

Odette Jankowitsch-Prevor, Quentin Michel,
Sylvain Paile-Calvo (eds.)

*Modelling Dual-Use
Trade Control Systems*

NON-PROLIFERATION
AND SECURITY



P.I.E. Peter Lang

Contents

| | |
|--|----|
| Introduction. Regional, Sub-Regional and National Trade Control Regimes Models: Choices for “Africa”? | 15 |
| <i>Dr. Odette Jankowitsch-Prevor</i> | |

PART I. A SEARCH FOR HARMONISING TRADE CONTROLS...

| | |
|---|----|
| Export Controls: Is a New Approach Needed? | 27 |
| <i>Wolfgang Lehofer</i> | |

| | |
|--|----|
| “Joined up Thinking”. The Pressing Need for Partnership in Compliance | 33 |
| <i>Martin Palmer</i> | |

| | |
|---|----|
| Transnational Consortia For Dual-Use Goods and National Export Control Regimes. Facing Diversity | 41 |
| <i>Harald Hohmann</i> | |

| | |
|---|----|
| Dual-Use Trade Control. National and Sub-Regional Model for Africa | 51 |
| <i>Yacine Amara</i> | |

| | |
|--|----|
| Export Controls of Dual-Use Goods and Technologies in the Democratic Republic of Congo? | 63 |
| <i>John Kabange Mukubu</i> | |

| | |
|--|----|
| The Control of Export of Dual-Use Material from Kenya | 71 |
| <i>Hamadi Iddi Boga</i> | |

| | |
|--|----|
| Controlling Export of Nuclear Material and of Dual-Use Goods in Niger | 79 |
| <i>Abdoul Rahimoune Massaoudou</i> | |

| | |
|---|----|
| Implementation of the United Nations Security Council Resolution 1540 in Nigeria | 87 |
| <i>Shamsideen B. Elegba</i> | |

| | |
|--|-----|
| United Nations Security Council Resolution 1540. A Universal Model? | 101 |
| <i>Dr. Andrea Viski</i> | |

| | |
|---|------------|
| Arms Export Controls. Setting Common International Standards | 111 |
| <i>Rosa Rosanelli</i> | |
| Lessons Learnt from Strategic Trade Control Enforcement Capacity-Building in Western Africa..... | 121 |
| <i>Renaud Chatelus</i> | |
| PART II. ... WITHOUT STANDARDISING | |
| From Global Straggler to Regional Exemplar. Japan's Export Control System 1990-present..... | 131 |
| <i>Crystal D. Pryor</i> | |
| Russian Dual-Use Trade Control. An Example to Follow? | 147 |
| <i>Ekaterina Chirkova</i> | |
| EU as a Model, "Yes But"... .. | 157 |
| <i>Ivana Micic</i> | |
| The EU Regulation. Regime, Framework or Guidelines for Sub-Regional and/or National Regimes? | 171 |
| <i>Dr. Laszlo Stefan</i> | |
| Bridging the Gap. The Role of Regional Organisations in Developing Universal Export Controls..... | 177 |
| <i>Sara Depauw</i> | |
| The EU Export Control Regime. Standards for the Walloon Region? | 191 |
| <i>Anne-Valentine Rensonnet</i> | |
| Export Control Systems: a Bulgarian Perspective..... | 201 |
| <i>Velislava Zhivkova</i> | |
| EU Regulation + French Regulations = An Exportable Control Model? | 211 |
| <i>Sylvain Paile-Calvo</i> | |
| The EU Dual-Use Trade Control System for Greece | 221 |
| <i>Christos Charatsis</i> | |
| From Models to a Model? | 235 |
| <i>Lia Caponetti</i> | |

A Portuguese Point of View 243
Miguel Sousa Ferro

Conclusion 251
Quentin Michel

About the Authors..... 259

7

7

1

7

1

11

11

21

35

A Portuguese Point of View

Miguel Sousa FERRO

*Guest Lecturer – University of Lisbon Law School Counsel –
Eduardo Paz Ferreira & Associados*

Introduction

The questions underlying the issue raised by the organisers of this book are so numerous and so complex, that they become almost overwhelming. It is, therefore, comforting that the requested contributions are so limited in size, as it makes one feel more comfortable about presenting merely broad considerations and thoughts on the relevant issues. In so doing, I shall focus on the topics which proved to be most relevant and controversial at the workshop that preceded the drafting of these considerations, at Chaudfontaine, in December 2013.

A special word of thanks to Quentin Michel, Odette Jankowitsch and their team, for their continued efforts in successfully bringing together an international group of experts to discuss an often neglected topic in an environment that allows for a candid and fruitful exchange of views, with the common goal of thinking ahead and looking for the best solutions for the most pressing problems in this field.

Naturally, I will not avoid making an initial reference to the situation in my country of origin, particularly considering that much of my perspective on the issues to be discussed is, of course, framed by this national experience.

The situation in Portugal

Portugal's industry and exports do not raise a very large number of concerns relating to trade control rules. Compared to countries such as Germany or France, the number of licences issued each year is quite small. The staff assigned to export licencing, both at the Ministry of Defence and at the Customs Authority, is minimal, and while their efforts are meritorious, namely in what concerns industry outreach programmes,

there seems to be little political attention or support for a deepening of regulation and supervision in this area. One consequence of this state of affairs is that no special legislation has yet been adopted to regulate export control of dual-use items, even though a draft has been in the pipeline for quite some time.

And yet, both in what concerns defence items and dual-use items, there are clearly significant risks, in this field, associated to national economic activity which cannot be ignored. The level of concern is made all the greater by Portugal's inclusion in the EU internal market, which has justified the imposition of a uniform and directly applicable regime to all the Member States.

The adoption of EU regulations in this area has significantly limited the negative consequences of the relative passiveness of the national legislator.

And this may, perhaps, be one of the most important lessons to be learned from the Portuguese experience: one of the great advantages of a regional model is that it dispenses with the need for a country by country legislative intervention, extending to States where such concerns are not so prominent the benefit of the protection of legal regimes that are developed and pushed forward by countries with more experience and knowledge in tackling the relevant issues.

When such a regime is directly applicable, with no need for transposition into national law, the advantages are even greater, as this prevents delays that derive from different priorities being awarded by different States to the subject at hand.

The bottomline is that, if it weren't for the EU, Portugal might not presently have an export control regime for dual-use items at all, or it might have an outdated version of one.

Do we have an EU model?

There is clearly an EU model, but not a complete one. EU rules allow for significant discretionary margin in the interpretation and enforcement of several provisions. Experience shows that, at the end of the day, one Member State's regulator may prohibit exports that another Member State deemed legitimate and admissible.

This is an unacceptable state of affairs within the context of the functioning of the internal market, as it leads to competitive distortions between Member States. Indeed, this framework creates an incentive for regulatory competition between Member States, who may be tempted to adopt interpretations within their discretionary margin that favour their national economic interests. Ultimately, this might even lead, at least on

a case-by-case basis, to a race to the bottom. On the flipside of the coin, a State should not see its economic interests damaged because it implements, in a certain instance, a greater level of prevention when it comes to international security than fellow EU Member States.

A full and effective EU model can only be achieved through the creation of an EU wide regulator, who would ensure a uniform treatment of requests for licences from all the Member States.

Aside from ensuring an absence of internal market distortions, this solution seems essential to implement a common commercial policy in this domain, and may have other significant advantages, which require further study and consideration.

Thus, for example, it may be the case that a common regulator would create regulatory efficiencies that would decrease administrative and enforcement costs in the public sector, as well as reducing compliance costs for companies. Centralisation in a single authority might also allow for a greater level of access to information and to a reduction in enforcement gaps.

A fundamental argument against the creation of such an EU regulator is that the decision to grant export licences involves a component of political decision-making that is still very much within the sphere of sovereignty of the Member States, not having been transferred to the EU.

However, from a first glance at the legal side of the argument, it seems entirely possible to accommodate such new powers within the framework of the existing treaties, even if, in the most restrictive interpretation, consensus might be required for some issues.

Secondly, it is not entirely clear that licencing decisions should be allowed to rest on political considerations, beyond those that derive from the criteria for authorisation or prohibition foreseen in the applicable legislation. It may indeed be argued that it is at that level, when the legislator still has control of the process and the criteria are set in a public and scrutinisable manner, that a political judgment is required, and that a political judgment by an administrative authority at the moment of granting licences carries the risk of regulatory distortion or even abuse of process.

Do we have a universal model?

UNSC Resolution 1540, and the documents associated thereto, are certainly, to some extent, a universal model, and a mandatory one at that. But it is, in my humble opinion, a misguided attempt at international legislation. The Security Council was not meant, nor is it prepared, to be a global legislator, at least not when it comes to adopting such specific provisions.

The content and language of Resolution 1540 is too close to the traditional thinking and structuring of UN Resolutions to be an adequate approach to a binding source of law, even one that still requires an intervention by national legislators.

Do we really believe that every single Member State of the United Nations needs to include in its legislation all the prohibitions foreseen in that Resolution, including all their specific elements and variations, in order to guarantee the attainment of the objectives of this measure? Do we expect the UNSC to take action against States who have not integrated the entirety of those prohibitions into their national law, even if in the absence of any demonstrable effect on international security? Possibly not.

I would argue that, in reality, for what is probably a majority of the countries throughout the world, export control rules could be far more modest and limited in scope than what is foreseen in the global model. And, indeed, in practice, it actually is quite more modest and could not be otherwise.

That being the case, one may question the very justification for a global model, at least one with a level of detail as the one that has been adopted. If the objective is merely to guarantee that national law includes provisions which guarantee that, when necessary, there is an appropriate legal basis to intervene in defence of national or international security, then a more general phrasing of prohibitions might, in some cases, suffice, and may even be easier to comprehend and to enforce.

The existence of “a” global model – not necessarily the present one – does have obvious advantages. For one thing, by ensuring regulatory harmonisation across borders, transaction costs and companies’ investments in regulatory compliance would be reduced, but only to the extent that harmonisation is actually achieved.

Above all, international peace and security is a pressing issue which cannot be ignored, and the global “model” must therefore always be understood, first and foremost, as a mandatory minimum for the sake of that goal.

At the end of the day, it would seem to be less important to have a detailed export control regime, identical or very similar, in every single State around the world, than to have (at least) a basic export control regime everywhere, as long as, given the characteristics of the legal order in question, that basic regime would suffice as a foundation for the national government to intervene when needed.

This is one instance where, quite clearly, a global uniformised regime will be neither realistic nor suitable. What works and makes sense for

the USA and for Germany will be entirely out of place in Mali or in East Timor.

This picture is made worst by the approach of the 1540 Committee, who has taken what is an already "Westernised" view of how to go about defining an export control regime and has proceeded to specify its obligations from an "Americanised" point of view, deriving from the Resolution requirements that have little, if any, correspondence in the letter of the law, and whose necessity or relation to the spirit of the law is quite arguable. To be clear, in my view, an American interpretation of how to implement Resolution 1540 is not necessarily the right interpretation, and it should therefore not be used to build the template on the basis of which compliance with this Resolution is assessed.

Should we have a regional model?

It is safe to assume that it is settled that a region that has undergone a process of economic integration, particularly one that has led to the creation of a common commercial policy and to an internal market, requires some kind of harmonisation of export control rules. Thus, it is not in dispute that the European Union should have a regional model. In the EU, what can be discussed – as we have already mentioned – is the level of harmonisation, the degree of transfer of sovereignty to the supranational bodies in this regard.

Elsewhere in the world, however, regional models may also be useful and justified. Many African nations, including those grouped together in international organisations that pursue goals of economic integration (even if at an early stage), or Pacific island nations, to name a few examples, may find that their domestic industries and security concerns are quite similar.

In such cases, coming together to find a common solution may be a far more efficient way of drafting optimum export control rules that meet the needs and fit the reality of the respective region, thus best pursuing the ultimate goals of the international regime.

Such an option brings with it the added advantages of cost reduction for companies operating within that region, incentive to trade by reduction of information barriers, and greater ease of cooperation between national authorities.

The role of Customs

It seems to be often the case that too much weight is placed on Customs as the main agent for export control enforcement. Although Customs are a

crucial ingredient in the recipe for success of export control, it can never be responsible for the greater part of the actual "control".

Control of dual-use items will always be a tough sell for customs officials. It is difficult to fully grasp, the items are difficult to identify and the psychological and financial rewards are far smaller than if their efforts were aimed at detecting other illegal shipments, such as narcotics.

What's more, Customs controls are a deterrent, but a small one. Only a very small percentage of shipments will ever be controlled in such a manner as to allow for the identification of illegal exports of dual-use items. Finally, exports of intangible items circumvent Customs altogether.

Thus, without neglecting the training of Customs officials in these subjects, far greater attention needs to be paid to awareness-raising campaigns and, above all, to dissuasion through sanctions and *ex post facto* enforcement.

The objective must be to create a regulatory environment such that exporting companies will have every economic incentive to cooperate with authorities and to avoid carrying out an export which may subsequently be deemed a violation of export control rules.

In order to achieve this result, high financial penalties are important. But just as important can be other types of sanctions with drastic economic consequences, such as the suspension of rights to export licences, by the company in question and any of its subsidiaries or parent companies, for a certain period following the detection of an infringement of a certain gravity.

Furthermore, an effective mechanism of company audits needs to be created. A company may not be concerned about its exports being thoroughly controlled at the borders, or it may be entirely unconcerned if its exports are of an intangible nature. But if it knows that, sooner or later and periodically, the export control authorities will inspect its transaction records to detect infringements of export control rules, it may think twice before taking a chance, and it may put more care into prevention and internal compliance programmes.

Thus, a body of trained inspectors within the borders, in periodical dialogue with companies, may obtain more promising results than a body of trained inspectors at the borders.

A list, my kingdom for a list?

Finally, too much emphasis is placed by some on the importance of creating a list of items subject to control.

It is true that the EU's list has proven quite useful. It makes it easier for European companies to know which of their activities fall under the scope of export control rules, allowing for greater legal certainty and cross border harmonisation. Such a list is crucial in the context of highly complex trade involving an extremely diversified set of industries. Also, that list has tended to be used as a reference even beyond the EU's borders.

But this does not mean that other States should simply copy the list. In a country that has only a very small fraction of the industries that generate items included on the list, the reproduction of it in its entirety is not only superfluous, it can be counterproductive, as it dilutes the information and makes it more difficult for companies in that country to identify the items of concern.

It is true that, thanks to transit or imports and exports, any country may need to apply export control rules to virtually any item. But these exceptional situations can be safeguarded through a catch-all provision, possibly accompanied by non-binding reference to foreign or international standards.

Let us not lose sight of the fact that even the EU list does not pretend to be exhaustive. The European solution was – simplistically – to automatically subject to licencing the listed items, and then to allow for a case-by-case assessment of exports of non-listed items.

If any list must, necessarily, contain only examples of the items subject to authorisation, why should countries with domestic industries that produce only a limited number of items of concern be bothered with reproducing a more complete list, the objectives of which could just as easily be achieved through a general clause?

A tailor-made country or regional approach to lists would have the added advantage of requiring an initial effort of dialogue with stakeholders, so as to allow for the identification of the items of concern produced domestically. In other words, national rules would be built in dialogue with national industry, in a partnership that could greatly contribute to both transparency and awareness raising. Also, this initial identification of areas and companies of concern should make subsequent enforcement efforts less burdensome for the administration.

Naturally, such “specialised” lists would have to be periodically revised to keep track of new industries and new technological developments. But that is equally true of a European-style extensive list.