

Implementation by Poland

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1. INTERNAL SANCTIONS: PENALTIES FOR WEAPONS OF MASS DESTRUCTION PROLIFERATION-RELATED OFFENCES

Polish Law¹⁵⁹ provides two legal bases for prosecuting proliferation-related offences. The first is a provision in the Criminal Code that relates to production and transfer of weapons of mass destruction (WMD). The second are the penalties listed in the national law on the control of trade in dual-use items. When prosecuting a WMD-related offence, including illegal trade in dual-use items, national enforcement authorities, according to their individual judgement, decide to choose the most relevant legal basis between these two sources. The following paragraphs present the two legal frameworks in detail (see List of penalties in Table 1).

1.1. Criminalization of WMD-related offences

Chapter 16 of the Polish Criminal Code¹⁶⁰ catalogues crimes against peace, humanity and war crimes. Two articles refer to WMD-related offences. First, Article 120 provides that a person using a weapon of mass destruction prohibited by international law shall be sentenced to imprisonment of 10 years, up to 25 years, or to a life sentence. Second, Article 121, provides a penalty of imprisonment for one year up to 10 years for an array of different offences relating to the illegal development of WMD, i.e.: manufacture, development, collection, acquisition, selling, storing,

159 A general description of enforcement of the EU dual use trade controls, including penal provisions may be found in: Sibylle Bauer, WMD-Related Dual-Use Trade Control Offences in The European Union: Penalties and Prosecutions, *Non-Proliferation Papers*, no. 30 July 2013.

160 The Law on Criminal Code, 6 June 1997 (Dz.U.1997.88.553).

transporting, developing or transferring WMD. “Illegal” in this case should be understood as: in contravention of prohibitions set forth by international law or by specific provisions of national law¹⁶¹.

With these two provisions in place Poland fulfils international obligations set out in three corner stone treaties relating to WMD:

- Treaty on the Non-Proliferation of Nuclear Weapons (1968),
- the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons (1972) and
- Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (1993).

Additionally, the provisions of Article 121 are an implementing measure of the United Nations Security Council resolutions (UNSCR) which impose sanctions on the supply of dual-use items for development of WMD and their means of delivery. It is also relevant to note that Article 121 of the Criminal Code is listed in the national “1540 Implementation Matrix”¹⁶² as a measure of enforcement with regard to the UNSCR 1540 (2004) which obliges States to impose regulations that prohibit and prevent non-State actors from developing or acquiring WMD and their delivery means.

1.2. Penalties listed in the national Export Control Law

The organisation and functioning of the trade control system regarding arms and dual-use goods is governed in Poland by the Law of 29 November 2000 on foreign trade in goods, technologies and services of strategic importance to the security of the State and to maintaining international peace and security (further referred

161 Article 121 of the Criminal Code reads: “A person who, in contravention of the prohibitions of the international law or provisions of law, manufactures, collects, acquires, sells, stores, transports or transmits the WMD or develops them with the view to their manufacturing or use, shall be sentenced to imprisonment for 1 year up to 10 years.”

162 <http://www.un.org/en/sc/1540/national-implementation/1540-matrix/committee-approved-matrices.shtml#P>.

to as the “Law on the export control”).¹⁶³ Chapter 6 of this Law lists criminal, administrative and financial penalties applicable to violations of the Polish and European Union’s¹⁶⁴ export control regulations (see table 1).

The most important provision (Article 33.1) states that a person trading in strategic goods (dual-use goods or arms) without an authorisation, or in contravention thereof may be punished by imprisonment for up to 10 years. According to Article 33.2, if a person carries out trade in violation of the conditions set forth in the authorisation and acts without intent, and, if this person undertakes a command the person shall be liable to a fine, non-custodial sentence (community works) or imprisonment of up to 2 years. In 2012 a provision was added in the Law (Article 33.2a) criminalizing false or incomplete information in an application submitted for a trade authorisation. Such an offence is liable to a fine, non-custodial sentence (community works) or imprisonment of up to 2 years.

In case of all three above mentioned offences, the court may also issue a forfeiture order with respect to items in question or other items used in order to commit the offence or resulting from such offence, including cash and securities (Article 33.4). It is important to stress that pursuant to the provision, this refers also to items that are not the offender’s property. Thus the Law provides enforcement authorities with the right to effectively confiscate the item or the funds and prevent them for contributing further to the proliferators’ efforts.

163 For a detailed description of the Polish export control system please refer to: Irena Kolakowska, Searching for the Balance: Non-proliferation, Security and Economy. Export Control System in Poland., in: Quentin Michel (ed.), *Sensitive Trade. The Perspective of European States*, Brussels, P.I.E. Peter Lang, Coll. Non-Proliferation, no. 5, 2011; and Irena Kolakowska-Falkowska, “European Dual-Use Trade Controls: Poland Beyond Materiality and Borders”, Liège, *Les Cahiers de Sciences Politiques*, no. 28, 2013.

164 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; Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment and Directive 2009/43/EC simplifying terms and conditions of transfers of defence-related products within the Community (Intra Community Transfers Directive).

Any company (i.e. a legal person) carrying out trade without valid authorisation, is liable to a financial penalty of up to 50,000 euros (equivalent to 200,000 Polish zloty) imposed by the trade control authority by way of an administrative decision (Article 37). If an enterprise carries out a trading activity in contravention of the conditions set forth in the authorisation, the enterprise is liable to a financial penalty of up to 25,000 euros (100,000 Polish zloty). The same applies if the enterprise provides false or incomplete information in its application for the authorisation (Article 38).

Table 1. Penalties relevant to WMD proliferation-related offences

Action	Penal provisions	Financial penalties	Administrative
WMD-related offences: manufacture, development, collection, acquisition, selling, storing, transporting, developing or transmitting the WMD	imprisonment for 1 year up to 10 years		
trade without or contrary to authorisation (Article 33 STC Law)	imprisonment: 1 – 10 years		confiscation of goods
trade contrary to authorisation, without intent, plus compliance action (Article 33 STC Law)	non-custodial sentence (community works) imprisonment of up to 2 years	fine	confiscation of goods
false or incomplete information in application (Article 33 STC Law)	- non-custodial sentence (community works) - imprisonment up to 2 years	fine	
Regarding legal person: trade with no authorisation (Article 37 STC Law)			50,000 euros
Regarding legal person: trade contrary to authorisation or false information in application (Article 38 STC Law)			25,000 euros

→ PROSECUTION CASES

On the basis of publicly available data this author was able to identify two cases concerning trade in strategic goods that took place during last 16 years which ended with a conviction. The first relates to a intended export of dual-use items without a licence (breach of Article 33.1 of the Export control Law). Although the verdict was not available, other related court procedeeings reveal that additionally to the conviction, a court decided also to confiscate the dual-use goods involved. These did however, not belong to the convicted person but to another company, unintentionally involved in this illicit transaction.¹⁶⁵

The second case concerns a group of offenders that were found guilty of exporting military items, in particular rocket engines dismantled from demilitarized missiles (court ruling from 20 May 2011 (IV K 36/10) District Court in Warsaw). The offenders were sentenced to 1 up to 2 years of imprisonment suspended for 2 or 3 years and for fines (up to 4,000 euros).

Moreover, in 2005, Polish authorities arrested a UK citizen of Iranian origin suspected by the US of supplying WMD-related materials and military technology to Iran. US issued an international arrest warrant after Mr. Manzarpour for exporting in 2004 without a proper licence to UK and then to Iran a one-engine, ultralight plane “Berkut” made of fibreglass and carbon (the plane was self-assembled). For this he would face an imprisonment and a fine in the US. Mr. Manzarpour claimed that he had a licence for exporting the plane from UK to Iran and that no authorisation was needed for transfer between US and UK. Final decision of the Polish court in second instance was issued in 2008. It was decided against an extradition to the US because the deed was not considered a

165 After the confiscation of the goods the company decided to file a constitutional complaint in the Constitutional Court in Poland (case no. Ts 32/13, brought by Euroturbine B.V. N. based in The Netherlands). The company aimed at proving that the fact that they were not informed about the criminal court rulling against the offender (different person) which involved confiscation of their goods and which resulted in a lack of possibility to claim the goods was unconstitutional. The complaint was rejected on the basis that it did not fulfil the formal requirements.

crime in Poland (the plane was not considered to be covered by the military export control list in Poland). Mr. Manzarpour spend nearly two years in arrest in Poland before he was released before the final verdict. He was also previously convicted in the US, in 1998, for other export control violations.¹⁶⁶

2. EXTERNAL SANCTIONS. IMPLEMENTATION OF THE EU AND UN WMD-RELATED EMBARGO DECISIONS

An analysis of the implementation in Poland of the UN and EU sanctions on WMD-related activities starts with a general notice on the relevant legal framework. According to the Constitution of the Republic of Poland¹⁶⁷ (Article 9) “The Republic of Poland shall respect international binding law”. Further, Article 91.3 of the Constitution says that: “If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws”. This includes abiding by the embargoes imposed by the Council of the European Union.

In Poland there is no single act referring to the implementation of international sanctions. The restrictions on trade in dual-use goods are enforced in the export control process governed by the Export Control Law presented above. In the export control licencing process, the main responsibility for assessing licence applications against international sanctions rests with the Ministry of Foreign Affairs (Departement of Security Policy), which is an advisory body. The Ministry of Development is the export control authority and takes opinions presented by the MFA into account when issuing export licences.

166 Accessed on 24 March 2016: <http://www.iranwatch.org/suppliers/ali-asghar-manzarpour>; <http://wiadomosci.wp.pl/query,ali%20asghar%20manzarpour,szukaj.html>.

167 Constitution of the Republic of Poland, 2 April 1997, (Dz.U.1997.78.483)

Implementation of all other sanctions, concerning assets freeze, visa ban, oil and gas embargos as well as luxurious goods, that are often in relation to WMD-related activities as in the case of the DPRK, is not covered by any separate law. Their application is the task of different ministries in charge of relevant sectors of the economy. However, in order to coordinate efforts within the government, an Interagency Committee on Implementation of Sanctions' oversees the process and is in charge of resolving problematic issues. The leading role in this process lies with the Department of International Law in the Ministry of Foreign Affairs.

As to the implementation of international sanctions on trade in dual-use goods two "mechanisms" may be mentioned that serve this purpose: a) direct application of EU sanctions; and b) provisions of national Law on Export Control. Until recently there was also a national list of prohibited end users, but it is no longer used. These measures will be presented in the following paragraphs.

2.1. Direct application of EU sanctions

All WMD-related UN Security Council sanctions are implemented within the legal framework of the European Union. This can be implemented by way of EU regulations or CFSP Council decisions. Following EU law, both measures are directly applicable by the Member States. Therefore all UN sanction regimes are binding upon EU Member States.

A review of the EU embargoes reveals that most, if not all, of WMD-related sanctions are imposed by way of both instruments at the same time: i.e. EU regulations and Council decisions. The EU regulations have a general application and are binding in their entirety. They take precedence over conflicting measures of a Member State and are directly applicable towards legal and natural person. This means a prohibition for legal and natural persons to engage in trade with a sanctioned entity – a State or a non-state actor. The scope of the provisions of the EU regulations includes trade in dual-use items.

On the other hand, Council decisions aim at shaping the policies of Member States, or to be more specific, of their national authorities. Council decisions therefore apply directly to these authorities. This means that governments are bound to follow the political guidance set in the Council decision, including taking into account EU embargoes in the licencing process Council decisions may refer to both dual-use items and arms.

2.2. National assessment criteria

However, Polish Law on export control also contains separate provisions that allow to enforce international prohibitions: the existence of a given embargo is mentioned as one of the criteria against which a licence applications should be assessed. Article 16.1.2.a of the Law on export control states that no licence shall be issued if it is in contradiction to the UN, EU or OSCE sanctions.¹⁶⁸ This provision echoes Article 12.1.b of the EU Regulation 428/2009 and the Article 2.1 of the Council Common Position 2008/944/CFSP (even though formally OSCE does not have a authority to impose sanctions).

In Poland, the Ministry of Foreign Affairs (MFA) is responsible in particular for assuring that international sanctions are taken into account in the licencing process concerning trade in dual-use or military items. The MFA's opinion is then provided to the trade control authority (Ministry of Development).

2.3. National list of sanctioned States

Until recently the Polish government by virtue of an executive order regularly adopted two lists of States with which trade is: (a) prohibited, or (b) restricted. Although the legal basis for this mechanism is still in place, it is no longer in use since 2014. Nevertheless,

168 In 1992, in response to the armed conflict between Armenian and Azerbaijan over the area of Nagorno-Karabakh the Organization for Security and Co-operation in Europe (OSCE) requested its participating States to impose an embargo on arms deliveries forces engaged in combat in the Nagorno-Karabakh area. http://www.sipri.org/databases/embargoes/eu_arms_embargoes/azerbaijan.

it is worth describing the case and presenting the reasons that made the mechanism obsolete. The lists were established by the Council of Ministers on the basis of Article 6b of the Law on export control. The Law indicated that the lists shall include countries with which trade in strategic items shall be forbidden or limited. When drafting the lists, the government shall take “into account public security and human rights, and in the case of military goods also defence or security needs of the Republic of Poland, commitments of the Republic of Poland arising from international agreements and arrangements, as well as alliance commitments”, including: NPT, CWC, BTWC, the Australia Group, the Missile Control Technology Regime, the Zangger Committee, the Nuclear Suppliers Group, the Wassenaar Arrangement and the Hague Code of Conduct Against Ballistic Missile Proliferation.

A ban or restriction was imposed on States. However, the list of prohibitions included a ban of export to any country if the items were to be used by Al Quaida terrorist organisation.

In practice, the list of sanctioned States mirrored the existing embargoes imposed by the UN Security Council or the European Union. The scope of the banned goods reflected exactly the area covered by international sanctions. If there was an exemption to the embargo, it was also taken into account on the list. When it comes to sanctions on dual-use items there were only two States on the last version of the list (enacted on 20 October 2009): Iran and the Democratic Republic of Korea. DPRK was banned from all dual-use deliveries and Iran from items indicated on the UN sanction lists of that date.

The second list was intended to indicate recipients that should be not banned but only restricted from receiving dual-use items or military goods. However the Law on export control formally did not specify what such restriction should cover, or how it differs from a total ban on trade. In practice, it meant a greater scrutiny and vigilance in assessing the applications in the licencing process with the final decision undertaken after informing the Council of

Ministers on the case and of its consent.¹⁶⁹ The last version of the list included: the Democratic Republic of China,¹⁷⁰ Taiwan, Cuba and Syria.

In the course of the long existence of the prohibitions and restriction lists some substantial problems were identified that finally led to the cancellation of this mechanism. First, the review process of the lists was rather cumbersome – they were to be accepted by the government. Therefore this process was carried out not only on an annual basis. At the same time, due to the dynamic evolution of the international situation which resulted in frequent imposition of sanctions by the UN Security Council and EU Council, the lists were often outdated soon after their revision.

Second, the existence of the lists confused exporters. States named on the lists were often regarded by business as the only banned or restricted end users. This resulted in a view that all other States were legitimate recipients of arms or dual-use goods. This argument was used by the entrepreneurs against taking into account other criteria listed in the national Law and in the EU Common Criteria on arms export, especially after 2008 when the EU Criteria became binding.

Finally, independently from the above mentioned considerations, the Governmental Legislation Centre, located in the Prime Minister's Chancellery, decided in 2014 that the lists enacted in the form of governmental decree are unconstitutional. The reasoning was that any circumventing of the freedom of citizen (in this case it was a freedom to choose a trade partner) cannot be restricted by virtue of a decision by the Council of Ministers but only by a law adopted by the Parliament.

169 According to an official of the Ministry of Foreign Affairs of the Republic of Poland – conversation in November 2015.

170 It should be noted that the EU embargo on arms exports to China was imposed on the basis of the Declaration of the European Council, is still binding but was not reintroduced as a CFSP decision or a EU Regulation afterwards.

As a result, the Governmental Legislative Centre decided to review the Law on export control and to delete the provision concerning the lists of prohibitions and restrictions. The review is yet to be undertaken.

In the opinion of the author, a final abandonment of a national sanctions list would be of advantage. This would result in more clarity regarding the legal restrictions on the side of the exporters. There would be no competing “frameworks” concerning restrictions of trade, (meaning UN/EU/OSCE sanctions vs. national control list). At the same time, it might be more burdensome for the entrepreneurs to follow existing UN, EU and OSCE sanctions. This requires implementation of at least basic internal compliance programmes on the side of the business and more vigorous awareness raising on the side of the authorities.