

Regulating Military and Security Services in the EU: Existing and Future Controls

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Introduction¹

In recent years, there has been a growing disillusionment with the lack of national and international regulations of private military and security services. While the proliferation of the industry after the end of the Cold War has led to an increasing number of incidents with private soldiers accused of shooting at civilians on the streets of Baghdad,¹ torturing prisoners in Abu Ghraib,² trying to overthrow the government of Equatorial Guinea,³ training the Croatian army which committed human rights atrocities in the Krajina,⁴ and circumventing the arms embargo against Sierra Leone,⁵ only the United States and South Africa currently have separate laws concerning the export of private military and security services. Moreover, regional and international efforts such as the United Nations and African Union conventions on mercenaries have proven ineffective.

This chapter seeks to show that the extent to which private military and security services are currently controlled by national and international regulation, and the options for strengthening existing legislation have been very much underestimated. In particular, in Europe there has been an expansion of national and international regulations which also control some aspects of the provision and export of private military and security services since the mid-1990s. The emergence of European controls is particularly important because a growing section of the private military and security industry is not only based in Europe, but also employed by European governments in international interventions. Moreover, through the development of best practices and through the active promotion of European standards such as the European Union (EU) Code of Conduct within international organizations and allied nations, the EU is contributing to improving the global governance of the private military and security industry.

This chapter is divided into four parts. The first part seeks to explain why the role of the EU in the regulation of private military and security services has so far been neglected. The second part investigates the growing range of EU policies which seek to control the provision and export of military and security services. The third part examines how these have complemented and influenced national regulations among the member states. The fourth part identifies existing loopholes in the current legislation and what steps could be taken to address these. The chapter concludes by arguing that the approach of regional harmonization and

¹ This paper has been published in Alan Bryden and Marina Caparini (eds.) (2007) *Private Actors and Security Governance* (Münster: LIT), pp. 189-212.

strengthening of military service export controls embraced by the EU is likely to be supported by both governments and industry.

Security Governance: the EU and the Regulation of PSCs

One reason for the lack of attention paid to the EU with regard to the regulation of private military and security services has been the state-centric models with which many authors have approached the issue. Proceeding from Weber's imperative that the state should hold the monopoly on the legitimate use of force, the key question has been how the state can retain or regain control over the use of force by private military and security companies. An international regime on the control of private military force is believed to be highly unlikely in the light of the failures of the United Nations International Convention Against the Recruitment, Use, Financing and Training of Mercenaries 1989 and the Organization of African Unity (OAU) Convention for the Elimination of Mercenaries in Africa.⁶ However, in conflict regions or failing states, where private military contractors have increasingly been employed, state control is often weak and sometimes non-existent.

What this perspective underestimates is the positive role that exporting states in Europe and North America and their regional organizations can play in setting new standards for the regulation of private military and security services. Although it is correct that private security and military companies can evade stricter national and regional controls by moving abroad, experience with armaments companies shows that the standards and export regulations of exporting nations can significantly influence and improve the global level of governance of the defence sector. Moreover, since many defence export countries and regions are developed and democratic, they are much more capable of enforcing controls and standards than the underdeveloped or failing states which import military and security services.

The security governance approach helps to illustrate the range of actors who might be involved in regulating the sector. It suggests that centralized governmental control over the provision of security has been replaced by more fragmented modes of governance in which state and non-state actors, including private companies but also regional organizations such as the EU, NATO and the OSCE play a growing role.⁷ The differentiation of governance can be observed in seven dimensions: geography, function, resources, interests, norms, decision-making, and policy implementation. In each of these dimensions, exclusive governmental control is increasingly replaced by a multitude of actors, policies and regulations. In

geographical terms, governmental legal authority over citizens and companies competes or overlaps with that of regional regimes and private regulations. In functional terms, many regional security organizations have expanded their remit from defence and deterrence to conflict prevention and non-proliferation. Moreover, there can be a spillover effect from some dimensions to the others which can contribute to the transformation from centralised modes of government to fragmented ones.⁸ For instance, the fragmentation of resources and security expertise among state, private and international organizations has facilitated the inclusion of these actors in the security policy decision-making and policy implementation process.

The exponential growth in private security and military services can be understood as part of this shift from centralised 'government' to fragmented 'governance'.⁹ It is on the one hand a result of the differentiation of resources and expertise between the armed forces and private military and security companies, and on the other hand it is a factor which contributes to the further involvement of private companies in security policy-making and implementation.

However, the security governance approach also suggests the possibility of controlling private security contractors beyond the state. In particular, it argues that the state is not the sole actor capable or even responsible for the regulation of private military and security companies. In addition, there is scope for the self-regulation of private security firms and for a growing role of regional organizations in regulating the private use of force. Most importantly, the security governance approach argues that contemporary governance can proceed through sets of overlapping standards and regulations at multiple levels including the company, industry, state, region or globe which can be mutually reinforcing and frequently create their own dynamics contributing to tighter regulations.

Diverse standards, codes of practices and legislation can be observed across these levels. They include registering and licensing of companies providing private security and military services as well as the provision and export of these services themselves. The relevant companies include specialized military service firms, domestic private security and guarding companies, risk consultancies and armaments corporations; the services can range from combat, personal security and military training to security consulting, technical support for the operation and maintenance of military equipment, procurement, trafficking and brokering of military equipment, explosive ordnance disposal, logistical support for military operations and bases, intelligence collection and analysis, including the interrogation of military prisoners.¹⁰

Given the variety of companies and services that can be subsumed under the private

military and security service sector, different regulations, laws and standards apply to separate sections of the industry. In Europe, such laws and standards include national registration of companies, public and private training standards set by governments and industry associations, but also a growing number of national and regional EU-wide regulations on the export of specific military and security services.

Just as the differences between the mode of governance in different dimensions can lead to pressures for further transformation, the divergences and interactions between distinct regulatory approaches and standards in Europe have led to demands for greater harmonization. However, rather than limiting standards to the lowest common denominator, as has been the case in some environmental regulations¹¹, controls over the private military and security sector have been tightened and expanded.

The EU has been a key actor in this development because it has been at the centre of various overlapping sets of regulations – both in functional and geographical terms. Functionally, the EU's authority ranges from the regulation of the private security industry as part of the internal market to the potential control of the export of private military and military support services under its Common Foreign and Security Policy. Geographically, the EU influences the regulatory policies of its member states, but is also involved in representing its members at the United Nations and promoting common EU standards, such as the EU Code of Conduct on Arms Exports, worldwide.

However, while a system of multilevel governance in which overlapping national and regional regulations strengthen each other appears to have major advantages, there are also some disadvantages. The disadvantages include the complexity and inconsistency of the emerging controls which currently leave a number of legislative loopholes and which put a heavy administrative burden on regulators and private security providers. The following sections examine how these controls have evolved over the past decade before proceeding to discuss the potential for further improvements.

European Union regulations and policies

The European Union has played a critical role in promoting national and regional regulations on the provision of military and security services in its member states and their export to third countries.¹² Existing regulations include the EU Code of Conduct on Arms Exports and a range of Common Foreign and Security Policies, either in conjunction with the Code or

separately, which have created requirements for national laws or imposed limitations on the export of military services such as technical assistance related to weapons of mass destruction (WMDs) and to embargoed destinations, the brokering of arms, and the export of small arms and light weapons. In addition, the EU Court of Justice has formally established EU competence over the regulation of domestic security services under the first pillar.¹³ The following sections examine each policy in detail before turning to national legislation in the member states.

Code of Conduct on Arms Exports

The EU Code of Conduct on Armaments Exports emerged in June 1998 out of the Common Foreign and Security Policy, but through its institutionalization has taken an independent role in the promotion of stricter export controls for military equipment and services.¹⁴ The Code of Conduct was originally drawn up to set common standards for conventional arms transfers and to facilitate the exchange of information about arms exports among member states. The Code of Conduct further called for the circulation among the member states of confidential annual reports on their arms exports and the implementation of the Code, as well as for the production of a consolidated yearly report by the EU. The first report was published in November 1999.¹⁵ It was four pages long and observed the initial efforts to establish institutional channels of communication on arms transfers among the member states. Since then the details contained in each report and the scope of the Code have increased every year.¹⁶ While the fifth report of 2003 was 42 pages long and included lists of arms export volumes by destinations and exporting member states,¹⁷ the seventh report of 2005 contained no less than 288 pages specifying national exports by country, destination, type of equipment and value.¹⁸

Since all member states are required to produce annual national reports as the basis for the consolidated EU report, most members have decided to make their national data on armaments exports public. Today all but two of the twenty-five member states, i.e., Cyprus and Greece, publish their national reports online.¹⁹

The impact of the Code of Conduct has not only been to increase transparency concerning armaments exports from the EU, the Conventional Arms Exports Working Group (COARM) has played an important role in identifying additional areas which require regulation and in strengthening existing export controls. With regard to private military and security services, COARM has specifically contributed to EU regulation on the brokering of

arms. COARM first identified the issue of brokering as a problem in the annual report on the implementation of the Code in 2000. It wrote: "The member states intend to continue and deepen their discussions on the procedures for monitoring arms brokers' activities in order to incorporate this special topic – the importance of which has been recognised – into the process of convergence of the member states' control policies."²⁰ By 2001, member states had agreed on a set of guidelines for controlling brokering as the basis for national legislation.²¹ The result was the Council Common Position on the control of arms brokering, passed in June 2003, which has made binding the national regulation of brokering among the member states.²²

Armaments Brokering

The provision for the national regulation of armaments brokering are set out in Council Common Position 2003/468/CFSP of June 2003.²³ The Common Position formally requires member states to implement these guidelines in the form of national legislation. The stated objective of the Common Position 2003/468/CFSP 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 EU Code of Arms Exports". The Common Position mandates that "member states will take all necessary measures to control brokering activities taking place within their territory", but it also encourages member states "to consider controlling brokering activities outside their territory carried out by brokers of their nationality resident or established in their territory".²⁴

Technical Assistance Related to WMDs and Embargoed Destinations

Whereas Common Position 2003/468/CFSP emerged from deliberations within the context of the EU Code of Conduct, other defence export control issues are discussed under the general provisions of the EU's Common Foreign and Security Policy. Specifically, the Council agreed on the need to control technical assistance related to weapons of mass destruction.

The resulting EU Council Joint Action 2000/401 of 22 June 2000 has committed member states to the control of technical assistance related to certain military end-uses or destinations among the member states.²⁵ The proposed regulations concern technical assistance related to items "which are or may be intended for use in connection with weapons of mass destruction or missiles for delivery of such weapons."²⁶ Technical assistance as

defined by the EU Joint Action covers nearly the entire spectrum of private military and security services, albeit only with regard to WMDs, including "technical support related to repairs, development, manufacture, assembly, testing, maintenance, or any other technical service, and may take forms such as instruction, training, transmission of working knowledge or skills or consulting services."

The Joint Action also "encourages" member states to "consider the application of such controls also in cases where the technical assistance relates to military end-uses other than those referred to in Article 2 ... and is provided in countries of destination subject to an arms embargo." In sum, the Council suggests national legislation regarding the export of private military services related to chemical, biological or nuclear weapons as well as to any country subject to international arms sanctions.

EU Embargoes on Technical Services

While Joint Action 2000/401/CFSP suggests that EU member states should contemplate a national regulation of the export of technical assistance to embargoed destinations, the EU has also directly mandated the licensing or prohibition of technical service exports to certain countries in compliance with United Nations sanctions.

Following increasing awareness of the dangers of exporting military assistance and services to conflict regions by the United Nations and the inclusion of such services into UN sanctions since the mid-1990s, the EU Council has imposed collective EU regulations on technical assistance to a number of destinations.²⁷ In May 2006, nine individuals, groups and countries were subject to such export restrictions, including the Democratic Republic of Congo, Ivory Coast, Liberia, Myanmar/Burma, Somalia, Sudan, Osama bin Laden/Al-Qaida/Taliban, Uzbekistan and Zimbabwe.²⁸ Previously, similar embargoes had been imposed on Afghanistan,²⁹ Ethiopia and Eritrea,³⁰ Libya,³¹ Nigeria³² and the former Yugoslavia.³³

Importantly for the regulation of PSCs, the EU's definition of "technical services" in most of these embargoes subsumes all types of military, security and military support services. The definition is also considerably broader than those embraced in many of the national export legislations that emerged from Joint Action 2000/401/CFSP. In the case of the Democratic Republic of Congo, it includes a prohibition to "grant, sell, supply or transfer technical assistance, brokering services and other services related to military activities and to the provision, manufacture, maintenance and use of arms and related materiel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment,

and spare parts for the aforementioned."³⁴

Small Arms and Light Weapons

In addition, the EU has adopted common policies regarding the transfer of small arms and light weapons, which can be facilitated by the operations of PSCs in developing countries.³⁵ In 1998, the Council adopted Joint Action 1999/34/CFSP on the EU contribution to combating the destabilizing accumulation and spread of small arms and light weapons.³⁶ Amongst others, the Joint Action envisaged that the EU shall enhance efforts to build a consensus in international organizations such as the United Nations and the OSCE for restrictive arms export criteria as provided in the EU Code of Conduct. Moreover, the Joint Action proposes that member states "shall seek to increase the effectiveness of their national actions in the field of small arms."³⁷

In 2002, it was replaced by Joint Action 2002/589/CFSP which also included the export of ammunition for small arms and light weapons and expanded the list of measures sought to counter the spread of small arms.³⁸ In direct application of the Joint Actions, the Council passed two Decisions which offered the government of Cambodia assistance in the development of appropriate legislation for the possession, use and sale of small arms and ammunitions and for general disarmament measures.³⁹ Other projects directed at the finding, collection and destruction of small arms were agreed on with regard to Georgia/South Ossetia⁴⁰ and Mozambique (Operation Rachel).⁴¹

Private Security

Finally, the EU is beginning to exert its influence over the regulation of private security services among the member states. Specifically, the European Court of Justice has established the competence of the EU Commission in several rulings according to which private security counts as an "economic sector" and as such falls under the first pillar of regulation of the internal market.⁴² However, the movement towards common European regulations on private policing has so far been rather slow. A Spanish initiative concerning the establishment of a network of contact points of national authorities responsible for private security was rejected by the European Parliament for formal reasons.⁴³ Nevertheless, the committee of the European Parliament in charge of the issue was in favour of harmonizing member states' regulations of the private security sector and the Council adopted on 13 June 2002 a

recommendation regarding cooperation between the competent national authorities of member states responsible for the private security sector.⁴⁴ Further pressure for common European regulations is exerted by the Confederation of European Security Services (CoESS) and the trade union federation Uni-Europa which signed on 18 July 2003 a Code of Conduct for the private security sector. The sectoral social partners believe “that the rules governing their sector need to be harmonized across the EU.”⁴⁵

National Controls

The impact of EU policies on national legislation regarding private military and security services in the member states has been significant. Current national regulation applies to six types of military and security services in particular: technical assistance related to WMDs and embargoed countries, brokering, technical services related to controlled goods, military training and domestic security services. The first three sets of regulations are a direct consequence of the EU policies outlined above. The last three are the result of national policy priorities and export control traditions, specifically among the new member states in Central and Eastern Europe which used to have strict export controls and were recently required to develop new laws due to accession.⁴⁶ Since a detailed examination of the legislation in all twentyfive member states is beyond the scope of this chapter, the following sections discuss the scope and variance of regulation in each of the six areas.

Technical Assistance Related to WMDs and Embargoed Destinations

Since Joint Actions are legally binding for EU member states, Joint Action 2000/401/CFSP on the export of technical assistance related to WMDs has to be implemented in the form of national legislation by the member states. As of 2006, a majority of members have done so. They include Austria, the Czech Republic, Denmark, Estonia, Finland, Germany, Hungary, Italy, Lithuania, Poland, Slovakia, Slovenia, Spain, Sweden and the United Kingdom. However, slow legislative processes have delayed new legislation on technical assistance as well as embargoed destinations in a considerable number of countries. In particular, Belgium, Cyprus, France, Ireland, Luxemburg, Malta and the Netherlands have not yet implemented new laws.

While Joint Action 2000/401/CFSP requires member states to regulate the export of

technical assistance related to WMDs and missiles for their delivery, the form of regulation is left to the individual member states. Accordingly, national legislation within the EU varies considerably. Five countries, namely Austria, Denmark, Germany, Sweden and the United Kingdom, have prohibited the export of related technological assistance, whereas other member states request that exporters apply for a licence.

The variation is even greater with regard to technical assistance for embargoed destinations because Joint Action 2000/401/CFSP encourages, but does not demand, national legislation on the issue. Whereas Austria and Hungary prohibit the export of certain types of technical assistance to all countries under an arms embargo, others such as the Czech Republic, Estonia, Germany, Italy, Lithuania, Poland, Slovakia and Spain require export licences. Finally, Denmark, Sweden and the United Kingdom, have decided not to nationally regulate the export of technical assistance to countries subject to international sanctions, perhaps because prohibitions to export technical services are today already included in most United Nations and EU arms embargoes with which member states have to comply.

Brokering

Passed three years after Joint Action 2000/401/CFSP, Common Position 2003/468/CFSP on the brokering of arms has been implemented more widely among the member states, although not more consistently.⁴⁷ National licensing requirements exist in nineteen EU countries with the exceptions of Cyprus, Greece, Ireland, Italy, Luxemburg, and Portugal. However, the scope of the controls differs considerably among the member states. Some countries such as Austria and Denmark regulate brokering activities only when conducted from within their national territories; other countries such as Finland, Hungary and Slovakia control brokering also if citizens, permanent residents or registered businesses engage in brokering activities abroad. Some national laws are very complex and detailed; others are very general leaving much open to interpretation. In addition, several countries, including Hungary, Latvia, Lithuania, Malta, the Netherlands, Slovenia and Spain, have set up national registers for armaments brokers in which individuals or businesses planning to engage in future brokering activities have to be registered prior to applying for a licence, whereas most states require only individual export licences.

Technical Services Related to Controlled Goods

As a consequence of historically strict export controls and the necessity to revise national export legislation in compliance with EU accession in 2004, most Central and Eastern European countries have more extensive licensing requirements than the older EU member states. In particular accession has encouraged the new members to draft legislation which subjects the export of all types of military equipment and related services to licensing. The Czech Republic, Estonia, Hungary, Lithuania, Poland, Slovenia and Slovakia thus have comprehensive regulations which typically include the services provided in connection with controlled military equipment, such as development, design, production, adjustment, repair, maintenance and use, under the same licensing laws.

How strict national criteria are for granting a licence is, as in all the cases above, a separate question. In principle, the EU Code of Conduct lists eight criteria which member states have agreed to take into account when granting arms export licences:

1. "Respect of human rights in the country of final destination;
2. The internal situation of the country of final destination;
3. Preservation of regional peace, security and stability;
4. The national security of the Member States and of territories whose external relations are the responsibility of a Member State, as well as that of friendly and allied countries;
5. The buyer country's behaviour with regard to the international community, in particular its attitude to terrorism, the nature of its alliances and respect for international law;
6. The existence of a risk that the equipment will be diverted within the buyer country or re-exported under undesirable conditions;
7. The compatibility of the arms exports with the technical and economic capacity of the recipient country."

Military Training

Due to the explicit linkage of services to controlled military equipment in EU Joint Action 2000/401/CFSP, few member states regulate the export of military training beyond that in the use of military technology. Thus, the Czech Republic, Hungary and Italy demand licences for the export of all training related to the "use" or "handling" of military equipment; and Estonia and Poland regulate the export of training and consulting services related to military goods including "technical support related to the development, manufacture, assembly, testing, repairs, transport or maintenance of military goods, or any other relevant service."⁴⁸ Only

Sweden has a separate stipulation on the licensing of all "training with a military purpose."⁴⁹

Private Policing

Whereas the preceding sections have focused on the export of certain types of military and security services, a large body of national legislation applies to the provision of security services within the territory of the member states. Although these regulations do not apply to the transfer of private security services overseas, it can be argued that companies which have to meet certain standards nationally will to some degree export them when operating abroad. An overview of national legislation on private security services among the twenty-five EU member states has been produced by CoESS.⁵⁰ It shows that from the 1990s nearly all European countries have stepped up their control of domestic private security and policing services.

The prime mechanisms regulating private security and military services in the EU member states are the national registration and licensing of security companies and their personnel.⁵¹ The conditions for a licence, which on average needs to be renewed every five years, vary among the member states. However, all member states require a clear criminal record among management and personnel. Additional conditions include sufficient liability insurance, identification cards with name and photo, and approved uniforms which are not easily confused with those of the police or armed forces.⁵²

About 60 percent of the EU member states mandate specific training of private security personnel and the passing of an examination.⁵³ Training can range from basic instruction of between 32 (France) and 300 hours (Poland) to complementary and follow-up training, including for the protection of persons, the transport of valuables and the use of firearms. With the exception of Denmark, France, the Netherlands and the UK, most member states allow for the carrying of firearms by security personnel with a special permit. Nevertheless, many states limit and request registration of the type and number of weapons concerned, and most mandate that after hour storage has to be in special facilities.⁵⁴

General Level of Controls

Although the extent to which EU member states are controlling the provision or export of private military and security services is larger than commonly recognized, few countries go beyond the requirements currently set by the EU Code of Conduct and the Common Policies

and Joint Actions outlined in the first part of this chapter. As summarised in Table 1, the main European arms exporting states, such as the UK, France, Germany and Italy, do not have the most extensive controls. In fact, the largest exporter of military and security services, the UK, is one of the member states with the least restrictive export regulations. Although the UK has implemented all new EU regulations, it has only done so to the required minimum. Other large defence exporters, such as France and Italy, are still in the process of implementing the new EU export control policies with regard to technical assistance or brokering in national laws.

Among the medium-sized arms exporters, Sweden stands out as the member states with the strictest controls, whereas the regulations of Austria and Spain are merely average. The states with the most restrictive armaments and military service export regulations can be found among the new members, including Poland, Hungary, Lithuania, Estonia, Slovakia, Slovenia and the Czech Republic. Ironically, these countries have been more likely to be importers than exporters of private military and security services.⁵⁵

Table 1: Military Service Export Controls in the EU

| Country | Technical assistance - WMDs & Missiles | Technical assistance - Embargoed destinations | Brokering | Technical services related to controlled goods | Military Training |
|------------------------------|--|---|-----------|--|-------------------|
| Austria ⁵⁶ | prohibited or licensed | prohibited or licensed | licensed | - | - |
| Belgium ⁵⁷ | - | prohibited or licensed | licensed | - | - |
| Cyprus ⁵⁸ | - | - | - | - | - |
| Czech Republic ⁵⁹ | licensed | licensed | licensed | licensed | - |
| Denmark ⁶⁰ | prohibited | - | licensed | - | - |
| Estonia ⁶¹ | licensed | licensed | licensed | licensed | licensed |
| Finland ⁶² | prohibited | - | licensed | - | - |
| France ⁶³ | prohibited (chemical weapons) | - | licensed | - | - |
| Germany ⁶⁴ | prohibited | licensed | licensed | - | - |
| Greece ⁶⁵ | - | - | - | - | - |
| Hungary ⁶⁶ | licensed | prohibited | licensed | licensed | licensed |
| Ireland ⁶⁷ | - | - | - | - | - |
| Italy ⁶⁸ | licensed | licensed | - | - | licensed |
| Latvia ⁶⁹ | licensed | licensed | licensed | licensed | - |
| Lithuania ⁷⁰ | licensed | licensed | licensed | licensed | - |
| Luxemburg ⁷¹ | - | - | - | - | - |
| Malta ⁷² | - | - | licensed | - | - |
| Netherlands ⁷³ | licensed | licensed | licensed | licensed | - |
| Poland ⁷⁴ | licensed | licensed | licensed | licensed | licensed |
| Portugal ⁷⁵ | ? | ? | - | ? | ? |
| Slovakia ⁷⁶ | licensed | licensed | licensed | licensed | - |
| Slovenia ⁷⁷ | licensed | licensed | licensed | licensed | - |
| Spain ⁷⁸ | licensed | licensed | licensed | - | - |
| Sweden ⁷⁹ | prohibited | - | licensed | - | licensed |
| United Kingdom ⁸⁰ | prohibited | - | licensed | - | - |

Loopholes and Options for Future Regulation

The preceding analysis has illustrated the range of regulative measures which control the domestic provision and international export of private military and security services in Europe. Although some organizations such as Amnesty International find reasons to criticise the implementation of existing armaments export legislation in Europe,⁸¹ it demonstrates that the member states of the EU are recognizing the importance of regulating not only the export of military equipment, but also of related services. In addition, the central place of the EU within the evolving security governance structures in Europe and pressures for the harmonization of various standards and legislations have contributed to the strengthening of controls. Since the new regulations on the control of technical assistance and brokering have only recently come into force and only in some member states, it is too early to attempt an assessment of the effectiveness of these controls and their implementation. Instead, this section will discuss the remaining gaps in the current legislation and how the EU might address them.

Gaps in Current Legislation

As has been argued in the second part of this chapter, the private military and security industry includes a broad variety of providers and services. They range from armaments corporations to security guards; and from combat and armed site protection to risk consulting and military training. The preceding sections have shown that only a limited section of these providers and services are subject to specific legislation. As a result, control over the provision and export of private military and security services in the EU has two major gaps.

The first gap in the current controls concerns the application of national licensing and training standards to companies and individuals who are registered in one of the member states, but who are providing their services in other member states or outside the EU. With regard to the former, the EU Court of Justice has ruled that, in the absence of common EU regulations, member states have to recognize the national standards of other EU countries even if these are lower than their national licensing requirements. Since the majority of security companies rely on local and national expertise and reputation for their success, the danger of companies circumventing tight controls by moving to those member states with the least controls has been limited. Although there is an increasing transnationalization of larger

companies, most work through national subsidiaries, which operate under national laws. For instance, the world's second largest private security company, G4S which was formed in 2004 by a merger between Group 4 Falck and Securicor, operates globally through a network of subsidiaries registered in over one hundred countries.

Nevertheless, there has been increasing pressure for a harmonization of national legislation under the authority of the EU, including from security industry associations such as CoESS. The industry contends that the current differences not only give companies registered in member states with low standards a competitive advantage, they also make it difficult for security firms to supply transnational security services such as transport security for the integrated market of the EU.

With regard to the operation of security companies outside the EU, there has so far been no attempt to enforce national licensing and training standards. Although Finland, Hungary and Slovakia have set a precedent for the extraneous application of national regulations in the case of arms brokering, most EU member states are reluctant to take responsibility for the foreign operations of national companies or citizens. The main argument against such legislation is that states do not have the resources to monitor the compliance with national standards abroad.

A second gap regards the export of military and security services that are not directly linked to military equipment. Unfortunately, these services make up a major proportion of the private military and security sector. They include armed combat, personnel and site protection, transport security, strategic and tactical military training, risk analysis, intelligence gathering and contingency planning. Even the prohibitions of technical military assistance and services to embargoed destinations under the EU's Common Foreign and Security Policy rarely subsume these services. Nevertheless, experience in the Balkans, Afghanistan and Africa has demonstrated that the provision of strategic and tactical assistance can be as decisive for the outcome of a conflict as the export of missiles and tanks. Although embargoed destinations are obviously the main areas of concern with regard to the supply of non-technical military assistance, the long-term impact of military training in particular should be taken into account when permitting their export to non-democratic regimes.

Policy Options

Several policies suggest themselves to address these gaps and simplify the regulation of the private security industry within the EU. With regard to the national registration and licensing

of companies and individuals, considerable progress towards the harmonization of national laws within the EU has been made by the ruling of the EU Court of Justice that security services are part of the common internal market. As a consequence, the Commission has the technical authority over the sector under the first pillar. While the EU Council decided to exclude private security services from the Commission's proposed draft directive on services in the internal market which is likely to come into force in 2006, it tasked the Commission with presenting a separate proposal for the harmonization of regulations concerning private security services within a year after the implementation of the directive.⁸²

The most effective solution would be a proposal for common basic standards for the registration and licensing of private security providers, including vetting, training, safekeeping of weapons and license renewal. Common EU standards could help to raise the level of regulation and lessen the administrative burden on both companies and member states. Moreover, common regulations would facilitate the spread of EU best practice among acceding and aspirant members such as Romania, Bulgaria, Croatia, Macedonia, Turkey, Albania, Bosnia-Herzegovina, Serbia and Montenegro, as well as countries trading with the EU.

Concerning the export of military and security services not related to military equipment, a number of complementary policies could be envisaged. Most effective would be an agreement within the EU Council on a CFSP Common Position comparable to that on brokering activities, which requires member states to implement national legislation controlling the export of military and security services. Such legislation should apply to all third countries and require the licensing of all service exports by the national authorities. Member states would decide what types of services should be controlled and what requirements should be made for an export license.

Alternatively or to complement the above, the EU Council could extend the application of the export control criteria endorsed in the EU Code of Conduct on Arms Exports to military and security services. Although the Code is less binding than a EU Common Position, it might serve as a first step towards the introduction of export controls on military and security services. Given the success of the Code's COARM working group in bringing about legislation on arms brokering, such including would facilitate broader awareness and discussion of the problems posed by unregulated service exports among the EU member states.

In addition, COARM would want to consider a common list of military and security services similar to the EU common list of military equipment established under the EU Code

of Conduct to encourage the harmonization of the military and security service export legislation among the member states.⁸³ The list would need to be reviewed regularly to take into account new developments in the sector and to establish best practice. In the case of further legislation, the EU Code of Conduct could also be used to facilitate the exchange of information regarding military and security service license denials through the same network that has been set up for notification on arms exports among the member states.

Finally, the EU's common regulations on the export of dual-use equipment, i.e. goods with civilian and military applications, could be extended to cover technical assistance related to these services. A 2005 study on the possible amendment of Council Regulation 1334/2000 on export control of dual use items and technologies initiated by the EU Commission has already investigated different options for controlling the illicit brokering of dual-use items to comply with UN Resolution 1540.⁸⁴

Conclusion

The aim of this chapter has been to illustrate the current extent and future possibilities of strengthening the national and international regulation of private military and security services in the EU and, thus, worldwide. It has demonstrated that private security companies are not only subject to extensive standards and regulations within the member states, but that the EU is also controlling the export of an increasing range of military and security services ranging from technical assistance to support for military activities in embargoed destinations.

What are the consequences of this analysis for the debate over the regulation of private military and security services? Most contemporary efforts to control the growing private military sector have aimed towards new, preferably global, regimes on mercenaries and private military and security firms. However, in order to function, these regimes not only need the support of a sufficient number of signatories, they also require a strong normative commitment in the absence of global monitoring mechanisms or effective sanctions. As a consequence, progress on a global regime for private military services has been limited.

This chapter suggests that there might be a faster and more effective way to improve the regulation of private military and security services. It has demonstrated that overlapping national and regional regulations, while not perfect, can create a dynamic by which a centrally placed actor such as the EU can exert pressure for harmonisation in favour of more comprehensive control mechanisms. This approach appeals to governments because common

controls are more cost efficient and easier to implement than national regulations by simplifying overlapping legislations. However, it is also supported by the industry because regional regulations eliminate competitive disadvantages.

It might be argued that the example of the EU is not directly transferable to other regional organizations because few have the central decision-making capacity and authority of the EU. Nevertheless, several arguments suggest that the evolution of military and security service regulations in Europe might still serve as a model. First, the EU Code of Conduct, Common Position 2003/468/CFSP and Joint Action 2000/401/CFSP were decided intergovernmentally and on the basis of a consensus among the member states. High levels of integration are thus not a precondition for common regulations. Second, the initial level and scope of EU export controls was limited. Rather than trying to achieve a maximum level of control immediately, member states agreed on a general framework in the form of the Code of Conduct which institutionalised cooperation and consultation on the issue of armaments export controls. While the original Code was only politically binding and very general in its stipulations, it was this institutional network which has created a permanent forum for the discussion, and implementation, of more extensive regulations. Finally, the EU through enlargement and as an international actor in organizations such as the United Nations seeks to increase the number of states which subscribe to the Code and related regulations. A small number of states who can agree on common regulations for their growing national and international private military service industry might thus serve as a core for future regional or pan-regional controls. In conclusion, the EU not only suggests how other regions might be able to improve the regulation of private military and security services, it also plays an active part in the expansion and export of its controls.

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