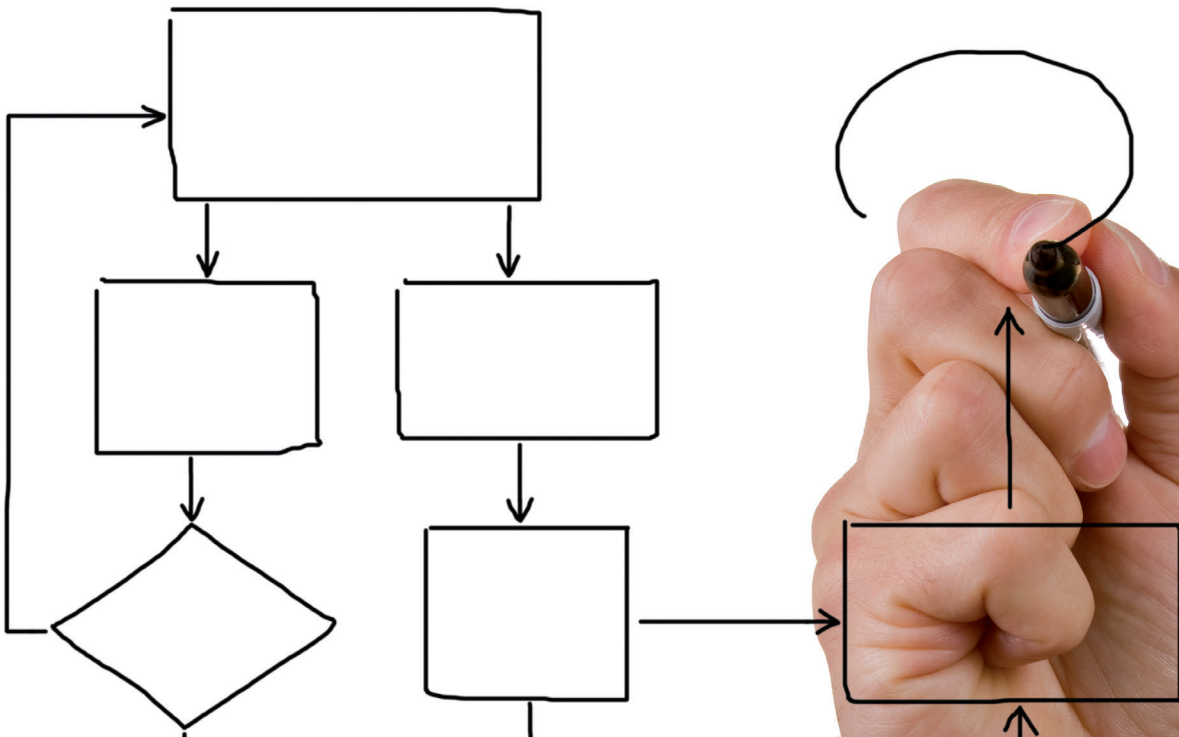




Internal Compliance Programmes – ICP

Internal export control systems





Federal Office
of Economics
and Export Control
BAFA

Internal Compliance Programmes – ICP

Internal export control systems

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Introduction

Preliminary Remarks

There is nothing new about the concept of an internal export control or internal compliance programme (ICP) that is audited by the authorities. However, it is a matter that has become increasingly important in recent times. This information leaflet picks up the various threads of the ongoing discussions surrounding the topic, and demonstrates why it benefits companies to establish an internal export compliance programme. It also explains the legal basis for such a programme and sets out the criteria that must be fulfilled. The leaflet is intended to help you set up or optimise an ICP in your own company or undertaking.

Definition

The term “compliance” has legal origins and refers to the action or fact of complying with, observing, following or abiding by certain rules or requirements. Compliance in this sense simply requires that German companies act in accordance with the law, which is, of course, self-evident for all those to whom the provisions of the law are addressed.

It is only recently that compliance has also come to refer to companies taking appropriate preventive measures to avoid infringements of the law by their employees.

In the purely preventive sense of the term, compliance encompasses all valid statutory obligations and prohibitions that apply to foreign trade. Contrary to popular misconceptions, it is in no way limited to the checking of sanction lists.

Contents

I. Introduction – why your company needs an internal compliance programme?

1. Working together to combat the proliferation of weapons of mass destruction

Preventing the proliferation of weapons of mass destruction (WMD) is one of the most pressing challenges we face today. The reality of the situation is that many countries are currently endeavouring to either manufacture or purchase weapons of mass destruction or to acquire the knowledge required to manufacture such items and possibly sell them at a profit to other states.

This poses a threat to each and every one of us, and we must be constantly alert to these risks and threats in order to avoid unintentionally assisting in attempts to procure these weapons.

To effectively combat proliferation, the Member States of the European Union (EU) and, indeed all industrial nations, have committed to work together towards the non-proliferation of weapons of mass destruction and to control the export of critical goods to sensitive countries. Conventional military equipment is also subject to export control.

However, effective state control of exports is only possible if all stakeholders, including manufacturers of critical goods, exporters, engineers, recognise the need for such controls and support them with all resources available to them. A close, trust-based partnership between industry and the authorities is vital if we are to achieve our shared objective. Your expertise, including your knowledge of the technical characteristics of your products and of your potential customers outside of Germany, plays a key role in export control.

Your knowledge and experience could prove extremely valuable in the early detection and prevention of attempts to procure WMD. A systematic approach is necessary to achieve this aim. A company or undertaking must be organised in such a way that efforts to procure WMD are detected in time and can be prevented.

Export control is our shared responsibility. The fight against the proliferation of weapons of mass destruction is futile without your involvement. ICPs can support us in this endeavour.

2. Protecting the good name of your company and Germany's reputation as a location for business

Our export control system relies on your company's sense of responsibility and that of your employees. You decide which contracts to conclude; which goods, software and technology to export; which services to make available outside of Germany; and which technical knowledge to pass on to third parties.

Infringements of export control legislation not only carry a legal penalty - the news media also seizes on stories of actual or alleged "export scandals", which draw critical public attention at home and abroad. Even if a company is merely suspected of carrying out illegal export activities, its reputation in foreign trade may be tarnished. This kind of bad press not only affects the company itself, but can also have implications for the German economy as a whole. A company may even jeopardise its survival by failing to observe the regulations, depending on the severity of the infringement and its consequences.

In addition, effective export control can, in the long term, help to secure strategically important foreign markets for the entire German export industry. For example, delivering a machine tool to country X for use in its missile programme may appear at face value to have short-term benefits for the exporting company. However, in the long term, all companies in the economy would benefit significantly more from X abandoning its missile programme: this would in turn open up that country to more exports for civilian uses.

Companies need to have adequate compliance systems in place if they are to achieve these objectives.

Take advantage of an ICP to protect the good name of your company and avoid negative media attention from the German export industry!

3. Staying on the right side of the law

All those involved in foreign trade are obliged to comply with a plethora of statutory requirements, such as export control legislation, customs procedures, tax law, statistical legislation, contract law and transport regulations.

Note: The term “export control legislation” is sometimes used in a narrow sense to refer only to those regulations that serve to restrict export for reasons relating to foreign and security policies. In other cases, the term is used in a broader sense to also include export restrictions that serve, for example, to protect the environment, the health of the consumer, or our cultural heritage. This information leaflet refers only to export control legislation in the stricter sense.

To ensure adequate control of exports and transfers without restricting trade any more than necessary, export control legislation primarily relies on export prohibitions and licensing requirements. Prohibitions apply to activities that are wholly incompatible with the objectives of export control (for example, activities in connection with chemical weapons). Meanwhile, a licensing requirement means that, before items can be exported, they must be checked by the authorities on a case-by-case basis to ascertain whether they pose a risk to export control objectives.

Export control legislation is certainly complex. Restrictions may be imposed by EU law and by national legislation. Moreover, export control legislation draws on many different legal sources, for example, statutes, directives, circular orders and official announcements. Exporters are required not only to be aware of and comply with the valid norms and standards, but also to keep abreast of the latest legislative changes and frequent amendments to foreign trade legislation. Companies cannot assume that their employees will comply with standards without providing them with specific instructions. An internal compliance system is the only way to ensure that a company can comply with the current legislation.

Don't leave it to chance or to luck – an ICP helps ensure systematic compliance with the legislation.

4. Avoiding liability risks

If companies (and their employees) involved in foreign trade fail to comply with the legislation, they face a host of (avoidable) liability risks. These may have serious personal and economic consequences for company owners and employees alike.

First and foremost, infringements of export control legislation may result in criminal sanctions being imposed. In such cases, heavy fines or prison sentences may be imposed on management at the company or the employee responsible - see Section 34 of the Foreign Trade and Payment Act (Außenwirtschaftsgesetz, AWG).

Violations that are not prosecuted under criminal law may still be pursued as an administrative offence and may carry a penalty of up to 500,000 euros.

Please note: The decision as to whether an act is pursued as an administrative offence with an administrative fine or as a criminal offence with a prison sentence depends on the specific circumstances of each case (e.g. commercial or gang-related offences or offences that disrupt Germany's external relations carry a minimum sentence of two years).

Furthermore, the breach of obligatory supervisory responsibilities due to a lack of organisation or poor organisation within a company is considered an administrative offence under Section 130¹ of the German Administrative Offences Act (OWiG), and may be punished with a fine of up to one million euros and an order for forfeiture of proceeds. According to Section § 9 of this act, this also applies to legal representatives of the company, including members of the board of management or those in a managerial position.


Failure to comply with regulations also carries the risk of liability under corporate or civil law. The systematic avoidance of risks forms part of the duty of care that falls to the management of a company, and is a key component of its corporate governance. In stock corporations, for example, the members of the supervisory board have an important supervisory role to play as part of their duty of care in accordance with Section 111, Paragraph 1 of the German Stock Corporation Act (Aktiengesetz, AktG). According to Section 93 of the AktG, members of a

¹Section 130 Paragraph 1 OWiG: Whoever, as the owner of a firm or an enterprise, wilfully or negligently fails to take the supervisory measures required to prevent contravention of duties in the firm or the enterprise which concern the owner in this capacity, and the violation of which is punishable by a penalty or a fine, shall be deemed to have committed an administrative offence if such a contravention is committed which could have been prevented or made much more difficult by proper supervision.

company's supervisory board who neglect their supervisory duties in this respect are jointly liable for any resulting damage. Similarly, managing directors in breach of their supervisory duties in limited liability companies are jointly liable to the company for any damages caused, in accordance with Section 43 of the German Law pertaining to Companies with Limited Liability (GmbHG).

Employees who violate the applicable regulations also face consequences under labour law, including a possible dismissal.

It is in your own interest to counter these risks from the offset by establishing adequate organisational preventive measures in your company. You can do so by setting up an internal export control system and ensuring compliance with this.

 For more details, see: *Export Control in Practice (Praxis der Exportkontrolle), Part 8: Criminal Law; HADDEX, Volume 1, Part 1 7. Chapter: Criminal and Administrative Offences*

There are far-reaching consequences for anyone who violates the law. An ICP will help you to avoid criminal and civil liability risks.

5. Freedom of foreign trade and the duties of companies

The principle of unrestricted foreign trade is enshrined in German law (see Section 1, Paragraph 1 of the German Foreign Trade and Payments Act (AWG)).

However, Germany's foreign and security policy interests and international agreements place some limits on the freedom of foreign trade. Each company is responsible for ensuring its compliance with the applicable legal restrictions.

The duty of companies to act in accordance with the law is the unavoidable downside of unrestricted foreign trade. Accordingly, the German export control system relies on the personal responsibility of our export companies, whose business activities directly affect Germany's foreign and security policy interests. Efficient internal procedures are essential if a company is to take responsibility and act responsibly in this regard.

German export control legislation fundamentally relies on the personal responsibility of our export companies.

6. Application process

Granting of export licences may be made dependent on material and personal conditions, in particular the reliability of the applicant (see Section 3, Paragraph 2 Sentence 1 of the AWG).

The requirements that must be met in order to be deemed reliable were specified in the "Principles of the Federal Government for evaluating the reliability of exporters of war weapons and arms-related goods" of 25 July 2001. According to these principles, the exporter/operator must put in place adequate organisational and workflow structures to ensure compliance with all restrictions, licensing requirements and other relevant duties, including legal requirements pertaining to the holding of business records. Establishing an internal compliance programme is therefore essential.

These principles are available on the BAFA homepage².

An essential prerequisite for companies when applying for a licence to export restricted items is to nominate a member of the board of management, a managing director or a representative shareholder to the position of 'person responsible for exports' or Chief Export Control Officer – CECO ("Ausfuhrverantwortlicher", AV), who is personally responsible for transfers and exports. This Export Control Manager must fulfil certain organisational obligations, is responsible for personnel selection and training, and also has supervisory duties. Licence applications must always be signed by the CECO (see no. 2 of the principles mentioned above).

The CECO plays **the** key role in organising export control in a company and is personally responsible for ensuring compliance with the legislation. He/she is required to declare in writing to BAFA that the necessary precautions have been taken (in other words, an internal system has been established) to ensure that the company complies with the provisions of foreign trade legislation.

² http://www.ausfuhrkontrolle.info/ausfuhrkontrolle/de/vorschriften/zuverlaessigkeit_ausfuhrverantwortlicher/index.html

Neglect of these duties has serious economic and legal consequences, and undermines the reliability of the company as a whole. If there is any reason to assume that the CECO is unreliable and the assumption proves true following an investigation, licence applications are normally rejected on the basis of the applicant company's unreliability. Licences that have already been granted are revoked in this case (see principle no. 3, 4 and 6).

Reliability means being able to ensure compliance with the law.

7. Benefit from simplified procedures

A global export licence (SAG), like general transfer licences, is granted using a licensing procedure that offers significant practical benefits to reliable exporters. A global export licence authorises the exporter to export a range of items to various consignees in several countries. Due to the scope of the authorisation granted to the recipients of such licences, applicants must fulfil particularly stringent requirements to prove their reliability. If you wish to apply for a SAG, it is not sufficient to submit a declaration by the CECO stating that all necessary precautions have been taken in accordance with the regulations. BAFA will also investigate, by means of written communication and an on-site audit, whether your company has implemented an ICP capable of ensuring that the global export licence is exercised correctly.

An ICP is a prerequisite for obtaining a global export licence (SAG).

8. Improve operational effectiveness – avoid unnecessary work

Time is money, and an efficient ICP can prevent a senseless waste of working hours. For example, if you enter into negotiations with business partners or begin production before finding out whether the export of the product in question is prohibited in all cases or clearly fails to meet the requirements for export authorisation, you will have unnecessarily wasted your time and money if forced to abandon the project. Unnecessary stress may be caused if, for example, you only find out shortly before a planned export that delivery will not be possible due to current licensing restrictions.

Save yourself time, money and hassle – use your ICP to find out as soon as possible whether your desired project complies with export control legislation.

II. Which legal requirements apply to an ICP?

1. Self-interest and binding legal requirements

As stated in the introduction, implementing an ICP is a worthwhile exercise in many respects. For example, you may be authorised to use processes that offer additional practical benefits because your company demonstrably has an export control programme in place, and can thus ensure compliance with all applicable regulations.

In addition, having an operational ICP is now a legal requirement in many areas, and is expected to meet minimum specifications.

2. Application process: Principles of the Federal Government for evaluating the reliability of exporters

The general requirements of an ICP depend on the above-mentioned reliability principles of the Federal Government. According to these principles, an ICP must have a systematic approach for ensuring that the following obligations are met:

→ Selection of staff:

The CECO must select sufficient and suitably qualified staff for the internal compliance programme and also ensure that the staff selected are reliable and properly trained.

→ Staff training:

Regular staff training (inhouse training, participation in external seminars) must be organised to ensure that employees have the required skillset. The necessary support material must also be procured and updated as required.

→ Organisational structure:

The CECO must define the chain of responsibility for export control within the company (organisational structure) and the workflows in order to avoid breaches of foreign trade and payment legislation (workflow management). Experience has shown that having a centralised coordination office for internal compliance (export control) is both essential and logical. This centralised coordination office must have both access to enough internal information and

sufficient authorisation to issue instructions to all parties involved in export transactions.

→ Supervision:

The CECO must use appropriate measures to ensure that all instructions regarding workflow management are being followed and must also regularly check that the ICP is functional.

Further detail on these obligations is provided by the European Commission's recommendations on the certification process in accordance with the EU directive on transfers of defence-related products (see Point 4 below).

Important: There is no boiler plate ICP that you can simply copy and apply to your company. Depending on the size of your company and the business divisions involved, you must conduct a risk analysis and impact study to determine which particular requirements should be met by your ICP.

As a fundamental rule, companies with a product range that includes listed products must appoint a person responsible for exports (Chief Export Control Officer – CECO) (see item I no. 6) and notify BAFA of this person's details.

This applies to all applications for the export/transfer of goods that are included in the following control lists:

→ War Weapons List³,

→ Part I section A of the Export List⁴,

→ Part I section C of the Export List (especially the 900 numbering range)⁵,

→ I of Council Regulation (EC) No. 428/2009⁶.

Once appointed, the CECO commits to fulfilling the duties of organisation, selection of staff and staff training, and the duty of supervision associated with the position. This person thus assumes responsibility for an effective internal compliance programme.

Export control is a matter for senior management: this must be borne in mind when appointing the CECO. It reflects the responsibility assumed by companies in the area of foreign trade. Ideally,


³ http://www.gesetze-im-internet.de/krwaffkontrg/anlage_46.html,

⁴ http://www.ausfuhrkontrolle.info/ausfuhrkontrolle/de/gueterlisten/ausfuhrliste/al_abschnitt_a.pdf

⁵ http://www.ausfuhrkontrolle.info/ausfuhrkontrolle/de/gueterlisten/ausfuhrliste/al_abschnitt_c_header.pdf


⁶ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2009R0428:20090827:DE:PDF>

company management should provide a clear, unambiguous statement on export control, as part of the company objectives, for example, or as part of the company's mission statement. In line with this approach, it is imperative that the CECO be a member of upper company management. Proxy arrangements are not acceptable. If several people jointly manage the company, it is not sufficient for any member of the company to be appointed to the position of CECO. According to the company's internal division of tasks, the CECO must be responsible for carrying out deliveries that are subject to licensing. This is a prerequisite for this person to organise internal compliance, manage the employees responsible for the relevant tasks and fulfil the duties assigned to him or her as the CECO. An CECO must be appointed even if company management consists of just one person.

 For more details on the position of CECO: *HADDEX, Volume 1, Part 6, Chapter 7, margin no. 350 - 352*

To notify BAFA of the person appointed to the role of CECO, use form AV17⁷.

The form must be signed by the CECO and the original submitted to BAFA. It is not sufficient to submit details of the appointment via the electronic application system ELAN-K2.

 For more details on the process, see also: *HADDEX, Volume 1, Part 6, Chapter 7, margin no. 353*

Please note: Under the War Weapons Control Act (Kriegswaffenkontrollgesetz), applications for a licence must always be signed personally by the CECO. In all other cases, the CECO can delegate signature authority to other persons; however, he or she still retains overall responsibility for ensuring that applications are completed and submitted correctly. Consequently, if delegating signature authority, the CECO must expressly declare responsibility for the applications not personally signed by him or her. This declaration is completed with form AV2⁸.

 For more details, see *HADDEX, Volume 1, Part 6, Chapter 7, margin no. 354f*.

When submitting applications, the signatory must

indicate, in field 37 of form AG/E 1, whether the application is being signed personally by the CECO, or whether it is signed by an authorised representative of the company for whom the CECO has declared he will assume responsibility.

3. Global export licence (Sammelgenehmigung, SAG): ICP as an application requirement

A global export licence (SAG)⁹ authorises the licence holder to carry out a range of export/transfers of numerous items to various consignees in various countries.

Global export licences are especially useful for companies that are involved in developing and manufacturing goods together with a large number of foreign partners as part of international defence projects, and therefore need, as part of these projects, to carry out a large number of exports or transfers that are subject to authorisation.

Global export licences are also of practical relevance to companies that have genuinely long-term business relations involving high volumes of deliveries to a large number of customers or that conduct bulk business or frequently deliver replacement parts to a large number of customers. A global export licence that has already been issued can be adapted at any time to take account of a change in the authorisation holder's business relations. Details of new purchasers/recipients/end users can be included in the authorisation besides additional goods. If necessary, the total value can be increased on application, based on sufficient grounds.

Given the additional advantages offered by global export licences, these are associated with higher requirements of exporters in terms of reliability, compared to individual export licences. These requirements must be incorporated in the ICP. More information is provided in the circular directive No. 10/2003 from 02 June 2003¹⁰:

- Compilation and rating of goods subject to licensing according to the Export List;
- Evaluation of the reliability of the recipient group, especially with reference to the end-use or to re-exports and the preparation, if necessary, of a substantiated review report to BAFA;

⁷ http://www.ausfuhrkontrolle.info/ausfuhrkontrolle/de/antragstellung/formulare_av/anla_av1.pdf

⁸ http://www.ausfuhrkontrolle.info/ausfuhrkontrolle/de/antragstellung/formulare_av/anla_av2.pdf

⁹ Council regulation (EC) No 428/2009 also refers to 'global export authorisations'. http://www.ausfuhrkontrolle.info/ausfuhrkontrolle/de/arbeitshilfen/merkblaetter/merkblatt_sag.pdf

¹⁰ http://www.ausfuhrkontrolle.info/ausfuhrkontrolle/de/verfahrenserleichterungen/sag/runderlass_sag.pdf


- Notification to BAFA if there are indications of breaches by foreign customers against regulations relating to foreign trade;
- Data backup and retention of all documents relating to the global export licence issued, including the associated orders issued;
- Provision of a list of persons (including telephone extensions) who are responsible for adhering to these regulations. BAFA must be notified immediately of any staff changes, together with details of the global export licence number and the customs number.

Further detail on these requirements is provided by the European Commission's recommendations on the certification process in accordance with the EU directive on transfers of defence-related products (see Point 4 below).

Before you can apply for a global export licence, a preliminary audit must be conducted (this usually takes the form of an on-site inspection). As part of this requirement, the company must provide details and documents including the following:

- Abstract description of the products according to the Export List, item number from the Export List, commodity classification number, technical documents;
- List of persons responsible for complying with export control regulations;
- Overview of the computerised internal compliance programme, with particular reference to monitoring of licensing obligations, rating of products according to the Export List, precautions taken against the delivery of unlicensed products or the delivery of licensed products to unlicensed recipients;
- Organisation chart of the company structure with reference to export control and/or a workflow chart showing the internal compliance programme with the names and positions of assigned employees.

Once the preliminary audit is completed successfully, companies can proceed with the application.

 For details on the licensing process for the global export licence, see: HADDEX, Volume 1, Part 7.6. Chapter, margin no. 495ff. or the relevant information leaflet ("Sammelausfuhrgenehmigungsverfahren")¹¹.

4. Certification in accordance with the directive on defence-related products

Directive 2009/43/EC on defence-related products aims to simplify and optimise the licensing process for transfers within the EU by creating standardised, transparent requirements. According to Article 5 (2) (b) of the directive, a general transfer licence is to be introduced for certified recipients. In other words, your company must have already been certified before you can avail of this general transfer licence.


This certification is meant to testify the reliability of the recipient undertaking in particular. BAFA issues certificates on application for companies registered in Germany if the following requirements specified in Article 9 of the directive are fulfilled:

- a. Proven experience in defence activities, taking into account in particular the undertaking's record of compliance with export restrictions, any court decisions on this matter, any authorisation to produce or commercialise defence-related products and the employment of experienced management staff;
- b. Relevant industrial activity in defence-related products within the Community, in particular capacity for system/sub-system integration;
- c. The appointment of a senior executive as the dedicated Manager personally responsible for transfers and exports (= CECO);
- d. A written commitment of the undertaking, signed by the senior executive referred to in point (c), that the undertaking will take all necessary steps to observe and enforce all specific conditions related to the end-use and export of any specific component or product received;

¹¹ http://www.ausfuhrkontrolle.info/ausfuhrkontrolle/de/arbeitshilfen/merkblaetter/merkblatt_sag.pdf

- e. A written commitment of the undertaking, signed by the senior executive referred to in point (c), to provide to the competent authorities, with due diligence, detailed information in response to requests and inquiries concerning the end-users or end-use of all products exported, transferred or received under a transfer licence from another Member State; and
- f. A description, countersigned by the senior executive referred to in point (c), of the internal compliance programme or transfer and export management system implemented in the undertaking. This description shall provide 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.

published.

 For more details, see: *Information leaflet on the certification procedure according to Section 2a AWG, Section 2a AWV and Article 9 of the directive on defence-related products (2009/43/EC)*¹³.

An undertaking's reliability is audited on the basis of 6 core areas:

- Undertaking/organisational, human and technical resources
- Organisational structure/chain of responsibility
- Audits/supervision
- Workflow management/operating procedures and general awareness-raising
- Physical and technical security
- Records/record-keeping

The European Commission has published recommendations with questions and guidelines for evaluating ICPs¹², with the aim of standardising certification within Europe (for details, see point III.). The Federal Government's reliability principles have been incorporated in formulating these core areas and guidelines.

The European Commission is notified of certificates granted and the details are recorded in its CERTIDER database. Notification for the certificates are

¹² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:011:0062:0074:DE:PDF>

¹³ http://www.ausfuhrkontrolle.info/ausfuhrkontrolle/de/arbeitshilfen/merkblaetter/merkblatt_zertifizierungsverfahren.pdf

III. ICP criteria

The following criteria for an effective ICP are based on certification according to the directive on defence-related products, but have been further elaborated to provide a standard for all ICPs relating to foreign trade legislation. They are also applicable within the context of reliability evaluations and the procedure for global export licences (SAGs). Any special features of particular procedures are highlighted separately.

As already mentioned, there is no „boiler plate“ ICP. The individual requirements of your ICP essentially depend on the size, structure and scope of your business, and in particular, on your company's specific business activity. Only high-risk business areas (areas that are affected by export control regulations) need to be included in the ICP. However, since concerns can develop, it is the company's duty to monitor the level of risk and to adapt the ICP accordingly.

In defining the ICP criteria, we must differentiate between mandatory, directory and optional provisions, questions to be addressed and guidelines:

Mandatory provisions are compulsory and include minimum requirements; these must be fully adhered to. For example, number 2 of the reliability principles, states that, depending on the legal form of the applicant, either a member of the board of management, a managing director or a shareholder authorised to represent company management **must** be appointed as the „CECO“.

Most requirements are specified as directory provisions. This means that undertakings are generally obliged to comply with these provisions. However, in some individual cases, a company may be permitted to deviate from these provisions if there are exceptional company-specific reasons for doing so. For example: „The classification of products **should** be recorded in an electronic data processing system.“

Occasionally, compulsory and directory provisions are combined, as in the case, for example, of the requirement specifying the intervals at which internal company audits must be carried out: „Ideally, once a year and, at least, every 3 years.“ In all cases, audits must be conducted at least every 3

years; but in fact, it is recommended that audits be carried out much more regularly than this, and generally once a year. Audit intervals for individual undertakings are determined depending on factors including the scope of the business.

Some requirements are specified as optional provisions. For example: „It should be possible to make records available electronically (...).“ Records **can** also be available in hard copy (...).“ The wording here allow companies to choose between these options.

Under the headings below, it is indicated whether the criterion is mandatory, discretionary (that is, generally applies, but from which you may be able to refrain) or optional.

1. Human and technical resources allocated to the management of exports

1.1. Human resources

The undertaking must exercise particular care in selecting and appointing the employees responsible for export control (see also 4.2 of the criteria). It must ensure that all areas of the business that are related to foreign trade are adequately staffed with employees who demonstrably have the required specialist skills (legal and technical) and are also personally reliable.

Several factors must be taken into account when allocating staff to a company's internal export control process. The size of the company, the product range, business partners, personnel resources and export quota all play an important role.

At least one person must be employed in the area of export control. Depending on the average volume of applications, this person may only have to handle tasks relating to foreign trade legislation on a part-time basis. If this person is absent, for example, because of holiday or illness, a substitute who is equally qualified to manage export control must be available to assume the tasks.

1.2. Technical resources

There are no mandatory requirements about technical resources that must be procured in order to comply with the provisions of foreign trade

legislation. For example, the Commission recommendations regarding the certification of undertakings in accordance with the directive on defence-related products state only that products should be classified in an electronic data processing system, if one is in existence already (Criterion 4.1.1. (c) (1)).

However, it is highly unlikely nowadays that undertakings would not use any computerised system at all. Nor would this be practical, given the increasing complexity of foreign trade legislation and the recent introduction of electronic communication processes (ATLAS, ELAN-K2). An electronic system for the management of exports and transfers is therefore recommended. Information on the software products commercially available for this purpose can be obtained from the Chamber of Industry and Commerce for your business field.

Special feature of the global export licence (SAG) procedure: In contrast to the process for individual export licences, the process for a global export licence requires that you apply via an electronic data processing system. As part of the preliminary audit, you must demonstrate your computerised internal compliance programme, with particular reference to monitoring of licensing obligations, classification of products according to the Export List, precautions taken against the delivery of unlicensed products or the delivery of licensed products to unlicensed recipients.

1.3. Working equipment/compliance manuals

Export control staff must always have access to the relevant legislative texts, including the latest applicable lists of products and employees.

Legislative texts including circular orders and official announcements are published in the official journals below:

- Official Journal of the European Union¹⁴
- Bundesgesetzblatt Teil 1 (Federal Law Gazette Part I)¹⁵
- Bundesanzeiger (Federal Gazette)¹⁶

It is also recommended to provide relevant specialist journals and commentaries on legislation in the area of export control.

For details of regulations, updates, information leaflets on various topics related to foreign trade legislation, forms, checklists and other links, see also:

- BAFA homepage, www.ausfuhrkontrolle.info
- of German Export Control (HADDEX), www.haddex.de
- BAFA's Guide to Export Control "Praxis der Exportkontrolle"

Furthermore, manuals must be drawn up to describe the operational and organisational processes that must be followed by the export control staff. The export control staff must be advised of any changes to the manuals and informed about when they take effect. Updating the manuals once a year is recommended. The manuals should cover at least the following items:

- Clear statement from company management on compliance with the provisions of foreign trade legislation;
- Description of the entire process from order receipt, to evaluation of the applicability of foreign trade legislation, compliance with relevant provisions through to final export or transfer; this process should include references to sanctions lists, ITT (intangible transfer of technology) and technical assistance;
- Details of how compliance with the conditions required for a licence is monitored;
- description of the interaction with external stakeholders and, in some cases, with other departments within the company, such as the legal department and sales and marketing;
- overview of coordination between all employees assigned to or involved in export control;
- overview of the coordination and information exchange with relevant authorities (e. g. notification of suspicious transaction requests, existence of a policy for voluntary declarations and so on).

It is recommended that manuals are made available

¹⁴ <http://eur-lex.europa.eu/de/index.htm>

¹⁵ http://www.bgbl.de/Xaver/start.xav?startbk=Bundesanzeiger_BGBl

¹⁶ <https://www.bundesanzeiger.de/>

not only to export control staff, but also to all employees, at least in electronic format (for example, on the company's Intranet). In particular, the company management's statement on adhering to the provisions of foreign trade legislation should be clearly and regularly communicated to employees in order to promote a culture of export control compliance.

2. Organisational structure/chain of responsibility

Overall responsibility within the company for the subject of export control must be defined and communicated in writing. For companies that export listed products, this responsibility would be assumed by the CECO (see above). Other responsibilities must also be specified and communicated (by means of an organisational chart, for example). The document must be kept up-to-date. The hierarchy of responsibilities must include details of how responsibilities are assigned and a description of the steps followed if the manager with overall responsibility is absent.

Whether export control is managed in the company's shipping departments or in the head office, or whether there is a separate department for export control, depends on the size and structure of company.

An important prerequisite is that export control employees are as independent as possible. The fewer employees in a company, the more difficult this is. The main aim should be to protect export control staff, as far as possible, from any conflict of interests. There is, for example, a higher risk of conflicted interests if export control employees are also responsible for sales and marketing. For this reason, the export control department should be structured so that it is as independent as possible.

Export control staff should be authorised to halt a transaction. Otherwise, export control staff must have the authority to inform the CECO directly when they require permission to stop a transaction.

3. Audits/Supervision

The ICP must incorporate control mechanisms as part of daily operations. For example, one approach is to release products based on the 4-eyes principle or random inspections.

In addition to the process-related controls, the design, adequacy and efficiency of the ICP must also be checked.

Note on certification: Ideally, internal ICP system audits should be carried out once a year and at least every three years.

If the system audit is conducted internally, one of the following employees should be entrusted with this task:

- Senior employee from the hierarchy of responsibilities for controls/inner audits,
- Quality manager,
- Finance manager or accountant,
- Person from middle management or a more senior position, who does not work directly on routine daily tasks with the export control staff.

The audit can also be conducted by qualified external professionals, e. g. legal practitioners, management consultants or chartered accountants.

Since the system audit examines the processes and supervision that take place within the company's internal export control procedure, all aspects of internal export control must be included. These include the relevant work orders and organisational guidelines, training courses, record-keeping methodology and documentation.

The audit criteria should be specified in writing beforehand and the results of the audit documented. The audit should address at least the following questions:

- Are the applicable export limitations abided by? (to be assessed by means of spot-checks)

- Are procedures in place and updated to ensure that all foreign trade legislation is complied with?
- Are training courses and awareness-raising measures implemented regularly?
- Are records complete and readily available?
- Is information available on the life of relevant products from source to destination?
- In the event of changes to the law, how are the necessary updates handled?

Special feature of certification:

Do the records cover all the relevant aspects of import, export and transfer, and products remaining within the Member State?

To ensure that a representative number of shipments is audited, at least one shipment per customer or destination should be audited or at least one shipment for each project.

If the system audit indicates that there has been a failure to comply with regulations, any suspected breaches and the associated corrective measures, together with an assessment of the effectiveness of these measures must be documented in writing; the records must be retained. Self-disclosure of violations is not mandatory.

Employees must be provided with a documented process, including details of the steps for internal escalation and emergency procedures in the event of non-compliance.

4. Workflow management/operating procedures and general awareness-raising

4.1. Process manual

Operating and organisational procedures must be documented in writing and contain instructions and guidelines on the following subjects:

- The entire process from order receipt, to evaluation of the applicability of foreign trade regulations, compliance with relevant provisions through to final export or transfer, (a final audit to check compliance must be conducted before shipping); ideally, there should be a link with existing process (e. g. sales/marketing, purchasing, etc.)
- Monitoring of compliance with the conditions required for a licence;
- The interaction with external stakeholders and, in some cases, with other departments within the company, such as the legal department and also sales and marketing;
- Coordination between all employees engaged in carrying out or otherwise involved in controls (e. g. sales staff are to be instructed to inform export control staff about any doubts, and to be advised that an order may only subsequently to be processed once approved by export control staff);
- Coordination and any information exchange with relevant authorities (e. g. notification of suspicious orders, existence of a policy for voluntary declarations and so on).

The process manual must provide answers to the questions from number 35 to 49 in the list of certification criteria (see also the BAFA homepage¹⁷). These questions form the core element of any internal compliance programme.

¹⁷ http://www.ausfuhrkontrolle.info/ausfuhrkontrolle/de/antragstellung/zertifizierung/a_az_fk_eg200943.pdf

4.1.1. Operating and organisational procedures: pre-licensing phase¹⁸

4.1.1 a): Embargoes	35) 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"> → compliance with prohibitions; → 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.
4.1.1 b): Sanctions lists	36) 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.
	37) 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 (a “hit”)?	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).
	38) What procedures are followed when a match for a name has been found?	

¹⁸ The purpose of the pre-licensing phase is to determine whether the undertaking is affected 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 relevant measure, for example, to apply for a licence or to appropriately use a general licence.

4.1.1 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:	
	39) 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. Changes to the control lists should be immediately reported in the system.
	40) How are all products subject to licensing requirements classified and recorded, and who is responsible for this?	The control staff should be responsible for recording and classifying products, if necessary in consultation with technical experts. If changes are made to the list, these should be verified and documented in the system.
	41) What processes are in place to ensure that the classification of products is kept up to date, and how is it documented?	
	42) How is the end use by and the reliability of the recipient assessed?	The control staff should be responsible for verifying the reliability of the recipients, with special attention given to the end use and risk of diversion. If the control staff determine that the recipient has breached 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. orders for unusual quantities, special and unusual transit routes requested by the recipient ...).

4.1.1 d): Intangible transfer of technology	43) How does the undertaking ensure compliance with the intangible transfer of technology (ITT) requirements (e.g. e-mail and access to the intranet from abroad)?	The undertaking should have issued clear and written instructions in relation to ITT over e-mail, fax, intranet or Internet. The provision or transfer of technology should not occur until such an assessment has been made of its licensability, and if licensable, a licence is in place to permit the transfer.
4.1.1 e): Control of unlisted products	44) How does the undertaking assess whether it must apply for a licence for a product that is not listed?	A verification procedure for the end usage of the products and their end users should exist. The export/transfer control staff should examine in particular government warnings and monitor the internal risk profiles of critical end users and recipients (e.g. by creating internal warning lists and blacklists).
	45) Is there a process for deciding when and how the competent authority is informed?	If there is knowledge of sensitive end use, the competent authority is informed and on the instruction of the competent authority, a licence is obtained before export. If necessary, doubts about the need to have an unlisted product licensed for export/transfer should be clarified with the competent authority.
4.1.1. f): Technical assistance	46) How does the undertaking ensure compliance with technical assistance requirements?	A compliance procedure regarding technical assistance should be in place: → for foreign visitors/employees, → for employees (e.g. technicians) abroad, → for conferences, seminars with foreign participants or when organised abroad.
4.1.1. g): Commercial and intermediary activities	47) How does the company check the requirements for commercial and intermediary activities?	If an applicable business activity is carried out, an arrangement is in place to check commercial and intermediary activities in order to determine: → whether products are supplied from one third country to another third country → whether the products are listed.

<p>4.1.2. Operating and organisational procedures: <u>licensing phase</u></p>	<p>48) How does the undertaking ensure that it makes full and complete license applications?</p>	<p>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.</p>
<p>4.1.3. Operating and organisational procedures: <u>post-licensing phase</u></p>	<p>49) What internal procedures ensure compliance with the conditions of the licence?</p>	<p>A final verification of the control requirements should take place before final shipment to ensure that the terms and conditions of the licence have been complied with.</p> <p>The terms and conditions of the licence should be adhered to and regularly monitored within the undertaking.</p>

Registered users of general transfer licences must also ensure that the usage conditions can be complied with.

Special feature of the global export licence procedure: as the holder of a global export licence, you must be able to credibly show at all times that your recipient, end user or purchaser is reliable. You must therefore check the reliability of your customers, in particular with regard to compliance with the intended purpose and final destination of the products and, where applicable, inform BAFA of the result of the check. You are not permitted to use the global export licence if you have information or knowledge that products are being transferred or are expected to be transferred to an untrustworthy end user and/or are to be re-exported without BAFA’s consent.

4.2. Selection of staff

Export control staff must have:

- knowledge of foreign trade and payments law;
- knowledge of the licence application process;
- manufacturing/organisational skills.

The export/transfer control staff are trained, e.g. by means of employee induction programmes. They are familiarised with the job requirements and if necessary prepared for these by an external workshop on foreign trade and payments law.

4.3. Awareness-raising, training and information

The CEO must be aware at all times of his or her obligations in observing the compliance and organisational regulations.

Export control staff must be constantly updated when key regulations and procedures are changed. Export control staff must have an opportunity at least once a year to acquire further training, either inside or outside the undertaking, on the subject of export control.

For the purposes of further training, it is recommended that legislative texts, together with commentaries on legislation in the area of foreign trade and payments law and specialist journals, are provided.

Information on the current range of training courses available can be found in iXPOS, the foreign trade portal operated by the Federal Ministry of Economics and Technology, in AW-Prax, a specialist journal on foreign trade and payments law, or in the Federal Gazette's foreign trade portal:

- <http://www.ixpos.de>
- <http://aw-portal.de/aktuelles/>

Employees who are involved with the export process are informed during their induction about the in-house export control system, e.g. through online training or seminars.

The export control staff or external service providers are made aware of government warnings and in-house risk profiles on an annual basis.

In addition, all employees should have access to the named organisational and operating procedures in relation to export/transfer controls.

All employees are advised who they can contact if they have questions about foreign trade and payments law. A list of contacts should be readily accessible.

5. Physical and technical security

Special feature of certification: the requirements for physical and technical security currently apply only to certification in accordance with the directive on defence-related products. The fact that the security of the undertaking is accredited is sufficient. For example, an AEO status (AEO S and F) may be sufficient as a measure of security. War Weapons Control Act checks are also accepted. Security measures should also be in place to safeguard export/transfer records and procedures, such as the installation of fencing around the entire company grounds with climb-over protection, security at the entrance, constant monitoring of the premises even outside of working hours and a separate entrance for collections and deliveries.

Security measures, such as password-protected systems, a firewall and a surveillance system for electronic equipment and e-mails, should also be in place for software and technology.

6. Records and record-keeping

Export-related documents from all phases of the application process must be retained in accordance with statutory requirements (Section 17a of the Foreign Trade and Payments Ordinance, Außenwirtschaftsverordnung, AWV). All vocational training certificates are also retained. They are kept with the relevant employee's personnel file, for example.

The records must be made accessible to the competent authorities. It should be possible to provide the records electronically. In some cases, an on-site visit will be necessary if access to the secure intranet is required; in other cases, records can also be sent for remote checks. Records can also be made available

in hard copy and, where applicable, as scanned documents.

The individual steps involved in any checks are to be documented accurately at all stages of a project. If the export control unit authority deems that an application does not need to be submitted to BAFA, it is important that this conclusion is documented carefully.

In this regard, the documentation should also specify who manages the licences that are awarded. Licences that are not used must be returned.

Special feature of certification: The undertaking should have one or more of the following options with regard to records:

- *electronic files or e-mail folders;*
- *project-related folders;*
- *supplier-related folders;*
- *separate folders according to restrictions or*
- *order system.*

The export restrictions should be linked to subsequent transfers/exports by one or more of the following options:

- *electronic file or e-mail folder containing import and subsequent movement information;*
- *as part of a business management system;*
- *project-related folders or supplier-related folders, where all information is kept together, or*
- *a filing system similar to the folder system.*

IV. Warnings

Combating the proliferation of weapons of mass destruction crucially depends on awareness within industry. State export control can only be effective if all parties involved (manufacturers, exporters, engineers, etc.) actively support the controls. Close cooperation is called for in the fight against proliferation, together with an appropriate awareness of the risks involved in dealing with sensitive products and the dangers of abuse.

The following information is intended to help companies assess whether there is a risk of becoming or being unintentionally embroiled in weapons of mass destruction programmes and the cases in which they should seek advice. It does not automatically entail an obligation to apply for a licence.

1. Attempts to procure products

Anyone who exports or transfers dual-use products can unintentionally support the planning or implementation of a weapons of mass destruction programme. Special attention must be paid in order to detect attempts to procure such products.

Examples:

- Enquiries are received from new or unknown customers; their identity remains uncertain; they offer noticeably evasive answers in response to questions regarding their identity or they cannot provide any plausible references.
- The customer does not answer questions about the destination or the intended use of the products or does not provide satisfactory answers to these questions.
- The customer does not ask any commercial or technical questions that would normally be asked in business negotiations or in the relevant documentation.
- The customer requires unusual and excessive confidentiality with regard to the destination or the products to be supplied.

- Unusually favourable payment terms are offered. For example, the customer is willing to pay a larger amount in cash immediately.
- The customer asks for a project, which was partly set up by another company, to be completed.
- The description of the products is vague or meaningless or the products seem to be unnecessarily highly specified.
- The specified value of the products does not match normal business practice.
- The customer requires security precautions that seem to be exaggerated in relation to the intended use. Packing requirements do not make sense (e.g. seaworthy packing for delivery within Europe).
- The equipment in question is not appropriate for the factory in which it is to be used. The customer does not appear to be familiar with the usual security precautions when dealing with the goods that are ordered.
- The customer requires unusual labelling, identification or markings.
- The purchaser is denied access to areas of the plant in suspicious-sounding circumstances.
- The customer splits up a contract for a related order into several individual contracts
- for no reason.

2. Attempts to procure expertise

Economic cooperation can also be abused in order to obtain specialist knowledge that can then be used to develop and manufacture weapons of mass destruction. Having free access to universities and other research and technical institutions enables scientists, students and engineers from countries that are suspected of conducting weapons of mass destruction programmes to acquire in-depth knowledge of a high-tech environment.

Expertise can also be transferred at national and international conferences, trade fairs, special

exhibitions, workshops, meetings, symposiums, joint R&D projects and training programmes. Such events also offer opportunities for making personal contacts, facilitating the informal acquisition of specialist knowledge, which generally does not raise any suspicions.

Transfer of expertise also occurs through scientific and academic exchange programmes between industrialised countries and countries that are suspected of operating ABC (atomic, biological, chemical or radiological) weapons programmes. Private initiatives also offer sufficient opportunities for making contacts and exchanging information. Another way of obtaining specialist knowledge is by directly approaching experts and/or technical staff, who may be working on the assembly or maintenance of production facilities.

Examples:

- Enquiries are received from individuals whose identity remains unknown since the letterhead is incomplete, for example, or has been photocopied into the letter.
- Answers to questions relating to relevant commercial or technical aspects of a process suggest the person making the enquiry does not have the specialist knowledge normally required for these types of projects.
- The person making the enquiry does not justify their need for the transfer of expertise or a training course or does not provide satisfactory reasons for this need.
- The project is split into several subsections for no reason and without a plausible explanation.
- The person making the enquiry relinquishes further management of the project and discontinues cooperation.
- The person making the enquiry eschews expert assistance or training for employees, both of which are typically required or usually requested in a project of this type.
- The person making the enquiry requests assistance and advice in a specific field of technology.
- The person making the enquiry specifies a protected security area as the destination, e.g. an area close to military facilities or an area to which only a very limited group of individuals have access.
- Enquiries are received from individuals who can only be contacted via a PO box number or mobile phone number.
- Enquiries are received from individuals whose assertions about transport routes are geographically or economically not logical.
- Enquiries are received from individuals who do not have plausible explanations about the whereabouts of previously supplied products.

3. Procurement attempts and terrorism

The abuse of products for terrorist purposes also represents a serious risk. One example of such a risk is the 1995 sarin gas attack on the Tokyo subway in Japan. The above-mentioned warnings also apply to potential procurement attempts associated with terrorist activities.

V. Official ICP audits

BAFA carries out ex-officio audits of the functioning of internal compliance programmes used by companies in certain categories.

1. Individual export licence (Einzelgenehmigung)

Company management must take precautions to ensure that the company's obligations with regard to foreign trade and payments law can be observed. If an CECO has been appointed, he or she is personally responsible for ensuring compliance with the statutory requirements.

BAFA reviews the company's internal compliance programme if there is a reasonable assumption that export control within the company does not meet requirements. In such cases, a compliance test is conducted. The applicant is initially requested to clarify the matter and provide a response. The notification process for licence applications may be suspended until the issue is clarified. If it transpires that there are actually grounds for assuming untrustworthiness, applications that have been submitted can be declined or licences that have been granted can be revoked. However, the applicant can avoid this by helping to clarify the matter and implementing the staff-related and/or organisational measures required by the compliance test. This may even entail replacing the relevant staff, e.g. the CECO, and restructuring the internal export control process.

2. Global export licence (Sammelgenehmigung, SAG)

A Global export licence offers significant benefits over the individual application process and is therefore only granted to especially reliable companies. These companies therefore bear greater responsibility than those participating in the individual application process. Before granting a global export licence therefore, BAFA checks whether the company can assume this level of responsibility: the company must have an operational internal compliance programme for export control. BAFA audits the ICP on site and audits are carried out at regular intervals throughout the validity period of the global export licence. A key focus of the audit is the company's IT system, which

is a mandatory requirement of the application in the global export licence process. In addition, the six-monthly reports are examined for signs of non-compliance.

3. General export licence (Allgemeingenehmigung)

General transfer licences are granted for categories, which, from the point of view of export control are comparatively less critical in terms of security and therefore subject to fewer controls. At the same time, a general transfer licence can also be revoked for a number of reasons, e.g. if the company does not sufficiently guarantee compliance with the main export control regulations. The principles of the reliability of exporters in accordance with Section 3 Paragraph 2 of the Foreign Trade and Payments Act (Außenwirtschaftsgesetz, AWG) apply here.

4. Certification in accordance with the directive on defence-related products – constant monitoring

BAFA regularly checks, at least every three years, whether the recipient fulfils the criteria outlined in Article 9, Paragraph 2 of the directive on defence-related products and the conditions outlined in Article 9, Paragraph 4 of the directive relating to the certificate.

5. War Weapons Control Act (Kriegswaffenkontrollgesetz, KWKG)

BAFA carries out audits and on-site inspections within the scope of the War Weapons Control Act. It checks compliance with statutory requirements and also with the incidental provisions of War Weapons Control Act licences. Obvious organisational defects must be eliminated. These checks incorporate ICP aspects on an ongoing basis.

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