Weapons to be controlled are those listed by the State concerned
- No catch-all clause
Council Regulation 428/2009 – DU

Authorisation is required for listed items:
If a broker has been informed by the competent authorities of the Member State in which he is a resident ….
If a broker is aware, has ground for suspecting he must notify the competent authorities…

Sounds like a catch-all clause but it is not
Possibility to include a catch-all clause to control brokering transactions of non-listed items:

When the use of the item refers to:

- WMD
- A military end use and concerns destinations subject to arms embargo
For dual-use items

- Common list of items and transactions to be controlled by all EU Member States

- Common approach, even if it is up to Member States to grant or refuse an authorisation

- Catch-all clause
To conclude: separately or together

Illicit brokering activities of items related to WMD and of conventional weapons have some elements in common depending mostly on the definition used by the State implementing its international commitments.

Depends if you consider the glass as half full or half empty?