Article 12

1. In deciding whether or not to grant an individual or global export authorisation or to grant an authorisation for brokering services under this Regulation, the Member States shall take into account all **relevant considerations** including:

(a) The **obligations and commitments** they have each accepted as members of the relevant international **non-proliferation regimes** and export control arrangements, or by ratification of relevant international treaties;

(b) Their obligations under **sanctions** imposed by a decision or a common position adopted by the Council or by a decision of the OSCE or by a binding resolution of the Security Council of the United Nations;

(c) Considerations of **national foreign and security policy**, including those covered by the Council Common Position 2008/994/CFSP defining common rules governing control of exports of military technology and equipment[93];

(d) Considerations about intended **end use and the risk of diversion**.

Comment:
In order to grant or not an authorisation, Member States assess their decisions on the basis of two types of considerations, which are conditions and criteria.
Conditions are **objective elements** that recipient countries have to meet to obtain an export authorisation from the supplier. Those elements can be a ratification of a treaty, a conclusion of a safeguards system or a submission of an end-user certificate.
Criteria are **subjective elements** to be considered by the supplier State, through a case-by-case analysis, in order to authorise or not a transfer. Criteria can be an internal situation in the country of final destination, existence of tensions or armed conflicts and a risk that the recipient country would use the proposed export aggressively against another country or to assert by force its territorial claim.

Article 12 establishes a non-exhaustive list of **criteria** to be taken into consideration by Member States' authorities, while assessing an opportunity to grant or not an export authorisation.
Cross reference to the Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of export of military technology and equipment is made in this Regulation. Shall Member States then take into consideration, when assessing an application, the eight criteria of the Common Position? If, politically, such mechanism might be considered, the Common Position cannot formally extend either the Member States' obligation to consider such criteria in the consultation mechanism for an essentially identical transaction previously denied established by Article 13(5) or the criteria list set up by Article 12.

This list is a summary of conditions and criteria adopted by the **five international export control regimes**. In this regard, one should refer to each export control regime to have an accurate list of conditions and criteria by category of dual-use items.

For the States Parties to the **Chemical Weapons Convention**, a note (Note 2 under 1C350)

[93] OJ L 335, 13/12/2008, p. 99.

has been added in Annex I exempting from export authorisation the transactions involving chemical mixtures containing one or more of the chemicals specified in certain entries in which no individually specified chemical constitutes more than 30% by the weight of the mixture.

Nuclear dual-use items

The **Nuclear Suppliers Group (NSG)** has adopted two groups of guidelines. The first set of guidelines governs the export of items that are especially designed or prepared for nuclear use (trigger list)[94]. The second one rules the export of nuclear-related dual-use items and technologies, which are items that are normally destined for a non-nuclear use; however, in certain circumstances they could also make a major contribution to an unsafeguarded nuclear fuel cycle or nuclear explosive activity[95].

NSG guidelines impose an obligation to submit to a national export authorisation all items listed in both trigger and dual-use lists. Whereas both guidelines do not include a formal prohibition, suppliers are invited to adopt a restrictive policy regarding transfers of **sensitive items** especially if active denials have been issued by one or more NSG supplier States. Sensitive items are defined rather broadly as items "*usable for nuclear weapons or other nuclear explosive devices*"

In principle, exports to nuclear-weapon States are prohibited except to five States recognised as such by the Nuclear Non-Proliferation Treaty (China, France, Russia, United Kingdom and United States of America). Since September 2008, an additional exception has been included in the NSG Guidelines authorising transfers of all items listed in the trigger and the dual-use lists to India[96].

While deciding whether or not to authorise a transfer, supplier States should examine the licence application for a trigger list items in the light of the **non-proliferation principle,** which invites suppliers to authorise a transfer only when they are satisfied that it would not contribute to the proliferation of nuclear weapons or other nuclear explosive devices or would not be diverted to an act of nuclear terrorism.

Suppliers should also **refuse a transfer** if there are potential **risks of retransfer** due to the **failure** of the Recipient State to develop and maintain appropriate and effective national export and transhipment controls as identified by UNSCR 1540.

Complementary, *Suppliers should exercise a policy of restraint in the transfer of sensitive facilities, equipment, technology and material usable for nuclear weapons or other nuclear explosive devices, especially in cases when a State has on its territory entities that are the object of active NSG Guidelines Part 2 denial notifications from more than one NSG Participating Government.*[97]

Different criteria, which should be considered in connexion with the non-proliferation principle, are defined for nuclear dual-use items. These criteria are:

" *(a) Whether the recipient State is a party to the Nuclear Non-Proliferation Treaty (NPT) or*

[94] INFCIRC/254/Rev.12/Part 1 Communications Received from Certain Member States Regarding Guidelines for the Export of Nuclear Material, Equipment and Technology.

[95] INFCIRC/254/Rev.9/Part 2 Communications Received from Certain Member States Regarding Guidelines for Transfers of Nuclear-Related Dual-Use Equipment, Materials, Software and Related Technology.

[96] For more details, see INFCIRC/734(corrected).

[97] INFCIRC/254/Rev.12/Part 1 Communications Received from Certain Member States Regarding Guidelines for the Export of Nuclear Material, Equipment and Technology, point 6.

to the Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco), or to a similar international legally binding nuclear non-proliferation agreement, and has an IAEA safeguards agreement in force applicable to all its peaceful nuclear activities;
(b) Whether any recipient State that is not party to the NPT, Treaty of Tlatelolco, or a similar international legally-binding nuclear non-proliferation agreement has any facilities or installations listed in paragraph 3(b) above that are operational or being designed or constructed that are not, or will not be, subject to IAEA safeguards;
(c) Whether the equipment, materials, software, or related technology to be transferred is appropriate for the stated end-use and whether that stated end-use is appropriate for the end-user;
(d) Whether the equipment, materials, software, or related technology to be transferred is to be used in research on or development, design, manufacture, construction, operation, or maintenance of any reprocessing or enrichment facility;
(e) Whether governmental actions, statements, and policies of the recipient State are supportive of nuclear non-proliferation and whether the recipient State is in compliance with its international obligations in the field of non-proliferation;
(f) Whether the recipients have been engaged in clandestine or illegal procurement activities; and
(g) Whether a transfer has not been authorised to the end-user or whether the end-user has diverted for purposes inconsistent with the Guidelines any transfer previously authorised;
and
(h) Whether there is a reason to believe that there is a risk of diversion to acts of nuclear terrorism.
(i) Whether there is a risk of retransfers of equipment, material, software, or related technology identified in the Annex or of retransfers of any replica thereof contrary to the Basic Principle, as a result of a failure by the recipient State to develop and maintain appropriate, effective national export and transhipment controls, as identified by UNSC Resolution 1540"[98].

Before granting an authorisation, a supplier State should also verify if a recipient State fulfils the scope of **export conditions** defined by the NSG guidelines. These conditions are different for trigger list items and dual-use items.

Conditions of supply for NSG trigger list items
The first condition of supply for trigger list items concerns an obligation for a Recipient State to bring into force an agreement with the IAEA requiring the application of **safeguards** on all sources and special fissionable material in its current and future peaceful activities (Comprehensive Safeguards Agreement (CSA)). This condition contains one exception for transfers to non-nuclear-weapon States when they are deemed essential for the safe operation of existing facilities and only if safeguards are applied to those facilities. Before granting such authorisation, suppliers should inform and, if appropriate, consult in case they intend to authorise or to deny such transfers. This exception has been used twice by Russia to supply fissile material for a nuclear power plant to India in 2000 and 2006.
Even if currently an Additional Protocol does not constitute an NSG Guidelines' condition of supply for all trigger list items, it is presently required by all EU Members States.

The second condition of supply for trigger list items concerns the submission of four types of

[98] INFCIRC/254/Rev.9/Part 2 Communications Received from Certain Member States Regarding Guidelines for Transfers of Nuclear-Related Dual-Use Equipment, Materials, Software and Related Technology, Establishment of Export Licensing Procedures, Point 4.

government-to-government assurances:

- The first is a commitment of the recipient State to explicitly **exclude** any use which would result in any **nuclear explosive device.**
- The second concerns a retransfer management. In this regard, suppliers should transfer trigger list items or related technology only upon the recipient's assurance that in the case of retransfer of the concerned items and of items derived from facilities originally transferred, or with the help of equipment or technology originally transferred by the supplier, the recipient of the retransfer or transfer will have to provide the same assurances as those required by the supplier for the original transfer.
- The third concerns an obligation to bring into force a safeguards agreement requiring the application of safeguards on all trigger list items if the CSA should be terminated.
- The fourth is related to the elaboration of an appropriate verification measure or a restitution of transferred and derived trigger list items if the IAEA decides that an application of IAEA safeguards is no longer possible.

Complementary to these conditions, suppliers should require from a recipient country to place a nuclear material and facilities under effective physical protection in order to prevent unauthorised use and handling. Levels of physical protection on which these measures should be based are the subject of an agreement between supplier and recipient.

The transfers of **enrichment and reprocessing facilities, equipment and technology** are submitted to stricter conditions than those applicable to trigger list items. A transfer should not be authorised unless the following criteria are met by the recipient State:

- Should be a **NPT Party** and be in full compliance with its obligations under the Treaty;
- Should **not be identified** by IAEA Secretariat report as being **in breach** with its obligations to comply with its **safeguards** agreement;
- Should have brought into force a Comprehensive Safeguards Agreement and an Additional Protocol (or similar regional agreement approved by the IAEA);
- Should adhere to the **NSG Guidelines** and report to the UN Security Council that it implements **effective export controls** as identified by Security Council Resolution 1540;
- Should conclude an **inter-governmental agreement** with the supplier including assurances regarding non-explosive use, effective safeguards in perpetuity, and retransfer;
- Should have provided a "*legally-binding undertaking from the recipient State that neither the transferred facility, nor any facility incorporating such equipment or based on such technology, will be modified or operated for the production of greater than 20% enriched uranium*".

Moreover, supplier States should encourage recipients to accept, as an alternative to national enrichment and reprocessing facility, **any other appropriate multinational participation** in a resulting facility.
Finally, supplier States should avoid as practicable as it might be a transfer of enabling design and associated manufacturing technology and should negotiate an agreement that permits or enables replication of the facilities.

Condition of supply for NSG dual-use items
Conditions of supply for dual-use items to be required by the supplier State consist essentially in the submission of three government-to-government assurances:

- A statement from the end-user specifying the **uses** and the **end-use** locations of the proposed transfers;
- An assurance explicitly stating that the proposed transfer or any replica thereof would not be used in **any nuclear explosive active** or **unsafeguarded** nuclear fuel cycle activity;
- An assurance that a **prior consent** of the supplier will be required before transferring any dual-use item to a State not adhering to the Guidelines.

Biological and chemical dual-use items

Regarding transfers of chemicals for purposes not prohibited, the **Chemical Weapons Convention** (CWC)[99] divides chemicals in three categories for which specific regimes are organised.

Category I contains chemicals considered as **very sensitive**. States Parties shall not produce, acquire, retain or use such chemicals outside the territories of States Parties and shall not transfer them outside their territory except to another State Party. Moreover, quantities of chemicals that States Parties could acquire per year through production, withdrawal from stocks of chemical weapons and transfer, are strictly limited to or less than 1 tonne. The production of such chemicals should be assumed by a single small-scale facility.

The transfers of equipment specifically designed for use in connection with these chemicals are not submitted to specific conditions. Nevertheless, due to the general commitment not to assist, encourage or induce, in any way, anyone to engage in any activity forbidden by the Convention, it could be assumed that States Parties should not export such equipment.

Category II includes chemicals considered as **sensitive**. States Parties should disclose on annual basis national data on the quantities produced, processed, consumed, imported and exported of each chemical listed, as well as a quantitative specification of import and export for each country involved. Similar to the first category, chemicals of category II should only be transferred to or received from States Parties. This obligation has taken effect in April 2001, i.e. three years after entry into force of the Convention.

Category III comprises chemicals considered as **less sensitive.** Similar to Category II, States Parties should disclose on annual basis national data on quantities produced, imported and exported, as well as a quantitative specification of import and export for each country involved. Transfers of Category III items to non-States Parties of the CWC are authorised if a supplier has adopted all necessary measures to ensure that the transferred chemicals would only be used for purposes not prohibited under the CWC. *Inter alia*, a supplier State shall require from a recipient State a certificate stating, in relation to the transferred chemicals:

- That they will only be used for purposes not prohibited under this Convention;
- That they will not be retransferred;
- Their types and quantities;
- Their end-use(s); and
- The name(s) and address(es) of the end-user(s).

The **Convention on the Prohibition of the Development, Production and stockpiling of Bacteriological (Biological) and Toxin Weapons and their Destruction (BTWC)** states explicitly in its Article III that States Parties should not transfer "*to any recipient whatsoever, directly or indirectly, and not in any way to assist, encourage, or induce any State, group of States or international organisations to manufacture or otherwise acquire any of agents,*

[99] The Convention has its own website: https://www.opcw.org/chemical-weapons-convention.

toxins, weapons, equipment or" their means of delivery.

The Guidelines of the **Australia Group** establish a list of non-exhaustive criteria to be taken into account in the licencing decision-making process. These **criteria** are:

- Information about proliferation and terrorism involving chemical and biological weapons (CBW), including any proliferation or terrorism-related activity, or about involvement in clandestine or illegal procurement activities of the parties to the transaction;
- Capabilities and objectives of the chemical and biological activities of the recipient State;
- Significance of the transfer in terms of the appropriateness of the stated end use, including any relevant assurances submitted by the recipient State or end-user and the potential development of CBW;
- Assessment of the end use of the transfer, including whether a transfer has been previously denied to the end-user, whether the end-user has diverted for unauthorised purposes any transfer previously authorised, and, to the extent possible, whether the end-user is capable of securely handling and storing the item transferred;
- Applicability of relevant multilateral agreements including the BTWC and the CWC.

The transfer should be denied if the Government considers that the items will be used in a chemical or biological weapons program or for CBW terrorism, or if there is a significant risk of diversion.
In addition to the assessment of these criteria, States should check that the items are not intended for a retransfer to a third State. In case of further re-export, items should be submitted to the guidelines in the recipient State and a prior consent of the initial exporter should be required. Government-to-government assurances confirming such obligation should be exchanged before authorising the transfer.

Missile technology dual-use items
The **Missile Technology Control Regime (MTCR)** has established a list of 20 items divided in two categories.
The transfers of **Category I** items are, like those from the NSG "sensitive export", almost forbidden even if the text of the MTCR guidelines is not as restrictive. Participating States are encouraged to consider transfers of Category I items with particular restrain and with "*a strong presumption to deny such transfers*". There is one absolute prohibition in the regime, which is the transfer of Category I production facilities.
In the rare case were such transfer might be undertaken, a binding government-to-government assurance on end use and retransfer prohibition should be required. Moreover, a responsibility of a supplier and not only of a recipient is engaged. The MTCR guidelines specified that suppliers should "*assume responsibility for taking all steps necessary to ensure that the item is put only to its stated end-use*".

The transfers of **Category II** items should be submitted to export control authorisation when a supplier state "*judges on the basis of all available, persuasive information, evaluated according to factors, that they are intended to be used for the delivery of weapons of mass destruction, and there will be a strong presumption to deny such transfers*". Factors to be considered by the national authorities of a supplier State while assessing a licence application are following: concerns about WMD proliferation, capabilities and objectives of missile and space programs of the recipient State, significance of the transfer in terms of a potential development of WMD delivery systems, assurances given by the recipient, applicability of relevant multilateral agreements and risk of controlled items falling into the hands of terrorist

groups and individuals.

Other items listed by the Wassenaar Arrangement
Compared to other trade control regimes, the Wassenaar Arrangement is not dedicated to one category of WMD. Its list of dual-use goods and technologies is divided in nine categories that include items not necessarily covered by other regimes. Such categories are special material and related equipment, material processing, electronics, computers, telecommunications and information security, sensors and lasers, navigation and avionics, marine, aerospace and propulsion. It is usually admitted that the Wassenaar dual use list has inspired the structure of the EU dual use list (Annex I of this Regulation).
The Wassenaar Arrangement has adopted several guidelines, statements of understanding and elements of procedures to support application assessment by States' authorities:

- Statement of Understanding on Control of Non-Listed Dual-Use Items adopted December 2003;
- Elements for Effective Legislation on Arms Brokering adopted December 2003;
- Best Practices for Implementing Intangible Transfers of Technology Controls adopted December 2006;
- Best Practice Guidelines on Internal Compliance Programmes for Dual- Use Goods and Technologies adopted December 2011.

2. In addition to the criteria set in paragraph 1, when assessing an application for a global export authorisation Member States shall take into consideration the application by the exporter of proportionate and adequate means and procedures to ensure compliance with the provisions and objectives of this Regulation and with the terms and conditions of the authorisation.

Comment:
The objective of this paragraph is to encourage Member States to require, from exporters, an implementation of an effective internal compliance programme (ICP) before granting a global authorisation. Such programme might include a status of "Authorised Economic Operator" as established by the Community Customs Code.[100]
On 5 August 2019, the Commission Recommendation (EU) 2019/1318 of 30 July 2019 on internal compliance programmes for dual-use trade controls under Council Regulation (EC) No 428/2009 has been published on the Official Journal of the European Union (OJ L 205/15 of 5/8/19).[101]
This Commission Recommendation on ICPs, which is not legally binding, provides a framework to help exporters identify, manage and mitigate risks associated with dual-use trade controls and to ensure compliance with the relevant EU and national laws and regulations.
The guidance focuses on the following 7 core elements for an effective ICP, each one detailed in a dedicated section:
Top-level management commitment to compliance
Organisation structure, responsibilities and resources
Training and awareness raising

[100] Provisions on AEO within the UCC are set out in Section 4 of Chapter 2 of Title 1.
[101] Commission Recommendation (EU) 2019/1318 of 30 July 2019 on internal compliance programmes for dual-use trade controls under Council Regulation (EC) No 428/2009, OJ L 205/15 of 5/8/19, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019H1318&from=EN.

Transaction screening process and procedures
Performance review, audits, reporting and corrective actions
Recordkeeping and documentation
Physical and information security
The Recommendation includes also a set of questions pertaining to a company's ICP (contained in Annex I to the Recommendation) and a list of diversion risk indicators and "red flag" signs about suspicious enquiries or orders (contained in Annex II to the Recommendation).

Bulgaria and **Hungary** require the implementation of an ICP for **individual** authorisations.
Austria, Bulgaria, Croatia, Denmark Hungary, Romania and **Slovenia** require it for **national general** authorisation (NGA).
Austria, Bulgaria, Denmark, Finland and **Hungary** require it for **EU GEA**.

Croatia, Finland, Hungary and **Germany** require an ICP for **global authorisation (GA)**.

Nevertheless, if some Member States do not require the implementation of an ICP, it does not mean that such element would be not be considered as key factor, when they will consider individual, global or general authorisation applications (**Belgium**, **Ireland**, **The Netherlands**, **Sweden**).

It should be noted that criteria, conditions and requirements are rather different from one Member State to another. Some, as for example **Poland**, introduced an ICP certification in the national legislation with a reference to ISO 9000. Others, like **Finland**, publish various Guidelines for exporters but it is up to exporters to apply them. The size of a company might also influence the level of requirements requested by Member States' authorities.

Table 14: Internal Compliance Program

Member State	Mandatory	Certification
Austria	NGA, EU GEA.	
Belgium **(Flemish Region)**	No formal legal requirement. In conformity with article 12 of Regulation 428/2009, the existence of an ICP is taken into account in any global licence application. In practice this means that most global licences will be denied if no performing ICP is in place. Exporters are encouraged to have an ICP in place via website and outreach.	No formal certification. ICP is an ongoing commitment and subject to ongoing evaluation on the basis of meetings, presentation by the exporter of their ICP, but most importantly on day-to-day interaction and practical application.

Member State	Mandatory	Certification
Belgium **(Walloon Region)**	As regards the ICP requirement, the Walloon Licensing Authority applies the provisions of Art 12.2 of the Dual-Use Regulation. Generally speaking, the implementation of an effective ICP constitutes a significant input for a license application.	
Belgium (Brussels)	Guidelines for academia are published on the official websites. Furthermore, ICP procedures for companies will be published in current 2020 (probably, first semester).	
Bulgaria	Individual, NGA, EU GEA.	
Croatia	GEA, NGA.	
Cyprus	None.	
Czech Republic	COMMISSION RECOMMENDATION (EU) 2019/1318 of 30 July 2019 on internal compliance programmes for dual-use trade controls under Council Regulation (EC) No 428/2009.	
Denmark	EU GEA, NGA.	
Estonia	None.	
France	None.	
Finland	GEA.	
Germany	None.	
Greece	None.	

Member State	Mandatory	Certification
Hungary	Individual, GEA, NGA, EU GEA.	
Ireland	An ICP is required to be submitted with a global licence application.	
Italy	None.	
Latvia	Must have a designated person and record keeping.	
Lithuania	None.	
Luxembourg	None.	
Netherlands	None.	
Poland	None.	Yes.
Romania	ICP required for global licences.	
Slovakia	None.	
Slovenia	NGA.	
Spain	None.	
Sweden	No, however the ISP recommends all companies involved with dual-use items to have Internal Compliance Programs in place.	