Chapter
05

Italy's sanctions system related to dual-use trade violations

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The Italian sanctions system concerning dual-use trade violations is organised around one single legal act, Legislative Decree no. 96/2003 of 9 April 2003, implementing (EC) Regulation no.1334/2000, the so called "dual-use Regulation".[120] Since the entry into force of (EU) Regulation no. 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items,[121] replacing (EC) Regulation No 1334/2000, Legislative Decree no. 96/2003 (which is, however, in course of amendment) directly implements (EU) Regulation no. 428/2009. Legislative Decree 96/2003 has three fonctions:

1. Implemenation of (EU) Regulation no. 428/2009;
2. Internal violations: establishment of a regime of internal sanctions for violations of dual-use legislation (at the EU level, such as EU Regulation no. 428/2009, as well as at the national level, such as Legislative Decree no. 96/2003);
3. External violations: establishment of a regime of external sanctions for violations of dual-use trade embargoes decided at the international and European level (UN and/or EU embargoes).

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120 Decreto legislativo 9 aprile 2003, n. 96 *Attuazione di talune disposizione del regolamento (CE) n. 1334/2000 che istituisce un regime comunitario di controllo delle esportazioni di prodotti e tecnologie a duplice uso, nonché dell'assistenza tecnica destinata ai fini militari, a norma dell'articolo 50 della legge 1° marzo 2002, no. 39* (GU n. 102 del 5-5-2003). Available at: http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2003;096.

121 (EU) Regulation 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, L 134/1 of 29/5/2009. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:134:0001:0269:en:PDF.

It is worth to highlight that the same sanctions, laid down in Article 16 of Legislative Decree 96/2003, are applied for internal and external violations.

Given the shared sanctions framework for internal as well as for external violation of dual-use legislation, the analysis of the content of Legislative Decree 96/2003 will be presented in part 1 on internal sanctions, while part 2 will deepen some other aspects of external sanctions. Part 3 will explore other forms of sanctions adopted in Italy in the field of dual-use trade control and will draw some final considerations.

1. INTERNAL SANCTIONS

Article 16 of Legislative Decree 96/2003 establishes seven possibilities of infringements, listed in a decreasing order, from the toughest to the softest provision.

The first case of infringement, providing the toughest sanction for violations of dual-use trade legislation, is the export of dual-use goods and technology without licence or licence obtained with false declarations and/or documentations. For this case of infringement, the law provides administrative sanctions from 25,000 up to 250,000 euros and criminal penalties going from 3 up to 6 years of imprisonment. The confiscation of concerned goods is also provided, according to Article 444 of the Italian penal code.

The second case of infringement is the export in deviation from licence' s obligations. In this hypothesis, administrative fines go from 15,000 up to 150,000 euros, criminal penalties establish imprisonment from 2 up to 4 years and the possibility for goods concerned to be confiscated is also provided. In case of confiscation, the concerned firm is also constrained to pay the lease of the wherehouse where the goods are stored during the seizure.

The third case of infringement establishes only crinimal penalties, with imprisonment up to 2 years in case of omission of notification to national competent authorities in case there is a risk of diversion for concerned goods and technology.

On the contrary, the infringement of omission of record-keeping for at least 3 years, or the non transmission of information upon request of competent authority establishes only administrative fines from 15,000 up to 90,000 euros.

The provision of technical assistance is sanctioned according to the end-use of concerned dual-use goods and technology: in case of WMD end-use, the provider is sanctioned with administrative fines from 15,000 up to 150,000 euros or imprisonment from 2 to 4 years; in case of military end-use or destination to an embargoed country, sanctions decrease with administrative fines from 10,000 up to 50,000 euros and imprisonment up to 2 years.

Finally, the transmission via internet or via other electronic devices of listed items without licence or with a licence obtained with false documentations is sanctioned with administrative fines from 10,000 up to 50,000 euros, imprisonment up to 2 years and with the seizure of the website containing the information.

The Italian legislative framework establishing sanctions for violation of dual-use internal legislation has been considered by a case-law of the Italian High Court (Corte di Cassazione), which clarifies the concept of imputability in case of delegation. In fact, the law states that, being the firm' legal representative the person directly responsible for compliance, in case of infringement of trade controls legislation, the legal representative is directly responsible and, therefore, subject to sanctions. Indeed, the simple acceptance of the office implies duties of supervision and control. But in case of delegation, the imputability could falls upon the delegate instead of the legal representative if, and only if, some conditions are met.

The conditions that have to be met for the delegation to work as exemption of criminal liability and listed in this case-law (No 43818 of 9 October 2008)[122] are the following:

1. Delegation must be explicit and precise;
2. The delegate person must be professionally and technically qualified;
3. Delegation must be justified on the ground of the firm's organisational needs;
4. Delegation must imply also a transfer of decisional power and budget management;
5. The existence of the delegation must be judiacially prooved.

It is worth to notice that the Italian jurisprudence is not rich of case-laws related to violation of dual-use trade legislation. More important, it does seem that, in the few cases dealt by Italian courts on dual-use trade controls violations, sanctions applied have beeen quite smooth. As example, in the case-law presented above, the Italian firm *Italchimici s.p.a.* exported without authorisation 243 barrels of cyanide, which is an item listed in Annex I to (EU) Regulation No 428/2009 and, therefore, subjet to prior authorisation. Considering the case of infringement that is export without authorisation, the Court should have applied administrative fines from 25,000 up to 250,000 euros or imprisonment from 3 up to 6 years, accordingly with Article 16 of Legislative Decree 96/2003. Instead, the Italian company was sanctioned with the payment of a fine of 18,000 euros. The lower amount of the attributed fine is explained, by the Court, by the concession of a series of generic extenuating circumstances.[123]

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122 *Sentenze Cassazione penale, sezione III, Sentenza* no. 43818 *del* 09/10/2008.

123 Generic extenuating circumstances are established by Article 62 bis of the Italian penal code. The article establishes that the concession of some generic extenuating circumstances is left to the discretionary power of the judge. Some examples of generic extenuating circumstances are the absence of previous criminal records, a sponatneous confession of the crime, proper behaviour during the trial or cooperative attitute during the trial (as established by Article 62 of the penal code).

As regard the national competent authority responsible for the supervision and implementation of sanctions in case of infringement of dual-use legislation, this is the Ministry of Economic Development (MED), in its Division of International Trade, which is also the licences issuing authority. The MED, in its duty of supervision of compliance with dual-use trade legislation is supported by the Customs Agency and the *Guardia di Finanza*, a special police body (althoug *Guardia di Finanza* depends directly on the Ministry of Economy and Finance).

2. EXTERNAL SANCTIONS

As for the implementation of external sanctions, as explained in the introduction, Article 16 of Legislative Decree 96/2003 applies also in this case.

In other words, Article 16 of Legislative Decree 96/2003 implements the provision established by each EU Regulation/Council decision when calling Member States to lay down "effective, proportionate and dissuasive penalties" for infringements of the concerned Regulation/Council decision establishing restrictive measures as, for example, Article 8 of Council regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia' actions destablilising the situation in Ukraine: 1. Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.[124]

If Article 16 of Legislative Decree 96/2003 has been and continue to be the legal basis in the Italian legislative framework to establish penalties in violation of EU restrictive measures related to dual-use trade (or UN embargoes related to dual-use trade imple-

124 Council regulation (EU) no. 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia' actions destabilising the situation in Ukraine, *Official Journal* of the European Union, L229/1 of 31 July 2014.

mented through the EU legislation), it is worth to notice that as far as restrictive measures against Iran were concerned, another Italian Legislative Decree established santions for infringement of Council regulation (EC) No 423/2007 concerning restrictive measures against Iran.

Legislative Decree 64/2009[125] (now repealed) established stricter penalties compared to Legislative Decree 96/2003. In fact, for trade operations related to Annex I of Regulation 423/2007, that is to say, goods and technologies contained in Nuclear Suppliers' Group (NSG) and Missile Technology Control Regime (MTCR) lists, Legislative Decree 64/2009 established only criminal penalties, with imprisonment from 3 up to 8 years; while for trade operations related to Annex II of Regulation 423/2007 (which means goods and technologies that could contribute to enrichment-related, reprocessing or heavy water-related activities, development of nuclear weapon delivery systems or other about which IAEA expressed concerns) 2 up to 6 years of imprisonment.

As it is evident from the comparaison of the two Legislative Decrees establishing penalties for violation of dual-use trade embargoes, the Italian legislator's will was to establish a stricter (and maybe more dissuasive) sanctions framework for trade of sensible items with Iran. In this perspective, there are no administrative sanctions possible, but only imprisonment which, in the case of trade operations related to items listed in Annex I of Regulation 423/2007 provides 3 up to 8 years instead of 2 up to 6 years of imprisonment (the "toughest" penalty for dual-use trade violation in the Italian system) established in Legislative Decree 96/2003.

It is worth noticing that the Italian competent authority for the implementation of embargoes related to dual-use items is the Ministry of Economic Development, Division of International

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125 Decreto Legislativo 14 maggio 2009, n. 64 - *Disciplina sanzionatoria per la violazione delle disposizioni del Regolamento (CE) n. 423/2007, concernente misure restrittive nei confronti dell'Iran*, published on the Gazzetta Ufficiale, no. 138 of 17 June 2009. Available at: http://www.gazzettaufficiale.it/gunewsletter/dettaglio.jsp?service=1&datagu=2009-06-17&task=dettaglio&numgu=138&redaz=009G0076&tmstp=124531965287.

Trade; the same competent authority responsible for the implementation of internal penalties for dual-use trade legislation violations. However, the Ministry of Economic Development (which is also the Italian licencing authority) is responsible only for commercial (or objective) embargoes. The competent authority for the implementation of subjective and financial embargoes is the Financial Security Committee (FSC), depending from the Ministry of Economy and Finance and more precisely from the Treasury Department. It is plausible to suppose, then, that whenever a restrictive measure concerning dual-use items is adopted and it includes restrictions not only for goods and technology, but also financial operations related to them and, possibly, linked to a list of persons and entities, there will be a cooperation between the Ministry of Economic Development and the Financial Security Committee, each of them responsible for the implentation of its field of competence.

Besides the responsibility of these two competent authorities, there is also, according to the case, the involvement of the Ministry of Foreign Affairs and the Ministry of Defence, the latter, especially in the case of arms embargoes.

3. "UNCONVENTIONAL" FORMS OF SANCTIONS

Since few years, the responsibility mechanism in trade controls has been reversed with the economic operator (exporters, brokers, etc.) called to actively contribute to the fight against illicit trade. The so called "suspicios clause" in the EU dual-use Regulation is an example. As stated in Article 4(5) of EU Regulation 428/2009: "A Member State may adopt or maintain national legislation imposing an authorisation requirement on the export of dual-use items not listed in Annex I if the exporter has grounds for suspecting that those items are or may be intended, in their entirety or in part, for any of the uses referred to in paragraph 1".

This provision also known as the "suspicion clause" establishes the possibility for a Member State to impose an export authorisation if an exporter has grounds for suspecting that the dual-use item not listed in Annex I, he or she intends to export, will contribute to the elaboration of a weapon of mass destruction or military items listed in the EU Military List. The responsibility to appreciate the risk lies with an exporter. If an exporter, intentionally or by negligence omits to apply for an export authorisation, his or her responsibility could be engaged and administrative and/or criminal sanctions could be applied.[126]

Considering this increasing political and legal responsibility of economic operators involved in trade controls, the equally increasing role of targeted sanctions against one specific company it is not very surprising. If targeted sanctions, with a related lists of persons and entities are quite common at the international level, though UN Security Council resolutions and, on the European level, through Regulations and Council decisions, such sanctions are not very common at the national level, at least in the EU practice. Still, there are at least two ways in which national targeted sanctions against one specific company can be implemented. In a first scenario, it is not very appropriate to use the term "sanction" since the measure adopted is a catch-all clause intended to control the export of one specific company. However, the following example of adoption of a catch-all clause against the Italian company *Hacking Team*, shows how a control measure can operate as a *de facto* sanction.

In the second scenario, the imposition of a targeted sanction against one company originates from a third State. In the case-study illustrated below, the United States, well-known for the extra-territorial application of some of its legislation, imposed sanctions on a list of companies and individuals accused of having contributed to Iran's nuclear programme. The case of an Italian company (*Dettin s.p.a.*), listed among others on the US "black list", will be discussed.

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126 Quentin Michel, "The European Union Dual-Use Items Control Regime: Comment of the Legislation Article-by-article", August 2015, DUV5Rev4). Available on: http://www.esu.ulg.ac.be/file/20150812094802_Vademecum-DUV5Rev4.pdf.

3.1. Scenario 1: a catch-all clause as de facto sanction – The Hacking Team case

It is interesting to notice that the "imposition" of a catch-all clause could also work as a *de facto* sanction, especially if established on the product(s) of a specific/targeted company. The administrative procedures required by the implementation of a catch-all clause, in fact, could be quite lengthy, hampering the concerned company from exporting.

This has been the case, in Italy, with the decision of the Ministry of Economic Development to establish a catch-all clause, on the basis of Article 4 of (EU) Regulation 428/2009, to monitor the exports of the Italian company, *Hacking Team*. The company exports a surveillance software, which at the time of the establishment of the catch-all clause, was not subject to any prior export authorisation, as it is today following the entry into force of the Commission Delegated Regulation (EU) No 1382/2014 of 22 October 2014.

Following the MED' s decision to establish the catch-all clause on *Hacking Team*' s product, *Galileo Remote Control System*, the Italian company asked for the annulment of the measure because *de facto* prevented the company' s export operations for some of the following constraints:

- The company has very tight delivery deadlines incompatible with timing of administrative procedures required for the implementation of the catch-all clause;
- End-users are mainly governmental security and law enforcement agencies having specific needs in terms of secrecy and quick delivery;
- The software requires constant updates through a *camouflage* software in order to not be detected by third parties and this implies a regular supply of such software in very short time;
- Delay in deliveries would mean payment of penalties, which, in the end, could cause a problem of solvability of the company.

One month later after the establishment of the measure, on 27 November 2014, the MED ordered the suspension of the catch-all clause for a period of six months and, as already mentioned, in January 2015, Commission Delegated Regulation entered into force updating Annex I to EU Regulation 428/2009 and subjecting some intrusion software to prior export authorisation.

Leaving aside any discussion on the short life of the catch-all clause established by the Italian competent authority and the reason for the imposition of such measure[127], it is interesting to notice that what is a "preventive" measure at the origin also works in the sanctions logic.

However, for several reasons the effectiveness of catch-all clauses as *de facto* sanctions is questionable. The first reason lies in the political nature of the decision to establish or not a catch-all clause "to punish" a company. In fact, it is not surprising that the government (in this case, the Ministry of Economic Development), which is supposed to impose a sanction, could also be a client of the company (in this case, it was the Ministry of Defence, among other governmental agencies). In other words, there would be a lack of legal certainty and a conflict of interest. Second reason to distrust the adoption of catch-all clauses as sanction measures lies in the structure of the EU internal market. The adoption of catch-all clauses, in fact, could result in a market distortion. At both the internal (within the EU) and the international levels, the imposition of such measure on exports of a given company could lead to a lack of competitiveness for the targeted firm, advantaging foreign competitors not constrained by this type of control.

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127 *Hacking Team* has been severely accused, by many human rights defenders and NGOs, as well as by some Members of the European Parliament, of violating human rights and fundamental freedoms by selling its surveillance software to authoritarian regimes. On this basis, it seems quite *bizarre* that the Italian competent authority chose Article 4 and not Article 8 as legal basis for the establishment of the catch-all clause. In fact, Article 8 provides the possibility for Member States to adopt a catch-all clause for reasons of public security and human rights considerations.

3.2. Scenario 2: targeted sanctions imposed by a third State – The Dettin s.p.a. case

On 29 August 2014, the US Government imposed sanctions on persons involved in certain Iran-related activities. Specifically, the US Treasury Department, Office of Foreign Assets Control (OFAC) imposed sanctions on eight individuals, fourteen entities, and six vessels; while the US Department of State sanctioned two entities.

Among the listed persons and entities, there was the Italian company *Dettin s.p.a.* active in the production of equipment for the chemical and petrochemical industry as well as textile machinery.

The company was included in the US Specially Designated Nationals List (SDN List), according to the Iran Sanctions Act of 1996, as amended by Iran Threat Reduction and Syria Human Rights Act of 2012. It is worth noticing that the EU considered this US law to be in violation of international law because of its extra-territorial effects.

The above referred US law established sanctions with a duration of 24 months, reducible to 12 months, following the US authority's discretional power.

Following the intervention of Italian authorities, *Confindustria*,[128] as well as the legal assistance from some important law firms (which reassure the full compliance of the Italian company with existing export control legislation) on 19 November 2015, the US Office of Foreign Assets Control (OFAC) of the US Treasury Department announced the revocation of sanctions against the Italian company.[129]

The *Dettin s.p.a.*, active since more than forty years in the production of stainless steels, would have supplied items and assistance to an Iranian petrochemical industry for a value of more than 250,000 US dollars.

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128 *Confindustria* is the main association representing manifacturing and service companies in Italy.

129 Studio Legale Padova, *Comunicato stampa: Recovate le sanzioni USA alle Dettin s.p.a.*, posted on 23 November 2015. Available on: http://www.italia.co/politica-societa/commercio-con-liran-revocate-le-sanzioni-usa-allazienda-veneta-dettin-s-p-a/.

This US Treasury Department, Office of Foreign Assets Control's decision (to sanction a foreign company) is part of the so-called US "secondary sanctions". These are sanctions that can be imposed by the competent authority of the US to any individual or entity (even to foreign entities) which deliberately supply to Iran items (or assistance) related to sectors listed in the US law (such as the energy sector, petrochemical, transport, etc.).

The Italian company was sanctioned by the US authority despite an export authorisation delivered by the Italian competent authority and the fact that such export operations were carried out in full compliance with the Italian and the European legislation on export controls.

As for the damages caused to the company, considering that 95% of the revenues originate from the export activity, beside the so-called reputational damage and the loss of market shares, there have also been commercial damages: revenues declined up to 15%. The company also suffered a strong financial strain due to loan refusals by banks and credit institutions.[130]

Despite the happy /expensive ending of the story, the extra-territorial effects caused by some countries' legislation (USA) remain questionable and, *de facto*, a further source of potential sanctions.

The practice of issuing legislation with extra-territorial effects regarding trade controls dates back to 1996 with the adoption, by the USA of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (Helms-Burton Act).[131] On the other hand, the EU's practice to protect itself from such types of "external interferences" stopped in 1996. In fact, while the US adopted the Helms-Burton Act, aiming at establishing a sort of mechanism of sanctions against States assisting Cuba (under US embargo since 1960), the EU pro-

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130 Giovanna Lucietto, *Fine di un incubo: Dettin esce dalla black list*, Il Giornale di Vicenza, posted on 24/11/2015. Available on: http://www.ilgiornaledivicenza.it/home/economia/fine-di-un-incubo-dettin-esce-dalla-black-list-1.4463615?refresh_ce#scroll=1471.

131 Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996. Available on: http://thomas.loc.gov/cgi-bin/query/z?c104:H.R.927.ENR:.

tected itself with the adoption of Regulation (EC) No 2271/96 of 22 November 1996[132] shielding against the effects of extra-territorial application of legislation adopted by a third country. But while the US keeps issuing legislation with such effects, notably as regards trade controls, the EU does not keep the pace; updating Regulation 2271/1996 does not seem to be on the agenda. Resignation? Maybe. Meanwhile, in a note of September 2014, one of the biggest Italian law firms, specialised in trade controls and embargoes, warned European exporters from carrying out commercial and/or financial operations with Iran, in order to comply with EU as well as with US legislation, as concerned transactions with Iran.[133]

4. CONCLUSION

From this brief overview of the Italian sanctions regime of dual-use trade control violations, the system seems to be easy, being organised around one single legal act (Legislative Decree No 96/2003 of 9 April 2003). However, a wider inquiry revealed that there can be sanctioning measures which reach beyond the legislative framework of reference *stricto sensu.* The first case study, on the Italian company *Hacking Team*, shows how a catch-all clause imposed on all transfers of a company could affect the company itself, causing commercial and reputational damages. The second case study, on another Italian company, *Dettin s.p.a.*, draws attention to the phenomenon of extra-territoriality of some third States' legislative acts and, notably, the potential of such third State to act as sanctioning authority.

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132 Council regulation (EC) no. 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, *Official Journal of the European Union*, L 309, 29/11/1996. Available on: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996R2271:EN:HTML.

133 Studio Legale Padovan, Client Alert Export Control, September 2014, Sanzioni USA contro l'Iran: le sanzioni USA colpiscono anche le imprese europee – update. Available on: http://www.studiopadovan.com/allegati/Client_Alert_Export_Control_USA.pdf.

Several criticisms can be addressed to both "unconventional" sanctioning instruments.

Concerning the use of catch-all clauses, the political nature of the decision to establish or not a catch-all clause in order "to punish" a company risks to result in a lack of legal certainty as well as in conflicts of interest. Moreover, the adoption of catch-all clauses could result in market distortions, on both the internal (within the EU) and the international level, given the absence of competitiveness of the targeted firm.

As regards sanctions imposed by third States, by issuing acts with extra-territorial effect, the main objection to such legislation is the doubtful legitimacy to impose sanctions on other States' actors, thereby interfering with internal matters and established national legislation.

However, conventional forms of sanctions established by internal legislation are also not exempt from reproach. The "legal certainty" characterising legislative sanctions seems to have been missing in cases when companies, brought to court for infringements of trade control laws, were sanctioned with penalties that, in the best scenario, seem to be far from "effective, proportionate and dissuasive".

A step forward to implementing effective, proportionate and dissuasive penalties would be to adapt these last ones to characteristics of the targeted firm, notably to its turnover. It is clear that the impact of penalties, especially the payment of fines, will depend on the size of the company at fault. The impact will inevitably be higher on SMEs that also have greater difficulties in bearing the costs of compliance. In this perspective, there is a risk that, at the end, complying with legislation becomes only a matter of … "Affordability".

Anyway, in the absence of a collection of available data on the numbers and typology of sensitive trade control violations, it is difficult to estimate whether the common practise is infringement or compliance and, under the first hypothesis, what is the impact on the lawbreaker.