

**A BRIGHT DAY FOR THE BLACK MARKET: WHY COUNCIL
DIRECTIVE 2008/51/EC WILL LOSE THE BATTLE AGAINST
ILLICIT FIREARM TRADE IN THE EUROPEAN UNION**

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I. INTRODUCTION

Open internal borders hallmark the success of the European Union model. Yet, along with the increased mobility of persons, information, and capital throughout Europe comes the difficult job of regulating the illicit trade of small arms.¹ In 1991, against the backdrop of Europe's differing perceptions of gun ownership and regulation and its recently abolished internal frontiers,² the European Union took steps toward "harmoniz[ing] gun control standards" in an effort to "insure a degree of control that would eliminate the necessity of border checks"³ by enacting Council Directive 91/477/EEC (1991 Directive).⁴ This legislation, aimed at allowing the free movement of goods and people, authorized firearm carriers to move freely throughout the European Community.⁵ However, during a highly publicized, seven-year period of deadly school shootings in Germany and Finland⁶ following the legislation, the European Community recognized that the 1991 Directive lacked the substance to control violence in the European states.

Coupled with the efforts of the United Nations to strengthen the fight against the illicit trade of firearms by organized crime,⁷ the European Union

¹ Although there remains debate over the exact definition of "small arms," the use of the phrase in this Note will correspond to the United Nations' definition: small arms include "[r]evolvers and self-loading pistols; [r]ifles and carbines; [s]ub-machine-guns; [a]ssault rifles; [and] [l]ight machine-guns" The Secretary-General, *Report of the Panel of Governmental Experts on Small Arms*, ¶ 26, delivered to the General Assembly, U.N. Doc. A/52/298 (Aug. 27, 1997). References to "firearms" in this Note will include a narrower class of weapons than small arms, although the reader should consider civilian firearms and firearms intended for military use as interchangeable unless otherwise noted.

² The Single European Act art. 13, 1987 O.J. (L 169) 1, required Member States to relinquish the power to carry out border checks which impede the free movement of people and goods across intra-community frontiers.

³ Christina Eigel, Comment, *Internal Security in an Open Market: The European Union Addresses the Need for Community Gun Control*, 18 B.C. INT'L & COMP. L. REV. 429, 431 (1995).

⁴ Council Directive 91/477/EEC of 18 June 1991 on Control of the Acquisition and Possession of Weapons, 1991 O.J. (L 256) 51 [hereinafter Council Directive 91/477/EEC].

⁵ Eigel, *supra* note 3.

⁶ Dan Bilefsky, *European Legislators Back Tough Gun Control Rules*, N.Y. TIMES, Nov. 29, 2007, http://www.nytimes.com/2007/11/29/world/europe/29iht-29union.4.8530991.html?_r=1.

⁷ United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, U.N. Doc. A/RES/55/25 (Jan. 8, 2001) [hereinafter UN Convention]; Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/255, U.N. Doc. A/RES/55/255 (June 8, 2001) [hereinafter UN Protocol]. The use of

took steps to address the continued fear of violence inflicted upon European citizens through access to illegal firearms. In 2007, the European Parliament set in motion a series of amendments targeted at curing the failures of the 1991 Council Directive.⁸

This Note will analyze whether the 2008 amendments to the 1991 Council Directive adequately address the challenges of regulating the illicit trade of small arms in the European Community, and act as a means of curbing increased firearm violence. Ultimately, this Note takes the position that the design of the 2008 amendments is inadequate to control the flood of illicit weapons into Europe through channels orchestrated by organized crime networks, arms brokers, and individuals with the incentives to acquire or sell illegal firearms.

This Note assesses the 2008 amendments in light of their effect on intra-Community trade flow instead of attempting to gauge relative security through firearm violence rates. The 1991 Directive, which sought to harmonize Member-State regulations pertaining to the interstate movement of firearms, did so because these State regulations threatened the hallmark objective of the European Union—open internal borders. Although individual Member States still may institute regulations to combat firearm violence, the 1991 and 2008 Council Directives attempt to procure the common end of reducing violence by blocking access to small arms from illicit trade flow. In other words, the aim of the legislation is to reduce illicit firearm transfers, not to directly curb violent firearm use. As such, the EU legislation's success in reducing trade flow can be measured in terms of whether individuals have *access* to illicit firearms, the *ease* of access to these weapons, and the extent of their availability. In light of such considerations, this Note addresses the access to illicit firearms that has surfaced as a byproduct of increased, legal trade flow between Member States, and endeavors to analyze whether unified action in the form of EU legislation can effectively curb illicit trade flow.

Part II of this Note looks at the nature of small arms trade in both the global and European markets as well as the available data on civilian violence resulting from the trade. Part III explores the history of firearm legislation of European Member States and of the EU, focusing on the events that galvanized consensus for each piece of legislation. Part IV discusses the specific components of the 1991 Council Directive and the technical changes enacted

"firearms" in this context includes firearms, firearm components, and ammunition.

⁸ Directive 2008/51/EC of the European Parliament and of the Council of 21 May 2008 Amending Council Directive 91/477/EEC on Control of the Acquisition and Possession of Weapons, 2008 O.J. (L 179) 5 [hereinafter Directive 2008/51/EC].

by the 2008 amendments, highlighting the motivations behind these amendments. Finally, Part V evaluates the potential effectiveness of the 2008 amendments in light of the nature of the illicit trade of small arms in Europe.

II. SMALL ARMS TRADE

An estimated 200,000 deaths per year result from the use of firearms in non-conflict-related violence and crime worldwide.⁹ Western Europe has some of the lowest rates of firearm homicide, but some of the highest rates of firearm suicide, in the world.¹⁰ Studies attempting to determine the rates of non-fatal firearm violence also indicate that Western Europe's rates are some of the lowest in the world.¹¹ Central and Eastern Europe, however, experience levels of firearm mortality nearly similar to world averages.¹² Central and Eastern Europe experience more firearm homicides than firearm suicides,¹³ but firearm suicides still occur more frequently here than in the rest of the world, on average.¹⁴ Despite relatively low firearm mortality on the continent, the European public has become collectively responsive to firearm violence in recent years after several mass killings occurred. As a result of these highly publicized events, the European Community (EC) began to question the effectiveness of its existing firearm legislation, launching an extensive investigation into the nature of the small arms trade in Europe. Specifically the EC attempted to identify exactly what made these mass killings logistically possible.

The cross-border trade of small arms in Europe occurs within three overlapping markets that are global in scope: the legal market, the "grey market," and the black market.¹⁵ In general, the legal market for small arms

⁹ GRAD. INST. INT'L STUD. GENEVA, SMALL ARMS SURVEY 2004: RIGHTS AT RISK 174 (2004). This number is contrasted with the estimated 300,000 deaths resulting from armed conflicts worldwide. *Id.* It is important to note, when considering the relationship between firearms and crime, that firearms are responsible for only 6% of suicides globally, as compared with 40% of homicides globally. *Id.* at 175.

¹⁰ *Id.* at 178 fig.6.3.

¹¹ *See id.* at 179 box 6.2 (noting "[t]he lowest victimization rates are experienced in Western Europe and Asia"). This study looked at urban areas only. *Id.*

¹² *Id.* at 178 fig.6.3.

¹³ *Id.*

¹⁴ *See id.* (providing that Central and Eastern Europe experience 1.4 firearm suicides per 100,000 people, while the average for the world is 1.3 per 100,000 people).

¹⁵ Elise Keppler, Comment, *Preventing Human Rights Abuses by Regulating Arms Brokering: The U.S. Brokering Amendment to the Arms Export Control Act*, 19 BERKELEY J. INT'L L. 381, 386 (2001).

includes transfers between governments or between a government and a private company.¹⁶ These legal transfers comply with national export laws as well as international and regional arms-control regulations.¹⁷ Grey market transfers occur on the fringes of legal transfers.¹⁸ Although these transfers may technically comply with applicable regulations, they involve transfers that may compromise the spirit of national and international arms control efforts.¹⁹ Examples of grey market transfers include state-sponsored or -supported transfers that are covert or politically contentious but still legal because the state is not subject to commercial export controls; private-entity exploitation of loopholes in weak export-control regimes; and the “diversions of weapons by the intended end-user or contractual recipient to an unauthorized third party.”²⁰ Lastly, transfers on the black market encompass “transactions conducted by non-government entities, individuals, and private companies” explicitly violating firearm regulations and export-control laws.²¹

Although the majority of arms trade is technically legal, an estimated 10%–20% of small arms sales worldwide occur illicitly.²² As recognized by the United Nations, organized crime accounts for a concerning level of the illicit trade of firearms throughout Europe and the world.²³ In the European Union, where most Member States’ gun regulations restrict the ability to acquire such weapons legally,²⁴ organized crime circuits profit by satisfying the demand for difficult-to-acquire contraband, including firearms.²⁵ Guns smuggled into and throughout the European Union feed a market demand from criminals, as well as (to a lesser extent) Separatists in Northern Ireland,

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*; see also Silvia B. Cucovaz, *The Role of the “Grey Market” in the Context of Arms Trafficking*, circulated at the Second Meeting of U.N. Office Small Arms and Light Weapons, 14 (Mar. 24–28, 2004), available at <http://disarmament.un.org/CAB/docs/trcnexperts/scucovaz1.pdf> (concluding that sometimes, players operate legally in the “grey market” knowing that at some point the operation will become illegal).

¹⁹ GRAD. INST. INT’L STUD. GENEVA, SMALL ARMS SURVEY 2007: GUNS AND THE CITY 73 (2007) [hereinafter SMALL ARMS SURVEY 2007].

²⁰ Keppler, *supra* note 15, at 386.

²¹ *Id.* at 387.

²² Federation of American Scientists, *The Illicit Arms Trade*, <http://www.fas.org/asmp/campaigns/smallarms/IssueBrief3ArmsTrafficking.html> (last visited Nov. 22, 2009).

²³ U.N. Convention, *supra* note 7; U.N. Protocol, *supra* note 7.

²⁴ James Graff et al., *Gunning for It*, TIME EUR., May 13, 2002, at 50, available at <http://www.time.com/time/europe/magazine/2002/0513/guns/story.html>.

²⁵ James J. Killeen, *Der Große Lauschangriff: Germany Brings Home the War on Organized Crime*, 23 HASTINGS INT’L & COMP. L. REV. 173, 175 (2000).

the Basque Regions, and Corsica.²⁶ Firearms may now frequently travel alongside other black-market items, such as illegal drugs²⁷:

From "recreational drugs" to counterfeit credit cards, from fake designer watches to stolen diamonds, it is no longer a case of the operation of this or that isolated black market, but rather the emergence of an international underground economy.

....

....

The general result of the combination of new arms dealers and the spread of underground economic activity is that covert arms deals are likely to take place within a matrix of black-market transactions.²⁸

In the *2005 Organized Crime Report*, Europol emphasized Member-State concern over the correlation between "enlargement of the EU" and the presence of illegally trafficked firearms.²⁹ Europol attributes this correlation to the operations of organized crime networks in the Western Balkans and Eastern Europe.³⁰ In particular, Bulgarian organized crime groups significantly impede the fight against illicit firearm-trafficking within the Member States.³¹ Hand-made Bulgarian weapons are smuggled into Western Europe through Turkey, Serbia, and Montenegro, and sold for a profit of 800%.³²

Logistically, the movement of small arms between legal and illicit channels occurs in a variety of ways. An explanation of the various methods of diverting firearms into illicit channels is crucial to evaluating legislation aimed

²⁶ Toine Spapens, *Trafficking in Illicit Firearms for Criminal Purposes Within the European Union*, 15 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 359, 360 (2007), available at <http://arno.uvt.nl/show.cgi?fid=68801>.

²⁷ Gavin Hales et al., *Gun Crime: The Market in and Use of Illegal Firearms*, in FINDINGS 279, at 3 (U.K. Home Off., Res. Dev. & Stat. Directorate, 2006), available at <http://www.homeoffice.gov.uk/rds/pdfs06/r279.pdf>.

²⁸ R.T. Naylor, *The Structure and Operation of the Modern Arms Black Market*, in LETHAL COMMERCE: THE GLOBAL TRADE IN SMALL ARMS AND LIGHT WEAPONS 44, 48-49 (Jeffrey Boutwell et al. eds., 1995).

²⁹ Council of the E.U., Europol, *2005 EU Organised Crime Report—Public Version*, at 24, 13788/1/05 REV 1 (Nov. 17, 2005), available at <http://www.europol.europa.eu/publications/OrganisedCrimeReport2005.pdf>.

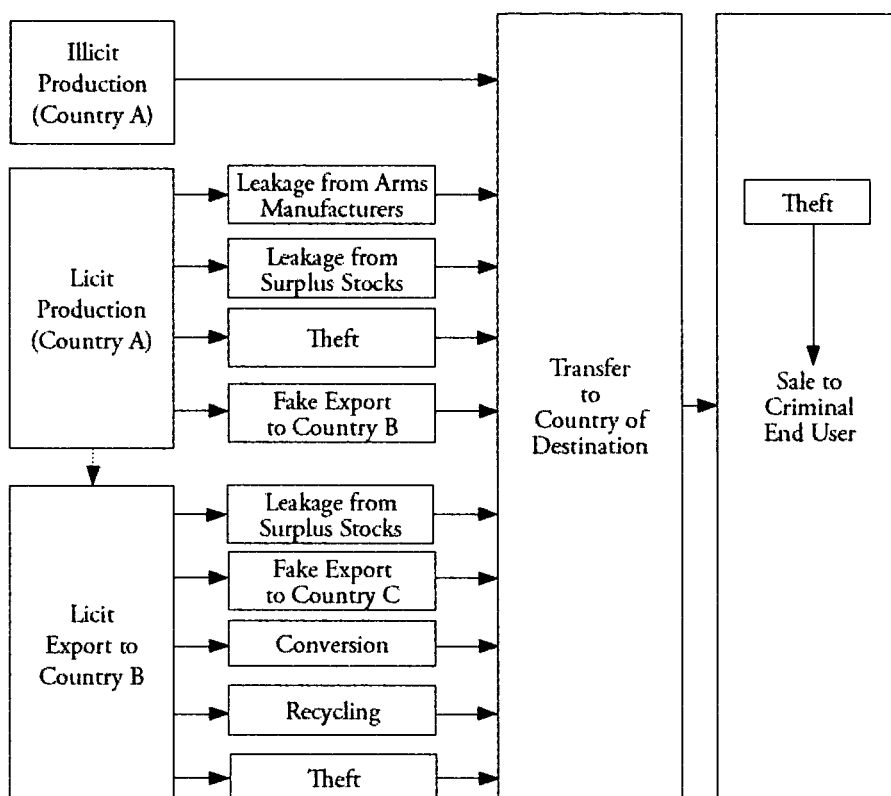
³⁰ *Id.* at 32.

³¹ *Id.* at 24.

³² *Id.*

at combating illicit trade. Figure 1 provides an overview of illicit firearm transfer patterns.

FIGURE 1. METHODS OF DIVERTING FIREARMS INTO ILLICIT TRADE CHANNELS³³



Most illicit firearms are either legally manufactured or legally procured before they slip into illicit channels;³⁴ however, the illicit manufacture of firearms does account for a small percentage of illicit firearms in Europe.³⁵

³³ Spapens, *supra* note 26, at 362.

³⁴ KEITH KRAUSE, CAN. DEP'T FOREIGN AFF. & INT'L TRADE, SMALL ARMS AND LIGHT WEAPONS: PROLIFERATION PROCESS AND POLICY OPTIONS 18 (2000).

³⁵ See Spapens, *supra* note 26, at 363 ("Of the firearms that were seized between 1998 and 2000, an estimated 95% or more were originally legally manufactured. However, firearms are also manufactured illicitly.").

Illicit manufacture involves one of three scenarios: (1) the firearm is an amateur fabrication assembled in the home; (2) the firearm is an illicit copy assembled in a factory; or (3) the firearm was produced legally but then fraudulently diverted by the manufacturer.³⁶

Because a firearm consists of only a few working parts, amateur firearm fabrication involves "modest tools."³⁷ For example, "craft" manufacturers in Britain circumvent regulations by converting non-lethal replicas, such as air guns and BB guns, into lethal firearms.³⁸ Although lethal firearms can be deactivated into non-lethal forms, craft manufacturers re-insert these weapons into illicit channels by reactivating their components.³⁹

The circulation of illicit factory fabrications can also be a problem for EU countries. For example, the Yugoslav wars in the 1990s saw firearms being manufactured in a "legal twilight area."⁴⁰ Small factories in Croatia produced illicit firearms to "meet the great demand for weapons."⁴¹ The Dutch police seized several dozen of these Croatian-built machine pistols⁴² between 1998 and 2000.⁴³

Other firearm diversion tactics involve theft from legal dealers or private owners of legal firearms,⁴⁴ and fraud committed by legal firearm owners in "straw purchases."⁴⁵ A straw purchase, in this context, occurs when a firearm is "bought licitly by someone with a clean record and then sold or given to a second owner."⁴⁶ Because these transfers are more likely to occur in a country without strong licensing and registration laws, straw transactions are of particular importance to the EU in making regulation decisions.⁴⁷

Often, arms brokers exploit under-regulated markets to facilitate the transfer of small arms.⁴⁸ Brokering involves the private dealing of arms, in which the

³⁶ *Id.*

³⁷ The simplest firearm design, while still lethal, is composed of a barrel, a spring with a housing pin, and a housing unit. *Id.*

³⁸ WENDY CUKIER, PEACEBUILD, SMALL ARMS WORKING GROUP, THE ILLICIT TRADE IN SMALL ARMS: ADDRESSING THE PROBLEM OF DIVERSION 6 (2008), <http://www.ploughshares.ca/libraries/Congrol/SAWG08Cukier2.pdf>.

³⁹ *Id.*

⁴⁰ Spapens, *supra* note 26, at 364.

⁴¹ *Id.*

⁴² These Croatian weapons were illicit copies of the Israeli UZI. *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ CUKIER, *supra* note 38, at 7.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See RACHEL STOHL ET AL., THE SMALL ARMS TRADE: A BEGINNER'S GUIDE 50 (2007)

broker often negotiates the terms of a sale, locates arms suppliers, and arranges the logistics of the transaction.⁴⁹ Although this statistic is difficult to assess accurately, it appears that a significant number of the world's arms brokers "operate from Europe."⁵⁰ Brokers operate in a variety of ways to complicate the tracking and identification of their transactions. Brokers are notorious for evading accountability by "inserting distance between [their] suppliers and recipients, [creating] a chain of associates and various bases of operation"⁵¹:

In some cases the arms will be delivered by a shipping firm based in one country, with its aeroplane registered in a second, which flies out from a third, will pick up arms in a fourth country, re-fuel in a fifth, be scheduled to land in a sixth, but actually will deliver its lethal consignment in a seventh country.⁵²

Brokers often operate outside their country of citizenship and outside both the supplying and receiving nations.⁵³ Also, these brokers often exploit the differences in national laws governing these transactions.⁵⁴

Finally, illicit traders divert firearms by abusing end-user certificates (EUCs).⁵⁵ An EUC, required for most transnational arms transfers, constitutes paper verification that the small-arms transaction is legitimate and legal.⁵⁶ Diversion of small arms into illicit channels using EUCs usually occurs in one of two scenarios: (1) the EUC is "signed by authorized but corrupt officials" within the recipient government who then transfer the firearms to an

(noting that brokering "is an under-regulated area of the small-arms trade").

⁴⁹ Keppler, *supra* note 15, at 382.

⁵⁰ *See id.* at 387 (noting that "[p]recise data on arms brokers are not available, as the brokers tend to operate in secrecy").

⁵¹ *Id.* at 388.

⁵² *See id.* (quoting OXFAM, *OUT OF CONTROL: THE LOOPHOLES IN UK CONTROLS ON THE ARMS TRADE* § 2 (1998)).

⁵³ *Id.* at 382.

⁵⁴ *See* STOHL ET AL., *supra* note 48, at 50 (noting that "only around forty countries have adopted legislation on [arms] brokering").

⁵⁵ Michael T. Klare, *The Global Trade in Light Weapons and the International System in the Post-Cold War Era*, in *LETHAL COMMERCE*, *supra* note 28, at 34.

⁵⁶ *Id.*

unauthorized final destination, or (2) the EUC is counterfeited.⁵⁷ Increasingly, arms brokers have facilitated these types of transactions.⁵⁸

III. EVOLUTION OF GUN CONTROL LEGISLATION IN THE EU

Historically, there has been a spectrum of approaches among EU Member States, in their individual sovereign capacities, regarding the issue of citizen firearm possession and acquisition. At one end of the spectrum, states like the United Kingdom⁵⁹ and the Netherlands⁶⁰ have traditionally advocated stringent regulation of firearms. Nordic states, like Finland, generally occupied the other end of the spectrum, preferring more lenient regulation of firearms.⁶¹

The Netherlands passed its Firearms Act in 1919, imposing the requirement of an "official certificate" for "the import, export, manufacture, supply or possession of a gun."⁶² The Act applied to sporting guns as well as items resembling a firearm.⁶³

The United Kingdom addressed firearm possession and acquisition in its 1968 Firearms Act.⁶⁴ This Act required a firearms certificate for the possession of a firearm or ammunition,⁶⁵ while a separate certificate was required for the possession of shot guns and ammunition.⁶⁶ The Act generally prohibited automatic weapons.⁶⁷ These regulations exempted, among other

⁵⁷ CENTER FOR THE STUDY OF DEMOCRACY, *WEAPONS UNDER SCRUTINY: IMPLEMENTING ARMS EXPORT CONTROLS AND COMBATING SMALL ARMS PROLIFERATION IN BULGARIA* 46–47 (Philip Gounev et al. eds., 2004).

⁵⁸ See Katharine Orlovsky, Note, *International Criminal Law: Towards New Solutions in the Fight Against Illegal Arms Brokers*, 29 HASTINGS INT'L & COMP. L. REV. 343, 343, 346 (2006) (noting that "arms brokers continue to enjoy broad impunity under existing international and domestic law" and that "end-user certificates can be, and often are, forged or falsified").

⁵⁹ See SMALL ARMS SURVEY 2007, *supra* note 19, at 59 box 2.6 (referencing the "strong anti-gun culture" of England and Wales and the "regulative barriers [that] inhibit buying, keeping ownership far below the levels that wealth alone would anticipate").

⁶⁰ See Spapens, *supra* note 26, at 360 (describing the Netherlands's regulatory regime as historically "one of the most restrictive weapon laws in Europe").

⁶¹ See Associated Press, *Facts and Figures About Finland's Gun Culture*, HUFFINGTON POST, Sept. 23, 2008, <http://www.huffingtonpost.com/huff-wires/20080923/eu-finland-guns-glance/> (observing that "Finland has some of Europe's most relaxed gun laws" and that "Finns say their hunting traditions justify widespread gun ownership").

⁶² Eigel, *supra* note 3, at 431.

⁶³ See *id.* (noting that the Act extended to "items which might be confused for a real firearm").

⁶⁴ Firearms Act, 1968, c. 27 (Gr. Brit.).

⁶⁵ *Id.* pt. 1, § 1.

⁶⁶ *Id.* pt. 1, § 2.

⁶⁷ *Id.* pt. 1, § 5. The Act provides a standard definition of automatic weapons, stating, "if

things, firearms used in sporting events, in theatre or cinema, and for the slaughter of animals.⁶⁸

Finland, in contrast, did not pass any legislation regulating firearms until 1998⁶⁹—only after Directive 91/477/EEC took effect. Finland established only the minimum requirements for compliance with the EU Directive on harmonization. For example, Finns aged fifteen and older were allowed to possess a firearm with parental consent.⁷⁰ Finnish reluctance to tighten gun-control regulation is often attributed to the country's long-standing hunting tradition and the influence of the hunting lobby on legislators.⁷¹

The differing national conceptions of gun ownership rights created a particular challenge to the European Union in its formative years. Of particular concern to the young European Union were the security problems that would arise from abolishing internal border checks. As discussed below, early agreements between the European states recognized the need to balance security with freedom of movement.

In 1957, France, West Germany, Italy, Belgium, Luxembourg, and the Netherlands signed the Treaty Establishing the European Economic Community (EEC Treaty).⁷² The treaty required the signatory states to establish a common market that would embody “four freedoms” of movement: that of persons, goods, capital, and services.⁷³ As a means of facilitating the transition to and perpetuation of the European common market, the EEC Treaty called for the implementation of common policies among the signatory states.⁷⁴ The harmonization of national laws to facilitate internal cross-border movement became one of the main objectives of the transition.⁷⁵ After the

pressure is applied to the trigger, missiles continue to be discharged until pressure is removed from the trigger or the magazine containing the missiles is empty.” *Id.* pt. 1, § 5(1)(a).

⁶⁸ *Id.* pt. 1, §§ 7–15.

⁶⁹ Firearms Act (1998) (Fin.).

⁷⁰ *Id.* § 45.

⁷¹ Steve Rosenberg, *Angry Finland Focuses on Gun Laws*, BBC NEWS, Sept. 24, 2008, <http://news.bbc.co.uk/2/hi/europe/7633538.stm>.

⁷² Treaty Establishing the European Economic Community, Mar. 25, 1957, 2984 U.N.T.S. 11 [hereinafter EEC Treaty]. This treaty is more commonly referred to as the Treaty of Rome, or Rome Treaty.

⁷³ *Id.* pt. II.

⁷⁴ EUROPA, Summaries of EU Legislation, Treaty Establishing the European Economic Community, EEC Treaty, http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_eec_en.htm (last visited Nov. 25, 2009) [hereinafter Summaries of EU Legislation: EEC Treaty].

⁷⁵ EEC Treaty, *supra* note 72, art. 100; *see also* Eigel, *supra* note 3, at 429 (“As the European Union (EU) works toward a single common market, the free movement of goods, services and people has been a primary goal.”).

Single European Act of 1986 required the final establishment of the internal market by 1992,⁷⁶ the European Commission proposed a Council Directive that would harmonize rules governing the acquisition and possession of weapons in order to facilitate the movement of persons⁷⁷ across internal EC borders as mandated by the EEC Treaty.⁷⁸ The European Community adopted the 1987 Proposal as Council Directive 91/477/EEC in 1991.⁷⁹

Debate ensued in the 1980s as to the exact meaning of the “free movement of persons,” as required by the founding treaties of the European Union.⁸⁰ Some Member States believed the EEC Treaty called for the free movement of EU citizens only, while others believed the treaty implicated the free movement of all people within the EU.⁸¹ Although the Member States did not reach a consensus, five Member States⁸² signed an independent agreement on June 14, 1985 to eliminate internal borders, thus establishing the “Schengen area.”⁸³ A second agreement was signed on June 19, 1990.⁸⁴ The Schengen Agreement abolished internal border checks and created one external border.⁸⁵ The concern over decreased security controls from the lack of internal border checks led the signatory states to include a series of “compensatory” measures.⁸⁶ These measures aimed to “improv[e] cooperation and coordination between the police and the judicial authorities” of each signatory state—mainly

⁷⁶ Summaries of EU Legislation: EEC Treaty, *supra* note 74.

⁷⁷ At the inception of the European Union, some Member States had conflicting firearm legislation that would render it difficult for European citizens to travel within the EU without potentially violating a neighboring nation’s gun laws.

⁷⁸ Proposal for a Council Directive on the Control of the Acquisition and Possession of Weapons, 1987 O.J. (C 235) 8 [hereinafter 1987 Proposal].

⁷⁹ Council Directive 91/477/EEC, *supra* note 4.

⁸⁰ EUROPA, Summaries of EU Legislation: The Schengen Area and Cooperation, http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/133020_en.htm (last visited Nov. 25, 2009).

⁸¹ *Id.*

⁸² The five European states were France, Germany, Belgium, Luxembourg, and the Netherlands. Lauren Gilbert, *National Identity and Immigration Policy in the U.S. and the European Union*, 14 COLUM. J. EUR. L. 99, 120 (2008). After 1990, the Schengen area would continue to expand, eventually including all EU Member States, with the exception of Britain and Ireland. Desmond Dinan, *Fifty Years of European Integration: A Remarkable Achievement*, 31 FORDHAM INT’L L.J. 1118, 1133–34 (2008).

⁸³ The agreement was signed in Schengen, Luxembourg. Summaries of EU Legislation: The Schengen Area and Cooperation, *supra* note 80.

⁸⁴ *Id.* This agreement took effect in 1995, and was signed by the original signatories to the first Schengen Agreement. *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

by establishing the Schengen Information System (SIS).⁸⁷ The SIS would facilitate coordination between these legal authorities by providing sophisticated information on certain people and goods in an effort to combat organized crime.⁸⁸ Additionally, Articles 77–90 of the Schengen Agreement dealt specifically with the harmonization of national firearms and ammunition legislation.⁸⁹ These provisions demonstrate an early recognition of the need for sensitive attention to the movement of firearms across internal borders for the success of the Schengen area, in terms of security and politics.

After the signing of the Treaty of Amsterdam in 1997,⁹⁰ there was some confusion as to whether Articles 77–90 of the Schengen Agreement or Directive 91/477/EEC would govern the harmonization of gun legislation by Member States.⁹¹ In 1999, a Council Decision declaring that Directive 91/477/EEC would supersede Articles 77–81 and Articles 83–90 of the Schengen Agreement⁹² settled the matter.⁹³

Between 1993⁹⁴ and 1997,⁹⁵ each Member State transposed the provisions of Directive 91/477/EEC into national legislation.⁹⁶ Pursuant to Article 17 of Directive 91/477/EEC, the Commission created a report in 2000 concerning the

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Schengen Acquis – Convention Implementing the Schengen Agreement of 14 June 1985, tit. III. Ch. 7, 2000 O.J. (L 239) 19 [hereinafter Schengen Acquis].

⁹⁰ The Treaty of Amsterdam, one of eight amendments to the EEC Treaty, incorporated the Schengen Agreements into EU law. Treaty of Amsterdam, Protocol Integrating the Schengen Acquis Into the Framework of the European Union, 1997 O.J. (C 340) 96.

⁹¹ See *Report from the Commission to the European Parliament and the Council: The Implementation of Council Directive 91/477/EEC, of 18 June 1991, on Control of the Acquisition and Possession of Weapons*, ¶ 10, at 5–6, COM (2000) 837 final (Dec. 15, 2000) [hereinafter *2000 Implementation Report*].

⁹² Article 82 of the Schengen Agreement is still in effect. Article 82 lists three categories of firearms not subject to prohibition, authorization, or declaration: antique firearms (firearms manufactured prior to 1870), reproductions of antique firearms, “provided that they [are unable to] fire metal-case cartridges,” and firearms officially stamped as “unfit to fire any kind of ammunition.” Schengen Acquis, *supra* note 89, art. 82.

⁹³ Council Decision 1999/436/EC of 20 May 1999, Annex B, art. 2, pt. 1, 1999 O.J. (L 176) 17, 21.

⁹⁴ The European Community adopted Directive 91/477/EEC on January 1, 1993. European Commission, Enterprise and Industry: Directive 91/477/EEC as a Measure in Support of Internal Market Policy, http://ec.europa.eu/enterprise/regulation/goods/dir91477_en.htm (last visited Nov. 25, 2009).

⁹⁵ Austria, Finland and Sweden were given until the 1997 to “transpose” the Directive. *2000 Implementation Report*, *supra* note 91, ¶ 2, at 4.

⁹⁶ *Id.*

implementation of the Directive.⁹⁷ This report included an update from Member States on the implementation and operation of the Directive,⁹⁸ as well as suggestions for its improvement.⁹⁹ Finally, the Report stated that, in light of the then-draft of the United Nations Protocol addressing the illicit manufacture and trafficking of firearms, "certain provisions of the Directive may need to be adapted to be brought into line with those of the Protocol."¹⁰⁰

Shortly after the Commission Report was submitted to the European Parliament and Council, the United Nations adopted a resolution in 2001 establishing the United Nations Convention Against Transnational Organized Crime (Organized Crime Convention).¹⁰¹ The UN General Assembly adopted a resolution, unfinished as of the date of the Organized Crime Convention, to supplement this Convention with the Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition (UN Protocol).¹⁰² In January 2002, the European Commission signed the UN Protocol on behalf of the European Community.¹⁰³

A proposal to amend Directive 91/477/EEC came in 2006,¹⁰⁴ arising from new international obligations based on the UN Protocol and the issues identified in the 2000 Report.¹⁰⁵ Tragic events in the Member States also galvanized domestic support for change in the existing approach to harmonization of firearm legislation.¹⁰⁶

Several horrific massacres within Member States—notably, the United Kingdom, Germany and Finland—led to demands for tighter gun controls. On March 13, 1996, in Dunblane, Scotland, a forty-three-year-old man named Thomas Hamilton entered a primary school and opened fire, killing sixteen five- and six-year-olds and their teacher before killing himself.¹⁰⁷ Hamilton arrived at the primary school with "two semi-automatic pistols[,] two . . . revolvers, [and] 743 rounds of ammunition."¹⁰⁸ Subsequent investigations

⁹⁷ *Id.* ¶ 1, at 4.

⁹⁸ *Id.* ¶¶ 36–88, at 9–17.

⁹⁹ *Id.* ¶¶ 89–106, at 17–20.

¹⁰⁰ *Id.* ¶ 120, at 22.

¹⁰¹ UN Convention, *supra* note 7.

¹⁰² UN Protocol, *supra* note 7.

¹⁰³ Council Decision 2001/748/EC of 16 October 2001, 2001 O.J. (L280) 5.

¹⁰⁴ *Commission Proposal for a Directive of the European Parliament and of the Council Amending Council Directive 91/477/EEC*, COM (2006) 93 final (Mar. 2, 2006).

¹⁰⁵ Bilefsky, *supra* note 6.

¹⁰⁶ *Id.*

¹⁰⁷ BBC News, On this Day, 13 March, 1996: Massacre in Dunblane School Gym, http://news.bbc.co.uk/onthisday/hi/dates/stories/march/13/newsid_2543000/2543277.stm.

¹⁰⁸ BBC : h2g2, The Dunblane Massacre, May 15, 2006, <http://www.bbc.co.uk/dna/h2g2/>

revealed that the local man “had licenses for six guns.”¹⁰⁹ Following the massacre, concerned UK citizens started the Snowdrop Campaign, petitioning Parliament for the complete ban of handguns.¹¹⁰ In 1997, the efforts of the Snowdrop Campaign produced an amendment to the Firearms Act banning all privately owned handguns in the United Kingdom.¹¹¹

Similar shootings in Germany and Finland solidified fears of a growing “‘gun-friendly culture’” in Europe.¹¹² What has been called the most deadly incidence of violence in post-WWII Germany occurred at the Gutenberg School in Erfurt on April 26, 2002 when a recently expelled nineteen-year-old shot and killed seventeen people before killing himself.¹¹³ The teenager had legally obtained his firearm—a handgun—through his membership in a local gun club.¹¹⁴ In southern Finland, on November 8, 2007, an eighteen-year-old killed eight people at his high school before killing himself.¹¹⁵ Less than a year later, a twenty-two-year-old gunman killed nine people at his college in western Finland before shooting himself in the head.¹¹⁶ The gunman used a .22-caliber handgun, which he had obtained legally.¹¹⁷ Although the 2008 shooting prompted fierce debate in Finland regarding the leniency of its gun laws, the laws were not changed.¹¹⁸

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¹⁰⁹ Massacre in Dunblane School Gym, *supra* note 107.

¹¹⁰ The Dunblane Massacre, *supra* note 108.

¹¹¹ *Id.*

¹¹² Bilefsky, *supra* note 6.

¹¹³ See Edmund L. Andrews, *Shooting Rampage at German School*, N.Y. TIMES, Apr. 27, 2002, at A1 (noting that, before this, “[t]he worst case of such violence in postwar Germany had been an incident last fall in Munich, when a student killed three people”).

¹¹⁴ See Jochen Wiesigel, *Germany Remembers Worst School Shooting*, WASH. POST, Apr. 26, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/04/26/AR2007042601025.html> (noting that the shooter “was a gun club member licensed to own weapons”).

¹¹⁵ Reuters, *Student Kills 8, and Himself, at Finnish High School*, N.Y. TIMES, Nov. 8, 2007, at A20.

¹¹⁶ *Id.*

¹¹⁷ See *Gunman Kills 10 at Finnish Trade School*, N.Y. TIMES, Sept. 23, 2008, <http://www.nytimes.com/2008/09/23/world/europe/23iht-finland.4.16418825.html> (noting that after the shooting, “the government said it would raise the minimum age for buying guns from 15 to 18, but insisted there was no need for sweeping changes to gun laws”).

¹¹⁸ Associated Press, *Gunman Kills 10 in Attack at School in Finland*, N.Y. TIMES, Sept. 24, 2008.

In May 2008, galvanized by the fear and concern surrounding a decade of fatal school shootings,¹¹⁹ the European Community passed Directive 2008/51/EC (the 2008 Directive), amending Directive 91/477/EEC (the 1991 Directive).¹²⁰

IV. DIRECTIVES OF 1991 AND 2008

The 1991 Directive, as stated previously, embodied a compromise between Member State concerns arising from the abolition of internal-frontier controls and the need to control the acquisition and possession of firearms among the Member States. The 1991 Directive required Member States to comply with a minimum threshold of harmonization, while allowing for the enactment of “more stringent” domestic firearms controls based on the particular attitude toward gun control within each Member State.¹²¹ In order to ease the security concerns arising from the free movement of persons across intra-frontier borders, the 1991 Directive generally prohibited persons in possession of a firearm from passing from one Member State to another absent compliance with the Directive’s procedural requirements.¹²² For persons not qualifying as arms dealers,¹²³ the main procedural requirement is possession of a European firearms pass (EFP).¹²⁴ The EFP is a “non-transferable document” issued by the authorities of a Member State upon request of a person legally obtaining a firearm.¹²⁵ The EFP lists all firearms possessed by the EFP holder and must stay on the holder’s person at all times while traveling with a firearm.¹²⁶ The EFP is valid for five years, unless issued for only Category D firearms, in which the EFP is valid for ten years.¹²⁷ Changes in either the “possession or characteristics of the firearms” must be noted on the EFP.¹²⁸

¹¹⁹ Bilefsky, *supra* note 6.

¹²⁰ Directive 2008/51/EC, *supra* note 8.

¹²¹ Council Directive 91/477/EEC, *supra* note 4, art. 3.

¹²² See *id.* pmbl. (stating “passing from one Member State to another while in possession of a weapon should, in principle, be prohibited . . . [and] a derogation therefrom is acceptable only if a procedure is adopted that enables Member States to be notified that a firearm is to be brought into their territory”).

¹²³ Council Directive 91/477/EEC defined a *dealer* as “any natural or legal person whose trade or business consists wholly or partly in the manufacture, trade, exchange, hiring out, repair or conversion of firearms.” *Id.* art. 1, ¶ 2.

¹²⁴ *Id.* art. 1, ¶¶ 3–4.

¹²⁵ *Id.* art. 1, ¶ 4.

¹²⁶ *Id.* art. 1, ¶ 4, Annex II.

¹²⁷ *Id.* art. 1, ¶ 4.

¹²⁸ *Id.*

The 1991 Directive established four categories of firearms: Category A, "prohibited firearms"; Category B, "firearms subject to authorization"; Category C, "firearms subject to declaration"; and Category D, "other firearms."¹²⁹ Specific qualifications for acquisition and possession attach to each category.¹³⁰ According to the 1991 Directive, Member States should only allow Category B firearms, requiring authorization, for "good cause," to individuals who are eighteen years or older and who "are not likely to be a danger to themselves, to public order or to public safety."¹³¹ The Directive creates an exception to the Category B age requirement in the case of firearms used for hunting or target shooting.¹³² Category C and D firearms should be granted only to persons eighteen years or older, again creating an exception for firearms intended for use in "hunting or target shooting."¹³³ Category C and D firearms do not include the same personal or public danger provision as Category B.¹³⁴ The rules and requirements applicable to ammunition are based on the relevant category of firearm.¹³⁵

The scope of the 1991 Directive was not intended to reach the acquisition or possession of firearms by the armed forces, the police, or collectors of cultural or historical weapons.¹³⁶ Commercial transfers of weapons and ammunition intended for war are also explicitly excluded from the reach of the 1991 Directive.¹³⁷

Aside from the specific requirements placed on private owners of firearms, the 1991 Directive lays out a series of rules for dealers. Member States may allow dealers to engage in the trade of Category A and B firearms only "upon authorization on the basis of at least a check on the private and professional integrity of the dealer."¹³⁸ Each dealer is required to keep a register of transactions for five years, which should include enough information regarding each firearm so as to facilitate identification of the weapon by the police, as well as the name and address of both the "supplier and the person acquiring the [firearm]."¹³⁹ Article 11 provides the procedural requirements for dealer

¹²⁹ *Id.* Annex I.

¹³⁰ *Id.* arts. 5–8.

¹³¹ *Id.* art. 5.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* art. 10.

¹³⁶ *Id.* art. 2.

¹³⁷ *Id.*

¹³⁸ *Id.* art. 4.

¹³⁹ *Id.*

transfers of firearms between Member States, specifically including mail order sales.¹⁴⁰

The Directive provides, only in general terms, that Member States should impose penalties "sufficient to promote compliance" when persons fail to comply with the provisions of the Directive.¹⁴¹

Pursuant to the mandate of the 1991 Directive,¹⁴² the Commission produced a Report on the Directive's implementation after all Member States had transplanted it into national law.¹⁴³ After reviewing the general complaints of Member States regarding the implementation of the 1991 Directive, the Commission made several specific suggestions for improvement of the Directive based on two major areas of concern: the operation of the European firearms pass (EFP) and the exchange of information between Member States.¹⁴⁴ First, the Report recognized that the EFP did not facilitate the efficient movement of persons, as it was originally intended to do.¹⁴⁵ To improve the operation of the EFP, the Report suggested that the EFP should better distinguish between "firearms in general and firearms used for sport and hunting which can be governed by more flexible rules";¹⁴⁶ that all information on the EFP should be entered by only one Member State, instead of splitting the responsibility between the State of origin and the destination State;¹⁴⁷ and that there should be "more transparency"¹⁴⁸ and non-discrimination for "agreements on mutual recognition of national documents" between Member States.¹⁴⁹ In addition, the Report recommended the creation of a "Contact Group" that would provide a forum for coordinating the Directive's "application and enforcement."¹⁵⁰ To clarify the scope of the Directive, the Report recommended better definitions of each weapon type, specifically those firearms falling outside the Directive's scope.¹⁵¹ In addition, the Report

¹⁴⁰ *Id.* art. 11, ¶ 1.

¹⁴¹ *Id.* art. 16.

¹⁴² *Id.* art. 17.

¹⁴³ 2000 *Implementation Report*, *supra* note 91.

¹⁴⁴ *Id.* ¶ 90, at 17.

¹⁴⁵ *Id.* ¶ 40, at 10, ¶ 94, at 18 (noting that "the free movement of persons is impeded even when they are in possession of the [EFP] because they are subject to excessive controls by the Member States" and that "there is a need to establish procedures that are more in line with the objectives of the [EFP]").

¹⁴⁶ *Id.* ¶ 91, at 17.

¹⁴⁷ *Id.* ¶ 95, at 18.

¹⁴⁸ *Id.* ¶ 98, at 18.

¹⁴⁹ *Id.* ¶ 97, at 18.

¹⁵⁰ *Id.* ¶ 102, at 19.

¹⁵¹ *See id.* ¶ 105, at 19-20 (noting that Some Member States "prohibit certain weapons that

emphasized that any changes to the 1991 Directive might need to include new obligations created by the UN Protocol, which at the time of the Report was in the negotiations phase.¹⁵²

The 2008 amendments reflect many of the suggestions made by the 2000 Report, including the additional Community obligations created by the UN Protocol on the Illicit Manufacturing of and Trafficking in Firearms. In an attempt to confront new challenges facing the European Union, the 2008 amendments expand the scope of Directive 91/477/EEC, now addressing such issues as illicit manufacturing and trafficking.

First, the 2008 Directive addresses the conversion of weapons—a form of illicit manufacturing that has become a prevalent concern in the Member States¹⁵³ by expanding and clarifying definitions found in the 1991 Directive.¹⁵⁴ The 2008 amendments expand the definition of *firearm* to include “any portable barreled weapon” that “may be converted to expel a shot, bullet or projectile by the action of a combustible propellant.”¹⁵⁵ The amendment goes further by elaborating on the meaning of *converted*, defining such an object as one “capable of being converted to expel a shot, bullet or projectile” when the

are considered to be hunting firearms in other Member States”).

¹⁵² *Id.* ¶¶ 117–121, at 21–22.

¹⁵³ *Replica Weapons ‘Posing Threat,’* BBC NEWS, Oct. 31, 2007, http://news.bbc.co.uk/1/hi/newsid_7070000/7070547.stm; Nicola Smith, *Germans Sell British Gangs Replica Guns*, TIMES ONLINE (U.K.), Sept. 30, 2007, <http://www.timesonline.co.uk/tol/news/uk/crime/article2558291.ece>. Although these articles refer to converted weapons as *replicas*, there is some indication from the text of both the UN Protocol and the 2008 amendments that *converted* weapons and *replica* weapons refer to two categories of objects with only the potential to overlap. Converted weapons are those which could eventually expel a combustible propellant, whereas a replica might be capable of conversion, but in some cases will never be capable of expelling a combustible propellant. Under the current 2008 amendments, converted weapons fall within the scope of the legislation. Compare Directive 2008/51/EC, *supra* note 8, art. 1, ¶ 1(a) (including in the definition of firearms converted weapons or weapons capable of conversion) with *id.* ¶ 12 (calling for a report to be submitted in 2010 on the possibility and desirability of including replica firearms in the legislation). The Commission’s concern with replicas may be in response to a rise in crimes committed by non-lethal, non-convertible replica firearms. *Replica Guns*, BBC INSIDE OUT, Jan. 12, 2004, http://www.bbc.co.uk/insideout/yorkslincs/series5/gun_crime_replica_weapons.shtml.” *Replica Weapons* Directive 2008/51/EC, *supra* note 8, pmbl., para. 4 (noting that “[p]olice intelligence evidence shows an increase in the use of converted weapons within the Community. It is therefore essential to ensure that such convertible weapons are brought within the definition of a firearm for the purposes of Directive 91/477/EEC.”).

¹⁵⁴ Directive 2008/51/EC, *supra* note 8, art. 1, ¶ 1(a).

¹⁵⁵ *Id.*

object "has the appearance of a firearm," and the object's construction or component material "can so be converted."¹⁵⁶

The 2008 amendments provide other technical definitions that were absent in Article 12(2) of the original legislation¹⁵⁷ in response to a complaint published in the 2000 Report.¹⁵⁸ Specifically, the 2008 Directive defines a firearm *part* for purposes of the Directive, as well an *essential component*.¹⁵⁹ These definitions are pertinent to the issue of converted weapons, as they provide law enforcement and national governments with a uniform source for identifying potentially illegal firearm parts. This provides for a more comprehensive regulatory response to illicit manufacturing, as converted weapons are easily "re-manufactured" from readily available firearm component parts.¹⁶⁰ With only minor exceptions, these definitions track the language set forth in the UN Protocol.¹⁶¹

Second, the 2008 Directive significantly expands the original legislation to include both illicit manufacturing and illicit trafficking activities.¹⁶² The amendment calls for a definition of actions or behavior qualifying as *illicit manufacturing*. The "manufacturing or assembly of firearms, their parts and ammunition" qualifies as *illicit* if it is constructed "from any essential component of such firearms illicitly trafficked"; if the manufacturer is not authorized pursuant to Article 4 of the 1991 Directive; or if the manufacturer does not properly mark the firearms at the time and place of assembly.¹⁶³ The 2008 Directive proceeds to define *illicit trafficking* as the cross-border "acquisition, sale, delivery, movement or transfer of firearms, their parts or ammunition" between Member States when none of the Member States authorizes the transfer, or if the firearms are transferred unmarked.¹⁶⁴ These definitions also track the language of the UN Protocol.¹⁶⁵

In direct response to the UN Protocol, the 2008 Directive requires the marking of firearms "[f]or the purpose of identifying and tracing each assembled firearm."¹⁶⁶ If a firearm is not marked, the Member State must

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* art. 1, ¶ (1)(b).

¹⁵⁸ See 2000 Implementation Report, *supra* note 91, ¶ 92, at 17 (noting that Article 12(2) "contains, as it stands, certain contradictions and ambiguities").

¹⁵⁹ Directive 2008/51/EC, *supra* note 8, art. 1, ¶ 1(b).

¹⁶⁰ See *supra* notes 37–38 and accompanying text.

¹⁶¹ UN Protocol, *supra* note 7, art. 3.

¹⁶² Directive 2008/51/EC, *supra* note 8, pmbi., ¶ 6.

¹⁶³ *Id.* art. 1, ¶ 1(d).

¹⁶⁴ *Id.*

¹⁶⁵ UN Protocol, *supra* note 7, art. 3(d)–(e).

¹⁶⁶ Directive 2008/51/EC, *supra* note 8, art. 1, ¶ 2.

ensure that the firearm is deactivated.¹⁶⁷ The marking must meet specific requirements: most notably, the marking must be “affixed to an essential component of the firearm, the destruction of which would render the firearm unusable.”¹⁶⁸ Marking requirements apply to packages of complete ammunition.¹⁶⁹ Governments are not exempt from all marking requirements, as they must ensure that firearms are properly marked at the time of firearm transfers “from government stocks to permanent civilian use.”¹⁷⁰ The marking must “permit ready identification by all States of the country of manufacture.”¹⁷¹

The 2008 Directive also expands the responsibilities of the entities involved in firearm sales or transfers. Regarding dealers, the legislation requires Member States to perform “at least a check of the private and professional integrity *and of the abilities of the dealer*.”¹⁷² Unlike the requirements of the 1991 Directive, the dealer is required to turn over to the Member State a register of all activities, including particular information regarding transfers, after the dealer has ceased his activities.¹⁷³ The 2008 Directive also includes language that authorizes Member States to more rigorously track the activities of dealers. The Directive requires the dealer to promptly communicate information regarding a firearm transfer in certain circumstances. Upon notification, Member State authorities shall “carry out inspections, where appropriate on the spot, to verify the correspondence between the information communicated by the dealer and the actual characteristics of the transfer.”¹⁷⁴

Regarding Member States, the 2008 Directive requires national governments to establish and maintain “a computerised data-filing system” to which authorized authorities are guaranteed access.¹⁷⁵ Each firearm subject to the Directive must be recorded in this system, as well as the name and address

¹⁶⁷ Directive 2008/51/EC amends Annex I to Council Directive 91/477/EEC by providing specific deactivation requirements. This includes ensuring that “all essential parts of the firearm have been rendered permanently inoperable and incapable of removal, replacement or a modification that would permit the firearm to be reactivated in any way” *Id.* art. 1, ¶ 13(b)(i)(a).

¹⁶⁸ *Id.* art. 1, ¶ 2.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* (emphasis added). Only the italicized portion refers to modifications of Directive 91/477/EEC.

¹⁷³ *Id.* art. 1, ¶ 2.

¹⁷⁴ *Id.* art. 1, ¶ 7.

¹⁷⁵ *Id.* art. 1, ¶ 2.

of each person possessing or acquiring the firearm.¹⁷⁶ The system must maintain this information for twenty years.¹⁷⁷ The 2008 Directive also requires Member States to control internet acquisitions, or “distance contracts.”¹⁷⁸ Finally, the 2008 Directive requires Member States to impose more stringent non-compliance penalties, mandating that penalties be “effective, proportionate and dissuasive.”¹⁷⁹ The 1991 Directive, by contrast, required only that penalties be “sufficient to promote compliance.”¹⁸⁰

Regarding the Commission, the 2008 Directive requires the establishment of a contact group “for the exchange of information for the purposes of applying this Article.”¹⁸¹ In addition, the 2008 amendments call for the creation of a committee to assist the Commission.¹⁸² Both of these changes respond directly to concerns over the original implementation of the 1991 Directive identified by Member States in the 2000 Implementation Report, discussed above.¹⁸³

Regarding potential firearms purchasers, the 2008 Directive only permits purchases by “persons who have good cause,”¹⁸⁴ are over the age of eighteen (except for minors acquiring a firearm for hunting or target shooting and under the “permission” or “guidance” of a parent), and “are not likely to be a danger to themselves, to public order or to public safety.”¹⁸⁵ Unlike the 1991 Directive, the 2008 amendments provide an example of the non-fulfillment of the last criterion, providing that “[h]aving been convicted of a violent intentional crime shall be considered as indicative of such danger.”¹⁸⁶ In addition, these requirements apply to all categories of firearms—a significant departure from the specific, categorical requirements under the 1991 Directive.¹⁸⁷

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* The UN Protocol, by contrast, required signatories to maintain records of each firearm in this recording system for “not less than ten years.” UN Protocol, *supra* note 7, art. 7, para. 1.

¹⁷⁸ Directive 2008/51/EC, *supra* note 8, art. 1, ¶ 5.

¹⁷⁹ *Id.* art. 1, ¶ 11.

¹⁸⁰ Council Directive 91/477/EEC, *supra* note 4, art. 16.

¹⁸¹ Directive 2008/51/EC, *supra* note 8, art. 1, ¶ 9.

¹⁸² *Id.* art. 1, ¶ 10.

¹⁸³ 2000 Implementation Report, *supra* note 91, ¶¶ 100–103, at 19.

¹⁸⁴ The 2008 amendments do not elaborate on what constitutes “good cause,” but imply that good cause will be determined by the Member State: “Member States may withdraw authorisation for possession of a firearm if any of the conditions on the basis of which it was granted are no longer satisfied.” Directive 2008/51/EC, *supra* note 8, art. 1, ¶ 4.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ Council Directive 91/477/EEC, *supra* note 4, art. 5.

V. SUCCESS OR FAILURE: WILL THE 2008 AMENDMENTS
CURB ACCESS TO ILLICIT FIREARMS IN THE EU?

The open internal border policy of the European Union offers the citizens of Member States, visitors of Europe, and other entities operating businesses across the continent generally free and unimpeded movement within the EU. As a result of this internal border transformation, the European Union has experienced a great deal of economic success.¹⁸⁸ Yet, with all the benefits of an open European Community come the disadvantages to security: Member States no longer have the authority to control their internal borders. The free flow of persons and goods has proven a major advantage to trade and economic well-being, but controlling the free flow of *unwanted* goods and people has proven a difficult reality and an ever-present concern to Member States.

Council Directive 91/477/EEC appeared as a major, unified response to the need to balance freedom of movement with the Member States' expectations of security. Highly-publicized violence, issues with implementation, and new international obligations led the consensus in the European Parliament to push for amendments to the 1991 Directive. The amendments were well received and in 2008 became legally binding on the Member States. Yet, do these amendments provide an effective legal framework for an actual reduction in the flow of illicit firearms within the European Community? It is the position of this Note that while significantly improving upon the 1991 Directive, the legal framework created by the 2008 Directive remains too weak to counter the flow of illicit firearms facilitated by organized crime networks, arms brokers, and individuals with an incentive to profit financially from the demand created by strict regulation.

Despite consensus for the 2008 amendments, galvanized by the objectives of the UN Protocol and necessitated by violence in the Member States, the legislation only attempts the bare minimum. While providing a legal framework for the potential prosecution or penalization of conduct involving firearms, firearm parts, or ammunition, the 1991 and 2008 Directives lack "teeth," for they take a weak stance on non-compliance and do little to reduce black market demand. The legislation fails to adequately address the very entities that actually thrive off of strict regulation—arms brokers, organized crime networks, and individuals conducting straw transactions. Because it

¹⁸⁸ See Sándor Richter, *The First Three Years in the EU – A Clear Economic Success*, 6 STATISTIKA 437 (2007), available at <http://panda.hyperlink.cz/cestapdf/pdf07c6/richter.pdf> (discussing the economic success of the Eastern European countries as a result of their inclusion in the EU).

lacks a more decisive stance on the roots of the illicit firearm trade in the European Union, the legislation will do little to reduce the success of the black market.

The 2008 amendments stand the best chance to limit (though not eliminate) the activities of those individuals who seek to profit from stringent regulation through straw transactions.¹⁸⁹ As noted in Part III, these transactions are more likely to occur in countries with strong regulation and licensing requirements.¹⁹⁰ As such, the very existence of the legislation incentivizes individuals to profit from potentially high demand and little “supply” (or extremely low access to supply due to regulatory red tape). The situation is complicated further by the difficulty of monitoring small or individual transactions. Given these factors, the legislation probably will not reduce the likelihood of any one transaction, but stands a good chance of reducing straw purchases in the aggregate. Several additions from the 2008 amendments lead to this conclusion.

First, the technical amendments to the 1991 Directive—regarding definitions and the added requirement for marking all firearms—will likely assist Member States in identifying more violations by individuals. By requiring the marking of all firearms and by requiring Member States to connect the marking information with the original owner, the original owner may have less incentive to pass the firearm to the second owner in the straw transaction when he knows that the firearm is tied to his name. Also, the more inclusive definition of *firearm* will make it more difficult for a savvy individual to exploit the technical differences between Member State regulations. However, individuals sufficiently motivated by the profit margin on an illicit firearm will likely find ways to exploit the limitations of the Directive. For example, the original owner in the straw transaction could immediately claim the firearm was stolen, which is a common way for firearms to enter illicit channels.¹⁹¹

The 2008 amendments have much less force against illicit trafficking by arms brokers. In a curious manner, the EU does include the definition of an *arms broker* and recognizes that future attention to the trade may be required, but only *suggests* such regulation to the Member States.¹⁹² The amendments go on to suggest what such a regulatory system might include: either the

¹⁸⁹ Again, a straw transaction occurs when a legally acquired firearm is obtained and then sold to a second owner in avoidance of legal procedure. CUKIER, *supra* note 38, at 7.

¹⁹⁰ *Id.*

¹⁹¹ See *supra* note 33 and accompanying illustration (identifying theft as a possible black-market entry point).

¹⁹² See Directive 2008/51/EC, *supra* note 8, art. 1, ¶ 3 (noting that “Member States shall consider establishing a system for the regulation of the activities of arms brokers”).

registration of broker activity within the Member State's territory or "requiring the licensing or authorisation" of broker activity.¹⁹³ Given the exploitative and manipulative nature of many arms brokers—particularly those willing to meet the demand for illicit firearms—asking Member States only to *consider* regulating broker activity significantly undermines the EU's commitment to the UN Convention and Protocol. Unlike the UN Protocol,¹⁹⁴ the 2008 amendments fail to encourage the storage or exchange of information regarding brokers or brokering. Failing to codify the inclusion of brokers and brokering information in the computerized data-filing system creates a large gap in the tracing mechanism introduced by the 2008 amendments. The absence of information on arms brokers and their activities in this system renders the tracking mechanism for potentially illicit firearms incomplete and ineffective.

As previously noted, the 2008 amendments do present several legislative responses to issues identified by the UN Protocol and by the 2000 Implementation Report. Notably, the 2008 amendments finally bring illicit manufacturing and illicit trafficking into the scope of the Directive. As identified in Figure 1 on page 243,¹⁹⁵ illicit manufacturing is often the first step in the life of an illicit firearm. While statistics indicate that most firearms are manufactured legally,¹⁹⁶ addressing the small market for illicitly manufactured firearms becomes essential in light of the durability and longevity of the weapon. The 2008 amendments not only define illicit manufacturing, but also bring the actions defining the violation to the forefront of the issue by outlining exactly what will be considered illicit behavior. Because the licit manufacturing of a firearm in a Member State will involve the proper marking of the firearm, the amendments attempt to place a permanent tracing device on the product—a potential benefit to both the Member State and any law-enforcement agency that may need the information in the future. The amendments also include manufacturing from illicit firearm parts and manufacturing firearms without the proper authorization of the Member State as violations of the Directive. While the legislation may not reduce the frequency or number of violations, it does provide Member States with a wider net for prosecuting illicit manufacturers.

¹⁹³ *Id.*

¹⁹⁴ UN Protocol, *supra* note 7, art. 15, ¶ 2.

¹⁹⁵ See *supra* note 33 and accompanying illustration (identifying illicit production as an entry point of firearms into illicit trade channels).

¹⁹⁶ See KRAUSE, *supra* note 34, at 7 (stating that "virtually all illicit weapons transferred were, at some point in their life, legally produced or procured").

Similarly, the inclusion of illicit trafficking and its definition in the 2008 Directive allows Member States an avenue for prosecuting illicit cross-border transfers when discovered. For purposes of the Directive, a transfer is *illicit* when it lacks authorization or the firearms are not marked.¹⁹⁷ Again, this portion of the Directive highlights the Community's general commitment to the objectives of the UN Protocol by attempting to provide incentives for the marking and tracing of all firearms, firearm parts, and ammunition manufactured and transferred within the European Community. Yet the Directive does little more than define *illicit manufacturing* and *trafficking* and require Member States to penalize the perpetrators of these activities in an "effective, proportionate and dissuasive"¹⁹⁸ manner.

Further, though recognizing definitions of illicit manufacturing and illicit trafficking, the 2008 amendments fail to adequately address the groups generally involved in these activities: organized crime networks. The 2008 amendments do not define what constitutes organized crime for the purposes of the Directive. Nor do the amendments specifically criminalize the illicit transfer of firearms; the Preamble of the Directive merely states that "[i]n some serious cases, compliance with . . . the Protocol requires the application of criminal sanctions and the confiscation of the weapons."¹⁹⁹ Also, the 2008 amendments do not require the criminalization of Directive violations; they only require that "penalties . . . must be effective, proportionate and dissuasive."²⁰⁰

In further degradation of the effort to combat the black market for illicit firearms in the EU, the 2008 amendments do not properly denounce other mechanisms by which organized crime networks feed the demand for illicit firearms—namely, conversion of replica firearms and other non-lethal objects, recycling of deactivated firearms, or theft of firearms from legal owners or manufacturers. The legislation does address conversion by adding converted weapons to the definition of *firearm*, but the Directive does not declare the act of conversion to be a violation. While it is true that not all forms of conversion are illicit, the Directive takes great pains only to recognize the act of converting a firearm or its parts or ammunition, instead of requiring Member States to penalize certain acts of conversion—namely, those performed on toy guns or other non-lethal objects capable of such. For example, the conversion of a

¹⁹⁷ Directive 2008/51/EC, *supra* note 8, art. 1, ¶ 1.

¹⁹⁸ *Id.* art. 1, ¶ 11.

¹⁹⁹ *Id.* pmb., ¶ 10.

²⁰⁰ *Id.* art. 1, ¶ 11.

weapon would qualify a person as a dealer²⁰¹—an entity authorized under the Directive to engage in the trade of firearms following only minor procedural inquiries.

Other frequent mechanisms by which firearms surface in illicit channels—principally the recycling or theft of weapons²⁰²—are not addressed in the Directive. Nor does the Directive address the fact that firearms and their components often appear in the same shipments with drugs or other black market goods.²⁰³ Instead, the Directive appears to focus only on the minor violations resulting from the cross-border movement of firearms amongst the Member States—it does not appear to address major violations to any substantial degree.

The 1991 Directive and the 2008 amendments do little to combat the black market for illicit firearms and instead focus on ever-more precise regulation of already-legal firearm owners. In reality, the illicit firearm trade may not be an area capable of regulation; indeed, the black market is a creature of the very existence of strict regulation. In other words, high regulation creates a gap in supply, which organized crime, arms brokers, and straw purchasers exist to satisfy.²⁰⁴ In return, these illicit actors receive substantial profit margins otherwise unavailable in a market absent of regulatory restrictions to access. Although it may seem counterintuitive to those seeking to reduce violent crime, the removal of intense regulation may be the only way to eliminate the black market for illicit firearms.

Finally, the weakness of the 2008 amendments may be tied to the structural challenges associated with the European Union, especially with regard to the sensitive issue of firearm ownership. The legislation is wrought with compromise. As noted by Gisela Kallenbach during a debate in the European Parliament regarding the 2008 amendments:

I have learned a great deal throughout this process. I have learned about the true role that lobbyists can play: some of them contributed constructively to achieving common solutions, whereas others deliberately set out to obstruct the process with half-truths and misinformation. From the outset, it was obvious

²⁰¹ *Id.* art. 1, ¶ 1(c).

²⁰² Spapens, *supra* note 26, at 365.

²⁰³ Naylor, *supra* note 28, at 48–49.

²⁰⁴ See Jeffrey A. Miron, *Violence, Guns, and Drugs: A Cross-Country Analysis*, 44 J.L. & ECON. 615, 618 (2001) (reasoning that “[p]rohibitions of goods for which there is substantial demand and imperfect substitutes generally give rise to black markets”).

to me that it is no simple matter to strike the right balance between the requirements of a well-functioning internal market, the justified safety concerns of citizens about the illegal use of firearms and the understandable desire of hunters and sports marksmen to pursue their hobbies largely unhindered I admit that I would have preferred even more clear-cut provisions here and there, for example in order to achieve better legislation or to simplify matters However, I was unable to secure majorities here.²⁰⁵

Although Member States may agree that access to illicit firearms is a major concern to Member States, the complex political nature of the European Union may render a single, effective legislative response unattainable.

VI. CONCLUSION

The 1991 Directive created a legal framework for the harmonization of Member State law regarding the possession and acquisition of firearms. Despite feelings of relative success by the Member States regarding implementation,²⁰⁶ the EU found it necessary to amend the 1991 Directive to address the weaknesses identified during implementation and to bring the EU into compliance with the newly-signed UN Protocol dealing with illicit firearms in relation to transnational organized crime. Given the EU's commitment to the reduction of criminal access to illicit firearms—as evidenced by its support of the UN Protocol—the 2008 amendments provide the EU an opportunity to challenge the Member States to create a unified legislative front against the black market for firearms in Europe. Although the 2008 amendments succeed in bringing illicit manufacturing, trafficking, and brokering into the scope of the Directive, the amendments fail to create a regulatory environment sufficient to counter the lucrative efforts associated with firearm trafficking. The 2008 amendments will likely strengthen the EU's effort to limit firearm access to the general population, but the amendments do not appear comprehensive enough in either scope or force to confront the highly incentivized black market for firearms on the European continent.

²⁰⁵ Remarks of Rapporteur Gisela Kallenbach, EUR. PARL. DEB. 69 (Nov. 28, 2007).

²⁰⁶ 2000 *Implementation Report*, *supra* note 91, ¶¶ 36–42, at 9–10.