Chapter
01

Designing and implementing appropriate and effective penalties for dual-use trade control offences

Sibylle Bauer
Programme Director, Dual-use and Arms Trade Control, SIPRI

1. INTRODUCTION

Enforcing national and international law regulating the trade in dual-use items and arms is key for effective controls. However, the design of penalties and their application in investigation and prosecution has not been a major focus of national, regional and international political or legal discussion to date. This chapter explores the specifics of this issue from a comparative perspective. Section II sets out the international legal and political framework for penalties and prosecutions in the area of dual-use and conventional arms trade controls. Section III shows the diversity of national penal provisons, comparing countries in the EU and South East Asia. Section IV outlines challenges of translating political and legal terms into effective enforcement. Section V presents the conclusions.

2. INTERNATIONAL LEGAL AND POLITICAL FRAMEWORK

As in other policy areas, there are currently no international legal standards regarding penalties for trade control offences regarding arms and dual-use items. Somewhat vague requirements can be derived from United Nations Security Council resolutions and from the international treaties regarding nuclear, biological and chemical (NBC) weapons. The Arms Trade Treaty (ATT) makes no provisions regarding penalties. None of the four export control regimes currently provide guidance on penalties and prosecutions.

The 1993 Chemical Weapons Convention (CWC) requires states parties to 'adopt the necessary measures to implement its obligations under this Convention'. This explicitly includes the obligation to 'prohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction as recognized by international law from undertaking any activity prohibited to a State Party under this Convention, including enacting penal legislation with respect to such activity'; and to extend this legislation 'to any activity prohibited to a State Party under this Convention undertaken anywhere by natural persons, possessing its nationality, in conformity with international law'. The CWC even requires that each state party 'shall cooperate with other States Parties and afford the appropriate form of legal assistance to facilitate the implementation' of these obligations.[1] The 1972 Biological and Toxin Weapons Convention (BTWC) only provides that '[each] State Party to this Convention shall, in accordance with its constitutional processes, take any necessary measures to prohibit and prevent the development, production, stockpiling, acquisition or retention of the agents, toxins, weapons, equipment and means of delivery specified in Article I of the Convention, within the territory of such State, under its jurisdiction or under its control anywhere.'[2] The 1968 Non-Proliferation Treaty (NPT) does not make reference to enforcement or penalties.[3] The Arms Trade Treaty (ATT), which entered into force in December 2014, obliges States Parties to 'take appropriate measures to enforce national laws and regulations that implement the provisions of this Treaty'.[4] This aspect has been absent from ATT discussions in the context of the preparatory

1 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, entered into force 29 April 1997, http://www.opcw.org/chemical-weapons-convention/articles/article-vii-national-implementation-measures/, Article VII.

2 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, entered into force 26 Mar. 1975, http://www.opbw.org/, Article IV.

3 Treaty on the Non-Proliferation of Nuclear Weapons, entered into force 5 March 1970.

4 Article 14. http://www.un.org/disarmament/ATT/.

meetings and the first meeting of Conference of States Parties to date, and appears to have received little attention in related seminars and capacity-building activities. While this is likely due to the recent adoption of treaty's entry into force, which required an initial focus on resolving financial, procedural and organisational questions, enforcement measures including penalties are a crucial element of the treaty's effectiveness and impact.

UN Security Council Resolution 1540 *inter alia* requires states to: adopt and enforce legislation prohibiting non-state actors from engaging in NBC proliferation activities; and 'take and enforce effective measures to establish domestic controls to prevent the proliferation of nuclear, chemical, or biological weapons and their means of delivery, including by establishing appropriate controls over related materials'. These are specified as to comprise border controls and law enforcement efforts as well as controls on export, re-export, transit, trans-shipment, financing and transport. This explicitly includes 'appropriate laws and regulations' and 'establishing and enforcing appropriate criminal or civil penalties for violations of such export control laws and regulations'. The resolution defines a non state-actor as an 'individual or entity, not acting under the lawful authority of any State in conducting activities which come within the scope of this resolution'. It can thus apply to recipients but also suppliers of WMD-relevant items. Related materials in turn are defined to also comprise equipment and technology and are now widely interpreted to refer to WMD-related dual-use items as defined by the multilateral export control regimes.

For all abovementioned international conventions and resolutions, states determine the ways in which they will implement these obligations. Depending on the laws that are applicable to specific activities within a given legal system, penalties can vary considerably.

UN sanctions on the transfer of arms and dual-use items do not include any specific requirements or guidance on penalties. For example, UN Security Council Resolution 1737 provides that 'States shall take the necessary measures to prevent the supply, sale

or transfer' of certain items to Iran, while UN Security Council Resolution 1696 calls on states to prevent the transfer of specified items to the Democratic People's Republic of Korea (DPRK or North Korea) 'in accordance with their national legal authorities and legislation and consistent with international law'.[5]

3. NATIONAL PENALTY SYSTEMS

Internationally and within the EU, national penalty systems for dual-use trade control offences differ considerably, regarding (a) the types of specific penalties and their severity, e.g. regarding the length of prison sentences; (b) the types of generic penalties that may be or have been applied to strategic trade control offences, such as smuggling or falsification of documents; (c) the overall design of the criminal justice system and the system for administering non-criminal penalties; and (d) the actual application of penalties in cases. Generally, penalties available can be divided into administrative and criminal penalties. Administrative penalties can include fines; the revocation of licences; the loss of access to trade facilitation privileges (e.g. simplified licencing or customs procedures); the loss of property rights through confiscation; the temporary or definitive closure of a company; the change of the person legally responsible for exports in a company; and mandatory compliance training. Criminal penalties include fines but primarily are prison sentences, which may be suspended.

3.1. Examples of penalty systems in the EU

Penal law has remained within the national competence of EU member states across all issue areas, including criminal procedural laws. These include the modalities for deciding whether to take a case to court. Depending on national legal traditions, penal provisions

5 UN Security Council Resolution 1737, 23 December 2006; and UN Security Council Resolution 1696, 31 July 2006.

can be placed in a specific law, such as the foreign trade, economic crimes and/or customs act, or in the penal code. A combination thereof is also possible.

The only EU-wide legislation regulating arms exports concerns embargoes (see below). The EU Common Position on exports of military equipment contains no reference to penalties, while the 2003 Common Position on Arms Brokering states: 'Each Member State will establish adequate sanctions, including criminal sanctions, in order to ensure that controls on arms brokering are effectively enforced.'[6]

The legal framework for prosecuting dual-use offences in the EU is a combination of EU and national laws. The EU Dual-use Regulation is directly applicable across the EU and includes the control list of dual-use items for which a licence is required for export and, in certain limited cases, brokering and transit.[7] EU member states are responsible for enforcing these provisions. In addition, the Regulation allows for some national discretion, which has implications for potential offences. Article 24 of the EU Dual-use Regulation requires member states to 'take appropriate measures to ensure proper enforcement of all the provisions of this Regulation' and to 'lay down the penalties applicable to infringements of the provisions of this Regulation or of those adopted for its implementation'. Article 24 also provides that penalties for breaches of the regulation be effective, proportionate and dissuasive. Similar wording has been used in EU arms and dual-use embargoes and sanctions. However, the translation of these provisions into national criminal penalties and administrative sanctions differs

---

6 Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, *Official Journal of the European Union*, L335, 13 December 2008, pp. 99–103; Council Common Position 2003/468/CFSP of 23 June 2003 on the control of arms brokering, *Official Journal of the European Union*, 25 June 2003, L156, p. 79.

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, *Official Journal of the European Union*, L134, 29 May 2009. The Regulation entered into force on 27 August 2009.

enormously.[8] Additionally, penalties for violating embargoes also differ, as do institutional competence and the interpretation and application of basic concepts in penal law—such as aiding and abetting, attempt, support, negligence and intent. To date, no significant efforts have been made to develop agreed standards on what is meant by 'appropriate measures' or by 'effective, proportionate and dissuasive' in this context, neither within the EU nor at the international level. However, it should be noted that different avenues and apparent differences may effectively lead to the same, or similar, results in terms of the administration of sanctions and the outcomes of prosecutions.

→ GERMANY

They key elements of legislation for German penalties are to be found in the Foreign Trade Act and the War Weapons Control Act, and the accompanying orders. Germany has revised penal provisions for dual-use and arms trade controls a number of times, most recently in 2013 with the most fundamental revision since the adoption of these laws over 50 years ago.

The revised act and implementing provisions entered into force on 1 September 2013. While the maximum penalty of 15 years imprisonment — the highest maximum possible for fixed-term prison sentences in the German legal system — remains, a number of important changes have been adopted. Previously, in order for certain offences to be considered criminal, it was necessary to prove that the alleged offence seriously endangered Germany's external relations, thus constituting 'aggravating factors'. The current law no longer requires these aggravating factors. Instead, basically all breaches committed with intent are considered criminal offences.

---

8 The most recent comparison of penalties dates back to 2005/2006: European Commission, Directorate-General for Trade, Working Party on Dual-use Goods, Report on the answers to the questionnaire DS6/2005 rev. 3 on existing sanctions—implementation of Article 19 of Council regulation 1334/2000, DS 37/4/2005 rev. 4, 11 May 2006; and 'Sanctions imposed by EU member states for violations of export control legislation', Draft rev. 14, September 2005.

Negligent acts will only constitute an administrative offence.[9] The only exceptions are violations of arms embargoes, where both intentional and negligent (*leichtfertige*) offences constitute a criminal offence.

Also, a voluntary self-disclosure provision for certain negligent formal or procedural errors was newly introduced. Lower maximum sentences (e.g. 5 years), and certain minimum prison sentences (e.g. 3 months) are proscribed for specified offences. The provisions in force until 2013 can however still be applied to prior offences, and thus up to 20 years. As previously, fines of up to 500,000 euros can be imposed; and in specified minor offences up to 30,000 euros. These administrative offences are classified as *Ordnungswidrigkeiten*, a German particularity. *Ordnungswidrigkeiten* can be imposed by an administrative authority, and no criminal procedure is required although the provisions of the criminal procedural law have to be applied.[10] For example, a CEO can be fined if an offence occurs due to a breach of duty of care, such as a result of lack of training or compliance procedures.[11]

Few countries have investigators and/or prosecutors, or units within the respective services, that are specialised in breaches related to foreign trade control. In Germany, since 1 January 2007 major WMD-related dual-use trade offences can be transferred to a specialised prosecution unit of the Federal Prosecutor General (*Generalbundesanwalt*).[12] A central, federal authority (the German Customs Criminological Office, *Zollkriminalamt* and its

---

9 *Gesetz zur Modernisierung des Außenwirtschaftsrechts* [Law on the Modernisation of Foreign Trade Law] of 6 June 2013, *Bundesgesetzblatt* (Federal Gazette), part I, no. 28, 13 June 2013, pp. 1482-1496. Available at http://www.bgbl.de.

10 "Unless otherwise provided by this Act, the provisions of general statutes concerning criminal proceedings, particularly those of the Code of Criminal Procedure, of the Courts Constitution Act and of the Youth Court Act, shall apply mutatis mutandis to the regulatory fining proceedings", *Ordnungswidrigkeitengesetz*, Article 46. The Regulatory Offences Act, sometimes also translated as Administrative Offences Act.

11 Article 130, *Ordnungswidrigkeitengesetz*.

12 2. *Justizmodernisierungsgesetz* [Second Justice Modernization Law], 22 December 2006, http://www.gesmat.bundesgerichtshof.de/gesetzesmaterialien/16_wp/jumog2/bgbl106s3416.pdf.

local branches, recently transformed into a department within the Directorate General for Customs) is responsible for investigating criminal offences, while regional customs authorities are in charge of imposing administrative sanctions.

Criteria in the decision regarding the amount of the fine are: acknowledgement of the fault; whether a licence would have been granted if applied for; whether an offence had been committed before or someone is a first offender; whether the offence was committed on behalf of a third party; whether lack of due diligence was involved; the size of the company– if an individual is fined, the amount is likely to be smaller than for a company; the reason for the offence (e.g. new compliance officer in charge or position vacant etc.). The offender can go to court if he or she disagrees with the decision and wishes to subject it to a judicial test. Challenges occur if the company in question does not exist any more, or the department in charge has been spun off, and legal succession is not clear.[13]

In addition to fines, access to facilitated customs procedures may also be suspended or denied as an administrative sanction, which constitutes a very serious measure for companies. The economic advantage gained through the illegal activity may also be taken away. The maximum fine is 500,000 euros per offence; actual fines up to 490,000 euros have been imposed in the past, and this can be complemented through taking away the economic advantage.

Germany is among the countries with the highest number of actual prosecutions for both embargo breaches and regular trade control offences, and has thus gathered substantial practical experience in processing such cases. It is also one of the few countries in the EU where long prison sentences have been the consequence.[14]

---

13 This section is based on information provided by the German authorities.

14 For examples of cases see Bauer, S., 'Prosecuting WMD-related dual-use trade control offences in the European Union: penalties and prosecutions', *Non-proliferation Paper* no. 30, July 2013; and for example http://www.welt.de/regionales/koeln/article125007745/Bundesanwaltschaft-laesst-Deutsch-Iraner-festnehmen.html; http://www.lto.de/recht/hintergruende/h/embargo-iran-waffen-handel-dual-use.

→ THE NETHERLANDS

In the Netherlands, the national legal framework regarding export control for arms and dual-use items comprises: the Strategic Goods Order; the Strategic Goods Decree 2012; and the Strategic Services Act 2012 (which controls brokering, technical assistance and intangible transfers of technology). Arms exports are additionally governed by the Arms and Munitions Act, while legislation on sanctions includes the 1977 Sanctions Act and Embargo Orders. The export of chemicals is also regulated by the Chemical Weapons Convention Implementing Act and the Chemical Weapons Convention Implementing Order. Finally, the General Customs Act also applies to arms and dual-use exports. Export control offences as defined by these acts can be punished according to the Economic Offences Act. Penalties for export control breaches can be divided into misdemeanours and felony offences. For misdemeanours, the maximum prison term is one year. In addition, a fine of category 4 (ranging from 20,250 to 81,000 euros), and community service can be imposed. For felony offences, the maximum imprisonment is 6 years, and penalties can include community service and a category 5 fine (from 81,000 to 810,000 euros). In the Netherlands, both companies and individuals can be prosecuted.

Additional administrative penalties include: (a) deprivation of certain (public) rights; (b) full or partial closing down of a company for a maximum of one year; (c) confiscation of goods; (d) confiscation of the profit; (e) publication of the sentence; and (f) placing a company under judicial supervision. If the Prosecutor considers there is sufficient evidence he or she can also propose a settlement to the suspect.

While prosecutors in the Netherlands usually apply the Economic Offences Act for export control violations regarding strategic goods, one individual who supplied chemicals that were

used by Iraqi President Saddam Hussein as chemical weapons against Iraq's Kurdish population was charged with genocide and crimes against humanity.[15]

Examples of prosecutions include the case of Henk Slebos, who provided dual-use items to his university friend A. Q. Khan in Pakistan. A District Court imposed 12 months imprisonment (with 8 months suspended) and a fine of 100,000 euros. The Amsterdam Court of Appeal subsequently imposed 18 months imprisonment (with 6 months suspended) and a fine of 135,000 euros.[16] Other cases taken to court in recent years include the export of afterburners for military fighters, which resulted in a 10,000 euros fine and forfeiture of the goods; and the export of M113 and M60 tank parts, which resulted in a 75,000 euros fine and 240 hours of community service.

→ THE UNITED KINGDOM[17]

In the UK, for offences regarding the export of military and dual-use goods, the maximum penalty for deliberate offences is up to 10 years imprisonment (14 years if nuclear material is involved)

---

15 This was because the export of those chemicals was not in violation of foreign trade legislation at the time of their export. Later exports did not take place from the Netherlands and, even if they had, the statute of limitation would have applied. At the time, dual-use brokering was not subject to control. The individual was acquitted of the Genocide Convention Implementation Act but found guilty of violating the Criminal Law in Wartime Act, in conjunction with the Dutch penal code. District Court of The Hague, Case 09/751003-04, Judgement LJN: AU8685 of 23 December 2005; and Court of Appeal of The Hague, Case 09/751003-04, Judgement LJN: BA673 of 9 May 2007. These and other rulings can be accessed at http://www.haguejusticeportal.net/. See also van der Wilt, H. G., 'Genocide, complicity in genocide and international v. domestic jurisdiction: reflections on the van Anraat case', *Journal of International Criminal Justice*, vol. 4, no. 2 (July 2006), pp. 239–57; and van der Wilt, H. G., 'Genocide v. war crimes in the van Anraat appeal', *Journal of International Criminal Justice*, vol. 6, no. 3 (July 2008), pp. 557–67.

16 This case is summarized in Bauer 2013 (note 14), and Wetter, A., *Enforcing European Union Law on Dual-use Goods*, SIPRI Research Report no. 24, 2009.

17 This section is based on information provided by UK HMRC for a study conducted by the author for the Swedish Parliamentary Committee on Arms Exports (KEX) in 2014. For further detail, see Bauer, S., 'Penalties for export control offences for dual-use and export control law: a comparative overview of six countries', April 2014, in *Skärpt exportkontroll av krigsmateriel – DEL 2, bilago, Slutbetänkande av Krigsmaterielexportöversynskommittén, KEX*, SOU 2015:72, Stockholm 2015, pp. 753-770, http://www.sou.gov.se/wp-content/uploads/2015/06/1_SOU-2015_72_DEL-2_sid-1-818_webb.pdf.

and/or a fine of any amount.[18] If the offence was not deliberate, the exporter and their agent can be fined at a specified level on the Standard Scale, or can be given a fine of three times the value of the goods. The offence is thus a strict liability offence, as the Customs Act defines it as an offence to export goods or take them to a place to be exported (for example a port or airport) if there is any prohibition or restriction on their export. Both companies and individuals can be prosecuted in the UK.

Fines imposed have ranged from 1,000 to 575,000 British pounds. The fine is calculated according to the goods and destination (e.g. how serious an offence it was) and also sometimes the value of the goods and the profit they made. Also, Her Majesty's Revenue and Customs (HMRC, the British customs agency), issue many written warnings for first-time offences if they are not serious. They can also charge a 'restoration penalty' if the exporter wants to have his or her goods back and apply for a licence. This is calculated based on the value of the goods and the seriousness of the offence.[19] In deciding whether to apply restoration penalties, HMRC will consider the risk that restoring the goods would result in the exporter's attempting to evade the controls for a second time. When Customs issues a fine instead of criminal prosecution, this is called a 'compound penalty'. Sometimes the exporter is given the choice of whether to pay a fine or go to court. The majority of breaches of export controls have resulted in the control authority (HMRC or the Home Office Border Force) issuing a fine or written warning. Only around 1% of cases result in criminal prosecution; a small percentage of cases result in large financial penalties (fines) in lieu of prosecution, while the vast majority of cases are dealt with by small fines (restoration penalties) and/or official written warnings.

---

18 The relevant law is in Section 68(1) and (2) of the Customs and Excise Management Act of 1979. The penalties are in Section 68(3). http://www.legislation.gov.uk/ukpga/1979/2.

19 These powers are regulated under Section 152 of the 1979 Customs and Excise Management Act http://www.legislation.gov.uk/ukpga/1979/2.

Examples of prosecutions since 2005 include prosecutions for export licencing offences, but also trafficking and brokering ('trade') offences.[20] Details have been published by the British authorities through press releases and information in the annual report on arms exports. Serious deliberate offences resulting in prosecution and imprisonment are fairly rare—not normally more than five per year, and some years only one or two cases. Examples of cases where compound penalties have been issued can be found on the website of the British export licencing authority.[21] According to information provided by UK Customs in 2013, about

3.2. Examples of penalty systems in Asia

→ REPUBLIC OF KOREA

In terms of criminal sanctions, the Foreign Trade Act provides two penalty provisions for export violations related to strategic items. First, anyone who exports items without a licence to facilitate international proliferation of strategic items faces imprisonment for up to seven years or a fine not exceeding five times the value of the exported or brokered items.[22] Second, anyone who exports items without a licence or who obtains a licence fraudulently faces imprisonment for up to five years or a fine not exceeding three times the value of the exported goods.[23] Attempt of specified violations is to be treated as completed for the purpose of punishment (Article 55).

The Foreign Trade Act contains three types of administrative sanctions: (a) banning all exports or imports of strategic items for up to three years by a person who has exported any strategic items without an export licence or situational licence inter alia[24]; (b) an 'educational order' to take a training course to any person who has

---

20 http://blogs.bis.gov.uk/exportcontrol/category/prosecution/.

21 http://blogs.bis.gov.uk/exportcontrol/prosecution/compound-penalty-cases/.

22 Foreign Trade Act, Article 53(1). An English version of the act can be found at http://www.moleg.go.kr/english/korLawEng?pstSeq=54776

23 Foreign Trade Act (previous note), Article 53(2).

24 Foreign Trade Act (previous note), Article 31(1).

exported strategic items without an export licence or a situational licence or obtained an export licence or a situational licence by fraud or other wrongful means;[25] and (c) a civil fine not exceeding 20 million won, for example, for failure to submit a report or data or has submitted a false report or data.[26]

The Korea Customs Service (KCS) is responsible for investigating foreign trade offences as judicial police in accordance with the Customs Act, including powers to search and arrest.[27] The officers can search offenders under the Foreign Trade Act and arrest them at the scene. Bringing a case to court is the responsibility of the Prosecutors' Office.

There have been a number of recent prosecution cases, including a case involving the illegal export of equipment for the production of shells to Myanmar, disguised as agricultural machines. The cases resulted in fines as well as suspended prison terms. The case also illustrates an important point in strategic trade prosecutions. The Republic of Korea's supreme court in December 2010 charged the suspects with illegitimate export only for the period after October 2004. Prior to that, the relevant regulation defined the export restriction for strategic items to apply to an "area which could jeopardize the international peace and community safety". This was considered too broad and imprecise, and lacking legal clarity. The law was later revised to specifically mention each country of which export is restricted, and the current regulation requires all strategic material exports to obtain valid approval regardless of the importing country.[28]

---

25 Foreign Trade Act (previous note), Article 49.

26 Foreign Trade Act (previous note), Article 59(1)3.

27 Customs Act, Law no. 11 602 as amended up to 1 January 2013, http://www.law.go.kr/lsInfoP.do?lsiSeq=131363, Articles 295 and 296. For further detail on the role of South Korean Customs, See Lee, J., Lee, J., South Korea's Export Control System, SIPRI Background Paper, November 2013, http://books.sipri.org/product_info?c_product_id=468.

28 Korea Strategic Trade Institute (KOSTI), [Annual report 2011] (KOSTI: Seoul, 2011), in Korean. English translation of document provided to author by KOSTI in November 2015). See also Lee (note 27).

A company that exported dual-use machine tools without the necessary licences to China, India and other countries between 2005 and 2008 was fined 50 million won and one month of export restriction. In 2011, 21 administrative measures for violations of the Foreign Trade Act were imposed.[29] These included warnings and educational orders for to 15 companies, export restrictions up to two months and fines for 3 companies, and 3 cases where export and import restrictions were imposed for up to three months. This overview of cases provides interesting insights into the actual application of penalties. It also includes cases where the company had been unaware, and exported to destinations not considered highly sensitive, where a fine and warning letter were the result.

→ MALAYSIA

With the death penalty explicitly included in the 2010 Strategic Trade Act (STA), Malaysia has the most severe penalties for strategic trade control offences of all countries worldwide. The death penalty may be reconsidered in the context of the 2016 legal revision, as it has been subject to severe criticism given that the penalty could also be imposed without intent, if death is the result of the act.[30] Article 9 of the STA also foresees up to life imprisonment and severe fines, including a minimum fine of 30 million Ringgit for a specified offence committed by a 'body corproate' (equivalent of almost 7 million euros). A person convicted of an export, transshipment or transit offence may also be disqualified from holding or obtaining an STA permit (Article 9).[31] To date, no court cases have been the result of these provisions.

---

29 See Lee (note 27).

30 http://www.str.ulg.ac.be/wp-content/uploads/2016/03/Strategic-Trade-Review-Issue-02.pdf.

31 For the Strategive Trade Act 2010, see http://www.miti.gov.my/index.php/pages/view/2581?mid=287.

4. TRANSLATING POLITICAL TERMS INTO LEGAL CONCEPTS

The way political terms are translated into legal concepts or norms can vary considerably, as can the national definition of legal concepts that are agreed at international level, the legal consequences for breaches at the national level, and their application through the national legal system. Due to these four steps in the interpretation, conceptualisation and application of norms, what constitutes an offence may differ considerably from country to country, even where the original source of the law is the same.

Importantly, due to the low number of foreign trade control related cases in the vast majority of countries, in many or even most countries, little attention has been given to a systematic, deliberate and coherent approach. Where cases have occurred, at least initially, prosecutors often had to apply penalties for regular offences such as fraud, or even unrelated offences such as tax evasion. This has at times resulted in very low penalties and often only fines, when compared to penalties for similar cases in some other countries such as Germany or the US. Among investigators, prosecutors and judges not familiar with the specifics of foreign trade control offences, and in particular those involving dual-use items, common misperceptions include: (a) that dual-use items are harmless since they mostly have civilian uses; (b) that generic legal provisions are sufficient to prosecute such cases; and (c) that provisions regarding hazardous goods could be applied, although very few dual-use items constitute hazardous items as such unless they are used to build a nuclear weapon or missile, for example, but are otherwise common industrial products.

4.1. 'Effective' and 'appropriate'

UN Security Council Resolution 1540 uses the terms 'effective' and 'appropriate' 11 times each. Regarding effectiveness, an important question to consider is prevention, although the relative

importance of prevention differs in national legal doctrines. Legal theory distinguishes between 'special' and 'general' prevention. Special prevention aims to stop an offender from committing further crimes; if the offender is part of a network, special prevention is also a possible contribution to disrupting wider illegal activities. General prevention aims to deter other acts that could or would contribute to proliferation.[32] Closely related to this is the issue of the appropriate deterrent for companies and individuals. Whereas fines, loss of property rights (confiscation) and privileges are obvious penalties (also) for companies, prison sentences clearly can only be applied to individuals. Effectiveness can also be interpreted to apply to the actual application of the penalties and to the overall system. Where penalties only exist on paper but are known or believed not to be enforced, their effectiveness can be called into question.

The criterion of appropriateness also raises several questions. Should this criterion be assessed in relation to the seriousness of the crime, including its consequences or potential consequences? Should consideration be given to the subjective perspective, and thus the individual perpetrator, and in particular his or her intent? Or should appropriateness be considered in relation to other offences within the same legal system? This criterion refers to both penalties for other offences such as fraud, murder, and other trade-related offences such as embargo violations. Countries may have very different penalties for dual-use trade offences related to chemical weapons and offences related to nuclear weapons, due to the different origins and context of the legislation. Furthermore, as has been pointed out, corresponding penalties may be found either in specific legislation or in the penal code, depending on the country.

The term in the EU Dual-use Regulation related to appropriate is 'proportionate'. Defined as such, the scope of an offence and the penalty assigned to a breach has to fit the national legal tradition and system and be proportionate to the offence and to other offences. Furthermore, the EU requirement for penalties to be 'dissuasive'

---

32 For further detail see Wetter (note 16).

relates to the deterrence and prevention point discussed above, and both the EU Dual-use Regulation and UN Security Council Resolution 1540 use the term 'effective' in relation to penalties.

4.2. Different types of act and degrees of involvement

Regarding the acts to which penalties are applied, there is a wide range of possible acts of involvement in an illegal transaction. A focus on the exporter can pose a problem from a prosecution perspective, since another actor may be the main or even the only perpetrator. Moreover, the range of actors and their types of involvement in export control related offences has expanded considerably due to the increased complexity of legal trade flows, company structures, modes of transport and illegal procurement patterns. The use of intermediaries, front companies, shell companies and diversion or trans-shipment points has multiplied the number and types of actors and activities involved in transfers. Although the term 'export controls' continues to be used, 'trade controls' more accurately reflects reality as it specifically includes export associated activites such as brokering, transit, trans-shipment, financial flows. Moreover, technological developments have added to the complexity of prosecution cases through their impact on both the type of items transferred and the way and ease with which they are transferred. Technology transfer can occur by electronic means, which legally constitutes an export, or through the oral transfer of know-how. The latter is a form of technical assistance, which can also take place through manual services. These developments create strong demands and challenges from both a conceptual legal and practical enforcement perspective.

In addition, there are different degrees to a person's responsibility. Theoretically, the subjects of punishment could include anyone acting on their own initiative; anyone who organizes an illegal transport and orders the staff to carry it out; anyone who knows about or tacitly approves infringements in his or her area of responsibility but does not intervene; or anyone who is accounta-

ble for the violation because of a breach of his or her duty of care. Whether in particular the latter two types of involvement can be subject to criminal prosecution will again differ from country to country.

4.3. Penalizing attempt

Given the main goal of trade control enforcement efforts being prevention, the question of whether and how to penalize the attempt to commit an offence is an important question. Enforcement authorities usually are either obliged to stop a suspected illegal shipment, or otherwise have to weigh the risks of a so-called controlled delivery—where the item is monitored even outside the country in order to identify further actors involved before stopping a transaction. This can be particularly useful in the discovery of illegal networks rather than individual, one-off offences. Whether or not it is considered a priority to stop the item rather than to let it proceed and establish an offence, legislators need to determine whether the intent to export should be penalized.

Penal codes can provide for the offences of attempting to commit a crime or conspiracy to commit a crime—even if the item has not left a specific territory or the transaction been completed. British Customs legislation makes the attempt to circumvent export restrictions an offence.[33] Regarding whether intent to commit a crime is applicable, the key question is not only what legally constitutes intent, but also when the export legally takes place—for example, on submission of the customs declaration, or once the national border is crossed and national jurisdiction ends.[34]

---

33 See Section 68(2) of the British Customs and Excise Management Act: 'Any person knowingly concerned in the exportation or shipment as stores, or in the attempted exportation or shipment as stores, of any goods with intent to evade any such prohibition or restriction as is mentioned in subsection (1) above shall be guilty of an offence under this subsection and may be detained.' The complete text of the act can be found at http://www.legislation.gov.uk/ukpga/1979/2/section/68.

34 E.g. in the Netherlands submitting an export declaration for a transaction that would be illegal is considered an offence. Attempt also constitutes an offence, but only in cases of intent.

5. CONCLUSIONS

National approaches to penalizing export control offences for dual-use and military items vary considerably. This is the case even within the EU where a common law is in place for trade in dual-use items, and common criteria apply to the arms trade. The differences include the balance between criminal and administrative penalties; the forms of administrative penalties and severity of criminal penalties; their application in actual administrative or criminal procedures; the actors and actions related to export control offences that can be subject to punishment; the powers of authorities to impose administrative sanctions without participation of a court as well as the procedures and modalities involved; and the types of law in which export control-related penalties can be found.

These differences can be attributed to a number of factors, including the overall philosophy and structure of the laws, and the legal system; the size and scope of the arms and dual-use industry; and how seriously the government takes trade-related offences involving dual-use items and arms.

There is also a considerable difference in the number of prosecutions that countries have brought. This can be attributed to a number of factors, such as the differing numbers of detections of illegal transactions, differing volumes of export transactions, and varying priorities and resources of enforcement and prosecution authorities.

Given the importance that has been assigned to preventing the proliferation of nuclear, biological and chemical weapons and to controlling flows of conventional weapons, the low degree of attention and resources focused on enforcement and penalties in preventing their illegal spread may be surprising. While this may be partly due to resource constraints, common gaps between political statements and resource allocation for implementation, and countries' insistence on maintaining national autonomy in judicial matters, enhanced information exchange on specific cases

and penal provisions, development of guidance, sharing effective practices and lessons learned, and further scholarly research could go a long way in clarifying the choices available to policy makers and law makers, and facilitating the effective implementation and enforcement of legal norms that have been adopted.