



THE EUROPEAN DIRECTIVE ON TRANSFERS OF DEFENCE-RELATED PRODUCTS WITHIN THE COMMUNITY AND A NON-EXHAUSTIVE MODEL OF IMPLEMENTATION

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The European Directive on the intra-community transfer of defence products from 2009 established mandatory steps to be taken in order to simplify the necessary documentation and to create a federated framework linking Member States' national approaches and regulations. The regulatory document emerged as a result of the need to distinguish between import-export and transfer operations and, further, to secure the defence-related supplies within the European Union. The Directive introduced a new licensing system, based on general, global and individual licenses, encouraging the Member States to use general licenses for simple transfers of defence products between Member States, while maintaining control over their key security interests. From the perspective of the new European Defence Fund, the application of the Directive is difficult and measures should be taken to secure a more uniform implementation at Member States' level, at least from the perspective of transfers associated with research and development and innovation.

Keywords: *Directive 2009/43/EC; intra-community transfer; essential security interest; EDTIB; defence industry; licensing.*

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Preliminary considerations

Since the launch of the European Defence Technology and Industry Base (EDTIB) in 2007 (European Parliament A 2020), the Member States of the European Union (EU) have been constantly working to integrate their national defence industrial and technological bases so that it can ensure, first and foremost, the security of supply at European level. A stronger EDTIB may be possible through a more efficient and strengthened intracommunity industrial cooperation, the correlation of all the European regulations related to the defence industry and the establishment of terms of reference for the entire domain.

Prior to 2009, there were no Community regulations on the licensing of defence equipment between EU Member States. The European defence industry had to comply with national regulations separately, with each Member State having its own export control regime designed primarily to control the risks associated with exports of military equipment to non-EU countries. Moreover, the process of granting or refusing a license for transfers between European states and for exports to non-EU states was essentially the same, which meant that Community economic operators did not have legislative instruments at their disposal to benefit from the EU internal market. Thus, the introduction of *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 (Text with EEA relevance)* (the ICT Directive) (European Commission 2009) intended to minimize the obstacles regarding the movement of defence equipment between European states. This Directive is therefore considered an important part of the strategy for the foundation of a valid European internal market for defence equipment and services, thus being included in the European Commission's defence package in order to liberalize the European defence trade process and, consequently, to promote the prominence of EDTIB.

1. Purpose of the ICT Directive

The ICT Directive is a significant step toward reducing barriers to intra-EU trade in defence products, encouraging the harmonization and simplification of the EU framework in terms of licensing and national procedures. Its aim was to simplify the terms of transfers of defence products within the EU, with a view to facilitating and accelerating the movement of military products in Europe to strengthen security of supply and the competitiveness of the European defence industry. Thus, the ICT Directive applies to all defence equipment suppliers for the Armed Forces of another Member State or to the suppliers or the sub-suppliers of a certified company established in another Member State. The Directive applies to



all commercial defence-related products, their transfers for maintenance or repair and also to products at the experimental model/demonstrator level. Defence-related products are defined as any of the products listed in the Annex of the ICT Directive, including energetic materials, chemical, biological, radioactive and related materials, ammunition, weapons, vehicles and military equipment, software and technology. Of all these categories included in the Annex, some products are very well defined, while others need to be addressed and interpreted in accordance with the provisions of other regulations and directives.

The general objective of the Directive was opening up of the internal market for defence products, to facilitate cross-border procurement (European Parliament B 2020), to build a EU-wide industrial base in the European defence and security sectors by introducing a standardized certification system for the defence industries, building trust between national governments and meanwhile complying with export control regulations.

The ICT Directive is a tool designed to standardize the regulations of EU Member States on the transfer or export of defence equipment and provides Member States' competent authorities with a regulatory framework that, in theory, should reduce the administrative burden on authorities and suppliers. Since its entry into force, the ICT Directive has proved to be a robust regulatory act, being amended only on delegated acts – in 2019 (European Commission 2019) and to update the List of Defence Products (European Commission 2021).

2. Types of Licenses

According to the ICT Directive, a company that intends to transfer defence equipment from one Community state to another needs a prior authorization (a license) from the authorities of the European state from which the product is to be transferred. However, the ICT Directive allows European states to exempt certain types of transfers from the licensing obligation under particular conditions. In addition to traditional individual transfer licenses, it introduces the general (GTL) and global transfer licenses.

According to Article 5 of the Directive, GTL can be granted *ex officio*. While some Member States have introduced constraints and require registration before the first use of a GTL, this requirement is not mandatory in the text of the Directive, allowing automatically the authorization for movements that meet the legal licensing requirements. Such licenses allow the suppliers to export their defence-related products to different recipients in various Member States without any supplementary request.

Where a Member State considers that, under certain conditions, transfers of certain types of military products to other Member States do not involve major



risks, it may adopt and publish a GTL (European Commission 2016) to authorize such transfers, allowing all national suppliers of such products to perform multiple transfers directly to other Member States under certain conditions, without the need for another individual license to be issued.

According to Article 5, paragraph 2 of the Directive, the conditions set for releasing a GTL may apply not only to the types of products covered, but also to the Member States to which those products may be transferred under license, to the purpose of transfers, *e.g.*, maintenance, demonstrations or exercises, or to recipients of products, *e.g.*, the armed forces or the contracting authorities (European Commission 2016) (European Commission 2018).

Regarding the global transfer license, according to Article 6 of the ICT Directive, such a license is granted on request to individual suppliers. With such a license, the supplier may deliver products to one or more recipients in other Member States. National authorities are responsible for determining the conditions under which transfers may be authorized under a global license and not individually (for transfers not covered by GTL). Global transfer licenses are particularly useful in a contractual framework that involves a regular flow of products between the supplier and the recipient.

The individual transfer licenses are described in Article 7 of the ICT Directive. Such a license is granted on request and allows a single shipment of a specified quantity of designated products only to one EU Member State in one or several shipments. It is used in all cases where licensing exemptions, GTL and global transfer licenses cannot be used.

3. Assessing the Level of Implementation of the ICT Directive

Regarding the ICT Directive implementation, there were performed extended assessments, which have proven its unequally application within the Member States. The challenges identified included the moderate advocacy of the new licensing options, an ambivalent approach to minimum congruity, the slow pace of defence companies' certification and a sudden shift in responsibility (and inherent risks) from the competent authorities towards individual economic operators. Thus, the ICT Directive has had a limited impact, without achieving its main objectives, in particular that of facilitating the movement of defence products on the EU market, and to have an efficient internal market, an enhanced security of supply and an improved competitiveness. In addition, it is still early to properly assess the impact of the ICT Directive on the development of EDTIB and on the European defence equipment market (European Parliament. SEDE. 2015) (European Commission 2016)(Brown, Teichler and Simmonds 2017).



In terms of efficiency, there are some positive effects on the national control systems, but they are very limited at EU level. In the meantime, GTL has not yet provided the expected benefits, and the cost/benefit balance of certification remains unclear. Thus, the application of the ICT Directive yet encounters three main obstacles: transfers are still perceived as a matter of national sovereignty with strong implications in export control policies, there are clear differences between EU Member States' control cultures and policies and there is a relative lack of Europeanization of transfer control communities.

4. An Application Model of the ICT Directive – the European Defence Fund

The global perspective on competitiveness, in particular transatlantic developments, plays an important role in trying to understand the issue of licensing, mainly from industry, but also from the governmental side. EU Member States have implemented the ICT Directive differently, so in addition to having to navigate among different regulatory practices on internal transfers, companies from the defence industry also have to deal with different re-export regulations. These issues create uncertainty on the market and represent a major concern when considering to ensure the industry competitiveness. The lack of regulations harmonization for both ICT and re-export creates a barrier to European cooperation both in development and production of major defence equipment. Consequently, there is a risk of precluding the European companies to cooperate in various types of projects. This apprehension applies to the recently introduced action, the European Defence Fund (EDF).

The European Commission initiated the EDF (Official Journal of the European Union 2021) to encourage the research and development among Member States in a collaborative manner in defence-related areas, and, consequently, to promote innovation and competitiveness for EDTIB (European Defence Agency 2020). The link between ICT and EDF is the common goal of promoting a strong EDTIB, although no changes to the ICT Directive have been planned so far as a consequence of EDF emergence. However, for the implementation of the basic objectives and principles, the dimensions of added value that could help to make decisions on EDF's research and development and innovation actions and technologies must be taken into account, namely:

- contributing to the support of EU resilience and European technological sovereignty/autonomy, by targeting strategic and industrial technology areas, in order to reduce dependence on non-EU sources, increasing EU autonomy and strengthening the security of supply. Thus, EDF supports the development of critical as well as disruptive technologies for defence applications and focuses on areas where defence research and development and innovation can be accelerated and



streamlined, thus contributing to the implementation of the European industrial strategy and the strengthening of EDTIB;

- alignment with the defence and security interests of the Member States and the EU, by funding research and development and innovation of defence products and technologies in line with the priorities set for obtaining defence capabilities;

- ongoing cooperation of Member States in the field of defence research and development and innovation, by directing funds to complex multinational actions, resulting in economies of scale, increased interoperability and greater efficiency for operational users;

- cross-border cooperation of small and medium-sized enterprises (SMEs), in view of the need for diverse and creative support in research and development and innovation programs, without the control of third countries.

Through the intermediary of its research and development programs, the EU intends to actively support critical defence technologies for defence applications. From the perspective of cooperation between Member States, the initiative to support defence-related research and development and innovation by funding is welcome, more specifically by cooperation and by directing budgets towards actions that would benefit from economies of scale, as they are too expensive, complex or too hazardous for a single actor. Supporting the defence industry by funding scientific research and collaborative development and innovation in the field of defence makes from the EDF an important tool that will be able to strengthen the industrial defence ecosystem for all categories of forces and, moreover, for joint forces.

Although the ambition to involve SMEs and industry in general in the EDF (European Commission 2022) is clearly expressed, they are reluctant to participate, questioning on potential legislative barriers, and consequently the potential cross-border cooperation may be hampered by policy differences as regards the granting of export licenses for commercial exploitation. In the case of export control, there are many situations in which the products that are subject to a transfer or an export are integrated into larger equipment and are then exported to various other destinations. In addition to the classic restrictions on the (re)export of the component as such (in certain states, or generally without the consent of the home-state), both from the perspective of the component manufacturer (intellectual property) and an export control authority in the state of origin, there are situations where re-export restrictions extend to the system or the sub-system in which the ICT component is integrated. The status of the component should be clearly identified in the end-user certificate or the end-user statement. The certification process of the integrating companies demonstrates exactly this ability of a manufacturer to comply with the re-export restrictions related to the components purchased from the Member States. From this perspective, the European Commission's recommendations on GTL have common minimum clauses on retransfer/export (re-export) in the case of final operations (to the Armed Forces and/or to certified companies).



Therefore, a harmonized EU export control strategy, as in the case of dual-use items, should prevent this from happening. And by the specificity of the direct approach of technologies and intracommunity cooperation, EDF can be seen as an additional step towards the creation of a more unified and open defence market. However, in the situation where the regulatory issues related to ICT and re-export are not sufficiently addressed, EDF itself risks not achieving its main objective, but instead only to serve as a mechanism for financing and consolidating the European defence industry in the short term, without ensuring a long-term return on investment for the EU Member States.

EDF can provide opportunities for the development of harmonized transfer licenses that smoothen collaborative projects. Additionally, the creation of an accurate EU transfer control community is a very promising medium-term effort to reconsider the national approaches and to advance a common culture of control. The EDF should thus be seen as a key initiative towards a more concerted political impetus from both the Member States and the EU to stimulate cooperation and consolidation in order to respond to the geopolitical trends facing the Union. The resurgence of the rivalry of the great powers means that only a market-approach to building a strong EDTIB is insufficient, and that the EDTIB is essential for the EU to maintain the same rate of progress with global technological developments.

5. NATO's Vision on Export Control

NATO's commitment to the defence and security industry was underlined after the 2012 Chicago Summit (NATO 2012), when heads of state and government recognized for the first time the relevance of the defence industry in Europe and the industrial cooperation within the Alliance as an essential condition for capabilities achievement. Building on the NATO Industrial Advisory Group (NIAG), one of the main dedicated groups in the Conference of National Armaments Directors (CNAD), and complementing the efforts of other relevant stakeholders (Allied Command Transformation and Agencies), NATO has been constantly working to improve its relationship with capability providers. For more than a decade, NATO has been considering the Transatlantic Defence Technological and Industrial Cooperation (TADIC) Forum, the NIAG studies (NATO 2013) and conferences, exploring options for addressing barriers in defence and technical and industrial cooperation, such as trade barriers and tariffs, intellectual property rights, competition, standardization and interoperability. Highlights from TADIC studies have informed the US export control reform and the recent US policy on conventional arms transfers.

At the NATO-Industry Forum (NATO's highest level of interaction with the defence and security industry), in 2021 (Allied Command for Transformation 2021), discussions were held on the adoption of innovation and it was emphasized that the



strategies adopted will influence the future geopolitical context and will pave the way for new legislation and regulations, the development of modern procurement procedures, the creation of advisory and consultation mechanisms, the extension of existing cooperation mechanisms or the identification of solutions to facilitate national involvement and contributions. NATO's overall relationship with the defence industry aims to support the acceleration and provision of capabilities, facilitating industry involvement even from the concept and development stage to enable the generation of "military requirements informed by industry advice". Thus, in recent years, the defence industry is increasing its' participation in earlier stages than the typical competitive/commercial level associated with procurement.

Furthermore, NATO encourages the Allies to take action on industrial policies and is currently focusing on the implementation of dual-use capability products through the intermediary of new initiatives, such as the NATO Defence Innovation Accelerator (DIANA) and the NATO Innovation Fund (NATO 2021), which also entail the establishment of a common legal framework in all NATO nations, including the modeling of sanctions regimes, the export control, the intellectual property or the foreign investment screening mechanisms.

Conclusions

The ICT Directive seems to be inefficient at some level, due to the fact that the transposition of the Directive itself has varied greatly among the EU Member States. The harmonization of ICT regulations at Member States level has not been achieved, as Member States do not apply the Directive in a federate manner. This has created uncertainty at the industry level on the modality to ensure the compliance with the various existing regulations for the same defence industry.

Consequently, it is clear that additional congruence is required to meet the ICT Directive objectives. Although charges and administrative-related burdens have been somewhat reduced and there are no reports of unreasonable increases in the costs associated with the certification process, there is a fear that the documentation requested by the competent authorities and the associated costs may change abruptly. In particular, this is a risk for the SMEs, partly due to the lack of information available and the lack of understanding by the SMEs on how and when to use the tools provided by the ICT Directive (European Commission 2022). There is also uncertainty on the usefulness of being certified, given that Member States have very different processes stemming from the ICT Directive disjoint implementation. The certification scheme's deficient application suggests that harmonizing the certification process is an important first step in achieving the ICT Directive objectives, and overall, it is difficult to argue that the ICT Directive has helped to create a functional and efficient single market, and the consensus is that, although a step has been made in the right direction, the goal of achieving EDTIB has not been met.



With the introduction of the EDF, the EU has taken important steps towards a more integrated European defence and the EU strategic autonomy. This strategic autonomy has a significant defence component, and a more effective common EDTIB needs to be created to support the development of European defence capabilities. This implies more competition and consolidation, including from the perspective of the ICT Directive. Given the priorities identified at EU level, addressing emerging challenges in the modern battlefield, defence catalysts and excellence in real confrontations to improve operational capabilities and support ambitious defence systems, the disruptive technological solutions and the information management may be considered key interdisciplinary activators. In order to benefit from these activators, it is necessary to first create the regulatory and implementation framework for the use of emerging technologies and autonomous systems, both from the perspective of international humanitarian law and lessons learned. Therefore, the cooperation of all EU Member States in defence is particularly important, so that these priorities are supported to develop and implement the results of the capability programs and to be able to talk in the near future about technological independence, interoperability and interchangeability at European level.

BIBLIOGRAPHY:

- Allied Command Transformation. 2021. “NATO-Industry Forum”. Accessed on March 5, 2022. <https://www.act.nato.int/industryforum>
- Brown, Neil, Teichler, Thomas, and Simmonds, Paul. 2016. “Evaluation of Directive 2009/43/EC on the Transfers of Defence-Related Products within the Community. Final Report”. Accessed on January 17, 2022. European Commission. Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs. <https://op.europa.eu/en/publication-detail/-/publication/538beabd-92af-11e7-b92d-01aa75ed71a1/language-en/format-PDF/source-search>
- European Commission. 2009. “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”. Accessed on March 3, 2022. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02009L0043-20211007>
- European Commission. 2016. “Commission Staff Working Document. Evaluation of the Transfers Directive Accompanying the document. Report from the Commission to the European Parliament and the Council on the evaluation of 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”. Accessed on March 3, 2022. [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016SC0398R\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016SC0398R(01)&from=EN)



- European Commission. 2016. “Commission Recommendation (EU) 2016/2123 of 30 November 2016 on the harmonisation of the scope of and conditions for general transfer licences for armed forces and contracting authorities as referred to in point (a) of Article 5(2) of Directive 2009/43/EC of the European Parliament and of the Council (notified under document C(2016) 7711)”. Accessed on March 3, 2022. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016H2123&qid=1648331850953>
- European Commission. 2016. “Commission Recommendation (EU) 2016/2124 of 30 November 2016 on the harmonisation of the scope of and conditions for general transfer licences for certified recipients as referred to in Article 9 of Directive 2009/43/EC of the European Parliament and of the Council (notified under document C(2016) 7728)”. Accessed on March 3, 2022. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016H2124&qid=1648331942379>
- European Commission. 2018. “Commission Recommendation (EU) 2018/2052 of 19 December 2018 on aligning the scope of and conditions for general transfer licences for the purpose of exhibition as referred to in point (c) of Article 5(2) of Directive 2009/43/EC of the European Parliament and of the Council (notified under document C(2018) 8611)”. Accessed on March 1, 2022. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018H2052&qid=1648332017427>
- European Commission. 2019. “Regulation (EU) 2019/1243 of the European Parliament and of the Council of 20 June 2019 adapting a number of legal acts providing for the use of the regulatory procedure with scrutiny to Articles 290 and 291 of the Treaty on the Functioning of the European Union (Text with EEA relevance)”. Accessed on March 2, 2022. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019R1243&qid=1648332096265>
- European Commission. 2021. “Commission Delegated Directive (EU) 2021/1047 of 5 March 2021 amending Directive 2009/43/EC of the European Parliament and of the Council as regards the updating of the list of defence-related products in line with the updated Common Military List of the European Union of 17 February 2020”. Accessed on January 24, 2022. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32021L1047&qid=1648332170672>
- European Commission. 2022. “The Defence Transfers Directive - Handbook for SMEs”. Accessed on February 25, 2022. https://ec.europa.eu/defence-industry-space/download-defence-transfers-directive-handbook-smes_en
- European Commission. 2022. “Internal Market, Industry, Entrepreneurship and SMEs”. Accessed on February 22, 2022. https://ec.europa.eu/growth/index_en
- European Defence Agency. 2020. “Implementation of the EU Defence Package”. Accessed on February 26, 2022. [https://eda.europa.eu/what-we-do/EU-defence-initiatives/european-defence-fund-\(edf\)](https://eda.europa.eu/what-we-do/EU-defence-initiatives/european-defence-fund-(edf))



- European Parliament. SEDE. 2015. “The impact of the ‘defence package’ Directives on European defence”. Accessed on January 6, 2022. [https://www.europarl.europa.eu/RegData/etudes/STUD/2015/549044/EXPO_STU\(2015\)549044_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2015/549044/EXPO_STU(2015)549044_EN.pdf)
- European Parliament. 2020. “EU Defence Package: Defence Procurement and Intra-Community Transfers Directives”. Accessed on January 15, 2022. [https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU\(2020\)654171](https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU(2020)654171)
- European Parliament. 2020. “The EU’s Defence Technological and Industrial Base – In-Depth Analysis”. Accessed on February 1, 2022. [https://www.europarl.europa.eu/thinktank/en/document/EXPO_IDA\(2020\)603483](https://www.europarl.europa.eu/thinktank/en/document/EXPO_IDA(2020)603483)
- NATO. 2012. “Chicago Summit Declaration”. Accessed on February 22, 2022. https://www.nato.int/cps/en/natohq/official_texts_87593.htm?selectedLocale=en
- NATO. 2013. “Transatlantic defence technological and industrial cooperation (TADIC) - NIAGConsultancy Advice Study”. Accessed on January 6, 2022. https://diweb.hq.nato.int/indrel/Shared%20Documents/Brochure_TADIC_SG154.pdf
- NATO. 2021. “NATO Allies take the lead on the development of NATO’s Innovation Fund”. Accessed on January 5, 2022. https://www.nato.int/cps/en/natohq/news_187607.htm
- Official Journal of the European Union. 2021. “Regulation (EU) 2021/697 of the European Parliament and of the Council of 29 April 2021 establishing the European Defence Fund and repealing Regulation (EU) 2018/1092”. Accessed on February 4, 2022. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32021R0697&qid=1648332296124>

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