



Federal Office of Economics and Export Control

Information Leaflet on Trafficking and Brokering

BAFA

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Introduction

In 1978 Germany already introduced a licensing requirement for the brokering of war weapons based on section 4a War Weapons Control Act (KWKG). The Common Position 2003/468/CFSP of the European Union (EU) obliged all Member States to subject arms brokering to authorisation. In Germany it is implemented by the 75th regulation amending the Foreign Trade and Payments Regulation (AWV); the relevant provisions enter into force on 29th July 2006. The regulation relevant for war weapons under section 4a KWKG remains unaffected and is supplemented by the AWV provisions.

Sect. 4c no. 6 AWV contains the definition of the term trafficking and brokering. The actual authorisation requirements are included in sections 40 to 42 AWV. These licensing requirements apply to armaments (Part I Sect. A of the Export List) and to sensitive dual-use items in accordance with Annex IV of Regulation (EC) No. 1334/2000 (EC Dual Use Regulation). These new provisions replace the regulation referring to transit trade in the previous sect. 40 AWV, which dealt with similar facts and circumstances. The term transit trade transaction is, however, retained in the new sect. 4c no. 8 AWV because of its importance to certain reporting requirements (sect. 66 AWV).

The licensing requirement in accordance with sect. 40 to 42 AWV only applies to trafficking and brokering of goods that are located in a third country, i. e. a non-EU Member State, and are to be exported to another third country. Thus, the brokering of goods located in Germany or another EU MS is not subject to control.

This Leaflet wants to inform about the new authorisation requirements and to provide assistance for the companies' internal export controls.

After an introduction the Leaflet explains the term trafficking and brokering and then it deals with the legal requirements as defined by sect. 40 ff. AWV. This is followed by statements on simplified procedures, fines and penal provisions. Furthermore there are some general hints on contact persons and how to file applications.

The Information Leaflet explains the existing legal situation after the entry into force of the trafficking and brokering provisions on 29 July 2006. It does not claim to be complete. The content of the Leaflet is subject to a differing interpretation by courts and criminal prosecution authorities and is not legally binding.

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I. Introduction

The control on trafficking and brokering plays an increasing role in today's export control systems. The reason is that trafficking and brokering become more and more important in illicit arms trade. The new licensing requirements for trafficking and brokering supplement the export controls in place.

The Council Common Position 2003/468/CFSP of 23 June 2003 on the control of arms brokering is the basis for establishing harmonised European-wide controls on arms brokering activities.

The objective of the Common Position - which is legally binding on all EU Member States - is to control arms brokering in order to avoid circumvention of UN, EU or OSCE embargoes on arms exports, as well as of the criteria set out in the European Union Code of Conduct on Arms Exports.

The mandatory elements of the Common Position include that a licence must be obtained in the Member State where the brokering activities take place. This obligation is supplemented by Art. 6 of the Common Position according to which adequate sanctions shall be established in order to ensure that arms brokering controls are effectively enforced.

These legal requirements were implemented in German law by the 75th regulation amending the Foreign Trade and Payments Regulation. The provision referring to trafficking and brokering enters into force on 29th July 2006.

The introduction of licensing requirements for trafficking and brokering in the new sect. 40 ff. AWV could replace the previous provision on transit trade in the former sect. 40 AWV which dealt with similar facts and circumstances.

In order to meet the justified needs of industry and business, simplified procedures, i. e. a **General Licence** and a **Global Licence** are envisaged (see V. below).

II. Definition of trafficking and brokering

1. The term trafficking and brokering

The definition in sect. 4c no. 6 AWV explains the meaning of trafficking and brokering. The term includes several types of business developments and the actual conclusion of contracts, in particular:

- the brokering of a contract on the acquisition or disposal of goods,
- the proof of an opportunity to conclude such a contract (on the acquisition or disposal of goods), or
- the conclusion of a contract on the disposal of goods.

These three alternatives correspond to the groups of cases set out in sect. 4a War Weapons Control Act (KWKG); so for details of these types reference is made to sect. 4a KWKG. For a first overview the following aspects are underlined:

- The term "**contract**" includes all agreements regarding the acquisition or disposal of goods. Therefore it is not necessary to sign a sales agreement. Moreover, hiring, borrowing and safekeeping contracts fall within the term of trafficking and brokering like letting, leasing or service contracts. The decisive point is the content of the contract which must focus on the acquisition or disposal of an item.

Example:

Company A signs a leasing contract with company B and hands over the specific item to company B. Since the delivery for the purpose of leasing is a part of the agreement, the leasing contract is a trafficking and brokering transaction as defined above.

It does not matter in which way or form the contract comes about; even oral contracts are sufficient. Nor does it play any role if the two contracting parties are aware of having concluded a contract or not.

Example:

Company A hands over goods situated in a free warehouse to its subsidiary company in a third country. This delivery implies simultaneously that a silent agreement on the delivery was concluded. It plays no role for the legal assessment whether the two contracting parties are aware of it or not.

- The **brokering of a contract** presupposes that contacts have been established with the two potential contracting parties in order to make them conclude the contract or (at least) to raise their readiness to do so.
- The case **proof of an opportunity to conclude a contract** applies if the person who intends to conclude the contract is informed about the name of another person who is possibly willing to do so. As a rule, the person must be identified so that the other person who was given the name can get in touch. It is not necessary to name responsible persons within a company.

Example:

Company A is requested by company B to name a potential customer and states that company C would be interested. This does meet the above conditions. It is not necessary to name a contact partner at company C.

The proof of an opportunity to conclude a contract also presupposes that a potential customer is named. Sending a list of customers with all the names of persons who might be interested is, thus, not sufficient.

- The type **conclusion of a contract on the disposal of items** applies if a contract is concluded as defined above.
Please note that - in contrast to the former transit trade transaction (see no. 2 below) - it does not matter whether the goods were acquired before or not. The only decisive point is that those goods were handed over to another person under this contract.

Example:

Company A has a subsidiary company in Mexico where certain goods are produced. These goods are sold by company A to a customer in Brazil. In this case, the conditions of a trafficking and brokering transaction are fulfilled.

Trafficking and brokering does not automatically imply that they are subject to licensing. Take for instance a contract on the delivery of goods where the goods are to be exported from Germany to another EU country. This is in fact a trafficking and brokering transaction as defined above, but that arrangement does not require a licence. In such a case, the relevant export licence requirements must be taken into account as before.

2. The difference to the former term transit trade transaction

Prior to the amendment the AWV only contained the term transit trade transaction which was defined in sect. 4c no. 8 AWV before.

The difference between transit trade transaction and brokering is, first and foremost, that the alternative actions of brokering, or proof of or conclusion of a contract were previously not subject to licensing.

Another difference of trafficking and brokering is that no purchase of goods and their subsequent resale is necessary. For trafficking and brokering it is sufficient that the goods are resold or handed over to other persons.

Example:

A transit trade transaction is when company A wants to acquire certain goods in a third country and to sell them to another third country. However, a trafficking and brokering transaction is assumed if the goods are sold to another third country independently of whether they were purchased before or not.

This example shows that any transit trade transaction is at the same time also a brokering transaction. However, this does not mean that you have to apply for two licences for a transit trade transaction. The previous licensing requirement for transit trade transactions was cancelled and substituted by the new authorisation for trafficking and brokering.

The term transit trade transaction is maintained in the new sect. 4c no. 8 AWV because it is still important for certain reporting requirements (sect. 66 AWV).

III. Which trafficking and brokering transactions require a licence?

1. General overview

Licences are required for the trafficking and brokering of goods that are located in a third country - i. e. a non-EU state - and are to be exported to another third country.

These authorisation requirements for trafficking and brokering are laid down in sections 40 to 42 AWV. The three provisions make a distinction as to the type of goods and the location where trafficking and brokering take place:

- **Licensing requirement under sect. 40 AWV:** goods in Part I Section A of Export List
- **Licensing requirement under sect. 41 AWV:** items of Annex IV EC Dual-Use Reg.
- **Licensing requirement under sect. 42 AWV:** trafficking and brokering takes place in a third country

2. Licensing requirements under sect. 40, 41 AWV (goods in Part I Section A of Export Control List and Annex IV of EC Dual-Use Regulation)

The licensing requirements under sect. 40, 41 AWV mainly differ in the type of goods controlled; for the purpose of this Information Leaflet both licensing requirements may be explained in the same way.

Both provisions require that a **trafficking and brokering transaction** as defined by sect. 4c no. 6 AWV takes place. More details are given in section II of this Leaflet.

Other pre-requisites of both licensing requirements are that the goods subject to the contract **are located in a third country and are to be exported to another third country.**

On a par is the case where the goods are situated in the economic territory or in the Community but have not yet been subjected to import clearance (in transit).

Thus, an essential condition of the licensing requirement is that the goods subject to the brokering transaction are exported from one third country to another third country. In accordance with sect. 4 para. 1 no. 4 Foreign Trade and Payments Act (AWG) third country is any territory outside the Community, i. e. the customs territory of the European Communities under Art. 3 of the Customs Code (sect. 4 para. 1 no. 3 AWG).

Leaving the peculiarities of the customs law aside, third country means each state outside the EU. But a licence is only necessary if the item is exported from one third country to another third country. If no border is crossed or if the item is exported from Germany or the EU customs territory, an authorisation is not required under sect. 40 to 42 AWV.

Example:

Company A has a subsidiary in Mexico where certain goods are produced. These goods are sold by company A to a customer in Mexico. A licence is not required.

In this connection please note that the term "export" in sect. 40 ff. AWV is not used within the meaning of sect. 4 para. 2 no. 4 AWG. In this case the term "export" does not refer to an export from Germany but to an export from a third country.

When the licensing requirements were fixed no exemptions were envisaged for supplies within a group of affiliated companies. Because of the CFSP decision mentioned above the link between industrial groups could only be taken into account in the possibility of granting licences and simplified procedures.

Example:

Company A has a subsidiary company in Mexico and another one in Brazil. It orders the Mexican company to deliver goods controlled by Part I Section A of the Export List to the affiliated company in Brazil. In accordance with sect. 40 para. 1 AWV, this trafficking and brokering transaction is subject to licensing.

Another condition is that the goods are either controlled by **Part I Section A of the Export List** or by **Annex IV** of the EC Dual-Use Regulation.

Items that are exclusively covered by Annex I of the EC Dual-Use Regulation and goods neither controlled by the national export list nor by Annex I of the EC Dual-Use Regulation do not fall under sect. 40 ff. AWV.

3. Exemptions from the licensing requirement under sections 40, 41 AWV

Exemptions from the above-mentioned licensing requirements are contained in sect. 40 para. 2 and sect. 41 para. 2 AWV:

- Trafficking and brokering of goods specified in Part I Section A of the Export List do not require a licence in accordance with sect. 40 para. 2 AWV if the transaction is already subject to licensing under **sect. 4a KWKG**.
This is to avoid the filing of two licence applications for an identical brokering transaction although the licensing conditions are essentially the same.
- Trafficking and brokering of items listed in Annex IV of the EC Dual-Use Regulation do not require a licence under sect. 41 para. 2 AWV if the **purchasing country and country of destination** is mentioned **in Annex II Part 3 of this EC Regulation**.
These are the following countries: Australia, Canada, Japan, New Zealand, Norway, Switzerland and USA.

4. Licensing requirement under sect. 42 (trafficking and brokering takes place outside the economic territory)

The Common Position 2003/468/CFSP encourages the Member States to also extend the licensing requirement to brokering activities outside of their territory carried out by resident brokers of their nationality. Sect. 42 AWV takes this suggestion into consideration in contrast to sect. 4a KWKG which does not apply extraterritorially.

In addition to the above licensing requirements - presupposing activities in the economic territory - sect. 42 AWV stipulates licensing requirements under certain conditions even if the commercial and brokering activity is carried out by a resident German in a third country.

Sect. 42 AWV controls brokering transactions carried out by resident German nationals in third countries in connection with armaments which are located in third countries. Besides this the purchasing country or country of destination must be subject to an embargo as defined by Art. 4 para. 2 of Regulation (EC) No. 1334/2000, or listed on Country List K (Annex L), or the goods are dangerous small arms (see sect. 42 no. 2 AWV where the goods of the War Weapons List are mentioned).

In the case of sect. 42 AWV a licence is also required, but only if the other conditions of sect. 40 para. 1, 41 para. 1 AWV apply, i. e. there must be a brokering transaction resulting in the export of the goods from one third country to another one. In this case, too, goods in transit (located in the economic territory without having been subjected to import clearance) are equal to goods in third countries.

IV. The licensing procedure

The licence is granted by the Federal Office of Economics and Export Control (BAFA).

The licensing process is similar as the previous one for transit trade transactions under sect. 40 AWV (former version) as well as the licensing procedure in accordance with sect. 4a KWKG.

More specifically it means that a licence must be applied for trafficking and brokering. The application must include all the relevant information permitting BAFA to check the licensing conditions, in particular:

- a description of the goods with the export control list number
- technical documents permitting a classification of the goods (technical data, brochures etc.)
- enclosure of the available contractual papers and orders
- names of sellers and purchasers
- the purchasing country and country of destination as well as
- information on the end-use of the goods

The nomination of a person responsible for exports is presently not mandatory. The presentation of end-use certificates depends on the circumstances of the individual case and may not be finally assessed.

The granting of licences for trafficking and brokering on war weapons (sect. 4a KWKG) remains within the scope of KWKG. The Federal Ministry of Economics and Technology is responsible. An additional licence under AWG/AWV is not required.

V. Simplified procedures

Simplified procedures envisaged are the General Licence No. 20 as well as the possibility of applying for a company- and product-related global licence for trafficking and brokering transactions.

1. General Licence No. 20

The General Licence No. 20 may be used if the goods are listed in Part I Section A of the Export List and the purchasing country and country of destination is mentioned in Annex II Part 3 of Regulation (EC) No. 1334/2000. These countries are Australia, Canada, Japan, New Zealand, Norway, Switzerland and the USA. In these cases it is not necessary to present a licence application at BAFA. Further details referring to general licences are contained in the Information Leaflet "General Licences" published at our website (www.ausfuhrkontrolle.info), go to "Publications", "Information Leaflets".

According to sect. 41 para. 2 AWV no licence is required for commercial and brokering transactions in case of items listed in Annex IV of EC Regulation for the same group of countries. Therefore it is not necessary to submit a licence application for brokering activities to BAFA.

With regard to the General Licence No. 20 the following peculiarities are underlined:

- The General Licence is linked with **a registration**, i. e. the users of this licence must register with BAFA.
- The General Licence **does not** provide for a **reporting procedure**.
- Figure 5 (**permitted destinations**) does not mention the EU Member States because the licensing requirement only applies to goods traded or brokered from a third country to another third country, i. e. a state outside the EU.

2. Global licence for trafficking and brokering

The global licence is only intended for the brokering of contracts on the acquisition and disposal of goods specified in the licence between the companies and the consignees indicated in the licence. In addition, the licence permits the applicants to conclude their own contracts on the disposal of the mentioned goods with the consignees listed in the licence.

The global licence is a privileged procedure for reliable companies which are involved in a considerable volume of trafficking and brokering activities. The global licence is thus the suitable instrument for a company to undertake an indefinite number of company- and product-related brokering transactions between a company and the consignees mentioned in the licence (also to different destinations).

Such licences may be applied for at the Federal Office of Economics and Export Control (BAFA).

VIII. Sanctions in case of infringements

A violation of the licensing requirements described above may be punished with fines under sect. 70 AWV. Serious infringements are a criminal offence and may also be punished in accordance with sect. 33, 34 para. 2 AWG.

VII. Contact addresses

1. In case of basic questions referring to details of licensing requirements under sect. 40 to 42 AWV please contact BAFA 's division 211.
2. In case of questions about specific applications please contact division 213 of BAFA.
3. Licensing procedures under sect. 4a KWKG fall within the responsibility of the Federal Ministry of Economics and Technology (BMW) Division VB3.