Article 5

General comment:
Article 5 organises the control of the brokering activities. This provision concerns transactions between two (or more) third countries organised by an entity/person established within the EU. If the item is located within the EU territory and will be exported to a third country, it will not require a brokering authorisation, but a common export authorisation established by Article 9, notwithstanding the fact that it might involve some brokering activities.

The fact that Article 5 covers brokering activities involving two third countries, being arranged by a broker located within the EU, does not prohibit Member States to extend such control to other brokering activities, such as transactions between two third countries organised and negotiated outside the EU by an entity/person established within the EU. Presently, **Germany** considers that brokering activity undertaken by a German resident in a third country might be subject to end-use related controls, if this activity concerns items listed in Annex I of this Regulation.

Article 5(1) is drafted like the catch-all provisions established by Article 4. Nevertheless, if the mechanism of the first paragraph of this Article is similar to the one established by the first paragraph of Article 4, it should not be assimilated to a catch-all clause, as long as it does not control export of dual-use items not listed in Annex I. It only allows Member States to submit to authorisation brokering services of **dual-use items listed in Annex I**.
Contrary to the control of export, where all transactions linked to listed dual-use items have to be authorised, brokering activities of listed items have to be authorised by Member States, only if the **broker has been informed** by his national authority that the transaction required an authorisation and/or he/she is aware that the concerned dual-use items are intended for a WMD end-use.

Complementarily, paragraphs 2 and 3 allow Member States to adopt or maintain in their national legislation a catch-all clause for brokering activities for **non-listed dual-use items,** in case these will contribute to a **WMD program** and for dual-use items destined for **military end-use** and countries submitted to **embargoes**. Such catch-all clause can be extended to cases where the broker "has grounds for suspecting" that the items might contribute to a WMD end-use (see comment on Article 4). This last national catch-all clause can be applied to listed and non-listed dual-use items.

Finally, certain Member States request from the broker to be registered. The registration can include the list of items and countries for which they are offering brokering services.
Bulgaria has introduced an obligation to register for brokers dealing with items listed in Annex I of this Regulation (Article 46 of the Law on export control of arms and dual use items and technologies).
Latvia requires that brokers register, but only for military list items.
Slovakia requires also the registration of brokers.

Article 5

1. An authorisation shall be required for brokering services of dual-use items listed in Annex I if the broker has been informed by the competent authorities of the Member State in which he is resident or established that the items in question are or may be intended, in their entirety or in part, for any of the uses referred to in Article 4(1). If a broker is aware that the dual-use items listed in Annex I for which he proposes brokering services are intended, in their entirety or in part, for any of the uses referred to in Article 4(1), he must notify the competent authorities which will decide whether or not it is expedient to make such brokering services subject to authorisation.

Comment:
The terms "**being informed**" and "**being aware**" remain undefined by the Regulation.
As regards the term "**being informed**", some Member States give their own understanding of this concept. The same happens with regard to the definition of **"being aware".**

2. A Member State may extend the application of paragraph 1 to non-listed dual-use items for uses referred to in Article 4(1) and to dual-use items for military end use and destinations referred to in Article 4(2).

Comment:
This provision has raised some controversial discussion on its field of implementation. If the first part of the sentence, concerning the possibility for a Member States to control brokering transaction for non-listed dual use items in case it will contribute to a WMD program, does not raise any concerns, it is not clear how the term of the second part of the sentence shall be understood. Does the term "dual-use items" allow Member States to control listed and non-listed dual-use items or only listed items? It seems that it is the broad interpretation that shall prevail, or at least, it is the most commonly accepted by Member States.

Table 7: Measures taken by Member States to extend brokering controls in conformity with Article 5(2)

Member State	Content	Reference
Austria	An authorisation shall be required for the brokering of dual-use items if the Federal Minister for Science, Research and Economy notifies the broker that the items in question are or may be intended for uses referred to in Article 4(1) and (2) of the Regulation.	Article 15.1 of the Foreign Trade Act (Außenwirtschaftsgesetz 2011, BGBl. I Nr. 26/2011.
Belgium (Flemish region)	None.	
Bulgaria	An authorisation shall be required for	Article 34, par. 4 of the Defence-Related Products and Dual-Use Items and

	the brokering of dual-use items: 1. **listed** in Annex I to the Regulation, when the items are or may be intended for the uses specified in Article 4(2) of that Regulation; 2. not listed in Annex I to the Regulation, when the items are or may be intended for the uses specified in Article 4(1) of that Regulation.	Technologies Export Control Act, State Gazette No 26/29.3.2011, effective 30.6.2012.
Croatia	An authorisation shall be required for the brokering of dual-use items **not listed** in Annex I to the Regulation, if the Ministry of Foreign and European Affairs informs the broker that dual-use items are or may be, in whole or in part, used for the purposes set forth in Article 4(1) and (2) of the Regulation.	Act on Control of dual-use items (OG 80/11 i 68/2013).
Czech Republic	An authorisation shall be required for the brokering of dual-use items if the Ministry informs the broker that: 1. dual-use items **not listed** in Annex I to the Regulation are or could be intended, wholly or in part, for use pursuant to Article 4(1) of that Regulation; 2. dual-use items are or could be intended, wholly or in part, for military end-uses specified in Article 4(2) of the Regulation.	Par. 3 of Act No 594/2004 Coll., Implementing the European Community Regime for the Control of Exports, Transfer, Brokering, and Transit of Dual-Use Items (as amended).
Estonia	An authorisation shall be required for the brokering of dual-use items which have characteristics of strategic goods because of their end-use or end-user, public security or human rights consideration, although they have not been entered in the list of strategic goods.	Par. 6(7) of the Strategic Good Act.
Finland	An authorisation shall be required for brokering of dual-use items: 1. **listed** in Annex I to the Regulation, if the broker has	Par. 3(2) and 4(1) of Law 562/1996 (as

	been notified by the Ministry for Foreign Affairs that the items are or may be intended wholly or partly in Articles 4(1) or 4(2) of that Regulation; 2. **not listed** in Annex I to the Regulation, if the broker has been notified by the Ministry for Foreign Affairs that the items are or may be intended wholly or partly for the uses specified in Article 4(1) of that Regulation.	amended).
Greece	An authorisation shall be required for the brokering of **listed** dual-use items for military end-uses and destinations referred to in Article 4(2) of the Regulation.	Par. 3.2.3 of 'Ministerial Decision No 121837/e3/21837/28-9-2009'.
Hungary	An authorisation shall be required for the brokering of dual-use items: **1. listed** in Annex I to the Regulation, when the items are or may be intended for the uses specified in Article 4(2) of that Regulation; **2. not listed** in Annex I to the Regulation, when the items are or may be intended for the uses specified in Article 4(1) and (2) of that Regulation.	Par. 17.1 of Government Decree No 13 of 2011 on the foreign trade authorisation of dual-use items.
Italy	None.	
Ireland	An authorisation shall be required for the brokering of dual-use items **not listed** in Annex I to the Regulation, for any of the uses referred to in Article 4(1) of that Regulation and for dual-use items for military end-uses and destinations referred to in Article 4(2) of the Regulation.	Sections 8(a) and (b) of Statutory Instrument 443 of 2009, Control of Exports (Dual-Use Items) Order 2009, as amended.
Latvia	All brokering transactions are controlled for dual-use items regardless of their use.	Latvian Law on the Circulation of Strategic Goods.
Luxembourg	Luxembourg Law (art. 42 (1)) requires an authorization for brokering services of dual-use items not listed in Annex I of	Law of 27 June 2018 on export controls as published in the Mémorial A No 603 of 20 July 2018.

	Regulation (EC) No 428/2009 for the uses specified in Article 4 (1) of Regulation (EC) No 428/2009, and dual-use items for military end-uses and destinations as referred to in Article 4 (2) of Regulation (EC) No 428/2009.	
Netherlands	An authorisation shall be required for the brokering of dual-use items: – listed in Annex I of the Regulation, when the items are or may be intended for the uses specified in Article 4(2) of that Regulation; – not listed in Annex I of the Regulation, when the items are or may be intended for the uses specified in Article 4(1) and (2) of that Regulation. Authorisation requirements have been imposed for brokering services of 37 chemical substances when the destination is Iraq, regardless of the specific consignee or end-user.	Strategic Services Act — Wet strategische diensten, Official Journal Stb 445 of 29 September 2011. Decree Goods for Dual-Use Iraq — Regeling goederen voor tweeërlei gebruik Irak.
Poland	There are no national measures taken by Poland to extend brokering controls in conformity with Article 5(2). The Regulation 428/2009 is implemented directly.	
Romania	An authorisation shall be required for the brokering of dual-use items **not listed** in Annex I to the Regulation if the items in question are or may be intended, in their entirety or in part, for any uses referred to in Article 4(1) and (2) of the Council Regulation.	Article 14(2) of the Emergency Order No 119 of 23 December 2010 (GEO No 119/2010) on the 'control regime for operations concerning dual-use items'.
Slovenia	None	
Spain	An authorisation shall be required for the brokering of **listed** dual-use items for military end-uses and destinations referred to in Article 4(2) of the Regulation.	Article 2(6) of the Royal Decree 679/2014, of 1 August 2014 on the control of external trade in defence material, other material and dual-use goods and technologies.

Sweden	No.	

3. A Member State may adopt or maintain national legislation imposing an authorisation requirement on the brokering of dual-use items, if the broker has grounds for suspecting that these items are or may be intended for any of the uses referred to in Article 4(1).

Comment:
Member States that have used the possibility to extend brokering controls, when the broker has ground for suspecting that the items are or may be intended for use in "connection with the development, production, handling, operation, maintenance, storage, detection, identification or dissemination of chemical, biological or nuclear weapons or other nuclear explosive devices or the development, production, maintenance or storage of missiles capable of delivering such weapons" (article 4(1)) are: **Austria**[44]**, Bulgaria**[45]**, Croatia**[46]**, Czech Republic**[47]**, Estonia**[48]**, Finland**[49]**, Greece**[50]**, Hungary**[51]**, Ireland**[52]**, Latvia**[53]**, Luxembourg**[54]**, Netherlands**[55] and **Romania**[56]**.**

4. The provisions of Article 8(2), (3) and (4) shall apply to the national measures referred to in paragraphs 2 and 3 of this Article.

Comment:
Article 8(2) to (4) establishes an obligation to notify to the Commission any measure and its modifications adopted under these provisions. Such measures should afterwards be published in the C series of the *Official Journal of the European Union*. The latest publication is available on (OJ C 16/4 of 17/01/20):
https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158576.pdf.

[44] Article 5 of the 2011 First Foreign Trade Regulation (Erste Außenwirtschaftsverordnung 2011), BGBl. II Nr. 343/2011, published on 28 October 2011.
[45] Article 47 of the Defence-Related Products and Dual-Use Items and Technologies Export Control Act (Promulgated, State Gazette No 26/29.3.2011).
[46] Par. 3 of the Act on Control of dual-use items (OG 80/11 i 68/2013)
[47] Par. 3(4) of the Act No 594/2004 Coll. 'Implementing the European Community Regime for the Control of Exports, Transfer, Brokering, and Transit of Dual-Use Items' (as amended).
[48] Par. 77 of the Strategic Goods Act
[49] Par. 3.2 and 4.4 of law 562/1996 (as amended).
[50] Par. 3.2.2 of the Ministerial Decision No 121837/e3/21837/28-9-2009.
[51] Par. 17(2) of Government Decree No 13 of 2011 on the foreign trade authorisation of dual-use items
[52] Section 9 of Statutory Instrument 443 of 2009, Control of Exports (Dual-Use Items) Order 2009, as amended.
[53] In accordance with the Latvian Law on the Circulation of Strategic Goods, all brokering transactions are controlled for dual-use items regardless of their use.
[54] Luxembourg Law (art. 42 (2)).
[55] Article 4a(5) of the Strategic Services Act — Wet strategische diensten.
[56] Par. 3 of Article 14 of the Emergency Order No 119 of 23 December 2010 (GEO No 119/2010) on the control regime for operations concerning dual-use items.