

“Internal Compliance Programme” in the EU dual use export control system from 2009 to 2019

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1. INTRODUCTION

During the last decades, national and international regulations on export control of dual use technologies have become increasingly sophisticated. The scope of the regulations has gradually broadened, and more details have been added to their provisions. Examples of this include the inclusion of the controls on “catch-all items”, brokering and transit, intangible technology transfers, and finally the introduction of Internal Compliance Programmes (ICP) for the dual use industry. The latter was required due to the complexity of the technologies under control and continuous technological development in the 1990s and later on, resulting in a need to involve the exporters themselves in the process of controlling the trade in sensitive goods.

As this article will present, since the 1990s the notion of an ICP has been included in the documents agreed upon at international political fora (like the Wassenaar Arrangement), in national laws and in EU law. In some national regulations, the notion of the ICP was introduced as early as the late 1980s (as in the case of Japan) and the beginning of the 1990s (Germany)¹. In the first EU regulations

1 Tamotsu Aoi, “Historical Background of Export Control Development in Selected Countries and Regions”, <http://www.cistec.or.jp/english/service/report.html>); “Key Elements of an Effective Export Control System”, Institute for Science and International Security (ISIS), 2003, https://books.google.be/books?id=PbLddoNkxi4C&pg=PA61&ots=-Nm8IM3JEN&dq=http%3A%2F%2Fwww.exportcontrols.org%2Fkey_elements.html&hl=fr&pg=PA61#v=onepage&q=http://www.exportcontrols.org/key_elements.html&f=false.

on export control established in 1994² and in 2000³, there was no mention of an ICP or comparable procedures. However, the regulations allowed national authorities to establish additional control measures at their discretion if they deemed them necessary. The notion of ICP was finally introduced into the EU export control law in 2009. As a result, the ICP has become one of the basic notions in modern export control regulations even though, in contrast to other elements mentioned above, it did not become obligatory in most of the jurisdiction.

This article will examine the evolution of the EU's regulation on ICP during the 2009-2019 period. It will then conclude with one national example from an EU Member State – that of the Republic of Poland. The case of Poland has been chosen not because the author is a Pole, but rather due to the fact that this example is unique, as since 2000 the ICP has been obligatory for all Polish exporters of dual use goods (although in 2012 this burden was significantly reduced).

2. INTERNAL COMPLIANCE PROGRAMME (ICP) – A SHORT EXPLANATION

An ICP provides the first line of control built into a company's structure. By knowing the customer and the specifications and potential application of the item in question, its manufacturer is well positioned to give the first judgment on the probable civilian or military end-use.

ICP⁴ is “an arrangement in which a company ensures that it is completing legal transactions, obeying the regulations enacted by the government, and fulfilling company export policies. Internal

2 Council Regulation (EC) No. 388/94 and Decision 94/943/CFSP.

3 Council Regulation 1334/2000.

4 “Key Elements of an Effective Export Control System”, Institute for Science and International Security (ISIS), 2003, http://www.exportcontrols.org/key_elements.htm.

compliance systems typically include a set of procedures that company officials must satisfy before an item leaves the company. Such procedures include a thorough investigation of the buyer and end-user prior to the shipment of a purchased item off-site.” An ICP should consist of “operational export compliance policies and procedures (...) and a written set of guidelines that captures those policies and procedures.” It provides guidelines for employees on what should be done before an export takes place and helps document what has been done in this regard. An ICP helps to ensure that exports are in compliance with export control legislation and enables reporting to the government when required or requested. Such processes help build trust between companies and government agencies. This system should also help companies keep up to date with legislation and enable them to know what goods are subject to export controls. An ICP should also advise employees on how to check a planned transaction in light of any concerns relating to the customer and the end use of the good⁵.

Detailed guidelines on ICPs for exporters have been provided by several national authorities, including the US and Germany⁶.

3. ICP IN EU LAW IN 2009

Because the ICP has been considered useful for decreasing the risk of incompliance with export control regulations, it was introduced into the EU export control law in 2009, although the corresponding article was not very demanding. The EU Dual-Use

5 “Key Elements of an Effective Export Control System”, Institute for Science and International Security (ISIS), 2003, http://www.exportcontrols.org/key_elements.htm.

6 German guidelines: https://www.bafa.de/SharedDocs/Downloads/EN/Foreign_Trade/afk_information_leaflet_internal_compliance_programms.pdf?__blob=publicationFile&v=2. US Guidelines: <https://www.bis.doc.gov/index.php/documents/pdfs/1641-ecp/file>.

Regulation 428/2009⁷, which remains in force, does not explicitly require companies to put in place an Internal Compliance Programme, nor does it provide a definition of an ICP. However, it states that during the authorisation process it is possible to consider whether an exporter has “proportionate and adequate” means and procedures to ensure compliance. Art. 12.2 of the Regulation lists the implementation of an ICP as one of the criteria against which an application for a global licence (not an individual one) should be assessed by national authorities. The provision says: “*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*”.

Hence, there is no obligation for an exporter applying for a global licence to have an ICP. The EU law recommends that national authorities take the existence and outline of an ICP (here under the notion of “*means and procedures*”) into consideration as an additional criterion in the assessment process, but it is definitely left up to the national authorities to decide whether they consider an ICP obligatory or not. The provision also underlines that the ICP implemented by the exporter needs to be “*proportionate and adequate*”. This should be understood as meaning proportionate and adequate to the size of the company and the volume and characteristics of its trade in dual use goods.

It can be said that the ICP was “recommended” by the European legislator to be used in national export control systems. It was considered that its implementation by exporters would increase their standing with the authorities by virtue of having high compliance standards, resulting in the decreased risk of proliferation. Nevertheless, the ICP has not been made mandatory at the EU level.

7 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 (OJ L 134, 29.5.2009).

The decision as to whether or not to use the ICP as an assessment criterion was left with the national authorities of the EU Member States. Among them, the situation varied. The approaches taken by the EU MS could be divided into 4 general clusters⁸: a) states requiring an ICP for individual licences⁹; b) states requiring an ICP for the use of the national or EU General Export Authorisations¹⁰ or c) when applying for global authorisations¹¹; d) states which do not require an ICP but would take its existence into account when assessing an application¹².

Moreover, when assessing the EU MS approach to the ICP, it should be noted that even though it is not obligatory as part of the EU law on export control, it has been successfully introduced into EU outreach programmes¹³.

4. ICP ON THE INTERNATIONAL AGENDA 2009-2019

On the international level, the concept of the Internal Compliance Programme was also widely discussed at export control-related fora between 2009 and 2019. After many months of debates, in 2011 the Wassenaar Arrangement, which currently comprises 42 states, agreed on the Best Practices document on the ICP¹⁴. Even

8 Prof. Dr. Quentin Michel, Lia Caponetti, Dr. Ilaria Anna Colussi, “The European Union Dual-Use Items Control Regime. Comment of the Legislation article-by-article” June 2017 (DUV5Rev7).

9 E.g. Bulgaria and Hungary.

10 Austria, Bulgaria, Croatia, Denmark, Hungary, Romania and Slovenia.

11 Croatia, Finland, Hungary and Germany.

12 Belgium, Ireland, The Netherlands, Sweden.

13 The Author personally delivered lectures on ICP during the subsequent editions of the EU P2P Export Control Programme for Dual Use Goods (2011-2016). For more information on the EU outreach programmes, please visit: <https://ec.europa.eu/jrc/en/research-topic/chemical-biological-radiological-and-nuclear-hazards/eu-p2p-outreach-programmes-export-control/dual-use-goods>.

14 <https://www.wassenaar.org/app/uploads/2019/consolidated/2-Internal-Compliance-Programmes.pdf>.

though it is not legally binding, it provides an important common reference for all the Arrangement's members (among them EU states, Australia, Japan, Russia, South Korea and the USA). The Best Practices also help to advertise the ICP among third countries, with the aim of encouraging governments to consider introducing this policy instrument. The ICP has also been an element of the US Export Control and Related Border Security Assistance (EXBS) outreach programmes and of US co-sponsored International Export Control Conferences¹⁵. As it is engaged in research on non-proliferation and in EU outreach programmes, the Stockholm International Peace Research Institute has undertaken several studies on national approaches to ICPs¹⁶. The Wiesbaden Process dedicated to dialogue on export control compliance between regulators and the industry naturally included the issue of ICPs in the agenda of its meetings¹⁷.

Through briefings and presentations about national approaches to the ICP during different outreach activities, nations shared information and exchanged experience on their policies, procedures or in some cases regulations related to the issue. The inclusion of the industry made it possible to broaden the picture and take into account their point of view on the advantages and disadvantages of the ICP. All these endeavours contributed to raising awareness and understanding of the ICP.

However, it should be noted that the notion of the ICP was not included in the UN Security Council Resolution 1540 (2004) on preventing the proliferation of WMD and their means of delivery to non-state actors, in particular for terrorist purposes. The reason

15 <https://2009-2017.state.gov/strategictrade/program//index.htm>. E.g. The EU- and US-sponsored 12th International Export Control Conference in Singapore in 2011 included ICP as a topic for one of the sessions co-led by the Author.

16 E.g.: a report from 2011 undertaken for SEESAC and UNDP entitled "Internal Compliance Programmes"; even though this report was produced in the framework of arms export control, it is useful in comparing ICPs implemented in Germany, Poland, Romania, Sweden and one private company. <https://www.sipri.org/sites/default/files/2016-03/Internal-Compliance-Programmes.pdf>.

17 E.g. during the 2015 edition of the Wiesbaden Conference, a panel dedicated to "Discussion of identified effective industry compliance practices" took place. Source: materials from the conference in the possession of the Author.

for this may be the fact that the Resolution sets out what nations should control (like intangible transfers or catch-all controls), but not how exactly they are to do it (e.g. by using an ICP). The notion of the ICP with regard to dual use export controls might still be too specific for several states that do not experience notable dual use transfers.

5. ICP IN THE COURSE OF THE RECAST OF THE EU REGULATION (2014-2019)

An important development regarding the ICP took place in the European Union in 2019, when on 30 July 2019 the European Commission published its Commission Recommendation (EU) 2019/1318 *on internal compliance programmes for dual-use trade controls under Council Regulation (EC) no 428/2009*. The “ICP Recommendation” is so far the only tangible outcome of the revision process of the EU export control law initiated in 2016¹⁸. This article will discuss the ICP Recommendation in more detail in the following paragraphs.

During the recast process, in the 2016 Proposal for a Regulation, the European Commission recommended a full revision of the EU export control law. In the resulting draft legislation, the Commission proposed that ICP implementation should be a prerequisite for using global authorisations and some general authorisations. It also proposed a definition of the ICP (art. 2.22¹⁹). According to its assessment, this step would ensure an EU-wide level playing field

18 The process began with the 2013 Commission report on the implementation of EU Regulation 428/2009. “Proposal for a Regulation of the European Parliament and of the Council setting up a Union regime for the control of exports, transfer, brokering, technical assistance and transit of dual-use items (recast)”; http://trade.ec.europa.eu/doclib/docs/2016/september/tradoc_154976.pdf.

19 “internal compliance programme” shall mean effective, appropriate and proportionate means and procedures (risk based approach), including the development, implementation, and adherence to standardised operational compliance policies, procedures, standards of conduct, and safeguards, developed by exporters to ensure compliance with the provisions and with the terms and conditions of authorisations set out in this Regulation”.

and increase the effectiveness of controls²⁰. This judgment was shared by the European Parliament, which in its 2018 Proposal accepted the Commission's text. The EP also aimed to introduce the possibility for companies "on a voluntary basis, to have its ICP certified free of charge by the competent authorities on the basis of a reference ICP established by the Commission, in order to obtain incentives in the authorisation process from the national competent authorities"²¹. In November 2019, the review process was still ongoing, being in the phase of interinstitutional negotiations between the Parliament and Commission and the Council²².

Important developments with regard to the ICP took place in the EU in 2009, though in the field of arms trade. At that time, the 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 was adopted with the aim of facilitating industrial cooperation in the defence industry in the EU. In general, it simplified export procedures among companies involved in long-term industrial cooperation in the field of the production of military equipment. While introducing the possibility of lessening requirements for licensing, it also established a standard for certifying the recipients of arms. For example, entities wishing to take advantage of the general authorisations published by national authorities (art.

20 Regarding the potential financial and bureaucratic burden on exporters, the Commission argued: "the proposal does not provide for exemptions in favour of Small and Medium Enterprises (SMEs): due to overriding security reasons, it is imperative that SMEs comply with controls. However, the scope of certain provisions which may be particularly demanding in terms of human and IT resources has been limited to avoid excessive regulatory burden on SMEs. Thus, the requirement for companies to implement an effective Internal Compliance Programme (ICP) – a set of formal measures and procedures ensuring compliance with export controls – mainly applies in relation to global licences (and certain general export authorisations), while small companies that cannot afford to develop a formal ICP can export under most general authorisations and/or individual licences. Moreover, the proposal's simplification of licensing procedures and enhanced legal clarity will bring important benefits to SMEs".

21 Recital 14 and art. 2.22 of the proposed Regulation. http://www.europarl.europa.eu/doceo/document/TA-8-2018-0006_EN.html

22 The Council Presidency began negotiations with the European Parliament's delegation on 21 October 2019. [https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI\(2016\)589832](https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2016)589832).

5) need to obtain a certificate that proves their reliability as regards their capacity to observe export limitations received under a transfer licence. The process of this certification includes checking if the company has established an internal compliance system (art. 9). The entity must appoint a senior executive as the dedicated officer personally responsible for transfers and exports who will ensure that the undertaking will take all necessary steps to observe and enforce all specific conditions related to the end-use and export. Finally, the Directive requires that a certified company provides a description of the internal compliance programme or transfer and export management system implemented in the undertaking. This description shall provide details of the organisational, human and technical resources allocated to the management of transfers and exports, the chain of responsibility within the undertaking, internal audit procedures, awareness-raising and staff training, physical and technical security arrangements, record-keeping and traceability of transfers and exports.

In 2011 the Commission published its Recommendation on the certification of defence undertakings under Article 9 of Directive 2009/43/EC²³. Its Annex 1 contains a detailed table of “Questions and guidelines on the description of internal compliance programmes and for subsequent assessment”. The questions guide the reader through a practical outline of an ICP (e.g. *Are compliance manuals being provided and kept up to date for export/transfer control staff?*). Additionally, examples of best practices are provided (e.g. *Compliance manuals for the use and guidance of export/transfer control staff should be available, at least in electronic version (for instance, on the undertaking’s intranet)*). However, no detailed explanation of the ICP itself is provided. Rather, the questions in the Annex seem to be useful for the assessment process of the ICP itself during the certification by national authorities.

23 file:///C:/Users/kolakowskai/Downloads/L_01120110115en00620074.pdf.en.pdf.

6. EU GUIDANCE ON ICP FOR DUAL USE TRADE CONTROLS (2019)

A significant improvement came in 2019 with another EU ICP guideline, but this time prepared for the benefit of dual use exporters. Even though the recast of the EU dual use export Regulation was still ongoing, in 2018 the European Commission put forward a draft EU Guide on ICPs for consultation with the industry and MS²⁴. After the consultation period, in July 2019 the recommendation was published as an official Commission document: Commission Recommendation (EU) 2019/1318 of 30 July 2019 on internal compliance programmes for dual-use trade controls under Council Regulation (EC) no 428/2019²⁵.

The objective of the ICP guidance is to provide a non-binding document that describes the concept of the ICP and aids the industry in implementing such programmes. By being a potential reference guide on ICPs in the EU, it has a chance of setting a standard approach to the issue among the EU MS. Its other important aim is to advise the national authorities in EU MS on risk assessment in the licensing process.

The Commission's Recommendation identifies the core elements of an effective ICP under the EU Dual-Use Regulation. While describing these 7 elements, it draws on previous international documents and discussions in this regard (e.g. the Wassenaar Arrangement Best Practices, EU 2011 Recommendation on ICP for arms exporters). These elements are:

1. Top-level management commitment to compliance,
2. Organisational structure, responsibilities and resources,
3. Training and awareness-raising,
4. Transaction screening process and procedures,
5. Performance review, audits, reporting and corrective actions,

24 https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157336.pdf.

25 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019H1318&from=EN>.

6. Recordkeeping and documentation,
7. Physical and information security.

For each of the elements, the Recommendation provides a clear, comprehensive explanation of “*what is expected*” from the company²⁶ and how it may be achieved (*What are the steps involved?*²⁷). This approach helps readers to see in practice and understand what EU Regulation 428/2009 “wants” from the industry when it vaguely states: 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*”.

The comprehensiveness and user-friendly outline of the Recommendation makes it useful for practical implementation. Moreover, as it was produced by the Commission, the document has a chance of drawing the attention of the European industry.

26 E.g.: “The company has an internal organisational structure that is set down in writing (for instance in an organisational chart) and that allows for conducting internal compliance controls. It identifies and appoints the person(s) with the overall responsibility to ensure the corporate compliance commitments. Please be aware that in some Member States this must be a member of the top-level management.” Point 2. of the Guidelines.

27 E.g.: “Determine the number of dual-use trade control staff, taking into account legal and technical aspects which need to be covered. Entrust at least one person in the company with the company’s dual-use trade compliance and ensure that an equally qualified substitute can assume the task in case of absence (such as sickness, holiday and so on). Depending on the average volume of orders, this person may only have to handle tasks relating to dual-use export control on a part-time basis. “Point 2. of the Guidelines.

7. EXAMPLE OF A NATIONAL APPROACH TO THE ICP – THE CASE OF POLAND

7.1. ICP as an obligatory measure between 2000 and 2012

When it comes to national approaches to Internal Compliance Programmes during recent decades, one of the most interesting examples has always been that of the Republic of Poland. In Polish export control law, the notion of the ICP was introduced in 2000²⁸, when the previous law from 1997²⁹ was amended³⁰. Between 2000 and 2012, the implementation of an ICP by the exporter was a mandatory criterion for all transactions in dual-use or military items, and for all types of export licence, be it individual, global or general ones³¹. Moreover, the implementation of an ICP was subject to a mandatory ISO-9001 certification procedure undertaken in each company every 3 years. Additionally, the enterprise had to undergo an external audit every 6 months (resulting in 5 audits during the 3-year period between ICP certifications). If an

28 The Act of 29 November 2000 on foreign trade in goods, technologies and services of strategic importance to the security of the State and to maintaining international peace and security <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20001191250/O/D20001250.pdf>. See also Irena Kořakowska, "Poland" in Quentin Michel (ed.), "Sensitive Trade: The Perspective of European States (Non-Prolifération et Sécurité / Non-Proliferation and Security)", 2011.

29 Act of 11 December 1997 on Administering of Foreign Trade in Goods and Services and on the Arms Trade <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19971571026>. However, the first national legislation on dual use export control was introduced in 1993 with the Act on the Rules of Special Control of Foreign Trade in Goods and Technologies Related to International Agreements and Obligations, published in the Journal of Laws (Dziennik Ustaw) No 129 of 24 December 1993.

30 https://www.sipri.org/sites/default/files/2018-01/poland_2016.pdf.

31 Art. 10.2 and art. 11 of the Act of 29 November 2000 on foreign trade in goods, technologies and services of strategic importance to the security of the State and to maintaining international peace and security.

entity wanted to apply for a general licence, it needed to have had the ICP in place for the last three years. This approach resulted in a very low number of dual use licence applications³².

The Polish Law was rather general regarding the description of ICPs. It provided that the exporter “shall establish and implement an internal system of control and management of trade in military goods” to be able to verify that the exported items are not intended for human rights violations, terrorist purposes or other unlawful purposes, and do not endanger peace or stability (Art. 10. 2). The Law also included a list of the elements of an ICP: “the internal control system shall define in particular the tasks of the bodies of the enterprise, basic tasks of jobs related to control and management of trade, the rules of employee recruitment, data archiving, internal control, completion of orders and training”³³. Even though the national law provided a general outline of an ICP, it did not go into details that would help entities to understand this concept.

In comparison to other EU Member States, but probably also globally, as indicated by many export control experts, this demanding approach was extraordinary. Even though some other EU MS required an ICP for individual licences (Bulgaria, Hungary³⁴), none required ICP certification along with an ISO standard and external audits conducted every 6 months. This was a substantial bureaucratic and financial burden on the exporters.

32 Irena Kołakowska, “Poland” in Quentin Michel (ed.), “Sensitive Trade: The Perspective of European States (Non-Prolifération et Sécurité / Non-Proliferation and Security)”, 2011.

33 Art. 11. Ibidem.

34 Prof. Dr. Quentin Michel, Lia Caponetti, Dr. Ilaria Anna Colussi, “The European Union Dual-Use Items Control Regime. Comment of the Legislation article-by-article” June 2017 (DUV5Rev7).

7.2. 2012 amendment: cancellation of the ICP for DU goods

A significant change of approach took place in 2012. At that time, as a part of the National Reform Programme Europa 2030, the Polish government was undertaking an initiative to simplify national legislation and reduce the administrative burden³⁵. As a result, the requirement for an ICP for all types of licences for trade in dual use items was cancelled. Since then, only companies dealing with arms exports have needed to have an ICP, and even in their case, the number of obligatory audits of the ICP has been decreased from 5 to 3 during a 3-year period.

Nevertheless, according to exporters and representatives of the authorities, the current law in Poland with regard to the ICP is still overregulated, too costly and not effective. This is due to the requirements for an ISO certification and external audits, which are costly and time consuming. Accompanying the ongoing discussion on the recast of the EU Regulation, further changes to the Polish law are being considered, which would enable harmonisation with the EU law and the introduction of less restrictive ICP provisions for arms exporters³⁶. This could result in the lack of certification of ICPs by external actors, with the latter being replaced by a simple obligation to register. On the other hand, if it is accepted on the EU level, the ICP may once again become an obligation for the dual use exports, but only for global licences. Moreover, the national authority is considering providing a national standard schematic of an ICP. The Commission Recommendation on the ICP may be helpful in this regard. As the EU dual use Regulation is still under review, the outcome of these deliberations is to be seen in the future.

35 https://ec.europa.eu/info/sites/info/files/file_import/nrp_poland_en_0.pdf.

36 Interview with a representative of the Polish export control authority, May 2019.

8. CONCLUSIONS – THE ICP HAS BECOME A STANDARD, BUT IS NOT AN OBLIGATORY REQUIREMENT

After looking at the developments around the concept of the Internal Compliance Programme since the 1990s, it can be argued that it became a widely recognised element of export control systems by states exporting dual use items (members of the Wassenaar Arrangement), especially those with high volumes of strategic trade (Germany, Japan, the US). National authorities responsible for controlling dual use exports consider it an important and useful instrument for decreasing proliferation risks and enabling trading companies to safely engage in exporting activities. This was proved by the adoption by the Wassenaar Arrangement Participating States of the Best Practices Guidelines on ICP, but also by the inclusion of the ICP in their global outreach activities. The Wassenaar Arrangement's Best Practices provide the notion of the ICP with a firm standing as an important element in export control systems. However, it did not become an obligation and is not universally applied by nations, not even the EU Members. The Wassenaar Arrangement's Best Practices are merely politically binding, and there is no document or supranational regulation making an ICP obligatory. It remains a national competence to decide on the applicability of the ICP to any particular national export control system.

In the European Union, the ICP has a rather strong position. One Member State introduced the notion of an ICP as early as the 1990s (Germany), while another made it obligatory for all dual use exporters without differentiating between the size of their exports (Poland in 2000). About half of them include the ICP in their licensing system. In a few states, having an ICP has been made an obligation for certain licences, whereas in others it is just a recommendation. In the EU export control law, a reference to the ICP was introduced in 2009. Since then, the European-level law explicitly recommends that national MS authorities include the ICP

in their national dual use export systems. However, it is still not obligatory, even for general or global license users. This reflects the balance between EU MS who have different approaches to the ICP. This settlement seems to be a fair solution. The EU general recommendation on the ICP enables national authorities, which are familiar with their local industry, to decide on the appropriateness and the scope of the ICP obligation. If the national authority deems it appropriate in their particular case to require an ICP, it would find sufficient ground for such a requirement in the EU Regulation 428/2009. This balance has continued over the last 10 years. It is also worth noting an important development in Poland that took place in 2012 when, after a period when ICPs were obligatory for all dual use exporters, the ICP was erased from the dual use trade. This case is an example of stepping back from overregulation.

In the case of the arms trade, the ICP was introduced in 2009 as a confidence-building measure in the framework of EU intra-community arms transfers. It became obligatory for companies wishing to take advantage of the simplified control measures (e.g. use general licences). Thanks to this development, all EU Member States became familiar with the notion of the ICP and its implementation, even though it concerned only the field of arms exports.

Another important development in dual use export control, though not a game changer, was the introduction of the non-binding Commission Recommendation on the ICP in 2019. It provides a detailed manual of Internal Compliance Systems, and should result in increasing awareness and familiarity with the ICP. It serves as one of the steps within the ongoing process of the recast of the EU Regulation 428/2009 aimed at introducing an obligatory ICP for companies using global licences. If completed, this would be the first time the ICP has been obligatory at the EU level. It would also further increase the demand for consulting services on ICPs across the EU. With both EU manuals referring to internal compliance systems (the 2011 recommendation for intracommunity arms trade

and the 2019 recommendation for dual use goods), the national authorities now have sufficient material to aid their national entities in the process of establishing ICPs.

The situation of the ICP in the EU export control system reflects the ongoing struggle in the process of establishing export control regulations to find the right balance between the need to assure industry compliance and the need to not overload the private sector. The 2009 EU Regulation on dual use controls enables national authorities, which are familiar with their local industry, to decide on the appropriateness and the scope of the ICP obligation. This provides flexibility and allows the level of control to be matched with the size of the industry and the scope of its production. This situation indicates a balance between a need to assure adequate controls and the proportionality of the burden.

The possible introduction of an EU-level obligation to have an ICP for global licences would increase the burden on the industry, but it would also assure effective controls in times of significant technological development. At the same time, the current European Parliament proposal on the dual use Regulation includes caveats on the ICP which require it to be proportional, thus preventing the risk of overregulation.