The internal market and national security

Trybus, Martin; Butler, Luke

The Internal Market and National Security: Harmonisation, Impact and Reform of the EU Directive on Intra-Community Transfers of Defence Products

MARTIN TRYBUS* and LUKE R. A. BUTLER**

1. Introduction

Whilst the Internal Market has been operational for decades with regard to all other goods, Member States have historically restricted the free movement of defence products within the EU. Law and practice in this field appears to operate in a parallel universe in which the Internal Market does not exist. National licencing laws and policies have treated 'intra-Union' transfers, that is, the transmission or movement of a defence-related product from a supplier in one Member State to a recipient in another,[1] as equivalent to exports to third countries outside the EU. A principal concern is the view that the absence of controls on transfers within the EU could exacerbate risks of illicit exports outside the EU, threatening national security and foreign policy interests. Disproportionate licencing requirements have incurred significant costs and delays, creating barriers to trade. However, in 2009, the EU adopted its "Defence Package", a key component of which is the Intra-Community Transfers Directive (ICT) 2009/43/EC introducing a harmonised transfer licencing and certification regime.[2] Reacting to this legislative development, the objective of this article is twofold. First, it aims to address an important gap in existing literature by offering a first legal analysis[3] of transfers in their historical context,[4] the strengths and shortcomings of the ICT's

*Professor of European Law and Policy and Director of the Institute of European Law, University of Birmingham. **Lecturer in Law, University of Bristol. The authors wish to thank Phil Syrpis and Albert Sánchez-Graells (University of Bristol), Anthony Arnull (University of Birmingham), Baudouin Heuninckx (Royal Belgian Air Force), and the participants of a workshop at the 46th UACES Conference in Bilbao in September 2015 for useful comments on a previous version of this paper. Any mistakes, however, are ours.

[1] Based on the definition of 'transfer' in Article 3(2) 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 [2009] OJ L146/1. The (August) 2009 ICT still uses the term 'Community' having preceded the (December) 2009 Treaty of Lisbon replacing the term 'European Community' with the term 'European Union'. However, the authors refer to 'intra-Union transfer' to reflect the Lisbon changes.

[2] The "Defence Package" consists of: the ICT; Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security; and amending Directives 2004/17/EC and 2004/18/EC [2009] OJ L216/76 and Commission Communication *A Strategy for a Stronger and More Competitive European Defence Industry* COM (2007)764 final, introduced to academia by Koutrakos, "The Commission's 'defence package" (2008) 33 EL Rev 1-2. Directive 2009/81/EC, arguably the most significant part of the Package, has been discussed in numerous publications including: Trybus, "The tailor-made EU Defence and Security Procurement Directive: limitation, flexibility, description, and substitution" (2013) 39 EL Rev 3-29 and Trybus, *Buying Defence and Security in Europe: the EU Defence and Security Procurement Directive in Context* (CUP, Cambridge 2014). See also: Heuninckx, "The EU Defence and Security Procurement Directive: Trick or Treat?" (2011) 20 PPL Rev 9.

[3] For a discussion in the political science/security studies literature, see Masson, Marta, Léger and Lundmark, "The "Transfer Directive": perceptions in European countries and recommendations", researches & documents, Fondation pour la reserche stratégique, No. 04/2010. Available at: <https://www.frstrategie.org/publications/recherches-documents/web/documents/2010/201004.pdf> (last visited 19 March 2016); Mölling, "Options for an EU regime on intra-Community transfers of defence goods" in Keohane (ed.), *Towards a European Defence Market*, Chaillot Paper 113 (EU Institute of Security Studies: Paris, 2008) and Ingels, "The Intra-EU Defence Trade Directive: Positive Goals" in Bailes, Depauw and Baum

provisions in light of their intended objectives and impact on national laws and practices.[5] This pre-empts a 2016 review of the ICT which is still ongoing and may be accompanied by a legislative proposal for reform.[6] Second, this article provides a case study of the EU's approach to harmonisation in an area comprising diverse national security interests and industrial capacities as part of an evolving EU competence in the field of armaments.

This article begins by examining the economic and historical context of transfers within the broader framework of EU law (Section 2). It then analyses the ICT's scope (Section 3), transfers and licences (Section 4), end-use controls (Section 5), certification (Section 6) and additional safeguards (Section 7) before offering some conclusions (Section 8). It is argued that whilst the ICT constitutes a significant first step towards reducing barriers to free movement of defence goods within the EU, the ICT's approach to harmonisation has so far adversely impacted the operational effectiveness of the regime. The article offers a strategic assessment of the prospects for reform under a revised ICT.

2. Context

The defence industries of several EU Member States are part of a global armaments market in which, in 2014, the top 100 defence producers sold goods and services worth US$401 billion.[7] Companies in the so-called 'Big Six' Member States, namely France, Germany, Italy, Spain, Sweden and the UK, sell to their respective governments, to a lesser extent to other Member States, and export to third countries.[8] Further, most Member States have at least niche capacities and participate in European and global supply chains. Therefore, the ability of Member States and companies to transfer defence products expeditiously with

---

(eds.) *The EU defence Market: Balancing Effectiveness with Responsibility* (Flemish Peace Institute: Brussels, 2011). For an overview in a legal context, see Trybus, *Buying Defence and Security in Europe*, ibid., at 139-156.

[4] Drawing on available data from UNISYS, 'Intra-Community Transfers of Defence Products', Final Report of the Study 'Assessment of Community initiatives related to intra-community transfers of defence products', Brussels, February 2005 (study commissioned for the European Commission) (*UNISYS*) to discern the *status quo ante*. This study is no longer available at the time of writing but remains on file. The analysis also draws on the 2007 Commission *Impact Assessment*, Commission, 'Commission Staff Working Document, Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on simplifying terms and conditions of transfers of defence-related products within the Community, Impact Assessment, SEC (2007), 1593, for the *intended* impact.

[5] Informed by Commission, *Report from the Commission to the European Parliament and the Council on transposition of Directive 2009/43/EC simplifying terms and conditions for transfer of defence-related products within the EU*, COM(2012) 359final to discern the ICT's *formal* transposition into national laws and Mampaey, Moreau, Quéau and Seniora, Final Report, *Study on the Implementation of Directive 2009/43/EC on Transfers of Defence-related Products*, Group for Research and Information on Peace and Security (*GRIP*) (prepared for the European Commission) 2014 for the practical impact on national laws until 2014: <http://www.grip.org/sites/grip.org/files/RAPPORTS/2014/Study%20on%20the%20implementation%20of%20Directive%20200943EC%20on%20transfers%20of%20defence-related%20products.pdf> (last visited 14 June 2016). The most recent data and analysis is provided in the European Parliament Directorate-General for External Policies Policy Department's Report – *The impact of the 'defence package' Directives on European Defence* 2015, <http://www.europarl.europa.eu/RegData/etudes/STUD/2015/549044/EXPO_STU(2015)549044_EN.pdf> [last visited 29 March 2016]. Information was also collected during semi-structured interviews conducted with Mr Ian Bendelow, Department for Business, Innovation and Skills (UK), as well as other informal discussions with officials in certain Member States including Germany.

[6] Recital 41 and Article 17 ICT.

[7] Stockholm International Peace Research Institute (SIPRI) Press Release, 14 December 2014: <http://www.sipri.org/media/pressreleases/2014/SIPRI-Top-100-December-2014> (last visited 19 March 2016). The list contains many EU-based companies. The European defence industries have an estimated annual turnover of €55 billion and employ approximately 300,000 people. See also 2007 figures in COM (2007)764 *supra* note 2, at 2, also indicating that 20 years ago these figures were almost twice as high.

[8] For a discussion of this grouping, see Trybus, *Buying Defence and Security in Europe*, *supra* note 2, at 26.

proportionate controls is an important contributor to the competitiveness and, indeed, survival of the European defence industries.

2.1. *The status quo ante: intra-Union transfers prior to the ICT*

For many years, the Commission has sought to prioritise intra-Union transfers as part of the development of a more competitive EU defence market.[9] However, there had been no general EU-wide regime for the intra-Union transfer of defence-related products.[10] Member States instituted their own national policies, legislation and practices which formally treated the internal transfer of defence products within the EU and their export to third countries without distinction.[11] National *ex ante* export licences would be required in both instances.[12] To this extent, national rules were not specifically adapted to differentiate Internal Market law obligations and any other legal obligations with regard to exports. Thus, measures that might otherwise be appropriate for export risks, such as potential diversion to third parties involved in conflict or terrorism, were equally applied to transfers to allied and generally peaceful Member States within a deeply integrated EU. The absence of free movement of defence goods within the EU was criticised not least by the European defence industries.[13] Whilst licence applications for export to other EU or NATO members were most likely subject to less scrutiny than exports to other countries,[14] the formal existence of many different laws was, in itself, "a serious burden for intra-[Union] transfers" exacerbated by their publication alongside licencing policies (if published) in different languages.[15]

Numerous barriers to trade could also be identified. Member States used different national and international lists for the control of armaments to determine the scope of coverage of licences.[16] Most national laws did not specify detailed or transparent licencing criteria.[17] Determinations were, therefore, at the absolute discretion of licencing authorities.[18] Further, more than one body could be designated with licencing approval responsibility including requirements to consult other bodies prior to approval.[19] Stages in the required licencing procedures also varied.[20] Moreover, certain national laws required that additional (pre-)licences be obtained or a fee paid before licences could be approved.[21] The processes for certifying reliable defence companies were also based on varying national practices.[22] Finally, in certain Member States, licences could be obtained for several years covering

[9] See *The Challenges Facing the European Defence-Related Industry, A Contribution for Action at European Level* COM(1996)10 final, at 19; *Implementing European Union Strategy on Defence-Related Industries* COM (1997)583 final, Annex I: Draft Common Position on Framing a European Armaments Policy, Article 5; Annex II: Action Plan; and *Towards a European Union Defence Equipment Policy* COM (2003)113 final at 13.

[10] By contrast, see Council Regulation 428/2009/EC setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items (recast) [2009] OJ L134/1.

[11] *Impact Assessment*, *supra* note 4, at 4.

[12] *UNISYS*, *supra* note 4, at 12; *Impact Assessment*, ibid., at 13.

[13] See the President of the European Defence Industries Group Corrado Antonini: "Political Harmonisation and Consolidation", EMP conference on the Future of the European Defence Industry, Brussels, 10-11 December 2003 as cited in *UNISYS*, ibid., at 80.

[14] See, for instance, the German practice prior to the adoption of the ICT in Masson, Marta, Léger, and Lundmark, 'The "Transfer Directive"', *supra* note 3, at 18. For a useful analysis of national licencing regimes prior to the ICT, see ibid 15-32 and *UNISYS*, *supra* note 4, at 8-36 and Annex D.

[15] *UNISYS*, ibid., at 12 also at 59 and 64.

[16] Ibid., at 9. See also: Mölling, *supra* note 3, at 58.

[17] *UNISYS*, *supra* note 4, at 61.

[18] *Impact Assessment*, note 4, at 14.

[19] *UNISYS*, *supra* note 4, at 13, 15-16 and 60-61 and *Impact Assessment*, *supra* note 4, at 13.

[20] *UNISYS*, ibid., at 17-24. See also: Mölling, *supra* note 3, at 58.

[21] *UNISYS*, *supra* note 4, at 61; *Impact Assessment*, *supra* note 4, at 14.

[22] Mölling, *supra* note 3, at 59.

multiple shipments whereas in others, licences were required for every single shipment.[23] Time limits for licence expirations also varied.[24] Renewals were often possible but requirements for renewal and the permissible length of renewals also differed.[25]

These issues resulted in significant administrative burdens, generating long lead times, in some cases up to several months.[26] Therefore, even companies transferring components between subsidiaries located in several countries had to comply with variable regimes.[27] It is difficult to assess the indirect costs on the defence industries overall, but the direct costs of licencing amount to hundreds of millions of Euros.[28] These costs are stark considering that licences were rarely refused. In 2003, out of 12,627 licence applications,[29] only 15 were refused, all in the Baltic States.[30] Whilst, as will be discussed in Section 4, there may be exceptional instances in which licencing measures may be justified, the above indicates that licensing practices have generally been disproportionate.[31]

However, some momentum towards liberalisation in this area resulted from the 1998 intergovernmental Letter of Intent (LoI) initiative, to which the 'Big-Six' defence industrial Member States are currently signatories.[32] Under the LoI, attempts had been made to introduce the 'Global Project Licence' removing the need for specific authorisations to transfer products between LoI partners participating in collaborative projects.[33] However, the LoI initiative has not been fully executed in practice and with limited results to date.[34]

In 2006, the EU launched a *Consultation Paper* on intra-Community transfers.[35] This precipitated the 2007 *Impact Assessment*[36] and proposal for a Directive.[37] The *status quo* was

[23] *UNISYS*, *supra* note 4, at 62.
[24] Ibid.
[25] *UNISYS*, *supra* note 4, at 62.
[26] Ibid., at 5; *Impact Assessment*, *supra* note 4, at 14 and Mölling, *supra* note 3, at 61-62, 68.
[27] *Impact Assessment*, *supra* note 4, at 4.
[28] *UNISYS*, *supra* note 4, at 112 estimates the indirect costs related to the obstacles to intra-Union transfers at €2.73 billion. The estimated direct costs for the 12,627 licence procedures conducted in 2003 amounted to €238 million (ibid.).
[29] With an overall value of €8.9 billion for conventional defence products delivered between the then 25 EU Member States: *UNISYS*, *supra* note 4, at 94. This represents approximately 31.4 per cent of all transfers, with the remainder being exports to third countries (ibid., 95). *UNISYS* reports that this percentage is in line with the turnover reported by large European enterprises: e.g. Thales reports a military turnover of 30 per cent inside the EU and 70 per cent outside. Ibid at fn 79 citing "Interview D. L. August 2004".
[30] *UNISYS*, ibid., at 94: six in Estonia, six in Latvia and three in Lithuania.
[31] *Impact Assessment*, *supra* note 4, at 4: "[t]his patchwork of licencing requirements - and the corresponding administrative burden – clearly appear to be *out of proportion* with actual control needs", and at 13: "Intra-community transfers of defence-related goods hindered by cumbersome and *disproportionate* procedures [emphasis added]."
[32] Letter of Intent between the Defence Ministers of the UK, France, Germany, Italy, Spain and Sweden on Measures to facilitate the Restructuring of the European Defence Industry signed in London, 6 July 1998. The LoI was formalised under a Framework Agreement between The French Republic, The Federal Republic of Germany, The Italian Republic, The Kingdom of Spain, The Kingdom of Sweden and The United Kingdom of Great Britain and Northern Ireland Concerning Measures to Facilitate the Restructuring and Operation of the European Defence Industry signed during the Farnborough Air Show on 27 July 2000. The Framework Agreement entered into force on 2 October 2003. For a general discussion of the LoI, see Trybus, *Buying Defence and Security in Europe*, *supra* note 2, at 225-231.
[33] Article 7, Framework Agreement.
[34] *Impact Assessment*, *supra* note 4, at 9 and 18.
[35] Commission, Consultation Paper on the Intra-Community Circulation of Products for the Defence of Member States, 21 March 2006, Brussels, ENTR/C.
[36] *Supra* note 4.
[37] Commission, *Proposal for a Directive of the European Parliament and of the Council on simplifying terms and conditions of transfers of defence-related products within the Community* COM(2007)765 final.

rejected due to the perceived disadvantages.[38] The Commission opted for a Directive rather than a Regulation based on the "primary responsibility" of Member States for simplification of licencing and the general sensitivity of defence.[39] On 6 May 2009, the ICT was adopted. Member States had until 30 June 2011 for transposition.[40] However, national provisions did not have to enter into effect until 30 June 2012, allowing a period in which to "foster mutual trust" and evaluate progress based on a Commission report.[41] In 2012, the Commission reported incomplete transposition[42] and initially launched infringement proceedings against seven Member States.[43] All Member States have now formally transposed the ICT.[44]

2.2. *Competence to regulate armaments and harmonisation under the TFEU*

Given that transfers of defence products may implicate national security and foreign policy considerations, a central issue concerns both the EU's competence to act and the nature and scope of harmonisation in this field.

2.2.1 *Competence*

One question that might be raised is whether the ICT is compatible with primary EU law because it purports to regulate measures that are deemed to be *prima facie* incompatible with the EU Treaties.[45] The ICT was adopted under Article 114 TFEU (ex 95 EC) which enables EU legislation that harmonises relevant national laws for the establishment and functioning of the Internal Market.[46] Harmonisation under EU law is conventionally understood as the institution of common EU rules to remove 'lawful' barriers to trade, that is, nationally diverse measures which are *prima facie* incompatible with the EU Treaties but which could exceptionally be justified, for example, on public health or security grounds.[47] If a harmonisation Directive is enacted to provide rules which protect such interests, recourse to Article 36 TFEU is precluded.[48] If harmonisation is not complete, Member States may continue to have recourse to Article 36 TFEU.[49]

Applied to the ICT, it is clear that defence-related products are goods for the purposes of EU law which impact the internal market.[50] Onerous licencing requirements may

[38] Identified as: the continued fragmentation of the market along national lines; the delay of necessary defence industry consolidation; the risks of discrimination between operators covered by intergovernmental regimes outside the EU and other EU operators; the difficulty of integrating Small and Medium Sized Enterprises ("SMEs") from new Member States in supply chains; the gradual technological decline as the critical mass of industries remained insufficient; the progressive exclusion from the highest value-added market segments; and, finally, the resulting erosion of competitiveness, sanctioned by loss of market share in both EU and third countries. See *Impact Assessment*, *supra* note 4, at 44.

[39] COM (2007)765 final *supra* note 37, at 8.

[40] Article 18(1) ICT.

[41] See Recital 40, Articles 17(1) and 18(1) ICT.

[42] The *Transposition Report*, *supra* note 4, at 15-19 reported in 2012 that 20 Member States had fully transposed, one had partially, six were expectant and one had not communicated transposition.

[43] *Transposition Report*, ibid, at 5.

[44] Croatia only joined the Union in 2013 in full compliance with the entire *acquis*.

[45] The authors are grateful to Phil Syrpis and Baudouin Heuninckx for this observation. On the relationship between secondary and primary EU law generally, see Syrpis, "The Relationship between Primary and Secondary Law in the EU" (2015) 52 CML Rev 461-488.

[46] Preamble and Recital 43 ICT.

[47] Alternatively, on the basis of the '*Cassis de Dijon*' mandatory requirements or overriding public interest grounds as recognised in *REWE Zentrale AG* v. *Bundesmonopolverwaltung für Branntwein* (Case 120/78) [1979] ECR 649, [1979] 3 CMLR 494.

[48] *Campus Oil* (72/83) [1984] ECR 2727, para.21.

[49] *Denkavit* (39/90) [1991] ECR I-3069, para.19.

[50] Recital 2 ICT. Armaments can be valued in money and can be the subject of commercial transactions. See the definition of goods in *Commission* v. *Italy ('Arts Treasures')* (Case 7/68) [1968] ECR 423, 429.

constitute measures having equivalent effect to quantitative restrictions on exports contrary to Article 35 TFEU.[51] Such measures are thus *prima facie* incompatible with EU law unless justified under Article 36 TFEU. The ICT considers harmonisation to be necessary because "direct" application of the free movement principles alone is insufficient to remove national restrictions in light of their potential to be justified under Article 36 or 346 TFEU.[52] Yet, the ICT continues to recognise that its ICT's application remains subject to Articles 36 (and 346 TFEU).[53] It is arguable that the ICT's scope and that of Article 36 TFEU are reconcilable on the basis that the ICT does not purport to limit the scope of Article 36 TFEU but rather attempts to provide a harmonised set of certain measures that would otherwise be justifiable under Article 36 TFEU but which the ICT now regulates, subject to the other principles of EU law, for example, proportionality.[54] This does not constitute an "indirect" attempt to limit the scope of the Treaties because the ICT does not preclude the possibility to continue to place further national restrictions on the measures regulated in the ICT or to adopt certain other measures, provided these are justified under Article 36 TFEU. Rather, Member States must identify why their public security interests cannot be sufficiently protected through compliance with a Directive intended to harmonise national measures whose continuing application would otherwise lead to broad public security exemptions restricting the internal market. An outstanding difficulty is that whilst the ICT indicates that measures have the "potential" to be justified under Article 36 (or 346) TFEU, prior CJEU case law had not provided a clear indication as to what kinds of measure can be justified under Article 36 TFEU and the level of scrutiny to be applied. So far, EU case law has only indicated that national licencing measures applicable to the import, export and transit of dual-use goods (rather than defence products) could be justified on grounds of public security.[55]

This uncertainty may be further exacerbated by the fact that, unusually, the ICT seeks to harmonise national measures justified not only under Article 36 TFEU within the scope of the Treaties but also under Article 346 TFEU outside the Treaties altogether.[56] Prior to the ICT, Member States considered that measures concerning armaments, including licencing in relation to transfers, are automatically and categorically excluded from the TFEU altogether under Article 346 TFEU[57] on the basis that such measures affect Member States' essential security interests.[58] However, the absence of CJEU case law on the transfer of defence

[51] This was repeatedly highlighted by the Commission in the *Consultation Paper supra* note 35 at 3 and COM(2007)765 final *supra* note 37, at 19. On these administrative burdens generally, see Section 2.1 above.
[52] Recitals 2 and 5 ICT.
[53] Recitals 5, 13 and Article 1(3) ICT.
[54] The authors are grateful to Albert Sanchez-Graells for discussing the extent to which the ICT may be said to "channel" or provide certain "modes of application" for, rather than limit the application of, Article 36 TFEU ".
[55] *Criminal Proceedings against Aimé Richardt and Les Accessoires Scientifiques SNC* (367/89) [1991] ECR I-4621; *Fritz Werner Industrie-Ausrüstungen GmbH* v. *Germany* (70/94) [1995] ECR I-3989 and *Criminal Proceedings against Peter Leifer* (83/94) [1995] ECR I-3231. See generally Koutrakos, *EU International Relations Law* (Hart: Oxford, 2006) 419-428.
[56] Directive 2009/81/EC on procurement is not a direct comparator. Directive 2009/81/EC is defined in relevant parts by reference to Article 346 TFEU. However, its primary objective is not to harmonise procurement falling within the scope of Article 36 or 346 TFEU where no prior harmonisation existed. Rather, its objective is to harmonise procedures for the award of contracts that were, in theory, always subject to specific EU Internal Market rules and did not require recourse to an exception (but for which Member States routinely and erroneously invoked Article 346 TFEU).
[57] Whilst difficult to empirically validate, this assessment was made by *UNISYS*, *supra* note 4, at 70-72 and the *Impact Assessment*, *supra* note 4, at 19.
[58] More specifically, Article 346(1)(b) TFEU which provides: "[…] any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes […]" In 1958, the Council compiled a list of armaments to which Article 346(1)(b) TFEU

products renders it unclear why Member States would not consider such measures justified under Article 36 TFEU, at least in the first instance and which similarly fails to clearly delimit the relationship between Article 36 and 346 TFEU.[59] Outside the specific context of transfers, for example in the area of defence procurement, the CJEU continues to refine its general interpretation that Article 346 TFEU does not represent an automatic or categorical exclusion of trade in defence products from the otherwise applicable TFEU.[60] Similar to the free movement exceptions such as Article 36 TFEU, Article 346 TFEU is subject to a narrow interpretation.[61] Member States must specifically invoke Article 346 TFEU and prove that a situation justifying its use exists. In the Commission's view, it is not possible to infer from Article 346 TFEU that there is a general proviso inherent in the TFEU covering all measures taken by Member States and that it has no effect on its legislative power to adopt harmonising legislation in the area of defence product transfers.[62] Again, it could argued that the ICT attempts to harmonise certain measures that Member States might have previously sought to justify under Article 346 TFEU without denying the possibility to continue to invoke Article 346 TFEU where security interests cannot be protected through the ICT's application. Notwithstanding, the ICT exposes continuing uncertainty surrounding the relationship between Article 36 and 346 TFEU.

On balance, then, it might be suggested that it is better to have a Directive that seeks to reduce the effect of lawful restrictions through EU measures than leaving restrictive national measures in place uncontrolled. Member States would no loner need to introduce or maintain other restrictions unless exceptionally required by Articles 36 or 346 TFEU.[63] Ultimately, it should also be acknowledged that, in practice, it is questionable whether the compatibility of the ICT with the EU Treaties would be challenged. There is no evidence to suggest that suppliers brought such challenges against national transfer measures before the ICT and Member States appear to accept the legal bases on which the ICT was adopted.

---

applies. See Council-Decision 298/58 of 15 April 1958 (not published). On Article 346 TFEU in detail: Trybus, *Buying Defence and Security in Europe*, *supra* note 2, at 87-128; Trybus, *European Union Law and Defence Integration* (Hart: Oxford, 2005), Chapter 5 and Trybus, "The EC Treaty as an instrument of European defence integration: judicial scrutiny of defence and security exceptions" (2002) 39 CML Rev 1347-1372. See also the interpretations of Koutrakos, "The Application of EC law to Defence Industries—Changing Interpretations of Article 296 EC" in Barnard and Odudu (eds.), *The Outer Limits of European Union Law* (Hart: Oxford, 2009), at 307-328 and Pourbaix, "The Future Scope of Application of Article 346 TFEU" (2011) 20 PPL Rev 1-8. On the 1958 List see Trybus, "On the list under Article 296 EC" (2003) 12 PPL Rev NA15-20 and *Buying Defence and Security in Europe*, ibid., at 88-104 (including a version of the 1958 List).

[59] It has been argued that Article 346 TFEU is a special national security derogation for armaments superseding the public security justification of Article 36 TFEU: Trybus, *European Union Law and Defence Integration*, *supra* note 53, at 166. For the view that Article 346 TFEU is not *lex specialis* to Article 36 TFEU, see Koutrakos, *Trade, Foreign Policy and Defence in EU Constitutional Law: The Legal Regulation of Sanctions, Exports of Dual-use Goods and Armaments* (Hart Oxford 2001) 188.

[60] *Commission* v. *Spain* (C-414/97) [1999] ECR I-5585, [2000] 2 CMLR 4. This interpretation was reiterated in a 2006 Commission Interpretative Communication: Commission, 'Interpretative Communication on the Application of Article 296 of the Treaty in the field of defence procurement' (Communication) COM (2006)779 final. This position has been confirmed and further refined in subsequent judgments: See the *Agusta* judgments (*Commission* v. *Italy* (C-337/05) [2008] ECR I-2173 and *Commission* v. *Italy* (C-157/06) [2008] ECR I-7313); the *Military Exports* judgments (*Commission* v. *Finland* (C-284/05) [2009] ECR I-11705; *Commission* v. *Sweden* (C-294/05) [2009] ECR I-11777; *Commission* v. *Italy* (C-387/05) [2009] ECR I-11831; *Commission* v. *Greece* (C-409/05) [2009] ECR I-11859; *Commission* v. *Denmark* (C-461/05) [2009] ECR I-11887; *Commission* v. *Portugal* (C-38/06) [2010] ECR I-1569; *Commission* v. *Italy* (C-239/06) [2009] ECR I-11913) and *Finnish Turntables* (*Insinööritoimisto InsTiimi Oy* (C-615/10), ECLI:EU:C:2012:324).

[61] *Johnston* (222/84) [1986] ECR 1651, [1986] 3 CMLR 240, para. 26. See also *Salgoil* (C-13/98) [1968] ECR 453, 463, [1969] CMLR 181, 192 and *Commission* v. *Italy* (C-7/68) [1968] ECR 633, 644.

[62] *Impact assessment*, *supra* note 4, at 19-20 citing Opinion of Mr Advocate General La Pergola, Case C-273/97, Angela Maria Sirdar v The Army Board and Secretary of State for Defence, point 11.

[63] Recital 13 ICT.

Further, the EU legislator's choice of a Directive is consistent with practice in relation to licensing and transfers in other related areas such as firearms and explosives for civil use.[64] The ICT also mirrors calls for action to regulate transfers in the context of dual-use goods. For example, the EU has adopted a Regulation establishing a common set of EU rules for the export of dual-use goods.[65] However, it has been criticised that the Regulation continues to enable Member States to impose restrictive controls on intra-EU transfers of dual-use goods and refers to the ICT as a potential model on which to base future harmonisation.[66]

2.2.2. *Nature and scope of harmonisation*

The above has considered the EU's competence to harmonise measures operating in the area of national security through the ICT. The key purported objective of harmonisation is to simplify intra-Union transfers.[67] However, it is questionable to what extent the ICT achieves real substantive harmonisation. Simplification may address the complexity of national licencing measures by standardising the types of licence that must be used. However, as will be discussed, this does not address other equally, if not more, restrictive barriers to trade, a prime example being onerous and restrictive licencing conditions, the national diversity of which was criticised in Section 2.1. This issue is compounded by the fact that the ICT does not fully address the underlying causes of complexity and diversity. Short of the EU adopting EU-wide comprehensive policies to coordinate *both* the transfer and export of defence products, the ICT's default position is largely to accommodate rather than systematically address these concerns through its provisions. An important limitation of the ICT's scope is that harmonisation of transfer rules and procedures is said to be without prejudice to: Member State policies regarding the transfer of defence-related products; [68] Member States' international obligations or commitments;[69] and Member States' policies on the export of defence-related products.[70] Consequently, as will be discussed in Section 4, Member States therefore retain considerable discretion to determine the terms, conditions and products applicable for each type of licence including export limitations. National controls on exports to third countries continue to remain a key organising construct which conditions the ICT regime.[71] In short, the simplification achieved through standardised licencing is to some extent undermined by the continuing diversity of national approaches on key issues left to

[64] Council Directive 91/477/EEC on control of the acquisition and possession of weapons [1991] OJ L 256/51 and Council Directive 93/15/EEC on the harmonization of the provisions relating to the placing on the market and supervision of explosives for civil uses [1993] OJ L 121/20. The ICT is without prejudice to these Directives. See Recital 15 ICT.

[65] Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items [2009] L 134/1.

[66] The Dual-use Regulation requires controls on the transfer of certain items listed in Annex IV: Articles 2(11) and 22. See Commission, Green Paper, *The dual-use export control system of the European Union: ensuring security and competitiveness in a changing world* COM(2011)393final, at 18 and Commission Staff Working Document, *Strategic export controls: ensuring security and competitiveness in a changing world – A report on the public consultation launched under the Green Paper* COM(2011) 393final, at 19.

[67] Recitals 6 and 43 and Article 1 ICT. See Recital 3 ICT referring to the more general objectives of removing disparities which may distort competition and hamper innovation, industrial cooperation and competitiveness of the defence industry within the EU.

[68] Recital 6 ICT.

[69] Recital 7 ICT.

[70] Ibid and Article 1(2) ICT. See also Recital 30 ICT referring to Member State cooperation within 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 [2008] OJ L 335.

[71] The number of references to exports in the Recitals are alone indicative. See Recitals 4, 7, 12, 27, 28, 29, 30, 31, 33, 34, 35 and 36 ICT. As *GRIP*, *supra* note 5, observes at 60: "Member States have used the opportunity given by the Directive to impose specific restrictions in their general transfer licences in order to maintain the coherence of their arms export control policy."

Member State discretion. It is suggested that any future revision of the ICT would need to identify more clearly its harmonisation objectives.

The ICT is also equivocal with regard to its scope of coverage concerning intergovernmental cooperation. As will be discussed in Section 4.3.1, the ICT requires Member States to impose mandatory publication of general licences in certain cases but Article 5(3) provides that Member States may publish a general licence for the purposes of participation in an "intergovernmental cooperation programme".[72] However, as will be discussed in Section 4.3.3 Article 4(2)(c) provides that Member States may exempt from licencing transfers necessary for the implementation of a "cooperative armament programme between Member States".[73] Further, Article 4(3) also provides that a Member State or the Commission at their own initiative may seek to amend the ICT's categories of transfer currently exempt from licencing to also exempt a transfer necessary for intergovernmental cooperation.[74] Yet, Article 1(4) also provides that the ICT does not affect the possibility for Member States to pursue and further develop intergovernmental cooperation, whilst complying with the ICT's provisions.[75] Thus, the ICT simultaneously provides for optional subjection of intergovernmental cooperation programmes to general transfer licences, optional exemption of cooperative armament programmes from licencing and the future possibility of optional exemption of intergovernmental cooperation programmes from licencing with the continuing possibility to pursue and further develop intergovernmental cooperation outside the ICT. Therefore, on the one hand, it is possible that the LoI identified in Section 2.1 could continue to provide an independent framework for the development of more detailed licencing measures thereby potentially influencing the future development of the ICT regime.[76] On the other hand, the co-existence of intergovernmental and supranational licencing regimes in a "two-speed" Europe may not be sustainable. The LoI *acquis* has already been largely transferred to the EU in light of the EU's exercise of competences in the field of defence trade.[77] Further, certain Member States may argue that licencing measures adopted outside the framework of the ICT to which they are not party may be discriminatory. Indeed, it is recalled from Section 2.1 that this was identified as a particular reason for introducing the ICT.[78] Therefore, a revised ICT should clarify its scope of coverage with respect to intergovernmental cooperation.

Having considered the legal basis, nature and scope of harmonisation, the remaining sections of this article examine the level of harmonisation achieved by the ICT.

3. General coverage of the ICT

The ICT applies to defence-related products.[79] These products are set out in an Annex which must correspond to the EU Common Military List ("CML")[80] adopted in the context of

[72] "Intergovernmental cooperation programme" is not defined.
[73] Similarly, "Cooperative armament programme" is not defined.
[74] See Recital 16 ICT and Article 4(3)(c) ICT.
[75] Recital 8 and Article 1(4) ICT. "Intergovernmental cooperation" is not defined.
[76] The authors are grateful to Mr. Ian Bendelow for discussions on the potential continuing role of the LoI initiative in light of the ICT.
[77] The relevant Sub-Committee recognises the EU's competence to regulate intra-Union transfers.
[78] Section 2.1, *supra* note 38.
[79] Articles 2 and 3(1) ICT.
[80] Common Military List of the European Union [2007] OJ L88/58. See also Recital 10 ICT. This list must not be confused with that of Council Decision of 1958 (Article 346(2) TFEU list), *supra* note 58, which determines the material scope of Article 346(1)(b) TFEU.

Council Common Position 2008/944/CFSP with regard to defence exports.[81] Article 13(1) ICT requires the Commission to update the Annex in order to strictly correspond to the CML and which has, to date, already been amended three times.[82] It follows that the ICT's coverage of products is determined by the Council. The ICT's application to products corresponding to the CML is intended to address the criticism concerning the variable use of national lists discussed in Section 2.1. However, the ICT's harmonisation-through-simplification objective has already been compromised. The Annex should be identical to the CML at all times but, in practice, the Annex has not fully corresponded to the CML for most of the year because the procedure for amending the Annex has taken at least seven months followed by a further transposition period.[83] The Commission therefore rightly considers it necessary to simplify the procedure for aligning the Annex and CML.[84]

4. Transfers and licences

The fundamental innovation intended by the ICT is to qualitatively differentiate transfers from exports. Firstly, what used to constitute "exports" from one Member State to another within the EU now constitute intra-Union "transfers". Article 3(2) defines a 'transfer' as "any transmission or movement of a defence-related product from a supplier to a recipient in another Member State".[85] It must be further qualified that whilst a transfer of defence products from one Member State to another must be subject to prior authorisation in the form of a licence, a further licence cannot be imposed for mere passage[86] of those products through one or more other Member States or for entrance onto their territory unless justified on grounds of public security or public policy.[87] Secondly, the ICT aims to facilitate the progressive replacement of individual *ex-ante* control, exercised through narrowly defined licences, with more broadly defined licences compensated by *ex-post* controls, including conditions on export, which are designed to foster mutual trust.[88] It is therefore important to acknowledge that the ICT does not create a European "licence-free zone";, licences continue to be subject to at least some prior authorisation through 'transfer licences' which are to be distinguished from 'export licences'.[89] Two principal reasons have been identified for

[81] The CML is updated by the Council annually usually as a consequence of an amendment to the 'Munitions List' adopted in the framework of the Wassenaar Arrangement. The latest version is The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, List of Dual-Use Goods and Technologies and Munitions List, WA-LIST (14) 2* 25 March 2015.

[82] Recitals 37 and 45 and Article 13(1) ICT. See Commission Directive 2010/80/EU [2010] OJ L308/11 ; Commission Directive 2012/10/EU [2012] OJ L85/3 ; Commission Directive 2014/108/EU [2014] OJ L359/117.

[83] *Transposition Report*, *supra* note 5, at 13.

[84] ibid. See also *GRIP*, *supra* note 5, at 64.

[85] Article 3(3) ICT defines a 'supplier' as the legal or natural person established within the [EU] who is legally responsible for a transfer. Article 3(4) ICT defines a 'recipient; as a legal or natural person established within the [EU] who is legally responsible for the receipt of a transfer.

[86] Recitals 9, 17 and Article 4(1) ICT. Article 3(7) ICT defines 'passage through' as "the transport of defence-related products through one or more Member States other than the originating and receiving Member States."

[87] Recital 14 ICT identifies the safety of storage, risk of diversion and prevention of crime as legitimate reasons. Germany, Hungary and the Netherlands have made use of these exceptions to maintain entrance and passage licences or prior notification systems with regard to certain categories of products. See *Transposition Report*, *supra* note 5, 18. According to the latest report on *The impact of the 'defence package' Directives on European Defence*, *supra* note 5, at 43 fn72, this can be seen as a limitation to the ICT's application and which, in practical terms, means that companies will have to inquire as to the existence of such measures.

[88] Recital 29 ICT.

[89] Article 3(5) ICT defines a 'transfer licence' as: "an authorisation by a national authority of a Member State for suppliers to transfer defence-related products to a recipient in another Member State." See also Recital 16

retaining a licencing regime. The first concerns the relative infancy of a common foreign policy and "uneven levels of trust" about the extent to which certain external borders maintain sufficient control.[90] The second is that the removal of licencing altogether would render it difficult to enforce certain export controls that are otherwise required by existing international export control regimes.[91] Ultimately, licencing was still considered necessary as a "vehicle" to carry possible re-export limitations.[92]

4.1. *Types of transfer licence*

Prior to the ICT, individual, general, and global licences were available. All three have been retained under the ICT and transposed into national laws.[93] Member States remain free to determine the appropriate choice of licence and the types of products covered by it.[94]

An individual transfer licence must be specifically requested by a supplier granting one specific authorisation for a single transfer of a specified quantity of specified products to be transmitted in one or several shipments to only one recipient.[95] Prior to the ICT, individual licences were most commonly used.[96] Notwithstanding their continued availability, as will be discussed in Section 4.2, the ICT intends to reduce recourse to individual licences.

A general transfer licence is an authorisation granted to suppliers established in one Member State to perform transfers of specified defence-related products to categories of recipients located in another Member State.[97] The main distinguishing feature is that a Member State must publish a general licence in order that a supplier meeting its terms and conditions is directly authorised to transfer without having to specifically request to do so in each case.[98] Removal of such requests enables a freer movement of specified goods and increased security of supply within a nascent Internal Market for defence goods.

Between the extremes of a general licence and individual licence is the global transfer licence. A global transfer licence is a licence which must be specifically requested by a supplier granting a specific authorisation to transfer products to authorised recipients in one or more other Member States.[99] The significant point of departure for the ICT is an attempt to change the type of licence predominantly used in practice away from restrictive individual licences towards broader general licences and to exempt certain types of transfer from licensing requirements altogether.

4.2. *Individual transfer licences*

As indicated in Section 4.1 above, prior to the ICT, individual transfer licences were most common and which contributed significantly to the costs and barriers to trade discussed in Section 2.1.[100] Notwithstanding their continued availability, the ICT intends to reduce recourse to individual licences to four exhaustively defined circumstances discussed

---

ICT. Article 3(6) ICT defines an 'export licence' as: "an authorisation to supply defence-related products to a legal or natural person in any third country."

[90] *Impact Assessment*, *supra* note 4, at 24.

[91] Ibid. identifying Wassenaar and the Missile Technology Control Regime, also acknowledged in Recitals 7 and 28 ICT.

[92] *Impact Assessment*, *supra* note 4, at 24-25.

[93] Ibid., at 4. See also Article 4(4) ICT and *Transposition Report*, *supra* note 5, at 8.

[94] Article 4(5) and Recital 18 ICT.

[95] Article 7 ICT.

[96] *Impact Assessment*, *supra* note 4, at 36.

[97] Article 5(1) ICT.

[98] Article 5(1) and Recital 21 ICT.

[99] Article 6(1) ICT.

[100] *Impact Assessment*, *supra* note 4, at 36.

below.[101] However, beyond prescribing these circumstances, the ICT contains no further provisions regarding the permitted terms and conditions and their period of validity.[102] Limited information has also been provided with regard to Member State use of individual licences under the ICT in terms of the types of products covered, for example.[103]

Concerning the circumstances in which individual licences may continue to be used, the first of these is where the request is limited to one transfer. This is unlikely to be particularly problematic from an Internal Market perspective, given that the licence is not imposed by the licencing authority in order to limit the user's ability to transfer but rather a single transfer is expressly requested by the user.

The second circumstance is where it is necessary for compliance with international obligations and commitments. This reflects the ICT's general approach to ensuring compliance with other international obligations and commitments.[104] Reliance on this circumstance is nevertheless likely to be subject to implied limitations to ensure that those international agreements or arrangements genuinely require an individual licence and are not used to circumvent the ICT's objectives.

The third circumstance is where it is necessary for the protection of essential security interests or on grounds of public policy.[105] As indicated in Section 2.2.2 above, this may be an attempt to accommodate such interests inside the regime rather than through an exception under Article 36 TFEU or derogation under Article 346 TFEU.

The final circumstance is where a Member State has "serious reason" to believe that the supplier will not be able to comply with all the terms and conditions necessary to grant it a global transfer licence (see 4.4 below). This circumstance is problematic for a number of reasons. Firstly, whilst this reinforces the ICT's attempt to institute a hierarchy or preference of licences (i.e. general or global in preference to individual), Member States exercise discretion to determine the terms and conditions (and products) for each type of licence. It is therefore difficult to know which terms and conditions are more or less susceptible to non-compliance. This is symptomatic of the fact that the ICT does not provide clear guidance to Member States in differentiating when a particular type of licence should be used as well as the terms and conditions applicable to each type. Secondly, it is not clear what will constitute a "serious reason" or the threshold and evidence in support of the belief required. It is argued that a revised ICT should retain a circumstance in which an authority grants an individual licence on its own initiative (as opposed to at the supplier's request) and for reasons other than to protect essential security as some default authorisation is necessary.[106] This may, for example, concern the circumstance indicated, namely where there is a risk that a supplier cannot comply with an alternate form of licence but also individual licences may exercise certain legitimate functions, for example, where a transfer involves highly sensitive products. However, in making such provision, clarity is required as to the kinds of reasons that might justify use of an individual licence as well as the burden of proof in order to safeguard against

[101] The conditions for use of an individual licence derive exhaustively from the circumstances permitting their use. This does mean, however, that the ICT does not appear to place any limitations on the duration of validity of an individual licence.

[102] *UNISYS*, supra note 4, at 14 highlights that prior to the ICT, individual licences were typically subject to limited duration, for example, expiring after 12 months or on fulfilment of a specified quantity. In the UK, individual licences under the ICT are considered equivalent to Standard Individual Export Licence (SIELs) and which are valid for two years. See the Department for Business Innovation & Skills, Notice to Exporters 2012/37 Implementation of the European Union Directive 2009/43/EC (Intra-Community Transfer of Defence Goods or 'ICT Directive'), at 3.

[103] *Transposition Report*, supra note 5, at 10.

[104] Recital 7 ICT.

[105] See also Recital 14 ICT.

[106] The authors are grateful to Baudouin Heuninckx for discussions on this issue.

the risk of abuse. The key will be to ensure that the continued availability of individual licences does not prejudice a successful transition to general licences.

4.3. *General transfer licences*

Member States are free to determine the appropriate choice of licence.[107] However, the ICT signals a clear emphasis on general transfer licences as the least restrictive form.[108] Prior to the ICT, Member States, with the exception of the UK, did not provide for extensive use of general licences.[109] The Commission had even considered a regime exclusively comprising general licences.[110] Whilst this could have minimised bureaucracy and significantly improved security of supply, the Commission considered an EU-wide general licencing regime to be unacceptable to the Member States not least because the general licence is not suitable for all types of equipment, especially the most sensitive.[111]

4.3.1. *Circumstances requiring general licences*

The ICT provides a list of "at least" four circumstances in which publication of a general licence is mandatory.[112] Therefore, Member States may exceed the minimum by requiring general licences in additional circumstances not listed.[113]

Perhaps the most significant circumstance requiring a general licence is where the recipient is certified in accordance with the ICT's certification provisions. The combined ability of a supplier to rely on a general licence compensated by certification of the recipient is a key component of the ICT and which is reserved for discussion in Section 6.[114]

A second circumstance is where the recipient is part of a Member State's armed forces or a defence contracting authority, purchasing for the exclusive use by that Member State's armed forces. This circumstance is intended to have a specific impact on defence procurement. For instance, Article 23(a) Defence and Security Procurement Directive 2009/81/EC provides that, in order to ensure security of supply, a contracting authority can require a tenderer to demonstrate that it will be able to honour its obligations regarding the export, transfer and transit of goods associated with the contract. It is usually the case that at the time of tender preparation, the authorisation to transfer equipment will not yet have been granted. Therefore, in some cases, contracting authorities may consider that a foreign supplier poses a greater risk with regard to guaranteeing securing of supply of the equipment than a domestic supplier given the difficulty of having to obtain a licence. The Commission's Guidance Note on Security of Supply, published to assist transposition of Directive 2009/81/EC, suggests that this uncertainty is now removed given that a general licence will

[107] Article 4(5) ICT.

[108] *GRIP*, *supra* note 5, at 42: "the licence of reference."

[109] *Impact Assessment*, *supra* note 4, at 15, 34. The UK has widely implemented a general licence for military goods under Open General Export Licences (OGELs). See Masson et al, *The "Transfer Directive"*, *supra* note 3, at 15-19 on British practice and 19 on German practice. According to one respondent interviewed for this article, Mr. Ian Bendelow, this has enabled an effective transposition of the ICT in the UK with relatively few adjustments to UK licencing practice. See also Notice to Exporters 2012/37 *supra* note 103 referring at 2 to the ICT model being "UK inspired".

[110] *Impact Assessment*, *supra* note 4, at 34-35.

[111] *Impact Assessment*, *supra* note 4, at 35.

[112] Article 5(2)(a)-(d) ICT.

[113] On minimum harmonization under EU law generally, see Weatherill, "Beyond preemption? Shared competence and constitutional change in the European Community" in O'Keefe and Twomey (eds) *Legal Issues of the Maastricht Treaty* (Chancery Law Publishing, 1994) and Dougan, 'Minimum Harmonization and the Internal Market' (2000) 37 CML Rev. 853, 854-856.

[114] Article 9 ICT concerns the certification of recipients of defence-related products. See also Recital 23 ICT.

have already been published with the necessary authorisation.[115] Recital 22 ICT also indicates that this will "greatly increase" security of supply to armed forces. However, as will be discussed in Section 5 below, general licences can still be withdrawn or granted with end-use restrictions and much still depends on the type of products covered, all of which may continue to hinder security of supply.[116] More fundamentally, it may be questioned to what extent security of supply can be guaranteed whatever licence is used not least because such guarantees only represent the tenderer's position at the time of tender.[117] Rather, the best assurance of optimal security of supply is to eliminate any licensing requirement altogether but which is currently only possible if a Member State decides to exempt armed forces transfers from prior authorisation. As will be indicated in Section 4.3.3 below, there is an argument for presumptively exempting armed forces transfers from prior authorisation.

The third and fourth circumstances are where the transfer is made for the purposes of demonstration, evaluation or exhibition or for the purposes of maintenance and repair.[118] Again, as will be indicated in Section 4.3.3, such transfers could be the subject of presumptive exemption from a licencing requirement altogether.

In addition, the ICT also provides that Member States participating in an intergovernmental cooperation programme may publish a general licence for transfers necessary for the programme's execution.[119] It appears that few large armaments producing Member States have directly transposed this option.[120] As explained in Section 4.3.3 below, such transfers could be the subject of presumptive exemption from a licensing requirement altogether although this matter is complicated by general uncertainty regarding the extent to which intergovernmental cooperation should be subject to or excluded from the ICT, an issue identified in Section 2.2.2 above.

Overall, the potential variability of national transposition and practices resulting from minimum harmonization are already apparent. It has been reported that some Member States have only provided for mandatory general licences in two out of four circumstances.[121] Further, some Member States have exceeded the minimum and subjected transfers to mandatory general licences in other circumstances, for example, transfers to the police, customs, border guards, and coast guards.[122] The ICT seems to suggest that further general licences could be published where the risks to security are low in view of the nature of the

[115] DG Internal Market and Services, Guidance Note, *Security of Supply*, at 10. There is no comparable Guidance Note for the implementation of the ICT although it must be acknowledged that the issuance of such guidance is rare.

[116] This view has also been expressed by the UK in its guidance published to assist interpretation of the UK Regulations implementing Directive 2009/81/EC. See The Defence and Security Public Contract Regulations 2011, Chapter 12 – Security of Supply, 7, para. 38.

[117] Heuninckx, 'Trick or Treat?' *supra* note 2, 24.

[118] In the case of maintenance and repair, the recipient must be the originating supplier of the defence-related products. Article 5(2)(d) ICT.

[119] Recital 24 and Article 5(3) ICT.

[120] According to the *Transposition Report*, supra note 5, at 9, Spain envisages general licences for transfers related to operations of NATO and NAMSA; Bulgaria, Greece, Cyprus, and Malta envisage general licences for cooperation programmes, provided for in Article 5(3). See also *The impact of the 'defence package' Directives on European Defence*, *supra* note 5, 46, fn 82. Importantly, this means that large armaments-producing states such as France, Germany, Sweden and the UK have not transposed this option. The authors are grateful to Baudouin Heuninckx for this observation. However, it is possible that because this is not a mandatory provision, Member States have not felt the need to transpose it. Thus, the absence of formal transposition of this provision should not necessarily be taken as an indication that this option is not available.

[121] See *The impact of the 'defence package' Directives on European Defence*, ibid., at 45-46.

[122] See France: Arrêté du 6 janvier 2012 relatif à la licence générale de transfert dans l'Union européenne de produits liés à la défense à destination de la police, des douanes, des gardes-frontières et des gardes-côtes d'un Etat membre dans un but exclusif d'utilisation par ces destinataires, JORF n°0008 of 10/01/2012, at 419. For other types of general licence identified as used in a range of Member States, see *GRIP*, *supra* note 4, at 19-22.

product and recipients.[123] However, as will be suggested in Section 4.3.3, the ICT's focus should be on subjecting the highest risk transfers to licencing whilst exempting low risk transfers from licencing altogether to the extent possible, rather than establishing minimum licencing requirements whatever the risk.

4.3.2. *Coverage of general licences*

It is recalled from Section 3 that Member States determine not only the choice of licence but also the types of products listed in the Annex corresponding to the CML that will be covered by the licence. [124] Several issues have arisen in this regard. Firstly, practice already indicates that, whilst all Member States refer to the CML, Member States are also continuing to use national ammunition lists or other international control lists when determining the coverage of chosen licences.[125] This variability is exacerbated by the fact that, as indicated, the Annex does not always correspond to the CML.[126] Secondly, it is questionable to what extent the ICT provides an effective balance between Member States' freedom to limit the types of products that can be subject to a general licence and ensuring that general licences can be used for as broad a range of products as possible. On the one hand, Member States appear to define the scope of their general licences case-by-case and based on factors such as the recipient in question, the sensitivity of the product, risk assessment and diversion risk on export.[127] This is a perfectly legitimate exercise, in particular allowing licencing authorities to tailor a licence to a particular security scenario.[128] On the other hand, post-transposition practice suggests that there is a lack of consensus as to how to define or classify "sensitive"[129] products that should be excluded from the scope of a general licence.[130] Given the need to encourage the uptake of general licences, it is understandable that the ICT provides maximum flexibility to select from the full range of listed products in defining general licences. Further, it may be argued that at least the ICT is requiring Member States to make assessments about the sensitivity of products in the context of using general licences rather than as a basis to simply legitimate default recourse to individual licences. An open question concerns whether challenges could be made to Member State licencing decisions regarding the choice of products covered, in particular, in light of proportionality concerns. It is suggested that a revised ICT could include more explicit provisions requiring that any limitations on the categories of products capable of being transferred under a general licence are based on a genuine and proportionate control need.[131] Whilst Member States might argue that this impinges on the exercise of Member States' transfer policies, it has been observed that Member States practice at present "varies greatly […] and patterns are difficult to establish".[132] Lack of "visibility and clarity" of different national lists,[133] has ultimately made

[123] Recital 25 ICT.
[124] Recital 18 and Article 4(5) ICT. Concerning general licences specifically, see Article 5(1) ICT.
[125] *GRIP supra* note 5, 23-27, 28-9, 38-9.
[126] Ibid at 25, Luxembourg appeared to be the only country referring to the most recent version of the ICT Annex in the definition of defence goods covered by its general transfer licences.
[127] *GRIP*, *supra* note 5, at 23.
[128] The authors are grateful to Baudouin Heuninckx for this observation.
[129] This must be contrasted with Article 4(8) ICT which indicates that the sensitivity of a transfer of components is relevant to determining the application of any export limitations for components. See Article 4(8) ICT.
[130] *GRIP supra* note 5, at 38.
[131] Article 4(7) ICT already requires Member States to assess the sensitivity of the transfer when determining the terms and conditions of transfer licences for components, taking into account the nature and significance of the components.
[132] *GRIP*, *supra* note 5, at 27.
[133] *GRIP*, ibid., at 27. According to the *Transposition Report*, *supra* note 5, at 9 only six Member States had communicated their respective lists to the Commission.

use of general licences less attractive for companies.[134] Therefore, at least some attempt should be made to ensure that general licences are not being restrictively defined. A balanced assessment indicates that, over time, use of the ICT may, at the very least, reveal that there are certain core categories of listed products for which general licences are clearly more suitable. This may also reveal that it may well be proportionate to exclude certain categories from being subject to a general licence.[135]

It has been suggested that the ICT should ideally include a harmonised list of covered products using the CML as an already widely used reference point with clearer correspondence to certain international control lists.[136] Ideally, a harmonised list would be comprehensive based on a common understanding of "sensitive products" to be definitively included or excluded from the list. However, it appears impossible at this stage to recommend a detailed list of categories of sensitive products to be excluded that would be accepted by all Member States.[137] It has therefore been recommended that a positive or minimum list should be adopted.[138] Determining "sensitivity" of products based on product coverage rather than Member State discretion may reduce subjectivity. Several Member States and companies have called for such a list "while taking into account national limitations" which would presumably need to be clearly defined.[139] However, due to the national security context some flexibility needs to be retained to encourage the use of general licences in practice.

4.3.3. *Exemptions*

It is recalled from Section 4.3.1 that the ICT identifies four circumstances in which general licences are required and one where a general licence is permitted. However, the ICT also identifies five circumstances in which Member States may optionally exempt transfers from prior authorisation altogether. [140] As will be discussed, it is suggested that the similarity between certain circumstances requiring or permitting general licences and certain of those permitting exemption from licencing altogether indicate uncertainty as to the level at which to set the floor of harmonisation. On the one hand it could be argued that the exemptions merely offer Member States the option of going beyond harmonisation to achieve total licence-free liberalisation. On the other hand, it also raises legitimate questions as to whether certain circumstances requiring or permitting use of general licences should be subject to prior authorisation through a licence as a general rule.

The two circumstances providing optional exemption from prior authorisation and which appear to be the least controversial in achieving total liberalisation are where the EU, NATO, the International Atomic Energy Agency or other intergovernmental organisations send supplies in the performance of their tasks[141] and "the transfer is linked to humanitarian aid in the case of disaster or as a donation in an emergency."[142] As indicated in Section 4.3.1, there are no similar circumstances otherwise requiring mandatory use of a general licence. Concerning the first circumstance, whilst supplier or recipient status as an international body does not automatically eliminate security and export diversion risks, such risks are likely to be limited in transfers between allies as opposed to instances in which a recipient is a private

[134] *GRIP*, *supra* note 5, at 39.
[135] An obvious example might be category ML17g nuclear power generating equipment. The authors are grateful to Baudouin Heuninckx for this observation.
[136] *GRIP*, *supra* note 4, at 63 emphasises the design of the list based specifically on the Wassenaar List.
[137] Ibid., at 39.
[138] *GRIP*, *supra* note 4, at 63.
[139] Ibid., at 48 and 63.
[140] Article 4(3) ICT further provides for the Commission on its own initiative or at a Member State's request to amend the ICT to exempt three additional circumstances from prior authorisation.
[141] Article 4(2)(b) ICT.
[142] Article 4(2)(d) ICT.

economic operator. Not all Member States have transposed this type of exemption.[143] Concerning the second circumstance, in addition to enabling expeditious transfer, references to disasters and donations suggest that the material in question will not raise major security concerns. This exemption is also consistent with the EU's humanitarian obligations.[144]

More problematic are two circumstances permitting optional exemption from prior authorisation which, broadly construed, cover the same circumstances in which Member States must otherwise subject to mandatory general licencing. The first is where the supplier or recipient is a governmental body or part of the armed forces.[145] This is similar to the mandatory ground for use of a general licence discussed in Section 4.3.1 above.[146] The second is where the transfer is necessary for or after repair, maintenance, exhibition or demonstration.[147] Again, this is similar to the mandatory ground for use of a general licence discussed in Section 4.3.1.[148] Concerning the government body and armed forces exemption, a similar rationale applies to that of exemption of transfers by international organisations. Again, not all Member States have transposed or made use of this type of exemption.[149] Concerning the demonstration to repair exemption, this exemption reflects the general reality that products at the pre-production or post-production stage carry a lower level of risk. A number of Member States have made use of this exemption.[150]

In addition to the listed exemptions, the Commission (or Member State on request) may amend the list of exemptions from prior authorisation to also include cases where *inter alia* it is necessary for "intergovernmental cooperation".[151] Conversely, as indicated in Section 4.3.1 above, in addition to the list of circumstances requiring mandatory publication of a general licence, the ICT also provides that Member States participating in an intergovernmental cooperation programme concerning the development, production and use of one or more-defence related products may publish a general transfer licence under the programme.[152] This "half-way" position between exemption from licencing and mandatory general licencing reflects both the importance and flexibility attributed to the objectives of cooperative procurement programmes under the Defence Package as a whole. The Defence and Security Procurement Directive 2009/81/EC similarly contains a specific provision permitting the exclusion of cooperative programmes based on research and development from its contract award procedures to ensure flexibility when procuring under, and executing, such programmes.[153] An exemption from licencing requirements for transfers is broadly consistent with this flexibility objective, although, as indicated in Sections 2.2.2 and 4.3.1

[143] *Transposition Report*, *supra* note 5, at 6.
[144] Articles 208-211 TFEU.
[145] Article 4(2)(a) ICT.
[146] Article 5(2)(a) ICT
[147] Article 4(2)(e) ICT.
[148] Article 5(2)(c) and (d) ICT.
[149] *Transposition Report*, *supra* note 5, at 6.
[150] Bulgaria, Estonia, Greece, France, Malta, Austria, Slovenia, Slovakia and Sweden. See *Transposition Report, supra* note 4, at 7.
[151] Article 4(3)(c) ICT, in turn, referring to Art.1(4) but which does not define "pursue and further develop intergovernmental cooperation".
[152] Article5(3) ICT. An example includes the *Eurofigher/Typhoon* fighter aircraft programme. For a discussion of EU armaments collaboration, see Heuninckx, "A Primer to Collaborative Procurement in Europe: Troubles, Achievements and Prospects" (2008) 17 PPL Rev 123-145 and *The Law of Collaborative Defence Procurement Through International Organisations in the European Union*, Ph.D. thesis submitted to the University of Nottingham and the Belgian Royal Military Academy, July 2011 (on file); and *The Law of Collaborative Defence Procurement in the European Union* (CUP, 2016), Chapter 8.
[153] See Article 13(c) Directive 2009/81/EC. For a discussion of this provision, see Trybus, *Buying Defence and Security in Europe*, *supra* note 2, at 283-288.

above, the extent to which intergovernmental cooperation should be subject to or excluded from the ICT requires clarification under a revised ICT.

The correspondence between certain circumstances permitting optional exemption and those requiring mandatory general licencing begs the question as to whether a revised ICT could be recalibrated. Firstly, the two circumstances providing optional exemption from prior authorisation which are not also covered by general licences i.e. international organisation and humanitarian transfers could be categorically excluded .[154] Secondly, the armed forces and demonstration to repair circumstances which are subject to general licences but which also correspond to circumstances permitting optional exemption could be presumptively excluded from prior authorisation altogether. This would presumptively mean total licence free liberalisation perhaps subject only to possible prior authorisation if a public policy or public security reason can be established.[155] This would send a clearer signal that such "low-risk" transfers should operate in a uniform licence free zone unless it can be established that prior authorisation is necessary in exceptional cases. As indicated in Section 2.2., given that any form of licencing requirement is generally considered to be a restriction on the Internal Market, the fewer circumstances subject to licencing the better.[156] At present, the current portfolio of optional exemptions offers flexibility but also indicates a certain ambivalence as to the baseline at which to set the baseline of harmonisation.[157]

4.4. *Global transfer licences*

As indicated in Section 4.1, the global transfer licence is situated between the extremes of a general licence and individual licence.[158] According to the Commission, the main simplification potential of the global licence is that it is not specific to a precise shipment and, thus, can be used several times to cover similar transfers.[159] Further, global transfer licences are typically not subject to quantitative limits and are valid over a long period.[160] Historically, global licences have been considered particularly helpful in cases of routine shipments to habitual customers or for SMEs with a limited catalogue.[161] Their potential had already been realised in certain Member States before the ICT.[162]

However, it is observed that the intended effect of global licences is uncertain and which is difficult to discern in light of no or limited information that has been communicated regarding transposition of general licences under the ICT.[163] Firstly, the underlying rationale for global licences is now unclear. The Commission opted against a 'global licences only' approach because a combination of general and global licences would enable general licences

[154] This would not necessarily preclude the possibility for Member States to justify a licencing requirement based on Article 36 or 346 TFEU.

[155] Concerning cooperative programmes, there may be a case for the use of a licence if the programme concerns sensitive R&D.

[156] Perhaps even more radically, it may be questioned whether it would be possible to introduce requirements short of licencing to ensure that such transfers are subject to at least some form of monitoring provided such monitoring does not, itself, infringe EU law.

[157] Article 5(2) enumerating the circumstances requiring mandatory general licences simply indicates that it is "without prejudice to Article 4(2)" enumerating the list of optional exemptions from prior authorisation.

[158] Article 6(1) ICT.

[159] *Impact Assessment*, *supra* note 5, at 36.

[160] Ibid., at 35.

[161] *Impact Assessment*, *supra* note 5, at 35. See also *GRIP*, *supra* note 5, at 39.

[162] *GRIP*, ibid. In 2002, France introduced global licences based on a catalogue of participating companies, specifically targeting SMEs. See *Impact Assessment*, *supra* note 4, at 36. The first 35 licences replaced 1,250 individual licences, a reduction in administrative bureaucracy by a ratio of 36. Similarly, during the ICT's preparatory phase, Romania indicated that it had replaced 700 individual licences with 7 global licences: ibid.

[163] *Transposition Report supra* note 5, 10. In the UK, these are the equivalent of Open Individual Export Licence (OIELs). See generally, See Notice to Exporters 2012/37 *supra* note 103, at 3.

for routine non-sensitive transfers while also accommodating the necessary flexibility for more sensitive transfers through global licences.[164] Therefore, whilst global licences were formerly used to cover routine shipments of less sensitive products in great quantity over a long period, it now appears that global licences should be used to cover less routine shipments of more sensitive products over a maximum period of three years.[165] Secondly, in contrast to general and individual licences, the ICT does not prescribe circumstances for use of global licences.[166] Thirdly, Member States must determine the products or categories of products covered and the authorised recipients, again, indicating considerable discretion in the use of such licences.[167] It is argued that this does not make the global licence the intended "default" type of licence under the ICT. It is suggested that if this had been the EU legislator's intention, more detailed provision on global licences would have been included. The inclusion of global licences may reflect the view that they are intended merely as a transitional measure until general licences are fully operational.[168]

The Commission had acknowledged a small risk that Member States may define global licences in such restrictive terms as to be equivalent to individual licences, but states that there is little reason to fear such abuses as a Member State would compromise the competitive position of its industries.[169] However, this does presuppose that competition rather than national security or some other protectionist motive will be the primary determinant when making licencing decisions. Nevertheless, global licences could be relied on, in particular, by small businesses used to such licences in order to avoid the perceived administrative and resource burdens of the certification regime under general licences discussed in Section 6 below.[170]

If global licences are transitional, it is suggested that the ICT should provide an illustrative list of circumstances in which a global licence must or can be used with even greater clarity required if it is clarified that global licences are an important default licence under the ICT. Either way, current provision on global licences looks somewhat anomalous when compared to the more detailed provisions on general and individual licences.

4.5. *The details: licence form, registration, terms, conditions and supplier information*

The ICT neither prescribes any particular documentary form for general licences nor their publication in specific locations. According to recent reports on implementation of the ICT, general licences are often difficult to access, available in various documentary formats varying in length, published in languages other than English, and not generally available through the official websites of the relevant national authorities.[171] Public visibility is integral to the credibility of the ICT regime among its users. A revised ICT could introduce further harmonisation to address some of these issues, for example, by specifying a common

[164] *Impact Assessment*, *supra* note 4, at 36.
[165] Article 6(2). Admittedly, Article 6(2) ICT provides that this period may be renewed although does not identify a minimum or maximum length of renewal. The UK's latest guidance suggests that the limitation of global licences to only three years constitutes a "significant difference" to previous UK practice. See Notice to Exporters 2012/37 *supra* note 103, at 3.
[166] Rather, Recital 26 ICT simply states that "[w]here a general transfer licence cannot be published, Member states should, upon request, grant a global transfer licence […] except in the case set out in this Directive […]".
[167] Article 6(2) ICT.
[168] *GRIP*, *supra* note 5, at 39.
[169] Ibid.
[170] *The impact of the 'defence package' Directives on European Defence*, *supra* note 5, at 49 and fn95.
[171] *GRIP*, *supra* note 5, at 19 and 20.

language and format or template. A more complex issue would be the centralisation of electronic access to general licence information.[172]

Even if suppliers can overcome difficulties experienced regarding documentation, before granting a general licence, the ICT provides that a Member State may lay down conditions for registration prior to first use.[173] Therefore, Member States retain considerable discretion to define procedures for registration and de-registration, the latter not mentioned at all in the ICT. Again, a revised ICT could introduce further harmonisation regarding the requirement of registration and de-registration in order to ensure greater conformity of approach across the Member States.

In addition, whilst certain terms and conditions may protect legitimate public policy or security concerns, it is recalled from Section 2.1 that Member States continue to exercise discretion to determine all terms and conditions.[174] Post-transposition practice indicates that Member States continue to rely on a diversity of terms and conditions most, if not all, of which appear to be disproportionate.[175] Therefore, many of the criticisms predating the ICT regime continue to predominate under the current regime. This is a highly sensitive issue which Member States may perceive to be a matter falling within the discretion of national transfer policies. Notwithstanding, a revised ICT could seek to place certain explicit controls on licencing conditions, for example, to ensure that such terms and conditions are reasonable and proportionate to the transfer in question. Conversely, there has been some minimum harmonisation of information required of suppliers. The ICT provides that Member States must require suppliers to provide a range of information regarding the transfer.[176] However, beyond this minimum, Member States can also determine additional information that may be required, again, creating potential divergences in requirements imposed.[177]

5. End-use controls

As indicated in Section 2.2.2, concerns regarding the illicit export of transferred goods into rogue hands or conflict zones in third countries remain a prevalent issue that has conditioned the ICT's approach to transfers and provided the greatest scope for Member State discretion. Whilst *ex ante* controls are no longer possible through routine recourse to individual licences, even general licences retain the possibility for *ex post* controls ensuring that any export restriction on the defence good issued by the Member State of origin "follows the transferred good".[178] As this Section will demonstrate, it is with regard to export controls on transferred goods that the limitations of the ICT's harmonisation objectives are most apparent.

[172] *GRIP*, ibid., suggests a potential designated module for general licences on the CERTIDER website given that this is a central information point for certification, on which see Section 6 below.

[173] In the UK, for example, most OGELs require the exporter or trader to register before making use of licences.

[174] Article 4(6) ICT.

[175] For instance, *GRIP* identifies French practice in which general licences have incorporated technical clauses requiring either the supplier or recipient to make specific alterations to the product before shipping it as well as specific conditions attached to each category of product. See *supra* note 5, at 36-37.

[176] Member States must ensure: that suppliers inform recipients of the terms and conditions of the transfer licence (including limitations relating to end-use) (Article 8(1) ICT); that suppliers inform, within a reasonable time, the competent authorities of the originating Member State of their intention to use a general licence for the first time (Article 8(2)); and regularly check that suppliers keep detailed records of their transfers and determine the reporting requirements attached to the use of a licence (whether general, global or individual) (Article 8(2)).

[177] Article 8(2) ICT. France has even reserved the right to conduct a preliminary interview with the supplier prior to transfer. See *The impact of the 'defence package' Directives on European Defence*, *supra* note 5, at 47 fn. 88.

[178] *Impact Assessment*, *supra* note 4, at 41.

5.1. *Limitations prior to transfer*

The ICT provides that Member States may not only include any limitations on export to third countries in their transfer licences but may also "avail themselves" i.e. positively take advantage of the possibility to request end-use assurances including end use certificates.[179]

As indicated in Section 2.2., the ICT does not intend to impact on Member States' export control policies. Member State export measures are, to some extent, guided by the EU Council Common Position 2008/944/CFSP defining common rules governing military exports including a User Guide indicating best practice on the use of end-user certificates ("EUCs"). However, it has been observed that end-use obligations and the type or format of end-use documentation currently vary greatly among Member States.[180] It appears that Member States continue to require EUCs for individual and global licences.[181] By contrast, Member States do not seem to require EUCs for transfers under a general licence but do generally include certain end-use restrictions such as non-re-export clauses, notification requirements and clauses requiring components to be integrated but which, again, vary.[182] Member States also impose a range of post-shipment controls in the form of delivery verification certificates ("DVCs") and end-use monitoring which also vary.[183]

Ultimately, most Member States wish to maintain end-use controls for both third country exports and intra-Union transfers.[184] A significant reason is that Member States have pre-existing commitments under international control regimes concerning controls on end-use. Further, there is still a concern that export policies "vary quite widely" among Member States and which might constitute a risk where an importing Member State is an intermediary for export of transferred goods to a third country.[185]

In light of the above, it is arguable that the ICT fails to sufficiently distinguish between intra-Union transfers which do not involve exports to third countries and those which do involve exports to third countries. For instance, Article 4(8) provides that Member States must not impose any export limitations for components where the recipient provides a declaration of use that the components are, or are to be, integrated into its own products and cannot at a later stage be transferred or exported as such (unless for the purposes of maintenance or repair).[186] However, Member States may impose export limitations if the transfer of components is determined to be "sensitive".[187] As indicated in Section 4.3.2 above, distinguishing between sensitive and non-sensitive transfers may prove difficult for the purposes of determining which licence a product should be subject to let alone whether or not a transfer should be subject to export limitations.[188] The continuing possibility for end-

[179] Article 4(6) ICT. This language is arcane and should be clarified in a subsequent revision of the ICT.
[180] *GRIP*, *supra* note 5, at 54-56.
[181] Ibid., at 55 and 60.
[182] *GRIP*, *supra* note 5, at 56-57 observes that a non-re-export clause is always included. Some clauses prohibit re-export without prior written authorisation by the original exporting country. Some also permit re-export without prior authorisation to certain allied countries e.g. Australia, Canada, Japan, New Zealand, Norway, Switzerland and the United States.
[183] Ibid., at 58-59. Several Member States do not require DVCs for transfers within the EU and, where required, these are only used under individual licences. Ibid., at 58.
[184] *GRIP*, *supra* note 5 59.
[185] Ibid.
[186] See also Recital 19 ICT. Member State practice indicates that general licences may incorporate integration clauses or declarations, or statements certifying to this effect and that certain Member States have used these sorts of statements as an alternative to the use of a non-re-export clause: *GRIP*, *supra* note 5, at 36, citing Walloon Region, Flemish Region and Luxembourg.
[187] Article 4(7) ICT.
[188] Whilst as indicated in Section 4.3.2., the ICT does not include any guidance regarding the sensitivity of products, Article 4(7) identifies two criteria for determining sensitivity: (a) the nature of the components in relation to the products in which they are to be incorporated and any end-use of the finished products which

use controls to be applied to the transfer of components suggests that the continuing likelihood of end-use controls being applied to more substantial product categories is even greater. This raises further questions about the extent to which "sensitivity" is an effective criterion for application in this context.

Some Member States have indicated that controls on intra-Union transfers could be less restrictive than controls on exports.[189] There appears to be continued support for global and individual licence transfers to retain EUC requirements.[190] However, it has been indicated that a majority of Member States are in favour of the harmonisation of EUCs, which could, in theory, also apply to general licence transfers but Member States do not have a common vision on its form and continue to express concern regarding the need for a case-by-case assessment in light of the diversity of end-use(r).[191] An open question is whether in cases in which an end-user is a certified company receiving products under a general licence without prospect of export, an end-use guarantee should not be required and may be considered disproportionate. In this regard, it could be argued that certification of the recipient itself should generally be treated as equivalent to a guarantee on end-use of the product within the EU and any end-use guarantee may be disproportionate.[192] However, this equivalence may be questioned on the basis that, as will be discussed in Section 6, certification simply provides a determination in general terms that a company is reliable, in particular, has capacity to observe export limitations on products transferred under a general licence.[193] Certification is not a legal guarantee that specified goods will not be exported. Therefore, it remains unclear whether further revision to the certification regime could more clearly differentiate between intra-EU transfers which do not involve exports and intra-EU transfers which do involve exports to third countries. This would appear unlikely under the next revision of the ICT given that, as discussed in Section 6, the certification regime itself has not been fully engaged by the user communities.

5.2. *Limitations prior to export*

Corresponding to the limitations placed on transfers through the imposition of terms and conditions and end use obligations regarding export, the ICT also seeks to ensure that the recipient of transferred products complies with export limitations when applying for an export licence. Article 10 ICT requires recipients to declare to their competent authorities that they have complied with any export limitations attached to the licence,[194] including having obtained the required consent from the originating Member State.

However, it may be argued that the ICT lacks any systematic means by which receiving Member States are routinely informed about relevant re-export conditions.[195] Whilst it is the Member State's obligation to implement Article 10 ICT, the recipient must

---

might give rise to concern; and (b) the significance of the components in relation to the products in which they are to be incorporated. Both criteria are likely to provide scope for broad interpretation, in particular, "significance".

[189] *GRIP*, *supra* note 5, at 60.

[190] Ibid.

[191] *GRIP*, *supra* note 5, at 61. This also means that harmonization of post-shipment controls is currently "inconceivable".

[192] Ibid., at 60 reporting that only one Member States expressed this opinion and that: "it should be underlined here that this understanding of the certification as an alternative to the EUC is not a shared interpretation among Member States. However, this issue should definitely be discussed among Member States."

[193] The authors are grateful to Baudouin Heuninckx for this observation.

[194] Recitals 34, 35, 36 and Article 10 ICT. This obligation corresponds with a prior obligation to ensure that suppliers inform recipients of limitations relating to end-use or export. See Recital 31 and Article 8(1) ICT.

[195] Taylor, EC Defence Equipment Directives, Standard Note SN/IA/4640 3 June 2011, House of Commons Library, 20 citing at fn. 49 Committee on Arms Export Controls, *Scrutiny of Arms Export Controls 2009*, HC 178, Session 2008-09.

ensure compliance and inform the authority of any export limitations. Consequently, the ICT fails to safeguard against the risk of unauthorised export in cases where recipients intentionally or inadvertently neglect to inform their authorities.[196] The Commission had originally considered an IT traceability database that would track all licences and their eventual export restrictions. However, this option was considered to be less cost-efficient than the information requirements finally adopted.[197]

Whilst the current uncertainty of Article 10 ICT may be criticised, this provision must not be seen in isolation as the only available safeguard. As indicated in Section 6, certification is one means of addressing export control concerns. In addition, the ICT contains provisions on customs procedures to ensure a further final check on exports and their conformity with relevant administrative formalities before leaving the EU.[198] Further, as indicated in Section 7, Article 16 ICT also requires Member States to lay down penalties for infringements, in particular, in the event of false or incomplete information being provided concerning the recipient's declaration of compliance with the terms of export limitations attached to the transfer, thereby incentivising compliance.[199]

6. Certification

It is recalled from Section 4.3.1 that the ICT requires Member States to use general licences where the recipient is a certified undertaking.[200] Thus, the introduction of a certification regime is the second fundamental innovation of the ICT. Certification concerns the assessment of the reliability of a prospective recipient of defence-related products under a general licence. This is conducted in the Member State in which it is registered according to common criteria before any transfer to that recipient takes place. The principal rationale is to ensure, in particular, the capacity of the recipient to comply with export limitations placed on transferred products.[201] Certain Member States operated their own national certification systems before the ICT.[202] However, the need for common principles and mutual recognition required existing national processes to be overhauled.

6.1. *Optional certification and mutual recognition*

The legislator decided to establish a regime based on optional rather than mandatory certification.[203] One significant argument against mandatory certification concerned the need for undertaking to weight the costs and benefits of certification in light of the manageable but still considerable costs of certification.[204] The ICT singles out the potential for certification to benefit transfers within a group of undertakings where the members of the group are certified in their respective Member States of establishment.[205] At the very least, optional certification may incentivise Member States to grant general licences in light of the guarantees provided by certified reliability.[206] It may also foster the conditions for mutual trust leading to mutual

[196] Ibid.
[197] Impact Assessment *supra note* 4, at 47.
[198] Article 11(1) ICT.
[199] See also Recital 38 ICT.
[200] Article 5(2)(b) ICT.
[201] Recital 33 and Article 9(2) ICT.
[202] French companies must obtain a "licence for manufacturing and trading" whilst UK companies are invited to implement a "compliance programme for exporters": *Impact Assessment*, *supra* note 4, at 37.
[203] *Impact Assessment*, ibid., at 26-27 and 37-40.
[204] Data collected during the consultation phase from stakeholders suggests annual costs of about €10,000.00 per company if that company is already certified under ISO9001 (a known industry standard on quality management): Ibid at 38-40. See also Recital 32 ICT.
[205] See Recital 3 ICT.
[206] *Impact Assessment*, *supra* note 4, at 40.

recognition of certificates attesting reliability. For instance, Article 9(6) ICT provides that Member States must recognise any certificates issued in another Member State.

6.2. *Competent authorities*

Article 9(1) ICT requires Member States to designate competent authorities to certify recipients on their territory under general licences published by other Member States. The fact that, prior to the ICT, departments other than defence (e.g. ministries of industry or economy) were often in charge of certification was an argument against the adoption of a transfer regime under the auspices of the European Defence Agency (EDA) which is seen as an agency of Member States' ministries of defence.[207] At present, the fact that certification is optional may militate against calls for the centralisation of certification under a unit within the Commission or the EDA, for example. However, the certification regime is already undergoing a process of centralisation. According to Article 9(8) ICT, Member States must publish and regularly update a list of certified recipients and inform the Commission, the European Parliament and the other Member States. Further, the Commission must make publicly available on its website a central register of recipients certified by Member States and has created a central register or this purpose.[208] In the long-term, further centralisation under an EU institution could be explored as a means to build further trust beyond mutual recognition, the arguments for and against falling beyond the scope of this article.

6.3. *Certification criteria, certification and publication*

As indicated, the ICT introduces common certification criteria to establish the recipient's reliability. [209] These criteria appear to be exhaustive. The ICT also prescribes the minimum mandatory information to be contained in certificates.[210] However, Member States may also provide that certificates contain further conditions relating to the provision of information required to verify compliance with the reliability criteria and concerning suspension or revocation of the certificate. [211] In addition, authorities must monitor the recipient's compliance with the reliability criteria and with any further conditions at least every three

[207] Ibid. at 18. See also *Transposition Report*, *supra* note 5, at 10. In Germany this is the responsibility of the Federal Office for Economy and Export Control (*Bundesamt für Wirtschaft und Ausfuhrkontrolle BAFA*) which is operating under the supervision of the Federal Ministry for Economy and in the United Kingdom the Export Control Organisation under the Department for Business, Innovation and Skills.

[208] The Commission's Register of Certified Defence-related Enterprises (CERTIDER) <http://ec.europa.eu/enterprise/sectors/defence/certider/> [last visited 16 March 2015] provides information about enterprises certified under the ICT, contains a list of the competent national authorities designated to deal with certification, the list of certified enterprises, details about the certificates and links to relevant national legislation. According to *GRIP*, most but not all Member States refer to the EU's list of certified recipients and several Member States specifically require the supplier to verify, on the EU website, whether the beneficiary holds a valid certificate (*GRIP*, *supra* note 5, at 33 indicating, however, that the UK authorities refer to a list of certified companies available on a UK website). It is submitted that a guidance note or a revised ICT could specify that all references should refer to the EU list of certified recipients. Modifications to the overall design and update of CERTIDER are also a necessary addition to improve information content (*GRIP*, ibid., at 63).

[209] These criteria are: proven experience, taking into account, in particular, the undertaking's record of compliance with export restrictions; relevant defence industrial activity, in particular capacity for (sub)system integration; the appointment of a senior executive personally responsible for transfers and exports; a written commitment of the recipient that it will take all necessary steps to observe and enforce conditions relating to the end-use and export of any specific component or product received; a written commitment that it will provide detailed information in response to requests and inquiries concerning the end-user(rs) of all products exported, transferred or received; and a description of the recipient's internal compliance programme or transfer and export management system. See Article 9(2)(a)-(f) ICT.

[210] Article 9(3)(a)-(d) ICT.

[211] Article 9(4) ICT.

years.[212] Finally, the validity of a certificate must not exceed five years.[213] Therefore, it appears that, notwithstanding common certification criteria, it is unclear whether Member States may issue certificates for less than five years up to the maximum. Further, Member States may differ in terms of the nature and level of information required to verify compliance and may monitor compliance more often than every three years.

In order to ensure further convergence in the applicable certification critieria, the Commission has published Recommendation 2011/24/EU[214] setting out common certification guidelines but which may, in fact, create further diversity of national measures contrary to the ICT's intended objectives. In certain respects, the guidelines not only amplify existing provisions but also leave scope for Member States to add further requirements, the proportionality of which might be questioned. It is not clear what has motivated this choice. The fact that certification is currently optional may be one reason why the ICT has opted to encourage convergence through a separate instrument that will be retained even under a revised ICT. It could equally reflect a view that the ICT's certification provisions have not achieved a sufficient degree of harmonisation, the Recommendation constituting an interim measure pending its formal incorporation into expanded certification provisions under the ICT. Whatever the reason, the Recommendation was not specifically envisaged or enabled by the ICT. The co-existence of a legally binding instrument and a non-legally binding Recommendation compromises legal certainty. Whilst caution must be exercised against substantially increasing the ICT's content in light of its minimum harmonization objective, additional certification provisions are arguably necessary under a revised ICT to clarify the criteria drawing on certain of the Recommendation's provisions where necessary.[215]

6.4. *Non-compliance*

If a competent authority determines that a certified recipient on its territory is no longer compliant, it must take "appropriate measures", which may include revoking the certificate.[216] It follows that measures other than revocation may be used such as temporary suspension. Uncertainty in determining what might constitute an instance of non-compliance and appropriate action may have the consequence that authorities simply opt for automatic revocation or suspension, irrespective of the gravity of the violation without considering the possibility of less severe corrective measures. There is no mechanism in the ICT for Member States to achieve a relative degree of uniformity in approach, other than an obligation to inform the Commission and other Member States of the decision taken.[217] Recommendation 2011/24/EU provides some indication as to how to proceed in assessing non-compliance, appropriate measures and determinations and time limits regarding the lifting, maintaining or revoking of suspensions. [218] On issues that might be considered to fall within the area of national procedural autonomy, EU law principles of proportionality and effective judicial protection will need to provide a residual safeguard in the absence of more specific provision.

[212] Article 9(5) ICT. This provides an additional safeguard to that provided in Article 8(3) ICT which requires Member States to regularly check that suppliers keep detailed and complete records of their transfers.
[213] Article 9(3) paragraph 2 ICT.
[214] Commission Recommendation 2011/24/EU of 11 January 2011 on the certification of defence undertakings under Article 9 of Directive 2009/43/EC of the European Parliament and of the Council simplifying terms and conditions of transfers of defence-related products within the Community [2011] OJ L11/62. The Recommendation was developed by the working group under the Committee procedure in Article 14 ICT.
[215] Whilst operating close to the sphere of national transfer policies and national procedural autonomy, there are certain issues concerning the suspension, revocation and termination of licences and certificates that could similarly be addressed in more detail or at least further clarified in a revised ICT.
[216] Article 9(7) ICT.
[217] Article 9(7) ICT.
[218] See, for example, Section 4(4.1) and Section 4(4.3.).

6.5. *Transposition, implementation, and impact*

Member States have put in place the framework to certify recipients, appointed competent authorities, established reliability criteria, "in general" foresee mutual recognition of certificates and instituted compliance monitoring and corrective mechanisms.[219] However, there has been a limited impact in practice.[220] Firstly, companies, in particular, SMEs express "serious doubts" about the practical benefits of certification given the time, risks, potential for intellectual property and security breaches and organisational and financial requirements necessary to prepare procedures, controls and audits for compliance.[221] Secondly, there are potentially unknown costs and risks. For example, concern has been expressed regarding the certification criterion which requires a senior officer to be personally responsible for transfers and exports.[222] Further, the consequences (in particular legal) for a company of not being certified were considered unclear.[223] Thirdly, lack of visibility of certification and the absence of sufficient harmonisation has limited confidence in the regime. For instance, the uncertain scope of application of general licences and the fact that it is not mandatory to publish licences and certifications in a common language such as English, has, in turn, impacted the assessment of whether or not recipients should seek certification.[224] Overall, only a small number of companies have so far been certified.[225]

Recognising that it will take time for Member States and the defence industries to develop trust and confidence in the regime, there are a number of issues that could be addressed in the short term. Firstly, a principal motivation for this article has been the relative absence of any public visibility of the ICT regime; greater and clearer publicity of the ICT certification regime is required given its corresponding impact on the uptake of general licences and *vice versa*.[226] Secondly, Member States and prime contractors should take the initiative to encourage the uptake of certification at lower levels of the supply chain.[227] Thirdly, certain criteria require clarification and reconsideration. For instance, the requirement for a designated officer to be "personally responsible" is only likely to make licencing officers even more risk averse.

7. Safeguards for Member States and undertakings

Appropriate safeguards for Member States and suppliers and recipients are vital in an area as politically sensitive as defence. However, as will be discussed, under the ICT, clear priority is given to the former over the latter.

Concerning Member States, the ICT envisages the possibility to enact suspensory measures. Firstly, Member States may withdraw, suspend or limit the use of transfer licences issued at any time on four grounds: protection of their essential security interests; public

[219] *Transposition Report*, *supra* note 4, at 11.
[220] *GRIP*, *supra* note 5, at 43.
[221] Ibid., at 40 and 44. According to *GRIP*, at 46, the administrative burdens and lack of information on general licences led some SMEs to use individual and global licences in the alternative.
[222] This had been identified as an issue within the export community as compliance programmes become increasingly mandatory and sophisticated. Thanks to Mr. Ian Bendelow for discussions on this point, although this was not expressed as a UK specific concern given the UK's historical experience of using compliance programmes. This is also reiterated in *GRIP*, *supra* note 5, at 44.
[223] Ibid., at 44.
[224] *GRIP*, *supra* note 5, at 45.
[225] Ibid. See also *The impact of the 'defence package' Directives on European Defence*, *supra* note 5, at 43 observing that only 38 certified defence companies are listed on CERTIDER and that "one must hope a significant acceleration of the rate of certification will occur in the coming months or the entire project of the EC to positively impact the European defence market may be at risk of failure."
[226] *GRIP*, *supra* note 5 at 46-47.
[227] Ibid., at 46.

policy; public security; and non-compliance with licence terms and conditions.[228] Secondly, as indicated in Section 6.4., the Member State of a certified recipient may take corrective action in relation to non-compliance with certificates which includes suspension of a certificate.[229] Thirdly, Article 15 ICT enables a Member State to take pre-emptive measures to provisionally suspend the effect of a general transfer licence where a licencing Member State considers that there is a "serious risk" that a certified recipient will not comply with a licence condition, or that public policy, public security or its essential security could be affected. Before suspension, the Member State must request verification from the recipient's Member State[230] and, if doubts persist, [231] impose suspension.[232] The suspending Member State may also decide to lift the suspension where it considers that it is no longer justified. Again, such determinations leave discretion to Member States but at the risk of variable national approaches to suspension.

Concerning undertakings, as indicated, the ICT does not contain any dedicated provisions enabling, for example, a supplier to challenge decisions regarding a Member State's choice to only grant a particular type of licence limited to certain types of product,[233] or to refuse to grant a licence, or to challenge the basis for suspending or revoking a licence or certificate. The absence of any consideration of review of remedies in the preparatory documents, reports and studies may reflect the sense that such issues are at the heart of Member State transfer policies and national procedural autonomy. It is therefore unsurprising that the ICT's provisions simply require Member States to lay down penalties for infringements.[234] The ICT indicates that the current deferment to Member States on this issue is necessary for the progressive building of mutual trust.[235] Notwithstanding, it is possible to bring claims for judicial review of licencing decisions under national administrative law. An open question concerns the level of judicial scrutiny that will be applied under national law.It must also be acknowledged that, prior to the ICT, the variable use of penalties and enforcement was a point of criticism.[236] It is therefore unclear whether future ICT revisions will include specific provisions clarifying use of suspensions as well as penalties.

8. Conclusions

The "Defence Package" imposed new harmonising regimes on a sector so far substantially unregulated by EU Internal Market law. The ICT seeks to cut through the fog of hazy claims that public policy and security concerns justify disparate and disproportionate national licencing procedures. Whilst it is possible to debate the extent to which legitimate risks to security do arise from transfers of defence products within the EU, it is difficult to refute the claim that such transfers generally pose a lesser risk than exports to third countries outside the EU. The ICT's main innovations are: (1) a transition away from individual licences

[228] Article 4(9) ICT.
[229] As referenced in art.9(4)(b) ICT.
[230] It is unclear to what extent verification will satisfy the licencing Member State especially if the recipient Member State has limited understanding of the circumstances. There is also a risk that verification simply becomes a formality, suspension having already been determined on the basis of an assessment of risk rather than evidence. Further, the ICT does not prescribe measures which may result after verification but which fall short of provisional suspension.
[231] This appears to indicate the presence of a "reasonable doubt": Recital 39 ICT.
[232] The suspending Member State must then inform the other Member States and the Commission of the reasons: Article 15(2) ICT.
[233] However, Recital 20 ICT indicates that Member States should determine the recipients of transfer licences in a non-discriminatory way unless necessary for the protection of their essential security interests.
[234] Article 16 ICT. See also Recital 38 ICT.
[235] Recital 38 ICT.
[236] *UNISYS*, *supra* note 4, 62-3.

towards general licences for the intra-Union transfer of defence products defined according to the EU's CML and subject to reduced *ex ante* controls; (2) certification of recipients accompanied by monitoring; and (3) *ex post* controls on export outside the EU.

However, this article has revealed that the ICT's approach to harmonisation has ultimately impacted the operational effectiveness of the regime. Firstly, the ICT seeks to harmonise national measures in an area in which Article 36 and Article 346 TFEU also operate raising questions as to the compatibility of the ICT with primary EU law. Legal uncertainty is not aided by the fact that the EU law compatibility of transfer licencing measures had hardly been tested prior to the ICT and has not since its coming into force. Secondly, Member States continue to exercise considerable discretion not least because the ICT purports to simplify rules and procedures but is without prejudice to national transfer and export policies. Thirdly, the ICT is ambivalent with regard to the level at which to set the floor of harmonisation, an example being the borderline between optional exemption from prior authorisation and mandatory licencing. Fourthly, whilst the ICT sets minimum standards, the supplementary Recommendation on certification is perhaps indicative that the ICT is not, itself, achieving the required level of harmonisation. Finally, Member States continue to exercise considerable discretion regarding information requirements and compliance measures. These decisions are only subject to the general constraints of EU Treaty principles. Uncertainty in the objectives and extent of harmonisation further exacerbate broader underlying concerns felt by suppliers and recipients as to whether, on a cost-benefit analysis, licencing and certification are worthwhile.

The above are also concessions to an overriding export control mentality which continues to pervaded the structure of the ICT regime. From the very outset, export risks may determine the type of licence and products to which a licence is subject, so far leading to discrepancies in the application of the CML. Concerns regarding export risks have continued to legitimate the retention of individual licences. Further, the ICT's certification regime and guidelines would not look out of place in an export compliance programme manual. There also continues to remain a diversity of national practices regarding end-use controls which do not sufficiently differentiate end-uses within the EU from end-uses outside the EU.

Notwithstanding, the ICT is a first iteration revealing the current limits of harmonisation and use of the regime by Member States and undertakings. This provides institutional learning for future revisions. Whilst this article has identified certain areas which may be amenable to further harmonisation, the political reality in the short to medium term must qualify expectations about future levels of harmonisation. The late exercise of EU competence in this area renders the regime susceptible to the same kinds of difficulties encountered when exercising a new competence: both are exercised for the first time, both legislators and stakeholders are in need of adaptation, with experience and mutual trust and recognition only growing over time. This may also explain the ICT's approach to harmonisation, its "particularly arduous" transposition, [237] and the extent of its current and potential impact. There is currently a stalemate between Member States accustomed to their own licensing cultures and anxious to safeguard against re-exportation risks and the private sector cautious to calculate the costs, benefits and risks associated with a wholescale transition to general licences. At the present stage of development of EU defence integration, it must be candidly acknowledged that intra-EU transfers are still considered to present security risks which legitimate certain controls. Over time, Member States need to ensure that licencing decisions are a true reflection of risk. Whilst a licence-free Europe may never be possible, the ICT, backed with institutional support at the national and EU levels may lead to a more licence-friendly Europe in an Internal Market for defence goods.

[237] *The impact of the 'defence package' Directives on European Defence*, *supra* note 5, at 43.