

Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community (Text with EEA relevance)

DIRECTIVE 2009/43/EC OF THE EUROPEAN  
PARLIAMENT AND OF THE COUNCIL

of 6 May 2009

simplifying terms and conditions of transfers of  
defence-related products within the Community

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee<sup>(1)</sup>,

Acting in accordance with the procedure laid down in Article 251 of the Treaty<sup>(2)</sup>,

Whereas:

- (1) The Treaty provides for the establishment of an internal market, including the abolition between Member States of obstacles to the free movement of goods and services, and for the institution of a system ensuring that competition in the internal market is not distorted.
- (2) The Treaty provisions establishing the internal market apply to all goods and services provided in return for remuneration, including defence-related products, but do not preclude Member States under certain conditions from taking other measures in individual cases where they consider it necessary for the protection of their essential security interests.
- (3) The laws, regulations and administrative provisions in Member States concerning the transfer of defence-related products within the Community contain disparities which may impede the movement of such products and which may distort competition within the internal market, thereby hampering innovation, industrial cooperation and the competitiveness of the defence industry in the European Union.
- (4) The objectives pursued generally by the laws and regulations of Member States include the preservation of human rights, peace, security and stability through systems of strict control and restriction of the exportation and proliferation of defence-related products to third countries as well as to other Member States.
- (5) Such restrictions on the movement of defence-related products within the Community cannot be abolished generally through direct application of the principles of the free

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movement of goods and services provided for by the Treaty, as those restrictions may be justified on a case-by-case basis in accordance with Articles 30 or 296 of the Treaty, which continue to be applicable by Member States, provided that their conditions are met.

- (6) The relevant laws and regulations of Member States therefore need to be harmonised in such a way as to simplify the intra-Community transfer of defence-related products in order to ensure the proper functioning of the internal market. This Directive only deals with rules and procedures as far as defence-related products are concerned, and, consequently, does not affect the policies of the Member States regarding the transfer of defence-related products.
- (7) Harmonisation of the relevant laws and regulations of Member States should not prejudice the international obligations and commitments of the Member States nor their discretion as regards their policy on the export of defence-related products.
- (8) Member States should remain entitled to pursue and further develop intergovernmental cooperation, whilst complying with the provisions of this Directive.
- (9) This Directive should not apply to defence-related products which only pass through the territory of the Community, namely to those products which are not assigned a customs-approved treatment or use other than the external transit procedure or which are merely placed in a free zone or free warehouse and where no record of them has to be kept in an approved stock record.
- (10) This Directive should cover all the defence-related products which correspond to those listed in the Common Military List of the European Union<sup>(3)</sup>, including their components and technologies.
- (11) This Directive should not prejudice the implementation of Joint Action 97/817/CFSP of 28 November 1997 adopted by the Council on the basis of Article J.3 of the Treaty of the European Union on anti-personnel landmines<sup>(4)</sup>, nor should it prejudice the ratification and implementation by the Member States of the Convention on Cluster Munitions, signed in Oslo on 3 December 2008.
- (12) The objectives of the preservation of human rights, peace, security and stability pursued generally by laws and regulations of Member States restricting the transfer of defence-related products require that the transfer of those products within the Community remain subject to authorisation by originating Member States and guarantees in the receiving Member States.
- (13) In view of the safeguards provided by this Directive for the protection of those objectives, Member States would no longer need to introduce or maintain other restrictions for their achievement, subject to Articles 30 and 296 of the Treaty.
- (14) This Directive should not prejudice the application of provisions necessary on grounds of public policy or public security. In the light of the nature and features of defence-related products, grounds of public policy, such as the safety of transport, the safety of storage, the risk of diversion and the prevention of crime, are of particular relevance for the purposes of this Directive.

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- (15) This Directive is without prejudice to the application of Council Directive 91/477/EEC of 18 June 1991 on control of the acquisition and possession of weapons<sup>(5)</sup>, and in particular the formalities for the movement of weapons within the Community. This Directive is also without prejudice to the application of Council Directive 93/15/EEC of 5 April 1993 on the harmonization of the provisions relating to the placing on the market and supervision of explosives for civil uses<sup>(6)</sup>, and in particular the provisions regarding the transfer of ammunitions.
- (16) Any transfer of defence-related products within the Community should be subject to prior authorisation through general, global or individual transfer licences granted or published by the Member State from whose territory the supplier wishes to transfer defence-related products. Member States should be able to exempt transfers of defence-related products from the obligation of prior authorisation in specific cases listed in this Directive.
- (17) Member States should be free to deny or grant prior authorisation. In line with the principles establishing the internal market, such authorisation should be valid throughout the Community and no further authorisation for passage through other Member States or entrance onto the territory of other Member States should be required.
- (18) Member States should determine the suitable type of transfer licence for defence-related products or categories of defence-related products for each type of transfer, and which terms and conditions should be attached to each transfer licence, taking into account the sensitivity of the transfer.
- (19) As regards components, Member States should refrain from imposing export limitations as far as possible by accepting the recipient's declaration of use, taking into account the degree of integration of such components into the recipient's own products.
- (20) Member States should determine the recipients of transfer licences in a non-discriminatory way, unless necessary for the protection of their essential security interests.
- (21) In order to facilitate transfers of defence-related products, general transfer licences should be published by Member States granting authorisation to transfer defence-related products to any undertaking fulfilling the terms and conditions defined in each general transfer licence.
- (22) A general transfer licence should be published for transfers of defence-related products to armed forces in order to greatly increase security of supply for all Member States which choose to procure such products within the Community.
- (23) A general transfer licence should be published for transfers of components to certified European defence undertakings in order to foster cooperation between, and the integration of, those undertakings, in particular by facilitating optimisation of supply chains and economies of scale.
- (24) Member States participating in an intergovernmental cooperation programme should be able to publish a general transfer licence for such transfers of defence-related products to recipients in other participating Member States as are necessary for the execution of that

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- programme. This would improve conditions for the participation in intergovernmental cooperation programmes by undertakings established in participating Member States.
- (25) Member States should be able to publish further general transfer licences to cover cases where the risk for the preservation of human rights, peace, security and stability is very low in view of the nature of the products and the recipients.
- (26) Where a general transfer licence cannot be published, Member States should, upon request, grant a global transfer licence to individual undertakings, except in the cases set out in this Directive. Member States should be able to grant renewable global transfer licences.
- (27) Undertakings should inform the competent authorities of the use of general transfer licences with a view to the preservation of human rights, peace, security and stability and in order to allow transparent reporting of transfers of defence-related products with a view to democratic control.
- (28) The degree of latitude of Member States in determining the terms and conditions of general, global and individual transfer licences should be flexible enough to allow ongoing cooperation under the existing international framework on export control. As the decision to authorise or deny an export is, and should remain, at the discretion of each Member State, such cooperation should only stem from the voluntary coordination of export policies.
- (29) In order to compensate for the progressive replacement of individual ex-ante control by general ex-post control in the Member State of origin of the defence-related products, conditions for mutual confidence and trust should be created by including guarantees which ensure that defence-related products are not exported in violation of export limitations to third countries. This principle should also be observed in instances where defence-related products are transferred several times between Member States before being exported to a third country.
- (30) Member States cooperate in the framework of Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment<sup>(7)</sup> through application of common criteria as well as denial notification and consultation mechanisms with a view to increasing convergence in the application of their export policies of defence-related products to third countries. This Directive should not prevent Member States from determining the terms and conditions of transfer licences of defence-related products, including possible export limitations, in particular where this is necessary for the purposes of cooperation in the framework of that Common Position.
- (31) Suppliers should inform recipients of any limitations attached to transfer licences in order to allow the building of mutual trust in the ability of recipients to comply with such limitations after the transfer, in particular in the case of a request for export to third countries.
- (32) It should be for undertakings to decide whether the benefits flowing from the possibility of receiving defence-related products under a general transfer licence justify the request for certification. Transfers within a group of undertakings should benefit from a general

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- transfer licence in cases where the members of the group are certified in their respective Member States of establishment.
- (33) Common criteria for certification are necessary in order to allow the building of mutual trust, in particular in the ability of recipients to comply with export limitations of defence-related products received under a transfer licence from another Member State.
- (34) In order to facilitate mutual confidence, recipients of transferred defence-related products should refrain from exporting those products where the transfer licence contains export limitations.
- (35) Undertakings should declare to their competent authorities, at the time of requesting an export licence to third countries, whether they have abided by any export limitations attached to the transfer of the defence-related product by the Member State which issued the transfer licence. In this context, it is recalled that the consultation mechanism between Member States, as provided for in Common Position 2008/944/CFSP, is of particular relevance.
- (36) Undertakings should furnish proof of the export licence at the common external frontier of the Community to the competent customs authority at the moment of the export to a third country of a defence-related product received under a transfer licence.
- (37) The list of defence-related products set out in the Annex should be updated in strict conformity with the Common Military List of the European Union.
- (38) It is necessary for the progressive building of mutual trust and confidence that Member States determine effective measures, including penalties, sufficient to ensure enforcement of the provisions of this Directive, and in particular those providing that undertakings comply with the common criteria for certification and with limitations of further use of defence-related products following a transfer.
- (39) Where a Member State of origin has a reasonable doubt as to whether a certified recipient will comply with a condition attached to its general transfer licence, or where a licensing Member State considers that public policy, public security or its essential security interests could be affected, it should not only inform the other Member States and the Commission, but should also be able to provisionally suspend the effect of any transfer licence with regard to that recipient, having regard to its responsibility for the preservation of human rights, peace, security and stability.
- (40) To foster mutual trust, the application of the laws, regulations and administrative provisions adopted to ensure compliance with this Directive should be deferred. That would allow, before application of those provisions, an evaluation of progress made on the basis of a report prepared by the Commission based on the information submitted by the Member States on the measures taken.
- (41) The Commission should regularly publish a report on the implementation of this Directive, which may be accompanied by legislative proposals where appropriate.
- (42) This Directive does not affect the existence or completion of regional unions between Belgium and Luxembourg, or between Belgium, Luxembourg and the Netherlands, as provided for in Article 306 of the Treaty.

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- (43) Since the objective of this Directive, namely the simplification of the rules and procedures applicable to the intra-Community transfer of defence-related products in order to ensure the proper functioning of the internal market, cannot be sufficiently achieved by the Member States in view of the divergence of present licensing procedures and the cross-border nature of transfers, and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.
- (44) The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers of the Commission<sup>(8)</sup>.
- (45) In particular, the Commission should be empowered to amend the Annex. Since those measures are of general scope and are designed to amend non-essential elements of this Directive, they must be adopted in accordance with the regulatory procedure with scrutiny provided for in Article 5a of Decision 1999/468/EC.
- (46) In accordance with point 34 of the Interinstitutional Agreement on better law-making<sup>(9)</sup>, Member States are encouraged to draw up, for themselves and in the interests of the Community, their own tables illustrating, as far as possible, the correlation between this Directive and the transposition measures, and to make them public,

HAVE ADOPTED THIS DIRECTIVE:

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- (1) Opinion delivered on 23 October 2008 (not yet published in the Official Journal).
- (2) Opinion of the European Parliament of 16 December 2008 (not yet published in the Official Journal) and Council Decision of 23 April 2009.
- (3) [OJ L 88, 29.3.2007, p. 58.](#)
- (4) [OJ L 338, 9.12.1997, p. 1.](#)
- (5) [OJ L 256, 13.9.1991, p. 51.](#)
- (6) [OJ L 121, 15.5.1993, p. 20.](#)
- (7) [OJ L 335, 13.12.2008, p. 99.](#)
- (8) [OJ L 184, 17.7.1999, p. 23.](#)
- (9) [OJ C 321, 31.12.2003, p. 1.](#)