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With a view to the upcoming presentation to COARM on 15 July by Ms Sibylle Bauer, SIPRI, please find for your information the paper on Detecting, Investigating and Prosecuting Export Control Violations - European Perspectives on Key Challenges and Good Practices.

DETECTING, INVESTIGATING AND PROSECUTING EXPORT CONTROL VIOLATIONS

European Perspectives on Key Challenges
and Good Practices

SIBYLLE BAUER AND MARK BROMLEY



**STOCKHOLM INTERNATIONAL
PEACE RESEARCH INSTITUTE**

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Abbreviations

AEO	Authorized economic operators
BAFA	Bundesamt für Wirtschaft und Ausfuhrkontrolle (German Federal Office for Economic Affairs and Export Control)
CEO	Chief executive officer
DDA	Antimafia District Directorate
DG TAXUD	Directorate General for Taxation and the Customs Union
DUCG	Dual-use Coordination Group
EIO	European Investigation Order
EU	European Union
EEAS	European External Action Service
FIOD	Fiscale inlichtingen- en opsporingsdienst (Fiscal Information and Investigation Service of the Netherlands)
GISS	General Intelligence and Security Service of the Netherlands
HMRC	Her Majesty's Revenue and Customs of the United Kingdom
ITT	Intangible technology transfer
MITEC	Modern Industries Technique Company
NGO	Non-governmental organization
OPCW	Organisation for the Prohibition of Chemical Weapons
POSS	Precursoren, strategische goederen en sancties (Precursors, Strategic Goods and Sanctions)
SALW	Small arms and light weapons
UAE	United Arab Emirates
WMD	Weapons of mass destruction
ZKA	Zollkriminalamt (German Customs Criminological Office)

Executive summary

The systems that states maintain for controlling the trade in arms and dual-use items (goods, materials and technologies that may be used for both civilian and military purposes) are known as export controls. One of the most acute (and complex) challenges with regard to the effective implementation of export controls is the detection, investigation and—when appropriate—prosecution of any violation of such controls. This is true even within the European Union (EU)—the only regional organization with a common legal framework for controlling the trade in dual-use items and, to a certain extent, military items. One indication of this is the limited number of cases of export control violations that have been taken to court and successfully prosecuted in EU member states. Indeed, several EU member states have little to no experience of the investigation and prosecution of arms and dual-use export control offences.

All stages of the detection, investigation and prosecution of export control violations pose significant and—in many cases—growing problems for national authorities. The increasing complexity of both legal and illegal trading patterns has led to a rise in the use of brokers, front companies and transit and trans-shipment points. This has multiplied the number and type of actors and activities involved in the trade in arms and dual-use items, and made it easier to conceal—and harder to identify—the real end-user and end-use in a specific transfer. Rapid technological advances, particularly in the field of electronic communications, have increased both the volume and significance of transfers of technology and software that enable the production, development and use of controlled items. Such transfers are now far harder to detect, while advances in areas such as additive manufacturing (also known as 3D printing) mean that the information transmitted can be used more readily in the production of controlled items. States' national legislation has sought to keep pace by extending controls to new activities and items, but effective enforcement requires the adoption of new tools and techniques.

This SIPRI report highlights the main obstacles that states face with regard to the detection, investigation and prosecution of export control violations and examines what steps have been taken—and could be taken—at the national and multilateral levels to overcome them. The report's content is primarily aimed at EU member states and the final recommendations are focused on steps that could be taken at the EU level. However, many of the challenges are generic rather than specific to the EU. Moreover, the standards adopted inside the EU in the field of export controls have significant influence on states in the European neighbourhood and further afield, meaning that the report's findings have relevance for states outside the EU.

Chapter 2 outlines some of the key differences in the way EU member states approach the detection, investigation and prosecution of export control violations. These differences relate to (a) the laws and types of law used by EU member states to enforce export controls; (b) the extent to which national legislation requires offenders to be aware of the offences that they are committing in order for them to be convicted; (c) the types and the severity of the penalties associated with export control violations; (d) the circumstances in which particular individuals and entities can be held responsible for violations of export controls; (e) the procedures and modalities that are used for applying the relevant national laws and the authorities that are responsible for doing so; and (f) the priority and resources member states allocate to the enforcement of export controls within a particular authority and at state level. These variations indicate a lack of harmonization in member states' policies in this area. However, they can also be viewed as an advantage because they offer a wide range of examples of

‘good practice’ that other states can use depending on their own particular needs and capacities.

Chapter 3 outlines some of the key obstacles to the detection, investigation and prosecution of export control violations and highlights areas of good practice. The chapter begins with a focus on the particular challenges that relate to the detection of export control violations. These include (a) making export controls a central part of customs authorities’ work; (b) carrying out effective risk profiling to identify potential violations of export controls; and (c) determining whether a particular transfer is subject to export controls. It then focuses on challenges of particular relevance to the investigation and prosecution of export control violations. These include (a) demonstrating that an offence has occurred even if a shipment has not taken place; (b) overcoming inconsistent, inadequate, complicated or unclear legislation; (c) dealing with the complexity and technical nature of export control cases; (d) proving knowledge of an offence on the part of the suspect; (e) using intelligence information in court; (f) determining the administrative and criminal penalties that should be available and applied; and (g) ensuring effective interagency cooperation. The chapter concludes with an assessment of some of the more complex aspects of export controls that create specific challenges to the detection, investigation and prosecution of export control violations: catch-all controls, brokering controls and intangible technology transfer (ITT) controls.

Chapter 4 presents seven cases where violations of export controls have been detected, investigated and prosecuted in EU member states in recent years. These cases involve (a) the export of dual-use machine tools from Spain to Iran; (b) the export of dual-use gas turbines from the Netherlands to Iran; (c) the export of firearms from Germany to Colombia via the United States; (d) the export of dual-use chemicals from Belgium to Syria; (e) the export of dual-use valves from Germany to Iran; (f) the export of aircraft spare parts from the United Kingdom to Iran; and (g) the export of arms from Italy to Iran and Libya. In each case, the offences committed, the specific complications that arose, and key insights that could be helpful for other national authorities are documented. The chapter highlights some of the key differences between national approaches outlined in chapter 2—such as the variations in national penalties and the types of law used to prosecute offences—and many of the challenges and examples of good practices discussed in chapter 3. Key challenges include the complexity of the cases and the difficulties associated with international cooperation and coordination, while good practices include clear routines and mechanisms for record-keeping and interagency coordination.

Chapter 5 provides the following set of recommendations for steps that could be taken at the EU level to support national efforts to detect, investigate and prosecute export control violations. This includes steps aimed at boosting capacity in relevant areas and creating improved processes of information exchange on good practices and lessons learned and operational information on actual or suspected violations.

Recommendations

1. Further enhance transparency of national penalties for export control violations and explore greater harmonization. Conduct a comprehensive comparison of EU member states’ penalties for export violations and consider how realistic it is to push for the harmonization of penalties given the complexities and differences in national legal structures.

2. Create a forum for exchanging information on national enforcement measures.

Ensure that national enforcement expertise is properly represented in the European Commission's proposed Enforcement Coordination Mechanism and make certain that the workings of this group are integrated into the activities of the Dual-use Coordination Group (DUCG).

3. Improve reporting on national enforcement measures under the EU Dual-use Regulation. Expand the requirement to report on national enforcement measures to include all cases involving the unlicensed trade in dual-use goods, rather than just violations of the Dual-use Regulation.

4. Improve reporting on national enforcement measures under EU arms embargoes. Review if and how the requirement to report on the enforcement of EU sanctions is being applied and connect this requirement to those in place under the Dual-use Regulation.

5. Build effective links between the various EU mechanisms for sharing information on national enforcement measures. Consider how to create stronger links between the Enforcement Coordination Mechanism and other existing and proposed EU mechanisms to avoid duplication of effort and create synergies.

6. Adopt clearer and more harmonized language on complex concepts. Use the 'recast' of the Dual-use Regulation to generate language that aims to bring clarity to the application of controls on software and technology, while also creating mechanisms for drafting guidelines to address other areas related to controls on ITT, such as cloud computing. A further recommendation is to ensure that the process of drafting these definitions and guidelines is as open and inclusive as possible, and takes account of national legal judgments in relevant cases and the views of all the affected sectors and actors, including prosecutors.

7. Make detection, investigation and prosecution a key focus of internal capacity-building and outreach efforts. Devote EU resources to building the capacity of officials in EU member states in areas related to the detection, investigation and prosecution of export control violations. A further recommendation is to ensure that enforcement forms a core component of outreach activities and that there is sufficient funding for such efforts.

1. Introduction

The systems that states maintain for controlling the trade in arms and dual-use items (hereafter referred to as ‘export controls’) are designed to promote global norms in non-proliferation, international security, international law and human rights.¹ They are also essential for enabling states to fulfil their obligations with regard to implementing arms embargoes imposed by the United Nations Security Council or—if they are European Union (EU) member states or are aligned with its policies—by the EU.² They are also used by states to support their national security and, in certain cases, their economic interests. The first priority for any export control system is the prevention of unauthorized transfers of arms and dual-use items. This includes situations where items are exported without any kind of authorization and cases of ‘diversion’, where items are exported with an authorization but are diverted—either during or after delivery—to an unauthorized end-user or for an unauthorized end-use. The main underpinnings of such a system are effective mechanisms of outreach to exporters and other actors, such as academia, freight forwarders and traders, to make them aware of the export controls to which they are subject and ensure that they have procedures in place to enable compliance. Other efforts aimed at promoting a ‘culture of compliance’ include ethics training among staff and encouraging processes of voluntary disclosure when companies or individuals become aware of past violations that they may have committed.

However, all efforts that are focused on promoting a ‘culture of compliance’ are reliant on a willingness on the part of exporters to comply with controls. They will have almost no effect in cases where companies or individuals are wilfully seeking to circumvent or violate export controls. One of the most acute challenges with regard to the effective implementation of export controls is the detection, investigation and—when appropriate—prosecution of such violations. This is true even within the EU—the only regional organization with a common legal framework for controlling the trade in dual-use items and, to a certain extent, military items. One indication of this is the limited number of cases of export control violations that have been taken to court and successfully prosecuted in EU member states.³ Indeed, several EU member states have little to no experience of the investigation and prosecution of arms and dual-use export control offences.⁴

All stages of the detection, investigation and prosecution of export control violations pose particular problems for national authorities. Moreover, many of these problems are being made more acute by changing trading patterns and rapid technological advances. First, the growing complexity of both legal and illegal trading patterns has led to an increase in the use of brokers, front companies and transit and trans-shipment points. This has multiplied the number and type of actors and activities involved in the trade in arms and dual-use items, and made it easier to conceal—and harder to identify—the real end-user and end-use in a specific transfer. Second, rapid technological advances—particularly in the field of electronic communications—have increased both the volume and the significance of transfers of technology and software that enable the production, development and use of controlled items. Illegal transfers

¹ Dual-use items are goods, materials and technologies that may be used for both civilian and military purposes. Most dual-use export controls specifically target dual-use items that can be used to develop and build weapons of mass destruction (biological, chemical and nuclear weapons) or their means of delivery (e.g. missiles).

² The SIPRI Arms Embargo Archive provides a detailed overview of most multilateral arms embargoes that have been in force since 1950 along with the principal instruments establishing or amending the embargoes.

³ Bauer, S., ‘WMD-related dual-use trade control offences in the European Union: penalties and prosecutions’, EU Non-Proliferation Consortium, Non-Proliferation Papers, no. 30 (July 2013).

⁴ Leenman K. and Leenman, D., ‘Key challenges and response in enforcement and detection of export control’, Technical Background Paper, Apr. 2019.

of technology were occurring at the beginning of the 20th century.⁵ However, they are now far easier to perform and harder to detect, while advances in areas such as additive manufacturing (also known as 3D printing) mean that the information transmitted can be used more readily in the production of controlled items.⁶

States' national legislation has sought to keep pace by extending controls to new activities and items, but effective enforcement requires the adoption of new 'tools and techniques'.⁷ Other obstacles include insufficient law enforcement resources and the difficulties associated with interagency and international cooperation, both of which are often essential for successful detection, investigation and prosecution efforts.

This SIPRI report highlights the main obstacles that states face with regard to the detection, investigation and prosecution of export control violations and examines what steps have been taken—and could be taken—at the national and multilateral levels to overcome them. The report's content is primarily aimed at EU member states and the final recommendations are focused on steps that could be taken at the EU level to improve the content and workings of the Dual-use Regulation. However, many of the challenges are generic rather than specific to the EU. Moreover, the standards adopted inside the EU on export controls have significant influence on states in the European neighbourhood and further afield, both indirectly (as a source of model legislation that other states adopt) and directly (through the various programmes of outreach and assistance that the EU supports and implements). As such, the report's findings also have relevance for states outside the EU.

Chapter 2 outlines some of the key differences in the way EU member states have responded to the difficulties associated with the detection, investigation and prosecution of export control violations. It looks at how EU and EU member states' legislation is structured, the way investigations are conducted, and the penalties associated with violations. Chapter 3 outlines some of the key obstacles with regard to the detection, investigation and prosecution of export control violations and highlights areas of good practice. It also includes a focus on some of the more complex aspects of export controls that have proved to be particularly problematic, such as catch-all controls, brokering controls and intangible technology transfer (ITT) controls. Chapter 4 presents seven cases where violations of export controls have been detected, investigated and prosecuted in EU member states in recent years. It documents the offences committed as well as the specific complications associated with each case, and sets out key insights that could be helpful for other national authorities. Chapter 5 provides a set of recommendations for steps that could be taken at the EU level to support national efforts to detect, investigate and prosecute export control violations. This includes steps aimed at boosting capacity in relevant areas as well as creating improved processes of information sharing on good practices and lessons learned as well as operational information on actual or suspected violations.

⁵ The case of Frederick Schroeder, a German spy, is a notable example of an illegal transfer of technology from the early 20th century. In 1914 Schroeder was sentenced to 6 years in prison in the UK for attempting to smuggle technical drawings for British naval systems to Germany. See e.g. Andrew, C., *The Defence of the Realm: The Authorised History of the MI5* (Penguin: London, 2012), pp. 61–62.

⁶ See Brockmann, K. and Kelley, R., *The Challenge of Emerging Technologies to Non-proliferation Efforts: Controlling Additive Manufacturing and Intangible Transfers of Technology* (SIPRI: Stockholm, Apr. 2018).

⁷ Leenman and Leenman (note 4).

2. Differences between national systems in the EU

There are currently no international legal standards on penalties for export control-related offences. General requirements to impose export controls and to have mechanisms of enforcement and related penalties can be derived from UN Security Council resolutions and the international treaties on biological, chemical and nuclear weapons. However, neither these instruments nor the four multilateral export control regimes (the Australia Group, the Missile Technology Control Regime, the Nuclear Suppliers Group and the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies) currently provide guidance on penalties and prosecutions.⁸

In the EU, minimum standards for the trade in military items have been established by an EU common position, which is legally binding but leaves the means of implementation to the discretion of member states.⁹ The trade in dual-use items is governed by an EU regulation that is directly applicable in member states' national laws. However, certain aspects of the dual-use export controls—such as enforcement—have been left in the hands of member states. EU arms embargoes and other EU sanctions measures are governed by EU directives, which are implemented through national legislation. These different instruments make reference to the importance of effective enforcement measures. For example, Article 24 of the Dual-use Regulation requires member states to 'take appropriate measures to ensure proper enforcement' and to lay down penalties 'applicable to infringements' that are 'effective, proportionate and dissuasive'.¹⁰ However, in all cases the form and content of enforcement measures are a national responsibility and as such remain subject to the significant differences in the structures and culture of EU member states' criminal justice systems. There are six key areas where significant variation can be identified.

First, there are differences in the laws and types of law used by EU member states to enforce export controls. Some states usually prosecute under general economic (criminal) offences legislation (e.g. the Netherlands);¹¹ some prosecute under (criminal) customs legislation (e.g. the United Kingdom);¹² while others have the option of using specific legislation on export controls (e.g. Croatia).¹³ States may also use different applicable legislation for particular cases. For example, in the Netherlands an individual who supplied chemicals that were used by Saddam Hussein as chemical weapons against Iraq's Kurdish population was charged with genocide and crimes

⁸ Bauer (note 3). The Nuclear Suppliers Group was established in 1974. In 1992 it published guidelines for the transfer of nuclear-related dual-use items. The Australia Group, founded in 1985, seeks to harmonize and enhance export controls to ensure exports do not contribute to the development of biological or chemical weapons. The Missile Technology Control Regime, founded in 1987, coordinates national licensing and enforcement efforts to prevent the proliferation of missile technologies. The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies was formally established in 1996. For more information see the websites of the regimes and the SIPRI Yearbook.

⁹ Council Regulation 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, *Official Journal of the European Union*, L134, 29 May 2009; and Council Common Position 2008/944/CFSP of 8 Dec. 2008 defining common rules governing control of exports of military technology and equipment, *Official Journal of the European Union*, L335, 8 Dec. 2008. For information on EU sanctions measures see the EU Sanctions Map website.

¹⁰ Council Regulation 428/2009 (note 9).

¹¹ In the Netherlands, cases involving illegal exports of controlled items are often prosecuted under the 1950 Economic Offences Act, as amended.

¹² Prosecutors in the United Kingdom often use the 1979 Customs and Excise Management Act for cases involving the illegal export of controlled items from the UK. See Bauer (note 3).

¹³ In Croatia, cases involving illegal exports of controlled items can be prosecuted under the 2004 Act on the Export of Dual-use Items, *Official Gazette* 100/04. See Mičić, I., 'Croatia', eds O. Jankowitsch-Prevor and Q. Michel, *European Dual-Use Trade Controls: Beyond Materiality and Borders* (Peter Lang: Brussels, 2013); and Amendments to the Act on the Export of Dual-use Items, *Official Gazette* 84/08.

against humanity.¹⁴ In other instances, states might prosecute on the basis of generic offences such as the falsification of documents, either on their own or in conjunction with other offences that are more specifically focused on export controls.¹⁵

Second, EU member states differ with regard to the extent to which national legislation requires offenders to be aware of the offences that they are committing in order for them to be subject to conviction. Some states—including Germany and the UK—have in place legislation in the field of export controls that provides for strict liability, meaning that it is harder to avoid prosecution by claiming ignorance of the law.¹⁶ Other states—including Sweden—do not impose strict liability, meaning that there is a stronger requirement for the prosecutor to demonstrate that the offender was aware that the act was in violation of the law.¹⁷

Third, states differ in relation to the penalties associated with export control violations. Differences in the laws that are used to prosecute offences, and whether a particular offence is classed as criminal or administrative, are reflected in the wide variation in the range and severity of the penalties that can be applied. According to a recent survey published by the European Commission, there remain notable differences between EU member states in terms of the penalties they apply for export control violations.¹⁸ In Cyprus, the maximum penalty for a deliberate violation of export control legislation is 3 years in prison (the lowest maximum term in the EU), while in Slovakia there are no provisions for prison sentences in connection with export control offences. By contrast, in France, the maximum prison sentence is 30 years—the highest maximum term for such offences in the EU. At a much broader level, national practices differ significantly with regard to the use of ‘plea bargaining’, suspended prison sentences and parole, all of which can have a significant effect on the severity of any sentence imposed.¹⁹

Fourth, there are differences between EU member states as to if and when particular individuals and entities can be held responsible for violations of export controls. For example, in the Netherlands, Slovenia and the UK, both companies and individuals can be prosecuted.²⁰ Penalties against companies can include compulsory closure or payment of a fine. In Germany, by contrast, it is not possible to prosecute a company. However, under German legislation companies are required to name an *Ausführverantwortlicher* (export responsible person)—a company representative from senior management who is individually responsible for the effective implementation

¹⁴ See e.g. District Court of The Hague, Case 09/751003-04, Judgment LJN: AU8685, 23 Dec. 2005; and Court of Appeal of The Hague, Case 09/751003-04, Judgment LJN: BA673, 9 May 2007. The case was tried on these grounds 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 limitations would have applied. At the time, dual-use brokering was not subject to control. The individual was acquitted of breaching the 1964 Genocide Convention Implementation Act but found guilty of violating the 1952 Criminal Law in Wartime Act, in conjunction with the Dutch Penal Code. The court rulings can be accessed at the website of The Hague Justice Portal. 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 (May 2006), pp. 239–57; and van der Wilt, H., ‘Genocide v. war crimes in the van Anraat appeal’, *Journal of International Criminal Justice*, vol. 6, no. 3 (July 2008), pp. 557–67.

¹⁵ For discussion of prosecutions of generic offences see Wetter, A., *Enforcing European Union Law on Exports of Dual-use Goods*, SIPRI Research Report no. 24 (Oxford University Press: Oxford, 2009).

¹⁶ Wetter (note 15), pp. 58–59.

¹⁷ Wetter (note 15), pp. 58–59.

¹⁸ European Commission, ‘Annex to the Report from the Commission to the Council and the European Parliament on the implementation of Regulation (EC) no. 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items’, COM(2019) 562 final, 4 Nov. 2019.

¹⁹ For an analysis of these and other differences in EU member states’ practices on criminal and civil prosecutions see Sellier, E. and Weyembergh, A., *Criminal Procedural Laws across the European Union: A Comparative Analysis of Selected Main Differences and the Impact They Have over the Development of EU Legislation*, European Parliament Directorate General for Internal Policies, Policy Department for Citizens’ Rights and Constitutional Affairs (European Parliament: Brussels, Aug. 2018).

²⁰ Bauer (note 3).

of export controls and can be held criminally liable in the case of violations.²¹ This can play a crucial role in the prosecution of export control offences.²² Moreover, the German penal code allows for the confiscation of assets that have been acquired as a result of an offence.²³

Fifth, the procedures and modalities that are used for applying the relevant national laws and the authorities that are responsible for doing so also differ between EU member states. This includes criminal procedural laws, which, for example, define the modalities for deciding whether to take a case to court. In addition, the differences in the definitions of basic legal concepts—such as aiding and abetting, attempt, intent, negligence and support—in different countries' penal laws have ramifications for export control cases. Moreover, the authorities in charge of detection, investigation and prosecution are often organized in different ways. In most states the customs authority would make the initial detection. However, in some states the customs authority (albeit often a different department) might then conduct the investigation, while in others it might hand over responsibility to another authority (such as the police, a specialized entity or the intelligence and security services). The prosecution itself might be carried out in regional services or by a specialized unit.

Finally, and perhaps most importantly, EU member states differ with regard to the priority and resources they allocate to the enforcement of export controls within a particular authority and at state level. In EU member states, the different functions that allow states to detect, investigate and prosecute violations of exports controls—such as customs controls, compliance audits, intelligence gathering, export licensing, criminal investigations, and prosecutions—are divided or shared between and within different agencies. This makes comparing overall resource allocation difficult. However, a simple comparison of the budgets and number of officials allocated to the task of issuing export licences demonstrates that the resources devoted to this policy area vary significantly between EU member states.²⁴ While this variation is largely driven by the size of the state and the number of export licences it processes, this by no means fully accounts for the disparities between some states.

The implementation across the EU of a wholly standardized approach to the detection, investigation and prosecution of export controls is unfeasible, especially given the extent to which the differences between states are based on legal and cultural variations that are beyond the scope of both EU export control legislation in particular and EU legal powers in general. At the same time, there is a clear potential to overemphasize the significance of some of the variations highlighted above and a need to recognize that there are different ways to achieve the same or similar end result. Nonetheless, there is scope to improve harmonization between EU member states, especially with regard to the penalties that are attached to violations of export controls. Variations in this area may lead proliferators to exploit the most lenient judicial framework to pursue their activities.²⁵ That said, it would be a mistake to consider

²¹ German Federal Office for Economic Affairs and Export Control (BAFA), 'Bekanntmachung der Grundsätze der Bundesregierung zur Prüfung der Zuverlässigkeit von Exporteuren von Kriegswaffen und rüstungsrelevanten Gütern' [Announcement of the principles of the Federal Government regarding assessment of the reliability of exporters of war weapons and armament-relevant goods], 25 July 2001, updated 27 July 2015.

²² Außenwirtschaftsgesetz [Foreign Trade and Payments Act], 6 June 2013, as amended.

²³ Since 2017, it has also been possible to confiscate assets from a third party that was neither a principal nor a secondary participant in the offence. See Strafgesetzbuch [German Penal Code], 13 Nov. 1998, as amended, Section 73. The situation in Germany may change in the near future. In August 2019 the German Government presented the draft of a new Corporate Sanctioning Act (Verbandssanktionengesetz) that would introduce corporate criminal liability in Germany. See e.g. Gleiss Lutz, 'Ministerial draft bill for an act to combat corporate crime (Corporate Sanctioning Act)', 27 Aug. 2019.

²⁴ SIPRI and Ecorys, *Final Report: Data and Information Collection for EU Dual-use Export Control Policy Review* (European Commission: Brussels, Nov. 2015), pp. 128–30.

²⁵ The opportunities for proliferation networks provided by variations in national enforcement efforts are also explored in Arnold, A. and Salisbury, D., 'Going it alone: the causes and consequences of US extraterritorial

prison sentences as necessarily being a better or more appropriate form of punishment for breaches of export controls than other types of penalty. Heavy fines can also act as an effective means of dissuasion due to the economic burden they create while the fact of being named in a judgment also carries significant reputational damage.²⁶

In the short term, a more profitable avenue to pursue than harmonization might be to see the variety of EU member state approaches as an advantage to be utilized rather than a barrier to be overcome. EU member states all broadly face the same set of difficulties with regard to the effective enforcement of export controls but their specific needs and the resources they have at their disposal differ significantly. These differences relate to the size and composition of the set of companies and research institutes producing and exporting arms and dual-use items, the nature and closeness of the relationship between them and the relevant government, and the number of national officials that are available—or could be made available—to work on different areas of export control enforcement. In this regard, the different approaches that EU member states have taken can be viewed as potential examples of ‘good practice’ that others can use depending on their own particular needs and capacities. This is especially true for some of the more challenging aspects of export controls in connection with detection and investigation, such as catch-all, brokering and ITT controls.

counterproliferation enforcement’, *Contemporary Security Policy*, no. 4, vol. 40 (2019).

²⁶ Sánchez-Cobaleda, A., ‘Sanctions and penalties for the infringement of dual-use trade controls under Spanish Law’, eds M. Quentin, O. Jankowitsch-Prevor and S. Paille-Calvo, *Controlling the Trade of Strategic Goods: Sanctions and Penalties* (University of Liège, European Studies Unit: Liège, 2016), p. 295.

3. Challenges and good practices in detecting, investigating and prosecuting export control violations

Detecting export control violations

Challenge: making export controls a central part of customs authorities' work despite competing priorities

The investigation and the prosecution of a violation of export controls are reliant on initial detection. In most cases, the main agency responsible for detecting unlicensed exports of arms and dual-use goods is the customs authority. While the precise allocation of enforcement tasks and the specific legal powers of each authority vary from state to state, the customs authority usually plays a central role due to its 'legal authority to detect, inspect, interdict, detain and sometimes even seize shipments or conduct investigations'.²⁷ However, the ability of customs authorities to perform these tasks has been undermined by the fact that the core focus of their work has been—and continues to be—revenue collection and import controls. There is a recent trend to recognize the role of customs authorities with regard to export controls on arms and dual-use items and other security areas.²⁸ Nevertheless, export controls still do not constitute a main priority for many customs authorities, either in the EU or globally. Moreover, the focus of many EU initiatives in the field of customs controls—such as the creation of facilitated procedures for authorized economic operators (AEOs)—is a reduction in processing times and other barriers to trade.²⁹ This means that export controls are not a primary factor in performance targets, resources for export control-related work may be insufficient or prone to fluctuation, and training on the identification and interception of unlicensed exports could be improved. This is reinforced by the generally low number of cases of this type, leading to low prioritization and a lack of experience among customs staff, which in turn further reduces the likelihood of cases.

Good practice: create a dedicated unit within the customs authority (or another relevant enforcement authority) that is specialized in dual-use and arms trade controls

Such units have been created in the customs authorities in Germany, the Netherlands and the UK. An alternative approach would be to achieve these ends by creating powerful and interlocked enforcement teams that jointly possess centralized risk-management expertise, strengthened interdiction capabilities and investigation competence. However, ensuring that these units have the resources and mandate to operate effectively would require a recognition at a more senior level of the importance of export control work and the need to prioritize it as a key area of focus for customs authorities.

²⁷ Leenman and Leenman (note 4).

²⁸ Bauer (note 3).

²⁹ Authorized economic operator (AEO) status was created by the 2005 amendments to the EU Customs Code and came into force in Jan. 2008. National authorities can award AEO status to manufacturers, exporters, freight forwarders, warehouse managers, customs agents and carriers that meet common criteria in a range of areas, including 'an appropriate record of compliance with customs requirements' and 'appropriate security and safety standards'. AEO status is recognized across the EU and makes the recipient eligible for certain customs control-related benefits, including expedited procedures at entry and exit points and simplified security- and safety-related inspections. Regulation (EC) 648/2005 of the European Parliament and of the Council of 13 Apr. 2005 amending Council Regulation (EEC) 2913/92 establishing the Community Customs Code, *Official Journal of the European Union*, L117, 4 May 2005, p. 15.

Challenge: carrying out effective risk profiling to identify potential violations of export controls

While customs authorities are responsible for carrying out physical checks of consignments, it is often difficult for customs officers to identify dual-use goods and military goods—particularly military parts and components. This is especially true given the enormous and still growing volume of goods that crosses national borders and the fact that most consignments are never seen by a customs officer but remain in a sealed container.³⁰ To have a realistic chance of identifying and intercepting unlicensed shipments, customs authorities need to adopt effective mechanisms of risk profiling. The customs authority in the UK has usefully defined risk profiling as ‘a practical means of replacing random examination of documents and consignments with a planned and targeted working method, making maximum use of customs resources’.³¹ Effective risk analysis requires the compilation of information not only from different sources within the state, but also from other states. In this regard, states that are not members of particular export control regimes and do not have access to their systems of information sharing face a disadvantage. However, the use of electronic systems does not necessarily translate into improved effectiveness in the identification and interception of suspect shipments. The human factor is important when it comes to spotting consignments that need additional attention, but training personnel to perform such tasks requires time and resources. However, facilitated procedures—such as simplified customs declarations—have reduced the time window available for human risk analysis.

Good practice: ensure that the right people have access to the right information at the right time and have the time and training needed to process the information

Electronic risk profiling alone is not sufficient to identify illegal shipments but must be complemented by human analysis to be effective. Creating a minimum time window during which human intervention can take place would be a good practice. Moreover, officers need to be provided with both adequate training and sufficient and timely information to identify suspicious shipments. There are different indicators that can be taken into account when conducting risk profiling. Indicators could be related to the goods, the end-use(r), the shipping route or whether a licence has previously been denied to a particular exporter or been the subject of a catch-all decision (see below).³² Customs authorities are well placed to receive and utilize information from a variety of different systems for the purposes of risk profiling. However, for this to work effectively, interagency information-sharing systems—specifically between customs and licensing authorities—need to be in place.³³ Information flows between customs and intelligence services are also essential, which in turn may require security clearances for the risk-profiling team, and the transformation of the information provided by the intelligence services into a redacted form that can be entered into the risk-profiling system for sharing more widely across the customs service. The success of all these efforts is dependent not only on effective mechanisms of international cooperation and information sharing (see below), but also on informal bilateral information exchanges. Where denials are already exchanged between states, providing more detailed information or indeed the full data on the transaction could greatly assist states to prevent similar transactions from originating in their jurisdictions. Moreover,

³⁰ Leenman and Leenman (note 4).

³¹ HM Revenue and Customs, ‘INCHP08050: risk analysis: part 1: risk analysis in customs control’, accessed 21 Mar. 2016.

³² Leenman and Leenman (note 4).

³³ Leenman and Leenman (note 4).

consideration needs to be given to who has access to information at the national level and ensuring that both licensing and customs personnel are involved.

Challenge: determining whether a particular transfer is subject to export controls

Detecting a suspicious shipment is of little practical value if expertise is not available to determine whether the shipment is subject to control. It is impossible for every single customs officer to have the specialist knowledge required to know whether a particular shipment is controlled by one of the many categories of the military and dual-use control lists (i.e. the list of items that require export authorization). At the same time, it is essential that customs authorities have (a) sufficient training to identify suspicious consignments; (b) specialized teams (or access to them) who have experience, in-depth training and possibly security clearance (and thus access to information); and (c) access to authoritative technical assessments from the licensing authority. This would enable customs authorities to identify potentially illegal exports in a timely manner without unnecessarily disrupting legal trade flows. In this regard, customs officers often depend on their colleagues within the licensing authority to confirm whether or not a violation has occurred.³⁴ This may entail a classification decision based on the list of controlled items.

Good practice: increase technical training and create resources that can be drawn upon at short notice to assist with product classification

The Netherlands has specialist advisory experts for different areas, including dual-use goods, arms and sanctions. They receive special training and are available in every customs region (and thus not just at central level). Customs officers can contact them directly or through a central contact point. If required, the specialist advisory experts can forward the case to the licensing office or to the enforcement/investigation team.³⁵ In Germany, a similarly layered system is in place. When a frontline officer detects a suspicious transaction, the officer can contact the specialized team at the Customs Criminological Office (ZKA, Zollkriminalamt). The team has specialized expertise, substantial experience and access to intelligence information. It can thus support the frontline officer in deciding on how to proceed as it has a direct link to the licensing authority database and—if necessary—can immediately involve technical experts in cases where it is unclear whether a particular shipment contains controlled items.

Investigating and prosecuting export control violations

Challenge: demonstrating that an offence has occurred even if a shipment has not taken place

Depending on how particular aspects of export controls are applied in a state's national legislation (and often whether the offence is a 'regular' export control offence or an embargo breach, which tends to be 'easier' to prove), the facts that will need to be demonstrated to ensure a successful prosecution will vary significantly (see box 3.1). One central question is whether the actual delivery and receipt of the items need to take place in order to establish that an offence occurred. The need to focus on the prevention of illicit transfers will often mean that an enforcement authority will be obliged to stop a suspected illegal shipment from taking place. However, if the attempt to export is not an offence, stopping the shipment may mean that it is

³⁴ Leenman and Leenman (note 4).

³⁵ Leenman and Leenman (note 4).

Box 3.1. Establishing the facts of the case^a

Investigators and prosecutors need to answer a series of questions to establish the facts of a case, including the following:

- *What is the destination and who is the recipient?* (e.g. is that recipient the final recipient (end-user)? Is the recipient or final recipient listed in embargos? Did the items actually reach the destination or recipient in question?)
- *What items are involved?* (e.g. are the items included in a control list and, if not, is a catch-all provision applicable (see below)? If a permit is required, would a permit have been granted or denied?)
- *Who is liable?* (e.g. who comes into question as a perpetrator or party involved: the manufacturer? The exporter? The broker? The recipient? Does the law provide that an offence occurs only when perpetrated by certain actors, such as the exporter?)
- *When did the action take place?* (e.g. for most exports of physical goods the moment of the export declaration might be considered the point at which the offence occurs but this will vary from state to state and case to case. For exports of intangible items (see below) the ‘when’ of the offence may be far less clear.)
- *Where did the action take place?* (e.g. the physical location of the suspected offender at the point where the suspected offence occurs—and if that location is abroad whether extra-territorial controls are in place—will be crucial to determine whether an offence has taken place.)
- *What type of cooperation will be required?* (e.g. which other authorities domestically or internationally need to be involved?)
- *What procedural measures can be used?* (e.g. telephone monitoring, search, arrest, interrogation, legal assistance, asset recovery etc.)

^a Morweiser, S., ‘Dual-use and arms export control violations: key challenges and good practices in investigations and prosecutions’, Technical Background Paper, Apr. 2019.

not possible to bring any charges against the exporter. The only alternative may be to allow a so-called controlled delivery—where the item continues to be monitored after export. This can also help to identify further actors involved before the transaction is stopped. However, conducting such operations can be risky and may not be possible for states with more limited resources. The question of whether an attempt to export could or should be penalized is determined by legislators. Penal codes can provide for the offence of an attempt to commit a crime or conspiracy to commit a crime, even if the item has not left a specific territory or the transaction has not been completed.

Good practice: consider making the attempt to export a criminal offence

A number of states have established the attempt to export as an offence in certain circumstances. These could be models for other states to follow. For example, the UK’s Customs and Excise Management Act of 1979 makes it an offence to attempt to evade a restriction or prohibition on the shipment of controlled items.³⁶ The same is also true under German legislation.³⁷ To determine how best to establish the offence of an attempt to commit a crime and to do so in a way that makes clear when it is applicable, two key questions would need to be addressed: (a) what constitutes an attempt to commit an offence?; and (b) at what point, as a matter of law, does an export (and thus the completed offence) take place (e.g. on submission of the customs declaration or when the national border is crossed and national jurisdiction ends)?³⁸

³⁶ See Section 68(2) of the 1979 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.’ Furthermore, under the 2008 Export Control Order, it is an offence to attempt to broker the movement of goods from a third country to another, and a person can be prosecuted even if the goods are never supplied. In 2012 this principle was tested in the case of *R. v. Ranger*, which involved the attempted supply of MANPADS (surface-to-air missiles) from North Korea to Azerbaijan. UK Crown Prosecution Service (CPS), ‘Michael Ranger sentenced for organising arms deals between North Korea and Azerbaijan’, 20 July 2012.

³⁷ German Penal Code (note 23), Section 23(1); and Foreign Trade and Payments Act (note 22), Section 18(6).

³⁸ 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. Bauer (note 3).

Challenge: inconsistent, inadequate, complicated or unclear legislation

The legislation applicable to dual-use and arms trade controls is often a patchwork of different legal provisions with different rationales and may not necessarily reflect changing trading and proliferation patterns. However, weaknesses in the legislation may not come to light until a case occurs. An insufficient legal basis for prosecution can sometimes be attributed to the increased complexity of transactions, which may involve multiple actors and actions. The traditional focus of EU regulation is on the exporter but the ‘main brain’ behind a transaction may be an actor other than the exporter such as a broker, while some transactions may have multiple actors involved.³⁹ An additional challenge is that a number of terms that are used in export control legislation lack clarity and are open to differing interpretations. Such terms include ‘development’, ‘production’, ‘use’, ‘technology’ and ‘basic scientific research’.

The issue of rising complexity has become particularly acute in the case of sanctions mechanisms, which are often drafted without sufficient consideration given to whether they can be implemented by companies and other actors or enforced by national officials. For example, the EU sanctions on Russia apply to exports of military items and exports of dual-use items ‘for military use or for a military end-user’, while also having implications for the financial services and energy sectors.⁴⁰ Since they were introduced in 2014, the sanctions on Russia have created a wide range of compliance- and enforcement-related complications that have in turn resulted in requests for legal clarification both in the national courts and in the European Court of Justice.⁴¹ Several commentaries have noted that the EU’s use of sanctions as a foreign-policy instrument has expanded in recent years and that this trend will probably continue.⁴² Despite the rising complexity of export controls, most EU member states have not allocated additional resources to enforcement staff and some states have implemented staff reductions. The UK, for example, reduced the number of its enforcement staff in line with broader reductions of civil service staff.⁴³ This reduction, or absence of investment, in resources among some EU member states is partly due to a lack of awareness at the policy level of the implications on resources of effective enforcement and new sanctions, and partly due to overall efforts to scale down the public sector in some countries.

Good practice: involve enforcement authorities in legal developments, reviews and strategies

Enforcement authorities should be involved not only in the detection, investigation and prosecution stages, but also in ensuring that customs law, export control law and relevant penal law fit the reality on the ground. Another important step is to collect experiences relating to legal constructions and concepts that have been tested in court. A starting point could be the creation of a database of proliferation-related prosecutions to begin the process of systematically building up institutional memory.

³⁹ Bauer et al., *Challenges and Good Practices in the Implementation of the EU’s Arms and Dual-use Export Controls: A Cross-sector Analysis* (SIPRI: Stockholm, July 2017).

⁴⁰ EU Sanctions Map website (note 9), accessed 10 Sep. 2019.

⁴¹ Trade Practitioner, ‘European Court of Justice (ECJ) clarifies sanctions in response to the crisis in Ukraine against certain Russia undertakings’, 17 April 2017.

⁴² See e.g. Portela, C., ‘How the EU learned to love sanctions’, M. Leonard (ed.), *Connectivity Wars* (European Council on Foreign Relations: London, 2016).

⁴³ See British Government, *Strategic Export Controls: Her Majesty’s Government’s Annual Report for 2012, Quarterly Reports for 2012 and 2013, and the Government’s Policies on Arms Exports and International Arms Control Issues, Reports from the Business, Innovation and Skills, Defence, Foreign Affairs and International Development Committees, Session 2014–15*, Cm8935 (Stationery Office: London, Oct. 2014), para. 30.

Box 3.2. Specialized investigation team in the Netherlands

In the Netherlands, a specialist team is responsible for the enforcement of export controls and sanctions. This team, known as the POSS (Precursoren, strategische goederen en sancties—Precursors, Strategic Goods and Sanctions), works under the customs administration. The POSS monitors and enforces exporters' compliance and can also conduct (criminal) investigations. To perform its tasks, the team has (a) the power to demand extensive information from any entity (manufacturers, traders, brokers etc.) that deals with the export of dual-use goods and military goods; and (b) the right to access company premises. In complex cases, the FIOD (Fiscale inlichtingen- en opsporingsdienst—Fiscal Information and Investigation Service)—which is responsible for investigations into economic, fiscal and financial fraud—could act as the lead unit for cases of export control violations, with technical expertise provided by the POSS. The Netherlands Public Prosecutions Service has a functional office for serious fraud, environmental crime and asset confiscation (Functioneel Parket).^a This office also supervises criminal investigations on dual-use and arms trade controls carried out by the POSS and the FIOD. The specialist prosecutor, together with assistant prosecutors, closely cooperates with the POSS and the FIOD, which has resulted in several successful prosecutions and the active involvement of the prosecution service in the enforcement of export controls and sanctions regulations.^b

^a Netherlands Public Prosecution Service, 'Netherlands Public Prosecution Service at a glance', Feb 2018.

^b B&A Law, 'Dutch transporting company fined EUR 50,000 for transiting military items to Russia', *WorldECR*, no. 65 (Dec. 2015), p. 10; and Leenman K. and Leenman, D., 'Key challenges and response in enforcement and detection of export control', Technical Background Paper, Apr. 2019.

Challenge: the complexity and technical nature of export control cases

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 current practice as it relates to, among other things, controls on brokering, financial flows, transit, trans-shipment, technical assistance (e.g. manual services and the oral transfer of know-how) and technology transfer (especially by electronic means), all of which create new demands and challenges from both a legal and a practical enforcement perspective. The presence of any one of these factors may add an extra layer of complexity to a case, placing another burden on investigators and prosecutors.⁴⁴ Complex investigations also take time. However, the amount of time between discovery of the violation and the trial can present obstacles to a successful investigation and prosecution. For example, in some cases the more time that is taken, the greater the likelihood that evidence will be destroyed, misplaced or forgotten. Moreover, the longer an investigation goes on, the more expensive it becomes, which raises the possibility of investigators simply running out of resources.⁴⁵

Another challenge is to ensure that the prosecutors and the court have access to the requisite technical knowledge to pursue a case. A successful criminal prosecution for export control violation requires specialist knowledge and experience. Among other things, the prosecution will involve a technical assessment as to whether the items in question meet or met the parameters of the control list which may be challenged by the defence in court.⁴⁶ However, such cases do not arise regularly, and even in Germany, the EU's largest exporter, the number of criminal proceedings relating to export control violations processed each year is relatively small (generally, this number is in the double digits). Therefore, because of the infrequency (and complexity) of such matters, typically it has not been deemed 'worthwhile' to create specialized court procedures or departments of public prosecution for this type of case. There may also be limits to centralization or specialization due to existing court structures. In addition, 'the scarcity of cases may make it difficult to find a judge with sufficient experience and specialized knowledge to preside over a case effectively'.⁴⁷ As a result,

⁴⁴ Bauer (note 3).

⁴⁵ Leenman and Leenman (note 4).

⁴⁶ Morweiser, S., 'Dual-use and arms export control violations: key challenges and good practices in investigations and prosecutions', Technical Background Paper, Apr. 2019.

⁴⁷ Bauer (note 3).

investigators, prosecutors and judges may become overwhelmed by the legal and technical complexity of cases and miss certain important aspects due to a lack of experience or a lack of knowledge of the applicable laws. In some cases, prosecutors may also find themselves faced with highly specialized defence lawyers.

Good practice: create specialized units to increase the availability of expert knowledge and institutional memory

A small number of EU member states, notably Germany, the Netherlands (see box 3.2) and the UK, have established a specialized investigation or prosecution team or both. Germany has set up a specialized unit at the federal prosecutor's office for dealing with certain export control cases.⁴⁸ In the UK, export control cases have generally been channelled through specific courts, which has led to increased judicial experience in this area.⁴⁹

Challenge: proving knowledge of an offence on the part of the suspect

In some states, such as Sweden, in order to show that an offence (or a serious offence) took place, the prosecution may be required to demonstrate that the suspected offender had knowledge that the act (or intended act) was subject to controls. By contrast, other states have so-called strict liability offences whereby knowledge of the controls does not need to be proven. In the Netherlands, for example, the 1950 Economic Offences Act establishes the principle of 'colourless intent'.⁵⁰ Under this principle, the prosecution does not need to demonstrate that the suspected offender was aware of the unlawfulness of the intended act, only that the suspected offender had the intent to carry out the act. However, limitations often apply to prosecutions of strict liability offences. In the UK, for example, a case involving a strict liability offence must be laid before the court within six months of the offence, which can make it hard for investigators and prosecutors to complete their work in time.⁵¹ Moreover, penalties for export control-related strict liability offences are limited to three times the retail value of the goods concerned and/or up to six months of imprisonment.⁵²

One approach to proving knowledge or intent can be to use intercept information (e.g. through surveillance of telecommunications). For example, German export control enforcement authorities have legal powers for preventive telecommunications monitoring.⁵³ However, while this type of evidence might be admissible in Germany, it is not admissible in the UK, for instance, as a matter of legal principle.⁵⁴

Different types of criminal prosecution may have different evidentiary requirements with regard to a suspected offender's knowledge that the act (or intended act) was subject to controls. In some cases, the prosecution must establish that the suspected

⁴⁸ This unit has been responsible for prosecuting a number of high-profile export control cases. However, cases can be referred to the federal prosecutor's office if the offence 'a) is capable of seriously endangering the external security or the foreign relations of the Federal Republic of Germany or b) is intended to and is capable of disrupting the peaceful coexistence of peoples (...)' Gerichtsverfassungsgesetz [Courts Constitution Act], 9 May 1975, as amended, Section 120(2)(4). As a result, important export control cases—particularly those that either involve or are related to the proliferation of weapons of mass destruction—are dealt with at the federal level in Germany.

⁴⁹ Most of the recent high-profile cases involving violations of export controls in the UK have been heard at Southwark Crown Court. See e.g. Export Group for Aerospace Defence and Dual-use, 'What can happen to me if I violate the UK's export control regulations?', July 2015.

⁵⁰ 1950 Economic Offences Act, as amended (note 11).

⁵¹ Section 127 of the Magistrates' Courts Act 1980 states that, for all summary offences, the information must be laid within 6 calendar months of the commission of the offence, except where any other act expressly provides otherwise.

⁵² Lorello, D., 'United Kingdom', Y. Aubin and A. Idiart (eds), *Export Control Law and Regulations Handbook: A Practical Guide to Military and Dual-use Goods Trade Restrictions and Compliance* (Third Edition) (Kluwer Law International: Alphen aan den Rijn, 2016).

⁵³ Ricke, K.-P., *Präventive Maßnahmen bei der Ausfuhr von Gütern* [Preventive measures in the export of goods] (Mendel: Witten, 2011).

⁵⁴ Sellier and Weyembergh (note 19), p. 47.

offender had relevant knowledge about the properties or intended use of the exported items; in other cases, such as certain embargo violations, proving that the suspected offender had knowledge about a particular end-use may not be required, instead the prosecution may need to prove that the suspected offender had knowledge about the specific end-user (i.e. the sanctioned entity).⁵⁵

Good practice: (raise) awareness in the licensing authority that its activities and documents may become evidence in order to prove knowledge or intent

This may include oral and written communication with exporters and other actors, documentation of participation in awareness-raising or training events, or catch-all and denial notification decisions.

Challenge: the use of intelligence information in court

Intelligence information is commonly used in the prosecution of export control violations and can be key to a successful prosecution. However, in some circumstances, a legal requirement to keep certain intelligence information secret—and the state's interest in doing so—may be at odds with the judicial duty to inform and the right to an effective defence and fair trial (Article 6 of the European Convention on Human Rights).⁵⁶ Moreover, while prosecutors seek to prosecute suspected legal breaches and gather all available evidence—and in some countries are obliged to do so—intelligence services may have an interest in protecting their sources and might prefer to monitor and disrupt export control violations rather than prosecute them.⁵⁷ In some cases, the information might have been obtained from the intelligence services of another state under condition not to share further. In practice, the use of intelligence sources in prosecutions invariably depends on both the specific case and the rules applicable in certain states. Intelligence information is admissible in court in Germany and the Netherlands as well as in the UK (where evidence from intelligence officers has been heard in court, although this might require special procedures). Intelligence can also be used to develop evidence in an admissible format. In the Netherlands, intelligence must also be supported by other evidence.⁵⁸

Good practice: establish specialized teams to handle intelligence information

One way to address some of the issues around the use of intelligence information would be to grant security clearance to a small team of specialized customs officers. These officers would have the possibility to present information necessary for evidence to the court without endangering national security as they would be in a position to collect information from other sources that could confirm information originally provided by intelligence. A specialized team might also be better placed to interact with intelligence services having established a strong working relationship with them over time. However, it should be noted that the creation of specialized teams would not address some of the other important challenges in this area, such as those arising from the right to an effective defence and fair trial—these rights are potentially jeopardized, for example, when evidence is given in secret and not made available to the defence—and the admissibility of particular types of evidence in court.

⁵⁵ Morweiser (note 46).

⁵⁶ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), opened for signature 4 Nov. 1950, entered into force 3 Sep. 1953.

⁵⁷ Bauer (note 3).

⁵⁸ Bauer (note 3).

Challenge: determining the administrative and criminal penalties that should be available and applied

Determining the types of penalty that should be applied in cases of export control violations is dependent on a number of factors that are specific not only to export control issues but also to the wider legal, national and international context.⁵⁹ In the UK, for example, the majority of export control-related enforcement actions conducted each year are dealt with through warning letters. The most common offence is incomplete or missing documentation. More serious cases have been addressed through ‘compound penalties’ (customs issuing a fine) or prosecution. The latter tend to be reserved for the most serious cases since the prosecution authority has to conduct a test to ascertain whether prosecution is in the public interest.⁶⁰ Under German law, the violation of export control provisions with intent constitutes a criminal offence, which is punishable by a fine or imprisonment of up to 15 years.⁶¹

Good practice: compare the administrative and criminal penalties in place for actual and theoretical cases of export control violations

This has been done to a very limited extent on an ad hoc basis, and mostly in the context of capacity-building workshops in third countries.⁶² However, a comparison could be done more systematically—for example, through peer reviews conducted at the international level or between regions or states that have similar legal systems or approaches. Legal experts could also examine cases from other states to determine whether their own national legal provisions are adequate and sufficiently clear and consistent, or whether further thought needs to be given to ensure that they cover the types of incident that occurred in real cases.

Challenge: ensuring effective interagency cooperation

Successful investigations and prosecutions of export control violations are dependent on effective cooperation, coordination and communication not only at the intra-agency and interagency levels within states but also often at the international level. However, this can be undermined by ‘a lack of formal agreements or procedures and pathways to share information; a lack of opportunities to meet; interpersonal conflicts; and insufficient clarity or overlaps between institutional, departmental or personal competences’.⁶³ Even when there is a clear willingness to cooperate, exchanging information can be problematic. For example, different legal systems in EU member states have different divisions of responsibility between those ‘investigating’, ‘prosecuting’ and ‘judging’. In some states (e.g. France, Germany, Hungary, Italy, the Netherlands and Romania), the prosecutor directs the preliminary investigation and the collection of evidence for indictment.⁶⁴ In other states (e.g. Finland and Ireland), the police lead all aspects of the preliminary investigation and the prosecutor does not take an active

⁵⁹ Salisbury, D., ‘Why do entities get involved in proliferation? Exploring the criminology of illicit WMD-related trade’, *Nonproliferation Review*, vol. 24, no. 3–4 (2017); and Wetter (note 15).

⁶⁰ Williams, D. and Stewart, I. J., ‘The UK’s enforcement of dual-use export controls’, Jankowitsch-Prevor and Michel, eds (note 13).

⁶¹ The Foreign Trade and Payments Act (note 22) provides for administrative and criminal penalties in the case of violations of national and European export control law. The Außenwirtschaftsverordnung [Foreign Trade and Payments Ordinance], 2 Aug. 2013, as amended, and the Ordnungswidrigkeitengesetz [Administrative Offences Act], 19 Feb. 1987, as amended, complement the Foreign Trade and Payments Act with regard to administrative penalties. See also European Commission (note 18).

⁶² Notably, in the context of dual-use export control capacity-building programmes funded by the EU and by the US State Department (EXBS).

⁶³ Bauer (note 3).

⁶⁴ Sellier and Weyembergh (note 19), pp. 23–24.

role.⁶⁵ Institutional responsibility for investigation of export control cases also varies between countries. In a number of states (e.g. Belgium, Germany, the Netherlands and the UK), the customs authority is responsible for the investigation of dual-use and arms export control offences, while in others (e.g. Denmark and Spain) the police or other organizations are responsible. This can pose challenges to international cooperation because the authority carrying out the investigation needs to identify and work with the functional counterpart in another state, which might not be its direct counterpart. Moreover, international cooperation, including mutual legal assistance, always adds a layer of complication (and, consequently, delays and commitment of resources).

Export control offences are by definition transborder crimes. Furthermore, transactions may involve multiple jurisdictions because of the internationalization of trading and production patterns as well as efforts by the infringing party to disguise the actual end-use. This is reinforced by the growing level of national legislation on transit, trans-shipment and brokering—as opposed to mere exports. Furthermore, the definitions of some offences connected to dual-use items with possible end-uses related to weapons of mass destruction (WMD)—particularly those offences covered by catch-all controls (see below)—are often focused on the end-use of the items in other states and may thus require the collection of evidence in other jurisdictions. In this type of case, it would be virtually impossible to obtain evidence from a state for which the end-use is considered problematic. It is also worth noting that the possible or actual end-use may play a role in the judge's decision on the final sentence imposed.⁶⁶

The meetings of the different multilateral export control regimes provide a ready forum where states can present and discuss recent prosecutions of export control offences. However, not all states organize the participation of national enforcement officials in regime meetings (including the meeting of licensing and enforcement officers) in a systematic way, and national prosecutors almost never participate. Moreover, enforcement officials tend to lack travel funds to attend regime and other export control meetings or are simply not included in delegations.

Good practice: use information exchange forums at bilateral levels and in the export control regimes

A number of countries regularly exchange information about enforcement officials through informal visits (e.g. Germany and the UK). In addition, although some countries do not organize the participation of enforcement officials in regime meetings systematically, others do and some also send them to the relevant EU meetings. This could be a good practice for all EU member states to follow.

Good practice: use and review or update existing mechanisms for international cooperation

Bilateral or multilateral Mutual Administrative Assistance agreements, the 2014 European Investigation Order (EIO), and letters of request or letters rogatory are all formal means of sharing both evidence and other types of information on an investigator-to-investigator or prosecutor-to-prosecutor basis within the EU (in the case of the EIO) or internationally (in the case of letters of request or letters rogatory).⁶⁷ In addition, Europol and Eurojust can assist in the coordination or facilitation of information exchange either informally or through the creation of Joint Investigation Teams.⁶⁸

⁶⁵ Sellier and Weyembergh (note 19), pp. 23–24.

⁶⁶ Bauer (note 3).

⁶⁷ For more information on the EIO see Eurojust, 'European Investigation Order', [n.d.]. For more information on the workings of letters of request or letters rogatory see e.g. Mills & Reeve, 'Letters of request: how to obtain the English evidence you need', 23 July 2019.

⁶⁸ See e.g. Eurojust, 'Joint Investigation Teams (JITs): Role of Eurojust and Europol', accessed 12 Nov. 2019.

Other agreements, such as the 1997 Naples II Convention (on close cooperation between EU customs administrations), and mechanisms for sharing information on counterterrorism—including those established by the UN Office on Drugs and Crime, the Egmont Group and the Financial Action Task Force—can also be used.⁶⁹

Good practice: share more comprehensive information through the existing channels for licence denials and customs controls

The various mechanisms for sharing information on export licence denials that have been created at the EU and multilateral regime levels could be used far more effectively by including information on both the consignees involved and the reasons for the denial. The value of these information exchanges could also be improved by ensuring that contents are made available to both licensing and enforcement officials at the national level.

Specific challenges associated with catch-all controls

Article 4 of the EU Dual-use Regulation establishes controls on the export of dual-use items that are not included in the EU export control list where those items are, or may be, intended to have a military end-use in an embargoed state or be used in connection with any stage of the development of WMD or as spare parts for illegally supplied military items. These are known as catch-all controls. Pursuant to Article 4, national authorities in EU member states can place controls on unlisted items and exporters are obliged to notify their national authorities if they are aware that they are exporting unlisted items that are intended for a proscribed use. Catch-all provisions differ from state to state. Even in the EU, where they are defined in a directly applicable regulation, there is certain scope for national discretion, and actual implementation varies considerably between states. Many of the challenges highlighted in this paper—and specifically those related to proving intent or end-use—are particularly problematic in the case of the violation of catch-all provisions.

Cases involving catch-all provisions are rare due to the serious challenges they pose. These challenges include the following: (a) linking exports to a WMD programme; (b) demonstrating knowledge of the offence; (c) making courts understand how catch-all controls work; (d) establishing what information should be included in a catch-all notification issued to an exporter to inform that exporter about a licensing requirement for an unlisted item; (e) determining how to inform the exporter; (f) ascertaining whom to inform or to whom to convey knowledge; and (g) determining whether intelligence information can be used when imposing a catch-all notification and whether this information could (or would) need to be revealed to the recipient of the notification.⁷⁰

As already noted, catch-all offences can occur in cases where national authorities make exporters aware of a possible misuse and in cases where exporters themselves become aware of a possible misuse. In a court case, the former tends to be easier to prove than the latter but even proving in court that the national authority informed the exporter of the possible misuse has been problematic when the delivery of the catch-all notification could not be proven. In addition, the phrasing of the notification letter might be considered as insufficiently precise to serve as evidence in court or, in the case of a company, it might be difficult to prove that a particular person at the company

⁶⁹ See European Union, 'Close cooperation between EU customs administrations (Naples II Convention)', updated 14 Nov. 2016; UN Office on Drugs and Crime (UNODC), *Supporting Legal Responses and Criminal Justice Capacity to Prevent and Counter Terrorism* (UNODC: Vienna, 2018), pp. 25–28; Egmont Group, 'About', [n.d.]; and Financial Action Taskforce (FATF), 'About', [n.d.].

⁷⁰ Leenman and Leenman (note 4).

had seen the information.⁷¹ Moreover, the fact that the Dual-use Regulation's catch-all provision is directly applicable law across the EU does not necessarily mean that violations automatically constitute an offence under national law in member states. For example, the UK has to introduce specific legislation to incorporate breaches of EU regulations into national criminal law. Additional complications arise because a catch-all notification issued by a national authority is applicable only in that EU member state and can be circumvented by exporting from another member state. Similarly, EU member states may have different interpretations of the EU control list's technical parameters and their application to individual items, which may lead to differences in member states' licensing requirements for the same item, despite the fact that these requirements are based on the same EU regulation.⁷²

Good practice: increase consistency in the interpretation and application of catch-all controls

Some efforts have been made to address these issues by improving information exchange in the EU and increasing consistency of the interpretation of catch-all controls through peer reviews. In addition, the creation of an enforcement working group, as proposed during the ongoing review of the EU dual-use legislation, may help to deal with some of the obstacles posed by catch-all controls (see chapter 5). However, improvements in this area remain a work in progress.

Good practice: (raise) awareness in the licensing authority that its activities and documents may become evidence in order to prove knowledge or intent (see above)

Specific challenges associated with brokering controls

In the EU context, brokers arrange or negotiate the movement of items (or technology) between third countries (i.e. non-EU states). However, the controls on brokering activities are applied by the EU member state in which the broker is resident or established, or from which the broker holds a passport. The fact that the items do not cross the borders of that state means that breaches of controls on brokering activities pose particular obstacles to investigation or prosecution. Nonetheless, a number of cases have been successfully prosecuted by EU member states and some—specifically those from the UK—highlight the main challenges and potential areas of good practice.⁷³

Challenge: circumvention of limited brokering controls

Although most EU member states have regulated brokering of military items through national legislation for some time, controlling the brokering of dual-use items is more recent and, for most countries, is a result of the EU Dual-use Regulation of 2009.⁷⁴ Article 5 of the regulation requires an authorization for brokering services involving dual-use items contained in the EU control list if the broker has been informed by the member state's competent authorities that the items in question are or may be intended

⁷¹ Bauer, S. and Wetter, A., 'Comparing sanctions and prosecutions related to export control violations in the EU', Memorandum submitted to the UK Parliament Quadripartite Committee, 16 Mar. 2007.

⁷² Bauer (note 3).

⁷³ See e.g. British Government, Department for International Trade, Export Control Joint Unit, 'Notice to exporters 2019/06: UK exporter punished for brokering goods without a licence', 14 May 2019.

⁷⁴ Article 2(5) of Council Regulation 428/2009 (note 9) defines 'brokering services' as 'the negotiation or arrangement of transactions for the purchase, sale or supply of dual-use items from a third country to any other third country, or the selling or buying of dual-use items that are located in third countries for their transfer to another third country'. A 'broker' is defined as 'any natural or legal person or partnership resident or established in a Member State of the Community that carries out services defined under point 5 from the Community into the territory of a third country'.

for use in connection with WMD.⁷⁵ If a broker is aware of such intended use, he or she must notify the authorities who will then decide whether an authorization is required. The concept thus resembles the wording of the catch-all provision for unlisted items (Article 4). As noted above, the EU regulation applies only to brokering activities related to the transfer of items between two non-EU states and to a broker acting from EU territory. This can be circumvented by a broker conducting the activities (which might be limited to a series of telephone calls) from outside EU territory.

Good practice: adopt extraterritorial application of brokering controls

To avoid easy circumvention of Article 5 or a similar provision by the broker acting from non-EU territory, states could adopt extraterritorial application of the controls so that they apply to citizens, permanent residents or organizations registered in a state, regardless of their physical location during the brokering activities.⁷⁶ However, in considering whether to adopt extraterritorial controls, states should be mindful of all the potential consequences, particularly in terms of their capacity to ensure that the controls are effectively implemented and the possible creation of overlapping compliance obligations on brokers or exporters.⁷⁷ In addition, a state may choose to regulate some brokering activities of dual-use items located on EU territory and not just movements between third countries, as is the case for the Netherlands.⁷⁸

Challenge: detection, investigation and prosecution of illegal brokering activities

As with ITT controls (see below), the enforcement of brokering controls demands an approach that differs from classic export controls because border controls and physical inspection are not applicable.⁷⁹ Identifying brokers who might be involved in illegal activities is a challenge in itself. Moreover, at the time that a potentially undesirable brokering activity is detected, it may be too late to inform the broker of a possible misuse since the brokering activity may already have taken place. In this case, the activity constitutes an offence only if the broker was aware at the time of the activity of the possible WMD end-use. Investigating and prosecuting a third-country-to-third-country transaction in combination with the challenges of proving knowledge of end-use is a considerable task. Moreover, despite the requirement on brokers to inform the authorities of a possible WMD end-use, they are unlikely to do so in reality as this could jeopardize the transaction.

Good practice: conduct systematic audits or supervisory inspections; these can be a useful first step to identify relevant actors

Information about possible brokers can be obtained from open sources (such as the internet, chambers of commerce and trade associations) and through audits of dual-use and arms exporters.⁸⁰ International cooperation and information sharing are other

⁷⁵ Although the EU-wide requirements on brokering services relate only to WMD, member states may apply additional brokering controls on items with a military end-use in an embargoed destination or on spare parts for previous illegal exports.

⁷⁶ E.g. under German legislation this is provided for in Section 18(10) of the Foreign Trade and Payments Act (note 22).

⁷⁷ These and other challenges related to the implementation of extraterritorial export controls are explored in Arnold, A., 'Solving the jurisdictional conundrum: how US enforcement agencies target overseas illicit procurement networks using civil courts', *Nonproliferation Review*, vol. 25, no. 3–4 (2018).

⁷⁸ Netherlands House of Representatives, 'Regels inzake de controle op diensten die betrekking hebben op strategische goederen (Wet strategische diensten)' [Rules on the control of services related to strategic goods (Strategic Services Act)], Kamerstukken II, 2010/2011, 32665, no. 3, 2 Mar. 2011.

⁷⁹ Leenman and Leenman (note 4).

⁸⁰ Leenman and Leenman (note 4).

important elements that could help to support the detection of activities taking place in third countries that might constitute an offence under an EU member state's national law. In addition, good cooperation between licensing, enforcement and intelligence authorities at inter- and intrastate levels could enable the detection of illegal brokering activities and support their investigation and prosecution. Different organizations have access to different types of information and information sources; by bringing these together and sharing them with other organizations, new opportunities may be created to identify brokers that are involved in illegal activities as well as to gather evidence that may be used to prove knowledge.⁸¹

Specific challenges associated with ITT controls

In the context of export controls, 'technology' has a very specific meaning. It is defined as 'specific information which is required for the "development", "production" or "use" of a controlled item'.⁸² Technology controls are viewed as being a particularly challenging aspect of export controls. The biggest problem is that, unlike other controlled items, technology can take an intangible form, such as the knowledge in a person's mind, and be transferred through intangible means, such as by email or a telephone call. It is therefore very difficult to detect, investigate and prosecute exports of this type. To date, there do not appear to have been any cases in which violations of ITT controls have been prosecuted by an EU member state, which makes identifying good practices in this area problematic. Nonetheless, it is an issue that is under consideration and discussion by national officials, and a number of guidance documents have been produced that highlight certain aspects on which states could focus their efforts.⁸³

Challenge: detecting ITTs

The traditional export control tools do not work for ITTs because of legal and technical challenges. A different toolbox is thus required. ITT flows cannot be detected through physical checks—and even the illegal export of physical goods may escape detection, as mentioned above. Particular issues in the field of ITT that make violations difficult to detect, investigate and prosecute include the lack of physical goods, the absence of a paper trail and the wide range of means through which ITT can occur outside of business transactions (e.g. academic exchanges) as well as during mergers and acquisitions.⁸⁴ In the EU, controlled items are subject to a licence whether exported physically (e.g. on a CD-ROM or as a printed report) or electronically. However, detecting unlicensed exports via these means is very problematic. For example, uncovering controlled technology on a flash drive carried by a person travelling between states requires (a) a check of the particular individual; (b) a check of the information on the flash drive; and (c) the capability to recognize that the information stored on the device is controlled technology. A successful detection is extremely unlikely in this scenario unless it is based on intelligence information or undertaken through a project-based approach with the assistance of a specialist who would be able to review the data and determine the nature of the information. In the case of ITTs via electronic means—such as email or remote download—or via person-to-person contact, the barriers to

⁸¹ Leenman and Leenman (note 4).

⁸² See e.g. Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, 'List of Dual-Use Goods and Technologies and Munitions List', Dec. 2018, General Technology Note, p. 3.

⁸³ For more information see Bromley, M. and Maletta, G., *The Challenge of Software and Technology Transfers to Non-proliferation Efforts: Implementing and Complying with Export Controls* (SIPRI: Stockholm, Apr. 2018).

⁸⁴ See e.g. Bromley and Maletta (note 83).

detection are even harder to overcome. Intercepting such transfers would require some form of data monitoring or surveillance through means such as telephone and computer interception. Even within the EU, states vary enormously in terms of the extent to which they have the legal powers and technical expertise necessary to carry out such an operation.

Good practice: conduct company audits as a means of complementing border controls and creating effective enforcement

While an ITT may not leave the same kind of paper trail as a physical export, there may still be some form of paper or, perhaps more importantly, electronic trail that can be uncovered by auditors with the appropriate skills and experience. However, few countries currently have auditors specialized in the particularities of dual-use and arms trade control law, let alone a dedicated and well-resourced audit strategy for dual-use and arms trade. Offences can be detected through a combination of routine, ad hoc (based on a risk analysis regarding a specific item or company) and thematic audits at the premises of exporters or traders. Since ITTs can also be undertaken outside of commercial entities, such as by universities and individual researchers, effective prevention and enforcement in this area require a completely different set of tools.⁸⁵

Audits offer ‘the possibility to check multiple exports instead of stopping and checking one consignment at the moment the shipment arrived at the border’.⁸⁶ They are also ‘a good opportunity to test certain risks within a particular trade sector or with regard to particular end-use/end-users’.⁸⁷ In addition, they enable authorities to assess the reliability of companies more effectively and provide possibilities to correct non-compliance—not only for intentional breaches, but also for unintended breaches.⁸⁸ Such audits therefore also have a prevention function.

However, to be able to conduct these compliance checks, the relevant targets must be identified. In many cases those who export controlled physical items also export controlled intangible technology. Thus, auditors will need to focus not only on physical items, but also on the related technology to detect ITTs. However, they would also need to expand audits on software and technology beyond the classical export industry to the research industry and academia.⁸⁹

Conducting audits related to ITT demands a number of adjustments to auditing techniques. First, the data transferred is often of a highly technical nature that can be assessed and categorized only by specialists. Second, determining whether technology has been exported is particularly challenging since no customs declaration or transportation documents are available. If the transfer has been made via email or cloud computing services, log files could be checked, but this would need to be performed by experts in electronic data processing. Finally, the sheer volume of intracompany and intercompany information transferred makes detection very difficult.⁹⁰

Good practice: hire specialized information technology forensics staff

Potential ITT evidence can be gathered from, among other things, emails, downloads, help-desk reports, log files, invoices and payments. The detection of ITTs therefore requires specialized staff (either internal or external consultants). Some countries,

⁸⁵ Bromley and Maletta (note 83).

⁸⁶ Leenman and Leenman (note 4).

⁸⁷ Leenman and Leenman (note 4).

⁸⁸ Leenman and Leenman (note 4).

⁸⁹ Leenman and Leenman (note 4).

⁹⁰ Leenman and Leenman (note 4).

such as Germany and the Netherlands, have such expertise.⁹¹ Where such expertise is not immediately available, states could look to draw upon specialized information technology forensics staff who are already employed by a national investigation body but who are focused on other crimes such as money laundering or tax evasion.

Challenge: unclear legal definitions

Some of the legal concepts associated with ITT controls are open to different interpretations. For example, Article 2 of the Dual-use Regulation states that the '(t)ransmission of software and technology by means of electronic media, fax or telephone to destinations outside the Community should also be controlled'. However, it is unclear if and how this obligation applies to situations in which technology is being shared between different branches of the same company or stored via cloud computing services. Among the questions that arise are (a) whether the act of uploading or downloading controlled software or technical data should be subject to export controls; (b) whether the location of the server or the entity downloading the data is the main point of concern; and (c) whether the user or the provider of cloud computing services is the entity that should be subject to licensing requirements. National standards among EU member states on these questions differ and, in some cases, are not well defined.⁹² The Nuclear Technology Note in the EU Dual-use Regulation states that technology 'directly associated with' items listed in Category 0 of Annex I are subject to control. Moreover, according to all of the export control regimes, technology controls do not apply if the technical data, knowledge or technical assistance in question is 'in the public domain' or refers to 'basic scientific research'. However, the terms 'directly associated with', 'in the public domain' and 'basic scientific research' all lack agreed definitions. This leads to differences in the way ITTs are made subject to control and the way controls are applied at the national level, which may create difficulties when it comes to the investigation and prosecution of export control violations.⁹³

Good practice: clarify key terms through the use of more precise language in guidance documents, legislation and court rulings

Efforts are being made to establish more precise definitions of some of the key terms, which would provide a basis for clearer language in national legislation or accompanying guidelines. For example, the ongoing review of the Dual-use Regulation has the potential to result in new language that could help to clarify these issues or create processes that could lead to the development of new guidance material (see chapter 5).

⁹¹ Findings from SIPRI's workshop on the detection, investigation and prosecution of export control violations, June 2019.

⁹² Bromley and Maletta (note 83), pp. 23–24.

⁹³ E.g. the German Federal Office for Economic Affairs and Export Control (BAFA) guidelines on export controls and academia indicate that basic scientific research is exempt from export controls because Article 5 of the German Constitution guarantees the freedom of research. BAFA, *Export Control and Academia Manual* (BAFA: Eschborn, Feb. 2019), pp. 65–68. However, the outcome of the so-called Fouchier case (relating to the publication of virology research) in the Netherlands indicates that, under Dutch law, the 'basic scientific research' exemption must be interpreted narrowly due to the EU Dual-use Regulation's goal of preventing proliferation. See District Court of Haarlem, Case AWB 13/792, 20 Sep. 2013 (unofficial translation); and SIPRI and Ecorys (note 24), pp. 86–88.

4. Case studies and lessons learned

a. Export of machine tools from Spain to Iran

On 1 April 2014 four individuals were arrested by Spain's Civil Guard for attempting to export dual-use items to Iran in breach of EU sanctions on Iran and the Dual-use Regulation.⁹⁴ The suspects (one Iranian national and three Spanish nationals) were trying to export two industrial metal-forming machines and associated technology that could be used to manufacture missile shells or parts for gas centrifuges used for enriching uranium.⁹⁵

The police operation, named *Terracota*, led to searches of several private residences and company headquarters in Tarragona and Palma de Mallorca. The police seized the two metal-forming machines, currency in euros and Iranian rials (equivalent to a total of around €10 000), documentation relating to the export and sale of military and dual-use goods, and several computer storage devices.⁹⁶ The *Terracota* operation began when the Civil Guard detected—within the framework of other export control operations and in cooperation with the UK's Her Majesty's Revenue and Customs (HMRC) and Metropolitan Police Service—the transfer of the two industrial machine tools from the UK to Spain with the purpose of hiding their intended unlicensed export to Iran.⁹⁷

The Foreign Trade Act (referred to as Law 53/2007) does not make provision for a penalty system.⁹⁸ Instead, Article 10 of Law 53/2007 states that 'violations of this law that are constitutive of crime, failure or administrative offence shall be governed as provided in the criminal code and the special legislation for the suppression of smuggling'. The suspects were thus charged with the crime of smuggling dual-use material in violation of the 2011 Anti-smuggling Act, and the crimes of membership of a criminal organization and money laundering in violation of the 1995 Criminal Code—charges that can bring up to six, eight and five years' imprisonment respectively.⁹⁹ While the Iranian national was remanded to prison pending trial, the three Spanish nationals were released on the condition that they would not leave the country and would report regularly to the authorities.¹⁰⁰ As of late November 2019, the case remained in the pre-trial phase.

The *Terracota* operation is one of a series of investigations conducted by the Spanish authorities since 2011, aimed at tackling the illegal export of military and dual-use items to Iran.¹⁰¹ Two earlier investigations involving attempted exports to Iran have led to a court judgment: operation *Kakum* and operation *Alfa*.¹⁰² In each case the company attempting to make the export was fined. The owner of the company involved in the *Alfa* operation was also given a prison sentence.

⁹⁴ Spanish Civil Guard, 'Desarticulada una red que pretendía enviar a Irán equipos industriales susceptibles de ser empleados para fabricar misiles' [Dismantled a network that intended to send Iran industrial equipment likely to be used to manufacture missiles], 7 Apr. 2014.

⁹⁵ Spanish Civil Guard (note 94).

⁹⁶ Spanish Civil Guard (note 94).

⁹⁷ Spanish Civil Guard Press Office, Communication with the authors, 8 Apr. 2019.

⁹⁸ Ley 53/2007, de 28 de diciembre, sobre el control del comercio exterior de material de defensa y de doble uso [Foreign Trade Act on defence and dual-use material], 28 Dec. 2007.

⁹⁹ Spanish Civil Guard (note 94); Ley Orgánica 6/2011, de 30 de junio, por la que se modifica la Ley Orgánica 12/1995, de 12 de diciembre, de represión del contrabando [Anti-smuggling Act], 30 June 2011, Article 3(1); and Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal [Criminal Code], 23 Nov. 1995, Articles 301 and 570.bis.

¹⁰⁰ CNN, 'Spain arrests four accused of attempting to export equipment to Iran', 8 Apr. 2014.

¹⁰¹ These include operation *Piraña*, operation *Altixatu* and operation *Nam*. *El Mundo*, 'El "Irangate" español' [The Spanish 'Irangate'], 19 July 2015.

¹⁰² Bilbao Criminal Court no. 4, Final Judgment, Case 192/2014, 4 June 2014; Bilbao Criminal Court no. 1, Final Judgment, Case 134/2015, 4 May 2015; and *El Mundo* (note 101).

Operation *Alfa* focused on a company, Fluval SL, that operated with front companies in the United Arab Emirates (UAE) to ship items to Iran.¹⁰³ The investigation was launched after the Spanish authorities detected a decrease in the number of export requests submitted by the company.¹⁰⁴ In January 2013 two people were arrested in Vizcaya, close to the French border, and were accused of illegally exporting dual-use Inconel 625 valves to Iran. Sentencing took place on 4 May 2015: the court ordered Fluval to pay a €5 million fine and prohibited it from (a) obtaining public subsidies for 7 months and 15 days; and (b) exporting Inconel 625 valves to Iran either for 6 months or until such time as EU Council Regulation 267/2012 on restrictive measures against Iran was no longer in force, whichever was longer.¹⁰⁵ The court sentenced the owner of the company to two years' imprisonment and a €3 million fine. However, the sentences are provisional because the case has gone to appeal.

The cases demonstrate the complexity of the investigations and the associated process of bringing prosecutions. For example, the arrests under the *Terracota* operation took place in 2014 but, as of late 2019, the case had still not gone to trial. The cases also highlight the discrepancies in the penalties attached to violations of export controls in EU member states. Similar cases in other EU member states have led to longer prison sentences for company personnel (see chapter 2). Sentencing guidelines under the Anti-smuggling Act are based on the financial value of the goods being shipped, which may be appropriate for other types of contraband but is not necessarily—and in fact usually is not—a useful criterion for judging the significance of export control violations.¹⁰⁶ Creating a special dual-use legislation sanctioning system under Law 53/2007 might help to align Spanish legislation with the EU Dual-use Regulation.¹⁰⁷

b. Export of gas turbines from the Netherlands to Iran

On 18 February 2019 the Court of Maastricht in the Netherlands convicted the company Euroturbine BV, a Dutch supplier of gas turbines, as well as its director and two employees, for the unlicensed export of gas turbine components to Iran.¹⁰⁸ The exports occurred from 2008 to 2010, after the tightening of the UN and EU sanctions against Iran because of concerns over its nuclear programme.¹⁰⁹ During this period, the company had applied for licences for the export of gas turbine components to Iran.¹¹⁰ However, these licences were denied by the Dutch Government, which issued a catch-all notification to Euroturbine on 10 February 2009. This decision was based on information from the intelligence services that the Iranian Ministry of Energy and its associated companies were involved in proliferation-sensitive activities.¹¹¹

Instead of complying with the licensing obligation pursuant to the catch-all notification, the company, whose income largely depended on exports to Iran, exploited its

¹⁰³ Spanish National Police, 'La Comisaría General de Información detiene a dos personas y desarticula una red de tráfico de material destinado al desarrollo del Programa Nuclear Iraní' [The General Commissariat of Information arrests two people and dismantles a network trafficking material intended for the development of the Iranian nuclear programme], 11 Jan. 2013.

¹⁰⁴ Sánchez-Cobaleda (note 26), p. 292.

¹⁰⁵ Article 2(2)(c)(1°) of the Spanish Anti-smuggling Act (note 99) defines the crime and Article 3 sets out the penalty for an individual and a company.

¹⁰⁶ Sánchez-Cobaleda (note 26), p. 282.

¹⁰⁷ Sánchez-Cobaleda (note 26), p. 295.

¹⁰⁸ Buchholz, R., 'Celstraf en boete voor medewerkers Euroturbine (Venlo) wegens illegale export' [Imprisonment and fine for Euroturbine employees (Venlo) for illegal exports], *WijLimburg*, 18 Feb. 2019.

¹⁰⁹ UN Security Council Resolution 1747, 24 Mar. 2007; and Council Common Position 2007/246/CFSP of 23 April 2007 amending Common Position 2007/140/CFSP concerning restrictive measures against Iran, *Official Journal of the European Union*, L106, 24 Apr. 2007, pp. 67–75.

¹¹⁰ Netherlands Public Prosecution Service, 'Gevangenisstraffen tot drie jaar geëist vanwege uitvoer gasturbine onderdelen naar Iran' [Prison sentences of up to three years demanded for export of gas turbine components to Iran], 30 Oct. 2018.

¹¹¹ District Court of Limburg, Case 04/990005-09, 18 Feb. 2019.

network of shell companies in Bahrain, France, Germany, Saudi Arabia and the UAE to circumvent Dutch legislation and deliver the items to Iran.¹¹² The goods, which included centrifugal compressors, ovens, moulds, blades and control panels, were all destined for companies connected to the Iranian Government.¹¹³ The investigation conducted by the Fiscal Information and Investigation Service (Fiscale inlichtingen- en opsporingsdienst, FIOD) began after information was provided by the General Intelligence and Security Service (GISS) on the acquisition by Iran of materials and technology for the manufacture of WMD, including gas turbine parts, from the Netherlands.¹¹⁴

The director and employees were arrested in 2010 but the trial did not begin until 2018, mainly because of the complexity of the transactions and the need for wide-ranging cooperation between the Dutch authorities and those in other countries.¹¹⁵ The defendants were charged with the offences of exporting dual-use materials without authorization, failure to inform the Dutch authorities about an export apparently destined for an authorized European third country while aware that the real end-user was Iran, money laundering, and income tax fraud.¹¹⁶ During the trial, the defendants sought to question the legality of the catch-all control and the way it had been applied. However, the court was satisfied that the prosecution had successfully demonstrated the legal basis of the control and the appropriateness of its use.¹¹⁷

Euroturbine was fined €500 000 and an affiliated company based in Bahrain was fined €350 000.¹¹⁸ Euroturbine's director, Parviz T., was sentenced to 12 months' imprisonment, 11 of which were suspended, and 240 hours of community service.¹¹⁹ The two employees, Jan H. and Nadia H., were sentenced to 8 months' imprisonment, 7 of which were suspended, and 180 hours of community service.¹²⁰

As noted above, it took around eight years for the case to come to trial. Although the delay was partly because of the number of offences involved (including tax fraud and money laundering), it clearly highlights the difficulties that investigators and prosecutors can face when attempting to unravel complex transactions in several countries, which also requires effective international cooperation. Moreover, the defendants' questioning of the legal basis of the charges against them demonstrates how such proceedings can become testing grounds for certain legal principles, particularly when charges are being brought under a law for the first time or when courts have a limited experience with cases of a similar nature. In addition, the case draws attention to the relevance of collaboration and information sharing between different national agencies, such as in this instance the GISS and the FIOD.

c. Export of firearms from Germany to Colombia

On 26 February 2019 the Court of Kiel, in northern Germany, began a trial against the arms manufacturer Sig Sauer.¹²¹ The Sig Sauer name is used by two sister companies,

¹¹² Netherlands Public Prosecution Service (note 110); and Buchholz (note 108).

¹¹³ Spierings, L., 'OM eist miljoenen van Euroturbine (Venlo) voor handel met Iran' [OM demands millions from Euroturbine (Venlo) for trade with Iran], *WijLimburg*, 2 Oct. 2018; and Netherlands Public Prosecution Service (note 110).

¹¹⁴ Netherlands Public Prosecution Service (note 110); and Verloop, J., 'Lessons from the Euroturbine case: global trends and enhanced due diligence essential to safeguard your business', *Association of Certified Sanctions Specialists*, 21 Feb. 2019.

¹¹⁵ Verloop (note 114).

¹¹⁶ Verloop (note 114); and Netherlands Public Prosecution Service (note 110).

¹¹⁷ Leenman and Leenman (note 4).

¹¹⁸ Associated Press, 'Dutch company fined for exporting turbine parts to Iran', 18 Feb. 2019.

¹¹⁹ Buchholz (note 108).

¹²⁰ Buchholz (note 108).

¹²¹ Deutsche Welle, 'Trial of German gunmaker Sig Sauer "illegal weapons shipments" begins', 26 Feb. 2019.

headquartered in Germany and the United States respectively. The German prosecutor accused Ron Cohen, the chief executive officer (CEO) of the US company, and two executives of the German company (Michael Luke and Robert Lacknermeier), of illegally exporting 36 000 pistols to Colombia in violation of German export control law.¹²²

In 2009 the US company made a deal with the Colombian National Police to deliver firearms worth €270 million.¹²³ Because of production problems at its US facility, the US company turned to its German sister company for help.¹²⁴ Although L&O Holding, a conglomerate based in Germany, owns both the German and US Sig Sauer companies, they appear to operate as independent entities.¹²⁵ Between 2009 and 2011, Sig Sauer manufactured at least 47 000 SP 2022 pistols in its German plant, which were shipped to the US factory in New Hampshire. Of these firearms, at least 38 000 were finally delivered to Colombia.¹²⁶

Sig Sauer was accused of having concealed the final destination of the weapons by submitting false end-use certificates to the German export authority—the Federal Office for Economic Affairs and Export Control (Bundesamt für Wirtschaft und Ausfuhrkontrolle, BAFA)—which named the USA as the final destination.¹²⁷ German arms export control rules (the 1961 Foreign Trade and Payments Act, the 1961 War Weapons Control Act, and the political principles adopted by the German Government in 2000) are very restrictive, and an application by Sig Sauer for exports of firearms to Colombia, a country plagued by a decades-long civil war, would probably have been denied.¹²⁸

Since 2013, customs investigators in Germany had suspected Sig Sauer of illegally exporting weapons.¹²⁹ However, it was only in 2014 that information about the Sig Sauer deal with Colombia became public due to the actions of various whistle-blowers, including an employee of the US company, who shared information with the German non-governmental organization (NGO) Aktion Aufschrei: Stoppt den Waffenhandel (Action Outcry: Stop the Arms Trade) that Colombia was the final destination of firearms being exported to the USA.¹³⁰ In February 2014 the NGO brought a lawsuit against the German company in relation to the exports.¹³¹ This led to detailed reporting on the case by the German media in May 2014.¹³² Following the publication of these reports, investigators raided the headquarters of the German Sig Sauer, and BAFA suspended the company's export licence pending the result of an audit.¹³³

The investigation was costly and took four years, mainly because of the challenges associated with tracking each weapon in cooperation with the US and Colombian

¹²² Bookman, T., 'CEO of US gun-maker faces jail in Germany', NPR, 25 Feb. 2019.

¹²³ Deutsche Welle (note 121).

¹²⁴ War Resisters' International, 'Sig Sauer CEO faces trial in Germany over arms trade to Colombia', 23 Jan. 2019.

¹²⁵ Deutsche Welle (note 121).

¹²⁶ NDR, 'Illegaler Waffenexport: Deal im SIG-Sauer-Prozess' [Illegal arms export: deal in the SIG-Sauer process], 27 Feb. 2019.

¹²⁷ Bookman (note 122).

¹²⁸ Foreign Trade and Payments Act (note 22); Kriegswaffenkontrollgesetz [War Weapons Control Act], 20 Apr. 1961, as amended; and German Government, 'Politische Grundsätze der Bundesregierung für den Export von Kriegswaffen und sonstigen Rüstungsgütern' [Political principles adopted by the Government of the Federal Republic of Germany for the export of war weapons and other military equipment], Jan. 2000.

¹²⁹ NDR (note 126).

¹³⁰ Bookman (note 122).

¹³¹ Aktion Aufschrei: Stoppt den Waffenhandel, 'Gewinnabschöpfung positiv: Bewährung zu milde: Landgericht Kiel verurteilt Führungskräfte des Waffenherstellers Sig Sauer wegen illegaler Waffenlieferungen nach Kolumbien' [Profit confiscation positive: probation too mild: District Court of Kiel condemns executives of the weapons manufacturer Sig Sauer for illegal arms deliveries to Colombia], Press release, 3 Apr. 2019.

¹³² Kabisch, V., 'Illegale Waffenlieferungen nach Kolumbien' [Illegal arms shipments to Colombia], NDR, 27 May 2014; and Kabisch, V., 'Deal im SIG-Sauer-Prozess wäre fatales Signal' [Deal in the SIG-Sauer process would be a fatal signal], NDR, 26 Feb. 2019.

¹³³ Kabisch, [Deal in the SIG-Sauer process would be a fatal signal] (note 132).

authorities.¹³⁴ The charges carried penalties of up to five years' imprisonment and up to €12 million in fines. However, the final penalties were reduced in return for confessions by the defendants.¹³⁵ On 3 April 2019 the Court of Kiel sentenced Cohen to an 18-month suspended prison sentence and a €600 000 fine. Luke received a 10-month suspended prison sentence and the same financial penalty as Cohen. Lacknermeier was sentenced to a 10-month suspended sentence and a €60 000 fine.¹³⁶

The Sig Sauer prosecution highlights the important role that whistle-blowers and media reporting can play in making authorities aware of unlicensed exports of arms and dual-use items as well as providing the information and attention needed to initiate an investigation. In addition, it illustrates that, under German export control law, even in the case that the 'export responsible person' (*Ausfuhrverantwortlicher*) from senior management neither facilitated the unauthorized export nor was directly responsible for it, that person can be convicted of a crime simply on the basis that he or she failed to prevent the export from taking place. The Sig Sauer prosecution also shows the power of the legal instrument of asset confiscation. In this case, the company was forced to pay over €18.5 million in penalties—an unusually large amount when compared with other export control cases in Germany and the wider EU, and one that might serve as a deterrent in the future.

d. Export of chemicals from Belgium to Syria

On 7 February 2019 the Penal Court of Antwerp convicted three Belgian companies and two directors for the export of 168 tonnes of isopropanol to Syria without the required licences.¹³⁷ The chemical is a dual-use item that has several civilian uses but is also an important component of the nerve agent sarin.¹³⁸ Between May 2014 and December 2016, the three companies, AAE Chemie (chemical wholesaler), Anex Customs and Danmar Logistics (responsible for the administrative and logistical aspects, respectively), shipped 24 chemical consignments to Syria, including acetone, methanol, dichloromethane and isopropanol with 95 per cent purity.¹³⁹ According to the Belgian Minister of Finance, Johan Van Overtveldt, whose department is responsible for customs, the defendants declared the goods to Belgian customs as being not subject to a licence, using an incorrect code.¹⁴⁰

The potential shipment of sarin precursor from Belgium to Syria was made public in April 2018 in a story jointly published by Syrian Archive (a collective of human rights activists) and *Knack* (a Flemish-language magazine).¹⁴¹ Syrian Archive began investigating the export of chemicals to Syria after the Organisation for the Prohibition of Chemical Weapons (OPCW) established the use of isopropanol in the

¹³⁴ Aktion Aufschrei: Stoppt den Waffenhandel, 'Deal der Staatsanwaltschaft mit SIG-Sauer-Managern: Schuldgeständnisse führen zu hohen Geld- und milden Bewährungsstrafen' [Prosecutor's deal with SIG-Sauer managers: guilt concessions lead to high monetary and mild probation convictions], 3 Apr. 2019.

¹³⁵ Deutsche Welle (note 121); and Deutsche Welle, 'Sig Sauer: German gun maker execs strike court deal over illegal sales', 3 Apr. 2019.

¹³⁶ Deutsche Welle (note 135).

¹³⁷ Syrian Archive, 'Antwerp court convicts three Flemish firms for shipping 168 tonnes of isopropanol to Syria', 7 Feb. 2019.

¹³⁸ *WorldECR*, 'Belgian companies prosecuted for unlicensed chemical exports to Syria', Apr. 2018; and Organisation for the Prohibition of Chemical Weapons (OPCW), 'OPCW Director-General shares incontrovertible laboratory results concluding exposure to sarin', News release, 19 Apr. 2017.

¹³⁹ Deutch, J. and Clerix, K., 'Belgium illegally shipped 168 tonnes of sarin precursor to Syria', Syrian Archive, 18 Apr. 2018.

¹⁴⁰ Belgian House of Representatives, 'Compte rendu analytique, Commission des finances et du budget' [Analytical report, Finance and Budget Committee], CRABV 54 COM 901, 22 May 2018, pp. 9–10.

¹⁴¹ Clerix, K., 'Isopropanol-schandaal: hoe een grondstof voor gifgas door de handen van de Belgische douane glipte' [Isopropanol scandal: how a raw material for poisonous gas slipped through the hands of Belgian customs], *Knack*, 18 Apr. 2018; and Deutch and Clerix (note 139).

sarin attack in Khan Shaykhun in April 2017.¹⁴² After consulting the UN Comtrade database, Syrian Archive established that Belgium was the only EU member state that had exported propanol or isopropanol to Syria since 2012. However, it was not possible to determine the illegality of the exports directly because propanol and isopropanol share a common customs code (HS 290512), even though only isopropanol is subject to dual-use export controls.¹⁴³ After contacting the Belgian customs, Syrian Archive learned that a criminal investigation was already in progress.

The Belgian customs initiated the prosecution at the end of March 2018 and the trial began on 15 May 2018. The Penal Court of Antwerp sentenced AAE Chemie to a conditional fine of €346 443, of which €50 000 was effective. The company declared bankruptcy on 20 December 2018 for reasons directly linked to the judicial case according to the company's lawyer. Anex Customs received a conditional fine of €500 000, of which €100 000 was effective, and Danmar Logistics received a conditional fine of €75 000, of which €50 000 was effective.¹⁴⁴ The managing director of AAE Chemie, Rolf Rippen, and the managing director of Anex Customs and Danmar Logistics, Herman Van Landeghem, were also sentenced to 4 months' and 12 months' imprisonment, respectively.¹⁴⁵

During the trial, the lawyer representing AAE Chemie argued that the reason why the company had not applied for an export authorization was that the Belgian customs tool, TARWEB, did not mention this requirement.¹⁴⁶ He also stated that the last update to the tool concerning isopropanol occurred one day after Syrian Archive and Knack published their report on the case.¹⁴⁷ The spokesperson of the Belgian Federal Public Service Finance, Francis Adyns, stated that the Belgian customs authority had 'no indication that the isopropanol exported from Belgium ha[d] been used for the production of sarin'.¹⁴⁸

An internal audit of the Belgian customs authority on the subject matter of the case—which was released in January 2019—revealed, among other things, that several of the required physical checks were not undertaken and that procedural information was either lacking or had not been updated.¹⁴⁹ These aspects of the case highlight the need for, and importance of, adequate training, physical controls and regular updates to customs information to facilitate the detection of sensitive items and irregularities in export procedures.

e. Export of valves from Germany to Iran

In 2012 the German Federal Prosecutor General arrested four German nationals suspected of supplying valves to Iran in violation of the EU's embargo on Iran.¹⁵⁰ The deliveries took place during 2010 and 2011 and were part of an order worth several million euros.¹⁵¹ To avoid detection, the exports were declared as shipments to Azerbaijan and Turkey.¹⁵² In fact, the end-user was Modern Industries Technique

¹⁴² Syrian Archive (note 137); and United Nations, Security Council, Letter dated 26 October 2017 from the Secretary-General addressed to the President of the Security Council, S/2017/904, 26 Oct. 2017, paras 84–88.

¹⁴³ Syrian Archive, 'Methodology', 19 Apr. 2018.

¹⁴⁴ Syrian Archive (note 137).

¹⁴⁵ Marks, S., 'Belgian exporters found guilty of sending chemicals to Syria', Politico, 2 July 2019.

¹⁴⁶ Syrian Archive (note 137); and Belgian House of Representatives (note 140), p. 9.

¹⁴⁷ Syrian Archive (note 137).

¹⁴⁸ Deutch and Clerix (note 139).

¹⁴⁹ Syrian Archive (note 137).

¹⁵⁰ Chambers, M., 'Germany arrests four men suspected of busting Iran embargo', Reuters, 15 Aug. 2012.

¹⁵¹ Chambers (note 150).

¹⁵² Chambers (note 150).

Company (MITEC), an entity responsible for the construction of Iran's heavy water reactor in Arak and therefore listed in the EU's Iran embargo.¹⁵³

Initial discussions about the shipments began in 2007 when an Iranian national, Hossein Tanideh, contacted Rudolf Mayer, the owner of a German company named MIT-Weimar, seeking to purchase valves on behalf of MITEC.¹⁵⁴ The first shipments took place in October 2010. During 2011, Tanideh also procured valves from another German company—Bekasar Industrietechnik GmbH—with the assistance of Gholamali Kazemi and Kianzad Kazemi. These shipments were also routed via Turkey.¹⁵⁵

Mayer, the Kazemis and Hamid Khoram, a businessman who acted as a middleman between the Kazemis and Mayer were charged. During the trial, the defendants argued that BAFA had not sent formal letters to the companies to inform them that the exports were unauthorized.¹⁵⁶ Instead, BAFA had warned the main defendant (Mayer) in informal awareness-raising letters, as well as phone calls, about Iran's procurement efforts and that exports of unlisted dual-use items would be potentially subject to catch-all controls.¹⁵⁷ BAFA argued that, at the time of the informal warnings, Mayer claimed that he had received no relevant inquiries, even though it was later established that he had already concluded supply contracts and sample shipments by that point. Based on Mayer's assurances, BAFA had assumed that the informal warnings were sufficient and had therefore not sent a formal export-denial letter.¹⁵⁸ According to the Federal Court of Justice, BAFA's informal awareness-raising letters and telephone calls satisfied the requirements of informing an entity that it may become the target of procurement efforts for an embargoed end-user.¹⁵⁹

In November 2013 Mayer received a three-year suspended sentence and a fine of €106 000, while Gholamali Kazemi received a four-year prison sentence and a fine of €250 000 and Kianzad Kazemi a two-year-and-nine-month suspended sentence. Khoram was given 18 months' probation.¹⁶⁰

Tanideh was arrested by the Turkish authorities in January 2013, but his current whereabouts are unknown.¹⁶¹ A German extradition request remains unfulfilled.¹⁶² According to reports from 2014, the Indian authorities also investigated shipments of valves from India to Tanideh's company in Turkey, IDI. However, the investigation concluded that the Indian company had not violated Indian laws since it did not have knowledge that the goods were to be re-exported to Iran.¹⁶³

The German case highlights the difficulties of investigating and prosecuting cases pertaining to the application of catch-all controls. Notably, the trial demonstrated the importance of issuing clear notifications to exporters of their obligations to apply for licences in cases that involve catch-all controls and of the need to keep detailed records of such notifications should they be required as evidence in court.

¹⁵³ German Federal Court, Case 3 StR 167/14, 14 Oct. 2014.

¹⁵⁴ Iran Watch, 'German authorities sentence four men for supplying Iran with valves for heavy water reactor', 25 Feb. 2015.

¹⁵⁵ Iran Watch (note 154).

¹⁵⁶ Morweiser (note 46).

¹⁵⁷ Morweiser (note 46).

¹⁵⁸ Morweiser (note 46).

¹⁵⁹ Morweiser (note 46).

¹⁶⁰ Iran Watch (note 154).

¹⁶¹ Salisbury, D. and Stewart, I. J., 'Valves for Arak: proliferation case study series', King's College London, Project Alpha Centre for Science and Security Studies, 22 Aug. 2014.

¹⁶² Salisbury and Stewart (note 161).

¹⁶³ Salisbury and Stewart (note 161).

f. Export of aircraft spare parts from the UK to Iran

In October and November 2018 the Southwark Crown Court in the UK convicted three British nationals, Alexander George and Paul and Iris Attwater, for the illegal export of military and dual-use goods, including Russian MiG and US F-4 Phantom parts, to Iran between February 2010 and March 2016.¹⁶⁴ George was charged with having been ‘knowingly concerned in the export of goods with intent to evade the prohibition or restriction on such export’ in breach of the 1979 Customs and Excise Management Act and the 2008 Export Control Order. The Attwaters were charged with knowingly violating the Customs and Excise Management Act.

According to the investigation by the HMRC, which is responsible for enforcing controls on exports of military and dual-use goods, George bought the parts from the USA and shipped them to his companies in Malaysia and the UAE before sending them to Iran.¹⁶⁵ When he became concerned about being investigated, George involved the Attwaters’ company, Pairs Aviation Ltd, to disguise the operation. In 2010, exports from Pairs Aviation had already been blocked because of concerns that the shipment might be diverted to an unauthorized end-user. During the same year, the HMRC questioned George twice, in August and in December, about his involvement in the trade in aircraft parts. However, George denied any association with this trade.¹⁶⁶

The Attwaters knowingly participated in the criminal activity by procuring the US parts and shipping them to George’s companies in Malaysia, which forwarded them to Iran.¹⁶⁷ In an effort to avoid detection, George and the Attwaters added an extra layer to the supply chain and began shipping the items to the Netherlands in the name of another company registered in the British Virgin Islands, Wiky Global Corp, before sending them to Iran via Malaysia.¹⁶⁸ Because of the complex nature of the supply routes, the Crown Prosecution Service had to work closely with the HMRC’s Fraud Investigations Service Unit to reconstruct the trading chain and prove the criminal activity.¹⁶⁹

George was sentenced on 22 November 2018 to two-and-a-half years’ imprisonment and was disqualified from being a company director for nine years. Paul Attwater, who confessed guilt towards the end of the trial, and Iris Attwater each received a six-month suspended prison sentence in addition to being disqualified from being a company director for six years.¹⁷⁰ The estimated profit coming from the illegal activity amounted to more than £5 million (€5.5 million) for George and £500 000 (€555 000) for the Attwaters. An action to recover the money under the 2002 Proceeds of Crime Act was in process at the time of writing.¹⁷¹

One possible lesson from this case is the need to improve systems of information sharing among EU member states on issued and denied export licences. Following the warnings they received in 2010, George and the Attwaters switched their shipping route to the Netherlands; if improved systems of information sharing had been in place, this might not have been possible. One option would be to create a system that allows for individuals or companies that have had licences denied because of concerns about diversion to be flagged among all EU member states. Currently, denials are shared but

¹⁶⁴ HM Revenue and Customs, ‘Pensioner jailed for trafficking fighter jet parts to Iran’, Press release, Mynewsdesk, 22 Nov 2018.

¹⁶⁵ Morris, S., ‘Somerset man jailed for trafficking fighter jet parts to Iran’, *The Guardian*, 22 Nov. 2018.

¹⁶⁶ Morris (note 165).

¹⁶⁷ HM Revenue and Customs (note 164).

¹⁶⁸ Morris (note 165).

¹⁶⁹ HM Revenue and Customs (note 164).

¹⁷⁰ HM Revenue and Customs (note 164).

¹⁷¹ Frost, S., ‘North Somerset man who trafficked military parts to Iran for £5million and broke WMD controls has cash seized by courts’, *North Somerset Times*, 18 Mar. 2019.

mainly for the purpose of identifying ‘essentially identical’ transactions and not for the purpose of drawing other states’ attention to particularly problematic exporters.¹⁷² This could help licensing authorities to be aware when they receive export licence applications from companies that have raised concerns in other EU member states, as happened with Pairs Aviation in this case.

g. Exports of arms from Italy to Iran and Libya

On 31 January 2017 three Italian nationals were arrested by the tax unit of the Italian financial police (Polizia Tributaria della Guardia di Finanza) of Venice following an injunction by the Antimafia District Directorate (DDA) in Naples. Mario Di Leva, Annamaria Fontana and Andrea Pardi, the CEO of Società Italiana Elicotteri (a company specializing in the supply of new and used helicopters and spare parts), were charged with trafficking arms and dual-use items to Libya and Iran between 2011 and 2015 in violation of the arms embargoes on both states.¹⁷³

The illicit trade covered the sale of Soviet-made weapons, including anti-tank and surface-to-air missiles, spare parts for helicopters and various types of ammunition.¹⁷⁴ An additional deal, which was disrupted because of the arrests, reportedly included 3 A129 Mangusta helicopters, a number of MI-17 Soviet assault helicopters, an air ambulance convertible for military use, 12 engine shut-off units for aircraft, 13 950 M14 rifles, and rockets and munitions of various types.¹⁷⁵

The investigation began in 2011 when the Central Service for Organized Crime Investigation (Servizio Centrale Investigazione Criminalità Organizzata) decided to deepen an investigation that had been conducted by the Public Prosecution Department of Naples. The Naples investigation focused on the involvement of the Brenta mafia and the Casalesi clan (Camorra) in training a battalion of Somali mercenaries in the Seychelles, who were believed to be linked to a relative of Abdirahman Mohamud Farole, the former leader of the Puntland autonomous region of Somalia.¹⁷⁶ This investigation led to the discovery of an international arms trade network that orbited around Pardi’s company in Rome.¹⁷⁷

The negotiations and sales of the goods took place in several countries in Africa, Asia and Europe. The products were exported to Iran and Libya without passing through Italian territory.¹⁷⁸ After several years of surveillance, the DDA ordered the arrest of the suspects because they had adopted countermeasures against audio surveillance and were considered a flight risk.¹⁷⁹ During subsequent searches, the DDA found, among other things, an email order for weapons on Di Leva’s computer.¹⁸⁰

¹⁷² Council Regulation 428/2009 (note 9), Article 13.

¹⁷³ *Il Fatto Quotidiano*, ‘Napoli, “vendevano armi a Libia e Iran”: fermate 4 persone. Anche l’ad di Società Italiana Elicotteri’ [Naples, ‘they sold arms to Libya and Iran’: stopped 4 people. Even the CEO of Società Italiana Elicotteri], 31 Jan. 2017; UN Security Council Resolution 1970, 26 Feb. 2011; Council Decision 2011/137/CFSP of 28 February 2011 concerning restrictive measures in view of the situation in Libya, 28 Feb. 2011, *Official Journal of the European Union*, L58, 3 Mar. 2011; and Council Regulation 359/2011 of 12 April 2011 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Iran, *Official Journal of the European Union*, L100, 14 Apr. 2011, pp. 1–11.

¹⁷⁴ *Il Centro*, ‘Traffico internazionale di armi, un arresto a Sulmona’ [International arms trafficking, an arrest in Sulmona], 31 Jan. 2017; Del Porto, D. and Sannino, C., ‘Jafaar e Annamaria: la coppia di San Giorgio a Cremano convertita all’Islam, arrestata per traffico d’armi’ [Jafaar and Annamaria: the couple from San Giorgio a Cremano converted to Islam, arrested for arms trafficking], *La Repubblica*, 31 Jan. 2017; and United Nations, Security Council, Final Report of the Panel of Experts on Libya established pursuant to resolution 1973 (2011), S/2018/812, 5 Sep. 2018.

¹⁷⁵ *Il Centro* (note 174); and United Nations, S/2018/812 (note 174).

¹⁷⁶ *Il Fatto Quotidiano* (note 173).

¹⁷⁷ Del Porto and Sannino (note 174).

¹⁷⁸ *Il Fatto Quotidiano* (note 173); and United Nations, S/2018/812 (note 174).

¹⁷⁹ *Il Fatto Quotidiano*, ‘Armi vendute a Iran e Libia, la società di Pardi aveva assunto la segretaria di Dell’Utri e un ex deputato del Pdl’ [Weapons sold to Iran and Libya, Pardi’s company had hired the secretary of Dell’Utri and a former deputy of the PDL], 31 Jan. 2017.

¹⁸⁰ Del Porto and Sannino (note 174).

The trial began on 27 June 2017. According to the Italian legislation applicable at the time of the violations, arranging the export of weapons without authorization could lead to 3 to 12 years of imprisonment, while arranging the export of dual-use items could lead to imprisonment of 2 to 6 years.¹⁸¹ However, all three defendants were granted a plea bargain: Pardi received a sentence of two years' imprisonment, Di Leva received three years and eight months of imprisonment and a fine of €8000, and Fontana was sentenced to three years and six months and a fine of €7000.¹⁸²

One of the key lessons of the case relates to the difficulties involved with detecting and investigating illicit brokering. In this case, the discovery of the complex proliferation network was only achieved as a secondary consequence of other investigations by the Italian authorities into mafia-related activities. As such, the case underlines the importance of effective lines of communication between different law enforcement bodies. In particular, it demonstrates the need for mechanisms that can ensure that cases involving the illicit exports of arms and dual-use items that are uncovered in the course of investigations into other suspicious activities are identified and passed on to a body that has the knowledge and resources to take them forward.

¹⁸¹ Legge 9 Luglio 1990 n. 185 [Law 9 July 1990 no. 185], *Gazzetta Ufficiale*, no. 163, 14 July 1990, Article 25; and Decreto Legislativo 9 aprile 2003 n. 96 [Legislative Decree 9 April 2003 no. 96], *Gazzetta Ufficiale*, no. 102, 5 May 2003, Article 16.

¹⁸² *Corriere del Mezzogiorno*, 'Armi a Iran e Libia: a giudizio coppia di coniugi napoletani' [Arms to Iran and Libya: in judgment of a married couple from Naples], 3 May 2017; and *Corriere del Mezzogiorno*, 'Traffico di armi, i coniugi di San Giorgio patteggiano la pena' [Arms trafficking, the spouses of St. George bargain the penalty], 13 July 2017.

5. Recommendations for improvements at the EU level

Drawing upon the analyses in chapters 2, 3 and 4, this chapter recommends steps that could be taken at the EU level to strengthen the detection, investigation and prosecution of export control violations. Many of these recommendations are focused on the EU Dual-use Regulation, which is currently in the final stages of a review and ‘recast’ process that began in 2011.¹⁸³ The April 2014 European Commission communication, which outlined the goals for the review, included ‘support effective and consistent export control implementation and enforcement’ in the set of four priorities for the review.¹⁸⁴ The review and ‘recast’ process offers a unique opportunity to achieve some level of standardization and improved information sharing at the EU level, as well as to make a coordinated effort to strengthen investment in enforcement across the EU. However, the recommendations are also focused on the need to create stronger connections between the Dual-use Regulation and other EU policy instruments related to export controls, such as the EU Common Position on arms exports and EU arms embargoes. Making connections between these instruments has long proved challenging. At the national level, sanctions regimes and controls on the export of both military and dual-use items are often implemented by the same authorities, using the same national regulations. At the EU level, however, the European External Action Service (EEAS) and different branches of the European Commission are responsible for overseeing states’ implementation of the relevant policy instruments and organizing the various working groups where member states compare national practices. This makes it difficult to develop joined-up policies or set up shared forums to discuss implementation and enforcement issues.¹⁸⁵

1. Further enhance transparency of national penalties for export control violations and explore greater harmonization

As detailed above, Article 24 of the Dual-use Regulation requires each member state to ‘take appropriate measures to ensure proper enforcement of all the provisions of this Regulation. In particular, [EU member states] shall lay down the penalties applicable to infringements of the provisions of this Regulation or of those adopted for its implementation. Those penalties must be effective, proportionate and dissuasive’. However, member states have interpreted this requirement in different ways, meaning that the types and levels of penalty vary between member states.¹⁸⁶ Although the establishment of offences and penalties is a national competence, the creation of a mechanism through which there can be a more detailed comparison and analysis of national practices may help to develop common perceptions as to what penalties are appropriate. While previous EU documents have included language on strong and potentially more harmonized penalties for breaches of dual-use export control law, this has not resulted in specific efforts beyond a 2005 overview of penalties.¹⁸⁷ In this

¹⁸³ See Bromley, M. and Gerharz, P., ‘Revising the EU Dual-use Regulation: challenges and opportunities for the trilogue process’, SIPRI Commentary, 7 Oct. 2019.

¹⁸⁴ European Commission, ‘Communication from the Commission to the Council and the European Parliament on the review of export control policy: ensuring security and competitiveness in a changing world’, COM (2014) 0244 final, 24 Apr. 2014.

¹⁸⁵ Bauer, S. and Bromley, M., ‘The dual-use export control policy review: balancing security, trade and academic freedom in a changing world’, EU Non-Proliferation Consortium, Non-Proliferation Papers, no. 48 (Mar. 2016), pp. 3–4.

¹⁸⁶ European Commission (note 18).

¹⁸⁷ European Commission, Directorate-General for Trade, Working Party on Dual-use Goods, ‘Report on the answers to the questionnaire DS6/2005 rev 3 on existing sanctions—implementation of Article 19 of Council Regulation 1334/2000’, DS 37/4/2005 Rev. 4, 11 May 2006; and Council of the European Union, ‘Sanctions imposed by EU

regard, the recent publication of a more comprehensive comparison of the penalties imposed by EU member states in connection with export control violations is a welcome initiative.¹⁸⁸ This will help to raise awareness of the penalties states impose for different offences. A necessary next step will be to conduct a more detailed review of how these penalties are being applied at the national level.

Recommendation: conduct a comprehensive comparison of member states' penalties for export violations and consider how realistic it is to push for the harmonization of penalties given the complexities and differences in national legal structures.

2. Create a forum for exchanging information on national enforcement measures

Unlike in the case of the various export control regimes, there is still no EU forum where export control officials can meet to discuss the measures taken at the national level.¹⁸⁹ In connection with the review and 'recast' of the Dual-use Regulation, the European Commission has proposed the creation of an 'Enforcement Coordination Mechanism' under the auspices of the Dual-use Coordination Group (DUCG) 'with a view to establish direct cooperation and exchange of information between competent authorities and enforcement agencies'.¹⁹⁰ A crucial first task for the 'Enforcement Coordination Mechanism' should be the creation of an informal network of investigators and prosecutors to enable bilateral sharing of information. It could also be involved in the regular presentation and exchange of information on past and ongoing cases, and the development of guidelines and good practice documents on how to handle particularly problematic issues, such as catch-all, ITT and brokering controls. Another key task could be the creation of a list of functional counterparts working on enforcement or prosecution issues. Such a list could be used to identify a relevant counterpart in another state, which would be particularly useful in cases when functional counterparts are not from the same type of national agency. As it stands, the EU does not maintain such a list. Although the creation of an 'Enforcement Coordination Mechanism' will no doubt be welcomed by national authorities, its success would be reliant on EU member states ensuring that the national officials with expertise on enforcement are brought to the relevant meetings. To date, the DUCG has mainly served the needs and interests of licensing officials, which means that there has not been much of a focus on enforcement approaches. To enable full participation by all EU member states, it is also important that the meetings of enforcement officers are fully funded, and not dependent on national resources and priorities.

member states for violations of export control legislation', Draft Rev. 14, Sep. 2005. For a summary see Bauer and Wetter (note 71), Appendix A.

¹⁸⁸ European Commission (note 18).

¹⁸⁹ Bauer, S., 'Improvement of EU dual-use export controls in the context of the European Commission's reform proposal', Workshop: Dual-use Trade Controls, European Parliament Directorate General for External Policies, Brussels, 17 June 2015, p. 71.

¹⁹⁰ European Commission, 'Proposal for a Regulation of the European Parliament and of the Council setting up a Union regime for the control of exports, transfer, brokering, technical assistance and transit of dual-use items (recast)', COM(2016) 616 final, 28 Sep. 2016. See also Bauer, S. and Bromley, M., 'Developments in the EU Dual-use and arms trade controls', *SIPRI Yearbook 2017: Armaments, Disarmament and International Security* (Oxford University Press: Oxford, 2017). Article 23 of the Dual-use Regulation sets up a Dual-use Coordination Group, which brings together experts from the European Commission and EU member states to examine any issue concerning the application of export controls with a view to practically improving their consistency and effectiveness throughout the EU.

Recommendation: ensure that national enforcement expertise is properly represented in the Enforcement Coordination Mechanism and make certain that the workings of this group are integrated into the activities of the DUCG.

3. Improve reporting on national enforcement measures under the EU Dual-use Regulation

Article 25 of the Dual-use Regulation requires each member state to inform the European Commission, among other things, about the ‘the measures referred to in Article 24’. The Commission, in turn, is required to review the implementation of the regulation every three years and ‘present a comprehensive implementation and impact assessment report’. This report should include ‘comprehensive information provided on the measures taken by the Member States pursuant to Article 24 and notified to the Commission [by EU member states]’. However, potentially because of a lack of awareness of this requirement, capacity issues or national legal constraints, the amount of information provided as a result of this process has been limited. The Commission published the first of its reports in October 2013 but the information contained in this and subsequent reports on enforcement steps has been very brief.¹⁹¹ The most recent edition—from November 2019—indicated an increase in the amount of information shared. The report states that ‘120 breaches of export control regulations were recorded in 2017, while 130 administrative penalties and 2 criminal penalties were applied by national law enforcement authorities’.¹⁹² One way of improving the scope of this information exchange would be to create a centralized database of export violations at the EU level. Although it might not be possible to share full case data because of privacy reasons, sharing the court rulings would already be a major step forward. Another option would be to expand the scope of the information exchange to the full range of offences that might be of interest to the national licensing and customs officials and prosecutors that would have access to the system. As shown in chapters 3 and 4, many of the cases involving unlicensed exports of dual-use items are not prosecuted as violations of the Dual-use Regulation but as violations of embargoes or customs controls.

Recommendation: expand the requirement to report on national enforcement measures to include all cases involving the unlicensed trade in dual-use goods, rather than just violations of the Dual-use Regulation.

4. Improve reporting on national enforcement measures under the EU arms embargoes

EU arms embargoes also oblige EU member states to share information about cases of export control violations. The EU Council Regulation concerning the sanctions on Iran requires EU member states to share information on ‘violations, enforcement problems and judgments handed down by national courts’.¹⁹³ Equivalent language is

¹⁹¹ European Commission, ‘Report from the Commission to the Council and the European Parliament on the implementation of Regulation (EC) no. 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items’, COM(2013) 710 final, 16 Oct. 2013, pp. 8–9. The report from Dec. 2018 simply states that ‘The DUCG exchanged information on certain specific attempts at the circumvention of controls’. European Commission, ‘Report from the Commission to the Council and the European Parliament on the implementation of Regulation (EC) no. 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items’, COM(2018) 852 final, 14 Dec. 2018.

¹⁹² European Commission (note 18).

¹⁹³ Council Regulation 267/2012 of 23 March 2012 concerning restrictive measures against Iran and repealing Regulation 961/2010, *Official Journal of the European Union*, L88, 24 Mar. 2012, p. 17.

included in most other EU sanctions that are currently in place.¹⁹⁴ Although effective implementation of these commitments clearly presents difficulties for many member states, there has not been any effort to map them or produce guidelines on how they can be overcome. Such challenges include restrictions based on data privacy and on what can be shared about ongoing investigations outside of those directly involved.

Recommendation: review if and how the requirement to report on the enforcement of EU sanctions is being applied and connect this requirement to those in place under the Dual-use Regulation.

5. Build effective links between the various EU mechanisms for sharing information on national enforcement measures

Information-sharing mechanisms also exist in relation to EU customs controls. For example, under the auspices of the Directorate General for Taxation and the Customs Union (DG TAXUD) there is an ongoing process aimed at developing a common risk-management framework for customs procedures.¹⁹⁵ Most recently, in the update to the EU small arms and light weapons (SALW) strategy that was released in 2018, member states committed themselves to ‘improve cross-border cooperation between judicial and law-enforcement authorities’.¹⁹⁶ However, it is unclear if and how these commitments are being implemented at the national level, and whether any steps are being taken to build effective links between them. There is a clear need to strengthen the implementation of these different EU reporting mechanisms with regard to national enforcement measures and the links between them.

Recommendation: consider how to create stronger links between the Enforcement Coordination Mechanism and other existing and proposed EU mechanisms to avoid duplication of effort and create synergies.

6. Adopt clearer and more harmonized language on complex concepts

As noted, there is a lack of agreement about if and how arms and dual-use export controls apply in certain cases, which creates uncertainties and a lack of clarity with regard to the detection, investigation and prosecution of export control violations. This is of particular pertinence to transfers of technology. For example, there are differences with regard to how requirements to control technology that is ‘directly associated with’ a controlled item should be interpreted and how the exemptions for ‘basic scientific research’ and information that is ‘in the public domain’ should be implemented. As part of the review and ‘recast’ of the Dual-use Regulation, the Commission has proposed the creation of a mandate for the development of more detailed guidance material with the aim of harmonizing the interpretation of some of the key legal concepts and terms associated with ITT controls. Specifically, the Commission’s proposed wording of Article 24 states that the ‘Commission and the Council shall, where appropriate, make available guidance and/or recommendations for best practices for the subjects referred to in this Regulation to ensure the efficiency of the Union export control regime and the consistency of its application’.¹⁹⁷

¹⁹⁴ EU guidelines on the implementation of EU sanctions recommend that relevant legal instruments should require member states to provide ‘regular reporting on the implementing measures and enforcement actions’ they have taken. Council of the European Union, ‘Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy’, 5664/19, 4 May 2018, p. 45.

¹⁹⁵ European Commission, ‘Customs Risk Management Framework (CRMf)’, [n.d.], accessed 10 Sep. 2019.

¹⁹⁶ Council of the European Union, ‘Council conclusions on the adoption of an EU strategy against illicit firearms, small arms and light weapons and their ammunition’, 13581/18, 19 Nov. 2018.

¹⁹⁷ European Commission (note 190).

Recommendation: use the recast of the Dual-use Regulation to generate language that aims to bring clarity to the application of controls on software and technology while also creating mechanisms for drafting guidelines to address other areas related to controls on ITT, such as cloud computing.

Recommendation: ensure that the process of drafting these definitions and guidelines is as open and inclusive as possible, and takes account of national legal judgments in relevant cases and the views of all the affected sectors and actors, including prosecutors.

7. Make detection, investigation and prosecution a key focus of internal capacity-building and outreach efforts

There are currently no sustained efforts within the EU to strengthen capacity on export controls—neither on technical licensing aspects nor on enforcement—although ad hoc seminars have taken place and proposals to launch capacity-building programmes have been drafted.¹⁹⁸ Implementing the proposed Enforcement Coordination Mechanism and sending enforcement staff to relevant EU and export control regime meetings could be a first step towards connecting and strengthening capacities. However, in order to build capacity across the EU, and have staff available to conduct outreach from more than a few EU member states, dedicated training programmes would need to be established and funded. These could, for example, build on the dedicated training programmes for prosecutors that have been conducted by Germany. The improvement of national capacities in these areas would also help the EU to integrate enforcement work into its outreach and assistance activities. Since 2005, the EU has developed the world's second-largest dual-use trade-control capacity-building programme after the USA, involving countries in Europe, Africa, Asia and the Middle East.¹⁹⁹ Enforcement-related issues have been a part of these outreach efforts for many years. However, such efforts have been constrained by the limited number of officials with enforcement expertise who are available to take part.

Recommendation: devote EU resources to building the capacity of officials in EU member states in areas related to the detection, investigation and prosecution of export control violations.

Recommendation: ensure that enforcement forms a core component of outreach activities and that there is sufficient funding for such efforts.

¹⁹⁸ Bauer (note 189), p. 79; and German Federal Office for Economic Affairs and Export Control (BAFA), 'Final report to the tender related to prepare a study setting out a technical training concept on dual-use export controls submitted by the German Federal Office for Economic Affairs and Export Control (Bundesamt für Wirtschaft und Ausfuhrkontrolle, BAFA)', [n.d.].

¹⁹⁹ See e.g. the EU Outreach in Export Control website. SIPRI conducted the original scoping study for this programme before its later expansion. For the first 10 years, the programme was implemented by the German export licensing authority, the German Federal Office for Economic Affairs and Export Control (BAFA), with a pool of legal, licensing, industry outreach and enforcement practitioners drawn from member states across the EU. A consortium led by Expertise France has been managing the successor programme since September 2015. See Bauer, S. and Mattiussi, J., 'Transforming the EU's approach to outreach and technical assistance in the area of export controls', ed. A. Ricci, *From Early Warning To Early Action? The Debate on the Enhancement of the EU's Crisis Response Capability Continues* (Office for Official Publications of the European Communities, 2008); and Bauer and Bromley (note 185).

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