

Enforcing sanctions through trade controls in Greece

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1. CONCEPTUALISING 'SANCTIONS'

What do we mean by 'sanctions'? What is the relationship between sanctions and trade controls? The 2015 Chaudfontaine seminar focused partly on the conceptual problematic connecting to the term of sanctions. The first understanding sees sanctions as coercive measures decided by states, regional and international organisations with a view to bringing about a change to a policy or practice of a given country. In this case, sanctions represent a foreign policy measure targeting foreign states, entities and individuals. They may include positive inducements as part of a 'sticks and carrots' strategy and, they may provide for humanitarian exemptions satisfying for instance the basic needs of targeted persons. Sanctions or alternatively 'restrictive measures' may also bring severe unintended consequences.⁸⁵ In response to that problem there has been a shift from traditional restrictions of sweeping or indiscriminate nature such as comprehensive embargoes towards more sophisticated and carefully crafted sanctions targeting, for instance, certain industry sectors or individuals. Distinguishing between the society as a whole and the ruling elite or specific illicit groups is an applicable

85 Whereas the term 'sanctions' is not explicitly used in the relevant UNSC resolutions, it has prevailed the international discourse (think of sanction committees). In the EU, the term 'restrictive measures' is used most often in formal legal texts.

practice today.⁸⁶ Further, sanctions can range from more soft and symbolic types such as the severance of diplomatic relations (to more harsh ones such as the withdrawal of economic assistance, bans on capital investment, restrictions on arms, dual-use goods and other commodities (e.g. oil and refinery products) as well as denying access to financial markets.

The second understanding sees sanctions as measures set by a national state with the aim to punish a violation of law by any natural or legal person or entity established in its territory. In this case, sanctions are referred alternatively as penalties. In the context of non-proliferation and trade controls, penalties may range from formal or informal warnings (e.g. communication letters) to life imprisonment and even death sentence.⁸⁷ Between of these two 'extremes', penalties may take different forms such as revocation or suspension of export licences, withdrawal of trade facilitations, loss of property rights, suspension of a firms exporting activities and even closure of the company. Mandatory export compliance training is a further example of an innovative measure to be considered.⁸⁸ Economic penalties can be the result of both administrative and criminal nature as provided in the law and depending on the severance of the violation.

The main connection between the two understandings is the fact that a violation of either sanctions measures or trade control law leads to certain penalties. Also in practical terms, both measures may intent to punish wrongdoings and correct cases of non-compliance with international and national laws. Besides, sanctions

86 For a comprehensive analysis of the WMD related sanctions see: Bernardt Sitt et al., *Sanctions and Weapons of Mass Destruction in International Relations (Geneva Paper 16)*, Geneva Centre for Security Policy, 2010, retrieved from: http://www.cesim.fr/documents/publications/geneva_paper_16.pdf

87 Sibylle Bauer, "WMD-Related Dual-Use Trade Control Offences in The European Union: Penalties and Prosecutions," EU Non-Proliferation Consortium, *EU Non-Proliferation Papers* no. 30, SIPRI, (July 2013): 3, retrieved from: <http://www.sipri.org/research/disarmament/eu-consortium/publications/nonproliferation-paper-30>

88 *Ibid*, 4.

are frequently implemented through dual-use trade controls and arms controls. The table below summarises the main features of each concept.

Function	Sanctions	Penalties
Defining feature:	Foreign policy instrument	National prosecution
Decision-making:	National, regional & international	National
Intent:	Deterrence and prevention	Deterrence and prevention
Objective:	Change policy or conduct	Punish and correct a wrongdoing
Subject:	States, individuals & entities	Individuals & entities
Effectiveness:	(?)	(?)
Other:	Alternative to violence	Non-compliance with national laws

2. THE NATIONAL UNDERSTANDING AND IMPLEMENTATION OF ‘SANCTIONS’ IN GREECE⁸⁹

From the preamble, it is useful to clarify that the Greek understanding and practice follows the same logic as described above. Sanctions (κυρώσεις) denote both coercive measures aimed at changing the behaviour of a State and punishments imposed for breaking a law. In the latter case the word ‘ποινές’ that means penalties is most commonly used.

Greece may implement ‘sanctions’ pursuant to a UN resolution, a CFSP decision or a national act⁹⁰. With regards to UN sanctions,

⁸⁹ All the official legal texts referred to in this section can be found in the website of National Printing Office available only in Greek: http://www.et.gr/index.php?option=com_wrapper&view=wrapper&Itemid=108&lang=el.

⁹⁰ Presently, Greece does not implement any unilateral measures. An example coming from the recent past concerned the economic embargo imposed against Former Yugoslav Republic of Macedonia.

Greece still makes use of an old ‘forcible law’ adopted during the “colonels’ dictatorship”.⁹¹ According to this, UN measures adopted pursuant to Article 41 of Chapter VII of the UN Charter require first the publication of a Ministerial Decision by the Minister of Foreign Affairs and second, the enactment of a Presidential Decree. Greek officers and the Supreme Court have acknowledged that this represents a time consuming process that needs to be changed. A draft bill accelerating the implementing process for the entrance into force of such UN measures has yet to be enacted. Furthermore, the same old law stipulates the penalties applying for violations of UN sanctions. Failure to comply with the UN sanctions results to imprisonment up to 5 years without redemption and/or a pecuniary penalty. Commodities or products that are exported from or imported to or, traversing by the Greek territory in violation of UN sanctions are subject to confiscation. So applies also for the means of transports as long as their owner is aware of the prohibited activity.

Depending on their type, EU sanctions may be implemented either directly by the Member States as it is the case with arms embargoes and travel bans or through a Regulation adopted under Article 215 of TFEU as it is the case for economic measures halting partly or completely economic relations with a country⁹². Therefore, EU sanctions may also require the adoption of secondary national legislation either pursuant to a CFSP Decision or for specifying certain aspects of an EU regulation.

Most interestingly, the Greek legislation appears to discriminate somehow between penalties applying for the violation of EU sanctions and those concerning infringements to UN sanctions. More particularly, Article 458A of the penal code sets spe-

91 Forcible Law 92/1967 as amended by Article 39 of law 2145/1993 (A’ 139).

92 EU restrictive measures shall be adopted by the Council as a CFSP Decision under Article 29 of the TEU (adopted by the Council, acting by qualified majority, on a joint proposal from the High Representative and the Commission, under Article 215 of Treaty on the Functioning of the European Union). For an analysis of the applicable practices at the EU level see: European Commission-Restrictive measures 2008, Website of the External Action Service, available in: http://www.eeas.europa.eu/cfsp/sanctions/docs/index_en.pdf.

cific penalties in the case of wilful violation of EU sanctions that are considerably lower than those provided for violations of UN sanctions: imprisonment of up to two years unless a more severe punishment is applicable under other law.⁹³ This could be seen as problematic given that most of the time EU sanctions are adopted following a resolution of the UN Security Council and in any case, both sources of legislation seek to achieve similar objectives relating to security and foreign policy.

Concerning dual-use trade controls, although the EU Regulation is directly applicable, all Member States have adopted some type of secondary legislation implementing and specifying the provisions of the Regulation. Besides, Article 24 of the Regulation sets that it lies with the national authorities to adopt penalties that are effective, proportionate and dissuasive and, Article 25 requires from Member States to inform the Commission of the laws, regulations and administrative provisions in implementation of the Regulation.

In the past, in Greece the Ministerial Decision clarifying certain provisions of the EU Regulation provided for both administrative and criminal penalties by reference to Law 936/1979 concerning external trade contraventions in general.⁹⁴ However, with a view to improving the exporting environment for business it was deemed as necessary to abolish this law. In its replacement, Article 36 of the Law 4072/2012 provides solely for administrative sanctions to be imposed by the Minister of Economy, Development and Tourism in case of violations of the provisions relating to external trade. Indeed, depending on the severity of the violation, the law provides for either temporary suspension of a firm's activities for up to one year or fine up to 100,000 euros. Despite that, the prosecutor can still rely on the provisions of the National Customs Code setting that exporting or importing restricted goods without a licence

93 Law 4205/2013 amended the Penal Code by laying down 458A on EU sanctions.

94 Ministerial Decision 1837/E321837/09 of the Ministry of Economy, Development and Tourism.

shall amount to smuggling.⁹⁵ Article 157 of the Code lays down the minimum penalties applying for least and most serious smuggling infringements. For instance, a violation committed repeatedly or involving three or more accomplices or fraudulent means is considered as more serious and it is punished with at least one year of imprisonment. An attempt to export or import unlawfully is punished with the same penalties as those applying for actual violations. In practical terms, the mere act of intending to export a dual-use good without a licence most probably due to ignorance is not punished. The exporter is referred to the competent authority so as to apply for an export authorisation. Also, customs officers may proceed to audits, confiscation of goods and preliminary investigations with the aim of verifying a case of non-compliance. The powers and duties of the customs authority in prosecuting trade law violations are detailed in the Customs Code.

It must be noted that concerning the actual enforcement of sanctions, the Hellenic Financial Intelligence Unit (FIU) established initially by the Ministry of Finance in 2008 is an independent Authority gathering officers and scientific experts from different public services such as the Bank of Greece, the Hellenic Capital Market Commission, the Ministry of Finance and the Ministry of Justice with a view to implementing effectively financial sanctions and related measures.⁹⁶ More broadly, the Authority's mission comprises countering money laundering, terrorist financing and investigation of funding sources. Although the FIU takes care only

95 Law 2960/2001 establishing the National Customs Code.

96 The Hellenic FIU is a member of the Egmont Group of Financial Intelligence Units. Its full name is 'Anti-Money Laundering, Counter-Terrorist Financing and Source of Funds Investigation Authority' and it is structured around three units: The Financial Intelligence Unit (FIU), The Financial Sanctions Unit (FSU) & The Source of Funds Investigation Unit (SFUI). Its mission, according to L.3691/2008, as amended by L.3932/2011, is the collection, investigation and analysis of suspicious transactions reports (STR's) that are forwarded to it by legal entities and natural persons, under special obligation, as well as every other information that is related to the crimes of money laundering and terrorist financing and the source of funds investigation. Information retrieved from the public website of the FIU available in: http://www.hellenic-fiu.gr/index.php?option=com_content&view=frontpage&Itemid=54&lang=en.

of the enforcement of financial sanctions, it seems that in practice the Authority examines and deals with all preliminary investigation aspects relating to sanction measures. This means that whenever the customs intercept an export that is for instance, prohibited under dual-use related sanctions, they refer the case to FIU for further action. Besides, the FIU's president is an acting Public Prosecutor to the Supreme Court of Greece.

3. AN ASSESSMENT OF THE GREEK SYSTEM

One could assess the functioning of the Greek system concerning the application of penalties on the basis of the principles set in the Regulation. To begin with, the element of effectiveness could be evaluated by looking into the number of cases caught in respect of export control violations.⁹⁷ In the past, for dual-use related exports, fines have been imposed by the Ministry of Economy and judicial authorities.⁹⁸ However, since 2013 the Ministry of Economy has not imposed any pecuniary sanctions for an export control violation⁹⁹. This could be a combination of different factors such the relatively low number of dual-use exports from Greece and the fact that the revamped FIU undertook lately a more active role in prosecuting also trade violations as a result of sanction measures. In any case, there are no publicly available data concerning proliferation-related violations. Although for security or economic reasons the details of suspicious or judicial cases may need to be kept secret publishing examples of punishments resulting from violations of export

97 Overall effectiveness of a penalties system requires taking into account different aspects and it is not easy to be assessed. Preventing a violator from committing further crimes or completing attempted ones is a relevant aspect to examine. Considering the deterrence power and the number of cases referred to the public prosecutor each year in relation to the estimated volume of dual-use trade are further paths to take.

98 Interview with the former Director of the licencing authority, (imports-exports, Ministry of Finance).

99 Information retrieved after communication with the Department of specialised exports of the Greek Ministry of Finance, Development and Tourism.

controls and sanctions could increase the deterrence power of the law. In relation to this, tracking and keeping records of the export law violations -included attempts – can be a useful practice also for the purpose of future risk assessment. Besides, it helps maintaining the institutional memory of the administration at a good level.

In terms of dissuasiveness, carefully articulated and strict penalties are reasonably of importance for every legal system. As Bauer notes in the area of non-proliferation and trade controls, States may adopt differing penalties for offences related to chemical and nuclear weapons due to different origins and contexts of the legislation.¹⁰⁰ Furthermore, each legal system is a complex construction where different laws may apply for WMD-related, arms control and terrorism offenses, etc. This should not be seen necessarily as problematic. Instead, it represent an opportunity in that the prosecutor may rely on different channels for tackling a case depending on the gravity and the specific conditions of a violation. Whereas this is applicable also in the Greek context, unnecessary overlaps in the legislation concerning essentially similar violations should be fixed. Also, making widely known in the relevant government's website the harsh consequences brought by trade control violations could further increase the deterrent power of the Greek system.

Concerning proportionality, a “penalty assigned to a breach has to fit the national legal tradition and be proportionate to the offence and to other offences”.¹⁰¹ In that regard, penalties may escalate depending on the gravity, the impact of the violation and the existence or not of intent. The actual assessment of a case against such factors is to be done primarily by the judiciary authorities. The Greek system seems to take into account the principle of the proportionality differentiating for instance between wilful violations and acts of negligence.

100 Bauer, “WMD-Related Dual-Use Trade Control Offences in the European Union: Penalties and Prosecutions, *op. cit.*, p.6.

101 *Ibid.*

In sum, one could argue that the Greek system provides the legal basis for punishing violations of different severity. However, enhancing legal clarity is *sine qua non* for the overall effectiveness and deterrence of the trade control system and related sanction measures. Legal clarity is not limited to spelling out provisions for effective penalties. For instance, incorporating into law certain rules with regards to who shall be accountable in the case of an export control violation could reinforce compliance with the law. Potentially all actors involved in the supply chain, such as producers, traders, financiers and freight forwarders may have a responsibility to implement due diligence measures. Also, there might be no need to differentiate between penalties for violations of the EU Sanctions and penalties for UN sanctions or trade controls.

Last, the nature of trade control and sanction violations may warrant a closely coordinated prosecution process engaging officers from different agencies and ministries. Whereas the establishment of an Agency employing officers and experts from different Ministries may represent a best practice, a clear delineation of the competencies is of central importance. The responsibilities of each authority involved in the prosecution of an export control violation should be well-defined. Therefore, an unclear division of competencies can lead to ineffective enforcement of the law.