

## Penalizing export control violations: The case of Hungary

Tamás Bittman  
*Licencing officer*

### 1. INSTITUTIONAL AND LEGAL FRAMEWORK

As in other States the tasks of export control and implementation of restrictive measures are carried out in Hungary by different offices. The Hungarian Trade Licencing Office occupies a central role in fulfilling Hungary's non-proliferation related commitments and gives effect to the trade related restrictive measures. Government Decree 320/2010 on the Hungarian Trade Licencing Office and the Regional Meteorology and Technical Safety Authorities designates the Office as authority to perform tasks related to foreign trade administration. The Government Decree merges the foreign trade administration with the activity of licencing of military production and the provision of military services. This solution allows that the entire spectrum of trading with military or military related items is licenced and monitored by the same authority and can give an important leverage in some situations. The paragraph "on the designation of authority for foreign trade administration and supervision of military production and service provision"<sup>102</sup> provides that the following foreign trade activities are to be licenced by the designated authorities of the Office:

- to act as licencing authority for foreign trade in goods, services and property rights as well as licencing the import of commodities dangerous to public safety;
- licencing activities related to the export, transit, transfer and brokering of dual-use items and issues international import certificates.

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102 Act CIX of 2005.

- licencing activities of non-dual-use items as prescribed in international restrictive measures
- licencing and monitoring the production of military items and provision of services
- on the basis of Hungary’s international commitments licencing and monitoring the export, import, transit and transfer of defence-related articles.<sup>103</sup>

The following table shows the fields of responsibility of the Authority of Defence Industry & Export Control with respective legal sources:

Field of responsibility	Primary legislation*	Secondary legislation
Defence industrial licencing and monitoring	Act CIX of 2005 on the licencing of the manufacture of military products and the provision of military services	Gov. Decree 301 of 2005 on the detailed rules of the licencing of manufacturing military products and the provision of military services
Arms trade control	Act XXIX of 2004 on the amendment, repeal and codification of legislations in connection with accession to the European Union. (Further referred as Law on Accession) Act CIX of 2005	Gov. Decree no. 160/2011 on licencing of export, import, transfer and transit of military equipment and service and on certification of undertakings
Export control (dual-use items)	Regulation 428/2009/EC (further referred as “Dual-use Regulation”) Law on Accession	Gov. Decree 13/2011 on foreign trade of dual-use items
Implementation of trade restrictions and embargos	Act XXIX of 2004	Gov. Decree 13/2011 Gov. Decree no. 160/2011 (this law implements the arms embargos)
* This table shows only those laws which represent the cornerstone of Hungarian export systems. The Acquis Communautaire contains numerous legal instruments on export control and counter-proliferation.		

Foreign trade of dual-use items is an EU harmonised area the only primary detailed legislation in force is the Regulation 428/2009/EC. Although Hungarian Act no. XXIX of 2004 stipulates that in

103 Act XXIX of 2004.

line with international obligations and commitments or directly applicable legal acts of the European Union (i.e. Council regulations), legislative acts adopted by Parliament or Government may constrain the export, import or transit of certain goods, services or rights with material value. This Act only establishes the legal base of export control of military and dual-use items but in both cases separate legislation is required to define under what circumstances foreign trade is to be constrained.

The secondary legislation – Government Decree 13/2011 – ensures proper implementation of the EU “Dual-use Regulation” by defining the administrative framework and the rules for licencing delegated by the Regulation. However, this Government Decree has a wider scope than the mere implementation of the “Dual-use Regulation”: it also regulates the export licencing of goods restricted by international sanctions and contains certain national provisions on technical assistance to military end-user in order to implement Joint Action of the Council no. 401/2000/CFSP in national law. There are separate legislations in force for the implementation of the Chemical Weapons Convention and the Convention on the Prohibition of Bacteriological (Biological) and Toxin Weapons respectively, however the export licencing procedure for materials covered by the two conventions is regulated by Government Decree 13/2011 (and ultimately by the “Dual-use regulation”).

From a regulatory point of view, the export control of military items is a more complicated field because the legislative autonomy of the State continues to cover the area although some elements of conventional arms control are also subject to relevant legal acts of the European Union. Therefore, the primary source of law is the Act CIX of 2005 which empowers the Government to adopt separate legislation on licencing of foreign trade as well as on transit of military items. Government Decree 160/2011 regulates the export, import, transit and transfer of military products, defines the types of

licences to be issued, prescribes the procedural elements<sup>104</sup> of licencing, ensures the implementation of relevant international law in the field and establishes conformity between European and national law. It also contains the military list (ML) of Hungary. The ML lists items controlled as military items. The first twenty-two chapters are in conformity with the ML list of the European Union as prescribed in Commission Directive 2012/10/EU “amending Directive 2009/43/EC of the European Parliament and of the Council as regards the list of defence-related products”. In addition four national chapters have been added to cover every product with internal or external security specificities.<sup>105</sup> The Decree acts as a conduit for the arms trade related legislation of the European Union through which becomes an integral part of the national legal system. Conversely the Decree will contain every EU-level legislation affecting arms trade laws ranging from directives and common positions i.e. Transfers Directive<sup>106</sup> to arms embargos enacted in Council decision on CFSP matters.

Hungary is a member of all non-proliferation regimes and party to all international treaties aiming at preventing proliferation of weapons of mass destruction and curbing illegal trade of conventional arms. UNSC Resolution 1540 commits the international community to adopt effective legislative measures to prevent the proliferation of WMDs and their means of delivery. After joining the European Union, Hungary undertook a comprehensive reform of its export control system. The EU Dual-use Regulation replaced the national list for dual-use items and the arms trade legislation introduced new legal criteria to the existing Hungarian law. This modern export control system needs effective enforcement

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**104** The licencing procedure is more formalized in regard of military items than that of dual-use items, a committee consisting of delegates from ministries and other governmental institutions scrutinizes every licence application.

**105** These chapters are: Equipment specially designed for military use, services specially designed for military use, equipment for coercion and crime surveillance, secret service devices.

**106** Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community.

measures as well as penalties that are effective, proportionate and dissuasive to deter economic operators from transgressing export control regulations. The following chapter describes the system of administrative and criminal penalties applied in connection with violations of export control legislations.

## **2. SYSTEM OF PENALTIES**

There are two types of sanctions depending on the seriousness of violations committed. Generally, administrative sanctions are applied for petty crimes; these penalties are predominantly imposed on licencees who failed to comply with the applicable rules. If the breach of export control laws is serious and the criminal intent can be proven, criminal sanctions are to be applied as provided by the Hungarian Criminal Code.

### **2.1. Administrative sanctions**

As mentioned earlier administrative sanctions can be applied if the crime committed is not serious or the perpetrator acted in good faith without criminal intent. In case of dual-use items applicable administrative penalties are contained in the implementing legislation (13/2011) of the EU “Dual-use Regulation”. The legislation establishes two types of administrative sanctions. Fines are established for most of the cases. In practice to promote such legal principles as proportionality and gradualness, the Authority issues warning letters for first time offenders. Government Decree 13/2011 empowers the Authority to exert strict monitoring of transactions to keep violators under close scrutiny i.e. performs on-site. The Authority may exercise pressure on an economic operator to amend its internal compliance programme. In addition the Authority can involve the Custom Administration which conducts rigorous physical checks.

There are three categories of fines depending on the type of violation, its seriousness and the harm caused. Fines ranging from 400-17,000 euros may be imposed in case of provision of false data

that might deceive the authority in the licencing procedure, infringing obligations relating to provision of data keeping, notification, cooperation, declaration, registration. Threatening or infringing non-proliferation commitments or national security interests of Hungary, and infringing restrictive measures set out in international sanctions.<sup>107</sup> Administrative sanctions only apply if the infringement of international sanctions was committed inadvertently: the intentional transgression of non-proliferation commitments and sanctions is categorised as criminal law.

The notification, cooperation, declaration and registration obligations are important elements for implementing catch – all clauses; the economic operators are required to notify the Authority if it is presumed that the product may require a licence for particular end-user countries. After contacting the Authority operators are under obligation to submit every piece of information regarding the planned transaction and cooperate with the Authority.

The second category of fines covers offences which arise from breaches of specific conditions stipulated in licences. Government Decree 13/2011 states that fines in worth of 1,700-17,000 euros are to be inflicted for conducting foreign trade in dual-use items, including brokering activity or the provision of technical assistance, if not in accordance with the terms and conditions of the issued licences. At present the third category of fines is about aggravated circumstances of the second category and applies to cases when the breach in the terms and conditions of the issued licences are so serious that it violates foreign and security policy interests of Hungary, as well as its international commitments. In this case the fines are comprised between 17,000 and 34,000 euros.<sup>108</sup> These are serious transgressions of the regulations on dual-use trade and, as a consequence, persons who commit these offences may be subject to criminal prosecution as the part dealing with criminal offences will show.

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**107** Government Decree 13/2011.

**108** *Ibid.*

In addition to imposing fines, the Authority may use other corrective measures in case of contravention of administrative laws. The Authority may deprive the licensee of his rights or privileges. These are discretionary powers of the Authority, which may be stand-alone or ancillary punishments. Generally, the following measures may be applied: revocation of licence, modification of global licences i.e. less or items destinations or stricter terms and conditions.

The export licencing of military items belongs to a different domain. Before applying for an export licence the applicant has to fulfil some specific prerequisites. The producers and traders of military items have to obtain an activity licence and anyone who intends to export such items prior to the actual export has to apply for a negotiation licence to third countries. The negotiation licence virtually functions as a safety valve because application with high risk factors may be rejected in an early stage, without causing contractual damage to parties.

Generally, in the case of foreign trade with military items, the fines are higher than those for breaches in connection with dual-use items. International traders of military items are faced with almost the same administrative requirement as for dual-use items. For this reason the following sections mention only issues which are significantly different from the administrative regulation of dual-use items. Fines up to 17,000 euros are to be levied for contract making without a negotiation licence. In contrast with the case of dual-use items there are some categories of military items which are subject to transit licencing because of security reasons. Transportation of military goods without the proper authorisation fined up to 17,000 euros. Economic operators carrying out brokering activities, foreign trade in military items, providing services without proper licence, or violating the provisions of Council regulation (EC) no. 1236/2005 are to be fined up to 33,000 euros. The provision of false data able to deceive the Authority, or making false statements may be punished by a fine of up to 33,000 euros.<sup>109</sup> Applicants for military export licences

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**109** Decree no. 160/2011.

are expected to select their foreign partners with more circumspection than applicants for dual-use export licences. Although exporters of dual-use items have to verify the foreign partners' reliability it is not required to make a statement on it. Exporters of military items have to declare that their foreign partners are registered in their home country and operate lawfully. False declaration is punished by a fine up to 33,000 euros. This fine applies also for transgressions of terms and conditions stipulated by the Authority in the licences.<sup>110</sup>

## 2.2. Criminal sanctions

Criminal sanctions for infringement of Hungary's non-proliferation policy are listed in the Hungarian Penal Code. The Criminal Code distinguishes two categories of criminal offences: felonies are serious criminal offences and punishable by more than 2 years imprisonment. Any other offences are defined as misdemeanor. In every case violation of export control regulation is defined as felony. The penal code does not explicitly mention that the negligence is subject to criminal penalty. In such cases administrative sanctions are to be used.

The former Criminal Code<sup>111</sup> was amended several times over past years. The transition to market economy, the privatization of state owned enterprises, the cessation of state monopoly on foreign trade and the removal of crimes from the Penal Code which followed the planned economy's logic like unauthorised foreign trade activity required the inclusion of crimes related to illegal foreign trade in arms and other related items. The new title "Infringement of Obligations Relating to the Trade with Internationally Controlled Products and Technologies" covers arms and dual-use items as well. During the 1990ies Hungary became party to all relevant non-proliferation regimes and signed the Chemical Weapons Convention which increased the number of commodities covered by this title.

Hungary's accession to the European Union made the update of the Penal Code necessary inter alia with regard to the imple-

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**110** *Ibid.*

**111** 4th Act of 1978 on the Criminal Code, 2012.

mentation of international sanctions and foreign trade in dual-use products. Before Hungary's accession to the European Union the infringement of international sanctions was addressed under title "Breach of Hungary's obligations under international law" penalized the breach of economic (including trade) and financial restrictive measures enforced under Hungary's international obligations. This section enabled breaches of sanction imposed by UN Security Council to be prosecuted.

After accession the title has been revised and renamed "Violation of International Economic Restrictions" which – in addition to UN Security Council sanctions – penalizes breaches of EU sanctions as provided in Regulations or in common positions of the Council.

The Criminal Code of 2012<sup>112</sup> integrates every aspects of strategic trade control in one chapter ranging from trade restrictions due to international sanctions (together with financial sanctions), through restrictions on trading in dual-use items to arms trade controls. A new chapter called "Criminal Offenses Against International Commitment for Reasons of Public Security" has been established which contains the following non-proliferation and export control related titles:

- Criminal Offenses with Weapons Prohibited by International Convention
- Violation of International Economic Restrictions
- Failure to Report Violation of International Economic Restrictions
- Criminal Offenses with Military Items and Services
- Criminal Offenses with Dual-Use Items

### **2.3. Breaching economic sanctions and other restrictive measures**

Violation of international \_economic restrictions covers two categories of restrictive measures. As mentioned earlier the first category of restrictive measures originates from Hungary's commitments under international law these are particularly sanc-

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**112** 100th Act of 2012 on the Penal Code, 2012.

tions adopted by UN SC. Beside international legal obligations the Criminal Code penalizes breaches of restrictive measures enacted by the European Union. The definition of restrictive measures covers Council regulations on restrictions of capital movements and payments as stipulated in Article 75 of the Treaty on the Functioning of the European Union (further referred as TFEU), and decisions taken by the Council on the “interruption or reduction, in part or completely, of economic and financial relations with one or more third countries” in accordance with Article 215 of TFEU. Moreover the definition restrictive measures extends to any decision or regulation adopted by authorisation of the earlier mentioned regulations and Council decision adopted under Article 29 of the Treaty on the European Union (further referred as TEU). This article of the TEU empowers the Council to adopt decisions defining the approach of the Union to a particular matter of a geographical or thematic nature. According to this paragraph any person who violates the obligation for freezing funds or economic resources or any economic, commercial or financial restriction is guilty of a felony punishable by imprisonment between one to five years. If the sanctions act orders an arms embargo and the violation is committed in connection with arms and related material (in the Criminal Codes wording: trafficking in firearms, ammunition, explosives, blasting agents or equipment for the use thereof) the penalty shall be imprisonment between five to ten years. To broaden the scope of the paragraph, the definition of arms and related materiel is supplemented with the term “any product designed for military use”. In some special cases the phrase “any product designed for military use” may cover certain types dual-use products especially if there is an arms embargo in force prohibiting the sale of dual-use items for military end-users or military end-use.<sup>113</sup>

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113 *Ibid.*

The failure to report violation of international economic restrictions is penalized as misdemeanour and punishable by imprisonment not exceeding one year.<sup>114</sup>

#### **2.4. Violations of arms trade restrictions**

Criminal offences with weapons prohibited by international Conventions are liable to the most serious punishments. The Penal Code states “any person who develops, manufactures, obtains, uses or possesses, or decommissions without authorisation, transfers to a person without proper authorisation, imports or exports, or transports in transit through the territory of Hungary weapons prohibited by international conventions is guilty of a felony punishable by imprisonment between 5 to 15 years.<sup>115</sup> The same punishment is applied for unauthorised operation of facilities producing such weapons and for “provision of technical assistance for the development, manufacture, assembly, quality control, operation, maintenance or repair of weapons prohibited by international convention.” If the development, productions and trade with these weapons is committed on a commercial scale, in criminal association with accomplices by a public official, the penalty shall be between 10 to 20 years or life imprisonment.<sup>116</sup>

The Title on “Criminal offences with Military Items and Services” deals with crimes committed with items listed on Hungary’s ML list and addresses both internal commercial activities and the foreign trade in arms. In this manner the production and marketing of military items, the provision of military services, the import, export or transit of these items without authorisation is punished as a felony with imprisonment between 2 to 8 years. This Title deals also with two crimes which are considered border cases between arms trade control and the control of dual-use items. The first is the provision of technical assistance for the development, production,

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**114** *Ibid.*

**115** *Ibid.*

**116** *Ibid.*

handling, operation, maintenance, repair, detection, identification or dissemination of chemical, biological or nuclear weapons or other nuclear explosive devices, including the missiles capable of delivering such weapons. The other is the provision of technical assistance to military end-users established in countries subject to arms embargo. Both crimes are punished in the same manner as the unauthorised export of weapons. Although the 2000/0401/CFSP Council Joint Action is implemented through Government Decree 13/2011 the sanctioning is dealt with in this section. Under aggravating circumstances, the above mentioned crimes are punished with imprisonment between 5 to 10 years. Even the preparation is punished with imprisonment between 1 to 5 years.<sup>117</sup>

## **2.5. Export control violations with dual-use items**

Until 2012 dual-use items were addressed together with military items. As a result of the separation of crimes committed with dual-use items from violations of arms trade restrictions, dual-use export control violations became one of the less strict sanctioned offences in the chapter. According to the “Commentary to the Criminal Code”, the legislator decided to use less severe sanctions for crimes with dual-use items due to the fact that more types of items are concerned with varying level of danger. Without aggravating factors, the export of ‘dual-use items’ to a destination outside the European Community in an unauthorised manner is punishable with imprisonment between 1 to 5 years. If the export control violations are committed with nuclear dual-use items or with item covered by the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, the punishment is imprisonment between 2 and 8 years.<sup>118</sup>

The Criminal Code broadly defines the dual-use items stating that ‘dual-use items’ shall mean the items defined in point 1 of Article 2 of Council regulation (EC) no. 428/2009. This section states,

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**117** *Ibid.*

**118** *Ibid.*

that “dual-use items mean items, including software and technology, which can be used for both civil and military purposes, and shall include all goods which can be used for both non-explosive uses and assisting in any way in the manufacture of nuclear weapons or other nuclear explosive devices”.<sup>119</sup> There is however no reference to any definitive list determining the items which are categorised as ‘dual-use’. It is contested but this wording may enable violations of catch-all controls to be prosecuted, if the perpetrator has been notified by the Authority in advance that the intended export is subject to a prior licencing procedure and the criminal intention can be proven.

The above mentioned criminal penalties remained more or less un-amended over the years. This shows that the Criminal Code of Hungary found the balance between the seriousness of the crime and the punishment in case of proliferation related crimes.

<b>Punishment (in terms of years in prison)</b>		
<b>Felony</b>	<b>Criminal punishment</b>	<b>Aggravated circumstances</b>
Breaching economic sanctions and other restrictive measures	1 to 5 years	5 to 10 years
Criminal Offenses with weapons prohibited by international Conventions	5 to 15 years	between 10 to 20 years or life imprisonment
Criminal Offenses with Military Items and Services	2 to 8 years	5 to 10 years
Provision of technical assistance for development, production, handling, operation, maintenance, repair, detection, identification or dissemination of WMDs	2 to 8 years	5 to 10 years
Provision of technical assistance to military end-users established in countries subject to arms embargo	2 to 8 years	5 to 10 years
Export control violations with dual-use items	1 to 5 years	2 and 8 years

**119** Council regulation (EC) 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items.

### **3. CONCLUSION**

This chapter showed what are the penalties – both administrative and criminal – applicable in the case of export control violations and breaches of international sanctions. Beside describing the system of penalties, the article presents the legal sources and institutional functioning of the Hungarian export control system for dual-use and military items.

With regard to the administrative sanctions it must be pointed out that these types of sanctions function as a corrective measure for unintended offences; therefore the Authority may use ancillary penalties other than fines which are in some cases more suitable to achieve compliance on the side of economic operators. The application of administrative sanctions is more flexible than the criminal ones due to the variety of available measures.

In the context of Hungarian Criminal Code penalties prescribed for export control violation are strict compared to penalties for other offences. This article places the Criminal Code's provisions on export control in a historical context. Over the past two decades Hungary's new international commitments, the transition to market economy and the accession to the European Union necessitated the improvement and revision of the Criminal Code's provisions on export control.