

INTERNAL COMPLIANCE PROGRAMMES





**Internal
Compliance
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Abbreviations

AEO	Authorised Economic Operators
BAFA	Das Bundesamt für Wirtschaft und Ausfuhrkontrolle (Federal Office of Economics and Export Control – Germany)
ECP	Export Control Program
EMCP	Export Management and Compliance Programme
EMS	Export Management System
HADDEX	Handbook of German Export Controls
ICP	Internal Compliance Programme
ICS	Internal Compliance System
ICT	Intra-Community Transfer Directive (Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009, simplifying terms and conditions of transfers of defence-related products within the Community)
ISIS	Institute for Science and International Security
ISP	Inspektionen för Strategiska Produkter (Swedish Agency for Non-Proliferation and Export Controls)
SME	Small- and medium-sized enterprise

Introduction

Governments recognise that it is in their interests to monitor exports of arms, military equipment and dual-use items, and that way ensure that they are not destined for undesirable end-users and end-uses while limiting the negative impact on trade. Therefore, a central element of a national export control strategy is to ensure that entities involved in the trade of controlled goods are both able and willing to carry out their activities in accordance with national export control legislation. Governments, therefore, have to seek to enshrine an 'export control culture' among the relevant companies.¹ One common method for achieving this goal, which many governments support, involves companies (entities) putting in place a system that minimises the risks of illegal exports. Such a system is generally referred to as an internal compliance programme (ICP) or an internal compliance system (ICS).²

"An internal compliance system is an arrangement in which a company ensures that it is completing legal transactions, obeying the regulations enacted by the government, and fulfilling company export policies. Internal compliance systems typically include a set of procedures that company officials must satisfy before an item leaves the company. Such procedures include a thorough investigation of the buyer and end-user prior to the shipment of a purchased item off-site."³

An ICP should consist of "operational export compliance policies and procedures (...) and a written set of guidelines that captures those policies and procedures."⁴ It provides guidelines on what should be done and helps document what has been done. An ICP should help to manage the flow of information from government to company and company to government.⁵ An ICP should also help the company process information from the government, ensure exports are in compliance with export control legislation and enable reporting to government when required or requested. Such processes help build trust between companies and government agencies. Concretely, this system should help companies keep up to date with legislation and requirements for exports of controlled goods; enable them to know what goods are subject to export controls; screen for concerns relating to their customers (particular destinations, end-users, end-uses); iden-

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- 1 Institute for Science and International Security (ISIS), Key Elements of an Effective Export Control System, (2003), http://www.exportcontrols.org/print/key_elements.htm.
 - 2 Synonyms for Internal Compliance Programme (ICP) include: Export Control Program (ECP), Export Management and Compliance Programme (EMCP), Export Management System (EMS).
 - 3 Institute for Science and International Security (ISIS), Key Elements of an Effective Export Control System, (2003), http://www.exportcontrols.org/print/key_elements.htm.
 - 4 U.S. Department of Commerce, Bureau of Industry and Security, Office of Exporter Services, Export Management and Compliance Division Compliance Guidelines: How to develop an effective export management and compliance program and manual, February 2010, p. 5.
 - 5 Institute for Science and International Security (ISIS), Key Elements of an Effective Export Control System, (2003), http://www.exportcontrols.org/print/key_elements.htm.

tify persons responsible and competent to oversee/be involved in exports and other international arms trade activities. A Polish export control official has suggested that ICPs should be based on the following three rules:

- Know your foreign partner/recipient/end-user;
- Know the technical specifications of the company's products;
- Know and understand the potential uses for the company's products.⁶

The purpose of an ICP is to ensure: "that the right export decisions are consistently being made; that employees know their export control responsibilities; that the right procedures are being followed; and that the right questions are being asked to ensure that exports are being made in compliance with national legislation and, therefore, consistent with a company's best interests."⁷ Internal compliance systems should address several specific goals:

- To develop contacts and good-standing relationships between the company and export agencies;
- To remain informed of updates to the government's export control laws and regulations;
- To centralize export-related questions and issues;
- To standardize procedures;
- To provide early warning and screening of all inquiries and orders;
- To generate coherent and complete documentation of all sensitive export transactions; and
- To train all employees engaged, either directly or indirectly, with exports.⁸

It is widely recognised that establishing and maintaining an ICP carries costs, not only in terms of resources that need to be allocated (time and money), but also in terms of losses caused by companies avoiding particularly lucrative exports due to concerns about the end-use or end-user and potential violations of export control legislation. However, by taking such precautions companies also avoid the direct and indirect penalties associated with export control violations, therefore saving time and money. In addition, other noted benefits of maintaining an ICP are that it can:

- Reinforce senior management commitment to compliance with export control legislation;
- Provide management structure and organization for the processing of export transactions;
- Enhance accountability for export control tasks by identifying who is responsible for performing each part of the process and who is responsible for overall effectiveness;
- Provide compliance safeguards throughout a company's supply chain to ensure that order processing, due diligence checks and screenings produce consistent export decisions;
- Provide written instructions helping employees incorporate "screening" of export transactions against general prohibitions of exports, re-exports, and selected transfers to certain end-uses and end-users, as a part of their daily responsibilities;
- Serve as a vehicle to communicate red flag indicators that raise questions about the legitimacy of a customer or transaction;
- Provide personnel with tools to help them ensure they are performing their export control functions accurately and consistently;
- Identify transactions that could normally be exported without a license, but because of the end-use or end-user, require a license;

6 Śliwowski, J., 'Model of certified internal compliance systems,' in Auer, D., (ed), Wassenaar Arrangement. Export Control and its Role in Strengthening International Security, Favorita Papers, 01/2005, Diplomatische Akademie Wien, p. 78.

7 U.S. Department of Commerce, Bureau of Industry and Security, Office of Exporter Services, Export Management and Compliance Division Compliance Guidelines: How to develop an effective export management and compliance program and manual, February 2010, p. 5.

8 Institute for Science and International Security (ISIS), Key Elements of an Effective Export Control System, (2003), http://www.exportcontrols.org/print/key_elements.htm.

- Streamline the process and reduce time spent on compliance activities when employees have written instructions, tools and on-going training;
- Protect employees through training and awareness programs from inadvertently violating export control legislation.”⁹

It is also important to note that companies are not alone in this endeavour. Government agencies in many countries offer various forms of assistance to companies to establish and maintain ICPs. Examples of such assistance include providing: regularly updated information on legislation, lists of controlled goods, individuals, companies and destinations that are of concern or subject to embargoes. As the case studies below demonstrate, governments disseminate this information via the website of the export licensing authority, regular newsletters, handbooks, software, as well as through workshops, conferences and meetings with industry associations, ‘export control days’ or individual company consulting. Several states also offer some form of assistance in the form of training.

The UK and the USA provide detailed and publicly-available guidelines on the establishment of an ICP. These guidelines stress that there is no one-size-fits-all solution for designing and implementing an ICP and that it is therefore not advisable to simply adopt an ICP developed for another company. The US guidelines stress that each company’s ICP “should be appropriate to the scope of its export and re-export activities and to its business circumstances.”¹⁰ The US guidelines note that this is necessary because ICP’s will be affected by the specificities of the particular company, including its size, management structure, product range, the location(s) of its customers. For example, company’s size may influence decisions related to training and whether it should be conducted in-house or by external consultants. Meanwhile, both size and corporate culture may be the determining factors in deciding whether responsibility for the administration, performance, and coordination of export and compliance responsibilities should be centralised under a single employee (or small team), or located within various departments. The US experience suggests that “many centralize the administration of training, recordkeeping, dissemination of regulatory material, notification of non-compliance, and audits. However, the actual screening activities against various government lists (of foreign entities that should be avoided, certain end-use and end-user activities, and diversion risk) may be performed by personnel throughout the company.”¹¹ Companies will also find different legal requirements, and challenges, depending on whether they are seeking to export items contained on a control list of arms and military equipment or one for dual-use goods.

There are of course key elements that apply to all entities involved in the trade in arms, military equipment and dual-use goods. Although different sets of guidelines may use different titles/sub-headings, the key elements of an ICP can be summarised as follows:



9 U.S. Department of Commerce, Bureau of Industry and Security, Office of Exporter Services, Export Management and Compliance Division Compliance Guidelines: How to develop an effective export management and compliance program and manual, February 2010, pp. 7-8.

10 U.S. Department of Commerce, Bureau of Industry and Security, Office of Exporter Services, Export Management and Compliance Division Compliance Guidelines: How to develop an effective export management and compliance program and manual, February 2010, p. 5.

11 U.S. Department of Commerce, Bureau of Industry and Security, Office of Exporter Services, Export Management and Compliance Division Compliance Guidelines: How to develop an effective export management and compliance program and manual, February 2010, p. 5.

1. A commitment from senior management to comply with national export controls. UK guidelines suggest that the chairman, chief executive, or other senior official of the company should draft a written statement that clearly states the company's policy of compliance and that all employees should be aware of this statement, its contents and implications for their work.¹² The US guidelines go further and call for senior management to also commit sufficient resources for ICP implementation.¹³

2. The designation of a senior member of the company as the head of the ICP in order to ensure implementation of the ICP. Other identified responsible individuals within the organisation should be tasked with ensuring that the ICP is up-to-date and that lines of decision-making are clear and comprehensible.

3. A regularly updated written guide detailing company compliance policies and procedures, possibly in the form of a software package. The guide should provide details for daily compliance practices to ensure that exports are undertaken in accordance with national export control requirements. Ideally, the guide should include information on procedures relating to:

- Assessing when a licence is required and which type of licence is appropriate;
- End-use control considerations;
- Screening of customers;
- Mechanics of licence application;
- Shipment controls relating to exporting and freight;
- Records keeping.¹⁴

4. Ongoing training of staff responsible for different aspects of exports processing. Due to the fact that staff and national export control requirements change, it is necessary to have in place procedures ensuring that all responsible staff are aware of their roles with regards to the implementation of their company's ICP and that the information based on which assessments are made is up-to-date.

5. The screening of all aspects of an export. The US guidelines call for the screening of 'employees, contractors, customers, products, and transactions, and implementation of compliance safeguards throughout the export life-cycle, including for product development, jurisdiction, classification, sales, license decisions, supply-chain management, servicing channels, and post-shipment activity'. UK guidelines refer to procedures to enable the identification of 'suspicious enquiries' / red-flag indicators. In general, four aspects can be screened:

- Products: screening procedures should be in place to enable identification of products in accordance with control lists;
- Customer and end-user: as noted above, 'knowing your customer' is important for minimising risks;
- Destination: ensuring that the destination is not subject to an arms embargo or regarded as a diversion risk;
- End-use: ensuring that it is understood for which purpose the item will be used and what is the proposed use by the end-user.

12 Department for Business, Innovation and Skills, Export Control Organisation, 'Compliance Code of Practice', March 2010, pp. 7-8.

13 U.S. Department of Commerce, Bureau of Industry and Security, Office of Exporter Services, Export Management and Compliance Division Compliance Guidelines: How to develop an effective export management and compliance program and manual, February 2010, p. 9.

14 Department for Business, Innovation and Skills, Export Control Organisation, 'Compliance Code of Practice', March 2010, p. 8.

6. Adherence to national export control legislation record-keeping requirements. National export control legislation clearly indicates the type of information to be kept by companies involved in international arms transfers and the period of time during which records should be kept. It is therefore to be expected that one element in an ICP should relate to record-keeping requirements. Records can also be used to assist with screening, as internal databases and records can show information on denied licence applications, etc.

7. Establishment of procedures for regular internal audits and compliance monitoring within the company. This should be a task for the senior compliance officer and can help identify potential gaps in company policy and practice as well as assist with point 8. Reviews or audits should separately assess policies and practices.

8. Establishment of procedures for handling and resolving compliance problems and violations. As stated above, ICP should help prevent violations of national export controls as well as facilitate the flow of information between exporters and government export control authorities. An internal procedure enabling employees to come forward with concerns should ideally be put in place. This can help build trust between exporter and government export control authorities and consequently make the reporting of potential violations / lapses easier.

The remaining sections of this report are devoted to 4 case studies that analyse how different EU member states treat the issue of ICPs in their military equipment and dual-use goods transfer controls. Each case study gives a brief introduction on the development of states' approach to ICPs, the government's approach to the issue of ICPs, any legal requirements relating to an ICP and information on any government assistance regarding the establishment and maintenance of an ICP. Section 3 provides a case study of the ICP at the German manufacturer Diehl Stiftung & Co. KG. Also included at the end of the report is an appendix reproducing the 'Questions and guidelines on the description of internal compliance programmes and for subsequent assessment', from the Commission Recommendation on ICP certification for the ICT Directive.

ICP Requirements at the EU level

Legislation in most EU member states recommends that companies engaged in the export of military equipment and dual-use goods have effective systems of record-keeping, screening of recipients, reporting and other factors that constitute the central elements of ICPs. However, there are few states that have a mandatory requirement for an ICP to be in place before any type of transfer licence can be issued. However, this often varies depending on the type of licence in question. Therefore, even without a mandatory legal requirement for an ICP, many companies have one in place to assist with export control legislation compliance in these areas.

The principal of developing simplified procedures for reliable companies that have well-developed ICPs in place has been developed in a number of contexts within the EU, both in the fields of military equipment and dual-use transfer controls.

The EU Dual-Use Regulation

Under the EU Dual-Use Regulation, member states are required to “maintain ... the possibility of granting a global export authorisation.”¹⁵ Global export authorisations are “granted to one specific exporter in respect of a type or category of dual-use item which may be valid for exports to one or more specified end users and/or in one or more specified third countries.”¹⁶ When assessing applications for global export authorisations, member states must take into account whether the exporter has “proportionate and adequate means and procedures to ensure compliance with the provisions and objectives of this Regulation.”¹⁷

The Intra-Community Transfers (ICT) Directive

The ICT Directive obliges all EU member states to introduce General transfer licences and Global transfer licences for the export of military equipment to EU destinations.¹⁸ In order to act as the recipient of goods exported under a General transfer licence, companies must be ‘certified’ by their national authorities. In order to be certified, companies must fulfil a number of standards. These include appointing “a senior executive as the dedicated officer personally responsible for transfers and exports.”¹⁹ In addition, the company must provide a description “of the internal compliance programme or transfer and export management system.”²⁰ The description must include “details of the organisational, human and technical resources allocated to the management of transfers and exports, the chain of responsibility within the undertaking, internal audit procedures, awareness-raising and staff training, physical and technical security arrangements, record-keeping and traceability of transfers and exports.”²¹ Member States will have to transpose the Directive by 30 June 2011 at the latest. They will have to apply the Directive from 30 June 2012.²²

To assist with the harmonisation of certification of ICPs for companies seeking to obtain general and global licences in accordance with the ICT Directive, a working group consisting of representatives from EU member state licensing authorities drafted a set of recommendations setting common minimum standards, consisting of: questions and guidelines on the description of internal compliance programmes and subsequent assessment, a standard certification template, powers for monitoring compliance, corrective measures, suspension and revocation of certificates and exchanges of information relating to certification.²³ With regards

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- 15 Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items (Recast), L 134, p. 6.
 - 16 Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items (Recast), L 134, p. 4.
 - 17 Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items (Recast), L 134, p. 7.
 - 18 Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community, Official Journal of the European Union, L 146, 10 June 2009, pp. 1-36. General transfer licences allow companies to perform exports of certain types of goods to EU destinations and/or exports of certain types of goods to certain types of recipients within the EU without applying for additional export licences. Global transfer licences allow companies to export goods to certain named recipients without applying for additional export licences.
 - 19 Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence related products within the Community, Official Journal of the European Union, L 146, 10 June 2009, p. 7.
 - 20 Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence related products within the Community, Official Journal of the European Union, L 146, 10 June 2009, p. 8.
 - 21 Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence related products within the Community, Official Journal of the European Union, L 146, 10 June 2009, p. 8.
 - 22 European Commission - Enterprise and Industry http://ec.europa.eu/enterprise/sectors/defence/documents/index_en.htm.
 - 23 Commission Recommendation of 11 January 2011 on the certification of defence undertakings under Article 9 of Directive 2009/43/EC of the European Parliament and of the Council simplifying terms and conditions of transfers of defence-related products within the Community, EU Doc. 2011/24/EU Official Journal of the European Union, L11/62, 15 Jan. 2011.

to visiting enterprises to verify compliance, it is recommended that competent authorities should at least be empowered to:

- Enter relevant premises;
- Examine and take copies of the records, data, rules of procedure and any other material relevant to products exported, transferred or received under a transfer licence from another Member State. Such inspections should be carried out in compliance with the legislation of the Member State in which they are to be undertaken.²⁴

Annex is a particularly useful set of 'questions and guidelines on the description of internal compliance programmes and subsequent assessment' that list key areas as:

- Organisational, human and technical resources allocated to the management of transfers and exports;
- Chain of responsibility;
- Internal audits;
- General awareness raising;
- Physical and technical security;
- Record-keeping and traceability of exports and transfers.

For the full list of questions and guidelines, see Annex.

Authorized Economic Operator (AEO)

In April 2005 the EU made a series of security-related amendments to the customs code.²⁵ One of the amendments involved the creation of the status of Authorized Economic Operator (AEO).²⁶ National authorities can award the status of AEO to any business that "meets common criteria relating to the operator's control systems, financial solvency and compliance record."²⁷ Manufacturers, exporters, freight forwarders, warehouse managers, customs agents and carriers are all eligible to apply for AEO status. Once awarded, AEO status is recognized across the EU and makes the recipient eligible for certain benefits, including simplified procedures at entry and exit points and simplified security- and safety-related inspections.²⁸

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24 Commission Recommendation of 11 January 2011 on the certification of defence undertakings under Article 9 of Directive 2009/43/EC of the European Parliament and of the Council simplifying terms and conditions of transfers of defence-related products within the Community, EU Doc. 2011/24/EU Official Journal of the European Union, L11/62, 15 Jan. 2011, Para. 3.1, p. 3.

25 Anthony, I., Bauer, S., and Wetter, A. 'Chapter 11. Controls on security-related international transfers', SIPRI Yearbook 2008 (Oxford, OUP, 2008), pp. 493-513.

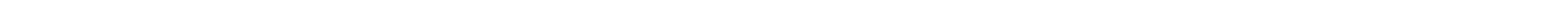
26 Regulation (EC) No. 648/2005 of the European Parliament and of the Council of 13 April 2005 amending Council Regulation (EEC) No. 2913/92 establishing the Community Customs Code, Official Journal of the European Union, L117 (4 May 2005), pp. 13–19.

27 Regulation (EC) No. 648/2005 of the European Parliament and of the Council of 13 April 2005 amending Council Regulation (EEC) No. 2913/92 establishing the Community Customs Code, Official Journal of the European Union, L117 (4 May 2005), pp. 13–19.

28 Anthony, I., Bauer, S., and Wetter, A. 'Controls on security-related international transfers', SIPRI Yearbook 2008 (Oxford, OUP, 2008), pp. 493-513.

Summary of key elements of an ICP

1. A commitment from senior management to comply with national export controls.
2. The designation of a senior member of the company as head of the ICP to ensure implementation of the ICP.
3. A regularly updated written guide detailing company compliance policies and procedures, possibly in the form of a software package.
4. Ongoing training of staff dealing with different aspects of processing exports.
5. The screening of all aspects of an export (products, customer and end-user; destination; end-use).
6. Adherence to national export control legislation record-keeping requirements.
7. Establishment of procedures for regular internal audits and compliance monitoring within companies.
8. Establishment of procedures for handling and resolving compliance problems and violations.





Case study 1: Germany

Development of ICP requirements

In the German export control system each company is responsible for its own export activities. It must decide which products are supplied to which customers, it must check whether an export authorization is required, and it must consider whether it applies or cancels the order. (...) A member of the management is responsible for compliance.²⁹

The German export control agency, BAFA, stresses that export control requires “task sharing between industry and the authorities, necessitating both efficient administration and effective internal compliance programmes”.³⁰ Export controls are in the interests of both government and industry. Export controls serve to protect companies from ‘unintentional involvement in illegal procurement activities by third persons and safeguards the access of German companies to technologies and growing import and export markets’. Therefore, BAFA places great importance on its relations with companies and industrial associations, understanding and supporting their interests, as well as urging them to protect national and international security. In particular, “industry is called upon to maintain its high degree of responsibility and help develop the export control system as a whole.”³¹

German companies are required to have in place systems for ensuring that they comply with general legal requirements relating to administrative procedures, which apply for all commercial enterprises. However, export control legislation introduces additional administrative requirements.³² It has been suggested that the root of Germany’s support for engagement with industry and ICPs originates with scandals tying German companies to development of Iraq’s WMD programmes.³³ Following these events, the German government updated its export control legislation and strengthened the export control agency. These changes required German companies to put in place ICPs and permitted the prosecution of senior company officials for illegal exports by the company - although at the time the term ICP was not in use.

29 BAFA annual report 2004, p. 8

30 BAFA, Report 2009 / 2010: Foreign trade, economic development, energy economy, climate protection, Eschborn, Germany, Apr. 2010, p. 8.

31 BAFA, Report 2009 / 2010: Foreign trade, economic development, energy economy, climate protection, Eschborn, Germany, Apr. 2010, p. 9.

32 Telephone interview with Holger Beutel, BAFA, 26 Jan. 2011.

33 Institute for Science and International Security (ISIS), Key Elements of an Effective Export Control System, (2003), http://www.exportcontrols.org/print/key_elements.htm.

At the same time, several German companies suffered from negative media attention and diminished sales with major customers in the US. Leybold AG, a supplier of equipment for Iraqi, Pakistani and South African WMD programmes, is an example of such a company.³⁴ In response to these allegations and their negative impact on orders from the US and Japan, Leybold AG undertook steps to overhaul its export compliance procedures and policies. Between October 1990 and March 1992 they: installed a new management team; established an internal Corporate Export Controls Office (CECO) to ensure Leybold was in compliance with German export control legislation; and issued a charter that laid out the company's principles with respect to controls on exports of products and services which included a principle of denying exports in case of doubts or concerns about end-use.

The German government and German companies recognised the benefits of an ICP to rescue their reputation and business with reputable customers. The ICP approach was also taken to try to deal with the administrative burden facing the German export control agency with regards to licence assessments.

Export control requirements and ICP

In Germany, exports of arms, military equipment and dual-use goods are governed by the Weapons of War Control Law (KWKG), the Foreign Trade Law (AWG), the Foreign Trade Regulation (AWV) and the EC-Reg.428/2009. These laws determine the circumstances under which export licences are required and the types of licences that can be issued. The Foreign Trade and Payments Act states that the granting of licences is conditional and is determined by the 'material and personal conditions, in particular the reliability of the applicant' (Section 3(2)). This Act also has reporting requirements (Section 26a).

The 'reliable exporter' requirement has therefore been in place since 1992 and has been interpreted as meaning that an applicant can comply with export control rules and regulations.³⁵ Germany does not have a certification requirement for ICPs nor does it require companies to present evidence of their ICP or undertake inspections for individual licence applications. But if non-compliance is reported, BAFA checks the ICP of a company (reliability check). Furthermore, BAFA does visit companies that apply for a global licence to ensure that they are able to comply with export control legislation and have an ICP in place. This does not result in certification, but it is a rigorous check to ensure that the company has a solid understanding of their responsibilities under export control legislation and an ICP in place.³⁶

An ICP certification process will be introduced in line with the ICT directive. It will use the common criteria, as laid out in the Commission Recommendation dating 11 January 2011 on the certification of defence undertakings under Article 9 of Directive 2009/43/EC of the European Parliament and of the Council simplifying terms and conditions of transfers of defence-related products within the Community. However, there will also be additional German-specific criteria. For example, as a part of the assessment process, and although the certification deals with the recipients, there will be assessments with regards to brokering controls and awareness.³⁷ BAFA will be the certifying agency and it anticipates approximately 100 companies to apply for certification.

34 Albright, D, 'Creation of Leybold's Internal Compliance System', Institute for Science and International Security (ISIS), 30 Mar. 2002, <http://www.exportcontrols.org/leybold.html>.

35 Telephone interview with German export control official (BAFA), 26 January 2011. In 2001 the German government issued 'Principles of the Federal Government to evaluate the reliability of exporters of weapons and arms-related goods of 25 July 2001 (Federal Gazette S. 17, 177) and 1 August 2001 (Federal Gazette S. 17, 281), which elaborated upon the requirement for the establishment of an ICP and the designation of an individual held responsible for compliance, as well as ensuring that staff have received training.

36 Telephone interview with Holger Beutel, BAFA, 26 Jan. 2011.

37 Telephone interview with Holger Beutel, BAFA, 26 Jan. 2011.

For all licence applications, a senior executive or board member of a company involved in the trade in arms, military equipment and dual-use goods is required to complete forms, which can be downloaded from the BAFA website, stating that the company has an ICP, is aware of the obligations for entities involved in the export of controlled goods and is willing to take all necessary precautions to ensure compliance with 'Foreign Trade Law (AWG), Regulation implementing the Foreign Trade Act (AWV), Council Regulation (EC) No 428/2009 setting up a Community regime for the control of exports of goods and dual-use technologies, the Law on Weapons Control (CHP) and the EC Customs Code' (Form AV1). They acknowledge that they may be denied a licence if there is a background check and the compliance manager is found not to know or understand the foreign trade law obligations. Form AV2 requires that the compliance manager takes on the responsibility for ensuring that exports are in compliance with national and community legislation. BAFA reports stress the responsibility of companies for export control and the fact that a company executive has to be designated as a compliance manager. The German system therefore relies on trust.

As a result of these laws and regulations, German companies involved in the trade in arms, military equipment and dual-use goods are expected to implement an ICP, complying with the following:

- Supply the end destination declaration to the BAFA;
- Check the reliability of their customers;
- Ensure that their customers will not transfer or re-export the product;
- Name the so-called "person responsible for exports," who is a member of the management or the Board of Directors and who has a high personal responsibility with respect to the selection of personnel, surveillance, and organization of export control in the company;
- Indicate the export control responsibility clearly in the organizational chart of the company and present it upon request (proof of reliability);
- Make continuous improvements to the internal company export control system;
- Regularly train the export employees in the export law, i.e., at least once a year, and evaluate the relevant technical literature;
- Introduce internal audits, reviews and other control measures, which will in turn effectively monitor the efficiency of the company's export control operation; and
- Be able to regularly obtain updated early warning indications from the authorities, which report any suspicious procurement activities by countries, organizations, and companies (and thus destroy the real or pretended "good faith" of the supplier, for example, as to the civil use of the export product).³⁸

It is not explicitly stated that an ICP can bring additional benefits, but according to the Regulation implementing the Foreign Trade and Payments Act (section 13(1)):

"the main custom office may permit reliable exporters, who regularly export a high number of goods, to declare the goods in advance to the customs office of export, if the entire export transaction takes place within the economic territory, the exporter can guarantee the continuous, complete and correct registration of export consignments in a way typical of a company's internal accounting, especially by the help of electronic data processing equipment, and the export surveillance is not impaired. Instead of an export declaration, an export control declaration, if necessary with supplementary sheets, shall be presented on a printed form prescribed by the Federal Ministry of Finance through announcement in the Federal Gazette. The presentation of the export control declaration and a presentation of the goods to the customs office of export shall not be required."

This is one area that is not usually given attention, but is of importance. Authorised Economic Operators (AEO) can enjoy special status reflected in simplified customs procedures, but there is no official requirement for an AEO to have an ICP in place dealing with export controls. However, in Germany, it is recognised that these two aspects are related and therefore BAFA and customs communicate with regard to this and under the certification process BAFA will inform customs of acceptance as a certified ICP.³⁹

Under the Foreign Trade and Payments Act (Section 44) BAFA is granted monitoring and inspection responsibilities for BAFA with the War Weapons Control Act also permitting BAFA and the customs services to be able to:

- Demand information from companies;
- Have access and a right to examine company records and other documents;
- Carry out inspections.

On average, BAFA has granted global licences to 80 companies. BAFA undertakes compliance visits, with each of the licensed companies, at least once every 5 years. These visits are related to checking on the company's ICP. In addition, BAFA carries out 120 external audits in accordance with the War Weapons Act. An estimated 12-14 reliability checks are carried out each year by BAFA among companies that are suspected of illegal exports and poor compliance.⁴⁰ In addition, compliance visits are carried out by special customs units, which review the company's compliance with export control legislation over the preceding three-year period.⁴¹ They carry out some 1,200 of these reviews per year and conduct physical checks of documentation.

Annual data on the number of compliance visits and external audits by BAFA

Year	Compliance visits	External Audits
2006.	More than 25 companies visited	120 external audits conducted
2007.	More than 25 companies visited	More than 100 external audits conducted
2008.	More than 25 companies visited	Around 90 external audits conducted
2009.	More than 15 companies visited	120 external audits conducted

Sources: BAFA annual report 2006, p. 33; BAFA, Annual Report 2007, p. 22; BAFA Annual report 2008, p. 18; BAFA, Report 2009 / 2010: Foreign trade, economic development, energy economy, climate protection, Eschborn, Germany, Apr. 2010, p. 18

Starting in summer 2011 BAFA will be certifying the ICP of companies according to the Intra-Community-Guideline on Arms Transfers (ICT). BAFA is expecting approximately 100 applications.

39 Telephone interview with Holger Beutel, BAFA, 26 Jan. 2011.

40 Telephone interview with Holger Beutel, BAFA, 26 Jan. 2011.

41 Telephone interview with Holger Beutel, BAFA, 26 Jan. 2011.

Guidelines and assistance provided by national government agencies for establishing and maintaining an ICP

BAFA utilises a range of methods to inform companies of their export control responsibilities and to provide assistance for putting an ICP in place. First, BAFA personnel are available for consultations and technical queries. In 2009, “more than 3,500 companies consulted BAFA’s technical and administrative experts,” with almost 500 cases being forwarded for further consideration by the Customs Criminal Investigation Office and the Prosecutor General.⁴²

Second, BAFA produces a range of written materials available in hard copy or online to assist with export control compliance. BAFA’s main assistance tool in this regard is the Handbook for Export Control (HADDEX). HADDEX contains all of the German laws and regulations on export controls as well as relevant EU regulations and directives, and UN decisions. It also contains practical advice for ICP management. BAFA produced the first volume of HADDEX in 1992 and since then has expanded and amended its contents.⁴³ It was initially a loose-leaf folder that could be added to, but since November 2009 an online version has been published which is updated on a daily basis.⁴⁴

In recent years the BAFA annual reports have focused on small and medium-sized enterprises (SME) and new businesses.⁴⁵ A number of recent publications have been produced to inform this target audience. For example, in 2006 BAFA produced ‘Export Control in practice – detect risks, solve problems and export in a responsible manner’ for ICP for SME. In 2008, BAFA ran an awareness campaign for SMEs, targeting new companies. It produced a new leaflet ‘Getting Started in the export control’, which recorded 8,630 downloads.⁴⁶

In 2009, awareness raising continued with 6,000 new business owners receiving information on export controls.⁴⁷ Each year BAFA identifies new companies that might be involved in exports of controlled goods and sends them information introducing export control requirements.⁴⁸ BAFA also produced a new leaflet on the revised EC Dual-Use Regulation to give companies a brief synopsis of the essential changes to this regulation and the amendments to the Foreign Trade and Payments Regulation. Using this information, companies can adapt their internal compliance systems with a minimum of time and effort.⁴⁹ Since September 2009, BAFA has published a monthly export control newsletter for SMEs, to keep them informed of changes in legislation, procedures, arms embargoes, controls lists and other developments relating to export controls.⁵⁰

BAFA has also used other media forms to assist SMEs and larger companies with ICP developments. In 2007 BAFA produced a film “Export Control in Focus - the movie company for exporting,”⁵¹ made available on DVD that outlines the duties of export control managers in companies. The film clearly demonstrates the advantages of an ICP and the problems that companies can encounter with regard to export control compliance. It also provides assistance on creating and running a well-functioning ICP.

42 BAFA, Report 2009 / 2010: Foreign trade, economic development, energy economy, climate protection, Eschborn, Germany, Apr. 2010, p. 9.

43 Rietz, M., ‘Germany’s Export Control Law in the New Millennium’, 8 Apr. 2002, <http://www.exportcontrols.org/rietz2002.html>.

44 BAFA, Report 2009 / 2010: Foreign trade, economic development, energy economy, climate protection, Eschborn, Germany, Apr. 2010, p. 10.

45 BAFA, Annual Report 2007, p. 9; BAFA, Report 2009 / 2010: Foreign trade, economic development, energy economy, climate protection, Eschborn, Germany, Apr. 2010, p. 8.

46 BAFA, Annual Report 2008, Eschborn, Jan. 2009, p. 10.

47 BAFA, Report 2009 / 2010: Foreign trade, economic development, energy economy, climate protection, Eschborn, Germany, Apr. 2010, p. 10.

48 Telephone interview with Holger Beutel, BAFA, 26 Jan. 2011.

49 BAFA, Report 2009 / 2010: Foreign trade, economic development, energy economy, climate protection, Eschborn, Germany, Apr. 2010, p. 11.

50 BAFA, Report 2009 / 2010: Foreign trade, economic development, energy economy, climate protection, Eschborn, Germany, Apr. 2010, p. 10.

51 BAFA, Annual Report 2007, p. 9.

In addition to printed and audio-visual materials, BAFA representatives participate in various outreach workshops and conferences to inform businesses on the topic of export controls. In collaboration with the Centre for Foreign Economic Law at the Institute for Public Economic Law of the Westphalian Wilhelms University, BAFA organised the first 'export control day' in 2007. It was intended to be an annual event informing participants about developments in export control and future projects.⁵² BAFA and the Centre for Foreign Economic Law held the second of these events in 2008 and the third in 2009.⁵³ More than 250 representatives of business, academia and government attended the 2008 meeting.⁵⁴ In addition, BAFA organises annual information days on export controls for businesses. In 2009 BAFA also hosted an event in relation to the EC Dual-Use Regulation (EC) No. 428/2009, which was attended by 400 companies and industry association representatives, to 'gain an initial overview of the most important amendments and other topical issues related to export control'.⁵⁵ In addition, BAFA representatives cooperated with various chambers of commerce and organised information seminars on export controls for SMEs.⁵⁶

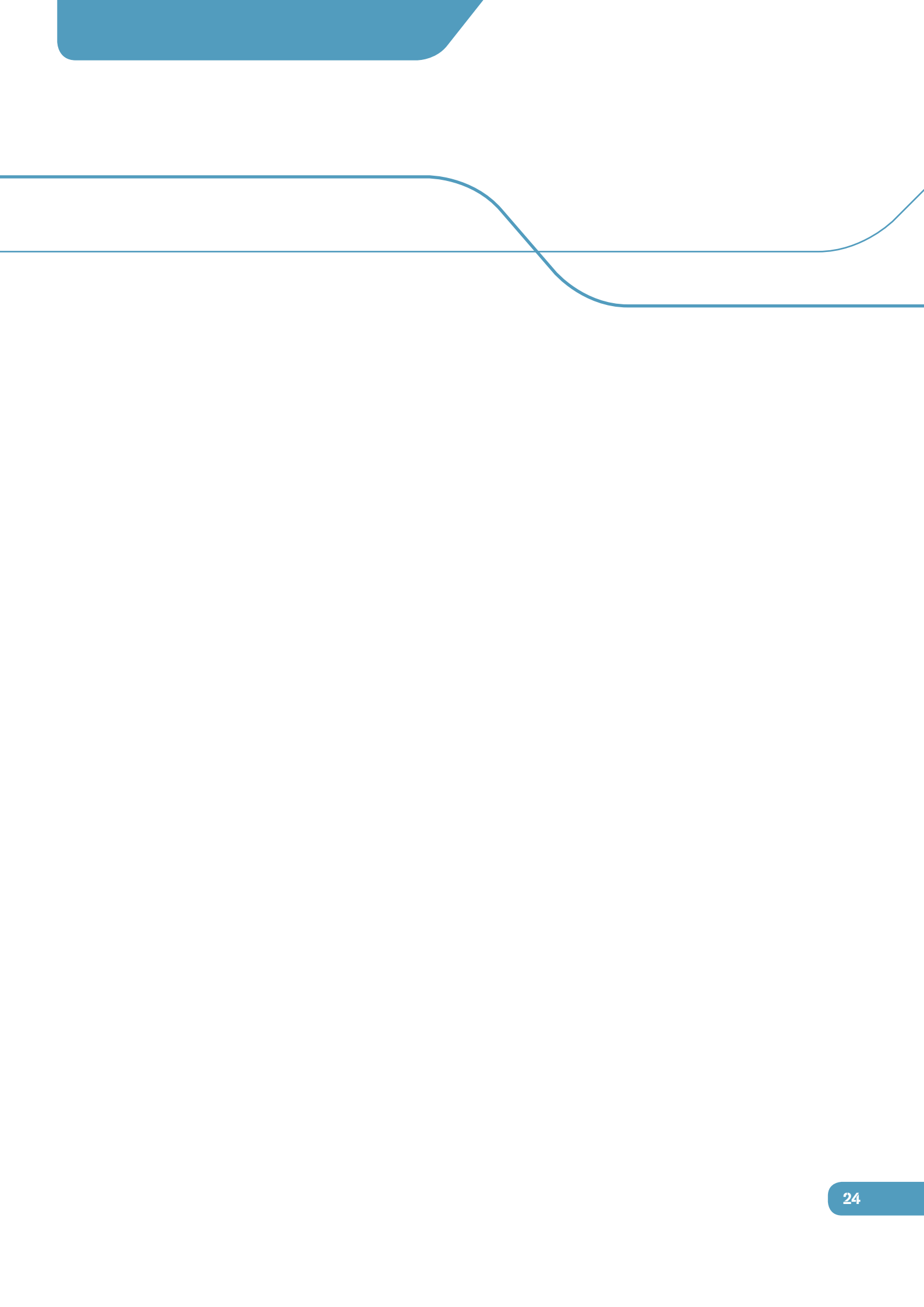
52 BAFA, Annual Report 2007, p. 10.

53 BAFA, Report 2009 / 2010: Foreign trade, economic development, energy economy, climate protection, Eschborn, Germany, Apr. 2010, p. 9.

54 BAFA, Annual Report 2008, Eschborn, Jan. 2009, p. 9.

55 BAFA, Report 2009 / 2010: Foreign trade, economic development, energy economy, climate protection, Eschborn, Germany, Apr. 2010, p. 10.

56 BAFA, Report 2009 / 2010: Foreign trade, economic development, energy economy, climate protection, Eschborn, Germany, Apr. 2010, p. 10.





Case study 2: Poland

Development of ICP requirements

The key tool in preventing transfers to unauthorized consignees of arms, military equipment, dual-use goods and technologies is the Internal Control System, which ought to function in each and every company. The enterprise should be made responsible by virtue of law for establishing and applying an internal control and management system for trade in strategic goods, which essentially helps carry out each transaction individually, pursuant to the existing regulations.⁵⁷

The Polish Ministry of National Economy stresses that ICP represents an effort by the Polish government to balance the need to safeguard national and international security and limit administrative burden and delays for Polish international trade.⁵⁸ ICPs are therefore seen as part of a government effort to meet Polish enterprises half-way and provide for a degree of self-control and –regulation. One Polish official has gone as far as to suggest that the rationale for ICPs in Poland is linked to:

“The requirement for the industry and administration to go hand in hand in their efforts to counteract the stockpiling of arms and dual-use goods and technologies which can be detrimental to the international peace and security. (...) In a modern state, industry ought to be partners with the administration. As such, the industry must have at least a rudimentary awareness of international non-proliferation agreements.”⁵⁹

According to the Ministry of Economy, an ICP is the “most important device preventing goods of strategic importance transfer - including arms and military equipment - to improper recipients.”⁶⁰ Therefore, a lot of responsibility has been placed on entities involved in the trade in arms, military equipment and dual-use goods by Polish national authorities. The Ministry of Economy has provided an exhaustive list of the entities that it argues should have a functioning ICP, including: “industrial enterprises, trading companies, scientific,

57 Śliwowski, J., ‘Model of certified internal compliance systems’, in Auer, D., (ed), Wassenaar Arrangement. Export Control and its Role in Strengthening International Security, Favorita Papers, 01/2005, Diplomatische Akademie Wien, p. 78.

58 Ministry of Economy, Partnership of entrepreneurs and governmental administration aimed at common security policy realisation, 13 Jan. 2011, http://www.mg.gov.pl/English/ECONOMY/Export+control/bezpieczenstwo_eng1.

59 Śliwowski, J., ‘Model of certified internal compliance systems’, in Auer, D., (ed), Wassenaar Arrangement. Export Control and its Role in Strengthening International Security, Favorita Papers, 01/2005, Diplomatische Akademie Wien, pp. 80-81.

60 Ministry of Economy, Partnership of entrepreneurs and governmental administration aimed at common security policy realisation, 13 Jan. 2011, http://www.mg.gov.pl/English/ECONOMY/Export+control/bezpieczenstwo_eng1.

research and implementation centres, intermediaries including shippers, carriers, trans-shippers and trade consultants.⁶¹

The reasons given by the Ministry of Economy for the importance of having an ICP include:

- Preventing accidental violations of export control law, which could result in economic sanctions or criminal penalties;
- Identifying persons within a trading entity, who are to be regarded as negligent if a violation does occur;
- Limiting government interference in trading activities by passing the burden of responsibility onto companies, and at the same time simplifying procedures for acquiring global and general export licences and facilitating information exchange with government agencies;
- Helping Polish entities to understand the important role that they can play in assisting the Polish government in contributing to international peace and security, and their responsibilities to achieve this;
- Facilitating commercial relationships with companies located outside of Poland that require their partners to also have ICP.⁶²

It has been suggested that the introduction of an ICP to Poland originates with the exposure to US and UK systems during the drafting of the 'Law of 29 November 2000 on foreign trade in goods, technologies and services of strategic importance to the security of the State and to maintaining international peace and security'. It certainly drew inspiration from documentation and practices in these two states.⁶³ However, as will be discussed below, Poland has taken its approach further than its US, UK and EU member counterparts.

Export control requirements and ICP

Poland's primary legislation on export controls requires all applicants for an individual, global or general licence for the export of controlled goods (both military equipment and dual-use goods) to have a certified ICP in place.⁶⁴ The legislation provides an outline description of the contents of an ICP. In particular, the ICP shall "define tasks of individual authorities in the organisation, job descriptions as regards basic tasks related to control and management of trade, the framework of co-operation between the natural or legal person and the state administration in this area, as well as rules and procedures of employee recruitment, data archiving, training, internal controls, and completion of orders."

Polish legislation also introduced a requirement for Polish companies' ICPs to be "certified for conformity with the requirements of international standards within the ISO 9000 series" (Article 11(2)). The certification is valid for 3 years and includes a requirement for authorised control bodies to carry out 5 audits during that period (i.e. on average one every 6 months). The legislation also included record-keeping requirements explicitly linked to the ICP (Article 25(2)). The legislation came into force on 1 January 2001, although article 10 on ICP requirements did not enter into force until 1 January 2002 to give companies extra time to be-

61 Ministry of Economy, Partnership of entrepreneurs and governmental administration aimed at common security policy realisation, 13 Jan. 2011, http://www.mg.gov.pl/English/ECONOMY/Export+control/bezpieczenstwo_eng1.

62 Ministry of Economy, Partnership of entrepreneurs and governmental administration aimed at common security policy realisation, 13 Jan. 2011, http://www.mg.gov.pl/English/ECONOMY/Export+control/bezpieczenstwo_eng1.

63 Telephone interview with Polish export control official, 20 Jan. 2011.

64 Article 10 (1 and 2) of the 'Law of 29 November 2000 on foreign trade in goods, technologies and services of strategic importance to the security of the State and to maintaining international peace and security' states that before an application for an individual or global licence can be made, 'a natural or legal person shall establish and implement an internal system of control and management of trade related to items of strategic importance, hereinafter referred to as the "internal control system"'. Article 8(2) states that an applicant for a general licence must be able to provide relevant documentation to show that they have utilised an ICP for the preceding 3 years. In addition, the Polish Ministry of Defence sometimes includes in its 'terms and conditions for tender' a requirement that companies seeking to respond to this particular tender provide evidence of a certified ICP. Telephone interview with Polish export control official, 20 Jan. 2011.

come certified.⁶⁵ Certification can currently only be carried out by the non-governmental Polish Centre for Research and Certification.⁶⁶

According to a Polish export control official, additional elements that should be included in an ICP are:

- Corporate mission statement;
- Human Resources selection procedures;
- Data archiving;
- Training;
- Procedures for carrying out export orders;
- Reporting practices;
- Analysis of denials list;
- Classification of products in accordance with control lists;
- Risk analysis of potential alterations to declared end-use;
- Internal controls;
- Technology transfers;
- System certification.⁶⁷

In early 2009, the Export Control Department announced that the July 2006 Polish Committee for Standardization's 'Internal Control System (ICS) Requirements' would be used as the basis for the certification of Polish ICPs, replacing the previous guidelines contained in 'Internal Control System Criteria'.⁶⁸ Once the certification has been gained, Polish entities are regarded as 'reliable partners'.⁶⁹ Although all entities engaged in the trade in controlled goods require a certified ICP to be eligible to receive a licence, having a certified ICP does not bring additional benefits to companies applying for export licences.⁷⁰ Poland's system serves to 'level the playing field' among companies applying for export licences.

Although responsibility for certifying companies' ICPs has been outsourced, the Polish Export Control Department does carry out compliance visits in certain cases. For example, companies applying for an EU general licence for the export of dual-use goods (EU 001) must both have a certified ICP in place, and have received the Export Control Department's 'Group control system' at their premises.⁷¹ The Export Control Department is also mandated to carry out 'control' visits when entities are suspected of violating export control legislation. The Export Control Department's 'Group control system' is currently mandated to conduct control visits to examine:

65 Article 52 of the 'Law of 29 November 2000 on foreign trade in goods, technologies and services of strategic importance to the security of the State and to maintaining international peace and security'.

66 Regulation of the Minister of Economy of 27 February 2011 on the list of certifying bodies authorised to conduct certification and control system for control and management turnover, Official Gazette, no. 17, item 200, 16 Mar. 2001.

67 Śliwowski, J., 'Model of certified internal compliance systems', in Auer, D., (ed), Wassenaar Arrangement. Export Control and its Role in Strengthening International Security, Favorita Papers, 01/2005, Diplomatiscche Akademie Wien, p. 79.

68 Ministry of economy, (Criteria for Internal Control System), 27 Feb. 2009, <http://www.mg.gov.pl/Gospodarka/DKE/Wewnetrzny/kryteria.htm>.

69 Ministry of Economy, Partnership of entrepreneurs and governmental administration aimed at common security policy realisation, 13 Jan. 2010, http://www.mg.gov.pl/English/ECONOMY/Export+control/bezpieczenstwo_eng1.

70 Telephone interview with Polish export control official, 20 Jan. 2011.

71 Telephone interview with Polish export control official, 20 Jan. 2011.

- Compliance with the conditions of particular licences and export control requirements;
- The efficiency of the internal control system;
- The accuracy of records.⁷²

In addition, the control team is granted permission to:

- Enter the property of the entity being inspected;
- Receive oral or written documentation and access to data.⁷³

If irregularities are found, the entity is given one month to demonstrate that the ICP is restored and internal controls are functioning. Such visits have been rare to date, despite concerns that the ICP requirement has not been adhered to by all entities that are involved in transfers of arms, military equipment and dual-use goods.⁷⁴ It is expected that enforcement agencies (e.g. Customs) will in the future be mandated to conduct compliance and control visits.⁷⁵ The case discussed in box 1 is a useful illustration of the Polish approach.

There are some signs that Poland's ICP requirements for companies involved in the export of dual-use goods may change as a result of the introduction of the EU Dual-Use Regulation. However, the requirement that companies must have a certified ICP in place is likely to remain for companies engaged in the export of arms and military equipment, even though there will also be some changes in this sphere.⁷⁶ For example, the monopoly on ICP Certification that is currently held by the Polish Centre for Research and Certification will likely come to an end with the establishment of a non-governmental certification agency based in the standardisation unit in the Ministry of Defence.⁷⁷ It is unlikely that Poland will have legislation in place to implement the ICT Directive before the end of June 2011, but it is expected to pass through the Council of Ministers and both chambers of parliament by autumn 2011.⁷⁸

Box 1. A case of non-compliance⁷⁹

The Polish Ministry of Economy has included on its Export Control Department website a cautionary case for companies involved in the export of items that are subject to export controls. The case concerns a company that produces and exports telecommunications equipment. Following an internal analysis of its products, the company concluded that it did not export items covered by Poland's national control list. However, when the company subsequently conducted a review of the classification of their products, with the assistance of external experts, it was revealed that controlled goods worth \$730,000 had been exported by the company in 2006 even though no export licences had been sought or received. The Board of Directors subsequently informed the Department of Export Control of this fact and that the company would begin the process of implementing an ICP. The company also undertook to keep the Department of Export Control aware of progress with regard to the implementation and certification of its ICP.

72 'Law of 29 November 2000 on foreign trade in goods, technologies and services of strategic importance to the security of the State and to maintaining international peace and security', Article 28(2).

73 'Law of 29 November 2000 on foreign trade in goods, technologies and services of strategic importance to the security of the State and to maintaining international peace and security', Article 30(1).

74 Telephone interview with Polish export control official, 20 Jan. 2011.

75 Telephone interview with Polish export control official, 20 Jan. 2011.

76 Telephone interview with Polish export control official, 20 Jan. 2011.

77 Telephone interview with Polish export control official, 20 Jan. 2011.

78 Telephone interview with Polish export control official, 20 Jan. 2011.

79 This description is taken from: (It is up to you to admit mistakes), 4 Apr. 2007, http://www.mg.gov.pl/Gospodarka/DKE/Wewnetrzny/DKE_warto_07.htm.

Due to these factors, and the fact that the destination of the goods was an EU member state and the company would have been likely to receive a permit given the circumstances, the Department of Export Control decided that the imposition of a penalty would not have been in the interests of the department or the company. The lessons drawn by the Department of Export Control were therefore that companies should regularly examine their products against the list of controlled goods and that an ICP should help to ensure that potential problems in this regard can be avoided.

Guidelines and assistance provided by national government agencies for establishing and maintaining an ICP

As noted above, the Export Control Department of the Ministry of Economy has posted various pieces of information on its website for entities involved in the trade in arms, military equipment and dual-use goods related to the requirements of an ICP. In particular, the website has a special section for information regarding ICPs.⁸⁰ The Export Control Department's website also makes a computer programme available to assist in the establishment of a computerised ICP. A private company, Export Management Systems (EMS), has also produced ICP software that provides information on export control requirements and model ICP elements, including assistance in the design of procedures for handling controlled goods for export, classifying goods, and filling out export licence applications.⁸¹ As noted above, the Polish Committee for Standardization has also produced a standard set of ICP requirements.

A number of private companies in Poland provide trainings for entities engaged in the trade in arms, military equipment and dual-use goods, assisting them in the implementation of ICPs. Although the Export Control Department of the Ministry of Economy reports that it cooperates with the companies that provide training, it also allocates funds each year to ensure that entities can receive training free of charge. In mid-2010 the Ministry of Economy reached an agreement with EMS to provide free training on ICPs and classification of goods of strategic importance.⁸²

The basic training programme includes information about the export control regulations in force and the ICP. The training is directed primarily to representatives for implementing ICP and ICP staff, or new staff appointed to carry out specific tasks within the system. Elements of the training include:

- Aims and international export controls;
- The role of industry in the export control;
- Polish and EU provisions on control of trade;
- Application for a permit, procedures and supporting documents;
- ICP - capital market supervision management system;

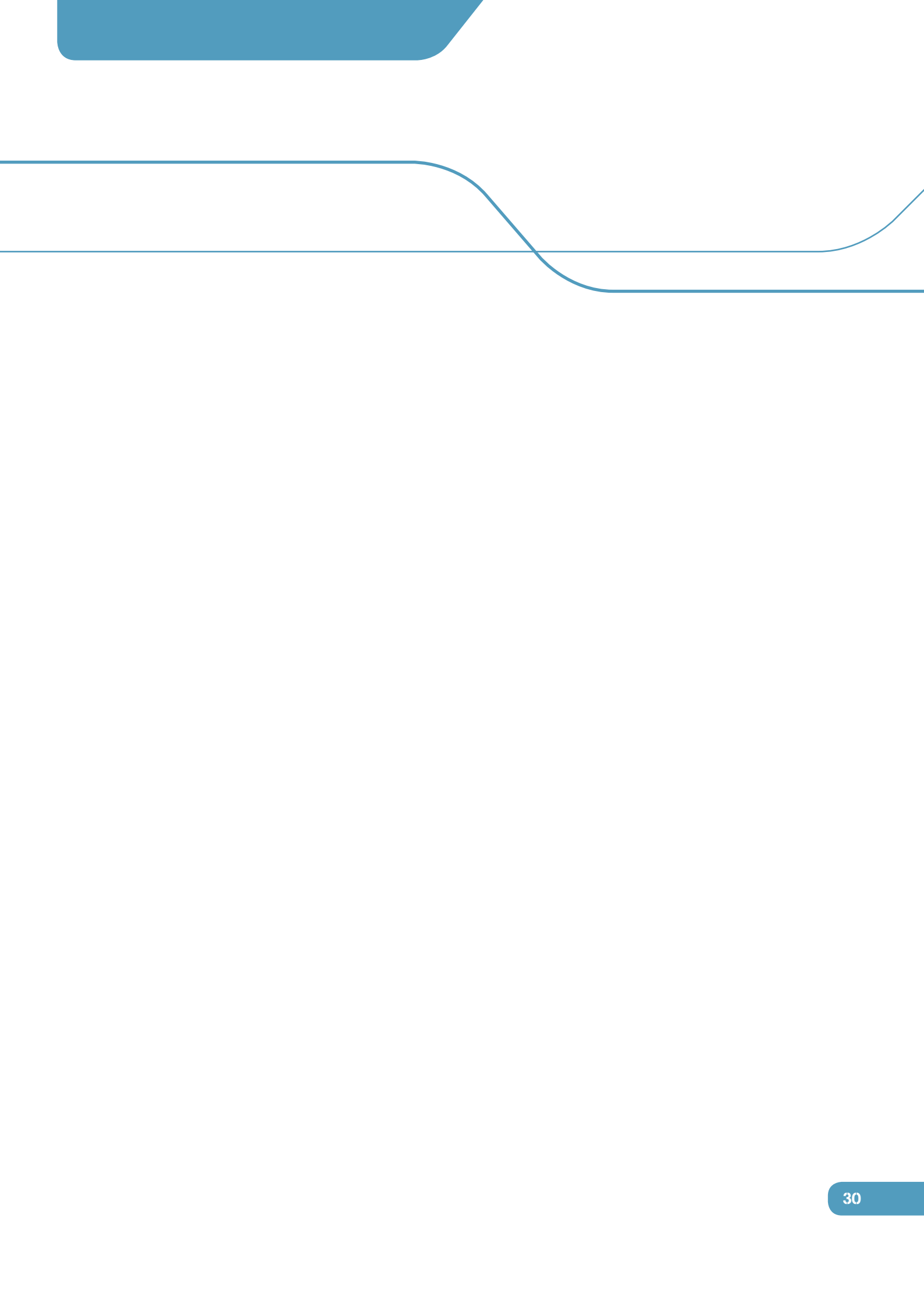
The refresher training covers the general points above as well as adapting ICP to standard PN-N-19001. They also offer training on the classification of controlled goods within an ICP framework. Although EMS has been awarded the contract to offer trainings in collaboration with the Export Control Department, there are other companies in Poland that have also developed training programmes for ICP establishment and maintenance.⁸³

80 See: <http://mg.gov.pl/GOSPODARKA/DKE/Wewnetrzny/>.

81 See: <http://www.ems.waw.pl/software.php>.

82 Ministry of Economy, Szkolenia WSK, 2 Aug. 2010, <http://www.mg.gov.pl/Gospodarka/DKE/Wewnetrzny/Szkolenia+WSK.htm>. EMS usually charges around €220 (including taxes) for its training programmes.

83 Telephone interview with Polish export control official, 20 Jan. 2011.





Case study 3: Romania

Development of ICP requirements

The Romanian National Agency for Export Control (ANCEX) started recommending that companies engaged in the export of dual-use goods begin to develop ICPs in 2004.⁸⁴ However, the issue of ICPs was mentioned in a 2002 conference by Paul Pasnicu, the then director of the export control agency.⁸⁵ According to an official within the Department for Export Controls, all companies engaged in the export of dual-use goods should implement ICPs “in order to have a mechanism for risk analysis.”⁸⁶ In addition, people working at companies that have an ICP in place tend to be more responsible and knowledgeable, which improves cooperation.⁸⁷

Export control requirements and ICP

There is an explicit provision in the secondary Romanian legislation stating that licence applications to export or broker military equipment will be rejected if the applicant does not have an internal programme to implement transfer controls.⁸⁸ The legislation also states that “holders of permits issued by the Agency or the Ministry of National Defense [...] are required to implement an internal control programme.”⁸⁹

The primary and secondary legislation controlling exports of dual-use goods also contains explicit requirements for an ICP. However, the existence of an ICP is only mandatory for companies that apply for a global licence and licences for brokering services.⁹⁰ The January 2007 Methodological rules request applicants for licences to show evidence of an internal control programme.⁹¹ The rules also state that ANCEX will periodi-

84 Gabriel Ciupitu, Advisor at the Department for Export Controls/Dual-use division, response to questionnaire, 24 Jan. 2011.

85 See: www.exportcontrol.org/library/conferences/1379/1002-04-Pasnicu_2.pdf.

86 Gabriel Ciupitu, Advisor at the Department for Export Controls/Dual-use division, response to questionnaire, 24 Jan. 2011.

87 Gabriel Ciupitu, Advisor at the Department for Export Controls/Dual-use division, response to questionnaire, 24 Jan. 2011.

88 Article 13-h, ANCEX President Order no. 59/2005 for the implementation of Government Ordinance no. 158/1999 on the control regime of exports, imports and other transfers of military goods, approved with amendments by Law no. 595/2004

89 Article 15-1, ANCEX President Order no. 59/2005, op. cit.

90 Gabriel Ciupitu, Advisor at the Department for Export Controls/Dual-use division, response to questionnaire, 24 Jan. 2011.

91 Methodological rules, January 15, 2007 for the application of the Government Emergency Ordinance no 129/2007 on the regime of export control of dual-use items and technology (published in Official Gazette no 83 of February 2, 2007).

cally evaluate companies' internal control programmes and that "the exporter shall prove the existence of internal control and administration of transfers for a period of at least three years."⁹² Ordinance no. 119 of December 30, 2010 and Ordinance no. 129 of December 21, 2006 include similar language.⁹³

There are several aspects of the Romanian military item export control for which an ICP would be useful. For example, entities applying for an export licence are required to: be aware of the classification of items on the Romanian control list when submitting an application; have a person named as responsible for export control management, as well as a point of contact for communication with export control agency.⁹⁴

Companies applying for export licences for dual-use goods should designate "at least one competent person" to be in charge of export controls.⁹⁵ Companies and individuals engaged in the trade of dual-use items should also submit to inspections by ANCEX and provide ANCEX with any information it may request.⁹⁶ In addition, controls in the field of both military equipment and dual-use exports include requirements with respect to end-user screening, record-keeping, and reporting to ANCEX. Entities applying for an authorization to trade in military equipment must attach a "Commitment form" which lays out these obligations.⁹⁷ The commitment form requires adequate record-keeping by the applicants. Namely, the applicants commit to protect all working papers related or referring to trading operations, as well as to respect the legal regulations on recording, preservation and handling of these documents.⁹⁸ The form also requires applicants to participate in activities organized by the ANCEX and designed to inform companies of their obligations.⁹⁹ Additionally, the "request for advice" to ANCEX requires that companies seeking advice provide their own assessment of their products. They should be able to say whether or not the products are on the list of military goods and fall under the export control regime.¹⁰⁰ Companies which have an ICP in place are better placed to perform these tasks.

The dual-use goods licensing application forms, that are available on the ANCEX website, do not clearly refer to ICP requirements. However, the legislation listing the necessary documentation to be submitted as a part of an export licence application has requirements for which an ICP could be useful. For instance, the January 2007 Methodological rules state that applicants must "show a commitment in writing that all the procedures will be disseminated and implemented effectively within the company." This must include a commitment to implement "an internal audit programme to verify compliance with established producers", "a training programme for the staff on procedures for general export licences", "and a specific system for archiving records operations and controls so that it provides, where necessary, the data on exports."¹⁰¹ In addition, when filing a request for advice form ANCEX, the applicant should already have some classification knowledge.¹⁰²

92 Methodological rules, Jan. 15, 2007, op. cit.

93 Ordinance 119 of 30 December 2010 on the control system with dual-use transactions (published in Official Gazette nr.892 of 30 December 2010); and Article 10-1, Emergency Ordinance no. 129 of 21 December 2006 concerning the export control regime for dual-use goods and technologies published in the Official Gazette 1045 of 29 December 2009

94 Article 7, ANCEX President Order no. 59/2005, op. cit.

95 Article 3, Methodological rules, January 15, 2007, op.cit.

96 Article 33-2, Ordinance 119 of 30 December 2010, op. cit.; Article 31-5, Ordinance 119 of 30 December 2010, op. cit.; and Article 31-6, Ordinance 119 of 30 December 2010, op. cit.

97 Commitment form, to be attached with the request for a permit to carry out foreign trade operations of military products.

98 Commitment form, op. cit.

99 Commitment form, op. cit.

100 Request for advice: www.ancex.ro.

101 Article 14-1, Methodological rules, January 15, 2007, op. cit.

102 Ancex.ro, accessed January 25, 2011.

For dual-use goods, the existence of a company ICP does not mean that the licence will be granted automatically.¹⁰³ Since 2007, for dual use items, Romania issued only a few individual export licences per year.¹⁰⁴ These individual licences allow a specified Romanian legal entity to trade in a specified volume of a particular category of military goods with a single foreign partner. Traders wishing to broker transfers may only apply for an individual licence.¹⁰⁵ For this type of licence, no ICP is required.¹⁰⁶

After Council Regulation 428/2009 entered into force, Romania amended its national legislation to conform to the EU dual-use regulation. The new legislation required the implementation of ICP only for the global licence exporters and broker companies.¹⁰⁷

Guidelines and assistance provided by the national government agencies for establishing and maintaining an ICP

ANCEX assists the private sector by providing sound information on the export control regime as it relates to military items. This assistance does not appear to be specifically focused on the establishment of an ICP. Article 21 of the Government Emergency Ordinance no. 158/1999 states that ANCEX informs economic agents “about the principles, objectives, rules and procedures for exports and imports regime of strategic goods.”¹⁰⁸ This is confirmed by the Article 77-c of the ANCEX President Order no. 59/2005. ANCEX should also provide free advice to agents interested in performing export or import operations of strategic goods.¹⁰⁹ This is also stated in Article 81 of the ANCEX President Order no. 59/2005. The 2007 Saferworld report writes that “as a first stage”, exporters of military goods “can consult with ANCEX in order to classify their products and to receive a ‘political appraisal’ of the proposed transfer.”¹¹⁰

The same type of assistance is provided to entities engaged in the export of dual-use goods. ANCEX organizes information seminars for those who have activities in the trade of dual-use goods.¹¹¹ Attendance is compulsory.¹¹² Consultancy provided by ANCEX is free of charge. In addition, a guide for activities in the trade of dual-use goods is available on the ANCEX website. Although this guide does not specifically address the issue of implementing an ICP, it does provide information necessary for companies to understand the application of the export control system for dual-use goods. The guide notes that exporters applying for a global license must prove the existence of an ICP¹¹³.



103 Gabriel Ciupitu, Advisor at the Department for Export Controls/Dual-use division, response to questionnaire, 24 Jan. 2011.

104 Gabriel Ciupitu, Advisor at the Department for Export Controls/Dual-use division, response to questionnaire, 24 Jan. 2011.

105 Wood, D. ‘Romania’s arms transfer control system at EU accession: an analysis’, op. cit., p.15

106 Gabriel Ciupitu, Advisor at the Department for Export Controls/Dual-use division, response to questionnaire, 24 Jan. 2011.

107 Gabriel Ciupitu, Advisor at the Department for Export Controls/Dual-use division, response to questionnaire, 24 Jan. 2011.

108 Article 21-2-m, Government Emergency Ordinance no. 158/1999, op. cit.

109 Article 21-2-n, Government Emergency Ordinance no. 158/1999, op. cit.

110 Wood, D., ‘Romania’s arms transfer control system at EU accession: an analysis’, op. cit., p.34

111 Article 4-4-i, Emergency Ordinance no. 129 of 21 December 2006, op. cit.

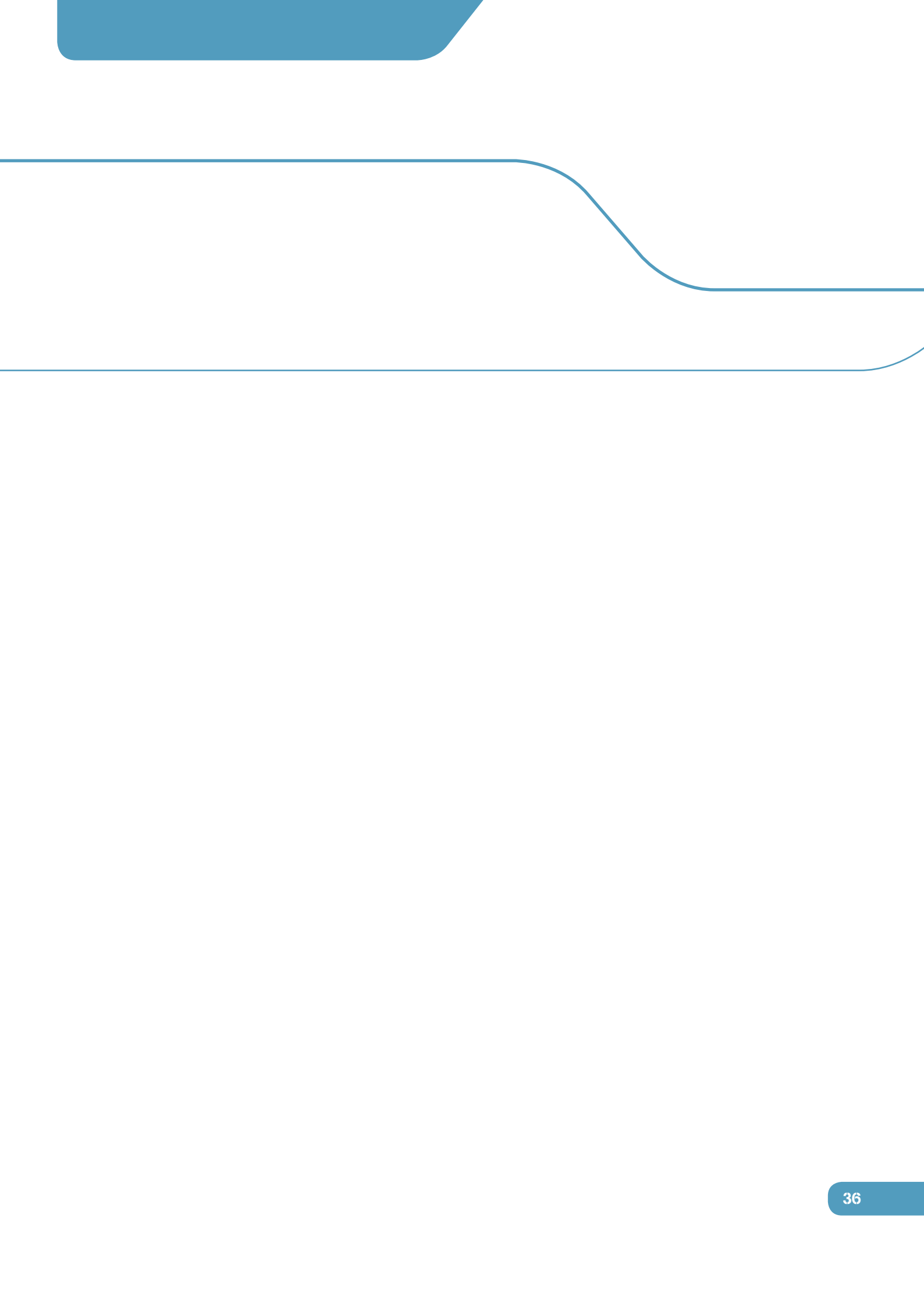
112 Article 4-1, Methodological rules, January 15, 2007, op. cit.

113 Guide on the control of exports of dual use products and technologies, ANCEX, p. 14

At least once a year the Romanian authorities carry out compliance checks among the companies engaged in the export of dual-use goods. Compliance checks also occur whenever an importing company requires an International Import Certificate, a Delivery Verification Certificate or when an exporter needs to transmit to the Romanian Authorities the Delivery Verification Certificate from a third country.¹¹⁴

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114 Gabriel Ciupitu, Advisor at the Department for Export Controls/Dual-use division, response to questionnaire, 24 Jan. 2011.





Case study 4: Sweden

Development of ICP requirements

The Swedish Agency for Non-Proliferation and Export Controls (ISP) began placing stronger emphasis on ICP issues in 2007. Previously, the ISP carried out only a limited number of inspection visits to check companies' standards in the field of ICP. However, in September 2007 the ISP underwent reorganization and created two new "interdisciplinary processes" related to licensing and compliance.¹¹⁵ The new structure meant that for the first time the ISP had a full-time staff member working on compliance issues, allowing it to significantly increase the number of company visits it carried out and the amount of work it performed in this area.¹¹⁶

The development and use of ICPs is closely related to the use of Global Licences in the field of dual-use goods (see below). The use of Global Licences in the field of dual-use goods is driven by the EU Dual-Use regulation, which provides the basis for Swedish controls in this area. However, the use of Global Licences has also been welcomed by the ISP because it enables ISP to focus its attention on high-risk cases. As the ISP states, the use of Global Licences frees up resources within the ISP that can then be used to "manage more complex licensing issues."¹¹⁷

The use of Global Licences requires companies to take on more responsibility and pay greater attention to potential risks of diversion. As the ISP states, the use of Global Licences imposes "new requirements on (...) industry."¹¹⁸ For example, if a company notices that a "planned delivery deviates from the normal pattern in one way or another, they should stop it." To meet these challenges, companies need to develop increased knowledge of trade routes and improve the development of "international contacts and (...) intelligence".¹¹⁹ All of these measures need to be embedded within an effective and well-implemented ICP.

In the future, ICPs are likely to play a stronger role in the assessment of export licence applications at least as far as dual-use goods are concerned. The ISP notes that increased "emphasis is gradually being placed on

115 'ISP Annual Report 2007', ISP, 2008, http://www.isp.se/documents/_English/Publications/AR/ISP2007eng.pdf, p. 5.

116 Telephone interview with Martin Lagerström, ISP, 21 Jan. 2011; and 'ISP Annual Report 2007', ISP, 2008, http://www.isp.se/documents/_English/Publications/AR/ISP2007eng.pdf, p. 5.

117 'Strategic Export Controls in 2009 – Military Equipment and Dual-Use Products', Skr. 2009/10:114, Stockholm 11 March 2010, p. 71.

118 'Strategic Export Controls in 2009 – Military Equipment and Dual-Use Products', Skr. 2009/10:114, Stockholm 11 March 2010, p. 69.

119 'Strategic Export Controls in 2009 – Military Equipment and Dual-Use Products', Skr. 2009/10:114, Stockholm 11 March 2010, p. 72.

industry's knowledge of its customers and its control over how the products purchased will be used."¹²⁰ Furthermore, it states that "expanded responsibility will be required of the companies' internal export control programmes" and "the ISP's supervisory activity will grow even more extensive and important."¹²¹

Export control requirements and ICP

The production and export of military equipment is governed by the Military Equipment Act (1992:1300) and the Military Equipment Ordinance (1992:1303).¹²² Companies' legal obligations in this area include complying with the relevant licensing procedures, providing regular reports on marketing activities abroad, submitting notifications on tenders and contracts, and reporting on deliveries of military equipment.¹²³ There are no legal requirements related to maintaining an ICP, although companies are obligated to cooperate with inspection visits (see below).

The main licence for the export of military goods is the 'Ansökan om utförelsetillstånd' ('Application for export permit').¹²⁴ Sweden does not issue general licences for the export of military equipment.¹²⁵ However, it does issue Global Project Licences (GPLs) within the context of the Framework Agreement (FA) between France, Germany, Italy, Spain, Sweden and the United Kingdom.¹²⁶ GPLs simplify 'arrangements for licensing military goods and technologies between countries who are participating in collaborative defence projects.'¹²⁷ In 2006 Sweden reported that it had introduced GPLs into its export licencing system but there had only been a limited number of applications.¹²⁸ In 2007, Sweden issued its first GPL in relation to a joint procurement project with Germany.¹²⁹

ICP issues do not play a formal role in the assessment of applications for military equipment export licences.¹³⁰ Exporters are not required to provide information on their ICPs in the application form and company record, with regard to ICPs, does not directly influence the decision on their application. However, most of the Swedish companies that are involved in the export of military equipment are larger enterprises that are known to ISP and have ICPs in place. One official estimated that around 9 out of 10 companies applying for export licences for military equipment have an ICP in place.¹³¹

Sweden is in the process of adjusting its export regulations to take into account the ICT Directive (see above). The ICT Directive makes no mention of whether or not ICPs should play a role in assessing whether or not a particular general transfer licence or global transfer licence should be granted or denied. The ISP

120 'Strategic Export Controls in 2009 – Military Equipment and Dual-Use Products', Skr. 2009/10:114, Stockholm 11 March 2010, p. 72; 'Strategic Export Controls in 2008 – Military Equipment and Dual-Use Products', Skr. 2008/09:114, Stockholm 12 March 2009, p. 56.

121 'Strategic Export Controls in 2009 – Military Equipment and Dual-Use Products', Skr. 2009/10:114, Stockholm 11 March 2010, p. 72; 'Strategic Export Controls in 2008 – Military Equipment and Dual-Use Products', Skr. 2008/09:114, Stockholm 12 March 2009, p. 56.

122 'Strategic Export Controls in 2009 – Military Equipment and Dual-Use Products', Skr. 2009/10:114, Stockholm 11 March 2010, p. 87.

123 'Strategic Export Controls in 2009 – Military Equipment and Dual-Use Products', Skr. 2009/10:114, Stockholm 11 March 2010, p. 17.

124 See: http://www.isp.se/documents/Blanketter/FM/ISP-blankett_KM-AUT.pdf.

125 'ISP Annual Report 2007', ISP, 2008, http://www.isp.se/documents/_English/Publications/AR/ISP2007eng.pdf, p. 10.

126 The Framework Agreement concerning Measures to Facilitate the Restructuring and Operation of the European Defence Industry was signed on 27 July 2000. The agreement is aimed at facilitating transfers and defence cooperation between the signatory states.

127 Global Project Licence (GPL), <http://www.businesslink.gov.uk/bdotg/action/detail?itemId=1084306140&site=101&type=RESOURCES>.

128 'Strategic Export Controls in 2006 – Military Equipment and Dual-Use Products', Communication 2006/07:114, Stockholm, 15 March 2007, p. 21.

129 ISP Annual Report 2007, ISP, 2008, p. 16.

130 For example, the Swedish guidelines covering the issuing of export licences make no mention of whether or not the exporting company has an ICP in place. 'Full text of the Swedish guidelines' 'Strategic Export Controls in 2009 – Military Equipment and Dual-Use Products', Skr. 2009/10:114, Stockholm 11 March 2010, pp. 90-91.

131 Telephone interview with Martin Lagerström, ISP, 21 Jan. 2011.

does not anticipate that the implementation of the ICT Directive will alter procedures for issuing of military equipment export licences. In particular, it is anticipated that most of the companies that apply for a general transfer licence or global transfer licence will be larger enterprises that already have an ICP in place.¹³²

However, if a company is applying for a general transfer licence or a Global transfer licence and it has not received a compliance visit for several years, the ISP may be prompted to initiate such a visit.¹³³ Under the EU Dual-Use Regulation, member states are required to “maintain (...) the possibility of granting a global export authorisation” (see above).¹³⁴ The ISP uses the term ‘Globalt exporttillstånd’ (‘Global licence’) to describe global export authorisations. These allow companies to export an unlimited quantity of defined goods to a list of one or more countries.¹³⁵ In order to obtain a global licence, a company must have, inter alia, “effective internal export control procedures.”¹³⁶ Having an ICP as a formal requirement for the issuing of export licences for dual-use goods is seen as important because of the wide variety of companies that apply for such licences.¹³⁷

Under Sweden’s arms export control law, companies that have received a permit covering the manufacture and supply of military equipment are obligated to give ISP access to the company’s premises. The Inspectorate is entitled to use the assistance of other government authorities to fulfil its functions in this area.¹³⁸

Inspection visits take place “in close co-operation with the Board of Customs and, in certain cases, with the Police.”¹³⁹ During each visit, the ISP verifies that the company understands the regulatory framework, that it has the complete list of materials subject to export controls and that this knowledge is applied in the work processes.¹⁴⁰ In advance of each visit, the company is sent a number of questions which are designed to assess the content of the company’s ICP (see below).¹⁴¹ In addition, a number of cases are selected for control. In each case, the company must present supporting documentation in the form of customs declarations, invoices and payment slips for specific consignments.¹⁴²

After each visit, a report is jointly prepared by the ISP and the Swedish Customs and sent to the company. The report ‘sets out the level of the company’s current export control activities and makes proposals for how the company could improve its internal controls.’

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132 Telephone interview with Martin Lagerström, ISP, 21 Jan. 2011.

133 Telephone interview with Martin Lagerström, ISP, 21 Jan. 2011.

134 Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items (Recast), L 134, p. 6.

135 Globalt exporttillstånd [Global licence], ISP, <http://www.isp.se/sa/node.asp?node=1107>.

136 Globalt exporttillstånd [Global licence], ISP, <http://www.isp.se/sa/node.asp?node=1107>.

137 Telephone interview with Martin Lagerström, ISP, 21 Jan. 2011.

138 The Military Equipment Act (1992:1300) - With amendments up to and including SFS 2000:1248 (Swedish Code of Statutes) (Unofficial translation from the Ministry of Foreign Affairs), Section 20.

139 ‘Strategic Export Controls in 2009 – Military Equipment and Dual-Use Products’, Skr. 2009/10:114, Stockholm 11 March 2010, p. 17.

140 ‘ISP Annual Report 2008’, ISP, 2009, http://www.isp.se/documents/_English/Publications/AR/ISP_AR2008_web.pdf, p. 4.

141 ‘ISP Annual Report 2008’, ISP, 2009, http://www.isp.se/documents/_English/Publications/AR/ISP_AR2008_web.pdf, p. 16.

142 ‘ISP Annual Report 2008’, ISP, 2009, http://www.isp.se/documents/_English/Publications/AR/ISP_AR2008_web.pdf, p. 16.

Annual data on the number of compliance visits by the ISP

Year	Compliance visits
2005	9
2006	17
2007	20
2008	30
2009	34
2010	35

Sources: 'ISP Annual Report 2007', ISP, 2008, <http://www.isp.se/documents/_English/Publications/AR/ISP2007eng.pdf> p. 14; 'Strategic Export Controls in 2008 – Military Equipment and Dual-Use Products', Skr. 2008/09:114, Stockholm 12 March 2009, p. 13; 'Strategic Export Controls in 2009 – Military Equipment and Dual-Use Products', Skr. 2009/10:114, Stockholm 11 March 2010, p. 17; 'Strategic Export Controls in 2009 – Military Equipment and Dual-Use Products', Skr. 2009/10:114, Stockholm 11 March 2010, p. 17.

Guidelines and assistance provided by national government agencies for establishing and maintaining an ICP

The ISP does not publish a specific set of guidelines detailing the content of an ICP which states are required to maintain. For example, there is no 'general text' which is sent to all companies.¹⁴³ The ISP's ICP requirements are tailored to each individual company and depend on a range of issues including its size and the type of goods it manufactures. Different documents produced by the ISP include some of the key elements that companies are expected to have in place. These include:

- A company policy which is known to the staff concerned;
- An export control organizational chart with responsible individuals;
- A product classification system;
- End-use controls ;
- Application procedures for export permits;
- Systems for managing suspicious queries.¹⁴⁴

When assessing the effectiveness of a particular company's ICP procedures, the ISP will focus on a number of questions that are particularly relevant for the company in question. These questions can include:

- "Do you have a policy document or instructions on export control activities? What does this look like?"
- Has the company appointed a person to deal with export control issues?
- Are all products classified by engineers or technical staff in line with current legislation?
- Do you have procedures for how materiel carried as hand baggage is to be handled?
- Do you have procedures for handling transfers of classified electronic documents such as production data, software or other information?"¹⁴⁵

143 Telephone interview with Martin Lagerström, ISP, 21 Jan. 2011.

144 Globalt exporttillstånd [Global licence], ISP, <http://www.isp.se/sa/node.asp?node=1107>.

145 'ISP Annual Report 2007', ISP, 2008, http://www.isp.se/documents/_English/Publications/AR/ISP2007eng.pdf, p. 14.

In order to keep companies informed about developments in export control issues, the ISP organises an annual general seminar on this subject.¹⁴⁶ The ISP also provides informal assistance to companies by helping them interpret different control lists and giving them advance notice of whether a particular licence application is likely to be granted or denied.¹⁴⁷

The ISP also works closely with the Swedish Export Control Society and encourages companies to undergo training in export control and customs procedures.¹⁴⁸ The Swedish Export Control Society was created in 1994 at the initiative of the Swedish industry.¹⁴⁹ The Society is run by a board consisting of representatives from the Swedish defence industry and trade associations. The purpose of the Society is to support company representatives who are responsible for export control procedures. Among its members are representatives of “companies, organisations or authorities” that deal with export control issues.¹⁵⁰ The Society arranges meetings and seminars where export control issues are discussed, including issues related to the establishment and maintenance of ICPs. In April 2011, the Society will organise a two-day workshop on “Organization of export controls in the company.”¹⁵¹

By providing training, information and support to company officials who are responsible for export control issues, the ISP seeks to utilize and guide “the companies’ quality processes - e.g. ISO 9000 – and to monitor their control processes during inspection visits.”¹⁵² The ISP also places a strong emphasis on tailoring its ICP requirements to the company in question, adjusting the questions and issues it focuses on based on the size of the company and the types of goods it manufactures and exports.¹⁵³ For example, compliance visits will be different for companies that manufacture dual-use goods and companies that manufacture military equipment. Although some questions will be different, many will be the same. In addition, the technical expert from the ISP that takes part in the visit will be different.

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146 ‘Strategic Export Controls in 2009 – Military Equipment and Dual-Use Products’, Skr. 2009/10:114, Stockholm 11 March 2010, p. 17; ‘Strategic Export Controls in 2008 – Military Equipment and Dual-Use Products’, Skr. 2008/09:114, Stockholm 12 March 2009, p. 13.

147 ‘Strategic Export Controls in 2009 – Military Equipment and Dual-Use Products’, Skr. 2009/10:114, Stockholm 11 March 2010, p. 71.

148 ‘ISP Annual Report 2008’, ISP, 2009, http://www.isp.se/documents/_English/Publications/AR/ISP_AR2008_web.pdf, p. 16.

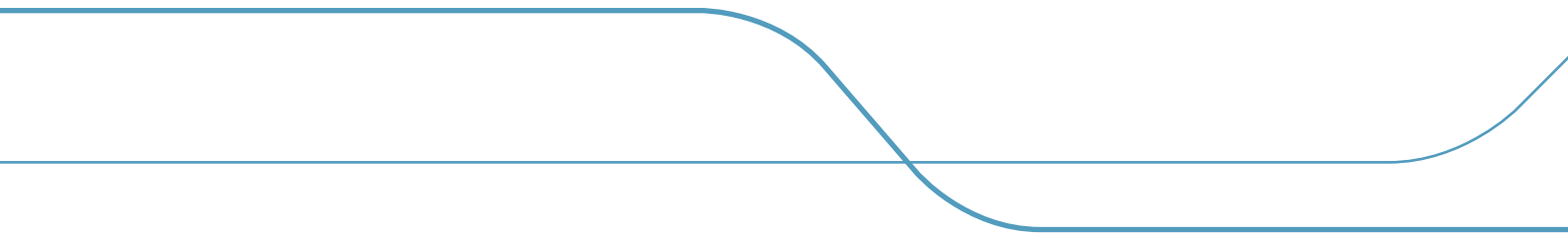
149 See: <http://www.chamberse/in-english-4.aspx?cid=in-english-3>.

150 See: <http://www.chamberse/in-english-4.aspx?cid=in-english-3>.

151 ‘Certifierad exportkontrollhandläggare - ORGANISATION AV EXPORTKONTROLL I FÖRETAGET: DEL IV’, <http://www.chamber.se/?id=11719&eid=8975>.

152 ‘Strategic Export Controls in 2008 – Military Equipment and Dual-Use Products’, Skr. 2008/09:114, Stockholm 12 March 2009, p. 56.

153 Telephone interview with Martin Lagerström, ISP, 21 Jan. 2011.





Company case study: Diehl Stiftung & Co. KG

Diehl Stiftung & Co. KG (Diehl) was founded in 1902. It has 12,200 employees working in 40 independent companies and five different areas: Metals; Controls; Defence; Aerosystems; and Metering. Diehl generates annual sales of €2.2 billion and its defence sales account for 12.5 per cent of the annual revenues.¹⁵⁴ Defence products manufactured by Diehl include ammunition, artillery rockets, fuses and guided missiles.¹⁵⁵ Diehl also manufactures and exports a number of dual-use goods. However, military equipment accounts for the majority of its exports of controlled goods.¹⁵⁶

Diehl's ICP has been in place for approximately 20 years.¹⁵⁷ The Programme is managed by the Export Control Department which has around 50 employees in total and reports to the senior management of Diehl. The key factors driving the development and structure of Diehl's ICP have been the demands of Germany's export control regulations. In particular, the companies within the Group that are engaged in the manufacturing of military equipment are required to follow the Foreign Trade Act, the War Weapon Control Act, and the accompanying requirements in the managing and implementing of ICPs (see 'Case study 1: Germany').¹⁵⁸

The key elements of Diehl's ICP include the independence of the Export Control Department and the fact that a member of the board of directors or the executive management bears overall responsibility for policy in this area. The Export Control Department implements Diehl's ICP and has the power to stop exports. It is tasked with producing clear descriptions of the relevant export control regulations and company processes, as well as educating the various specialists and employees that are involved in the export of controlled goods. The "observation of export and import control laws" is listed as one of the elements of the 'General Business Principles of the Diehl Corporate Group'.¹⁵⁹

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154 See: <http://www.diehl.de/index.php?id=30&L=1>.

155 For a complete list of the groups products, see: <http://www.diehl.de/index.php?id=26&L=1>.

156 Telephone interview with Wolfgang Susic, Head of Export Control, Export Control Department, Diehl Defence Holding GmbH, 31 Jan. 2011.

157 Telephone interview with Wolfgang Susic, Head of Export Control, Export Control Department, Diehl Defence Holding GmbH, 31 Jan. 2011.

158 Telephone interview with Wolfgang Susic, Head of Export Control, Export Control Department, Diehl Defence Holding GmbH, 31 Jan. 2011.

159 See: <http://www.diehl.de/index.php?id=2092&L=1>.

To assist with its work, the Export Control Department has created a regularly updated e-learning tool that is available to all company employees.¹⁶⁰ The tool is also sold to other companies to assist the export control specialists in the creation and maintenance of an ICP.¹⁶¹

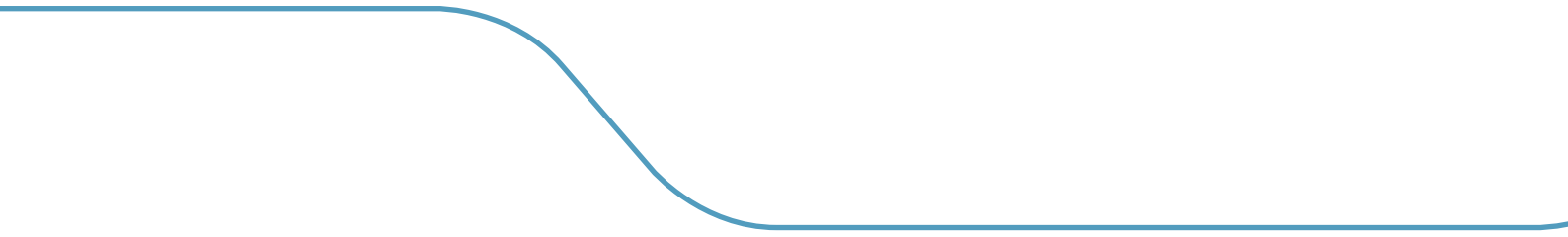
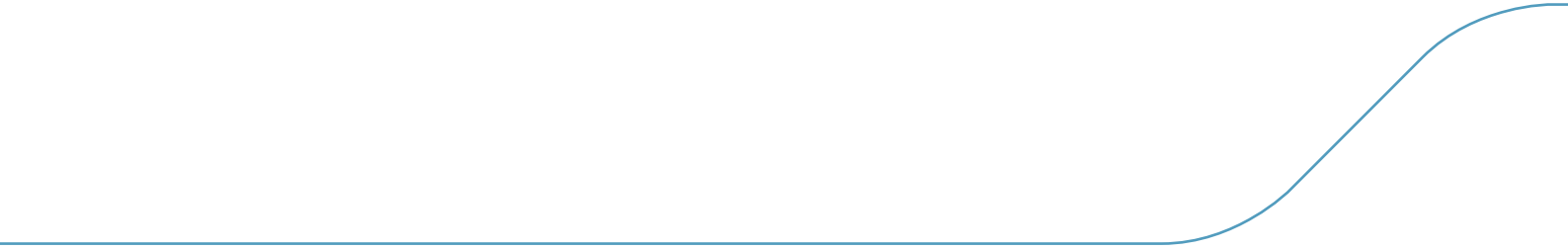
The main challenges of implementing Diehl's ICP include ensuring that employees are aware of the processes associated with export controls and understand all of the procedures they need to fulfil.¹⁶² Another challenge is keeping track of the latest changes in export control regulations and their implications for Diehl's ICP. This often requires 'more personnel and better software programs'.¹⁶³ For example, Diehl is currently updating its procedures to account for the ICT Directive, allowing it to apply for Certification under the new regulations (See 'ICP Requirements at the EU level').

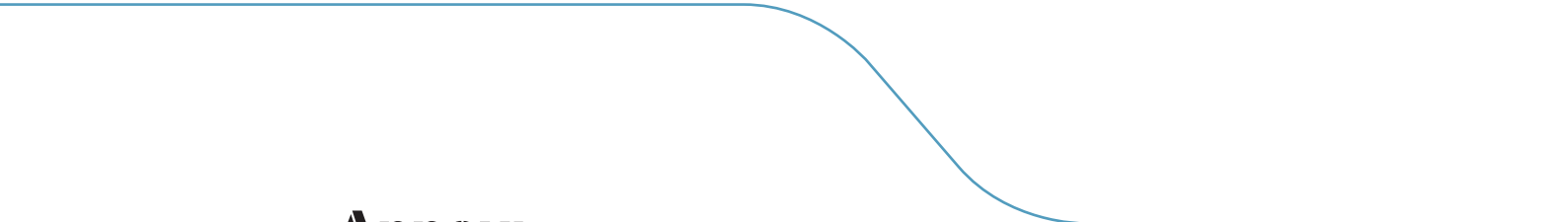
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160 See: <http://www.waw-portal.de/produkte/exportkontrolle/exportieren-aber-sicher.html>.

161 Telephone interview with Wolfgang Susic, Head of Export Control, Export Control Department, Diehl Defence Holding GmbH, 31 Jan. 2011.


162 Telephone interview with Wolfgang Susic, Head of Export Control, Export Control Department, Diehl Defence Holding GmbH, 31 Jan. 2011.

163 Telephone interview with Wolfgang Susic, Head of Export Control, Export Control Department, Diehl Defence Holding GmbH, 31 Jan. 2011.





Annex:
**Questions and guidelines
on the description of internal
compliance programmes
and for subsequent assessment**



Core areas	Key questions	Best practice recommendations
1. Organisational, human and technical resources allocated to the management of transfers and exports	<p>What percentage of the undertaking's business (annual turnover) depends on exports and transfers of licensable items?</p> <p>How many exports and transfers of such items take place within a year? What functions within the company (e.g. purchasing, engineering, project management, shipping) are involved in the export and transfer process and how are those responsibilities organised?</p> <p>Has the undertaking an electronic system to manage exports and transfers?</p> <p>What are its main features?</p>	The purpose of these questions is to obtain additional information on the undertaking's internal organisation, which is relevant for assessing the impact of export/ transfer activities on the undertaking and on the related operational procedures
	How many people are either employed solely to deal with the management of exports and transfers or have responsibility for it with other tasks?	There should always be at least 2 people in case of holiday, illness etc.
	<p>Does the undertaking internally circulate its written commitment of compliance with export/transfer control regulations and of adherence to any relevant end-use and export restrictions?</p> <p>Does the undertaking internally circulate its written commitment to provide on request end-use/end-user information?</p>	Both written commitments should be included in the compliance manuals available to export/ transfer control staff and should also be known to all employees concerned by export/transfer controls (e.g.: sales department ...).
	Has the undertaking so far complied with export/transfer control regulations?	The undertaking should have a sound track record of compliance with export/ transfer control regulations
	Are compliance manuals being provided and kept up-to- date for export/transfer control staff?	<p>Compliance manuals for the use and guidance of export/transfer control staff should be available, at least in electronic version (for instance, on the undertaking's intranet).</p> <p>Those manuals should contain the operating and organisational procedures to be followed by export/transfer control staff.</p> <p>Export/transfer control staff should be expeditiously informed of the amendments to the manual applying to their tasks as well as of their entry into force.</p>

Core areas	Key questions	Best practice recommendations
2. Chain of responsibility	Please describe the chain of responsibility for exports and transfers within your undertaking	<p>The responsibility for export/transfer control compliance should be set down in writing. The written support describing the chain of responsibility (such as records or organisation charts) should be kept up-to-date.</p> <p>The description should provide detail on delegations of responsibility and the adopted routines in situations when the senior executive referred to in Article 9(2)(c) of Directive 2009/43/EC is absent</p>
	Is such a description always accessible to the competent authority?	Knowledge of the chain of responsibility should always be easily accessible to the competent authority not only at the application phase but also for subsequent compliance monitoring and compliance visits.
	In which part of your undertaking is the export/transfer management situated?	Whether export/transfer control management is organised in each shipping unit, in the head office or as a separate export control department should depend on the size and the structure of the undertaking
	How do export/transfer control staff interact with other functions inside the undertaking?	Export/transfer control staff should be protected as much as possible from conflicts of interest. They should be empowered to stop a transaction.
	How is the relationship between the export/transfer control staff and the senior executive organised, for example, the possibility of information exchange?	Export control staff should be allowed to report directly to the senior executive if they require authority to stop a transaction.
	Please indicate the other responsibilities of the senior executive who has been appointed personally responsible for transfers and exports	The senior executive should be part of the top management. His/her position should not present a conflict of interest (e.g.: he/she should not also be head of sales ...)

Core areas	Key questions	Best practice recommendations
3. Internal audits		
(a) Random inspection	How frequently are random inspections carried out?	The ICP and the daily operating procedures should be subject to (unexpected) random checks.
(b) Internal audits	How frequent are internal audits?	Ideally, once a year and, at least, every 3 years
	What percentage of exports/transfers is subject to checks?	Depending on the number of exports/transfers, at least 1 % and an expected maximum of 20 %. The ratio can vary each time an audit is undertaken.
	Who carries out these checks?	Possible answers should be one of the following: <ul style="list-style-type: none"> • someone senior in the chain of responsibility for export/transfer controls, • the quality manager, • the finance manager or accountant, • anyone else of a middle management or higher position who is one step or more away from the day to day work of the export/transfer team.
	What questions do these audits cover?	Audits should provide answers to the following questions: <ul style="list-style-type: none"> • Are the export limitations put in place abided by? • Are procedures in place and updated to ensure that all export and transfer regulations are complied with? • Is regular awareness training undertaken? • Are records readily available? • Are the records comprehensive? • Do the records cover all the relevant aspects of import, export and transfer, and products remaining within the Member State? • Is information available on the life of relevant products from source to destination?
(c) Planning, effectiveness and follow-up of the audits	How do you ensure you audit a representative range of shipments?	At least one shipment per customer or destination should be audited or at least one shipment for each project.
	Does the undertaking establish a programme of internal audit?	A programme of internal audit should be established ensuring that a representative range of shipments are to be audited.
	Is the non-compliance disclosed by internal audits systematically corrected? Is a trail of such actions kept?	The undertaking should clearly record any suspected occurrence of non-compliance identified by the internal audit, the measures recommended to correct such an occurrence and an assessment of the effectiveness of those corrective measures on compliance.

Core areas	Key questions	Best practice recommendations
4. General awareness raising		
4.1. Operating and organisational procedures	How are the undertaking's internal processes designed to raise general awareness and minimise risks related to export/transfer controls?	<p>Operating and organisational procedures should be set down in writing and provide instructions and guidelines on the following:</p> <ul style="list-style-type: none"> • the overall export/transfer process from reception of an order, assessment of applicability of export/transfer regulations, compliance with relevant export/transfer regulations and shipment or transmission (a final compliance check must be carried out before shipment or transmission), • the monitoring of compliance with the terms and conditions of the licence, • the interaction with external parties, and in certain cases, with other interested departments within the undertaking, such as the legal and sales department, • the coordination of all employees involved in or somehow concerned by export/transfer controls (e.g.: sales staff should be instructed to inform export/transfer control staff of any doubts, and should be informed that the processing of an order can only take place once it has been cleared by the export/transfer control staff), • the coordination and possible exchange of information with the competent authorities (e.g.: possible reporting of suspect transaction orders, possible existence of a voluntary disclosure policy ...).
4.1.1. Operating and organisational procedures: pre-licensing phase ¹⁶⁴		
(a) Embargoes	How does the undertaking take into account embargoes?	<p>In cases where a shipment is planned to be sent to an embargoed destination, rules should be in place to verify the relevant embargo regulations. Such verification should at least encompass:</p> <ul style="list-style-type: none"> • the supply bans enacted by the embargo regulation, • the classification of products to be shipped against the embargo's list of products, • the additional licensing requirements for certain services, such as technical assistance.

¹⁶⁴ The purpose of the pre-licensing phase is to determine whether the undertaking is impacted by export/transfer controls, that is, whether export/transfer control regulations are relevant in respect to the activities and transactions of the undertaking and accordingly whether there is a licensing requirement for those transactions. The goal is to identify and analyse as early as possible any export/transfer control risks, and to implement any necessary relevant measure, for example, to apply for a license or to appropriately use a general licence.

Core areas	Key questions	Best practice recommendations
(b) Sanctions lists	How does the undertaking take into account sanctions lists?	The names and identities of the legal and natural persons to be supplied should be checked against the relevant sanctions lists.
	When searching for an identity on the sanctions list, what level (or percentage) of certainty that a match has been found is required to consider it a match ('hit')? What procedures are followed when a match for a name has been found?	Procedural instructions should have been set down in writing which detail how likely matches and 'hits' are to be addressed (for example, when a match has been found, it must be reported to the competent authority).
(c) Control of listed products (products subject to licensing because of their inclusion in an export/ transfer control list)	Questions on internal processes ensuring that a listed product is not exported or transferred without a license:	
	(1) Is there an electronic data processing system in place to record the classification of products received or manufactured by the undertaking?	The classification of products should be recorded in an electronic data processing system (only if in existence already). Changes in the control lists should be immediately reported in the system.
	(2) How are all products subject to licensing requirements classified and recorded, and who is responsible for this? What processes are in place to ensure that the classification of products is kept up to date, and how is it documented?	The export/transfer control staff should be responsible for recording and classifying products, if necessary, in consultation with technical experts.
	(3) How is the end-use by and the reliability of the recipient assessed?	<p>The export/transfer control staff should be responsible for verifying the reliability of the recipients, with special attention given to the end-use and risk of diversion.</p> <p>If export/transfer control staff are informed that the recipient has breached export/ transfer control regulations, they should inform the competent authority. A verification of the recipient's good faith is especially important in cases where the customer is new or where the customer's identity is unclear or when there are doubts about the declared end-use (e.g.: order in unusual quantities, special and unusual transit routes requested by the recipient ...).</p>
(d) Intangible transfer of technology	How does the undertaking ensure compliance with intangible transfer of technology (ITT) requirements (e.g, e-mail and access to the intranet from abroad)?	<p>The undertaking should have issued clear and written instructions in relation to ITT over e-mail, fax, intranet or Internet.</p> <p>The provision or transfer of technology should not occur until, an assessment has been made of its licensability, and if licensable, a licence is in place to permit the transfer.</p>
(e) Technical assistance	How does the undertaking ensure compliance with technical assistance requirements?	<p>A compliance procedure regarding technical assistance should be in place:</p> <ul style="list-style-type: none"> • for foreign visitors/employees, • for employees (e.g. technicians) abroad, • for conferences, seminars with foreign participants or when organised abroad.

Core areas	Key questions	Best practice recommendations
4.1.2. Operating and organisational procedures: licensing phase	How does the undertaking ensure that it makes full and complete licence applications?	The undertaking should be equipped to fully comply with the licence application process and procedures in force in the Member State where it is established.
4.1.3. Operating and organisational procedures: post licensing phase	What internal procedures ensure compliance with the conditions of the license?	A final verification of the export/transfer control requirements should take place before final shipment to ensure that the terms and conditions of the licence have been complied with.
4.2. Awareness raising and training of export control staff	What information is available to all employees concerned by export/transfer controls and to export control/transfer staff?	All should have access to the above-mentioned organisational and operating procedures relating to export/transfer controls. Those operating and organisational procedures should be recorded and updated in compliance manuals available to export/transfer control staff. The operating and organisational procedures should include a clear description of the export/transfer compliance process, from the reception of an order, the verification of compliance with relevant export/transfer regulations to the final shipment or transmission.
	How often is the export control staff's knowledge updated?	This should occur when changes are made to national and Union export control legislation and procedures but at a minimum at least once every year. In addition to annual general training updates, it is recommended that commentaries on export/transfer control legislation as well professional journals and magazines, where they exist should also be made available.
	How is the export/transfer control staff's knowledge updated?	Training through various tools including: <ul style="list-style-type: none"> • external seminars, • subscription to information sessions offered by competent authorities, • training events, external or online.

Core areas	Key questions	Best practice recommendations
5. Physical and technical security	Is your company security accredited by an appropriate Government body? Please give details.	Each national Ministry of Defence or similar organisation is likely to require some measure of security where the undertaking is working on their behalf. The mere fact that the undertaking is security accredited in some way may be enough.
	If there is no such official security accreditation, which security measures are in place to secure export/transfer records and procedures?	The premises should be entirely enclosed by fencing. The entrance should be secured and controlled. The premises should be under constant surveillance, even during non-working hours. There could be a separate entrance for deliveries and collections, away from the main production area.
	What are the security measures regarding software and technology?	The system should be password protected and secured by a firewall. The undertaking's network is secured against unauthorised access. There should be a control on electronic devices (laptops, personal digital assistants, etc.) being taken offsite or overseas and over e-mails sent as part of a project and in other circumstances.
6. Record-keeping and traceability of exports and transfers	How do you maintain records of the exportation limitations passed to you from the supplier of the products?	Undertakings should include one or more of the following: <ul style="list-style-type: none"> • electronic file or e-mail folder, • folders based on projects, • folders based on suppliers, • in separate folders for limitations, • on an order system.
	How do you relate export limitations to subsequent transfers or exports?	Possible answers should include one or more of the following: <ul style="list-style-type: none"> • electronic file or email folder containing import and subsequent movement information, • as part of a business management system, • folders based on projects or suppliers where all information is kept together, • a filing system similar to the folder system.
	How are these records made available to the competent authorities?	<ul style="list-style-type: none"> • It should be possible to make records available electronically • some may require a visit to the sites if access to secure intranets is necessary but some may be able to be transferred for remote checks. • Records can also be available in hard copy and some of these could be scanned, for example for remote checks.

Source: Questions and guidelines on the description of internal compliance programmes and for subsequent assessment, Annex I, Commission Recommendation of 11 January 2011 on the certification of defence undertakings under Article 9 of Directive 2009/43/EC of the European Parliament and of the Council simplifying terms and conditions of transfers of defence-related products within the Community, EU Doc. 2011/24/EU Official Journal of the European Union, L11/62, 15 Jan. 2011.

