Penalties for export control offences for dual-use and export control law: a comparative overview of six countries

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I. Introduction: scope and purpose of the study

The Committee has been tasked with examining the possibility of introducing administrative sanctions for export control offences regarding both dual-use items and conventional arms:

‘utreda lämpligheten av att införa administrativa sanktionsavgifter i krigsmaterielllagstiftningen och i lagstiftningen om kontroll av produkter med dubbla användningsområden samt lämna förslag till de författningsändringar som anses nödvändiga.’

This paper analyses the way that six states—Finland, Germany, the Netherlands, Norway, the United Kingdom and the United States—address the issue of penalties for violations of dual-use and conventional arms export control legislation. Drawing on available open-source information and communication with enforcement, licensing and policy officials, it addresses the following issues:¹

• The administrative and criminal penalties in place in the six countries.
• Where administrative sanctions can be used, issues addressed include (a) who decides on issuing a fine; and (b) the percentage of offences against current law that are prosecuted, and of this percentage, how many are penalized with an administrative penalty (to the extent that this information is publicly available).
• The rationale for administrative sanctions, and the advantages and disadvantages of the different types of penalty.

Section II explains the legal and political framework for prosecutions in the area of dual-use and conventional arms export controls, both internationally and in the European Union (EU). Section III provides reflections on translating political and legal terms into effective enforcement. Section IV compares the penalty systems in the six countries analysed. Section V presents the conclusions.

II. Penalties for dual-use and arms export control offences

International legal framework

As in other policy areas, there are currently no international legal standards regarding penalties for export control offences. Somewhat vague requirements can be derived from United Nations Security Council resolutions and from the international treaties regarding biological, chemical and nuclear weapons. None of the four export control regimes currently provide guidance on penalties and prosecutions.²

The 1993 Chemical Weapons Convention (CWC) requires states parties to ‘adopt the necessary measures to implement its obligations under this Convention’. This explicitly includes the obligation to ‘prohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction as recognized by international law from undertaking any activity prohibited to a State Party under this Convention, including enacting penal legislation with respect to such activity’; and to extend this legislation ‘to any activity prohibited to a State Party under this Convention undertaken anywhere by natural persons, possessing its

¹ The author would like to express her appreciation to those officials who generously provided information for this report.
² The Nuclear Suppliers Group, Australia Group, the Missile Technology Control Regime, and the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies. For more information on these groups see the websites of the regimes and the SIPRI Yearbook.
nationality, in conformity with international law’. The CWC even requires that each state party ‘shall cooperate with other States Parties and afford the appropriate form of legal assistance to facilitate the implementation’ of these obligations.\footnote{Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, entered into force 29 Apr. 1997, \url{http://www.opcw.org/chemical-weapons-convention/articles/article-vii-national-implementation-measures/}, Article VII.} The 1972 Biological and Toxin Weapons Convention (BTWC) only provides that ‘[each] State Party to this Convention shall, in accordance with its constitutional processes, take any necessary measures to prohibit and prevent the development, production, stockpiling, acquisition or retention of the agents, toxins, weapons, equipment and means of delivery specified in Article I of the Convention, within the territory of such State, under its jurisdiction or under its control anywhere.’\footnote{Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, entered into force 26 Mar. 1975, \url{http://www.opbw.org/}, Article IV.} The 1968 Non-Proliferation Treaty (NPT) does not make reference to enforcement or penalties.\footnote{Treaty on the Non-Proliferation of Nuclear Weapons, entered into force 5 Mar. 1970.}

Once the newly agreed Arms Trade Treaty enters into force, states that have signed and ratified will be obliged under Article 14 to ‘take appropriate measures to enforce national laws and regulations that implement the provisions of this Treaty’.\footnote{\url{http://www.un.org/disarmament/ATT/}.} UN Security Council Resolution 1540 of 2004 declares that the proliferation of weapons of mass destruction (WMD) and their means of delivery are a threat to international peace and security. Among other things, the resolution obliges all UN member states to exercise effective export controls over such weapons and related materials. This explicitly includes ‘appropriate laws and regulations’ and ‘establishing and enforcing appropriate criminal or civil penalties for violations of such export control laws and regulations’. Individual member states determine the ways in which they will implement these obligations.

UN arms embargoes and sanctions on the transfer of dual-use items do not include any requirements or even guidance on penalties.\footnote{See the SIPRI arms embargo database, \url{http://www.sipri.org/databases/embargoes}.} For example, UN Security Council Resolution 1737 provides that ‘States shall take the necessary measures to prevent the supply, sale or transfer’ of certain items to Iran, while UN Security Council Resolution 1696 calls on states to prevent the transfer of specified items to the Democratic People’s Republic of Korea (DPRK or North Korea) ‘in accordance with their national legal authorities and legislation and consistent with international law’.\footnote{UN Security Council Resolution 1737, 23 Dec. 2006; and UN Security Council Resolution 1696, 31 July 2006.}

Comparing different countries’ maximum prison sentences for export control offences is far from straightforward, as many different types of law have been used when taking cases to court. While the fact that illegal transactions can be legally pursued from many different angles can be an advantage in bringing a case to court, it can also be a sign that trade control legislation may not be sufficient. Depending on the laws that are applicable to specific activities within a given legal system, penalties can vary considerably.

Countries have chosen a wide range of criminal and administrative penalties in relation to arms and dual-use trade-related offences (see table 1). A wide range of possible prison sentences is available in different jurisdictions. The theoretical maximum term is usually different to the actual prison sentence imposed, which in practice tends to be considerably lower.
At the other end of the spectrum, fines can constitute a criminal or an administrative penalty, depending on the legal system and the specific provisions regarding this issue. For example, the Republic of Korea (ROK, South Korea) has created a special provision for mandatory export control training (referred to as an ‘educational order’) as a possible consequence of violations. Other options are the revocation of export licences, loss of access to trade-facilitation privileges (e.g. simplified licensing or customs procedures), loss of property rights through confiscation, and the temporary or definitive closure of a company.

The political and legal framework in the European Union

Penal law has remained within the national competence of EU member states across all issue areas, including criminal procedural laws. These include the modalities for deciding whether to take a case to court. In the UK, for example, a public interest test is applied to each case after weighing whether there is sufficient evidence for a realistic prospect of conviction. Depending on national legal traditions, penal provisions can be placed in a foreign trade law or in the penal code.

Regarding arms exports, with the exception of embargoes, there is no EU-wide legislation. The EU Common Position guiding licensing decisions and outlining information exchange and reporting requirements contains no reference to penalties. The Common Position on Arms Brokering states: ‘Each Member State will establish adequate sanctions, including criminal sanctions, in order to ensure that controls on arms brokering are effectively enforced.’

The legal framework for prosecuting dual-use offences in the EU is a combination of EU and national laws. The EU Dual-use Regulation is a law that is directly applicable across the EU and includes the control list of dual-use items for which a licence is required for export.

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9 The ‘educational order’ is contained within Article 49 of the Foreign Trade Act. An English version of the act can be found at <http://www.yestrade.go.kr/>.
and, in certain limited cases, brokering and transit. EU member states are responsible for implementing and enforcing these provisions, which remains within national competence, as does their enforcement. In addition, the Regulation allows for some national discretion, for example through additional control list items on public security or human rights grounds (Article 8). This has implications for potential offences. The use of such clauses thus reinforces differences in penal laws between member states.

Article 24 of the EU Dual-use Regulation requires member states to ‘take appropriate measures to ensure proper enforcement of all the provisions of this Regulation’ and to ‘lay down the penalties applicable to infringements of the provisions of this Regulation or of those adopted for its implementation’. Article 24 also provides that penalties for breaches of the regulation be effective, proportionate and dissuasive. A similar wording is typically used in EU arms and dual-use embargoes and sanctions. However, the translation of this provision into national penalty systems differs considerably across the EU. Administrative sanctions also vary considerably, and Sweden is among a number of EU countries that do not provide for them at all. In addition to penalties chosen by member states for violations of regular export control controls, penalties for violating embargoes will also differ. Institutional competence also varies considerably across different countries.

In addition, the interpretation and application of basic concepts in penal law—such as aiding and abetting, attempt, support, negligence and intent—will vary across the EU. As will practices regarding suspended prison sentences and parole. However, it should be noted that different avenues and apparent differences may effectively lead to the same, or similar, results.

III. Translating political terms into legal concepts

Legal concepts can be defined differently, depending for example on interpretation of the original source of the law. What constitutes an offence may differ from country to country, even where the origin of the law is the same. Differences in definitions can have important legal and practical implications.

Effective and appropriate

UN Security Council Resolution 1540 uses the terms ‘effective’ and ‘appropriate’. Regarding effectiveness, an important question to consider is prevention, although the relative importance of prevention differs in national legal doctrines. Legal theory distinguishes between ‘special’ and ‘general’ prevention, which could arguably be applied to this specific area. Special prevention aims to stop an offender from committing further crimes; if the offender is part of a network, special prevention is also a possible contribution to disrupting wider illegal activities. General prevention aims to deter other acts that could or would contribute to proliferation. Closely related to this is the issue of the appropriate deterrent for companies and individuals. Whereas fines, loss of property rights (confiscation) and


privileges are obvious penalties (also) for companies, prison sentences clearly can only be applied to individuals. Effectiveness can also be interpreted to apply to the actual application of the penalties and to the overall system. Where penalties only exist on paper but are known not to be enforced, they can hardly be considered effective.

The criterion of appropriateness also raises several questions. Should this criterion be assessed in relation to the seriousness of the crime, including its consequences or potential consequences? Should consideration be given to the subjective perspective, and thus the individual perpetrator, and in particular his or her intent? Or should appropriateness be considered in relation to other offences within the same legal system? This criterion refers to both penalties for other offences such as fraud, theft, bodily harm or murder, and other trade- or WMD-related offences such as embargo violations. Countries may have very different penalties for dual-use trade offences related to chemical weapons (which are often specified in a CWC implementation act) and offences related to nuclear weapons, due to the different origins and context of the legislation. Furthermore, corresponding penalties may be found either in specific legislation or in the penal code, depending on the country.

The EU term related to appropriate is ‘proportionate’. Defined as such, the scope of an offence and the penalty assigned to a breach has to fit the national legal tradition and system and be proportionate to the offence and to other offences. Furthermore, the EU requirement for penalties to be ‘dissuasive’ relates to the deterrence and prevention point discussed above, and both the EU Dual-use Regulation and UN Security Council Resolution 1540 use the term ‘effective’ in relation to penalties.

**Different types of act and degrees of involvement**

Regarding the acts to which penalties are applied, there is a wide range of possible acts of involvement in an illegal transaction. A focus on the exporter can pose a problem from a prosecution perspective, since another actor may be the main or even the only perpetrator. Moreover, the range of actors and their types of involvement in export control related offences has expanded considerably. Enforcing controls on trade in dual-use items and arms has become increasingly challenging as the patterns of both legal and illegal trade have become more complex. The use of intermediaries, front companies and diversion or trans-shipment points has multiplied the number and types of actors and activities involved in transfers. The term ‘export controls’ has commonly been used to describe the control of security-related items leaving the host country. However, the term ‘trade controls’ more accurately reflects reality as it relates to controls on brokering, transit, trans-shipment, financial flows, technology transfer (especially by electronic means) and technical assistance (e.g. manual services and the oral transfer of know-how), all of which create new demands and challenges from both a legal and practical enforcement perspective.

In addition, there are different degrees to a person’s responsibility. Theoretically, the subjects of punishment could include anyone acting on their own initiative; anyone who organizes an illegal transport and orders the staff to carry it out; anyone who knows about or tacitly approves infringements in his or her area of responsibility but does not intervene; or anyone who is accountable for the violation because of a breach of his or her duty of care. Whether in particular the latter two types of involvement can be subject to criminal prosecution will again differ from country to country and may be highly controversial.
Penalizing attempt

How and whether to penalize intent to commit an offence is a difficult question. Enforcement authorities usually are either obliged to stop a suspected illegal shipment, or otherwise have to weigh the risks of a so-called controlled delivery—where the item is monitored even outside the country in order to identify further actors involved before stopping a transaction. Whether or not it is considered a priority to stop the item rather than to let it proceed and establish an offence, legislators need to determine whether the intent to export should be penalized.

Penal codes can provide for the offences of attempting to commit a crime or conspiracy to commit a crime—even if the item has not left a specific territory or the transaction has been completed. British customs legislation makes the attempt to circumvent export restrictions an offence.\(^{15}\) Regarding whether intent to commit a crime is applicable, the key question is not only what legally constitutes intent, but also when the export legally takes place—for example, on submission of the customs declaration, or once the national border is crossed and national jurisdiction ends.\(^{16}\)

IV. Comparative overview

**Finland**\(^{17}\)

*Export control penalties*

In Finland, dual-use export control offences are defined in law no. 562/1996, in which Art. 9 refers to penalties provided for in the criminal code (law no. 769 of 24 Aug. 1990, chapter 46). Arms exports are regulated by law no. 282 of 8 June 2012, in which Art. 38 defines offences, for which penalties are again proscribed in the criminal code (Chapter 46, Art. 1–3). The law provides for an unspecified fine and a maximum prison sentence of 2 years. For offences which meet one of several characteristics—e.g. committed for an economic benefit, or in a planned way (planmässigt) and which are considered serious—the minimum imprisonment is 4 years, up to a maximum of 5 years. The law also provides for fines rather than imprisonment in case of minor offences.\(^{18}\) Negligent failure to comply with notification requirements (Anmälningsskyldigheten) can be punished with up to 6 months imprisonment (Art.12). The dual-use law explicitly provides that the attempt is also subject to punishment. It also gives some discretion regarding the decision to prosecute.\(^{19}\) For arms export offences the maximum prison sentence is 4 years (Art. 11). Providing incorrect information to the authorities is explicitly mentioned as an offence.

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\(^{15}\) See Section 68(2) of the British Customs and Excise Management Act: ‘Any person knowingly concerned in the exportation or shipment as stores, or in the attempted exportation or shipment as stores, of any goods with intent to evade any such prohibition or restriction as is mentioned in subsection (1) above shall be guilty of an offence under this subsection and may be detained.’ The complete text of the act can be found at <http://www.legislation.gov.uk/ukpga/1979/2/section/68>.

\(^{16}\) E.g. in the Netherlands submitting an export declaration for a transaction that would be illegal is considered an offence. Attempt also constitutes an offence, but only in cases of intent.

\(^{17}\) This section is based on information provided by the Finnish licensing and enforcement authorities.

\(^{18}\) ‘Om ett regleringsbrott, med hänsyn till den eftersträvade vinningens storlek eller andra omständigheter vid brottet, bedömt som en helhet är ringa, skall gärningsmannen för lindrigt regleringsbrott dömas till böter.’

\(^{19}\) ‘En myndighet kan avstå från att vidta åtgärder för väckande av åtal mot den som misstänks vara skyldig när gärningen, med hänsyn till dess menighet och gärningsmannens skuld sådan den framgår av gärningen, bedömd som en helhet skall anses ringa och allmän fördel inte kräver att åtal väcks.’ (Art. 9).
There are no provisions for administrative sanctions in the dual-use and arms export control laws. Rather, administrative sanctions are defined by the Customs Law (1299 of 30 Dec. 2003), which states that Customs can impose a penalty fee of €10–2500 (Art. 30). A typical case is that a company/entity has made a minor mistake, for example the company has forgotten to renew an existing export licence before its expiry date. In addition, there are different mitigating circumstances, for example a small routine case, in which the licence would have been granted if the client had applied for it on time; or if it was probably an unintentional mistake, and the person or entity has no monetary benefits from making that mistake.

**Responsible authorities**

At Finnish Customs, the Corporate Audit Unit and the Economic Crime Division deal with the issue of penalties. The penalties imposed by Customs can be divided into two main categories: (a) administrative sanctions and (b) criminal penalties. If the case is more serious due to either monetary benefits, intent or serious careless action involved, or if the exported goods were sensitive, the case is referred to the Customs Investigation Service. They will determine whether there are sufficient grounds to start a criminal investigation.

Customs and the Ministry for Foreign Affairs (MFA, the export licensing authority) cooperate in this field: the MFA receives audit reports from Customs concerning companies involved in exports of dual-use goods or defence materiel. The MFA can take action, if deemed appropriate by them.

**Recent cases**

While no statistics on administrative and criminal penalties imposed are available, according to the Finnish authorities in recent years there have been only 2–3 cases per year involving criminal investigation, and some of those cases have resulted in a decision to waive the prosecution. In practice, sanctions imposed have often equalled administrative sanctions through fines. The principle of *ne bis in idem* has to be respected in both cases.

**Germany**

**Export control penalties**

They key elements of legislation for German penalties are to be found in the Foreign Trade Act (*Außenwirtschaftsgesetz*) and the accompanying Foreign Trade Order (*Außenwirtschaftsverordnung*); and the War Weapons Control Act (*Kriegswaffenkontrollgesetz*). Germany has revised penal provisions for arms and dual-use export controls a number of times, most recently in 2013 with the most fundamental revision since the adoption of the laws in 1961.

The revised act and implementing provisions entered into force on 1 September 2013. While the maximum penalty of 15 years imprisonment—the highest maximum possible for fixed-term prison sentences in the German legal system—remains, a number of important changes have been adopted. Previously, in order for certain offences to be considered criminal, it was necessary to prove that the alleged offence seriously endangered Germany’s external relations, thus constituting ‘aggravating factors’. This was usually done using a statement provided by the German Federal Foreign Office. The provisions regarding ‘aggravating factors’ were reviewed by the federal court in a number of cases, and also
challenged by different legal opinions in legal journals. The current law no longer requires these aggravating factors. Instead, basically all breaches committed with intent are considered criminal offences. However, negligent acts, even when they are considered to cause considerable damage to Germany’s foreign relations, will only constitute an administrative offence. The only exceptions are violations of arms embargoes, where both intentional and leichtfertige (legally very close to gross negligence, although the term gross negligence also exists in German and was not chosen) offences constitute a criminal offence.

Lower maximum sentences (e.g. 5 years), and certain minimum prison sentences (e.g. 3 months) are proscribed for specified offences. The previous provisions can however still be applied to offences committed prior to the changes’ entry into force, and thus up to 20 years. In line with general provisions in penal law, the less severe penal provision is applied in those cases (Art. 2 of the German Penal Code Strafgesetzbuch).

As previously, fines of up to €500 000 can be imposed; and in specified minor offences up to €30 000. These administrative offences are classified as Ordnungswidrigkeiten (OWi), a German particularity. While sometimes referred to as administrative sanctions in literature, it is in fact unique. It is generally promulgated for offences of a minor nature, as is usually the case with administrative sanctions. A CEO can be fined if an offence occurs due to a breach of duty of care, for example as a result of lack of training or compliance procedures (Art. 130, Ordnungswidrigkeitengesetz, the Regulatory Offences Act, sometimes also translated as Administrative Offences Act). This provision is frequently applied in practice.

Ordnungswidrigkeiten can be imposed by an administrative authority, and no criminal procedure is required. However, the provisions of the criminal procedural law have to be applied. A voluntary self-disclosure provision for certain negligent formal or procedural errors was newly introduced in 2013.

Responsible authorities

In Germany, since 1 January 2007 major WMD-related dual-use trade offences can be transferred to a specialized prosecution unit of the Federal Prosecutor General (Generalbundesanwalt). Only few countries in the EU have taken similar steps. A central, federal authority (the German Customs Criminological Office, Zollkriminalamt and its local branches) is responsible for investigating criminal offences, while regional customs authorities are in charge of imposing administrative sanctions. All Ordnungswidrigkeiten above a minimal threshold (Bagatellgrenze) of €200 are entered into the central business register (Gewerbezentralregister) for 3–5 years.

Criteria in the decision regarding the amount of the fine are: acknowledgement of the fault; whether a licence would have been granted if applied for; whether an offence had been committed before or someone is a first offender; whether the offence was committed on behalf of a third party; whether lack of due diligence was involved; the size of the company– if an individual is fined, the amount is likely to be smaller than for a company; the reason for

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22 ‘Unless otherwise provided by this Act, the provisions of general statutes concerning criminal proceedings, particularly those of the Code of Criminal Procedure, of the Courts Constitution Act and of the Youth Court Act, shall apply mutatis mutandis to the regulatory fining proceedings’, Ordnungswidrigkeitengesetz, Art. 46).
the offence (e.g. new compliance officer in charge or position vacant etc.). The offender can
go to court if he or she disagreees with the decision and wishes to subject it to a judicial test.
Challenges occur if the company in question does not exist any more, or the department in
charge has been spun off, and legal succession is not clear.

In addition to fines, access to facilitated customs procedures may also be suspended or
denied as an administrative sanction, which constitutes a very serious measure for companies.
The economic advantage gained through the illegal activity may also be taken away
(Abschöpfung wirtschaftlicher Vorteil). The maximum fine is €500 000 per offence; actual
tines up to €490 000 have been imposed in the past, and this can be complemented through
Abschöpfung.

Recent cases

Statistical information on the imposition of administrative sanctions is not made public by the
customs authorities for data protection reasons. Court cases are usually made public through
announcements by the prosecutor’s office and media reports. The court rulings are also
publicly accessibly, apart from exceptional cases.24

The Netherlands

Export control penalties

In the Netherlands, the national legal framework regarding export control for arms and dual-
use items comprises: the Strategic Goods Order; the Strategic Goods Decree 2012; and the
Strategic Services Act 2012 (which controls brokering, technical assistance and intangible
transfers of technology). Arms exports are additionally governed by the Arms and Munitions
Act, while legislation on sanctions includes the 1977 Sanctions Act and Embargo Orders. The
export of chemicals is also regulated by the Chemical Weapons Convention Implementing
Act and the Chemical Weapons Convention Implementing Order. Finally, the General
Customs Act also applies to arms and dual-use exports.

Export control offences as defined by these acts can be punished according to the
Economic Offences Act. Penalties for export control breaches can be divided into
misdemeanours and felony offences. For misdemeanours, the maximum prison term is one
year. In addition, a fine of category 4 (ranging from €20 250 to €81 000), and community
service can be imposed. For felony offences, the maximum imprisonment is 6 years, and
penalties can include community service and a category-5 fine (from €81 000 to €810 000).
In the Netherlands, both companies and individuals can be prosecuted.

Additional administrative penalties include:

• Deprivation of certain (public) rights
• Full or partial closing down of a company for a maximum of one year
• Confiscation of goods
• Confiscation of the profit
• Publication of the sentence

24 For some recent cases see Bauer, S., ‘Prosecuting WMD-related dual-use trade control offences in the European Union:.penalties and prosecutions’, Non-proliferation Paper No. 30, July 2013; and for example
<http://www.welt.de/regionales/koeln/article125007745/Bundesanwaltschaft-laesst-Deutsch-Iraner-festnehmen.html>;
• Placing a company under judicial supervision (for felony for a maximum of 3 years; for misdemeanor for a maximum of 2 years)

Responsible authorities

The Public Prosecutor makes the decision whether or not to take a case to court. When a case is taken to court, the judge decides which punishment is appropriate. If the prosecutor considers there is insufficient evidence, he or she can drop the case. If the Prosecutor considers there is sufficient evidence he or she can also propose a settlement to the suspect. This means that the suspect and/or suspect company can pay a certain amount of money to avoid a court case and, in some cases, publicity. It does not mean that they avoid a criminal record. The rationale behind this administrative sanction is to reduce the burden on the Dutch courts, to shorten the time of the complete legal procedure and to be cost efficient.

Recent cases

While prosecutors in the Netherlands usually apply the Economic Offences Act for export control violations regarding strategic goods, one individual who supplied chemicals that were used by Iraqi President Saddam Hussein as chemical weapons against Iraq’s Kurdish population was charged with genocide and crimes against humanity.25

Examples of recent prosecutions include the case of Henk Slebos, who provided dual-use items to his university friend A. Q. Khan in Pakistan. A District Court imposed 12 months imprisonment (with 8 months suspended) and a fine of €100 000. The Amsterdam Court of Appeal subsequently imposed 18 months imprisonment (with 6 months suspended) and a fine of €135 000.26 Other cases taken to court in recent years include the export of afterburners for military fighters, which resulted in a €10 000 fine and forfeiture of the goods; and the export of M113 and M60 tank parts, which resulted in a €75 000 fine and 240 hours of community service.

Norway27

Export control penalties

The key pieces of Norwegian export control legislation are the Export Control Act, the 1968 Act regarding implementation of UN Security Council Resolutions, and the 2001 Act regarding implementation of other measures (the Sanctions Act, which is applied for EU

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25 This was because the export of those chemicals was not in violation of foreign trade legislation at the time of their export. Later exports did not take place from the Netherlands and, even if they had, the statute of limitation would have applied. At the time, dual-use brokering was not subject to control. The individual was acquitted of the Genocide Convention Implementation Act but found guilty of violating the Criminal Law in Wartime Act, in conjunction with the Dutch penal code. District Court of The Hague, Case 09/751003-04, Judgement LJN: AU8685 of 23 Dec. 2005; and Court of Appeal of The Hague, Case 09/751003-04, Judgement LJN: BA673 of 9 May 2007. These and other rulings can be accessed at <http://www.haguejusticeportal.net/>. See also van der Wilt, H. G., ‘Genocide, complicity in genocide and international v. domestic jurisdiction: reflections on the van Anraat case’, Journal of International Criminal Justice, vol. 4, no. 2 (July 2006), pp. 239–57; and van der Wilt, H. G., ‘Genocide v. war crimes in the van Anraat appeal’, Journal of International Criminal Justice, vol. 6, no. 3 (July 2008), pp. 557–67.

26 This case is summarized in Bauer (note 24), and Wetter, A., Enforcing European Union Law on Dual-use Goods, SIPRI Research Report no. 24, 2009.

27 This section is based on information provided by the Norwegian MFA (the export licensing authority).
sanctions that Norway decides to implement). The Export Control Act provides for unspecified fines or a maximum prison term up to 5 years. This applies to ‘any person who wilfully: 1. exports or attempts to export goods, technology or services in contravention of this Act or regulations issued pursuant thereto’. Complicity in such an offence is subject to the same penalty. ‘Any negligent contravention’ of this provision or complicity is punishable by fines or a maximum prison term of two years. The maximum sentence of 5 years explicitly also applies to a person who wilfully ‘contravenes or attempts to contravene any condition laid down pursuant to this Act’ or ‘furnishes incorrect information’ (Art. 5).

According to Art. 7 of the Export Control Act, coercive fines may be imposed on an enterprise or person that does not comply with duties to provide information as regulated in the Act. But while it provides that ‘The King will issue further regulations on imposing, calculating and remitting coercive fines’, this so far has not been implemented.

**Responsible authorities**

The prosecution authority, which in this case is the Security Police Service, can impose fines. If a company does not accept a fine, the case will go to court. The same would apply in a more severe case, where the prosecution authority can recommend imprisonment.

**Recent cases**

No cases have been taken to court since the late 1980s, neither in regard to Art. 5 nor Art. 7. However, the Security Police has imposed fines several times in recent years. The biggest fine was in a case where an airfreight company retransferred listed goods to Iran without the required license. They received (and accepted) a fine of 1 million Norwegian kroner.

**The United Kingdom**

**Export control penalties**

In the UK, for offences regarding the export of military and dual-use goods, the maximum penalty for deliberate offences is up to 10 years imprisonment (14 years if nuclear material is involved) and/or a fine of any amount. If the offence was not deliberate, the exporter and their agent can be fined at Level 3 on the Standard Scale (see Table 2 below), or can be given a fine of three times the value of the goods. The offence is thus a strict liability offence, as the Customs Act defines it as an offence to export goods or take them to a place to be exported (for example a port or airport) if there is any prohibition or restriction on their export. Both companies and individuals can be prosecuted in the UK.

To date, these fines have ranged from £1000 to 575 000. The fine is calculated according to the goods and destination (e.g. how serious an offence it was) and also sometimes the value of the goods and the profit they made. Also, HMRC, the British customs agency, issue many written warnings for first-time offences if they are not serious. They can also charge a ‘restoration penalty’ if the exporter wants to have his or her goods back and apply for a

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29 This section is based on information provided by UK HMRC (Her Majesty’s Revenue and Customs).

30 The relevant law is in Section 68(1) and (2) of the Customs and Excise Management Act of 1979. The penalties are in Section 68(3). [http://www.legislation.gov.uk/ukpga/1979/2].
licence. This is calculated based on the value of the goods and the seriousness of the offence. These powers are regulated under Section 152 of the 1979 Customs and Excise Management Act.\textsuperscript{31}

For restoration penalties, when the exporter has to pay a financial penalty after his or her goods are seized, in order to get the goods back, HMRC proceed as follows: They offer restoration whenever possible. Where a licence has been refused, they make it a condition of the restoration that the goods will not be exported in future without the necessary licence having been presented. Where there is evidence to suggest that restoring the goods would result in the exporter’s attempting to evade the controls for a second time, HMRC should refuse to restore the goods.

The decision to offer restoration of the goods should be made at the same level as seizure and the restoration sum determined as shown in Table 2.

\textit{Responsible authorities}

When Customs issues a fine instead of criminal prosecution, this is called a ‘compound penalty’. Sometimes the exporter is given the choice of whether to pay a fine or go to court. The majority of breaches of export controls have resulted in the control authority (HMRC or Home Office Border Force) issuing a fine or written warning. Only around 1\% of cases (generally the more serious offences) result in criminal prosecution.

\textit{Recent cases}

Examples of prosecutions since 2005 include prosecutions for export licensing offences, but also trafficking and brokering (‘trade’) offences.\textsuperscript{32} Details have been published by the British authorities through press releases and information in the annual report on arms exports. Serious deliberate offences resulting in prosecution and imprisonment are fairly rare—not normally more than five per year, and some years only one or two cases.

Examples of cases where Compound Penalties have been issued can be found on the website of the British export licensing authority.\textsuperscript{33} Compound Penalties (larger fines issued for more serious offences) may, on average, be in the region of 6 to 12 per year. In addition to that, around 200 offences per year are detected which are dealt with by restoration penalties and written warnings. So, as a very approximate estimate, one could say that

\begin{itemize}
  \item 1\% of cases result in criminal prosecution and imprisonment and/or financial penalties.
  \item 6\% of cases result in large financial penalties (fines) in lieu of prosecution.
  \item 93\% of cases are dealt with by small fines (restoration penalties) and/or official written warnings.
\end{itemize}

\textsuperscript{31} <http://www.legislation.gov.uk/ukpga/1979/2>.
\textsuperscript{32} <http://blogs.bis.gov.uk/exportcontrol/category/prosecution/>.
\textsuperscript{33} <http://blogs.bis.gov.uk/exportcontrol/prosecution/compound-penalty-cases/>.
The United States

Export control penalties

The key export control laws in the United States are the Arms Export Control Act (AECA) with its implementing regulations, the International Traffic in Arms regulations (ITAR); the International Emergency Economic Powers Act (IEEPA) and the Export Administration Regulations (EAR). According to AECA and the ITAR, the export of military items and services are regulated by the U.S. Department State. The Department of Commerce through the EAR controls the export of dual-use items.

Beginning in 2010, the US export control system has been undergoing a major reform process, which is not yet completed. This includes a shifting of controlled items from the

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**Table 2. Basis for calculation of fines**

<table>
<thead>
<tr>
<th>Stage 1. Nature of error/irregularity</th>
<th>Points</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unwitting error of a minor nature or the exporter possessed a valid licence and made all reasonable attempts to present it but failed or the exporter made all reasonable checks but a breach still occurred</td>
<td>0</td>
</tr>
<tr>
<td>The exporter exercised reasonable care but failed to do all that could be expected (e.g. presentation of an incorrect licence when a correct licence is held)</td>
<td>1</td>
</tr>
<tr>
<td>The exporter’s judgement was not unreasonable but inadequate checks were made</td>
<td>2</td>
</tr>
<tr>
<td>Little or no effort was made to consider licensing (e.g. the goods are significantly in excess of the licensed quantity)</td>
<td>3</td>
</tr>
<tr>
<td>Evident carelessness by the exporter</td>
<td>5</td>
</tr>
<tr>
<td>A second or subsequent similar error by the exporter</td>
<td>7</td>
</tr>
<tr>
<td>Deliberate/fraudulent evasion of the prohibition/restriction</td>
<td>10</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Stage 2. Nature/sensitivity of goods and/or relevant restriction</th>
<th>Points</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dual-use goods to a non-sensitive destination—no reason to think that a licence would not have been granted</td>
<td>1</td>
</tr>
<tr>
<td>Military goods to a non-sensitive destination—no reason to think that a licence would not have been granted</td>
<td>2</td>
</tr>
<tr>
<td>Dual-use/military goods to a sensitive destination—a licence likely to have been granted</td>
<td>3</td>
</tr>
<tr>
<td>Dual-use/military goods to a sensitive destination—a licence would not have been granted</td>
<td>5</td>
</tr>
<tr>
<td>Particularly sensitive goods (e.g. significant items for nuclear, biological or chemical weapons and missiles)</td>
<td>7</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Stage 3. Arriving at a restoration fee</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>The fee is calculated by taking the total from stages 1 and 2 above. The fee should be £100 for each point plus 0.1 % of the value for each point, to a maximum value of £1 000 000. The maximum fee should not exceed 20% of the value.</td>
<td></td>
</tr>
<tr>
<td>Example: If the offence warrants 8 points and the value is £100 000:</td>
<td></td>
</tr>
<tr>
<td>Restoration = (8 x £100) + (0.8% x £100 000) = £800 + £800 = £1600</td>
<td></td>
</tr>
<tr>
<td>For trans-shipment licensing offences, the UK agent is treated as the exporter.</td>
<td></td>
</tr>
<tr>
<td>Any storage charges incurred after the goods have been seized are the responsibility of the Department.</td>
<td></td>
</tr>
<tr>
<td>HMRC adds on the appropriate charge to the restoration fee so that they are reimbursed.</td>
<td></td>
</tr>
</tbody>
</table>
ITAR to EAR, a re-organisation and consolidation of the enforcement structures, and a revision of the penalty system.

The US system comprises a range of criminal, civil and administrative penalties. Arms export offences under the AECA can be punished with fines of up to $1,000,000 for each violation as a result of a criminal procedure, or imprisonment of up to 20 years, or both. For violations of the EAR the maximum criminal penalties are also fines up to $1,000,000 and up to 20 years of imprisonment. Maximum civil penalties are $1,000,000 and can include asset forfeiture.

Administrative penalties for the EAR may include a fine of $11,000 per violation or $120,000 per violation if the item exported was controlled for national security reasons. Both the EAR and ITAR provide for other administrative remedies such as denial of export privileges; and other sanctions, such as seizure and forfeiture of assets. The EAR includes the following types of offences, and thus a broad range: ‘engaging in prohibited conduct’, ‘causing, aiding or abetting a violation’, ‘solicitation and attempt’, conspiracy’, ‘acting with knowledge of a violation’, ‘possession with intent to export illegally’, ‘misrepresentation and concealment of facts’, ‘evasion’, ‘failure to comply with reporting, recordkeeping requirements’, ‘license alteration’ and ‘acting contrary to the terms of a denial order’.

Actual penalties are determined based on sentencing guidelines established for an offense. For instance, exportation of arms without a license has a base offense level of 26, unless the quantity of weapons was sufficiently small in which case it is reduced to 14. This is combined with the previous criminal history to determine a specific penalty range.

**Responsible authorities**

Within the Department of Commerce, the Bureau of Industry and Security (BIS) is responsible for export control of dual-use items. Its Office of Export Enforcement and the Office of Enforcement Analysis work with the Department of Justice to impose criminal sanctions for violations, including imprisonment and fines; and with the Office of Chief Counsel for Industry and Security to impose civil fines and denials of export privileges. The details and procedures, including the role of the administrative law judge and appeal options, are regulated in the Administrative Enforcement Proceedings (part 766). Factors considered in determining the appropriate penalties include the destination of the export and degree of wilfulness involved, as well as various mitigating and aggravating factors. The Proceedings also outline provisions for voluntary self-disclosure (VSD). According to BIS, most VSDs do not result in an administrative penalty, but either the determination that no offence was committed, or the issuance of a warning letter. Settlement cases with civil penalties as a result of VSD have been published on the BIS website, including the names of companies.

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36 Information provided by the US Department of Justice.
38 <http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&SID=9ae4e210682b4d41d4a5ace943b63ef1&rgn=div5&view=text&node=15:2.1.3.4.41&idno=15>. See also the BIS website on penalties <https://www.bis.doc.gov/index.php/enforcement/oeo/penalties>.
Recent cases

The USA is one of the most transparent countries with regard to enforcement action, as they seek to use the publication of details as a deterrent for potential offenders. Names of companies and individuals are published which in many European countries would violate privacy laws.\footnote{40}{\url{http://www.bis.doc.gov/index.php/about-bis/newsroom/press-releases}.} The Department of Justice regularly publishes detailed information about export control related court cases, specifying not only the penalties imposed but also the names of companies and individuals involved.\footnote{41}{See for example \url{http://www.justice.gov/opa/pr/2013/November/13-crm-1260.html}.}

V. Conclusions

National approaches to penalizing export control offences for dual-use and military items vary considerably, even within the EU. The differences include

- the balance between criminal and administrative penalties;
- the forms of administrative penalties and severity of criminal penalties;
- their application in actual administrative or criminal procedures;
- the actors and actions related to export control offences that can be subject to punishment;
- the powers of authorities to impose administrative sanctions without participation of a court as well as the procedures and modalities involved; and
- the types of law in which export control-related penalties can be found.

These differences can be attributed to a number of factors, which include

- the overall philosophy and structure of the laws, and the legal system;
- the size and scope of the arms and dual-use industry; and
- how seriously the government takes export control-related offences.

There is also a considerable difference in the number of prosecutions that countries have brought. This can be attributed to a number of factors, such as

- the differing numbers of detections of illegal transactions,
- differing volumes of export transactions, and
- varying priorities and resources of enforcement and prosecution authorities.

The advantages of the criminal procedure include that it is normally public and thus has a preventive and dissuasive effect. It can also be argued that it reflects a higher degree of legal security since it is processed by a court and is thus more transparent than the decision of an administrative authority, which may sometimes be perceived as more arbitrary. Several factors speak against an extensive use of criminal procedure and criminal penalties, in particular for minor breaches: it is time-consuming and resource-intensive and thus expensive, and therefore not always effective, as required for example by the EU Dual-use Regulation and other documents; penalties have to be proportionate to the crime; and the fact that a large number of offences are a result of ignorance and negligence rather than intent. Administrative sanctions involve a lighter and swifter process and fewer authorities than criminal procedures.
National authorities should however bear in mind that while penalty systems are within national competence, substantial differences between countries in the way the same offences are addressed may make it more attractive to commit offences in this particular country if there is an assumption or expectation of minor consequences for the business and an individual involved. After all, penalties also have a preventive purpose, both in terms of specific and general prevention. To conclude, the key question is not one of whether a system should include administrative or criminal penalties but rather, that the right combination of both should be found, each including a substantial range of options to reflect the severity of an offence, both in terms of intent and impact, and thus enable an appropriate and tailored response.