

RECOMMENDATIONS

COMMISSION RECOMMENDATION

of 11 January 2011

on the certification of defence undertakings under Article 9 of Directive 2009/43/EC of the European Parliament and of the Council simplifying terms and conditions of transfers of defence-related products within the Community

(Text with EEA relevance)

(2011/24/EU)

THE EUROPEAN COMMISSION,

guidelines on the certification of defence undertakings under Article 9 of Directive 2009/43/EC.

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 292 thereof,

Whereas:

- (7) The guidelines set out in this Recommendation are based on the best practices of certain Member States, which have proven to be efficient and practicable,

(1) Article 9 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⁾ lays down the criteria for the certification by Member States of defence undertakings established on their territory as recipients of defence-related products transferred under general transfer licences.

HAS ADOPTED THIS RECOMMENDATION:

1. THE CERTIFICATION CRITERIA

1.1. Assessment of criteria set out in points (a) and (b) of Article 9(2)

(2) The certification of undertakings is a key element of the simplified licensing system introduced by Directive 2009/43/EC.

Only recipient undertakings which actually manufacture defence-related products or partly completed defence-related products covered by Directive 2009/43/EC, consisting of components and/or systems and sub-systems purchased from third parties, with a view to being placed on the market under his own name or trademark should be eligible for certification.

(3) Different interpretations of the certification criteria by Member States could hamper the implementation of Directive 2009/43/EC and the achievement of its simplification objective.

(4) A convergent interpretation and application of the certification criteria by Member States are important to the mutual recognition of certificates referred to in article 9(6) of Directive 2009/43/EC and to a wide use of general licenses.

Certified recipient undertakings should use the defence-related products received under the general transfer licences referred to in Article 5(2)(b) of Directive 2009/43/EC for their own production (which includes incorporation of components into other products, or as spares or replacement parts) and should not retransfer or export them as such, (except for the purposes of maintenance or repair) where the prior authorisation of an originating Member State is required.

(5) Representatives of Member States in the Committee established by Article 14 of Directive 2009/43/EC have suggested that convergent interpretation and application of the certification criteria could be achieved by the adoption of a Commission recommendation.

Competent authorities should be able, where appropriate and before issuing a certificate, to require a statement from recipient undertaking whereby they commit themselves to the following:

(6) Representatives of Member States in the Committee established by Article 14 of Directive 2009/43/EC therefore established a working group to prepare

- (a) to use the defence-related products, received under the general licences referred to in Article 5(2)(b) of Directive 2009/43/EC, for their own production;

⁽¹⁾ OJ L 146, 10.6.2009, p. 1.

- (b) to refrain from retransferring or exporting the relevant products as such, except for the purposes of maintenance or repair.

1.2. Supplies to recipient undertakings purchasing for the exclusive use by the armed forces of a Member State under general transfer licences referred to in Article 5(2)(a) of Directive 2009/43/EC

Recipient undertakings qualifying as contracting authorities within the meaning of Article 1(9) of Directive 2004/18/EC of the European Parliament and of the Council ⁽¹⁾, purchasing for the exclusive use by the armed forces of a Member State, should be entitled to receive defence-related products under the general licences referred to in Article 5(2)(a) of Directive 2009/43/EC without being certified.

1.3. Assessment of criteria set out in points (c) and (f) of Article 9(2)

The senior executive referred to in Article 9(2)(c) of Directive 2009/43/EC should be personally responsible for the internal compliance programme or transfer and export management system implemented in the undertaking and the staff in charge of export and transfer control. That senior executive should be a member of the managerial body of the undertaking.

Where the certificate is requested for one or several production units, the description of the chain of responsibility within the recipient undertaking required under Article 9(2)(f) of Directive 2009/43/EC should clearly establish the control of the senior executive over the staff of those units in charge of export and transfer control.

Questions and guidelines on the description of internal compliance programmes and for subsequent assessment are set out in Annex I. Member States may add further questions. Where Member States add any further questions, they should be directly relevant to the certification assessment process.

1.4. Organisational Structure to be certified and assessment of criteria set out in points (d) and (e) of Article 9(2)

How certification is approached will depend on a recipient undertaking's organisational structure and how it delegates responsibility for transfer and export controls. The undertaking could be certified as a whole or by business unit. Undertakings with production units and associated

activities at several addresses, that have been delegated the responsibility for transfer and export controls, should specify which of those units are to be covered by the certificate.

2. THE CERTIFICATION

2.1. A standard certificate template

The use of a standard certificate template set out in Annex II is recommended.

The certificate should be drafted in one of the official languages of the Member State issuing the certificate and preferably in one of the official languages of another Member State, as indicated by the certified recipient undertaking. The date of entry into force of the certificate should be marked on the certificate.

For the purposes of Article 9(4)(a), the certificate should require the certified recipient undertaking to notify the competent authority of all factors and events arising after the certificate is granted which may influence validity or content of the certificate. The certified recipient undertaking should notify in particular the following:

- (a) any major change in its industrial activity in defence-related products;
- (b) any change in the address where records concerning received defence-related products are accessible to the competent authority.

For the purposes of point (a), the relevance of the change justifying notification should, where appropriate, be assessed in the light of the information already provided for the registration as a defence undertaking or for the granting of any defence activity licence or manufacturing licence.

2.2. Exchange of information on recipient undertakings seeking certification

For the purposes of Article 12 of the Directive 2009/43/EC, national competent authorities are encouraged to exchange all relevant information regarding the issuance of certificates. If for the assessment of a recipient undertaking in view of issuing a certificate it is necessary to collect information from other competent authorities, the issuing national competent authority should liaise with the other relevant national competent authorities before issuing the certificate.

⁽¹⁾ OJ L 134, 30.4.2004, p. 114.

3. MONITORING OF COMPLIANCE

3.1. Powers of competent authorities to carry out compliance visits

For the purpose of visits to verify compliance with the conditions attached to the certificate and with the criteria set out in Article 9(2), inspectors assigned by the competent authority should be at least empowered:

- (a) to enter relevant premises;
- (b) to examine and take copies of the records, data, rules of procedure and any other material relevant to products exported, transferred or received under a transfer licence from another Member State.

Such inspections should be carried out in compliance with the legislation of the Member State in which they are to be undertaken.

3.2. Cases justifying a re-assessment

A re-assessment of compliance with the conditions attached to the certificate and with the criteria set out in Article 9(2) should be carried out by the competent authority in the following cases:

- (a) major changes to the certified recipient undertaking, including changes to the internal organisation of the undertaking or to its activities;
- (b) indication that the relevant conditions and criteria are no longer met by the certified recipient undertaking;
- (c) where the certified recipient undertaking has been prescribed to take corrective action;
- (d) where suspension of the certificate is to be lifted.

3.3. Closer monitoring of newly certified recipient undertakings

The competent authority should pay particular attention to the monitoring of newly certified recipient undertakings. The competent authority should carry out a compliance monitoring preferably during the first year after the first time a certificate is issued.

4. CORRECTIVE MEASURES, SUSPENSION AND REVOCATION OF CERTIFICATES

4.1. Decisions to prescribe corrective action

Where a certified recipient undertaking no longer complies with one or more of the criteria set out in Article 9(2) of

Directive 2009/43/EC or with the conditions attached to the certificate and where the competent authority deems the non-compliance to be of minor importance, the competent authority should, within a time period not exceeding 1 month from the date the competent authority first became aware of the non-compliance, take a decision requiring the recipient undertaking to take corrective action.

That decision should immediately be notified in writing by the competent authority to the certified recipient undertaking. Such decision should require the certified recipient undertaking to carry out the prescribed corrective action within a time period set out in the written notification.

On expiry of that time period, the competent authority should verify that the corrective action has been implemented. The verification could include a site visit, a meeting with the senior executive referred to in Article 9(2)(c) of Directive 2009/43/EC or a senior officer nominated by that senior executive, and/or the assessment of written documentation supplied by that senior executive.

Within a time period not exceeding 3 months after completion of the verification, the certified recipient undertaking should be notified in writing of the assessment by the competent authority of the appropriateness of the corrective action undertaken.

4.2. Suspension and revocation of certificates

The competent authority should suspend or revoke the certificate in any of the following cases:

- (a) the certified recipient undertaking concerned has failed to take the corrective action within the time period set out in the written notification from the competent authority requiring the certified recipient undertaking to take corrective action;
- (b) the certified recipient undertaking no longer complies with one or more of the criteria set out in Article 9(2) of Directive 2009/43/EC or with the conditions attached to the certificate and the competent authority deems the non-compliance to be of serious importance.

The decision suspending or revoking the certificate should immediately be notified in writing by the competent authority to the certified recipient undertaking and to the Commission.

The competent authority should maintain the suspension until the certified recipient undertaking can demonstrate compliance with the criteria set out in Article 9(2) of Directive 2009/43/EC and with the conditions attached to the certificate. The competent authority should, at the time of written notification of the suspension of the certificate or in subsequent written correspondence, impose a time limit within which such compliance should be demonstrated by the certified recipient undertaking.

4.3. Lifting suspension of the certificate

Following expiry of the time limit imposed in the decision on suspension, the competent authority should verify whether the certified recipient undertaking is in compliance with the criteria set out in Article 9(2) of Directive 2009/43/EC and with the conditions attached to the certificate.

The verification could include a site visit, a meeting with the senior executive referred to in Article 9(2)(c) of Directive 2009/43/EC or a senior officer nominated by that senior executive, and/or the assessment of written documentation supplied by that senior executive.

Within a time period not exceeding 1 month after completion of the verification, a new decision from the competent authority should be notified in writing to the certified recipient undertaking stating any of the following:

- (a) that the suspension of certificate is lifted and the date on which it takes effect;

- (b) the suspension is maintained until a certain date, following which another verification will be carried out;

- (c) the certificate is revoked.

5. EXCHANGE OF INFORMATION RELATING TO CERTIFICATION

Where a certificate has been granted, suspended, revoked or suspension of a certificate has been lifted, the competent authority should immediately notify in writing the certified recipient undertaking and the Commission.

6. FOLLOW-UP

The Member States are invited to give effect to this Recommendation by 30 June 2012 at the latest.

Member States are encouraged to inform the Commission of any measures taken to give effect to this Recommendation.

7. ADDRESSEES

This Recommendation is addressed to the Member States.

Done at Brussels, 11 January 2011.

For the Commission

Antonio TAJANI

Vice-President

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

Core areas	Key questions	Best practice recommendations	Relevant certification criterion
1. Organisational, human and technical resources allocated to the management of transfers and exports	What percentage of the undertaking's business (annual turnover) depends on exports and transfers of licensable items? How many exports and transfers of such items take place within a year? What functions within the company (e.g. purchasing, engineering, project management, shipping) are involved in the export and transfer process and how are those responsibilities organised? Has the undertaking an electronic system to manage exports and transfers? What are its main features?	The purpose of these questions is to obtain additional information on the undertaking's internal organisation, which is relevant for assessing the impact of export/transfer activities on the undertaking and on the related operational procedures	
	How many people are either employed solely to deal with the management of exports and transfers or have responsibility for it with other tasks?	There should always be at least 2 people in case of holiday, illness etc.	
	Does the undertaking internally circulate its written commitment of compliance with export/transfer control regulations and of adherence to any relevant end-use and export restrictions? Does the undertaking internally circulate its written commitment to provide on request end-use/end-user information?	Both written commitments should be included in the compliance manuals available to export/transfer control staff and should also be known to all employees concerned by export/transfer controls (e.g.: sales department ...).	9(2)(d) and 9(2)(e)
	Has the undertaking so far complied with export/transfer control regulations?	The undertaking should have a sound track record of compliance with export/transfer control regulations.	9(2)(a)
	Are compliance manuals being provided and kept up-to-date for export/transfer control staff?	Compliance manuals for the use and guidance of export/transfer control staff should be available, at least in electronic version (for instance, on the undertaking's intranet). Those manuals should contain the operating and organisational procedures to be followed by export/transfer control staff. Export/transfer control staff should be expeditiously informed of the amendments to the manual applying to their tasks as well as of their entry into force.	9(2)(f)

Core areas	Key questions	Best practice recommendations	Relevant certification criterion
2. Chain of responsibility	Please describe the chain of responsibility for exports and transfers within your undertaking.	The responsibility for export/transfer control compliance should be set down in writing. The written support describing the chain of responsibility (such as records or organisation charts) should be kept up-to-date. The description should provide detail on delegations of responsibility and the adopted routines in situations when the senior executive referred to in Article 9(2)(c) of Directive 2009/43/EC is absent.	9(2)(f)
	Is such a description always accessible to the competent authority?	Knowledge of the chain of responsibility should always be easily accessible to the competent authority not only at the application phase but also for subsequent compliance monitoring and compliance visits.	9(2)(f)
	In which part of your undertaking is the export/transfer management situated?	Whether export/transfer control management is organised in each shipping unit, in the head office or as a separate export control department should depend on the size and the structure of the undertaking.	9(2)(f)
	How do export/transfer control staff interact with other functions inside the undertaking?	Export/transfer control staff should be protected as much as possible from conflicts of interest. They should be empowered to stop a transaction.	9(2)(f)
	How is the relationship between the export/transfer control staff and the senior executive organised, for example, the possibility of information exchange?	Export control staff should be allowed to report directly to the senior executive if they require authority to stop a transaction.	9(2)(f)
	Please indicate the other responsibilities of the senior executive who has been appointed personally responsible for transfers and exports	The senior executive should be part of the top management. His/her position should not present a conflict of interest (e.g.: he/she should not also be head of sales ...)	9(2)(c) and (f)
3. Internal audits			
(a) Random inspection	How frequently are random inspections carried out?	The ICP and the daily operating procedures should be subject to (unexpected) random checks.	9(2)(f)
(b) internal audits	How frequent are internal audits?	Ideally, once a year and, at least, every 3 years.	9(2)(f)
	What percentage of exports/transfers is subject to checks?	Depending on the number of exports/transfers, at least 1 % and an expected maximum of 20 %. The ratio can vary each time an audit is undertaken.	

Core areas	Key questions	Best practice recommendations	Relevant certification criterion
	Who carries out these checks?	Possible answers should be one of the following: — someone senior in the chain of responsibility for export/transfer controls, — the quality manager, — the finance manager or accountant, — anyone else of a middle management or higher position who is one step or more away from the day to day work of the export/transfer team.	
	What questions do these audits cover?	Audits should provide answers to the following questions: — Are the export limitations put in place abided by? — Are procedures in place and updated to ensure that all export and transfer regulations are complied with? — Is regular awareness training undertaken? — Are records readily available? — Are the records comprehensive? — Do the records cover all the relevant aspects of import, export and transfer, and products remaining within the Member State? — Is information available on the life of relevant products from source to destination?	
(c) planning, effectiveness and follow-up of the audits	How do you ensure you audit a representative range of shipments?	At least one shipment per customer or destination should be audited or at least one shipment for each project.	9(2)(f)
	Does the undertaking establish a programme of internal audit?	A programme of internal audit should be established ensuring that a representative range of shipments are to be audited.	
	Is the non-compliance disclosed by internal audits systematically corrected? Is a trail of such actions kept?	The undertaking should clearly record any suspected occurrence of non-compliance identified by the internal audit, the measures recommended to correct such an occurrence and an assessment of the effectiveness of those corrective measures on compliance.	

Core areas	Key questions	Best practice recommendations	Relevant certification criterion
4. General awareness-raising			
4.1. Operating and organisational procedures	How are the undertaking's internal processes designed to raise general awareness and minimise risks related to export/transfer controls?	Operating and organisational procedures should be set down in writing and provide instructions and guidelines on the following: — the overall export/transfer process from reception of an order, assessment of applicability of export/transfer regulations, compliance with relevant export/transfer regulations and shipment or transmission (a final compliance check must be carried out before shipment or transmission), — the monitoring of compliance with the terms and conditions of the licence, — the interaction with external parties, and in certain cases, with other interested departments within the undertaking, such as the legal and sales department, — the coordination of all employees involved in or somehow concerned by export/transfer controls (e.g.: sales staff should be instructed to inform export/transfer control staff of any doubts, and should be informed that the processing of an order can only take place once it has been cleared by the export/transfer control staff), — the coordination and possible exchange of information with the competent authorities (e.g.: possible reporting of suspect transaction orders, possible existence of a voluntary disclosure policy ...).	9(2)(f)
4.1.1. Operating and organisational procedures: pre-licensing phase ⁽¹⁾			
(a) Embargoes	How does the undertaking take into account embargoes?	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: — 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.	9(2)(f)

Core areas	Key questions	Best practice recommendations	Relevant certification criterion
(b) Sanctions lists	How does the undertaking take into account sanctions lists?	The names and identities of the legal and natural persons to be supplied should be checked against the relevant sanctions lists.	9(2)(f)
	When searching for an identity on the sanctions list, what level (or percentage) of certainty that a match has been found is required to consider it a match ('hit')? What procedures are followed when a match for a name has been found?	Procedural instructions should have been set down in writing which detail how likely matches and 'hits' are to be addressed (for example, when a match has been found, it must be reported to the competent authority).	
(c) Control of listed products (products subject to licensing because of their inclusion in an export/transfer control list)	Questions on internal processes ensuring that a listed product is not exported or transferred without a license:		9(2)(f)
	(1) Is there an electronic data processing system in place to record the classification of products received or manufactured by the undertaking?	The classification of products should be recorded in an electronic data processing system (only if in existence already). Changes in the control lists should be immediately reported in the system.	
	(2) How are all products subject to licensing requirements classified and recorded, and who is responsible for this? What processes are in place to ensure that the classification of products is kept up to date, and how is it documented?	The export/transfer control staff should be responsible for recording and classifying products, if necessary, in consultation with technical experts.	
	(3) How is the end-use by and the reliability of the recipient assessed?	The export/transfer control staff should be responsible for verifying the reliability of the recipients, with special attention given to the end-use and risk of diversion. If export/transfer control staff are informed that the recipient has breached export/transfer control regulations, they should inform the competent authority. A verification of the recipient's good faith is especially important in cases where the customer is new or where the customer's identity is unclear or when there are doubts about the declared end-use (e.g.: order in unusual quantities, special and unusual transit routes requested by the recipient ...).	
(d) Intangible transfer of technology	How does the undertaking ensure compliance with intangible transfer of technology (ITT) requirements (e.g., e-mail and access to the intranet from abroad)?	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, an assessment has been made of its licensability, and if licensable, a licence is in place to permit the transfer.	9(2)(f)

Core areas	Key questions	Best practice recommendations	Relevant certification criterion
(e) Technical assistance	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.	9(2)(f)
4.1.2. Operating and organisational procedures: licensing phase	How does the undertaking ensure that it makes full and complete licence applications?	The undertaking should be equipped to fully comply with the licence application process and procedures in force in the Member State where it is established.	9(2)(f)
4.1.3. Operating and organisational procedures: post licensing phase	What internal procedures ensure compliance with the conditions of the license?	A final verification of the export/transfer control requirements should take place before final shipment to ensure that the terms and conditions of the licence have been complied with.	9(2)(f)
4.2. Awareness raising and training of export control staff	What information is available to all employees concerned by export/transfer controls and to export control/transfer staff?	All should have access to the above-mentioned organisational and operating procedures relating to export/transfer controls. Those operating and organisational procedures should be recorded and updated in compliance manuals available to export/transfer control staff. The operating and organisational procedures should include a clear description of the export/transfer compliance process, from the reception of an order, the verification of compliance with relevant export/transfer regulations to the final shipment or transmission.	9(2)(f)
	How often is the export control staff's knowledge updated?	This should occur when changes are made to national and Union export control legislation and procedures but at a minimum at least once every year. In addition to annual general training updates, it is recommended that commentaries on export/transfer control legislation as well professional journals and magazines, where they exist should also be made available.	
	How is the export/transfer control staff's knowledge updated?	Training through various tools including: — external seminars, — subscription to information sessions offered by competent authorities, — training events, external or online.	

Core areas	Key questions	Best practice recommendations	Relevant certification criterion
5. Physical and technical security	Is your company security accredited by an appropriate Government body? Please give details.	Each national Ministry of Defence or similar organisation is likely to require some measure of security where the undertaking is working on their behalf. The mere fact that the undertaking is security accredited in some way may be enough.	9(2)(f)
	If there is no such official security accreditation, which security measures are in place to secure export/transfer records and procedures?	The premises should be entirely enclosed by fencing. The entrance should be secured and controlled. The premises should be under constant surveillance, even during non-working hours. There could be a separate entrance for deliveries and collections, away from the main production area.	9(2)(f)
	What are the security measures regarding software and technology?	The system should be password protected and secured by a firewall. The undertaking's network is secured against unauthorised access. There should be a control on electronic devices (laptops, personal digital assistants, etc.) being taken offsite or overseas and over e-mails sent as part of a project and in other circumstances.	9(2)(f)
6. Record-keeping and traceability of exports and transfers	How do you maintain records of the exportation limitations passed to you from the supplier of the products?	Undertakings should include one or more of the following: — electronic file or e-mail folder, — folders based on projects, — folders based on suppliers, — in separate folders for limitations, — on an order system.	9(2)(f)
	How do you relate export limitations to subsequent transfers or exports?	Possible answers should include one or more of the following: — electronic file or email folder containing import and subsequent movement information, — as part of a business management system, — folders based on projects or suppliers where all information is kept together, — a filing system similar to the folder system.	9(2)(f)

Core areas	Key questions	Best practice recommendations	Relevant certification criterion
	How are these records made available to the competent authorities?	— It should be possible to make records available electronically — some may require a visit to the sites if access to secure intranets is necessary but some may be able to be transferred for remote checks. — Records can also be available in hard copy and some of these could be scanned, for example for remote checks.	9(2)(f)

(¹) The purpose of the pre-licensing phase is to determine whether the undertaking is impacted by export/transfer controls, that is, whether export/transfer control regulations are relevant in respect to the activities and transactions of the undertaking and accordingly whether there is a licensing requirement for those transactions. The goal is to identify and analyse as early as possible any export/transfer control risks, and to implement any necessary relevant measure, for example, to apply for a license or to appropriately use a general licence.

ANNEX II

STANDARD CERTIFICATE TEMPLATE

LOGO OF THE MEMBER STATE – COMPETENT AUTHORITY
IDENTIFICATION OF THE COMPETENT AUTHORITY
CERTIFICATE issued pursuant to 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
Certificate No XXX –
The recipient undertaking (<i>name of the recipient undertaking</i>) Registered under (<i>commercial registration number</i>) Located at (<i>head office address, street No, postal code, town</i>) complies with the requirements of Article 9(2) of Directive 2009/43/EC as laid down in (<i>reference to the national law transposing Article 9</i>). The certified recipient undertaking, and its production units listed below, are entitled to receive defence-related products for their own production and for the purposes of maintenance and repair under general transfer licences published by other Member States. Addresses of production units:
(Optional exclusion box): <i>This certificate allows the receipt of defence-related products of the Common Military List of the Union, except the following categories:</i>
Conditions of this certificate are laid down in (<i>relevant national law</i>) This certificate is valid from (<i>date of entry into force</i>) until (<i>date of expiry</i>)
Issued at (<i>place</i>) On (<i>date of issue</i>)
(Signature of the competent authority in charge of certification)