



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

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New York, October 5th, 2010

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, transshipment)
- 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 transshipment*

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
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 ?