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**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND
THE COUNCIL**

**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**

{SWD(2016) 398 final}

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

1. Introduction

Directive 2009/43/EC¹ was adopted on 6 May 2009 and seeks to improve the functioning of the EU defence equipment market, promote integration of the EU defence supply chain and increase security of supply, by simplifying the rules and procedures for intra-EU transfers of defence-related products.

Under Article 17 of the Directive, the Commission must report to the Parliament and the Council on the review of the Directive's implementation. If necessary, the report should be accompanied by a legislative proposal. To this end, the Commission has evaluated the Directive to establish whether, and to what extent, the Directive's objectives have been met, including with regard to the functioning of the internal market. As required in Article 17, the Commission reviewed the application of all the Directive's key provisions, including those on certification (Article 9), export limitations (Article 10), customs procedures (Article 11), exchange of information (Article 12), safeguard measures (Article 15).

As required in Article 17, the Commission evaluated the Directive's impact on the development of a **European defence equipment market** (EDEM) and the **European defence technological and industrial base** (EDTIB), including with regard to SMEs. The evaluation of the Directive is taking place only three years after the transposition deadline, which makes it difficult to assess whether the long-term objectives of the Directive have been achieved. Rather, the present evaluation focuses on the implementation of the Directive and whether it is on track to meet its set objectives.

To support its work, the Commission contracted an external study² to analyse the Directive's implementation and evaluate its functioning.

The evaluation collected and analysed data from Member State competent authorities, defence companies, industry associations and other stakeholders. In order to mitigate the lack of available data and poor response in public consultation, a series of Europe-wide stakeholder workshops has been organised. All Member States, in particular the LoI countries³, and industry associations provided additional input and feedback on the preliminary findings. Proposed follow-up measures were discussed with the Committee on EU Transfers of

¹ OJ L 146, 10.6.2009, p. 1.

² http://ec.europa.eu/growth/sectors/defence/defence-firearms-directives_en.

³ The Letter of Intent (LoI) Framework Agreement Treaty, signed in 2000 by the defence ministers of France, Germany, Italy, Spain, Sweden and the UK, aimed to create a political and legal framework to facilitate industrial restructuring in order to promote a more competitive and robust EDTIB in the global defence market.

Defence-related Products set up under the Directive's Article 14, and with industry representatives.

This report presents the evaluation's main findings and a proposal for the way forward. The report is accompanied by a staff working document setting out more detailed results of the evaluation.

2. The Directive's aim and main provisions

Prior to the Directive, the Member States' licencing policy largely did not distinguish between exports of such products outside the EU and their circulation within it. In both situations, suppliers had to apply for the same type of individual licence. Such licences were positively assessed in almost all cases of transfers within the EU.

In the light of this, the Directive introduced tools to simplify the movement of defence products within the EU market. Movement of defence-related products between Member States requires prior authorisation in the supplier country, with only one licence necessary for the whole intra-EU transfer, i.e. with no further authorisation required for passage through or entrance to another Member State. However, the Directive also allows Member States to exempt transfers from the prior authorisation obligation in specific situations, e.g.:

- when the supplier or the recipient is a governmental body or part of the armed forces;
- supplies are made by the EU, NATO, IAEA or other intergovernmental organisations for the performance of their tasks;
- as part of cooperative armament programmes between Member States or humanitarian aid.

The Directive established three types of intra-EU transfer licences:

- General Transfer Licence (GTL). These are 'open licences', rely on *ex post* verification and cover a pre-determined range of products to specified recipients or for a specific purpose. No prior request is needed. However, suppliers must inform the competent authorities of their Member States when they intend to use a GTL for the first time.
- Global Transfer Licence (GloTL). These rely on *ex ante* verification and allow several shipments of a category of products under the same licence to one or more recipients in other Member States over a specified time;
- Individual Transfer Licence (ITL). These are for one transfer of a specified quantity of specified products to one recipient in another Member State.

The Directive requires at least four types of GTL to be published in Member States, for transfers: (i) to armed forces; (ii) to certified defence enterprises; (iii) for demonstration, evaluation or exhibition purposes; (iv) for repair or maintenance.

The second type of GTL can only be used by a supplier if the recipient of defence-related products is certified under the Directive's Article 9. Further requirements are laid down in the *Recommendation on certification*.⁴ Certification ensures the recipient's trustworthiness towards the export control authority in the Member State responsible for issuing the *ex post* verified GTL. It proves that the enterprise has in place the necessary internal system and staff to comply with export control rules. The Commission has created a central register of Member State-certified recipients, called CERTIDER, which is accessible to the public.⁵

Under Article 10 of the Directive, when transfer recipients of defence-related products apply for an export licence, they must declare to the competent authorities any export limitations set by the original transfer licence and that they have complied with them (including, where necessary, obtaining consent from the originating Member State). Under Article 11, exporters must provide customs offices with any necessary export licence. That Article also allows a Member State, in specific circumstances, to suspend the export from its territory of defence-related products received from another Member State under a transfer licence and incorporated in other defence-related products or, if necessary, prevent by other means such products from leaving the EU via its territory. Article 12 refers to cooperation and exchange of information between national competent authorities. Article 15 deals with safeguard measures seeking verification of recipient compliance from other Member States where there are concerns.

The material scope of the Directive is defined by a list of defence-related products, set out within its Annex.

3. Transposition and implementation

The Directive entered into force in 2009 and was to be transposed by 30 June 2011. It has applied since 30 June 2012. To date, all Member States have transposed it, although some with delay. By 2012, only 20 Member States notified the Commission of national transposition measures.⁶

The uptake of new licencing options and certification has been slower than anticipated. According to available information, only 19 Member States have published the GTLs required by the Directive, at least two still do not currently offer any GTLs and at least four do not offer all four types of GTLs. Furthermore, around half of Member States do not yet have experience with the certification process (i.e. no certified companies) and at least one is yet to introduce a fully operable scheme for certifying defence enterprises.⁷ Also the extent to which

⁴ OJ L 11, 15.1.2011, p. 62.

⁵ <https://webgate.ec.europa.eu/certider/>.

⁶ COM/2012/359.

⁷ No complete information is available for all Member States.

possible exemptions from prior authorisation have been taken up varies significantly between Member States, although transposition of the exemptions is not mandatory under the Directive.

The differences in how the Directive has been transposed are major barriers to its effective application, as analysed below. This has translated into:

- slow or incomplete application in individual Member States;
- a general lack of harmonisation in requirements and procedures between Member States;
- highly diverging conditions and limitations in GTLs published by the Member States.

4. Key results of the evaluation

a. Effectiveness of the Directive - Take-up in general, application of key provisions and barriers to effective application

The use of the GloTL and GTL, the Directive's main new tools, has increased since its application. However, the use remains behind initial expectations identified in the Impact Assessment and there are significant variations across Member States.

For instance, during 2012-2014 between **500 and 600 GloTL** were issued each year in 21 Member States (for which complete data are available). However, five of the states did not issue any GloTLs during the assessment period, while four issued close to or over 200 GloTL each.

For **GTL**, across the 24 Member States with complete data there were **1 475 notifications of first use** during the assessment period, although with considerable variation: 11 Member States did not register any notifications, while three had more than 100 notifications. The number of transactions under GTLs has grown significantly over time (although only eight Member States could provide data on this). In Germany, for example, reported GTL transactions increased from 71 (2012) to 1 769 (2013) to 4 884 (2014).

Different trends also apply across the four GTLs prescribed by the Directive. Notifications of first use for GTL for demonstration and repair have seen an increasing rate of growth, while the rate of growth for GTL for armed forces has been slowing. GTL for certified recipients was the only case where registrations actually fell from 2013 to 2014. The latter GTL has also the lowest use compared to the other three GTLs.

The **vast majority of transfers (~89 %) are still done through ITLs**, while only a small proportion involved GloTL (<5 %) and GTL (<10 %). ITLs were intended to be replaced by the new tools, but they still remain the main form of transfer authorisation in Europe.

The use of exemptions from prior authorisation varies significantly: some Member States use all the possibilities for exemptions offered by the Directive, some only use few options and some do not use any.

There was **slower and lower than expected uptake of certification**, which is mainly targeted at integrators (as opposed to component suppliers). Although the number of certified companies has risen steadily since 2012, only 55 companies have been certified across Europe. Half are located in just two Member States: Germany (14) and France (12), while half of the Member States have no certified companies at all. The certification process is considered by industry as costly and time-consuming. The cost-benefit ratio⁸ perceived by certified enterprises is inevitably weakened by the low take-up of GTLs across trading partners of certified enterprises. In some cases, the supplier is located in a Member State where the specific type of GTL for certified recipients would be unavailable or under heavy restrictions in terms of licence conditions (for instance concerning re-export).

Also, differences in implementation of the certification scheme could hamper its take-up, as it creates confusion and uncertainty in industry. Companies might prefer to apply familiar procedures available to them before the Directive rather than the quite stringent process of certification.

The evaluation identified a number of **barriers to effective application** of the Directive, resulting either from its provisions or from its transposition. A major problem pointed out by stakeholders was the lack of harmonisation in the implementation of GTLs across Member States. GTLs published by Member States vary significantly in terms of products and components that can be transferred under the GTL and the conditions for their transfer. That reduces their attractiveness for industry. Another barrier is the shift of liability (from authorities to economic operators), meaning that new GTLs are perceived as higher risk, especially by SMEs. A major obstacle for certification is the personal liability requirement for executives over export/transfer control.

A further obstacle is the low awareness, particularly among SMEs, of the tools available under the Directive and their benefits across industry within individual Member States. For example, companies could reduce time and administrative burden by using GTLs to transfer supplies to a certified enterprise.

Another indirect restriction for circulation of defence-related products in the EU stems from the system of Member States' export controls, governed by Common Position

⁸ As with any network, the performance and cost-benefit ratio is weaker in the emerging phase and should improve geometrically once it exceeds a critical level of users.

2008/944/CFSP⁹. Member States tend to prohibit subsequent exports in their national GTLs, which makes this instrument less attractive for industry.

Overall, the Directive has ambitious goals, which require change of sometimes long established and entrenched ways of working. Its successful application has been aided in Member States where changes to the existing licencing scheme were minimal (e.g. where an open licencing system pre-existed), where there was strong interest and good awareness of the changes taking place and where information and advice were available to support transition. Nevertheless, as the main elements of the Directive are yet to be implemented in some Member States, its effective application across the EU is difficult to assess.

The Commission has received some vague indications from industry concerning practical difficulties with the customs procedure set out in Article 11 of the Directive. However, the evaluation study has not established any evidence in this regard.

No specific issues were identified over the implementation of Articles 10, 12 and 15.

b. Impact on the European defence equipment market and European defence technological and industrial base

While the Directive provides a framework for harmonisation and helped to create similarly structured national licencing systems, it is sufficiently open and flexible to interpretation to mean that there are still essentially 28 different licencing systems across Europe. An example demonstrating this is the diverging national interpretation of ‘less sensitive products’ to be included in the scope of GTLs. This and other areas of difference in application do not contribute to achieving an open EDEM.

It is hard to assess the Directive’s impact on the development of the EDTIB and EDEM. In most Member States, transfers are a minor, though not negligible, part of the overall defence trade. In 2013, transfers counted for 26 % of the EU overall defence trade.

Since the Directive has applied only for a short time so far, we do not yet see an impact on the development of the EDTIB. Overall, more time is needed to see such benefits.

Furthermore, other factors have a strong impact, such as the steady decrease in defence investment¹⁰ in the EU since the financial and economic crisis. Contrary to expectations, some stakeholders indicated that this contributed to renationalisation of supply chains, which would be counter to the Directive’s original objectives towards de-fragmentation of markets.

⁹ Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, OJ L 335, 13.12.2008, p. 99.

¹⁰ The trend started with a sharp 11.6% real decrease in 2011, followed by another significant real fall of 9.1% in 2014; cf. Defence Data 2014 published by the European Defence Agency.

Moreover, the defence business is characterised by cycles and shifts that do not necessarily occur with regularity and usually have more than one reason. Thus we must be very cautious when attributing any shift to the Directive, which has been in place for three years (or less in some Member States). In addition, supply chains are generally rather slow to change. For a prime contractor it takes good reason and time to change suppliers. Simplification of transfer procedures is not considered a good enough reason alone to contemplating such a change.

Some competent authorities have stressed that the Directive's provisions, no matter how imperfect, do cater to companies' needs and lead overall to greater productivity by reducing administrative burden. The positive impact on the EDTIB is mainly seen by smaller countries. Several respondents also mentioned that an internal market for (less sensitive) equipment has been facilitated, but high-tech goods remain excluded from it.

The global perspective on competitiveness, in particular transatlantic developments, also plays a role. Many defence companies feel that recent reforms of US export control, which facilitated the exports of a number of defence products and components, have put US and European companies on an unequal footing, providing a regulatory advantage to US exporters.

Similarly, the Directive had a minor positive effect on the security of supply of defence-related products. It might, however, contribute to greater security of supply by increasing transparency i.e. by knowing other Member States' licencing systems, procurers or buyers could be reassured about the reliability of supplies from other Member States. The use of GTLs instead of applying for ITLs could reduce lead time and administrative costs and increase flexibility (on both sides of the supply chain, in the case of GTL for certified recipients).

c. Efficiency

There is no clear view yet of the Directive's overall impact on costs for the different parties involved. However, initial indications and anecdotal evidence suggest that costs will be reduced. Competent authorities have seen significant initial set-up costs, but expect this to be more than offset by reduced day-to-day costs as businesses increasingly shift from ITL to GloTL and GTL. Businesses have also experienced upfront costs of familiarisation and adaptation to new systems but expect to save time and money through the new licences.

Use of GloTLs and GTLs is increasing and over time this should more significantly reduce the use of ITLs and thus further reduce costs including administrative burden. Greater familiarity, better embedded processes and economies of scale may also add to increasing benefits over time.

While the Directive's initial application involved significant effort and cost for both competent authorities and companies, all the evidence suggests that these demands were affordable. Similarly, the direct costs of new licencing scheme appear to be more affordable

than pre-existing options. Overall, it can be considered that the Directive is on track to achieve useful cost reductions, including administrative burden reduction, in the longer run.

The main area where costs are not felt to be proportionate is certification, where stakeholders see very limited potential benefits from this option for the time being. A lack of incentives is contributing to the low number of certified enterprises and to the associated limited uptake and use of GTLs for certified enterprises.

d. Consistency and coherence

Article 13 of the Directive states that the list of defence-related products, set out in its Annex, must strictly correspond to the EU's Common Military List (CML),¹¹ updated each year by the Council. However, it takes several months to amend the Annex to reflect amendments to the CML, and the updated list of defence-related products must be then transposed by Member States. National legislation and in particular the scope of products under control are therefore unlikely to reflect the current CML at any given time and may also differ from that in other countries. This creates confusion for industry over which list of products applies for exports versus transfers control, or transfers from different Member States, and leads to legal uncertainty. This undermines effective circulation of military products within the EU and consequently impedes use of simplified tools such as GTLs.

Many product categories in the Annex fall under transfer licencing to the extent they are specially designed for military use. Since there is no common definition of 'specially designed for military use', industry faces diverging approaches in individual Member States concerning the scope of defence-related product transfers.

There are several potential and rather limited overlaps or inconsistencies between the Directive and other legislation on defence-related products or intra-community transfers, such as *Firearms Regulation*¹², *Firearms Directive*¹³, *UN Arms Trade Treaty* of 2013, *Dual Use Regulation*¹⁴, and *Common Position 2008/944/CFSP*. Such cross-references between the Directive and the *Firearms Regulation* will be addressed when the latter is evaluated. No incoherence with the *Defence Procurement Directive*¹⁵ has been identified.

¹¹ The EU CML is the material scope for export control of defence-related products under Common Position 2008/944/CFSP.

¹² OJ L 94, 30.3.2012, p. 1.

¹³ OJ L 256, 13.9.1991, p. 51.

¹⁴ OJ L 134, 29.5.2009, p. 1.

¹⁵ OJ L 2016, 20.8.2009, p. 76.

Finally, a few competent authorities highlighted that it is important that overlaps and incoherence is continually reconsidered as there are constantly evolutions in different legal frameworks, both within the EU and internationally.

e. Relevance and EU added value

The evaluation confirmed that all of the Directive's original objectives are still as valid in Europe today. These are long-term aims, to which the Directive has provided an initial contribution. Further effort is now needed to fully implement the Directive and to improve its practical and harmonised application so as to further reduce fragmentation of the European defence markets.

Before the Directive's adoption, each Member State had its own regime to control transfers of defence-related products, although a multinational trend had emerged, for instance in the form of LoI cooperation. The disparate national approaches, or sub-European multilateral initiatives, made some (limited) progress, but are unlikely to have been as ambitious as the Directive in attempting to restructure the transfers regime throughout Europe or to have achieved the same progress towards addressing the needs and risks identified. Therefore the European approach is more likely to contribute to achieving the Directive's objectives, although the extent of its current application falls short of achieving those objectives.

5. Conclusions and way forward

Overall, the Directive continues to provide an appropriate basis for addressing needs and issues over the transfers of defence-related products in Europe. Since implementation has taken longer than expected and has varied across Europe, the wider and more long-term ambitions to have an efficient internal market, greater security of supply and improve competitiveness have only been partly achieved.

Member State authorities and stakeholders broadly confirmed that the Directive and its tools still correspond to the needs and risks identified initially. It has made a limited but worthwhile contribution to a better functioning of the defence markets in Europe, even if the effectiveness of this contribution was difficult to measure due to limited data availability. Except for certification and taking into account limited time of application of the Directive, there are indications that the Directive led to a certain reduction of costs and administrative burden. The EU approach remains the most appropriate response to consolidating EU defence markets; however, the Directive's internal and external coherence could be improved. Overall, the Directive is on track to meet the initially identified objectives.

Therefore, rather than amending the Directive, the Commission intends to focus on improving its implementation, producing guidance measures and recommendations and promoting its use. Member States' progress over time in implementing the Directive will contribute to better uptake and could increase the availability of data for any future evaluation.

Based on the evaluation's findings and the input from Member States at the Committee and from industry across Europe, the Commission suggests the following way forward:

- The Commission intends to improve the Directive's implementation in individual Member States by starting a dialogue with national authorities to clarify and better understand the modalities of transposition of the Directive into the national legal orders and the reasons for non-implementation of some provisions in certain Member States and to solve any outstanding issues in this regard. The perceived lack of benefits of the certification system might be partly overcome by increased availability and uptake of GTLs for certified recipients versus ITL.
- Based on substantial efforts by the Working Group with Member State competent authorities set up under the Directive's Committee and valuable contributions from the LoI countries, the Commission has adopted two Recommendations to encourage harmonised functioning of GTLs for armed forces and for certified recipients. Both Recommendations contain a minimum set of less sensitive defence-related products and components and common minimum requirements for transfers of these products and components to be covered by the respective GTLs in individual Member States. The requirements include complete release from re-export restrictions in the Recommendation on GTL for armed forces and partial release in the Recommendation on GTL for certified recipients. Since the list of products covered by both Recommendations is not exhaustive, Member States may add other products and components in the scope of their GTLs. However, Member States should not add conditions for transfers under the GTL, which contradict or undermine the conditions listed in the Recommendations.
- The Commission is committed to continue working closely with the Member States and the Working Group on similar harmonisation of further GTLs specified by the Directive, i.e. GTL for demonstration, evaluation or exhibition and GTL for maintenance and repair. If necessary, this will result in further recommendations to the Member States. The Working Group is seen as a valuable way to exchange information and best practices and to support cooperation between Member States and the Commission.
- The Commission will continue exchanging views with Member States to identify concrete areas for more harmonised certification across the EU, including creating synergies with other regimes, such as dual-use products control, to the extent possible. It will explore whether further guidance or exchange of best practice among Member States or even revision or clarification of the currently applicable *Recommendation on certification* is the best way to boost the consistency and uptake of certification.
- Possibilities to incentivise certification in industry will be further examined, such as potential synergies with the concept of authorised economic operator under customs regulations, possible simplification of audit procedures and closer cooperation

between the competent authorities granting transfer licences and the customs authorities.

- The Commission will launch work on a common definition of the term ‘specially designed for military use’ to qualify which products are to be covered by the Directive and thus subject to licencing requirements. This task requires close cooperation with Member State competent authorities and users of GTLs, i.e. suppliers and recipients of defence-related products across the EU. The work by European and international fora on defence-related products’ export control will be taken into account.
- The Commission will continue exchanging views with the Member States concerning the application of Article 11 in their territories with a view to monitoring the situation.
- There is a strong role for the Commission and the Member States in raising awareness of the Directive’s tools and benefits. This includes outreach in the Defence SMEs Network meetings. In this context, the Commission has prepared a user-friendly handbook, directed especially at SMEs, explaining the instruments of the Directive and providing guidance on how to best use these instruments, in particular the certification scheme. The guide will be published in the beginning of 2017.
- Member States and defence undertakings should increase the Directive’s uptake through practice in their licencing policy. For instance, competent authorities should encourage operators to use GTLs instead of ITLs where circumstances allow. Where appropriate, in their purchasing policy, certified companies should encourage their suppliers to apply for a GTL instead of ITLs.
- The currently burdensome updates of the Directive’s Annex require further reflection by all those involved, in particular the European institutions. The Commission will examine options to simplify and speed up annual updates. This may involve limited revision of the Directive e.g. by separating the Annex from the Directive and by annual adoption of the updates by Commission decision. This will provide legal certainty and consistency in the scope of transfers between Member States and over transfer versus export control within them.
- To increase awareness of the Directive and information exchange between Member States, it could be considered to expand the CERTIDER database by additional information, such as concise but meaningful information on national systems with links to their internet presence. Public accessibility of such information at a one-stop-shop will foster information exchange among Member States and, more importantly, within the defence sector.
- The Commission also examines issues that may require revision of the Directive in the longer run, such as: making exemptions binding on Member States and enlarging the scope of exemptions; revising the certification scheme; introducing requirements to report directly to the Commission to ensure an appropriate and effective monitoring

system capable of supporting sound quantitative and qualitative cost/benefit assessment of the future performance of the Directive; creating new GTLs, e.g. for product return after exhibition or repair, for cross-border cooperation in research, for all-purpose transfers (e.g. covering purchase, maintenance, supply of spare parts). Several Member States already offer other GTLs on top of the four basic ones in the Directive; possibility of converting the above-mentioned Recommendations on GTLs into binding provisions.

The Commission is committed to enforcing the Directive's full implementation across all Member States. The Directive serves as an appropriate and necessary first step to addressing the fragmentation of defence transfers licencing in Europe and optimising supply chains which ultimately contribute to increasing competitiveness of the EDTIB. In line with the *European Defence Action Plan*, the way forward presented in this report is intended to:

- increase uptake of the existing legislative framework on transfers of defence-related products;
- improve the availability of GTLs throughout the EU;
- address the so far limited application of the certification scheme.

All these initiatives will ultimately boost development of EDEM and EDTIB, in line with the Directive's objectives, and thereby improve the functioning of the internal market for defence products.