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for Economic Affairs  
and Export Control



# Internal Compliance Programmes – ICP

Company-internal export control systems

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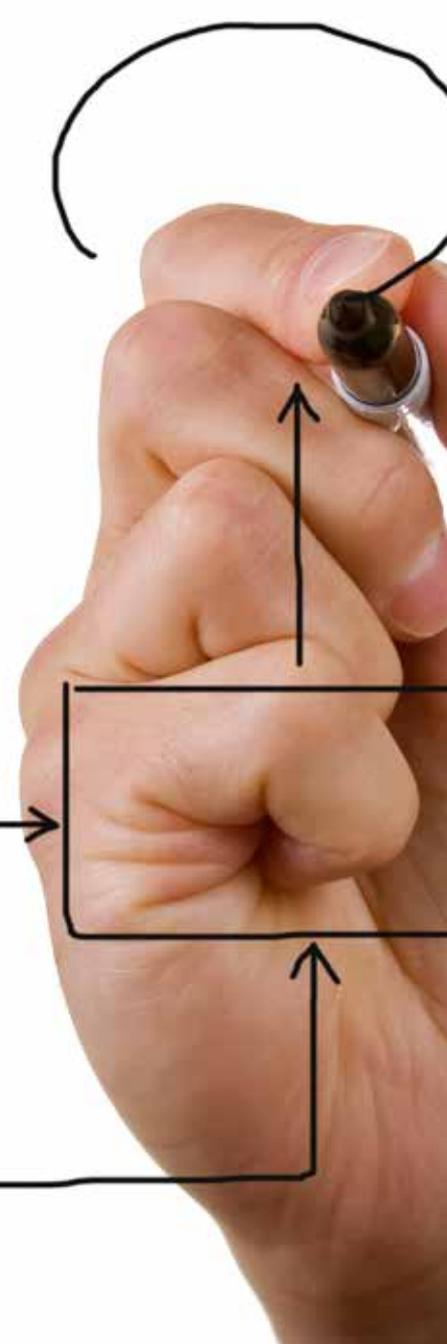
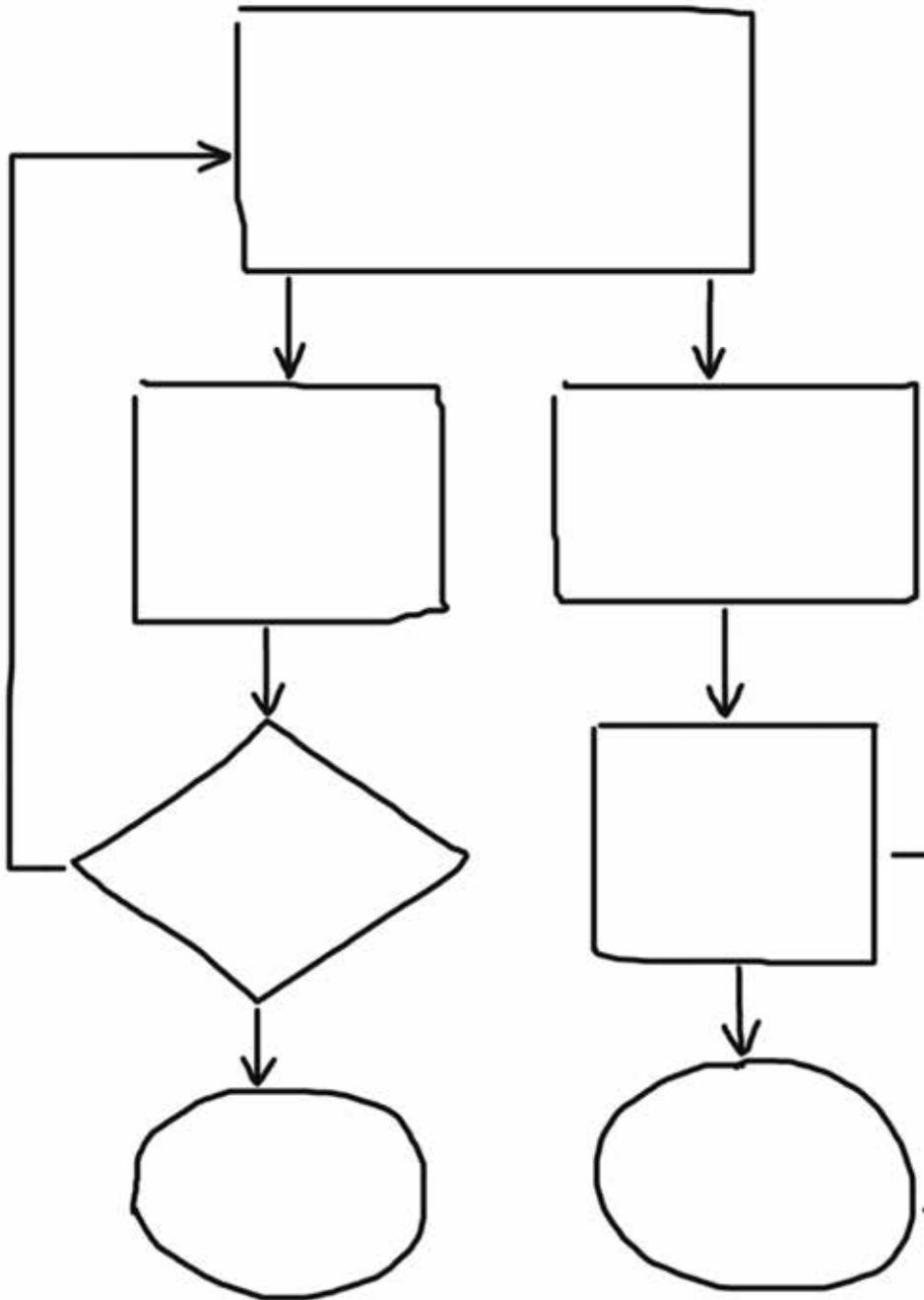
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# Introduction

## Preliminary remarks

The prevention of the proliferation of weapons of mass destruction is one of the most pressing challenges of our time. The reality is: A number of countries are aspiring to procure or manufacture weapons of mass destruction themselves, or are aspiring to acquire the knowledge to manufacture such weapons and potentially sell them for a profit to other states.

This threat is also relevant for companies: They must always have an eye on the risks and dangers of perhaps unknowingly contributing to a procurement program or becoming victim of a procurement attempt.

To effectively combat proliferation, the member states of the European Union (EU) and almost all industrial nations beyond have committed to the non-proliferation of weapons of mass destruction and monitoring the export of critical goods to sensitive countries. The export of conventional military equipment is also subject to control.

However, state-run export control can only be effective if all participating parties regard such control as necessary and support it with all available means. A close, trusting and transparent cooperation between the industry and authorities is indispensable for achieving the common goal.

As a basic principle foreign trade is generally not subject to restrictions. Inversely, this principle of free foreign trade gives rise to the obligation of all participating parties to familiarize themselves with possible restrictions and observe them. To this end, it is in the power of the companies themselves to make their contribution to detecting procurement attempts early and preventing them by establishing suitable organizational measures and provisions. In this context, the specialist knowledge of the exporting companies, for example regarding the technical specifics of their goods „know your product“ or regarding potential customers abroad „know your customer“, is extremely valuable for effective export control.

Export control is a joint task for all of us. The fight against the proliferation of weapons of mass destruction can only be waged successfully with your help!

Internal compliance programs can support you in this task.

## Terminology

The term “compliance” refers to the action or fact of observing, following or abiding with certain rules or requirements. It is self-evident that companies and their branches must act in compliance with the law. However, the concept of compliance also stands for the commitment of the company’s management to take organizational measures to avoid infringements of the law within the company from the start. Companies address this requirement in practice by implementing a compliance management system (CMS) which is designed in accordance with the risk profile of the company.

Compliance management programs which serve to support adherence to legal regulations, specifically regarding foreign trade, are referred to as internal compliance programs (ICP hereinafter).

This information leaflet is intended to help you to develop an ICP or to further optimize an already existing ICP. It presents under which conditions companies are required to install an ICP and identifies the criteria which constitute an effective ICP.

This information leaflet does not claim to be exhaustive. It should be noted that the application and interpretation of the underlying regulations may be subject to a different interpretation by the courts or public prosecutors. Therefore, the contents of this information leaflet are not legally binding.

All references to European or national directives or laws and references to procedural regulations and other information leaflets refer to the publication date of this information leaflet.

# 1 Which organizational rules apply for companies in foreign trade?

## 1.1 Internal Compliance Programme (ICP)

Companies participating in foreign trade, whose product range includes listed items<sup>1</sup> or goods which could be supplied towards a critical purpose, are required to implement an internal compliance program to ensure adherence to the regulations of foreign trade laws.

The requirement is not explicitly stated but derives from Section 130 Act of the Administrative Offences Act (OWiG) as well as the general due diligence requirements of company management (comp. Section 93 of the Stock Corporation Act (AktG), Section 43 Limited Liability Companies Act (GmbHG). In the field of foreign trade law the requirement derives from Section 8 Paragraph 2 of the Foreign Trade and Payments Act (AWG). According to this provision the granting of an export licence may be made dependent on material and personal conditions, in particular the reliability of the applicant. The same applies for the issuing of a BAFA certificate stating that a specific export does not require a license (so called „zero notice“).

Reliability is defined as the ability to ensure compliance with applicable laws and regulations. The requirements that must be met in order to be deemed reliable particularly with regards to export/transfer license applications for listed items 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.<sup>2</sup> According to these principles, the exporter/transferor must put in place adequate organizational 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 program is therefore essential.

The important thing to remember: There is no standard template for an ICP. Depending on the size, industry and customer portfolio of a company, the risk assessment and impact analysis must determine which specific requirements the ICP must meet.

## 1.2 Chief Export Control Officer (CECO)

The responsible person for the implementation of the company's ICP is the Chief Export Control Officer (CECO – „Ausfuhrverantwortlicher“). The nomination and appointment of a CECO is an essential prerequisite for companies when applying for a licence to export or transfer listed products.<sup>3</sup> This obligation derives from Section 8 Paragraph 2 Clause 1 AWG comp. with the aforementioned „Principles of the Federal Government“ of 25 July 2001.

The CECO is personally responsible for compliance with export control regulations. S/he must take all personnel and factual precautions so that compliance with the provisions of foreign trade is ensured. The CECO is responsible for the overall organization and supervision of the internal export control system as well as for staff selection and training.

For the appointment of the CECO, the guiding principle „Export control is a matter for the boss!“ applies. The CECO must be a member of the body authorized to represent the company, meaning the company's top-level management (member of the board, managing director or a representative shareholder). Procuration is not sufficient.

If several persons jointly manage the company, it is not permitted to appoint any random member as CECO. The CECO must be responsible for the shipments requiring a license as per internal business task assignment. Only then can s/he organize the internal export control, instruct responsible staff and that way do justice to his/her role as CECO.

1 Unless noted otherwise, listed products are defined as those of Part I Section A of the export list, Part I Section B of the export list (900 number items) and Annex I of Regulation (EC) No. 428/2009.

2 [http://www.verwaltungsvorschriften-im-internet.de/bsvwvbund\\_25072001\\_VB4500917.html](http://www.verwaltungsvorschriften-im-internet.de/bsvwvbund_25072001_VB4500917.html)

3 In some constellations, for example for the export or transfer of non-listed items and for the transfer of dual-use items, the nomination and appointment of a CECO is not stipulated as requirement to apply for licenses. However, it is recommended to internally appoint a CECO nonetheless.

With his/her appointment towards BAFA, the CECO confirms that s/he is aware of his/her duties. Form AV1<sup>4</sup> is required for the appointment and must be submitted along with a current trade registry listing (un-notarized copy). The CECO and, if available, at least one more member of the body authorized to represent the company must sign the form and submit the original to BAFA. An appointment via the electronic application system ELAN-K2 is not sufficient. Until recalled, the appointment of the CECO remains in effect towards BAFA. BAFA must be informed immediately if the person nominated as the CECO has left the company or loses the position in the company which is required for this task.

License applications as per the War Weapons Control Act (KrWaffKontrG) 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 AV2<sup>5</sup> which must also be submitted in the original form when the CECO is first appointed. The AV2 declaration is valid for one year from the date of declaration. The date the declaration was made shall be decisive. Subsequent declarations (AV2) can be submitted to BAFA as a copy, for example uploaded via the ELAN-K2 portal. The company has sole responsibility to ensure that a corresponding AV2 declaration has been submitted to BAFA if required, in order to prevent delays in processing applications.

For applications, the contact person at the applicant's must specify in Field 37 of the form whether s/he is the CECO of the company or is submitting the application as a representative of the company for which the CECO has declared accountability.

This applies for all applications for export / transfer of listed products.

#### Further reading

- ▶ HADDEX Volume 1, Part 6, Chapter 7.2.

4 [http://www.bafa.de/SharedDocs/Downloads/EN/Foreign\\_Trade/afk\\_nomination\\_chief\\_export\\_control\\_officer.pdf](http://www.bafa.de/SharedDocs/Downloads/EN/Foreign_Trade/afk_nomination_chief_export_control_officer.pdf)

5 [http://www.bafa.de/SharedDocs/Downloads/EN/Foreign\\_Trade/afk\\_declaration\\_chief\\_export\\_control\\_officer.pdf](http://www.bafa.de/SharedDocs/Downloads/EN/Foreign_Trade/afk_declaration_chief_export_control_officer.pdf)

## 2 Which disadvantages can an ICP help to avoid?

Companies participating in foreign trade and their employees face several - avoidable - risks if applicable laws are not followed. In case of violations of foreign trade law, companies may be liable to criminal proceedings or fines and be liable under civil law. A violation may also lead to a significant damage to the reputation of the company. Furthermore, the company's foreign trade reliability may be questioned.

### 2.1 Which liability risks exist?

#### 2.1.1 Criminal law

Intentional violations of the foreign trade laws generally constitute a criminal offense. For intent, it is generally sufficient if the culprit deems the violation of the regulation in question to be possible and approvingly accepts it (conditional intent). The elements of an offense of foreign trade law are specified in Sections 17, 18 AWG.

Violations of arms embargoes are specified in Section 17 Paragraph 1 AWG. They are punishable with prison sentences of one to ten years. If one of the qualification elements specified in Section 17 Paragraphs 2 and 3 AWG is furthermore realized, the minimum of the prison sentence is increased by one or two years. A reckless, meaning not deliberate but arguably grossly negligent violation of an arms embargo is punishable by prison of up to three years or by a fine as per Section 17 Paragraph 5 AWG.

Section 18 Paragraph 1 AWG contains a provision about the violation of EU embargoes. It is punishable by a prison sentence of up to five years.

Section 18 Paragraphs 2 and 5 AWG contain the rules on the violation of an requirement to obtain a license as per the German Foreign Trade Ordinance (AWV) for exports, transfers, trafficking and brokering transactions and technical assistance as well as per the EC Dual-use Regulation. Those violating the AWV or the EC dual-use Regulation are punishable by a prison sentence of up to five years or punishable by fine.

#### 2.1.2 Administrative offenses law

While deliberate violations of foreign trade law generally represent a criminal offense, negligent violations of the AWV or EC Regulation are generally considered administrative offenses. Negligence is defined as not exercising the necessary standard of care.

The central administrative offense regulation is stipulated in Section 19 AWG. As per Section 19 Paragraph 6 AWG, administrative offenses are punishable by a fine of up to €500,000 or €30,000.

For export control, the administrative offense of a violation of supervisory obligations as per Section 130 OWiG is also relevant. The owner of a company or business as well as authorized persons (such as managers, directors, authorized proxies) may be subject to a fine as per Section 130 OWiG if s/he has acted with negligence or intent when failing to take measures to prevent operational violations, for example if no effective ICP has been implemented. The maximum amount of the fine is determined by the fact whether the not prevented operational violation represents a criminal offense or an administrative offense.

#### 2.1.3 Self-disclosure

The option of self-disclosure is only possible in case of negligent violations as per Section 19 Paragraphs 2 to 5 AWG (Section 22 Para. 4 AWG) but not in case of export control violations as per Sections 17, 18 AWG. However, cooperative behaviour with the authorities may positively affect the measure of the punishment or fine in any case.

#### 2.1.4 Civil law

The realization of criminal offenses and violations of public legal provisions may represent a breach of duty of members of the company's senior management in the internal relationship towards the company which would result in the company's senior management assuming civil liability towards the company. The foundations for such claims are Section 93 Paragraph 2 AktG (AG), Section 43 Paragraph 2 GmbHG (GmbH) and Section 280 Paragraph 1 German Civil Code (BGB) (GbR, OHG, KG).

Furthermore, liability of the company towards third parties (investors, business partners, competitors) may apply. Such third parties may have the right to financial compensation for damages or claims to a contractual penalty payment against the company.

Employees who violate the applicable regulations are liable according to the principles of internal compensation for damages and must expect labour-related consequences all the way to termination.

#### Further reading

- ▶ Practice of export control, Part H
- ▶ HADDEX, Volume 1, Part 1, Chapter 7

## 2.2 Who is liable in case of violations in terms of criminal proceedings or money fines?

### 2.2.1 Natural persons

German law does not recognize corporate criminal law. Therefore, only individual, natural persons are able to commit criminal and administrative offenses. Each employee is personally responsible for his/her actions and is responsible for all activities falling into his/her scope of responsibility. Management, especially senior company management, is subject to a higher degree of liability responsibility in the form of selection, control and organizational duties.

Infringements subject to criminal consequences or fines may be committed by any person, through action (for example: approval of an export process by employees of the shipping department) as well as through omission (for example: not stopping an illegal transactions). Liability due to omission is only applied to those who have a legal obligation to act. The CECO in particular may face further criminal and administrative responsibility for the actions of employees. The CECO is responsible for the complete export control of the company and is therefore obligated to intervene in case of foreseeable and preventable violations of criminal or administrative laws and regulations. If the CECO fails to organize export control in the company through the implementation of an effective ICP and if this results in foreseeable illegal export procedures in the company, the CECO may be subject to criminal or administrative liability.

Section 130 OWiG specifies an expansion of the liability risk of the CECO, possibly also for other partners or board members. The culpable act in this case is constituted by the omission of the required measures to prevent operational violations, for example by not implementing an effective ICP. Section 130 OWiG is a collection standard and only applies if the business owner or his/her authorized representative is not already personally liable for the actual violation of the export control provisions.

### 2.2.2 Companies

Criminal and administrative proceedings against employees also contain serious risks for the associated company. For example, the courts will seize anything resulting from an illegal act during the proceedings. This can affect not only the culprit but also the company. In accordance with the gross principle, the entire purchase price is confiscated, not only the company's profit.

This may lead to serious economic consequences for the company and increase the risk of bankruptcy. Furthermore, the goods or a value replacement of goods if the goods are no longer available, may be confiscated.

In addition, the company may be subject to a significant fine as per Section 30 OWiG if a manager of the company (Section 30 Paragraphs 1 and 9 OWiG) committed a criminal or administrative offense.

An administrative offense may also apply in case of violation of the supervisory duty as per Section 130 OWiG. The company fine may increase to €10,000,000 in case of a criminal offense committed with intent. If the criminal offense is the result of negligence, the fine may amount to €5,000,000. If the offense is deemed to be an administrative offense, the max. amount of the fine is determined by the max. amount of the fine for that specific administrative offense. However, such a fine shall be tenfold if the administrative offense refers to Section 30 OWiG. This is the case for Section 130 OWiG. It must also be noted that the max. fine stipulated in the law may be exceeded if such a limit is not sufficient to remove the economic advantage drawn from the administrative offense by the culprit. (Section 17 Paragraph 4 OWiG). It also has to be noted that saved expenses (for example the implementation of an ICP) form part of the gained advantage and may therefore be taken into consideration when assessing the fine.

## 2.3 Intent, negligence and error

As stated under 2.1, the crucial factor for the distinction between a criminal offense and an administrative offense in foreign trade law is whether the act was committed with intent or was due to negligence. It is generally sufficient for intent if the culprit deems the violation of the regulation in question to be possible and approvingly accepts it (conditional intent). In such a case, the existence of an effective ICP may make a difference.

Companies with a functioning risk management generally trust regulations to be observed so that violations of due diligence can generally only be caused by negligent acts. Simple work errors are not to be pursued under criminal law but may constitute an administrative offense.

There exist some difficulties in the distinction between intent and negligence for „catch-all” regulations<sup>1</sup> which require a license for the export of non-listed products<sup>2</sup> if the exporting party is aware of the critical purpose of use of the goods. In such cases, positive knowledge is required. A lack of knowledge caused by negligence is not sufficient. However, the culprit may not turn a blind eye to circumstances which imply a critical purpose of use as defined by the catch-all provisions, if apparent. Such circumstances may include the technical characteristics of a good, prior use by the recipient or his/her plans with such goods. The knowledge of relevant circumstances is the equivalent of positive knowledge. Furthermore, the Federal Court of Justice (BGH) allows for a conclusion of knowledge based on conspirative behaviour. Therefore, if someone acts in such a way which may imply knowledge of the violation, it may also be assessed as positive knowledge.

If the exporter has erroneous assumptions about the classification of the goods or their destination, this constitutes a mistake which voids intent but may lead to criminal liability due to negligence.

However, if the exporter makes a mistake regarding the legal assessment of his/her action, for example if the shipment is subject to an embargo, this constitutes a so called prohibition error. Such prohibition errors are generally preventable regarding foreign trade because the responsible employees in the companies are obligated to familiarize themselves with the applicable regulations. This shall also apply if goods are only occasionally being exported. But even non-entrepreneurs are obligated to adhere to all regulations when conducting business, for example those relating to an area under embargo.

Incorrect information provided to the culprit by consultants will only lead to an unpreventable and possibly penalty exempting prohibition error if the culprit has selected a competent and nonbiased consultant who does not pursue any self-interest with the provision of such information and who offers a guarantee for the objective, diligent, dutiful and responsible provision of information.

## 2.4 Which other disadvantages can an ICP help to avoid?

### 2.4.1 Reliability audit

The granting of export licences may be made dependent on material and personal conditions, in particular the reliability of the applicant (see Section 8, Paragraph 2 AWG). Reliability is defined as the ability to ensure compliance with applicable laws. Therefore, the reliability of a company may be questioned if legal violations have been committed.

If there exists a suspicion of a company having committed violations of foreign trade law, BAFA will initiate a reliability audit (“ZVP”). If this audit results in the assumption of the unreliability of the company, license applications may generally be denied, while already granted licenses may be revoked (Principles 3, 4, 6).

The applicant may avoid the loss of reliability by clarifying the matter and implementing the personnel and/or organizational measures required as part of the reliability audit. In especially serious cases, this may include the replacement of responsible persons, including the CECO.

1 The „catch-all provisions (comp. Section 4 VO (EC) No. 428/2009 and Section 9 AWV) stipulate license requirements for non-listed products. The structure of these license obligations is generally identical. The goods are or may be intended for a specific end use. Critical end-uses in this sense include the use in the context of the development, production, handling, operation, maintenance, storage, detection, identification or dissemination of chemical, biological or nuclear weapons and/or a military end uses if the purchasing country or the country of destination is an arms embargoed country. Another prerequisite is the positive awareness of the exporter of such a use or that the exporter was informed about such a possible use by BAFA.

2 Non-listed products are defined as those not included in Part I Section A of the export list, Part I Section B of the export list (900 number items) and Annex I of Regulation (EC) No. 428/2009.

Through this risk-based approach, BAFA will place the companies and the efficiency of the adjusted organizational structure under supervision for the duration of the reliability audit process and at least until the ongoing preliminary proceedings have been completed. An on-site visit by BAFA for the purposes of verifying the measures taken by the company is generally intended.

#### Further reading

Comp. HADDEX Volume 1, Part 6, Chapter 7.2.

### 2.4.2 Loss of reputation

Violations of export control law are not only subject to criminal proceedings or may lead to negative administrative consequences. Actual or even supposed „export scandals“ are generally picked up by the media and are closely followed by a critical public, possibly even abroad. Those suspected of illegally exporting may be branded as „black sheep“ in foreign trade. Such reporting not only has negative effects for the company itself but may also impact German economy as a whole.

A functioning export control may sustainably contribute to strategically securing significant foreign markets for the German export economy. The supply of a tool machine to Country X for its missile program, for example, may turn a quick profit for individual companies at first glance. In the long term, however, all companies could benefit more from Country X abandoning its missile program and instead focus increasingly on using goods for civil purposes.

### 2.4.3 Cost risks

An efficient ICP may prevent bad investments. Negotiating with business partners, for example, or manufacturing a product without having considered that the export of the goods in question is prohibited or evidently not approvable, will cost unnecessary time and money once the project must be aborted. It is aggravating and could have been prevented if, for example, it becomes evident shortly before the planned export that the export is prohibited because no license is granted due to existing prohibitions, for example, or due to other reasons.



## 3 When does BAFA review an ICP?

BAFA carries out ex officio audits of the functionality of the internal export control system used by companies in certain case groups.

### 3.1 Individual export licenses

Section 8 Paragraph 2 AWG stipulates that the granting of an export licence may be made dependent on material and personal requirements, in particular the reliability of the applicant. According to this BAFA may make the issuing of licenses dependent on the existence or rather quality of an internal organization specifically aligned with export control, meaning an ICP.

For individual licence applications<sup>1</sup>, BAFA generally waives the material review of the ICP. In case of applications for listed products, the CECO instead assures BAFA implicitly through his/her nomination and the associated obligations (AV1) that s/he is taking all required measures for the company to comply with the provisions in foreign trade. BAFA gives credence to this declaration, generally without review, unless indicated otherwise.

Furthermore, BAFA performs on a risk-based approach preliminary reviews of application and reporting procedures in order to prevent criminal and administrative offenses from happening. Non-fulfilled conditions, incomplete applications, falsely submitted AV documents etc. are frequently indicators that the procedures in a company, and thereby the internal export control system, are defective.

The aforementioned declaration “AV 1” does not have to be submitted for applications for non-listed items<sup>2</sup>. However, it is assumed that a proper operation management organization as per Section 130 OWiG is in place.

<sup>1</sup> The application is submitted via the ELAN-K2 export. More information and info sheets about the application of ELAN-K2 are accessible at [http://www.bafa.de/DE/Aussenwirtschaft/Ausfuhrkontrolle/Antragsstellung/ELAN-K2/elan-k2\\_node.html](http://www.bafa.de/DE/Aussenwirtschaft/Ausfuhrkontrolle/Antragsstellung/ELAN-K2/elan-k2_node.html).

<sup>2</sup> Non-listed items are defined as those not included in Part I Section A of the export list, Part I Section B of the export list (900 items) and Attachment I of the Regulation (EC) No. 428/2009.

### 3.2 Global export licenses

A global export licence<sup>3</sup> (SAG) authorises the licence holder to carry out a range of export/transfers of numerous goods 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 authorization.

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 authorization holder’s business relations.

Given the additional advantages offered by global export licences, these are associated with higher requirements of exporters in terms of their internal procedures, compared to companies requesting only individual export licences.

Unlike for individual export licenses, the AV nomination to the ICP does not suffice for a SAG. Before granting a SAG, BAFA reviews the written organizational instructions for completion and effectiveness. This will be followed by an on-site visit to inspect the effectiveness of the system.

#### Further reading

- ▶ HADDEX Volume 1, Part 7, Chapter 6.
- ▶ Info sheet „Global export licenses for defense-related products“: [http://www.bafa.de/SharedDocs/Downloads/DE/Aussenwirtschaft/afk\\_sag\\_merkblatt\\_ruestungsgueter.pdf](http://www.bafa.de/SharedDocs/Downloads/DE/Aussenwirtschaft/afk_sag_merkblatt_ruestungsgueter.pdf)

<sup>3</sup> The EC Regulation uses the term „global license“.

### 3.3 Certification procedures in accordance with the directive on defence-related products

Directive 2009/43/EC on defence-related products aims to simplify and optimize the licensing process for transfers within the EU by creating standardized, transparent requirements. Upon application and meeting specific criteria, certain companies may be granted a certificate by BAFA on the basis of this directive. Transfers may be made to certified companies using general licenses if the EU member state from which the goods are to be transferred to certified companies in Germany has issued a corresponding general authorisation (Section 5 Paragraph 2). Certificates are only granted to reliable recipients fulfilling the criteria of the guideline (Section 9). BAFA regularly conducts on-site visits for the purposes of verifying the information provided during the written application process.

When receiving defence-related products from other member states on the basis of the certificate as per the directive on transfers of defence-related products, detailed delivery agreements are to be made so that it is evident in the delivery documentation under which individual license or global license the transfer was made and whether possible restrictions must be noted for the export of the goods from the EU.

Furthermore, additional review steps must be implemented in the IT system, so that guideline-compliant shipment can be retraced and documented.

#### Further reading

- ▶ HADDEX Volume 1, Part 7, Chapter 9.
- ▶ Info sheet „Certification process as per Section 9 AWG, Section 2 AWV and Art. 9 of the directive on transfers of defense-related products (2009/43/ EC)“: [http://www.bafa.de/SharedDocs/Downloads/DE/Aussenwirtschaft/afk\\_merkblatt\\_zertifizierung.pdf](http://www.bafa.de/SharedDocs/Downloads/DE/Aussenwirtschaft/afk_merkblatt_zertifizierung.pdf)



## 4 Which criteria must an ICP fulfil?

Compliance management in export control requires an internal export control program. The following criteria for an effective ICP are based on the 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 with consideration of the contents of the current discussion on EU level to create ICP-Standards for dual-use trade control<sup>1</sup>. Accordingly, the criteria apply for reliability audits and in the context of the procedures for obtaining global export licences (SAGs). Criteria of an ICP:



<sup>1</sup> Under the chairmanship of the EU Commission, a sub-working group of the Art. 23-coordination group „Dual-use goods“ has been meeting since April of 2017. The sub-working group pursues the objective of developing common ICP guidelines for the scope of the EU dual-use regulation.

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, No. 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 authorized to represent company management must be appointed as the ‚CECO‘.

Most requirements are specified as directory provisions. This means that companies 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 (theme: „comply or explain“). 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 in 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, generally once a year. Audit intervals for are determined depending on factors such the scope of the business of a company.

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

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

## 4.1 Top-level management commitment to compliance

Compliance in foreign trade, as with other sectors, can only work if the tone at the top is right, meaning that company top-level management makes it clear that the provisions of export control are to be taken seriously and compliance is expected. Company management must clearly commit to the compliance of foreign trade provisions and to the objectives of export control. The commitment by company management must be made in writing and repeatedly communicated to the staff of the company. Furthermore, adherence to foreign trade regulations must be exemplified by company management to anchor a corresponding general principle.

The special responsibility of company management regarding export control is furthermore emphasized by the institution of the CECO as „Person responsible for compliance“. Companies whose product range includes listed products must always designate a CECO as application requirement and inform BAFA accordingly (see above 1.2).

ICP test question:

Company goals	BAFA information
Does a compliance code of conduct exist or a corresponding general principle?	Written commitment by company management to export control compliance is the foundation of an effective ICP..

## 4.2 Risk analysis

The basic prerequisite for an effective ICP is a risk analysis, meaning the identification and assessment of compliance risks in foreign trade. As already mentioned, there is no standard template for an ICP which would be equally valid for all companies.

Depending on factors such as the size, structure, scope of business, customer portfolio, and in particular, the company's specific business activity and types of goods, companies are affected differently by the following ICP criteria. The risk analysis is intended to provide information as to which of the company's parts are to be integrated into the internal export control program and to support customizing the ICP to the export control compliance requirements of the company.

It is crucial for companies to analyse which legal provisions must be observed in foreign trade. The legal situation is constantly changing. The same applies for factors determining the degree to which a company is subject to the provisions of export control. As a result, the risk analysis is a continuous process which must be constantly developed further. Changes in the product portfolio, in the customer base and of business activities must be observed and assessed just as changes regarding the legal situation. Any finding that would affect the design of the internal export control program, needs to result in an adjustment of the ICP immediately, but at the latest after completion of the ICP audit (comp. ICP criterion No. 8).

ICP test question:

Company goals	BAFA information
How is the risk analysis being performed? Which risks are identified and how are they assessed?	Size, structure, scope of business, type of goods, customer portfolio and business activities are significant for the appropriate and effective design of the following ICP elements

## 4.3 Organizational structure/ Chain of responsibilities

There is no prescribed template for the design of the structural organization in export control and its integration into the overall company organization, but the following minimum requirements must be taken into account:

The 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) who must be clearly identified in the organizational chart, incl. a possibly necessary organizational unit for export control questions.

Other tasks and responsibilities associated with export control must also be specified and communicated within the company. The organizational chart 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 person with the overall responsibility for export control is absent.

Whether the 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. One important prerequisite is that export control employees must be as independent as possible, at least regarding sales and marketing. The fewer employees there are in a company, the more difficult this is. The main aim should be to protect export control staff, as much as possible, from any conflict of interests.

Export control staff should be organisationally situated in a way that that allows for them to halt a transaction. Additionally, export control staff must have the authority to report directly to the CECO.

If export control tasks are outsourced, the interfaces to the company and the cooperation must be organized. Even if outsourced, the overall responsibility remains within the company. Therefore, this is only appropriate in exceptional situations.

**ICP test questions:**

Structural organization	BAFA informations
Which department in the company is the anchor of export control and how is this department connected to other organizational units (organizational chart)?	The export control staff must be as independent as possible and protected from conflicts of interest. The responsibilities in the company must be specified in an organizational chart and accessible to everyone in the company. For companies exporting listed products, the CECO must be identified in the organizational chart.
Is the export control staff subject to conflicts of interest?	In light of unavoidable conflicts of interest between primarily profit and revenue-oriented units and those of export control, it generally does not make sense to integrate export control functions into the sales department.  If an overlap of different objectives within an organizational unit is unavoidable in smaller company units, the export control tasks should be supported by additional safety measures.
Does the export control staff have direct access to the CECO?	Direct access of the export control staff to the CECO should be stipulated in the organizational chart.
What rules are in place for the absence of export control staff in cases of sickness, vacation etc.?	Written rules must be in place in order to ensure that equally qualified substitutes can assume the export control staffs tasks in case of absence.

How is the responsibility for the classification of goods handled?	The review of the export control lists* is the basis of a reliable export control organization in companies.  The export control staff must be responsible for designating and classifying the goods, possibly in coordination with the technical staff. Regular update checks must be performed.
Who can release a shipment that was stopped by export control?	A functional right to veto an to give directions with a view to the adherence of export control regulations must be bindingly specified. To this end, it may be useful to install an Export Control Officer in the company who will perform the structural and organizational support of the operational export control processes and regularly reports to the CECO.  The Export Control division must have the unrestricted authority of (temporarily) stopping a transaction if not compliant with the provisions of foreign trade law (“Sop function”). They also have the right to release a shipment, for example as soon as proof has been submitted that the export ios admissible/ an export license has been granted.

\* Comparing the technical characteristics of an item against the applicable export control lists.

**4.4 Human, technical and other resources**

**4.4.1 Human resources**

The company 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 and are also personally reliable (see 4.7).

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 entrusted with the company’s export control. Depending on the average volume of orders, 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.

## ICP test question:

Human resources	BAFA information
How many trained staff is entrusted with export control (Export Control Department)?	The human resources depend on the results of the risk analysis and must be allocated in a way that smooth export procedures are ensured, for example also in case of a personnel shortage (keyword: absence rules )

#### 4.4.2 Technical resources for processing exports

There are no mandatory requirements about technical resources that must be procured to comply with the provisions of foreign trade legislation. For example, the Commission recommendations dated 11 January 2011 (2011/24/EU) regarding the certification of companies in accordance with Art. 9 of the directive on defence-related products 2009/43/EC state only that products should be classified in an electronic data processing system, if one is in existence already.

However, it is highly unlikely nowadays that companies would not use any computerized 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.

#### Attention!

Special features for global export license processes: In contrast to the process for individual export licenses, the process for a global export license requires the company to have an electronic data processing system in place. As part of the preliminary audit, you must demonstrate your computerized internal compliance program, 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.

## ICP test question:

Technical resources	BAFA information
Does the company have an IT system for managing exports / transfers and what are the main features of this system in relation to export control?	An electronic inventory control system to process exports and transfers is recommended.

#### 4.4.3 Other resources

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

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

- ▶ Official Journal of the European Union<sup>2</sup>
- ▶ Federal Law Gazette Part I<sup>3</sup>
- ▶ Bundesanzeiger<sup>4</sup>

It is also recommended to provide relevant specialist journals and commentaries on legislation in export control. For legal provisions, updates, information leaflets on various topics related to foreign trade legislation, forms, checklists and other links, see also:

- ▶ BAFA homepage: [www.bafa.de](http://www.bafa.de)
- ▶ the Guide to German Export Control (HADDEX), [www.haddex.de](http://www.haddex.de)
- ▶ the guide „Praxis der Exportkontrolle“<sup>5</sup>

Furthermore, the export control staff must have access to all organizational and process-related work instructions at all times.

<sup>2</sup> <http://eur-lex.europa.eu/de/index.html>

<sup>3</sup> [http://www.bgbl.de/Xaver/start.xav?startbk=Bundesanzeiger\\_BGBI](http://www.bgbl.de/Xaver/start.xav?startbk=Bundesanzeiger_BGBI)

<sup>4</sup> <https://www.bundesanzeiger.de/>

<sup>5</sup> [http://www.bafa.de/DE/Aussenwirtschaft/Ausfuhr-kontrolle/Arbeitshilfen/arbeitshilfen\\_node.html](http://www.bafa.de/DE/Aussenwirtschaft/Ausfuhr-kontrolle/Arbeitshilfen/arbeitshilfen_node.html)

ICP test questions:

Means for work	BAFA informations
Does the export control staff have access to legislative texts and auxiliary means?	The staff of the export control unit must be able to access legislative texts, including the latest applicable lists of controlled items and sanctions at all times. The provision of auxiliary means is an advantage.
How are the organizational, process-related and work instructions made accessible to all employees?	It is recommended that instructions are made available not only to export control staff, but also to all employees, at least in electronic format (for example, on the company's Intranet)

### 4.5 Workflow management and operational procedures

The process organization is the central element of an ICP in terms of operational implementation. The process organization is to ensure that no transaction is conducted without the required license or in violation of existing prohibitions.

The required operating and organisational procedures must be integrated into the process manual. The process manual should specify the procedures to be applied by the export control staff.

A process manual must at least include the following content:

Prozesshandbuch

- ▶ Provisions regarding the adherence to export control provisions throughout the entire process, from an incoming order to shipment
- ▶ Monitoring of compliance with the conditions of an obtained license
- ▶ Rules specifying the interaction with other departments within the company, such as the legal department and also sales and marketing
- ▶ Regulations regarding any information exchange with relevant authorities (for example notification of suspicious orders, existence of a policy for voluntary self-disclosure and so on).

- ▶ Coordination between all employees engaged in carrying out or otherwise involved in controls (for example sales staff are to be instructed to inform export control staff about any doubts or Red Flages, and to be advised that an order may only be processed once approved by export control staff

Export control staff must be constantly updated when the process manual is changed. The process manual should be reviewed as soon as relevant legislative amendments occur but at least once a year. Regardless of the updates of the process manual, legislative amendments affecting the company must be promptly communicated to employees.

It is recommended that the process manual is made available not only to export control staff, but to all employees of the company, at least in electronic format (for example, on the company's Intranet).

The process manual must in particular provide answers to the following questions. These questions form the core basis of any internal export control system.

## Process questions:

Process manual	BAFA information
How have the operating and organizational procedures relating to export control been designed?	A process manual must be drawn up and kept up-to-date, addressing all legal obligations in foreign trade determined as relevant during the risk assessment.
Embargos and sanction lists	
How does the company take into account embargoes?	In cases where a shipment is planned to be sent to an embargoed destination / (end) recipient, rules should be in place to verify the relevant embargo regulations. Such verification should at least encompass: compliance with prohibitions and licensing reservations, 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 contract conclusion, technical assistance, import, etc.
How does the company take sanction lists into account? What means are used for verification? Is software used?	All persons receiving resources (for example customers, haulers, employees, etc.) must be checked against relevant sanctions lists. Depending on the scope of the business contacts, applicable software should be used.
When searching for an identity on sanction lists, what level (or percentage) of certainty that a match has been found is required to consider it a match (a „hit“)?	<p>Tipp: it is recommended to configure the test software in a way that the name components to be checked are linked with an „and“ function to only present data sets with a match in first and last name. That way, the number of matches is reduced, facilitating a time-consuming manual follow-up of many irrelevant data sets for which only the first name, for example, appears in the sanction lists.</p> <p></p>
What procedures are followed when a match for a name has been found?	Procedural instructions should be set down in writing which detail how possible matches and “hits” are to be addressed (for example, when a match has been found, it must be reported to the competent authority).
Customer and transaction check	
How is the end use by and the reliability of the consignee assessed?	The control staff is responsible for checking
How are risk profiles for new customers created and how frequently are they updated?	<p>the reliability of the recipients. The stated end-use and the risk of diversions should be verified/checked with a certain standard of care. To this end, the websites of the parties involved in the business should be reviewed. In case of any warning signs (“red flags”) or unusual circumstances, a duty to further investigate applies. A verification of the recipient’s reliability 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 stated end use (for example orders for unusual quantities, special and unusual transit routes requested by the recipient). Using all customer information available in the company, the export control staff should develop the corresponding risk profiles.</p> <p></p> <p>Special feature of the global export licence procedure: the holder of a global export licence must be able to credibly show at all times that the recipient, end user or purchaser is reliable. S/he must therefore check the reliability of the customers, in particular with regard to compliance with the stated end-use and final destination of the products and, where applicable, inform BAFA of the result of the check.</p>
How does the company handle red flags for procurement activities?	Unusual customer requirements or deviations from normal business procedures must be reported to the export control staff. (see No. 5 „Warnings“)
Control of listed products (Questions about internal procedures to ensure that a listed item* is not exported or transferred without a license)	
How are items classified? How is the classification recorded and who is responsible for the recording?	The export control staff should be responsible for recording and classifying products, if necessary in consultation with technical experts. It does not suffice to rely on the information provided by manufacturers or suppliers when classifying products. If changes are made to the control list, the classification should be verified and documented in the system.
What procedures are in place to ensure that the classification of products is kept up to date, and how is this documented?	

How are purchased products classified?	A product classification provided by the seller or manufacturer is helpful but not sufficient. Therefore, a plausibility check of such a classification is required.
Are the products which are manufactured or received by the company classified by an electronic data processing system?	The classification of products should be supported by an electronic data processing system. Changes to the control list should be immediately implemented into in the system.
How is it ensured that listed items are not exported without a license? Are IT-supported stop and release functions in place?	Stop and release functions must be installed into the system to prevent unwanted print-out of shipping documents, for example. Only authorized persons (export control staff) may stop and release an export.
How does the company implement the duty to provide information as specified in Art. 22 para. 10 of EC Regulation no. 428/2009?	Listed dual-use items may only be dispatched within the EU if the business documents include information regarding the item classification.
<b>Intangible transfer of technology</b>	
How does the company ensure compliance with the intangible transfer of technology (ITT) requirements (for example e-mail and access to the Intranet from abroad)?	<p>The company should have issued clear and written instructions in relation to ITT over e-mail, fax, Intranet or Internet, incl. cloud computing.</p> <p>The provision or transfer of technology should not occur until the assessment has been if a license is required, and if applicable, a licence is in place to permit the transfer.</p>
<b>Control of unlisted products</b>	
How does the company assess whether it must apply for a licence for an item that is not listed?	Procedures must be in place to determine whether the company is “aware” in the sense of the catch-all provisions. All information (warnings) present to the company must be compiled and assessed. The creation of internal warning lists may be helpful.
Is there a process for deciding when and how BAFA is informed?	<p>In the case of “awareness” of a sensitive end use, BAFA is notified and it must be ensured that no export occurs without having received BAFA’s final decision.</p> <p>For cases in which the company is being “informed” by BAFA, procedures must be in place to ensure the swift flow of information. It must be ensured that the export of the unlisted item is stopped immediately. The item must not be exported without obtaining a license from BAFA.</p> <p>If necessary, doubts about the need to have a license for the export of a non-listed item should be clarified with BAFA. Obvious warnings (red flags) must not be ignored.</p>
<b>Technical assistance**</b>	
How does the company ensure compliance with technical assistance requirements?	A compliance procedure regarding technical assistance should be in place: <ul style="list-style-type: none"> <li>for foreign visitors / employees,</li> <li>for employees (for example technicians) abroad,</li> <li>for conferences, seminars with foreign participants or when organized abroad.</li> </ul>
<b>Commercial and intermediary activities***</b>	
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 to determine: <ul style="list-style-type: none"> <li>whether products are supplied from one third country to another third country****</li> <li>whether the products are listed</li> <li>whether there is information available about a sensitive end use*****</li> </ul>
<b>Licensing phase</b>	
How does the company ensure that it makes full and complete license applications?	The company should be equipped to fully comply with the licence application process*****.
<b>Post-licensing phase</b>	
What internal procedures ensure that the internal export control check is up-to-date?	A final check is performed before the actual transaction takes place.

What internal procedures ensure compliance with the conditions of the licence?	Monitoring the fulfilment of conditions is a necessary step for a licence-compliant processing of granted licenses. That includes monitoring the runtimes and the residual values of the licenses. It is absolutely mandatory for the validity of licenses to be monitored. If needed, an application for extension must be filed in due time. Write-offs for granted licenses must be documented and updated. Notifications (AGG, SAG) must be submitted on time.
How are the runtimes and residual values of the granted licenses monitored?	
General authorisations	
How does the company check the applicability of general authorisations and how is adherence to the secondary provisions ensured?	Registered users of general authorisation must ensure that the conditions of use are met, and the corresponding check and documentation steps have been installed.
Global export licenses	
Is the assignment of multiple recipients to one global export license possible in the IT system used for licensing management?	Common merchandise management systems must generally be modified for specific customers to be able to assign several recipients and roles to one license.
Is the history of the SAG data presented in a clear overview?	It must be ensured that the licensing scope valid at a certain time can be fully retraced any time.

- \* Please note that a product/item in this context is also listed if contained in the annexes of Regulation (EC) 2005/1236 ("Anti-torture regulation) or Annex I of Regulation (EU) 2012/258 (Firearms regulation). Also footnote 1 for further information on the term listed items/products.
- \*\* Technical assistance encompasses every service, such as repair, maintenance, development, but also passing on of practical abilities and expertise, for example through consulting and training.
- \*\*\* Commercial and intermediary activities are defined as (1) the brokering of a contract about the purchase or surrender of such items, (2) proof of an opportunity to conclude such a contract, or (3) the conclusion of a contract about the surrender of items.
- \*\*\*\* Third countries are all territories outside of the customs territory of the European Union except for Helgoland (Section 2 Paragraph 8 AWG).
- \*\*\*\*\* Critical uses in the sense of the catch-all provisions include uses in the context of the development, production, handling, operation, maintenance, storage, detection, identification or dissemination of chemical, biological or nuclear weapons and/or a military end uses if the purchasing country or the country of destination is an arms embargoed country.
- \*\*\*\*\* Support is provided by the information leaflet „Instructions for application in the online portal ELAN-K2“, accessible in German at: [http://www.bafa.de/SharedDocs/Downloads/DE/Aussenwirtschaft/afk\\_elan-k2\\_merkblatt\\_anwendung.pdf](http://www.bafa.de/SharedDocs/Downloads/DE/Aussenwirtschaft/afk_elan-k2_merkblatt_anwendung.pdf)

### 4.6 Record keeping and documentation

Precise and retraceable recordings of export control activities are indispensable for the compliance efforts of a company. A comprehensive recordkeeping system helps to perform internal audits, complying with documentation retention requirements and will facilitate cooperation with competent authorities.

Export-relevant documents from all phases of the licensing process must be stored in accordance with legal provisions (Section 22 Paragraph 3 AWV Art. 20 EC Directive).

The individual verification steps must be documented in all stages of processing a transaction. Steps must also be documented if the export control division concludes that no license needs to be applied for at BAFA. The reasons leading to such a conclusion must be documented. Furthermore, it should be clear who administers granted export licenses.

All training certificates must also be stored for the purposes of verification. They are included, for example, in the personnel file of the respective employee.

The records must be made accessible to the competent authorities. It should be possible to make records available electronically.

**ICP test questions:**

Documentation and retention of documents	BAFA information
How are test steps and results recorded?	Defined test steps must be retraceably retained for all export-relevant stages per order.
Where and how are these documents archived?	It must be possible to make records available to BAFA upon request either in electronic or paper form.
Are the export-relevant documents stored in accordance with the legal provisions?	Instruction need to be in place in order to ensure that documents are not destroyed before the legal retention periods have passed.

### 4.7 Selection of staff, training and awareness-raising

#### 4.7.1 Selection of staff

Not every employee is suitable for performing tasks in internal export control.

Export control staff must have

- ▶ knowledge of foreign trade and payments law
- ▶ knowledge of the licence application process
- ▶ knowledge of a company’s production processes/ organizational skills

or learn them promptly.

The export/transfer control staff are trained, for example by means of employee induction programs, and are familiarized with the job requirements.

**ICP test questions:**

Selection of staff	BAFA information
What kind of expert knowledge and training does the export control staff have and who makes the staff selection?	The company (CECO) must ensure that the export control staff have proven to be in possession of the corresponding specialist (legal and technical) knowledge and are personally reliable.
Do written workplace descriptions exist?	A workplace description is the description of activities to be performed in a specific workplace position. Tasks are specified and, for example, the superordination and subordination to other positions in the company is determined and specified.

#### 4.7.2 Trainings

The CECO must regularly seek information about the duties to adhere to compliance and organizational regulations. The export control staff must be up-to-date if the relevant regulations and procedures are changed.

The export control staff should have the opportunity at least once per year to attend further internal or external trainings about the topic of export control.

### Further reading

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 Energy, 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/IXPOS/Navigation/DE/Ihr-gescha-  
eft-im-ausland/Service/veranstaltungen.html](http://www.ixpos.de/IXPOS/Navigation/DE/Ihr-gescha-<br/>eft-im-ausland/Service/veranstaltungen.html)

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

Staff affected by export business must be informed about the internal export control system when being employed.

### ICP test questions:

Training	BAFA information
Which trainings are conducted for export control staff, how frequently do they take place and how are they documented?	The export control staff must be up-to-date if the relevant regulations and procedures are changed. The export control staff should have the opportunity at least once per year to attend further internal or external trainings about the topic of export control. All training certificates are to be stored. They are included in the personnel file of the respective employee.
Are trainings being held for employees who are immediately affected by export control (sales, shipping, project managers)?	The company (CECO) must ensure that all employees with tasks in export control have the opportunity to participate in relevant training.

#### 4.7.3 Awareness-raising

Awareness-raising by export control staff or external service providers about the risks in foreign trade within the company takes place annually.

Furthermore, all employees (not only export control staff) should have access to the aforementioned organizational and operational processes associated with foreign trade.

All employees must be aware who to contact in case of questions regarding foreign trade. A list with the corresponding contacts must be easily accessible.

### ICP test questions:

Awareness-raising	BAFA information
How and for whom is awareness raised for risks associated with foreign trade?	All employees affected by the company's export business in any way must be informed annually.

## 4.8 Process-related control / System-related control (ICP audit) / Corrective measures / Whistleblower system

To ensure that the ICP is applied in daily work and correctly implemented, control mechanisms must be incorporated as part of daily operations. Process-related control relates especially to the process organization as described under No. 4.5. One approach to ensure that transactions are ICP-compliant is to release products based on the 4-eyes principle or random inspections. This should help companies to largely avoid violations of foreign trade laws and regulations.

To ensure that a representative number of transactions is reviewed, process-related controls should always include at least one transaction per customer or destination or at least one transaction per project.

Regardless of the aforementioned control of whether the existing ICP is correctly applied to the matter at hand, the ICP must in its entirety also be regularly inspected for conceptualization, appropriateness and effectiveness. An ICP is not a static set of measures and must therefore be audited and updated. These system-related ICP audits ensure that the written operational compliance processes (still) correspond to the export control compliance requirements of the company. The reasons for an adjustment of the ICP may lie in the company itself (for example: Changes of product portfolio, customer base or business activity) or be due to changes in the legal situation. The system-related audit reviews the entirety of the ICP and should therefore include the complete internal export control and cover all 9 ICP criteria presented in this information leaflet.

Ideally, system-related audits should take place once per year, and at least every 3 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

- ▶ 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, for example legal practitioners, management consultants or chartered accountants.

The audit criteria should be specified in writing beforehand and the results of the audit documented.

If the ICP 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 the corrective measures should be documented in writing; the records need to be retained. Self-disclosure of violations is not mandatory. But notification of the authorities is generally recommended.

In addition to process-related and system-related audits, a well-functioning ICP should also include clear internal reporting procedures in case violations of foreign trade provisions are suspected within the company. As part of a compliance culture, employees must be sure not to be disadvantaged if they raise questions in good faith or express concerns regarding the adherence to provisions. They must be provided with written guidelines, specifying how they can provide information about deficits and malpractice in the company while remaining protected (whistle-blower system). This process must be communicated to the employees. Third parties may be given this option as well.

Information about possible malpractice needs to be examined appropriately. Discovered violations should be handled accordingly.

**ICP test questions:**

Monitoring	BAFA information
How are the work results of the export control staff audited?	The daily operations processes should be audited without announcement during ongoing operations, for example through samples. As an alternative, checks using the 4-eyes principle can be performed.
How frequently do system audits (ICP audits) take place and who performs such audits?	The functionality of the ICP should be audited regularly, ideally once per year but at least once every three years.
What is the reaction to discovered errors?	Violations are to be handled appropriately.
Who can employees contact if looking to report misbehaviour?	An (internal) whistleblowing system is implemented.

**4.9 Physical and technical security**

Listed items must be protected from unauthorized removal by third parties and employees. Suitable protective measures must be taken to reduce this risk. Access or exit supervision or other authorization concepts are conceivable to this end.

Special protective measures to prevent unauthorized access / information should also exist for listed software and technologies, such as password-protected systems, a firewall, a control regarding storage media and e-mails.

**Attention!**

Special feature of the certification: The requirements for physical and technical safety are especially relevant for the certification in accordance with the directive on defense-related products. For example, an AEO status AEO S may be sufficient as security measure. Furthermore, War Weapons Control act checks are also accepted. Security measures, such as complete fencing of company premises with climb-over protection, entrance security, constant monitoring of the premises even outside of working hours should be in place as well.

## ICP test questions:

Security	BABA information
How is the company physically secured?	Securing the company premises is recommended. Access to listed products should be controlled.
Is the company AEO S-certified?	An AEO status (AEO S) represents a sufficient security measure.
How is the company's IT security?	Protective measures should exist for listed software and technologies, such as virus scanners, password-protected systems, a firewall, a control regarding storage media and e-mails.



## 5 Warnings /“Red Flags”

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 actively support the controls. Close cooperation is called for in the fight against proliferation. An appropriate awareness of the risks involved in dealing with sensitive products and the dangers of abuse is indispensable for all sides.

The following information is intended to help companies assess whether there is a risk of becoming unintentionally embroiled in weapons of mass destruction programs. Such information will not always automatically lead to the obligation of applying for a license.

### 5.1 Attempts to procure products

Anyone who exports products can unintentionally support the planning or implementation of a weapons of mass destruction program. Special attention must be paid 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.
- ▶ The customer does not ask any commercial or technical questions that would normally be asked in business negotiations.
- ▶ 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 description of the products is vague. (for example, unusual volume of spare parts) 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.
- ▶ Persons enquiring whose statements regarding transport routes are geographically or economically illogical.
- ▶ Persons enquiring who are not able to offer plausible explanations about the fate of already delivered products.

### 5.2 Attempts to procure expertise

Scientific cooperation can also be abused 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 programs 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 programs. Such events also offer opportunities for making personal contacts, facilitating the informal acquisition of specialist knowledge, which generally does not raise any suspicions.

Expertise is also acquired through direct approaches to experts and/or associated technical staff, for example during installation or maintenance of production devices.

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 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.

### 5.3 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.









