

## ASSESSING THE PERMISSIBILITY OF EXPORTS – OPTIONS AND OWN RESPONSIBILITY

This year, the thematic chapter of this [\[Flemish\] Annual Report \[on Arms Trade 2020\]](#) deals with the following objective in the [Coalition Agreement of the Government of Flanders 2019-2024](#) and the [Policy Document 2019-2024. Foreign Policy and Development Cooperation](#) :

*“Flanders provides an ex ante ruling mechanism for export licenses for weapons and dual-use goods. Within the applicable standards, this increases legal certainty for the companies involved, reduces the administrative burden and speeds up the procedure, because when the export license is issued, only a check is required whether the ruling conditions are respected and the political situation in the country of destination has not changed significantly.”*

In light of this objective, in 2020, the Flanders Chancellery & Foreign Office made an analysis of: 1) the continued appropriateness of the instruments that are currently available to companies to obtain an indication of the permissibility of a particular transaction; 2) companies’ own responsibilities regarding transaction screening (and so-called “human rights due diligence” in general); and 3) the need and merit of adjusted or additional tools and of support in the exercise of due diligence. As part of this process, the Foreign Office also consulted representatives of the proposed target group, namely the [Belgian Security and Defence Industry](#) group (BSDI/Agora) and the [Flemish Aerospace Group](#) (FLAG). Based on the Foreign Office’s analysis and its consultations with the sector, a number of policy measures were subsequently proposed and validated by the Prime Minister in April 2021 and are currently being implemented by the Foreign Office.

All these aspects are discussed below, followed by an overview of the new policy measures.

### 1.1 EXISTING INSTRUMENTS AND CONSULTATIONS WITH THE SECTOR

The instruments that are currently available to companies to obtain an indication of the permissibility of a certain transaction are the preliminary advice, regulated in Article 9 of the Flemish Parliament Arms Trade Act, and the administrative practice of informal advice of the Strategic Goods Control Unit of the Foreign Office, which is based on a number of objective elements that are (mostly) found in sources that are publicly accessible.

The preliminary advice is in fact a kind of ex ante ruling mechanism. It is a positive or negative conclusion about a transaction and, in that sense, corresponded to the wishes expressed by the industry during the process leading to the adoption of the original Arms Trade Act in 2012. At that time, the industry envisaged a document that would include an indication of the possibility of export that could be presented in the context of defence procurement processes, commercial negotiations and R&D. Although a positive preliminary advice is not legally binding, nor a legal promise to grant a licence, the recipient of a positive preliminary advice may have the reasonable expectation that the assessment of a subsequent licence application will have the same outcome. In that regard, the same conditions apply as those that would apply to a “legally binding” ruling: 1) the details of the license application are essentially identical to those of the preliminary advice; and 2) since the positive preliminary advice, no circumstances have occurred in the countries of destination and end-use that could have a significant effect on the assessment of the license application under the criteria of the Flemish Parliament Arms Trade Act. In that sense, the preliminary advice offers the same legal certainty.

The consultations with the sector revealed that there were several misunderstandings about the value of the preliminary advice with a view to obtaining the actual licence. The same applies to other aspects, including the information to be submitted to get a preliminary advice, when an

application can be submitted, and the processing time of both preliminary advice and subsequent licence applications. This lack of clarity called for further awareness-raising (see below).

The informal advice of the Strategic Goods Control Unit is currently a limited administrative practice in which the Strategic Goods Control Unit provides a number of objective elements that are (mostly) available in public sources. These elements include whether or not restrictive measures are applicable to the countries of destination and end-use, whether or not licenses have been granted for the country of destination and end-use in the last three years, whether or not there are denials for the countries of destination and end-use in the last three years and whether or not the end user is involved in an armed conflict. Contrary to the preliminary advice, the informal advice hence does not involve a full-fledged risk assessment – that takes time – and consequently does not entail a conclusion about the transaction. Companies are therefore exclusively responsible for the actions they take on the basis of the communicated objective elements.

Consultations with the sector revealed that this type of informal advice more or less corresponded to the main wishes of companies. Above all, the sector wants – in addition to the regular procedure for preliminary advice – a fast, indicative and non-binding procedure that allows companies to make an immediate decision (within the day) whether or not to start certain sales and/or marketing activities when tenders are published. Based on that input, it was decided to provide a simple policy framework for such advice (see below).

With regard to the aforementioned elements, the Strategic Goods Control Unit did make it very clear that since these concern *objective* elements that can mostly be verified in publicly available sources, companies also have their own responsibility and that the Unit has always urged companies to make an initial assessment of the permissibility of a transaction themselves. This own responsibility is further explained below.

## 1.2 1.2 MANDATORY INTERNAL TRANSACTION SCREENING AS PART OF HUMAN RIGHTS DUE DILIGENCE OBLIGATIONS

### 1.2.1 Framework

Transaction screening by exporters of strategic goods is an important focal point in export control, but due to the potential impact of strategic goods on human rights, this also aligns with the obligation of companies to exercise human rights due diligence in their marketing and in all phases of their (business) relationship with (potential) customers.<sup>1</sup> In that regard, companies have an autonomous responsibility to respect human rights, independent of the obligations and responsibilities of the State. In the case of exporters of strategic goods, this means that they are jointly responsible for preventing misuse of their products, regardless of their compliance with export control regulations and regardless of the decisions of the State to grant export licenses. As the transaction screening element demonstrates, corporate human rights due diligence obligations do partially interact with export control obligations and can therefore also be partially enforced within the export control framework. It was therefore considered important to clarify the concrete due diligence responsibilities and expectations and their link with export control obligations, not

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<sup>1</sup> As formulated in the [UN Guiding Principles on Business and Human Rights](#), adopted by the UN Human Rights Council on 16 June 2011 with [Resolution 17/4](#). See also other instruments and assistance documents, such as the '[OECD Guidelines for Multinational Enterprises](#)', the '[OECD Due Diligence Guide to Corporate Social Responsibility](#)', the European Commission's '[Guide to Human Rights for Small and Medium-sized Enterprises](#)', the '[National Action Plan for Enterprises and Human Rights](#)' and the '[Toolbox Human Rights for business and organizations](#)'. Finally, see also the ongoing initiatives on a legally binding instrument in the UN Human Rights Council ([IGWG on TNCs](#)) and the European Commission (cf. [study](#)).

only concerning transaction screening, but concerning all phases of the business relationship. In doing so, it should be clear that due diligence is a duty of care that companies must comply with to the best of their ability, regardless of their size. In that regard, demonstrated due diligence entails that the aforementioned responsibility does not necessarily have to lead to liability if exported products are nevertheless misused.

### **1.2.2 Concrete responsibilities and expectations**

As mentioned, the prime example of the interaction between due diligence obligations and export control obligations concerns the primary subject of this thematic chapter, the assessment of the permissibility of a transaction. After all, human rights due diligence also requires that a company screens potential customers itself, and, in doing so, makes an assessment of the possible misuse of its goods and makes this part of its decision-making process. As mentioned earlier, this means that, as a minimum, companies need to verify the *publicly available elements* that were listed above (as the basis for the so-called “informal advice” of the Strategic Goods Control Unit). In addition, companies must also generally take into account the export criteria of the Arms Trade Act in their own assessment of a potential transaction. In order to better support companies in doing this, it was decided that the Strategic Goods Control Unit will provide guidelines for such risk assessment (see below).

Due diligence obligations do go further than just transaction screening however, as does the interdependence with companies’ export control obligations.

First and foremost, companies need to make their awareness of the impact of their goods on human rights and their own responsibility explicit, as is the case with export control obligations. This applies to their “mission statement” (policy statement), “code of conduct” or a comparable document. Logically, this also requires the involvement of senior management and making staff members responsible and accountable, especially those involved in marketing and sales.

The commitments included in the mission statement must then be further elaborated in the internal processes of companies. Given the interdependence with export control, for the relevant elements this is perfectly possible in the internal compliance programme (“ICP”) that is so important for export control purposes. That is why the Strategic Goods Control Unit will pay attention to this in its ICP guidelines (see below).

The necessary attention to transaction screening in the pre-contractual phase was discussed earlier. With regard to the contractual phase, companies should consider including a human rights clause in contracts, including consequences in case of non-compliance. During this phase, companies’ due diligence obligations also interact with export control obligations. According to the Flemish Parliament Arms Trade Act, during the licensing process companies must provide all information about the intended end user and the intended end use (article 19, §1 and 24, §1). This is an active obligation; company must actively query the recipient and the end user about it. Taking into account their due diligence obligations, this goes beyond simply describing the end-user and the end-use *as such*. Companies must also share all available information about the end-user’s record that may have an impact on the assessment of the license application under the criteria in Articles 26 and 28 of the Flemish Parliament Arms Trade Act. Also in the post-delivery phase, companies’ due diligence obligations interact with their export control obligations. As a general rule, companies are required to follow-up on their transactions. In this regard, the Flemish Parliament Arms Trade Act contains the general obligation to provide the Strategic Goods Control Unit with all the information the licence holder obtains during the validity period of the license about a change in purpose or intended use, or about the re-export of the goods (Article 19, §4, and 24, § 5). The due diligence obligation goes a bit further: if a company suspects misuse of its goods, it needs to report this information to the Unit, regardless of the

validity of the licence and, more importantly, it needs to take steps to address the situation, *independently* of any action that the Unit and its partner agencies might undertake, such as the suspension of licences. In doing so, companies must make use, to the extent possible, of the leverage that their business relationship with their client provides, including the relevant contractual provisions referred to above. The actions of a company in such situations will be crucial in assessing a company's due diligence *and* its potential liability. With a view to their ICP, it is therefore essential that companies include these information obligations towards the Unit and their possible measures in such situations in their internal procedures concerning follow-up of transactions and reporting to the Unit.

### **1.3 WAY FORWARD: FOUR POLICY MEASURES**

Based on the analysis of the Foreign Office and its consultations with the sector, it was ultimately considered neither necessary nor desirable to provide a new legal instrument to achieve the goal behind the objective of an ex ante ruling mechanism in the coalition agreement and the policy memorandum. It was, however considered useful to take four policy measures:

- 1) making companies more aware of the possibility of a formal preliminary advice;
- 2) establishing a minimal and transparent policy framework for the current "informal advice" of the Strategic Goods Control Unit;
- 3) organizing (semi-)annual bilateral consultations with the largest exporters of strategic goods about their prospected markets and marketing plans; and
- 4) focusing even more on making companies more responsible and accountable.

#### **1.3.1 Raising awareness about the preliminary advice**

As indicated above, there are quite a few misunderstandings about various aspects of the preliminary advice, especially concerning the information to be submitted, the timing of an application, the value of the advice with a view to obtaining an actual licence and the processing time for obtaining an opinion and the subsequent licence. Therefore, the Strategic Goods Control Unit will place more emphasis on this tool in its outreach and training courses as a way to get a clear judgment on a transaction at an early stage. This will happen via the Unit's website, in outreach events and in contacts with individual companies.

#### **1.3.2 Transparent framework for "informal advice": "indicative information"**

Earlier it was explained above how the Strategic Goods Control Unit answers informal questions about the permissibility of possible transactions in practice, using a number of objective elements. It was already noted that such 'informal advice' is closely in line with the objective in the policy memorandum and with the actual demand from the industry for the possibility of obtaining an indication about a transaction in a very short timeframe. For this reason, it was decided to connect a minimal, transparent framework to the existing practice of "informal advice", as a means to clarify to all stakeholders what the Strategic Goods Control Unit itself can provide to companies as advice. In order to make a clear distinction with the formal preliminary advice, provided in the Flemish Parliament Arms Trade Act and to emphasize the nature of the instrument, this 'informal advice' will be referred to as 'indicative information'.

This "indicative information", which will be provided in a letter, will still *not* include an opinion or conclusion about the proposed transaction. The letter will provide a number of guiding objective elements, on the basis of which a company can decide under its own responsibility whether or not to take certain actions. It will also be provided to companies with the encouragement to make *prima facie* assessments of the permissibility of a transaction themselves, using the publicly available objective elements (see above and below).

The content of the minimal, transparent framework for “indicative information” will be simple. First, it will include a description of the nature and scope of “indicative information”, supplemented with simple instructions on how to obtain it, and an indication of the processing time. It will then contain a summary and description of the objective elements on the basis of which “indicative information” is provided. These will be in line with the aforementioned objective elements that are currently the basis of the practice of informal advice. Elements that imply a risk assessment, such as an assessment of the relevance of UN reports on the human rights situation in the country, are, in that respect, not objective elements and will therefore be excluded. For such an assessment – which takes time – the option of a comprehensive formal preliminary advice remains available. Companies then have three options; 1) an informal advice (over the phone); 2) objective indicative information (by letter); or 3) a preliminary advice.

### **1.3.3 (Bi-)annual consultations with largest exporters about prospected markets**

Consultations with the sector have shown that it would be useful to not only offer companies indications about concrete opportunities, but also about their broader marketing strategies, as theses often includes a focus on specific markets (countries or regions). For this reason, it was decided to give companies the opportunity to have an informal discussion with the Strategic Goods Control Unit about their proposed focus markets once or twice a year (which was inspired by a similar initiative in the Netherlands). To this end, the Unit itself will proactively contact companies that frequently apply for licenses with end-users in potentially sensitive countries.

### **1.3.4 Making companies more responsible and accountable**

In addition to providing and promoting the three aforementioned options to obtain an indication of the permissibility of a transaction, further efforts will be made to make companies more responsible and accountable. This applies especially to the transaction screening aspect, but also to the other aspects of human rights due diligence that interact with export control obligations. This will be done through awareness-raising, support and monitoring.

#### **1.3.4.1 Awareness-raising**

Above, the relevant human rights due diligence obligations of strategic goods exporting companies have been transposed in concrete responsibilities and expectations. With a view to raising awareness, the Strategic Goods Control Unit will integrate these, where possible and relevant, into its awareness-raising about export controls and the associated responsibilities. This will take place in bilateral discussions as well as in trainings provided by the Unit.

#### **1.3.4.2 Guidelines for risk assessment by companies**

To make sure that the abovementioned expectations can be met in an effective manner, it is clear that awareness-raising must be accompanied by adequate guidance and support, which also takes into account the nature and size of the companies involved. In that regard, reference has already been made to the guidelines for risk assessment that the Strategic Goods Control Unit will develop to support companies in comprehensive transaction screening. These guidelines will contain two parts.

The first part will contain an adaptation of the aforementioned transparent framework around “indicative information” into a tool for *prima facie* assessments by license applicants themselves. Concretely, this will be a summary of the *publicly available* objective elements that the Unit will use for “indicative information”, so that companies are empowered to make a *prima facie assessment of the permissibility* of a transaction themselves.

The second part of the guidelines will include a public version of a currently internal document of the Unit that provides a flow chart for the assessment of export applications under the assessment criteria of the Arms Trade Act. This flowchart basically translates the criteria into a string of questions that must be answered in order to assess the permissibility of an application. For companies, this flowchart will provide a clearer insight into all elements that play a role in the assessment of their licence applications, and which they must therefore also take into account when entering into a relationship with a customer and agreeing business transactions.

For clarity, these documents will only be made available as an aid for internal assessments by companies. It is absolutely not the intention that companies would submit their internal assessments to the Strategic Goods Control Unit for validation. An indication from the Unit is only possible in the form of the formal preliminary advice and the new instrument of “indicative information”.

#### *1.3.4.3 Embedding due diligence in ICP guidelines*

Earlier it was explained in detail how concrete human rights due diligence obligations interact with export control obligations and how the internal compliance programme of strategic goods exporters is a good instrument to also implement their due diligence obligations. The Strategic Goods Control Unit will therefore include the due diligence component in the relevant sections of its ICP assistance documents, in particular the ICP brochure. The Unit will also refer to the relevant instruments and assistance documents.