

## Sanctions and penalties for the infringement of dual-use trade controls under Spanish Law

Ana Sánchez-Cobaleda

*PhD candidate and Lecturer at the Universitat de Barcelona*

This chapter is divided in two parts. First we will explain the national understanding of the term *sanction* under Spanish Law, i.e. the legal texts that regulate the control of dual-use goods trade at a domestic level and the types of sanctions foreseen in case of infringement. In the second part we will be looking at the way Spain's authorities implement international decisions regarding embargoes and what measures have been taken when embargoes have not been respected. Our general evaluation of the Spanish legal system will be provided in the context of the final considerations.

### 1. INTERNAL SANCTIONS

#### 1.1. National understanding of the term “sanction”

Just like many other Spanish words, the term “sanction” -i.e. “*sanción*”- comes etymologically from Latin (*sanction, -onis*), just as it does in French or in English.

The concept of “*sanción*” means “*castigo*”, which could be translated as “*penalty*” in English or as “*punition*” in French. In Spain the term sanction is understood as the “punishment that arises from committing certain actions and that does not necessarily have to be prescribed by the Law”<sup>171</sup> – for instance, social sanctions.<sup>172</sup> This is the meaning understood in common language and so it is reflected

---

**171** Moliner, M., *Diccionario de Uso del Español*, Madrid, Ed. Gredos, 1980.

**172** Silva-Sánchez, J. M., “Una primera lección de Derecho Penal”, in Luzón Peña, D. M., *Derecho Penal del Estado Social y Democrático de Derecho. Libro homenaje a Santiago Mir Puig*, Madrid, La Ley grupo Wolters Kluwer, 2010, pp. 76-83.

in Spanish Law. The general understanding of the term sanction in Spanish Law is therefore the “punishment or penalty prescribed by the Law for the infringement of rules”.<sup>173</sup>

Depending on the infringed rule and the branch of Law we might be looking at, the prescribed sanction will present differences, even in its name, as in Spain, different terms are used for the different kinds of punishment.

In Criminal Law any punishment gets the generic name of *pena*.<sup>174</sup> These penalties are classified in three different categories by the Spanish Criminal Code: severe penalty – *pena grave* –, less severe penalty – *pena menos grave* – and lighter penalty – *pena leve* –.<sup>175</sup> In the case of Administrative and Civil Law, the term used to refer to the punishment for when a negligent conduct takes place is – in both cases – *sanción*.

While criminal and civil sanctions – which are not incompatible with one another – must be imposed by a judicial body, administrative sanctions are imposed by the Administration. These are, however, subject to judicial control and can always be appealed against in case of being considered unjust. Fines or citations are two examples of a typical administrative sanction.

Generally, private sanctions in civil Law are related to compensation (using the Spanish term *indemnización*) and tend to have a monetary aspect which may entail a civil-private sanction as well.<sup>176</sup>

---

**173** Mir Puig, S., *Derecho Penal, Parte General*, Barcelona, Editorial Reppertor, 2015, pp.45-46.

**174** Which is translated in English as “sentence” or “penalty” and is equivalent to the French word “peine”. All translations into English and French have been done according to the *Oxford Spanish Dictionary*, Oxford, Oxford University Press, 2008, and *Dictionnaire Français-Espagnol*, Paris, Larousse, 1991.

**175** Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal. Article 33.3-5

**176** Silva-Sánchez, J. M., “Una primera lección de Derecho Penal”, in Luzón Peña, D. M., *Derecho Penal del Estado Social y Democrático de Derecho. Libro homenaje a Santiago Mir Puig*, Madrid, La Ley grupo Wolters Kluwer, 2010, pp. 76-83.

Whatever the ultimate aim of the sanction i.e. prevention, compensation or punishment no one denies that its imposition is associated with an illegal conduct. Therefore, a sanction is a threat used by the Law to dissuade anyone from committing a crime.<sup>177</sup>

In the legislative field of trade in sensitive goods, sanctions are indeed an effective means of enforcing trade control legislation. They act as dissuasive measures and, thus fulfill a preventive function that enforces the implementation of Spanish Law and its sensitive trade control regulations.

## **1.2. Brief presentation of Spanish trade control legislation regarding sensitive goods**

Export control of dual-use technologies is both a European and a national competency. Therefore the rules and regulations governing such transfers are applicable to all States of the European Union, that are required to adopt certain specific regulations and investigate any breaches against them.

In view of Spain's international commitment, national control authorities apply Council regulation 428/2009, which sets up a Community regime for the control of the export, transfer, brokering and transit of dual-use items<sup>178</sup> amended by later regulations.<sup>179</sup> It is also committed with UNSC 1540 Resolution, by adopting domestic legislation that fights the proliferation of nuclear, chemical and biological weapons and their means of delivery because of their threatening character against international peace and security.<sup>180</sup>

The Spanish control system assumes also all the commitments undertaken within the framework of the most important inter-

---

**177** Mir Puig, S., *Derecho Penal, Parte General*, Barcelona, Editorial Reppertor, 2015, pp.45-46.

**178** 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, OJ L 134.

**179** The last one being: Regulation (EU) no. 599/2014 of 16 April 2014 of the European Parliament and of the Council amending Council regulation (EC) no. 428/2009.

**180** UN Security Council, Security Council Resolution 1540 (2004) concerning weapons of mass destruction, 28 April 2004, S/RES/1540 (2004).

national control and non-proliferation *fora* of which Spain is a member (*i.e.* Wassenaar Arrangement, the Australia Group, the MTCR – Missile Technology Control Regime, the NSG and the Zangger Committee).<sup>181</sup>

These obligations and commitments regarding trade control regulations are set out in three texts of the Spanish legislative regime.

The oldest reference to crimes and sanctions in connection with dual-use material in domestic regulations relates to the smuggling of such goods – as well as defence material –.<sup>182</sup> It is an Organic Law from 1995, known as the Anti-smuggling Act, which was recently modified in 2015.<sup>183</sup>

This text categorizes as crime “the unauthorised export of defence or dual-use material – worth at least 50,000 euros – or the export of such with an authorisation obtained by means of a fraudulent or incomplete declaration” (Article 2.2. c.1º). This conduct is subject to criminal and civil penalties foreseen in articles 3-7.

If the value of the smuggled dual-use goods is inferior to 50,000 euros, article 11 of that same text categorizes it as an administrative infraction. These infractions are divided into three types. Depending on the degree of the breach, the infraction will be either *minor* (when the value of the smuggled items is less than 6,000 euros), *serious* (between 6,000 and 18,000 euros) or *very serious* (more than 18,000 euros but less than 50,000 euros). Each category of infringement implies its own administrative sanction, as we will see. The resistance, refusal or obstruction to the authorities will also be considered as an administrative infraction, which implies economic sanctions as well (Article 11.4)

---

**181** Muro Martínez, R., “Ley sobre el control del comercio exterior de material de defensa y de doble uso”, in *Boletín Económico de ICE*, no. 2933, Madrid, Ministerio de Industria, Turismo y Comercio, 2008.

**182** However, the first Organic Law to include the smuggling of dual-use goods as a crime in the Spanish system was Ley Orgánica 3/1992, de 30 de abril, *por la que se establecen supuestos de contrabando en materia de exportación de material de defensa o material de doble uso*, BOE no. 105, 1 de mayo de 1992, which was substituted by the LO 12/1995, the current one.

**183** Ley Orgánica 12/1995, de 12 de diciembre, de *Represión del Contrabando, Texto Consolidado*. BOE no. 227, de 22 de septiembre de 2015.

To remedy a possible fraud – consisting in the commitment of a plurality of smaller smuggling acts whose individual value does not reach the level of a crime – the Spanish legislator also criminalizes and sanctions anyone who smuggles various quantities of items whose accumulated value equals or surpasses the 50,000 euros (Article 2.4).

We see how the distinction between crime and administrative infractions is based on the financial value of the smuggled goods. This approach might appear a bit unusual to certain Member States who consider that proliferation has nothing to do with value, since a very unexpensive item could have very high proliferation implications. This quantitative criterion – regardless of its consistency from a proliferation point of view – has to be understood taking into account the ‘historical background’ of the legislator. Indeed, the wording of this Organic Law suggests that the mindset while drafting these provisions was the crime of smuggling as a general phenomenon, rather than the dual-use export.

At a more specific legislative level the Law 53/2007 (in force since 2008) *which controls external trade in defence and dual-use items*.<sup>184</sup> This was the first time that a regulation of this rank was enacted to deal with these matters in the Spanish legal system.<sup>185</sup>

Law 53/2007 is implemented through the Royal Decree 679/2014 as of the 1<sup>st</sup> of August,<sup>186</sup> *which approves the regulation for the control of external trade in defence materials, other materials and*

---

**184** *Ley 53/2007, de 28 de diciembre, sobre el control del comercio exterior de material de defenca y de doble uso. BOE no. 312, de 29 de diciembre de 2007.*

**185** In the Spanish legal system there are two kinds of Laws: ordinary Law and Organic Law. The difference is based on procedural and substantive factors. An Organic Law must be adopted by an absolute majority of the *Congreso de los Diputados* (Congress of Deputies) and it is required to regulate specific subject matters established in the Spanish Constitution. Any other subject which needs to be regulated under the law will have the form of an ordinary Law – which is adopted by simple majority. Until Law 53/2007, dual-use items were not even regulated by Law Sánchez Morón, M., *Derecho Administrativo Parte General*, Madrid, Tecnos, 2011, pp. 164-168.

**186** *Real Decreto 679/2014, de 1 de agosto, por el que se aprueba el Reglamento de control del comercio exterior de material de defenca, de otro material y de productos y tecnologías de doble uso. BOE no. 207, de 26 de agosto de 2014.*

*dual-use products and technologies*. This Royal Decree introduces all necessary changes in the regulation of (defence and) dual-use transfers in order to implement the corresponding international commitments. It was also adopted to reflect the signing<sup>187</sup> and ratification<sup>188</sup> by Spain of the Arms Trade Treaty in 2014.

Law 53/2007 provides that export authorisations are denied to conflict areas or regions where human rights are violated, and in other cases (Article 8). Another worth mentioning aspect of this Law is that according to its Article 3 *technical assistance* transfers (Article 3.14) will be considered as other regulated operations (i.e. export, import, brokering, etc.).

Broadly speaking, the aforementioned Law – together with the Royal Decree that develops it – establishes a licencing system which requires an authorisation every time a listed product (included in the Annex I of the 428/2009 EU Regulation) is exported by Spain to a country outside the European Union. Non-listed products may require an authorisation from the competent authorities whenever the operator has been informed or he/she knows that the exported items might be used partly or entirely in connection with weapons of mass destruction. This provision called “catch-all clause” or *cláusula escoba* in Spanish is contained in article 4 of the EU Regulation and will also apply in case dual-use items are purchased by a State that is under an arms embargo by the United Nations or the European Union.

The authorisation and licencing process established by the Spanish legislation in order to control the exports and guarantee the compliance with relevant international commitment is set forth in the aforementioned texts (i.e. Law 53/2007 and Royal Decree

---

**187** Soria López, J. M., *Intervención del Ministro de Industria, Energía y Turismo en la ceremonia especial para la firma del Tratado sobre el Comercio de Armas, Naciones Unidas*, New York, 2013.

**188** Toledo Segarra, M., “España ratifica el Tratado sobre Comercio de Armas de Naciones Unidas”, en *Boletín del Instituto de Estudios sobre Conflictos y Acción Humanitaria*, Madrid, IECAH, 2014.

679/2014). Since many levels of authority are involved in the export and import of dual-use goods and its security consequences, several bodies take part in the process.

The Secretariat of State for Trade -attached to the Ministry of Economy and Competitiveness – is the body responsible for authorising each external trade transaction concerning defence material, other material and dual-use items and technologies. It has to be duly informed by the Inter-Ministerial Regulatory Board on Foreign Trade in Defence and Dual-Use Material before deciding on any authorisation. This process is made on a case by case basis.<sup>189</sup> As the name indicates, the Regulatory Board is composed of representatives from all Ministries with a direct interest in dual-use trade.<sup>190</sup>

Once the authorisation is granted, the Deputy Directorate-General for International Trade in Defence and Dual-Use Material is the competent body to issue the licence.<sup>191</sup> The Deputy DG is a specific organ currently belonging to the Ministry of Economy and Competitiveness as well.

Export applications are analysed on a case by case basis by the competent organs.<sup>192</sup> Nevertheless, infringements of the legal obligations may still occur. As regards the sanctioning regime the same Law 53/2007 refers to the Ant-Smuggling Act and the Criminal Code, which establish the sanctions for each type of crime and infraction.

### 1.3. Types of sanctions

Failure to comply with the regulation is punished by the Spanish legal system. Article 24 of the EU Regulation establishes

---

**189** *Secretaría de Estado de Comercio, Ministerio de Economía y Competitividad. Estadísticas españolas de exportación de material de defensa, de otro material y de productos y tecnologías de doble uso, Año 2014. Gobierno de España, 2015.*

**190** Ministry of Interior, Ministry of Industry, Tourism and Trade, Ministry of Defence, Ministry of External Affairs and Cooperation and Ministry of Economy and Finance.

**191** The Deputy Directorate-General of International Trade in Defence and Dual-Use Material also serves as the Secretariat of the Interministerial Regulatory Board on External Trade in Defence and Dual-Use Material.

**192** Muro Martínez, R., “Ley sobre el control del comercio exterior de material de defensa y de doble uso”, in *Boletín Económico de ICE*, no. 2933, Madrid, Ministerio de Industria, Turismo y Comercio, 2008.

that “the penalties applicable to infringements of the provisions (...) must be effective, proportional and dissuasive”. Due to the leeway countries have as regards the interpretation and implementation of such “effective, proportional and dissuasive” penalties, the types and degrees of sanctions may differ substantially across the EU.<sup>193</sup> The Preamble and article 10 of the Law 53/2007 and its complementary Royal Decree 679/2014 refers to the Anti-Smuggling Organic Law in order to determine the criminal penalties and civil and administrative sanctions that will be imposed for the commitment of crimes or infractions against sensitive trade control regulations.

Article 3 of the Anti-Smuggling Act establishes imprisonment of up to five years and a fine of up to six times the value of the smuggled dual-use goods for any person committing the defined crime. If the crime was due to a reckless conduct the penalty will be imposed at the lower degree prescribed by the Law (Article 3.1). However, if the crime was committed by or on behalf of persons, entities or organisations whose nature or activity make it particularly easy to commit, the penalty will be imposed at the higher degree (Article 3.2).

In case of *criminal liability* of a legal person, a fine of twice to four times the value of the goods will be imposed. Equally it is forbidden to accept any public subsidies or public aid for contracting Public Administrations or for enjoying tax or National Insurance benefits or incentives from one to three years (Article 3.3.a). Additionally, the legal person will have to face suspension of the activities relating the smuggled dual-use goods for a period from six months to two years (regardless of the kind of activity -import, export, trade, etc.-) (Article 3.3.b).

Regarding *civil responsibility*, Article 4 establishes that in the proceedings for smuggling, civil liability will include all tax debt owed to the Tax Administration that were not settled due to prescription or other causes (foreseen in the General Tax Law

---

**193** Bauer, S., “WMD-Related Dual-Use Trade Control Offences in the European Union: Penalties and Prosecutions”, *Non-Proliferation Papers*, EU Non-Proliferation Consortium, no. 30, July 2013, p.5.

58/2003).<sup>194</sup> This shall include all accrued interest as well. A crime cannot be a taxable event. However, the prejudice experienced by the State as a result of smuggling is remedied through a civil penalty – which could be understood as a compensation.

For implementation of criminal fines and civil sanctions (Article 4 bis), judges and courts may seek assistance of the Tax Administration, which will require payment of the fine and the civil sanction by an administrative enforcement procedure (under the terms established in the General Tax Law).

Any penalty imposed for a crime of dual-use goods smuggling, entails the *confiscation* of all goods, property, profit obtained, as well as instruments, machinery and means of transport involved in the crime perpetrated. If seizure is not possible, according to Article 5, the monetary equivalent will be confiscated.

*Administrative sanctions* apply to the infractions listed under Article 11 of the Anti-Smuggling Act. The pecuniary fine will be proportional to the value of the smuggled dual-use goods. The sanction will also imply temporary closing or suspension of the activities for a duration of up to 12 months – depending on the scale of the infraction (Article 12.2). Administrative sanctions are compatible with the requirement of tax liability (Article 14 bis.2).

Although the penalty system for breach of the Regulation regarding dual-use goods is contained in the Anti-smuggling Act, there is an article in the general Criminal Code that requires a specific comment. Article 345 of the Criminal Code criminalizes certain conducts regarding dual-use items, but only in the case of nuclear or radioactive material. Hence, it criminalizes the possession, processing, use, transport, etc., of hazardous nuclear or radioactive materials if any of those actions are undertaken in violation of the aforementioned Laws. The sanction for this crime is imprisonment from 1 to 5 years, a fine from 6 to 18 times the value of the goods months and special disqualification from exercising the perpetrators

---

**194** Ley 58/2003, de 17 de diciembre, General Tributaria. BOE no. 302, de 18 de diciembre de 2003.

profession for a period of up to 3 years.<sup>195</sup> It must be highlighted that such a sanction, however, does not exist regarding chemical or biological items.

Any smuggling implying criminal and/or civil liability may be accompanied by aggravating factors if the author is a recidivist. Article 22.8 of the Spanish Criminal Code, provides that any person who has been sentenced in a criminal proceedings for the same type of violation, will face aggravation as to their responsibility, although among the published sentences regarding dual-use smuggling crimes there cannot be found any relevant example.

## **2. EXTERNAL SANCTIONS**

### **2.1. The incorporation of International Organisations Acts into Spanish Law**

The incorporation of binding resolutions adopted by international organisations into domestic Law is not expressly regulated by the Spanish Constitution.<sup>196</sup> There are no constitutional or legal norms contemplating such general issue, although it is clear that due to their international legal status, all binding resolutions from intergovernmental organisations enjoy primacy over any previous or subsequent domestic laws. Hence, the same articles that are valid for the introduction of International Treaties into domestic Law will be applicable – by analogy – for the reception of acts and decisions of international organisations – taking into account their different legal nature.<sup>197</sup> This was confirmed by the doctrine of the Spanish Council of State (*Consejo de Estado*) through its statement that: “Resolutions adopted by International Organisations of which

---

**195** *Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal. BOE no. 281, de 24 de noviembre de 1995, Article 345.*

**196** Casanovas, O. and Rodrigo, Á. J., *Compendio de Derecho Internacional Público*, Tecnos, Madrid, 2013, pp.140-141.

**197** Díez de Velasco, M., *Instituciones de Derecho Internacional Público*, Madrid, Tecnos, 2013, pp. 261-267.

Spain is a member are assimilated to Treaties concluded by Spain. Thus, such resolutions are automatically incorporated into domestic Law once they have been approved in the international arena and published in the BOE (Official Gazette – *Boletín Oficial del Estado*)<sup>198</sup>. Nevertheless, if an act has been already approved by the competent organisations, the requirement of the official publishing may be substituted by the development of internal legislation regulating that precise act.

Implementation by the national authorities depends on the direct or non-directly applicability of the provisions. In the latter case, non self-executing provisions are implemented through the promulgation of specific norms.<sup>199</sup>

In cases where resolutions adopted by international organisations to be introduced in Spanish Law that are considered to have a direct influence on the rights of citizens, specific disposition may have to be adopted, in the form of a Ministerial Order.<sup>200</sup> A relevant example is the introduction of UNSCR 661 in 1990 with regard to the commercial restrictions imposed against Iraq. Implementation of this Resolution was through a special order of the Ministry for Industry, Trade and Tourism.<sup>201</sup>

The appropriate legal instrument to implement the international rules depends on the relevant internal regulation. The competent body to adopt such an act depends on the internal distribution of powers – between State and Autonomous Communities. Regarding dual-use trade control resolutions, however, Autonomous

---

**198** *Dictamen 984/93/927/93, de 9 de septiembre de 1993, del Pleno del Consejo de Estado relativo a la introducción en el derecho interno español de la resolución 827 (1993) del Consejo de Seguridad de las Naciones Unidas por la que se crea un Tribunal Penal para el castigo de los crímenes internacionales perpetrados en la antigua Yugoslavia en Casos.*

**199** Like it happened with UNSCR 827 (1993) establishing an International Criminal Tribunal for the Former Yugoslavia, which was implemented through Organic Law 15/1994, of the 1<sup>st</sup> of June.

**200** Pastor Ridruejo, J. A. *Curso de Derecho Internacional Público y Organizaciones Internacionales*, Madrid, Tecnos, 2010, p. 180.

**201** *Orden Ministerial de 31 de mayo de 1991 por la que se modifica el régimen comercial de intercambios con Irak. Ministerio de Industria, Comercio y Turismo. BOE no. 133, 4 de junio de 1991.*

Communities do not play any role. Relations between these resolutions and the Spanish Constitution are governed by the principle of consistency.

Regarding the reception of binding resolutions from the European Union, regulations and directives are part of the domestic legal system, as European rules. There is no need for any incorporation technique, since their institutional completion and publication in the Official Journal of the European Union are the only two conditions according to the founding Treaties (Article 297 TFEU).<sup>202</sup> European Law enjoys primacy over any previous or subsequent domestic laws. Such primacy has been acknowledged both by ordinary courts and by the Constitutional Court, not without certain doubts about the effects for internal rules. Their entry into force and effects also depend on the EU's own rules: regulations are directly applicable; the transposition of directives (i.e. law enforcement) may be within the competence of the State and/or of the Autonomous Communities – in accordance with the statutes of autonomy.<sup>203</sup>

In brief, decisions regarding international embargoes taken by the United Nations or the European Union, will be implemented by Spain through their official publication and – only in certain cases – through the adoption of a specific Law.

## **2.2. Specific steps taken by Spain to ensure that embargo decisions are observed**

Once Spain has published the acts in the *Official Bulletin of the State* (BOE) or once it has adopted the corresponding Laws or Ministerial Orders, specific measures are taken to ensure the enforcement of WMD-related embargo decisions. Indeed, the above described control legislation is implemented by different levels of national authorities and all of them participate in making sure that embargos are respected and sensitive trade is controlled.

---

**202** Casanovas, O. and Rodrigo, Á. J., *Compendio de Derecho Internacional Público*, Tecnos, Madrid, 2013, pp.140-141.

**203** *Tribunal Constitucional, Sentencia 252/1988, de 20 de diciembre de 1988.*

The Deputy DG of International Trade in Defence and Dual-Use Material – as discussed above – is competent to issue exporting licences for dual-use goods. Regarding exports to countries under embargoes, this body implements systematically the so called “catch-all clause” -under which an authorisation can be required for export of dual-use items that are not listed in the aforementioned Annex I of the Community Regulation.<sup>204</sup>

The Secretariat of State for Trade keeps all data concerning the authorised export operations. Data corresponding to the actually completed exports is available at the Department of Customs and Excise Duties of the National Tax Administration Agency -attached to the Ministry of Finance and Public Administration. Law 53/2007 aims at creating an interconnected system in which all units of the administration which are directly affected by foreign trade of dual-use goods could be involved in its control.<sup>205</sup>

In order to have updated databases on the suppliers and related companies, all external trade operators in defence and dual-use technologies must submit their complete information to the Special Register for such type of transfer (known as REOCE, for its Spanish acronym).<sup>206</sup> Operators also have the obligation to inform the Administration anytime they intend to export to a State which is under an international embargo. They are also obliged to notify the authorities of any subsequent change that may take place in the export conditions -quantities, quality of the goods, type of transport- after the permit has been issued. (Article 15.1 Royal Decree). Failure to comply with these obligations may also lead to the commitment of a smuggling crime or infraction.

---

**204** *Secretaría de Estado de Comercio, Ministerio de Economía y Competitividad. Estadísticas españolas de exportación de material de defensa, de otro material y de productos y tecnologías de doble uso, Año 2014. Gobierno de España.*

**205** Muro Martínez, R., “Ley sobre el control del comercio exterior de material de defensa y de doble uso”, in *Boletín Económico de ICE*, no. 2933, Madrid, Ministerio de Industria, Turismo y Comercio, 2008.

**206** *Secretaría de Estado de Comercio, Ministerio de Economía y Competitividad. Guía del operador de materia de defensa, otro material y productos y tecnologías de doble uso. Gobierno de España.*

### **2.3. Case-Law of crimes and infractions by Spanish operators.**

Spain's heavy industry is starting to obtain a reputation among countries interested in developing a nuclear industry.<sup>207</sup> In spite of having strong competitors among other European countries which are specialised in the manufacture of machine-tools or bombs, Spain is considered to be at the forefront of the production of certain items like valves or electrical discharge machines (EDM). The last "Statistical Report on Spanish Exports of Defence Material, Other Material and Dual-Use Items and Technologies" – published in December 2015 – proves that the most exported category of dual-use goods in 2015 was the materials processing category – category 2. It also points out that the value of Spanish exports of dual-use goods has increased by 187,54% over the last decade.<sup>208</sup>

The destination of such exports – apart from clarifying the flows in trade partnerships – also sheds a light about the way in which Spanish authorities implement the control legislation when it comes to dual-use goods. USA has been the main destination of Spanish dual-use exports in recent years.<sup>209</sup> However, over the last decade, the other main recipients of dual-use shipments have been States under international embargoes – i.e. Iran, P.R. of China or Lybia. In such cases, all applications are analysed individually and the export of dual-use goods to these countries is the result of the application of the catch-all clause, which takes the international sanctions into consideration and avoids automatic denials. The interest of Spanish authorities in granting export licences in such

---

**207** Kern, S., "European Dual-Use Exports to Iran Continue Apace", Gatestone Institute, International Policy Council, April 2014.

**208** In accordance with the Secretary of "State for Statistical Export Reports" – which can be found under [www.comercio.es](http://www.comercio.es) in 2005 Spanish exports of dual-use goods yielded 58,6 million euros. In 2014 Spanish exports of dual-use goods were valued at 168,5 million euros – the official annual results of 2015 have not been published yet.

**209** It has been the number one destination of Spanish exports for five years, and it has occupied the top three in seven occasions over the last decade, in accordance with the "Secretary of State for Statistical Export Reports 2005-2015".

cases is obvious. The fact that several States under international embargoes are to be found among the main destinations of dual-use exports can be explained based on the importance of the dual-use sector for the Spanish economy. In times of crisis these powerful industries have boosted the exports of these goods to any demanding States. In any case, it appears that the interpretation of the catch-all clause allows broad discretion to exporting States.

The last Statistical Export Report also shows a sharp reduction in the number of dual-use items exported to Iran. These exports have decreased by 40% in only one year.<sup>210</sup> At the same time, some of the most recent prosecution cases against Spanish companies are connected to Iran. This could arise some questions about whether this decrease is at all connected with the dismantling of several smuggling operations.

In the past few years there have been a couple of cases – some of them still open – in which heavy-industry companies have been investigated and even sentenced for not respecting the embargoes established by the United Nations and the European Union. As an illustrative example, it is relevant to mention one of the most recent ones, in which the authorities detected a sudden decrease in the number of authorisation requests from a heavy industry company in northern Spain.<sup>211</sup>

The company Fluval Spain, S.L. had continued to produce the same number of machinery units but it had stopped asking for the usual number of export authorisations. Intrigued by the unexpected descent of requests, the authorities decided to investigate the company's behaviour. In January 2013, a truck on its way to the UAE with Iran as its final destination was intercepted at the Spanish border. The agents found it was carrying valves whose authorisation had not been required and that had been modified for purposes other than the usual, breaching not only the international embargo, but

---

**210** *Secretaría de Estado de Comercio, Ministerio de Economía y Competitividad. "Estadísticas españolas de exportación de material de defenca, de otro material y de productos y tecnologías de doble uso, Año 2015". Gobierno de España.*

**211** This case is also known as "Operación Alfa" [www.policia.es/prensa/20130111\\_2.html](http://www.policia.es/prensa/20130111_2.html).

also the regular European regulations.<sup>212</sup> The value of those 44 alloy valves was 2,631,935 euros – prices in the black market reach much higher ranges than they do in the legal flow – and the result of such a violation was two years of prison for the two managers and an 8 million euros fine for the commitment of a smuggling crime.<sup>213</sup>

Only a few months afterwards, another Company – Ona Electroerosion, S.A., specialised in electrical discharge machining (EDM) was also convicted of smuggling dual-use goods to Iran. This time the purchase had been made through a Turkish enterprise which ended up being a front company located in a small Istanbul apartment in which it would be physically impossible to fit the seven machines that had been illegally sold. Despite the previous denial of an authorisation to export such items to Iran, the Spanish company still intended to supply the machines to manufacture propellers for power plants that could be used in Iran’s nuclear programme. Their purpose of using front companies located in Turkey for the triangulation of illegal purchases was prevented by the security forces through the so-called *Operación Kakum* in 2012.<sup>214</sup> The sentence – which was issued in June 2014 – declared the company guilty of a smuggling crime and it was condemned to a 1,841,176 euros fine and a prohibition to trade with Iran for 3 years.<sup>215</sup> The Company’s manager avoided imprisonment – set as 16 months and 1 day – by paying a 48,900 euros fine instead.<sup>216</sup>

One of the cases which is currently in the pre-trial phase<sup>217</sup> is the so-called *Operación Terracota*. In the spring of 2014 Spain’s

---

**212** The composition of the valves had at least 58% of nickel and between 20.0 and 23.0% of chromium. Anything that surpasses the 25% is illegal according to EU Regulation.

**213** SJP 103/2015, Juzgado de lo Penal 1 de Bilbao de 4 de mayo de 2014. No. Resolución 134/2015. No. de Recurso 105/2015 de 4 de mayo de 2015.

**214** *Gabinete de Prensa de la Agencia Tributaria, “La Agencia Tributaria desmantela una trama de contrabando de maquinaria destinada al programa nuclear de Irán”, Notas de Prensa, Agencia Tributaria, 26th November 2012.*

**215** SJP 138/2014, Juzgado de lo Penal 4 de Bilbao. No. Resolución 192/2014. No. de Recurso 181/2014 de 4 de junio de 2014.

**216** This is the total amount of a 50 euros/day fine for a 32 months and 2 days period.

**217** *Juzgado de Instrucción no. 6 de Tarragona.*

*Guardia Civil* dismantled a network of three Spanish nationals and an Iranian who were attempting to export industrial machines to Iran. Those two machines – which could be used to process enriching uranium and to manufacture missile cases –,<sup>218</sup> had been illegally entered in Spain from the UK. The British company and the Spanish-Iranian network were aware – or should have been aware – of the fact that such items are covered by the NSG and MTCR control lists. For that reason they might have been waiting for the most appropriate moment to smuggle them without an authorisation that they would surely not be granted. The agents have so far confiscated the goods, plenty of documents and computer files regarding export operations, and 10,000 euros of cash – in both Iranian rials and euros. The detainees are likely to be charged with crimes of smuggling dual-use goods, belonging to a criminal organisation and money laundering.<sup>219</sup>

### 3. FINAL CONSIDERATIONS

As we have explained, Spain's domestic legislation incorporates and develops all international legal obligations and commitments regarding export controls of dual-use goods. This leads to major policy reforms and even – in some cases – to the adoption of rules at the highest level of the internal regulatory pyramid. This positive assessment, however, does not prevent us from noticing the existence of certain dysfunctionalities.

On one hand, this internal policy development remains dependent on the original parameters used by the Spanish legislation to address smuggling crimes or infractions as a general

---

**218** Components listed under Annex IV of the Council regulation (EC) no. 428/2009 of May 5 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items.

**219** *Gabinete de Prensa Guardia Civil*, “Desarticulada una red que pretendía enviar a Irán equipos Industriales susceptibles de ser empleados para fabricar misiles”, *Notas de Prensa, Guardia Civil*, 7 July 2014.

phenomenon. This explains the use of a quantitative approach in order to distinguish the application of the administrative sanctions from the criminal penalties system.

On the other hand, the fact of maintaining independently the category of criminal possession, processing, use, transport, etc. of hazardous nuclear and radioactive materials (Article 345 Criminal Code) does not seem consistent with the unitary approach – i.e. nuclear, biological and chemical items – as the defined at the international level.

According to international guidelines and regulations, sanctions have to be “effective, proportional and dissuasive”. In the Spanish framework it would be desirable – or, at least, worth considering to establish a sanctioning system especially designed for dual-use legislation infringements. Having a specific regime other than the Anti-smuggling act would facilitate the effectiveness and – probably – would discourage dual-use goods companies more directly. Nevertheless, within the Spanish criminal penalties framework, the penalties and prosecutions established in the current legislation can be qualified as efficient and proportionate. Heavy fines have proved to be very dissuasive. Since economic sanctions may reach six times the value of the smuggled items, not many companies decide to take such risks. The issue of reputation is a further matter to take into account while valuing the effect of prosecution measures. Spanish companies considered to be leading industries in their field are very concerned with their public image. Being sentenced – or even just investigated – may cause them important economic losses not directly linked to an economic judicial fine.

While coordination among the different State agencies has proved to be efficient in terms of detection and interruption of undergoing illegal transfers, it seems that there is room for improvement in terms of prevention. The lack of balance between the increasing importance of Spanish dual-use goods exports and the still scarce police and judicial operations on the matter, suggests that dual-use trade controls do not yet constitute the principal issue of interest for anti-smuggling agents and customs authorities -inspite

of implementing the international obligations at a domestic level and admitting that there is a certain tendency that seems to take such controls more into account.

The full incorporation by States of all challenges linked to the prosecution and sanctioning of transnational illicit behaviour is undoubtedly a slow and progressive work that requires States to adapt – or even transform – their internal systems. To that effect, participation in international *fora* and organisations can be a decisive impulse. In fact, Spain has already had the opportunity to do so since it was appointed Chair of the committees set up under resolutions 1718 (on Democratic People’s Republic of Korea’s sanctions) or 1737 (on the Islamic Republic of Iran). Spain, who has until now presided over the Iran Sanctions Committee of the United Nations will now – that the sanctions have been lifted – work as a UNSC “facilitator” of the new functions of Resolution 2231 towards the implementation and compliance of the “Iranian nuclear deal”.<sup>220</sup> Hopefully, having this prominent role is a good opportunity to raise awareness and to place the issue as an even more urgent priority for national security.<sup>221</sup>

---

**220** *Misión Permanente de España ante las NNUU*, “España en el Consejo de Seguridad de NNUU: Balance de 2015 y prioridades para 2016”, *Ministerio Asuntos Exteriores y Cooperación, Nueva York, 2016*.

**221** This wish has been stated by Spanish Authorities: Ministerio de Asuntos Exteriores y de Cooperación, “Aplicación del acuerdo nuclear con Irán”, *Comunicado 014, 17th January 2016*; “Programa. España 2015-2016: Miembro no Permanente del Consejo de Seguridad de las NNUU”, *Oficina de Información Diplomática, Gobierno de España, January 2015*.