Chapter
02

Enforcement of trade control provisions in France

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1. INTRODUCTION

The structure of the legal corpus of France, Member of the European Union, is the result of intertwined international, European and national norms. International and European norms are on top of the legal pyramid. In view of the "monist" legal doctrine[35] followed in France, international norms apply directly without any requirement for their translation into national law. Therefore, in areas regulated by norms of external origin, France needs not and does not develop additional laws and regulations.

As regards penalties applicable infringements of the dual-use trade control provisions, monism shall be read as expression of national sovereignty. In the EU Regulation 428/2009, the reference to penalties is limited to the requirements of setting "effective, proportionate and dissuasive penalties applicable to the infringements of the provisions"[36] and of communication of the "laws, regulations and administrative provisions adopted in implementation" of the Regulation.[37] A European regulation, unlike a directive, does not require further implementing acts, normally, but directly apply in all Member States' legal systems. Due to the fact that the adoption

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35 Monism is the legal theory according which a legal system must be considered as a whole and all the norms, independently from their origin, belong to the same structure. Dualism, as opposite to monism, considers that several legal orders can exist in parallel but do not meet and their norms have a value only for the order in which they are.

36 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, Recital 19 and Article 24.

37 *Ibid.*, Article 25.

and enforcement of civil, penal and predominantly administrative provisions and procedures remain a sovereign national capacity in the absence of exclusive European competence and enforcing authority, additional texts are required from the States in order to give strength to the Regulation. The risk is that enforcement differs between 2 States regardless the fact they adhered the same trade control provisions.

As regards sanctions adopted against a third State or persons that are decided in response to international security concerns, the EU usually acts on two levels: through a regulation where it relates to its fields of competence, through a Common Foreign and Security Policy (CFSP) decision where a coordinated approach of its Member States is needed but outside the EU competences. The first is a legally binding although the second is a political instrument which, if it is not legally binding as such, produces legal effects on the European private actors and may consequently may require further implementation measures. As for France, there are only a limited number of national texts that translate these restrictive measures into national law.

A ceetain paradox may arise in enforcing trade control provisions due to the application of the monist doctrine. On the one hand, a situation which normally requires none or little implementation because the provisions are set at a higher level or norms results in the existence of an important number of texts. On the other hand, a situation which could normally require extensive implementation leads to adoption of very few texts only.

2. PENALTIES FOR INFRINGING DUAL-USE TRADE CONTROL PROVISIONS

In implementation of Article 24 of the Regulation 428/2009, France had to design penalties that, together with the action of the enforcing agencies, give strength to the trade control provisions.

2.1. Sources

In the legal apparatus, dual-use-related provisions are contained in both specific texts dealing with this area or, as it is mostly the case regarding the penalties, in general texts, which cap activities of the society and individuals in general.

→ IN THE DUAL-USE SPECIFIC TEXTS

Despite its direct applicability, a regulation allows for the Member States organising its implementation through national texts, provided that they do not contradict the European norm. As for the dual-use Regulation, it is necessary, to many respects such as the creation and running of a licencing authority or the penalties in case of infringements of the provisions, to produce such implementing texts.

France, which system is driven by a civil law culture, had consequently adopted a set of regulations for adapting it to some of its "national specificities". The controls are organised by decrees[38] and arrêtés, that implement the decrees.[39] The EU general licences are implemented by the way of arrêtés.[40] The option left by the

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38 The main one being the Decree n°2001-1192 of 13 December 2001 *relatif au contrôle à l'exportation, à l'importation et au transfert de biens et technologies à double usage.*

39 Such as the Arrêté of 13 December 2001 *relatif au contrôle à l'exportation vers les pays tiers et au transfert vers les Etats membres de la Communauté européenne de biens et technologies à double usage* and the Arrêté of 13 December 2001 *relatif à la délivrance d'un certificat international d'importation et d'un certificat de vérification de livraison pour l'importation de biens et technologies à double usage.*

40 See Arrêté of 31 July 2014 *relatif à la licence générale "biens à double usage pour forces armées françaises"* and Arrêté of 31 July 2014 *relatif à la licence générale "Salons et Expositions" "Exportations et transferts au sein de l'Union européenne de biens à double usage importés pour la tenue de salons et d'expositions sous le régime douanier de l'admission temporaire".*

Regulation to adopt national general licences is used via arrêtés.[41] Additional controls are implemented by the way of arrêtés on "tear gas and riot control agents"[42] as well as some "civil helicopters and their spare parts"[43]. Administrative bodies have also been set up or (re-)organised for their respective fields of competence by specific decrees[44] and implementing arrêtés[45]. Certain laws may be also particularly relevant as they directly relate[46] to dual-use goods.

All these texts set out provisions designating the authority in charge of its execution. In relation with dual-use in general, it is most often the Minister in charge of Customs or one of its Directorate General. For specific areas, it can also be another authority or a joint responsibility of different ministries. However, only very few of these texts effectively contain penalties applicable in case of

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41 See Arrêté of 18 July 2002 *relatif à la licence générale "biens industriels" pour l'exportation des biens industriels relevant du contrôle stratégique communautaire* for some listed industrial goods, arrêté of 18 July 2002 *relatif à la licence générale "graphite" pour l'exportation des graphites de qualité nucléaire*, for nuclear-grade graphite, Arrêté of 14 May 2007 *relatif à la licence générale "produits biologiques" pour l'exportation de certains éléments génétiques et organismes génétiquement modifiés*, for certain genetically modified organisms, and the arrêté of 18 July 2002 *relatif à l'exportation des biens à double usage chimiques et à la licence générale "produits chimiques"*, for some listed chemical products.

42 See Arrêté of 31 July 2014 *relatif aux exportations de gaz lacrymogènes et agents antiémeute vers les pays tiers*.

43 See Arrêté of 31 July 2014 *relatif aux exportations d'hélicoptères et de leurs pièces détachées vers les pays tiers*.

44 See Decree n°2010-292 of 18 March 2010 *relatif aux procédures d'autorisation d'exportation, de transfert, de courtage et de transit de biens et technologies à double usage et portant transfert de compétences de la direction générale des douanes et droits indirects à la direction générale de la compétitivité, de l'industrie et des services*, which re-organised the ministerial competences in dual-use trade controls and foresees the creation of the SBDU as well as Decree n°2010-294 of 18 March 2010 *portant création d'une commission interministérielle des biens à double usage*, which created the interministerial dual-use goods commission (CIBDU), placed under the authority of the Prime Minister.

45 See Arrêté of 18 March 2010 *portant création d'un service à compétence nationale dénommé " service des biens à double usage ",* which created the licencing authority, the Dual-Use Goods Service (SBDU).

46 See Law n°2004-575 of 21 June 2004 *pour la confiance dans l'économie numérique*, which establishes specific controls for cryptographic products that are implemented by a separate authority from the SBDU. This law is implemented by Decree n°2007-663 of 2 May 2007 *pris pour l'application des articles 30, 31 et 36 de la loi no. 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique et relatif aux moyens et aux prestations de cryptologie*.

infringement of the controls by a trade operator of dual-use items. The Decree 2001-1192, which is the main "dual-use specific" text, establishes in its Article 1 possibilities to penalize trade licence holders. The Arrêté of 13 December 2001, which implements the Decree's provision in its Article 21, details these possibilities according to the degree of non-compliance *vis-à-vis* with the obligations of these licencees. Accordingly, a licence can be:

- Revoked if obtained from a false declaration or by fraud;
- Repealed if the obligations assumed to are not respected;
- Suspended, modified or repealed in the cases foreseen by articles 11[47] and 13[48] of the EU Regulation.

The French regulations, in general, do not establish penalties as these are generally considered to be the competence of the Nation through its representation, i.e. the legislator. The Law no. 2004-575, in relation to cryptographic products, contains detailed provisions on the penalties attached to infringements of its provisions.

Among all the legal texts that organise the dual-use trade controls at the national level, only very few of them and only for few cases of infringements contain references to penalties. These penalties are set out in the texts touching on the society's and individuals' activities in general.

→ IN THE GENERAL APPLICABLE TEXTS

The Customs Code contains provisions concerning illicit movements of dual-use goods. It defines, in its Article 38, the "prohibited goods"[49], which include the dual-use goods as defined by the European Regulation.

The Penal Code, in its Book IV Title I titled "Infringement to the fundamental interest of the Nation", defines the fundamen-

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47 For example, cases for which an other Member State is in position to express its views on a licence to be granted or already granted, notably for protecting its "essential security interests".

48 For example, cases for which a denial for a similar export had been issued by an EU Member State.

49 In Article 427, the Customs Code additionally defines what is the "import of prohibited goods".

tal interests of the Nation. The non-proliferation of weapons of mass-destruction (WMD) is clearly – though not expressely– linked[50] to these fundamental interests.

The Internal Security Code does not provide more elements on the infringements than their prosecution but it founds the competence of the specialised intelligence services for gathering intelligence information on fundamental interests of the Nation such as the non-proliferation of WMD[51].

Since the adoption and codification of the Law no. 2011-266 of 14 March 2011[52] concerning the fight against proliferation of WMD and their means of delivery, the Defence Code is the source containing the most extensive references to penalties applicable to infringements of trade controls. It is directed at proliferative criminal intentions and acts and is divided, in order to cover them, in 4 thematic chapters dealing respectively with the nuclear weapons, the WMD means of delivery, the biological weapons and the chemical weapons.

The dual-use trade-related penalties in the French legislation equally originate from both the – illicit – trade aspect, covered mainly by the Customs Code and the security – WMD non-proliferation – one, covered by a specific text. The purpose of a dual-use trade control system, namely to prevent the non-proliferation of WMD, is sought from two different angles. The first is dealing with the diversion of legitimate trade. The second is dealing with deliberate acts of proliferation.

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50 See Article 410-1: "Les intérêts fondamentaux de la nation s'entendent au sens du présent titre de son indépendance, de l'intégrité de son territoire, de sa sécurité, de la forme républicaine de ses institutions, des moyens de sa défense et de sa diplomatie, de la sauvegarde de sa population en France et à l'étranger, de l'équilibre de son milieu naturel et de son environnement et des éléments essentiels de son potentiel scientifique et économique et de son patrimoine culturel."

51 Internal Security Code, Article L811-3.

52 Law n°2011-266 of 14 March 2011 *relative à la lutte contre la prolifération des armes de destruction massive et de leurs vecteurs*, on the fight against WMD proliferation.

2.2. Infringements

The legal framework covers a wide range of behaviours and actions qualified as infringements to the dual-use trade controls. These infringements may constitute, according to their level of seriousness, a violation, an offence or a crime[53].

There are 4 classes of violations (1, 2, 3 and 5) that are defined under articles 410 to 413 bis of the Customs Code. These are the competence of the tribunaux de grande instance (high courts). They are less relevant regarding dual-use trade controls than the offences. Articles 414 and 414-1 qualify first-class offences such as the trafficking and imports or exports of prohibited goods – of which the dual-use ones are part of – without authorisation. Money laundering related to illicit movement of goods is qualified as a second-class offence under Article 415. The offences, which are liable to up to 10 years imprisonment – or 20 in case of repeated offence – and complementary sentences such as administrative penalties, are the jurisdiction of the tribunaux correctionnels (criminal courts). Above this 10-year threshold, the facts are re-qualified as crimes and fall into the jurisdiction of the cours d'assises (court of assizes), which can also pronounce prison and complementary sentences.

The legal framework aims at targeting exhaustively the behaviours and actions that may constitute a threat of WMD proliferation, notably trough procurement channels. The Customs Code covers the illegal movement of dual-use goods under Article 414 and the attempt of the offence under Article 409 for treating it like the offence itself.

The Penal Code attempts to describe infringements of the "fundamental interests of the Nation" as they relate to the dual-use trade controls and, more generally, the non-proliferation of WMD, lists as crimes the transfer of material assigned to national defence purposes (Article 411-3), information or material "likely to

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53 When going through them, the reader must however bear in mind that the French legislation does not make the difference in principle between exports, brokering, transit or transhipment, as the dual-use legislation covers all these movements under the single name of "export".

affect" these fundamental interests (Article 411-6), the efforts for collecting these information of material (Article 411-7 and 411-8). It establishes also as an offence the provocation of these crimes when these have not been committed (Article 411-11).

The Defence Code contains provisions aimed at enforcing non-proliferation of WMD in general and provides for a more extensive list of intents and actions that can constitute an infringement to dual-use trade controls. As concerns the nuclear domain, it sets out legal infringements pertaining to illegal nuclear-related activities, for impeding the normal control of these activities and for providing false information in relation to these controls (articles L1333-9 and L1333-12). In relation to WMD in general, the Defence Code does not follow a parallel structure between the different thematic sections (nuclear, means of delivery, biological and chemical). Therefore, some of these actions and behaviours may be expressly covered in some of these areas only. It notably defines an infringements related to the export without authorisation of listed materials, to leading or organising an activity with the purpose of disseminating chemical weapons (Article L2342-59), to the fraudulent acquisition of the authorisation of material-related or trade activities, to the active violation, alone and within the context or organised crime, and the collusion. Attempt is directly addressed only in cases of import of WMD delivery means (Article L2339-10), illicit import or export of nuclear material (Article L1333-9) and in cases where the author(s) had warned the authority about the infringement and cases of provocation to the infringement (for nuclear, biological and chemical areas). These infringements concern both physical and moral persons.

The Defence Code also establishes a specific infringement for the financing services related to proliferation of WMD through procurement channels of nuclear, biological and chemical related-material and the means of delivery[54]. The provision, which has the same content in all areas, establishes the following: "The fact

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54 See articles L1333-13-5 (nuclear), L2339-15 (means of delivery), L2341-2 (biological) and L2342-60 (chemical).

to supply financing in collecting or managing funds, stocks or any good or providing advice to this end, in the intent to see these funds, stocks or goods used or knowing they would be used to this end, entirely or partly, with view to commit the infringements established in the (corresponding articles), is liable to the same penalties foreseen in the (corresponding articles), independently from the effective realisation of this infringement".

The intentional element is generally absent from the definition of these offences and crimes. However, it has to be noticed that intent is mentionned in relation to the financing, as a component of the definition of this infringement. The nuclear section refers to the "objective of proliferation" in relation to an export without authorisation (Article L1333-13-4). The chemical section makes reference to intent only with respect to the lead or organisation of an activity for the purpose of disseminating WMD (Article L2342-59). There is no reference to intent in the biological or delivery means-related sections of the Code.

The Customs Code does not expressly consider criminal intent as a characteristic of the infringement. However, Article 414 covers both "illicit trafficking" and "export or import without authorisation", which factually have the same effect. It is not clear, therefore, but rather an assumption to characterise proliferation intent as a defining element between the provisions of the Defence Code and those of the Customs Code where it relates to dual-use trade controls.

2.3. Penalties

The legal framework distinguishes between administrative and criminal penalties. The administrative penalties generally include fines, revocation of licences, loss of access to trade facilitation privileges, loss of property rights (confiscation), closure of companies,

recall of persons legally responsible for exports in a company, mandatory compliance training[55]. The criminal penalties refer to fines and prison sentences.

In the dual-use specific texts, few provisions only describe penalties. In the main text, Decree 2001-1192, the possibility is established in the Article 1 to suspend, modify, withdraw or abrogate the export, brokering, transit licences. The implementing arrêté – Arrêté of 13 December 2001 –, in its Article 21, details this provision in establishing that the licence can be withdrawn if obtained on the basis of false information or by fraud, abrogated in case of violation of the commitments, suspended, modified or abrogated in the cases described in articles 11 and 13[56] of the dual-use Regulation.

Unlike the other "dual-use specific" texts, the law on cryptographic products contains penalties of both administrative and criminal natures. Article 34 prohibit putting such products on the national market and, complementarily, obliges the distributor to withdraw all the items already in circulation. Article 35 establishes criminal liabilities, *i.e.* prison and fines, for illicit export of such items, as well as complementary – administrative – penalties that are similar to those foreseen by the Defence Code. These penalties are without prejudice to the Customs Code provisions.

The Customs legislation sets out such combination of penalties also. Article 61 bis of the Customs Code and Decree N° 2012-945[57] describe in details the power of the Customs agent for – temporarily and for the needs of further investigations – immobilising goods that are suspected of being in violation with the trade controls. The key provision on customs penalties nonetheless remains Article

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55 Sybille Bauer, "WMD-related dual-use trade controls offences in the European Union: penalties and prosecution", EU Non-Proliferation Consortium, *Non-Proliferation Papers* no. 30, July 2013.

56 Respectively in the cases of a threat to a national security interest of a Member State or of sovereign decision of the licencing authority.

57 Decree n°2012-945 of 1 August 2012 *relatif aux conditions d'immobilisation par les agents des douanes des biens à double usage non communautaires en transit à destination de pays tiers*.

414 of the Customs Code, which establishes that illicit trafficking or export or import without authorisation of dual-use items is liable to a maximum sentence of 5-year prison, the seizure of the item, of the transport means involved, of all the objects which contributed to committing the fraud, of the direct or indirect profits originating from this fraud and a fine amounting up to three times the value of the object of the fraud. The prison sentence may be as high as 10 years and the fine 5 times the value of the fraud if these items are considered dangerous[58] as well as listed by an arrêté of the Customs Minister or if the fraud has been committed in the context of organised crime.

The Penal Code contains mostly[59] criminal penalties as well as fines[60] for infricgements of dual-use trade controls-related fundamental interests of the Nation it defines. In addition, in Article 414-5, it provides the possibility for the judiciary to pronounce complementary administrative sentences which are similar to many of those described in the Defence Code. Some of them are also reproduced in the list of complementary penalties contained in the law related to cryptographic products[61].

The Defence Code, complementarily to the criminal penalties, establishes an extensive list of administrative penalties the judiciary can select from. This list is the same for the WMD nuclear, chemical, biological and delivery means-related[62] and concerns the physical persons only. The violators of the provisions contained in articles L1333-9 and 1333-11 to L1333-13-6 are liable to:

- The interdiction of citizen and family rights[63];
- The prohibition to perform a public function or a professional or social activity in the context an offence or crime was committed;

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58 For health, (ethics) or public security.

59 See articles 411-3, 411-6, 411-7, 411-8 and 411-11.

60 Fines have a mixed – administrative and criminal – nature.

61 Article 35.

62 Respectively at articles L1333-13-7, L2342-77, L2341-5-1 and L2339-17.

63 Such as voting, being elected and being a guardian.

- The closing, definitively or for a maximum 5-year period of the facilities of the company that have been used for committing the infringements;
- The exclusion from public tenders for a minimum duration of 5 years;
- The seizure of the WMD-related goods as well as the equipment which has been used for the production, the use or transport of these goods;
- The publication or advertisement of the judicial sentence;
- The prohibition of stay on the national territory;
- The exclusion from the French national territory of foreigners, definitively or for a minimum duration of 10 years.

Alternative penalties are also listed in the Defence Code, with reference to the Penal Code, for the non-physical persons[64].

The judge is independent in applying the above-mentioned penalties. However, the law allows for grading penalties. For instance, the Defence Code foresees an attenuated liability for the author, the partner or the person having attempted to commit who inform the authorities about the possible infringement[65]. The penalty may even be avoided if the person informs the authorities before it results in casualties[66]. As for the chemical-related material, a scaling in the severity of the penalty is also foreseen as it implements measures adapted to the different categories of chemicals contained in the Chemical Weapons Convention[67].

The penalties, even if inserted by a unique law and codified within the same text, may indeed differ from one area to the other. Comparing penalties established for offences committed in relation to nuclear, biological, chemical materials and the WMD means of delivery is particularly illustrative.

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64 See for example Defence Code, Article L2342-78 regarding chemical weapons-related goods.

65 See for example Article L2341-6 for the biological weapons-related material.

66 See for example Article L2341-6-1 for the biological weapons-related material.

67 See articles L2342-59 and following.

Comparison of penalties: penalties foreseen for an illicit export of goods allowing for WMD proliferation in the context of organised crime

Nature of the proliferation	Defence Code provision	Penalties
Means of delivery	(Article L2339-14)	20 years prison + 3 million euros
Biological	(Article L2341-4)	30 years prison + 5 million euros
Chemical	(Article L2342-60)	30 years prison + 5 million euros Life + 7,5 million euros if leading or organising the proliferation
Nuclear	(Article L1333-13-4)	20 years prison + 7,5 million euros 30 years prison + 7,5 million euros if encouraging or provoking the proliferation

One could legitimately question some of these observations. It is the case notably with the fact that the encouragement or provocation of the proliferation of WMD is, in the nuclear area, more severely sanctioned than the intentional and tangible act. It is also the case with the fact that leading proliferation-oriented organisation is only targeted in the chemical domain and not in the other ones. Finally, it may also seem difficult to apprehend why penalties are not harmonised between the different domains. The differences in the severity of the penalties, indeed, can also be noticed for other scenarios of infringements than the scenario taken as an example. No real explanation or motivation for these differences, however, can be found in the text itself, in a possible preamble of the law which would have stated the reasons for considering the risks associated in different ways, or even in the international conventions – or related national declarations – that form the basis of these prohibitions.

2.4. Implementation of the penalties

In order to achieve their full deterring potential, the penalties shall not be used only as a punishing instrument but must also be promoted in order to prevent economic and trade operators from engaging in proliferating activities.

In this respect, it would appear that France is lacking the processes that can ensure the information on penalties is adequately disseminated to the right stakeholders, in the right form and in the right time.

The website of the licencing authority, the SBDU, does not contain any information on penalties for which the operators are liable if they infringe the dual-use trade controls and related procedures. The section for frequently asked questions on its website, in which it explains and comments the licencing procedures to the attention of non-experts, does not contain any reference to liability. The industry's outreach activities it organises are not used in principle for disseminating such information. In practice and in the absence of a legal office in the Service or of a regular contact with the judiciary (prosecutors or judges), its agents, when they are in position to evoke these penalties on a case-by-case basis with the operators, usually recall the Customs – Article 414, in a first place – and the Defence codes' provisions. These agents may themselves be unfamiliar with the provisions contained in the Penal or Defence codes, which can be explained by the very limited number of judicial cases France has had and, therefore, the limited information on practical implementation of the penalties. The other implementing agencies may also suffer from a lack of information on how the penalties are practically applied.

Only one case can be found from a search of the most French important legal database[68]. The decision of the Cour de Cassation[69] (criminal chamber of the Court) 01-88.491 of 11 December 2002 concerns an unauthorised export of dual-use goods. However, this happened before the adoption of European regulations 1334/2000 and 428/2009 and the judicial decision only confirmed a sentence to a fine amounting to 100,000 euros for the exporter. It was justified by Customs legislation provisions. Additional cases could also be

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68 For access to the texts and the decisions, consult: www.legifrance.gouv.fr.

69 The Cour de Cassation is the highest jurisdiction of the civil and penal legal orders. Its role is only to review the correct application of the law by the courts of appeal but it does not judge the case at the basis of the dispute.

found concerning an unauthorised export of cultural goods, for which the penalties associated generally obey the same logic as the dual-use goods in terms of trade controls[70]. However, none of these cases made use of penalties other than – criminal[71] – fines and no case could be found to illustrate the application of more administrative penalties.

In the French legal system, the burden of proof in the judicial treatment of a case is on the prosecution. The Code of Criminal Procedure does not limit the range of evidences the judge can base his or her decision on and, in principle, the Internal Security Code allows the use of intelligence technics and services for criminal investigations touching on the "fundamental interests of the Nation" such as in the WMD-proliferation domain[72]. However, the value of the intelligence-based evidence is not really clear in the legal system. The *Teixera v. Portugal*[73] and *Schenk v. Switzerland*[74] decisions of the European Human Rights Court respectively legitimate the use of undercover technics in criminal investigations and the acceptance of evidences that are in principle illegal for justifying a court decision, only when the violation is not provoked by the investigator. However, the French jurisprudence is more ambiguous. The Cour de Cassation[75] decided that a simple ploy, without any provocation from the agent, was an unfair means to obtain an evidence although the Law no. 2004-204 of 9 March 2004 defined the situations for which recourse to surveillance, undercover and taping operations for fighting organised crime are allowed.

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70 See Cour de Cassation (criminal chamber), case 94-83.737 of 3 October 1996 and Cour de cassation (criminal chamber), case 85-94.755 of 23 March 1987.

71 Although fines can be of criminal or administrative nature in principle, in these examples they were decided by criminal courts.

72 Article L811-3.

73 European Court of Human Rights, no. 44/1997/828/1034, 9 June 1998. Link: http://hudoc.echr.coe.int/eng?i=001-58193#{%22itemid%22:[%22001-58193%22]}.

74 European Court of Human Rights, Application no. 10862/84, 12 July 1988. Link: http://hudoc.echr.coe.int/eng?i=001-57572#{%22itemid%22:[%22001-57572%22]}.

75 See Cour de Cassation (criminal chamber), case 06-87-753 of 7 February 2007 and case 08-81.045 of 4 June 2008, which are two distinct decisions on the same proceedings.

Finally, one must legitimately suppose that, given the absence of specific "dual-use jurisdiction", the scarcity of the case law and the uncertainty surrounding the value to be recognised to investigation technics that – in the dual-use area – are key, the question of the knowledge of the actors of the judiciary, and even the question of their awareness, remains open. In such circumstances, indeed, there may be very few prosecutors – if any because they are usually dealing with infringements in general, notwithstanding their objects – who could be considered as guardians of the French dual-use trade control legislation and its effective enforcement.

3. SANCTIONS

3.1. The domestication into the French legislation

In terms of implementation of international restrictive measures – also referred to as "sanctions" – set by countries in reaction to the violation by another country of peace and security principles and rules, the role incumbent to French legislation and the dual-use trade bodies is limited.

In implementation of the monist legal doctrine, France does not need to further domesticate the restrictive measures such as the embargoes as they are meant to be directly applicable in the national legal apparatus and to be detailed enough not to require additional descriptions. In fact, there only 2 "implementing" decrees: one defines the authorities[76] referred to in the European Community (EC) Regulation 423/2007 on Iran and one[77] details the scope of the embargo against Libya. No such domesticating act had been established for other international restrictive measures.

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76 Decree N°2008-83 of 24 January 2008 *relatif aux mesures restrictives à l'encontre de l'Iran prévues par le règlement (CE) no. 423/2007 du Conseil du 19 avril 2007.*

77 Decree N°92-387 of 14 April 1992 *relatif à l'application de la résolution 748 du Conseil de sécurité des Nations Unies*, abrogated by Decree N°2004-372 of 29 April 2004.

As regards these international restrictive measures for their implementation by the French actors, the governance body is the DG Treasury of the Ministry of Economy and Finances. It publishes on its website[78], for the attention of the economic operators, the texts of these international sanctions which, thereby, shall be considered directly applicable by them. The Treasury is the competent administration for all restrictive measures (economic, financial, etc.) independently from the scope of the international texts. In the case of dual-use goods, the SBDU acts as the controlling authority. The SBDU is associated in the negotiations with the other relevant ministries and in permanent contact with the Treasury for the definition of implementing procedures[79]. It is thus able to inform and advise the dual-use operators on matters related to these sanctions.

Despite the formal absence of further implementing legislation on the restrictive measures, the Treasury provides guidance on their implementation. To this end, it issues and keeps up-to-date a Guide de bonne conduite/Foire aux questions (guide of good conduct/ frequently asked questions) on the implementation of economic and financial sanctions[80] in general and publish it on its website. This information document provides answers to basic questions an operator may have concerning the application of sanctions to a given situation but does not establish any binding norm.

In the case of the restrictive measures against Russia in the context of the conflict in Ukraine and the annexation of Crimea, established by regulations (EU) no. 833/2014 of the Council of 31 July 2014 and N°960/2014 of the Council of 8 September 2014, the same philosophy applies. Norms of European origin directly apply to the French legislation without any further domestication needed, or effectively acted. Nevertheless, in this case, the Treasury went beyond the mere general guidance of the Guide. It drafted a specific note, available on its website, on the *Implementation of the Regulation*

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78 See: http://www.tresor.economie.gouv.fr/sanctions-financieres-internationales.

79 Interview of SBDU representatives with their permission, 16 October 2015.

80 Available (in French only): http://www.tresor.economie.gouv.fr/File/406872.

(EU) no. 833/2014 of the Council of 31 July 2014[81]. This is however not a legal act but it comments on the different amendments of the regulations and the ways they shall be implemented – competence of the authorities, their contact details, procedures, etc. – in the French national context.

The Guide contains a specific chapter[82] on the dual-use goods with a military end-use in Russia or dual-use goods aimed at military end-users in which the Treasury clearly establishes the competence of the SBDU for issuing the trade authorisations and comments on articles 2 bis and 4 of the Regulation (EU) no. 833/2014 amended. Though it can be acknowledged that interpreting the provisions can be a source of obligation, the primary objective of the document and its form is to remain an information support. In addition, it must be noted that Article 2 bis, as it is emphasised by the Treasury, sets out controls of the dual-use ancillary services where the Regulation 428/2009 formally excludes them from its scope… Would this be a glance at the future of the European dual-use trade control system?

3.2. Penalties for the infringement to restrictive measures

The national legislation has set specific provisions for criminalising the infringements to restrictive measures. These provisions, however, are substantially the same for the measures of national origin[83] (Customs Code, Article 459, Paragraph 1) as for European and international measures (Customs Code Article 459 Paragraph 1bis). The "guide of good conduct" notably refers to these provisions and explains that their implementation is the responsibility of the Minister in charge of Customs.

Article 459 of the Customs Code targets the actions and attempts (Paragraphs 1 and 1bis) as well as the provocation (Paragraph 3)[84] to

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81 Available (in French only): http://www.tresor.economie.gouv.fr/File/407575.

82 See pages 6 and 7.

83 Though such national measures are rare, as stated above.

84 Independently from actual effects or their absence.

infringe either the national legislation or regulation on the financial relations with foreign countries or the EU restrictive measures that are taken on the basis of the Treaty on the Functioning of the EU (Article 215) or on the basis of international obligations.

These offenses are punishable by sentences up to 5-year imprisonment, a fine amounting from 1 to 2 times the value of the infringement for the acts or attempts and from 450 to 225,000 euros for the provocation, and to the publication of the sentence in media. In the first two cases, the violator is also liable to the seizure of the object of the infringement, of the means and of the products or profits of the infringement. The violators can additionnally, in the case of infringements of the national legislation or regulation on the financial relations with foreign countries, be prohibited to exercise elective or key positions within trade instances such as trade chambers, trade courts or labour courts.

4. CONCLUSION

The French legal system is characterised by complementary texts, norms and obligations concerning dual-use goods. It may be very positive in the sense that it allows for different acts and intents to be judged fairly, according to their level of seriousness *vis-à-vis* the non-proliferation of the WMD. But it may also be more negative in the sense that it likely blurs the – necessary – understanding the dual-use actors, e.g. the operators, the licencing authority and the prosecutors shall have of these penalties and make it more difficult in general to enforce these obligations.

Nonetheless, from a governance aspect and despite the existence of several but complementary bodies in the management of the dual-use trade controls, the "one-stop shop" role carried out by the Service des Biens à Double-Usage undoubtedly makes these controls more understandable and thus easier to comply with for the economic and trade operators.