

South Eastern Europe Export Control Seminar
Szeged, Hungary - June 17 - 18, 2003

German presentation on the control of
Brokering activities

*National point of view
and
international development*

Brokering - Germany's point of view - Introduction

Brokering as part of export control system

- Germany votes for brokering controls to be an integral part of export control system
- Two decisive points:
 - **(1) Facilitates understanding of relation to export controls:**
 - Export controls take priority over brokering controls; that means brokering controls do merely address transfers from one third country to another
 - This conception avoids unnecessary duplication of administrative burden; brokering and export control shall not overlap but rather complement each other
 - *Background: Brokering controls shall avoid circumvention of export control objectives by exploiting loopholes or differing level of control between states*

Brokering - Germany's point of view - Introduction

Brokering as part of export control system

- **(2) Established substance of overall export control system can be applied to brokering controls as well**
 - Particularly true for international co-operation (information exchange, denial notification, etc.), objectives, licensing criteria, list of controlled goods, licensing procedures

Brokering - Germany's point of view - Introduction

Brokering and penal law

- Brokering controls focus mainly on the activities of persons who operate in grey areas or in the illegal sector. The definitions to be introduced for the activities to be controlled must therefore satisfy the criminal law dictates of
 - **legal clarity**
 - **legal specificity**
 - **legal recognizability**
- Vice versa unnecessary burden on civil society by unspecified terms and control of merely indirect supporting activities seems to be inappropriate

Brokering - Germany's point of view - Introduction Prevention of divergence - international harmonisation

- Divergence of national developments in the field of export controls can impair effectiveness
- This is also true for a brokering control regime
- Germany therefore aims for harmonised steps; dual system of core and optional elements may ease international agreement:
 - Common core elements should contain all essential points that prevailing opinion considers necessary for effective and adequate regulation
 - Elements that go beyond this are deemed optional; it is up to each concerned state to examine appropriateness for integration into national law

Brokering - Germany's point of view - Introduction

Core activities and optional elements

- Certain “Minimum Standards” are indispensable for an effective, harmonised international practise
 - “Core activities” should be controlled as a rule in any country
 - Further controls are rather optional and have to be assessed on a national basis

Brokering - Germany's point of view

Guidelines

- So far rather introductory remarks
- Further guidelines on structural elements shall illustrate the conception

Brokering - Germany's point of view - Guidelines **Relation to export controls**

- Principle of priority of export controls:
 - In the case of an export transaction, a state applies its export controls ...
 - while Brokering controls apply only to transactions in foreign states
(*“from one third country to another”*)

Brokering - Germany's point of view - Guidelines

Definition of the term “brokering”- core activities

- The term “brokering” covers:
 - **Acquisition** of goods located in one third country for the purpose of transfer to another third country (*trade*)
 - **Mediation** between sellers and buyers of goods to facilitate the transfer of these weapons from one third country to another
 - **Indication** of the opportunity for such a transaction to the seller or buyer

Note: The standards for the procedure of brokering licensing should be the same as those applied in the procedures of export control licensing

Brokering - Germany's point of view - Guidelines
Definition of the term “brokering”- optional elements

- Further control options exist particularly for:
 - the arrangement of technical services
 - the arrangement of transportation services

Brokering - Germany's point of view - Guidelines Definition of the term “brokering”- negative list

- The term “brokering” does not cover:
 - transfer within one and the same country
 - acquisition of goods for the purpose of permanent own use
 - manufacture of goods
 - the provision of
 - technical services (note: there might be other restrictions)
 - transportation services (note: see above)
 - financial services
 - insurance services
 - advertising services

Brokering - Germany's point of view - Guidelines
Licensing requirement for brokering- just an example

- **Germanys War Weapons Control Act**

Section 4a - Foreign Transactions:

- (1) Anyone who intends to broker a contract on the acquisition or transfer of war weapons located outside federal territory or to indicate that an opportunity exists for concluding such a contract shall require a license
- (2) Anyone who intends to conclude a contract on the transfer of war weapons located outside federal territory shall also require a license
- (3) Paragraphs (1) and (2) above shall not apply if the war weapons are to be imported into or transported through federal territory in the execution of the contract

Brokering - Germany's point of view - Guidelines
Definition of the term "broker" - dispensable

- The term "broker" can be defined as follows:
 - The natural person or legal entity that carries out a brokering activity
 - *Note: Provided that brokering activities are sufficiently clearly defined, an explicit definition of the term "broker" might be dispensable*

Brokering - Germany's point of view - Guidelines
Scope of goods to be covered by brokering controls

- Desirable for the military goods; “WA Munitions List” may serve as a common source
- At least the following goods should be covered:
 - “Small Arms and Light Weapons” - OSCE process
 - War weapons - according to UN register and similar war related weapons
 - Military goods being relevant for (combat against) terrorism

Brokering - Germany's point of view - Guidelines

Matter of territoriality

- Definitions of controlled activities apply on own national territory as a matter of principle
 - Ensures indispensable congruity of control systems
 - Irrespective of nationality or permanent residence
 - Even little activities as a telephone call in the transit area of an airport are falling under scope of control
- An extension of brokering controls to apply extraterritoriality is desirable for certain groups of cases, such as activities carried out abroad by nationals and permanent residents, or in situations of implementation of international arms embargoes

Brokering - Germany's point of view - Guidelines
Licensing criteria

- International criteria and commitments governing export controls should apply similarly to license applications in the area of brokering as well

Brokering - Germany's point of view - Guidelines
Licensing procedure

- As a matter of principle, the standards for the procedure of brokering licensing should be the same as those applied in the procedures of export control licensing

Brokering - Germany's point of view - Guidelines
Registration and screening

- The reliability of the applicant and the parties to the contract must be checked prior to the issue of the license
- A registration procedure prior to the licensing procedure appears sensible in this context but not imperative

Brokering - Germany's point of view - Guidelines
Criminal law

- Effective and credible enforcement requires the introduction of sufficiently severe criminal penalties violations
- These should, where relevant, apply to acts of nationals and/or permanent residents carried out in foreign states

Brokering - Germany's point of view - Guidelines **International co-operation**

- International co-operation in the field of export controls must be broadened to cover the area of brokering
 - Close co-operation between intelligence services to support extraterritorial jurisdiction
 - Pre-licensing information exchange
 - Statistics on flow of goods, particularly to countries of concern
 - Denial notification system
 - Consultation between concerned states
- Once again “brokering” can capitalise on the substance of export control systems

Brokering - Germany's point of view - Guidelines

International development

- **OSCE:**

- German-Norwegian draft chapter for Best Practise Guide on SALW in all its aspects presumable before adoption

- **COARM (EU - Code of Conduct):**

- Draft Council Common Position on Arms Brokering - presumable just before adoption;

- **WA:**

- Draft aiming to be approved as Best Practise Guideline

- **OSCE, COARM, WA process:**

- Main points in line with principles mentioned here

- **Further fora:**

- UN Program of Action on SALW; UN protocol against illicit manufacturing of and trafficking in firearms; (other) regional approaches, e.g. within the framework of SADC, ECOWAS, OAS

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German contribution to process of “brokering”

*Thank you for your kind
attention
and for your patience ...*

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