

WMD-RELATED DUAL-USE TRADE CONTROL OFFENCES IN THE EUROPEAN UNION: PENALTIES AND PROSECUTIONS

SIBYLLE BAUER

I. INTRODUCTION

Enforcing controls on trade in dual-use items in the European Union (EU) has become increasingly challenging in the past decade as the patterns of both legal and illegal trade have become more complex.¹ The use of intermediaries, front companies and diversion or trans-shipment points has multiplied the number and types of actors and activities involved in security-related transfers. Effective enforcement includes detecting and investigating breaches of the relevant legal provisions, and may require their prosecution. However, prosecution of weapons of mass destruction (WMD) proliferation-related offences has proven challenging, as shown in a number of cases taken to court in different EU countries.

Dual-use trade controls are a major component of the EU's 2003 Strategy on the Non-proliferation of Weapons of Mass Destruction (EU WMD Strategy) and the complementary 2008 New Lines for Action by the European Union in Combating the Proliferation of Weapons of Mass Destruction and their Delivery Systems (New Lines for Action, NLA).² The NLA's recommendations regarding punitive action for proliferation-related acts were followed up with very little action at the EU level.

¹ Dual-use items are goods, materials and technologies that may be used for both civilian and military purposes. Most dual-use trade 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 Council of the European Union, Fight against the Proliferation of Weapons of Mass Destruction: EU Strategy against Proliferation of Weapons of Mass Destruction, 15708/03, 10 Dec. 2003, <<http://register.consilium.europa.eu/pdf/en/03/st15/st15708.en03.pdf>>; and Council of the European Union, New Lines for Action by the European Union in Combating the Proliferation of Weapons of Mass Destruction and their Delivery Systems, 17172/08, 17 Dec. 2008, <http://trade.ec.europa.eu/doclib/docs/2008/december/tradoc_141740.pdf>. The Council website also includes biannual reports on implementation of the EU WMD Strategy.

SUMMARY

Enforcing controls on trade in dual-use items in the EU has become increasingly challenging in the past decade as the patterns of both legal and illegal trade have become more complex. Effective enforcement includes detecting and investigating breaches of the relevant legal provisions, and may require their prosecution. However, prosecution of WMD-related offences has proven challenging, as shown in a number of cases taken to court in different EU countries.

This paper explains the legal and political framework for prosecutions in the area of dual-use trade controls, both internationally and in the EU and provides reflections on translating political and legal terms into effective enforcement at the regional and national levels. It also offers insights into specific prosecution cases in a number of EU countries and gives an overview of prosecution challenges derived from these and other cases.

Consistency in terms of penalties is not feasible in the current EU legal setting—and may not even be desirable. Nevertheless, a number of steps could be taken to address current prosecution challenges.

ABOUT THE AUTHOR

Sibylle Bauer (Germany) is Director of the SIPRI Dual-use and Arms Trade Control Programme. Before joining SIPRI in 2003, she was a Researcher with the Institute for European Studies (ULB) in Brussels. Since 2005 she has designed and implemented capacity-building activities in Europe and in South East Asia, with a focus on legal and enforcement issues related to the enhancement of transit, brokering and export controls for dual-use items. Her recent publications include 'Arms trade control capacity-building: lessons from dual-use trade controls' (SIPRI Insights on Peace and Security, March 2013) and chapters in *From Early Warning To Early Action? The Debate on the Enhancement of the EU's Crisis Response Capability Continues* (European Commission, 2008, co-author) and *The Arms Trade* (Routledge, 2010).

This paper identifies the challenges facing effective prosecution of WMD-related trade control offences, and proposes steps that can be taken to address these challenges at the national and EU levels. Section II explains the legal and political framework for prosecutions in the area of dual-use trade controls, both internationally and in the EU. Section III provides reflections on translating political and legal terms into effective enforcement at the regional and national levels. Section IV offers insights into specific prosecution cases in a number of EU countries. Section V gives an overview of prosecution challenges derived from these and other cases. Section VI recommends actions that the EU and EU member states could undertake to address these challenges.

II. THE LEGAL AND POLITICAL FRAMEWORK

International legal framework

As in other policy areas, there are currently no international legal standards regarding penalties for export control or proliferation-related offences. Somewhat vague requirements can be derived from United Nations Security Council resolutions and from the international treaties regarding biological, chemical and nuclear weapons. None of the four export control regimes currently provide guidance on penalties and prosecutions.³

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

³ The Nuclear Suppliers Group was established in 1975. 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 established in 1996. For more information on these groups see the websites of the regimes and the SIPRI Yearbook.

‘to any activity prohibited to a State Party under this Convention undertaken anywhere by natural persons, possessing its nationality, in conformity with international law’. The CWC even requires that each state party ‘shall cooperate with other States Parties and afford the appropriate form of legal assistance to facilitate the implementation’ of these obligations.⁴ The 1972 Biological and Toxin Weapons Convention (BTWC) only provides that

[each] State Party to this Convention shall, in accordance with its constitutional processes, take any necessary measures to prohibit and prevent the development, production, stockpiling, acquisition or retention of the agents, toxins, weapons, equipment and means of delivery specified in Article I of the Convention, within the territory of such State, under its jurisdiction or under its control anywhere.⁵

The 1968 Non-Proliferation Treaty (NPT) does not make reference to enforcement or penalties.⁶

United Nations Security Council Resolution 1540 declares that the proliferation of WMD and their means of delivery are a threat to international peace and security.⁷ The resolution aims to prevent non-state actors from accessing WMD and to counter proliferation more broadly. Among other things, the resolution obliges all UN member states to exercise effective export controls over such weapons and related materials. More specifically, it obliges member states to ‘establish, develop, review and maintain appropriate effective national export and trans-shipment controls’ over nuclear, biological and chemical weapons and their means of delivery, and related items.⁸ This

⁴ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, opened for signature 13 Jan. 1993; entered into force 29 Apr. 1997, <<http://www.opcw.org/chemical-weapons-convention/articles/article-vii-national-implementation-measures/>>, Article VII.

⁵ Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, opened for signature 10 Apr. 1972; entered into force 26 Mar. 1975, <<http://www.opbw.org/>>, Article IV.

⁶ Treaty on the Non-Proliferation of Nuclear Weapons, opened for signature 1 July 1968; entered into force 5 Mar. 1970.

⁷ UN Security Council Resolution 1540, 28 Apr. 2004. This and other UN Security Council resolutions can be accessed at <<http://www.un.org/en/sc/documents/resolutions/index.shtml>>.

⁸ UN Security Council Resolution 1540 defines ‘related materials’ as ‘materials, equipment and technology covered by relevant multilateral treaties and arrangements, or included on national control lists, which

explicitly includes ‘appropriate laws and regulations’ and ‘establishing and enforcing appropriate criminal or civil penalties for violations of such export control laws and regulations’. Individual member states determine the ways in which they will implement these obligations.

UN sanctions on the transfer of dual-use items to the Democratic People’s Republic of North Korea (DPRK, North Korea), Iran and Syria do not include any requirements or even guidance on penalties. For example, UN Security Council Resolution 1737 provides that ‘States shall take the necessary measures to prevent the supply, sale or transfer’ of certain items’, while UN Security Council Resolution 1696 calls on states to prevent the transfer of specified items ‘in accordance with their national legal authorities and legislation and consistent with international law’.⁹

Comparing different countries’ maximum prison sentences for WMD-related dual-use trade control offences is far from straightforward, as many different types of laws have been used when taking cases to court. While the fact that proliferation-related transactions can be legally pursued from many different angles can be an advantage in bringing a case to court, it can also be a sign that trade control legislation may not be sufficient. Depending on the laws that are applicable to specific activities within a given legal system, penalties can vary considerably. For example, in the case of WMD-related charges in Germany, the German War Weapons Control Act may be applicable, in combination with or instead of the Foreign Trade Act that defines and regulates dual-use offences, among others. While prosecutors in the Netherlands usually apply the Economic Offences Act, one individual who supplied chemicals that were used by Saddam Hussein as chemical weapons against Iraq’s Kurdish population was charged with genocide and crimes against humanity.¹⁰ Prosecutors in the United

could be used for the design, development, production or use of nuclear, chemical and biological weapons and their means of delivery’.

⁹ UN Security Council Resolution 1737, 23 Dec. 2006; and UN Security Council Resolution 1696, 31 July 2006.

¹⁰ This was because the export of those chemicals was not in violation of foreign trade legislation at the time of their export. Later exports did not take place from the Netherlands and, even if they had, the statute of limitation would have applied. At the time, dual-use brokering was not subject to control. The individual was acquitted of the Genocide Convention Implementation Act but found guilty of violating the Criminal Law in Wartime Act, in conjunction with the Dutch penal code. District Court of The Hague, Case 09/751003-04, Judgement LJN: AU8685 of 23 Dec. 2005; and Court of Appeal of The Hague, Case 09/751003-04, Judgement LJN: BA673 of 9 May 2007. These and other

Kingdom apply customs legislation—the 1979 Customs and Excise Management Act—when a case concerns an export from the UK.¹¹ One 1998 Swedish ruling was merely concerned with the falsification of documents, rather than a WMD or trade-control specific offence.¹² A recent prosecution in Croatia resulted in a two-year imprisonment and a five-year suspended sentence according to the provisions of Croatia’s ‘Act of exports of dual-use items’.¹³

Countries have chosen a wide range of criminal and administrative penalties in relation to WMD and dual-use trade-related offences. At one end of the spectrum, the death penalty is currently included in the Malaysian Strategic Trade Act of 2010 for breaches of the act where death is the consequence of the action.¹⁴ A wide range of possible prison sentences is available in different jurisdictions. In Austria, life imprisonment is the maximum penalty for contributing to a nuclear weapon if lives are lost as a result of its actual use.¹⁵ Other export control offences were expanded and penalties increased through the revision of the Foreign

rulings can be accessed at <<http://www.haguejusticeportal.net/>>. See also van der Wilt, H. G., ‘Genocide, complicity in genocide and international v. domestic jurisdiction: reflections on the van Anraat case’, *Journal of International Criminal Justice*, vol. 4, no. 2 (July 2006), pp. 239–57; and van der Wilt, H. G., ‘Genocide v. war crimes in the van Anraat appeal’, *Journal of International Criminal Justice*, vol. 6, no. 3 (July 2008), pp. 557–67.

¹¹ For all other detections, including trade controls, the UK uses legislation drafted by the Department for Business Innovation and Skills.

¹² Wetter, A., *Enforcing European Union Law on Exports of Dual-use Goods*, SIPRI Research Report no. 24 (Oxford University Press: Oxford, 2009), p. 101.

¹³ On the case see Micic, I., ‘Croatia’, eds. O. Jankowitsch-Prevor and Q. Michel, *European Dual-Use Trade Controls: Beyond Materiality and Borders* (Peter Lang: Brussels, forthcoming in 2013). The prison terms are up to one year, two to five years, or a minimum of five years, depending on the offence. Act on the Export of Dual-use Items, *Official Gazette* 100/04, and Amendments to the Act on the Export of Dual-use Items, *Official Gazette* 84/08, <<http://kontrolaizvoza.dutp.hr/default.aspx?id=144>>.

¹⁴ Malaysian Ministry of Industry and Trade (MITI), Strategic Trade Act 2010, <http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.section.Section_356e3af1-c0a81573-272f272f-b7977e99>.

¹⁵ Art. 177a of the Austrian Criminal Code establishes the offence of production, processing, development, import, export, transit, acquisition, possession, relinquishment or procurement of nuclear, chemical or biological weapons (‘Kampfmittel’, which literally translates as means of combat). Attempt, participation, assistance or financing are also criminal offences. Art. 64 (4b) of the Criminal Code provides for extraterritorial application to Austrian persons acting overseas. In addition, articles 169 and 170 provide that life imprisonment is the maximum sentence for causing the release of nuclear energy or other ionising radiation as a result of which people are killed.

Trade Act in 2011.¹⁶ The theoretical maximum term is usually different to the actual prison sentence imposed, which in practice tends to be considerably lower (see section IV in this paper).

At the other end of the spectrum, fines can constitute a criminal or an administrative penalty, depending on the legal system and the specific provisions regarding this issue. For example, the Republic of Korea (ROK, South Korea) created a special provision of mandatory export control training (referred to as an ‘educational order’), as a possible consequence of violations.¹⁷ Other options are the revocation of export licenses, loss of access to trade facilitation privileges (e.g. simplified licensing or customs procedures), loss of property rights through confiscation, and the temporary or definitive closure of a company, as is the case in the Netherlands and Slovenia, respectively (see box 1).

The political and legal framework in the European Union

The legal framework for prosecuting WMD-related dual-use offences in the EU is a combination of EU and national laws. The EU Dual-use Regulation is a law that is directly applicable across the EU and includes the control list of dual-use items for which a licence is required for export and, in certain limited cases, brokering and transit.¹⁸ EU member states are responsible for implementing and enforcing these provisions. Licensing and product classification decisions remain within national competence, as does their enforcement.

¹⁶ Außenhandelsgesetz 2011 [Foreign Trade Act 2011], *Bundesgesetzblatt der Republik Österreich* [Official Gazette of the Republic of Austria], 28 Apr. 2011, articles 79–88, <http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2011_I_26/BGBLA_2011_I_26.pdf>.

¹⁷ The ‘educational order’ is contained within Article 49 of the Foreign Trade Act. An English version of the act can be found at <<http://www.yestrade.go.kr/>>.

¹⁸ EU Regulation 428/2009 regulating the export, brokering and transit of dual-use items, including software and technology, entered into force on 27 Aug. 2009. The law substantially expanded the scope of dual-use trade activities subject to control, in line with the requirements of UN Security Council Resolution 1540 regarding brokering, transit and trans-shipment controls. Council Regulation (EC) no. 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, *Official Journal of the European Union*, L134, 29 May 2009. This regulation updates and expands previous EU-wide control provisions for dual-use items, which go back as far as 1995. Anthony, I. et al., ‘Multilateral weapon-related export control measures’, *SIPRI Yearbook 1995: Armaments, Disarmament and International Security* (Oxford University Press: Oxford, 1995), pp. 616–19.

Box 1. Administrative and criminal penalties

Administrative penalties

Fines
Revocation of licences
Loss of access to trade facilitation privileges
Loss of property rights (confiscation)
Closure of a company
Change of person legally responsible for exports
in a company
Mandatory compliance training

Criminal penalties

Fines
Prison sentences

In addition to the EU Dual-use Regulation, member states can adopt stricter national provisions such as additional control list items on public security or human rights grounds (Article 8), or stricter wording of the catch-all end-use control mechanism for unlisted items (Article 4(5)).¹⁹ The catch-all mechanism allows the competent EU member state authorities to impose an authorization requirement if items are or may be intended for a WMD end-use, or in relation to a listed conventional military item in a destination subject to an embargo. If exporters are aware of such an end-use, they are obliged to inform the competent authorities. EU member states have the option to add a stricter national provision, extending this information requirement to a situation where the exporter has reason to believe that there is a WMD end-use. This has implications for potential offences. The use of such clauses thus reinforces differences between the penal laws of member states.

Penal law has remained within national EU member state competence across all issue areas, including criminal procedural laws. These include the modalities for deciding whether to take a case to court. In the UK, for example, a public interest test is applied to each case after weighing whether there is sufficient evidence for a realistic prospect of conviction.²⁰ Depending on

¹⁹ E.g. the Netherlands has implemented a national decree on Syria with regard to the export of around 30 non-listed chemicals. Dutch official, Communication with author, 6 June 2013.

²⁰ The modalities are found in the British Code for Crown Prosecutors, <http://www.cps.gov.uk/publications/code_for_crown_prosecutors/>.

national legal traditions, penal provisions can be placed in a foreign trade law, or in the penal code.

Article 24 of the EU Dual-use Regulation requires member states to ‘take appropriate measures to ensure proper enforcement of all the provisions of this Regulation’ and to ‘lay down the penalties applicable to infringements of the provisions of this Regulation or of those adopted for its implementation’. Article 24 also provides that penalties for breaches of the regulation be effective, proportionate and dissuasive. A similar wording is typically used in EU arms and dual-use embargoes and sanctions. However, the translation of this provision into national penalty systems differs considerably across the EU. For example, the maximum prison sentence for export control violations in Germany is 15 years—the highest in the EU. Elsewhere, the maximum sentence is 10 years in the UK (but 14 years for nuclear-related offences), 6 years in the Netherlands, 6 years in Sweden and 12 months in Ireland.²¹ Slovenia introduced criminal sanctions in 2008, and now provides for a maximum five-year imprisonment for WMD-related offences, as well as for illegal trade or brokering in other restricted items.²² In addition, in 2012 Slovenia introduced provisions penalizing the violation of restrictive measures.²³ Administrative sanctions also vary considerably, and a number of EU countries (such as Sweden) do not provide for them at all.²⁴

In addition to putting penalties in place for infringements of the EU Dual-use Regulation, or for EU restrictive measures related to dual-use trade, authorities may also prosecute suspects for violations of national legal provisions in relation to WMD-related dual-use trade controls.

In 2013 Germany fundamentally revised its penal law regarding export control offences for dual-use items. The revised act and implementing provisions will enter into force on 1 September 2013. While the maximum penalty of 15 years imprisonment—the highest maximum possible for fixed-term prison sentences

in the German legal system—remains, a number of important changes have been adopted. Previously, in order for certain offences to be considered criminal, it was necessary to prove that the alleged offence seriously endangered Germany’s external relations, thus constituting ‘aggravating factors’. This was usually done using a statement provided by the German Federal Foreign Office. The provisions were reviewed by the federal court in a number of cases, and also challenged by different legal opinions in legal journals.²⁵ The current law no longer requires these aggravating factors. Instead, all breaches committed with intent are considered criminal offences. In the future, negligent acts, even when they are considered to cause considerable damage to Germany’s foreign relations, will only constitute an administrative offence. This does not apply to embargo breaches.²⁶

In addition to penalties chosen by member states for violations of the EU Dual-use Regulation, penalties for violating embargoes containing restrictions on WMD-related dual-use items will also differ. This has increased in importance in court cases since 2006 with the imposition of embargoes on Iran and the DPRK by the UN and the EU.

Institutional competence also varies considerably across the EU. In Germany, since 1 January 2007 major WMD-related dual-use trade offences can be transferred to a specialized federal prosecution unit.²⁷ Similarly, Sweden decided to transfer such cases to the federal prosecutor’s office for national security, which was established in 2006.

Numerous additional examples from across the EU could be added to illustrate the differing applications and interpretations of the terms ‘effective’, ‘proportionate’ and ‘dissuasive’ (see section III). This is reinforced by the fact that the interpretation and application of basic concepts in penal law such as aiding and abetting, attempt, support, negligence and intent vary across the EU. In addition, practices differ regarding suspended prison sentences and parole.

However, it should be noted that different avenues and apparent differences may effectively lead to the

²¹ 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 ‘Sanctions imposed by EU member states for violations of export control legislation’, Draft rev. 14, Sep. 2005.

²² Criminal Code of Slovenia, Art. 307 (previous Art. 310), as revised in 2011. Section 5 applies to dual-use goods, while section 1 applies to weapons (WMD, military and civil weapons).

²³ Criminal Code of Slovenia, (new) Article 374a.

²⁴ European Commission (note 21).

²⁵ German Federal Court of Justice, ‘Beschluss’ [decision], Case reference StB27/09, 19 Jan. 2010.

²⁶ Gesetz zur Modernisierung des Außenwirtschaftsrechts [Act on the Modernisation of Foreign Trade Law] of 6 June 2013, Bundesgesetzblatt [Federal Gazette], part I, no. 28, 13 June 2013, pp. 1482–96. This and other laws are available at <<http://www.bgbl.de>>.

²⁷ 2. Justizmodernisierungsgesetz [Second Justice Modernization Act], 22 Dec. 2006, <http://www.gesmat.bundesgerichtshof.de/gesetzesmaterialien/16_wp/jumog2/bgbl106s3416.pdf>.

same, or similar, results. In the Netherlands, Slovenia and the UK, both companies and individuals can be prosecuted. A company may for example be shut down or receive a monetary penalty. While prosecuting a company is not possible in Germany, fines or forfeiture may effectively lead to a company's closure.

Due to the different legal systems, traditions, terminologies and procedures across the EU, a level playing field in terms of penalties is currently not feasible. While the 28 different ways of implementing and enforcing the EU dual-use regulation are still based on one uniform law, investigation, prosecution and sentencing take place within 28 distinct frameworks and traditions.

III. TRANSLATING POLITICAL TERMS INTO LEGAL CONCEPTS

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

For example, UN Security Council Resolution 1540 uses the terms 'effective' and 'appropriate'. Regarding effectiveness, prevention is an important issue to consider, although its relative importance differs in national legal doctrines. Legal theory distinguishes between 'special' and 'general' prevention, which could arguably be applied to this specific area. Special prevention aims to stop an offender from committing further crimes; if the offender is part of a proliferation network, special prevention is also a possible contribution to disrupting wider illegal activities. General prevention aims to deter other acts that could or would contribute to proliferation. Closely related to this is the issue of the appropriate deterrent for companies and individuals. Whereas fines, or the loss of property rights (confiscation) and privileges are obvious penalties for companies and individuals, prison sentences clearly can only be applied to individuals. Effectiveness can also be interpreted to apply to the actual application of the penalties, and the effectiveness of the overall system. Where penalties only exist on paper but are known not to be enforced, they can hardly be considered effective.

The criterion of appropriateness also raises several questions. Should this criterion be assessed in

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

There are also no standard international definitions of the terms 'transit', 'trans-shipment' and 'brokering'. Broadly speaking, transit refers to the movement of internationally traded goods through the territory of a state that is neither the port of origin nor the destination port. In some definitions it refers only to cases where the goods stay on the same means of transport and is contrasted with trans-shipment, in which the goods are transferred from one means of transport to another. The EU defines trans-shipment as a form of transit or as part of the export process, whereas other jurisdictions give it a separate legal status. Brokering can include different aspects of facilitating transactions. While the scope is often limited to transactions between countries, some states include activities conducted on their territory in their legal definition of brokering. In 2009, through the Dual-use Regulation, the EU agreed to EU-wide definitions of these terms.

European Union terminology

In addition to definitions of the terms 'brokering' and 'transit', other terminology as used in the EU can lead to questions of interpretation. For example, the EU term related to appropriate is 'proportionate'. Defined as such, the scope of an offence and the penalty assigned to a breach has to fit the national legal tradition and system and be proportionate to the offence and to other offences. Furthermore, the EU requirement for penalties to be 'dissuasive' relates to the deterrence and prevention point discussed above,

while the EU's use of the term 'effective' is similar to that of UN Security Council Resolution 1540.

The demand in the 2008 New Lines for Action for the intensification of efforts to impede proliferation flows and sanction acts of proliferation leads to three fundamental questions, for which there are different answers—not only across the EU, but also internationally.²⁸

The first question relates to the way in which penalties are applied. As discussed in section II, the range of penalties differs widely across the EU, including possible criminal and administrative penalties, their actual application by the courts, and the types of law used to prosecute proliferation-related offences. The competent authorities may choose to impose a fine without proceeding to prosecution. The procedures, modalities and competent authorities for this also differ across the EU.

The second question relates to the acts to which penalties are applied. There is a wide range of possible acts of involvement in or contribution to proliferation. The focus in the dual-use regulation on the exporter can pose a problem from a prosecution perspective, since another actor may be the main or even the only perpetrator (see section IV). Moreover, as discussed earlier, the range of actors and their types of involvement in offences has expanded considerably.

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

The third question relates to the term 'proliferation'. There is no consensus legal definition apart from the provisions of the NPT, which defines nuclear proliferation as the spread of nuclear weapons to states other than the five nuclear weapon-possessing states specified in the treaty. However, this term is not necessarily translated into or directly applicable in

²⁸ In English, the verb form 'to sanction' means to condone, while a 'sanction' refers to an act of punishment. In the NLA, 'sanction' is obviously intended to have the latter meaning.

national laws. South Korea appears to one of the few states currently using the term 'proliferation' in its penal provisions.²⁹ The term is therefore not justiciable in the EU, even though it has become commonly used in political discussions and in enforcement circles.

IV. NATIONAL PRACTICE IN THE EUROPEAN UNION: EXAMPLES OF PROSECUTION CASES

Slebos, Netherlands

Henk Slebos, a Dutch national, exported a number of listed and unlisted dual-use items—some directly, some via diversion routes—from the Netherlands to Pakistan over a period of more than 20 years. Not once did he apply for an export licence. He also made frequent visits to A. Q. Khan, whom he had known since their time as students in the Netherlands in the 1960s.³⁰ Henk Slebos was convicted in the 1980s for an illegal dual-use export and sentenced to six months' imprisonment, a fine of 20 000 guilder (about €9000), and confiscation of the items, valued at 90 000 guilder (about €40 000).³¹

When enforcement officers began investigations into subsequent offences in 2001, they faced a number of obstacles: a lack of awareness on the part of prosecutors and judges of the legal situation and WMD issues; several changes of prosecutor; the long period between the initial investigation and ruling of the appeals court; gaps in legislation (e.g. brokering of dual-use items did not require a licence at the time, nor was it consequently an offence); administrative and procedural errors on the part of the licensing authority; complications regarding involvement of the intelligence service; and, initially, investigators' lack of experience in this specialized area. The 2001 case originally resulted in 12 months' imprisonment, of which 6 months were suspended, and a fine of €100 000.³² In 2009 the court of appeal increased

²⁹ See the Foreign Trade Act (note 17), Article 53.1.

³⁰ On the A. Q. Khan network see for example Albright, D., 'Peddling Peril: How the Secret Nuclear Trade Arms America's Enemies' (Free Press: New York, 2010) and Fitzpatrick, M., 'Nuclear Black Markets: Pakistan, A. Q. Khan and the rise of proliferation networks—a net assessment' (IISS: London, 2007).

³¹ The case is described in detail in Wetter (note 12). The first ruling was in 1985, after which the case went through several different courts and instances, only becoming definite on 17 June 1988.

³² Amsterdam Court (Gerechtshof Amsterdam), ruling in case no. 23-006776-05, 30 Jan. 2009.

the sentence to 18 months' imprisonment, of which 8 months were suspended, and a fine of €135 000.

This case illustrates the need for (a) experienced and specialized investigators, judges and prosecutors; (b) increased awareness on the part of licensing authorities of the fact that the documents they produce may become evidence in court; and (c) clear and comprehensive legislation.

Maltese case with British origin and Norwegian diversion

In 2006 a British businessman was awaiting advice from the British export licensing authority regarding the export of gyrocompasses to Azerbaijan. These are dual-use items, with applications in missile programmes and in civilian navigation. He transferred several of these items within the European common market to a company in Malta, which does not require a licence.³³ The Maltese company submitted customs documents to export the items to Iran. An alert Maltese customs officer (who happened to have just received dual-use awareness training) considered the transaction suspicious, and proceeded to a physical inspection.

Since the consignment had originated in the UK (although manufactured in France), the customs officer made inquiries with the competent British authorities, who informed him that the items were in fact listed on the EU's dual-use control list. The Maltese company then applied for an export licence to an end-user in Iran, which was denied. The items were shipped back to the British trader, who sold some of them back to the producer, but was otherwise determined to export to prevent or reduce losses, and exported two of the items via a third, non-EU country (Norway) to Iran without a licence. Export of the remaining items was stopped through a visit by British customs investigators to the trader's office, where they discovered evidence of six previous exports of dual-use items (gyrocompasses and other items) to Iran, via Malta, without the necessary licence.

The exporter was charged with four export control offences under the British customs act, and one offence of perverting the course of justice. In 2008 he was sentenced to 18 months' imprisonment and a

³³ Only a very small list of very sensitive nuclear dual-use items, included in the EU Dual-use Regulation, requires a licence for transfer within the EU. EU Regulation 428/2009 (note 18), Annex IV.

£432 970 (€587 915) confiscation order.³⁴ Also in 2008, the Norwegian shipping agent was fined 1 million Norwegian crowns (€125 605) for making a false transit declaration in violation of both the customs act and the export control legislation: while the documents had originally declared a Norwegian consignee as the recipient of the goods, the shipping agent had prepared transit documents and shipped the goods to Iran. Following an exchange of information between British and Norwegian customs officials, an investigation ensued.³⁵

This case clearly illustrates the general importance of training enforcement officers, and in particular the importance of international cooperation and swift information exchange within, but also beyond, the EU common market.

German exports to Iranian missile programme

In May 2009 a German businessman was sentenced to six years' imprisonment and the forfeiture of €705 000 for breaching the EU Dual-use Regulation and attempting to breach the EU embargo against Iran. The businessman exported licensable graphite (which has applications in missile programmes) on several occasions, via Turkey as a diversion route, having declared it as being of lower grade than was actually the case—and thus below the threshold that would require an export licence. Subsequent graphite exports involving a UK company were disrupted by Turkish customs.³⁶

In a separate case, an individual was charged, *inter alia*, with having exported licensable dual-use items with uses in a WMD missile programme on several occasions to a listed Iranian entity (i.e. an entity named in an EU embargo). In February 2009 he was sentenced to three years' imprisonment.³⁷

³⁴ R. v. Mehrdad Salashoor (2008).

³⁵ Norwegian and Maltese officials, Communication with author, June 2013.

³⁶ Oberlandesgericht Koblenz, Ruling of 11 May 2009, no. 3 StE1/09-4; and Oberlandesgericht Koblenz, 'Oberlandesgericht Koblenz verurteilt Angeklagten wegen Graphitexporten in den Iran zu Freiheitsstrafe' [Higher Regional Court Koblenz sentences defendant to imprisonment due to graphite exports to Iran], Press release, 11 May 2009. These and other documents can be found on the website of the Ministry of Justice and Consumer Protection, Rhineland Palatine, <<http://www.mjv.rlp.de>>.

³⁷ Kammergericht Berlin, Ruling of 12 Feb. 2009. See also German Federal Prosecutor's Office, *Festnahme wegen mutmaßlicher Verstöße gegen das Außenwirtschaftsgesetz* [Arrest due to suspected violations of the Foreign Trade Act], Press Release no. 26/2008,

Another 2009 case resulted in a suspended prison sentence of 22 months and a fine of €5000, due to breach of the War Weapons Control Act and the Foreign Trade and Payments Act. The charge was attempted support ('Förderung') of the development of nuclear weapons and attempted brokering in contravention of an embargo. The court dismissed other charges because it concluded that it could not prove that Iran had a nuclear weapon programme. However, the items in question (high speed cameras required for the development of nuclear warheads, and special detonators), are listed in the Iran embargo.³⁸

These three cases illustrate the importance of (a) penalty provisions for embargo breaches, complementing provisions for breaches of the dual-use regulation; (b) the difficulties of proving end-use in a nuclear weapon programme; and (c) the key factor of proving intent when seeking to obtain higher sentences.

British case illustrating diversity of actors

In January 2001 a British firm, A. M. Castle & Co., which manufactured and sold alloy metals, shipped a consignment of 6061 T6 aluminium to Pakistan. The licensing authority, the Department of Trade and Industry (DTI)—now the Department for Business Innovation and Skills (BIS)—had previously rejected the company's export licence application for these goods on the grounds that there was a risk of the material being used in a WMD programme. Enquiries with the company showed that the sale had been made by Lee Nicklin on behalf of the company, but had originated as a result of an intermediary, A. M. Khan, who had been approached by a company based in Pakistan called Tradewell.

The question for the prosecutor was who was responsible for the export, and who knew that the goods were subject to export controls. It was clear that Khan, the middleman, could not be prosecuted as he had not exported the goods, but had merely introduced the parties. The salesman, Nicklin, could not be prosecuted because there was no proof that

the refusal letter from the DTI had been brought to his attention in accordance with the EC Dual-use Regulation. Furthermore, Nicklin was not responsible for the decisions of the company. A. M. Castle & Co.'s managing director, who had received the warning from BIS, had not acted as the exporter, although he was responsible for the company's decisions. It was therefore not possible to charge anyone with being knowingly concerned in the export of prohibited goods contrary to section 68(2) of the Customs and Excise Management Act. However, as the goods had been brought to a place of export, the strict liability offence under section 68(1) of the Customs and Excise Management Act had been committed. The company was charged with this offence, pleaded guilty and was fined £1000 (1585) and ordered to pay costs of a further £1000.³⁹

This case illustrates the fact that it is insufficient to place the legal responsibility with the exporter, as well as the importance of licensing authorities considering the documents they produce as potential evidence in court.

European Court of Justice case

UN Security Council Resolution 1737 imposing restrictive measures on Iran was implemented through a 2007 EU Common Position.⁴⁰ In 2010 the German prosecution service charged suspects with violating the provisions of this Common Position as well as the catch-all provision of the EU Dual-use Regulation, both of which mandate criminal penalties according to Article 34 of the German Foreign Trade Act. The competent German court referred the case to the European Court of Justice in order to clarify the terms 'making available' in relation to designated persons or entities, as well as the terms 'circumvention' and 'knowingly and intentionally', all of which are included in the Common Position.⁴¹ The case was subsequently returned to the German court where it was still pending at the time of writing, thus also illustrating the often long duration of dual-use cases.

This case demonstrates the challenges that arise from translating the EU Dual-use Regulation, and embargo provisions, into different languages and legal

8 Oct. 2008; and 'Anklage und Verurteilung wegen Verstoßes gegen das Außenwirtschaftsgesetz' [Indictment and sentencing due to violation of the Foreign Trade Act], Press Release no. 11/2009, 20 May 2009.

³⁸ Landgericht Frankfurt, Wirtschaftsstrafkammer, Ruling of 24 Sep. 2009, case no. 5/2 KLs 9/09. See also Ministry of the Interior and Sports of Rhineland Palatine, Verfassungsschutzbericht 2009 [Report on the Protection of the Constitution 2009], 2009, p. 108.

³⁹ R. v. A. M. Castle (2001).

⁴⁰ UN Security Council Resolution 1737 (note 9); and EU Common Position 2007/140/CFSP. *Official Journal of the European Union*, 28 Feb. 2007, L61, p. 49–55.

⁴¹ Case C-72/11 *Afrasiabi and others*, <<http://curia.europa.eu>>.

terminologies, legal traditions (e.g. regarding intent) and penalty scales.

British attempted illegal export of dual-use switch-gear

In late 2011 a UK court found the director of a British company guilty of knowingly attempting to export restricted items with intent to evade said restrictions. The director had previously been denied a license for similar items. He was sentenced to 12 months' prison (suspended for 2 years), and ordered to undertake 250 hours of unpaid work.⁴²

This case illustrates the importance of disruption when seeking to achieve non-proliferation goals, and the potential function of licensing denials in terms of proving positive knowledge.

UK disruption case

A recently attempted supply of carbon fibre to Iran from the UK is another case in point. The carbon fibre originated in the United States, moved through the UK but was stopped before it left British shores. While the British authorities knew who the exporter was, he was not based in the UK and was not a British national. However, the authorities could identify the UK-based agent and charged him with breaches of the Customs and Excise Management Act.⁴³ The defendant claimed that the carbon fibre—which also has applications in nuclear weapon and missile programmes—was intended for the production of tennis rackets. Although the case went to trial, on hearing all the evidence and the account given by the agent the court found him not guilty.⁴⁴

Not being able to prosecute a breach, or not having an outcome to a prosecution case in the form of custody, fine or other penalty should therefore not necessarily be seen as a failure, if preventing proliferation is seen

⁴² UK Her Majesty's Revenue and Customs, 'Businessman jailed for potential WMD exports', Press release, 12 Dec. 2011, <<http://hmrc.presscentre.com/Press-Releases/Businessman-jailed-for-potential-WMD-exports-67275.aspx>>.

⁴³ British Customs and Excise Management Act (note 46).

⁴⁴ R. v. Gholamreza Semsarilar (2012). See also Court News UK, 'Semsarilar: businessman cleared of bid to export components to Iran', 30 Mar. 2012, <http://www.courtnewsuk.co.uk/online_archive/?name=Gholamreza+Semsarilar+&place=&courts=0#results>; and Court News UK, 'Semsarilar: businessman claimed hi tech components were for tennis rackets', 20 Mar. 2012, <http://www.courtnewsuk.co.uk/online_archive/?name=Gholamreza+Semsarilar+&place=&courts=0#results>.

as the main goal. At the same time, the end cannot automatically justify the means, and the reality may produce conflicts between a political interest or imperative to stop a transaction, and weak or insufficient legal grounds to do so.

V. LESSONS AND CHALLENGES ARISING FROM PROSECUTION CASES

Penalizing acts of proliferation is one of the goals of the New Lines for Action. A number of lessons and challenges arise from prosecution cases such as those outlined in section IV. The most important of these are described below.

Insufficient detection

To prosecute a case obviously requires a detection. It can safely be said that dual-use trade controls do not constitute a main priority for most customs organizations, either in the EU or globally. It should be noted, however, that there is a recent trend to recognize the role of customs in security.⁴⁵

Unclear or insufficient legal basis and legal inconsistencies across the EU

An insufficient legal basis for prosecution can sometimes be attributed to the increased complexity of transactions, with multiple actors and actions, whereas the traditional focus of EU regulation is on the exporter. However, the main brain behind a transaction may be an actor other than the exporter, and other actors may also be involved.

While the catch-all provision is directly applicable law in all EU member states, this does not necessarily mean that all violations constitute an offence under national law. Additional problems arise in the EU when catch-all provisions are only applicable in one or selected member states, and when differing interpretations of the EU control list's technical parameters and their application to individual items occur.

⁴⁵ E.g. the World Customs Organization held its first ever conference on strategic trade control in 2012, and created a new position at its headquarters on this issue.

Insufficient cooperation

Cooperation, coordination and communication at the intra-agency, inter-agency and international levels is crucial. However, this often poses a challenge, due to 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.

Lack of awareness, training and institutional memory among enforcement authorities and judiciaries

All too often, dual-use cases are an unique occurrence for investigators and prosecutors, although difficulties could be avoided through experience and specialized knowledge. A few EU countries, notably Germany and the UK, have for a number of years dealt with such cases through specialized investigation and prosecution units. Sweden has also decided to allocate such cases to the prosecutor's office for national security. In addition, in the UK, export control cases are channelled through two courts, which has led to increased judicial experience in this particular area.

At the same time, the scarcity of cases may make it difficult to find a judge with sufficient experience and specialized knowledge to preside over a case effectively.

Collecting evidence

Trade control offences are by definition trans-border crimes. Transactions tend to involve jurisdictions of many countries, both due to common trading patterns and efforts to disguise the actual end-use. This is reinforced by increasing national legislation on transit, trans-shipment and brokering—as opposed to mere exports—which has come about partly as a consequence of the requirements of UN Security Council Resolution 1540. Moreover, serious dual-use related offences are often linked to particular end-uses in other countries, and may thus require the collection of evidence in other jurisdictions. While international cooperation, including mutual legal assistance, always adds a layer of complication (and, consequently, delays and commitment of resources), obtaining evidence from countries for which the end-use is considered problematic in relation to WMD would be virtually impossible. The possible or actual-end-use may also

play a role in the judge's decision on the actual sentence imposed.

A second specific challenge relates to the common and essential use of intelligence in prosecuting dual-use trade offences. Translating intelligence into evidence poses difficulties, and invariably depends on both the specific case and the rules applicable in certain countries. For example, while intelligence information is admissible in court in Germany and the Netherlands (where evidence from intelligence officers has even been heard in court), the UK does not admit such evidence as a matter of legal principle, although intelligence can be used to develop evidence in an admissible format. In the Netherlands, intelligence must also be supported by other evidence.

Proving knowledge, intent or end-use

The issue of collecting evidence is closely connected to the frequent need to prove intent or end-use, in particular in relation to the catch-all provision, where unlisted items for an actual, intended or suspected WMD end-use are concerned. This is important since many items usable in WMD programmes are not listed. Where national legislation provides for strict liability, export of a licensable item without the correct licence may constitute an offence as the violation is defined as an offence regardless of intent. This is the case, for example, in the Netherlands and in the UK. In other countries, in order to either constitute an offence or establish a serious offence, the prosecution may need to prove intent, or at least positive knowledge. However, where embargo provisions are in place, proving intent may not be required for criminal prosecution—for example, where a case concerns an item made available to an entity listed in the embargo. This, in turn, may lead to new challenges in terms of collecting evidence.

Politics and potentially conflicting interests

The design, implementation and enforcement of export control legislation is in itself political, insofar as it is shaped and informed by political assessments and priorities. WMD-related cases in particular may be political and politicized. Ministers may request briefings on high-profile cases, and politicians may have a strong interest in a specific prosecution outcome. The media may be very interested in cases, thus increasing pressure to deliver results, and may possibly indirectly influence the process in one way or another.

Prosecutors and intelligence services may also have conflicting interests. On the one hand, prosecutors may seek to prosecute suspected legal breaches, and in some countries are obliged to do so. This will require gathering all available evidence in order to prosecute all of those involved. On the other hand, intelligence services may have an interest in protecting their sources and might prefer to monitor and disrupt transactions rather than prosecute them.

Penalizing attempts

How and whether to penalize an intent to commit an offence is a difficult question. Enforcement authorities usually are either obliged to stop a suspected illegal shipment, or otherwise have to weigh the risks of a so-called controlled delivery—where the item is monitored even outside the country in order to identify further actors involved before stopping a transaction. Where it is considered a priority to stop the item rather than to let it proceed and establish an offence, investigators may nevertheless seek to find out whether the intent to export can be penalized. The question of whether such an intent to export should be penalized is determined by legislators.

Penal codes can provide for the offence of 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. British customs legislation makes the attempt to circumvent export restrictions an offence.⁴⁶ Regarding whether intent to commit a crime is applicable, the key question is not only what legally constitutes intent, but also when the export legally takes place—for example on submission of the customs declaration, or once the national border is crossed and national jurisdiction ends.⁴⁷

⁴⁶ See Section 68(2) of the British Customs and Excise Management Act: 'Any person knowingly concerned in the exportation or shipment as stores, or in the attempted exportation or shipment as stores, of any goods with intent to evade any such prohibition or restriction as is mentioned in subsection (1) above shall be guilty of an offence under this subsection and may be detained.' The complete text of the act can be found at <<http://www.legislation.gov.uk/ukpga/1979/2/section/68>>. Furthermore, under the Export Control Order 2008, it is an offence to attempt to broker the movement of goods from one third country to another, and a person can be prosecuted even if the goods are never supplied. This was recently tested in the case of *R. v. Michael Ranger* which involved the attempted supply of MANPADS (surface to air missiles) from North Korea to Azerbaijan.

⁴⁷ 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.

Goal of prevention

Closely linked to the previous point is the importance of prevention. The New Lines for Action recommendations regarding penalties are placed in the section 'impeding and stopping', but reference is also made to prevention. In this context, outreach to industries and others in the supply chain such as transport agents, and to academics and scientists to alert them to correct procedures and relevant legislation including potential sanctions, is crucial. Preventive enforcement thus has two elements: cooperation with industry that intends to be compliant, and deterrence of illegal behaviour by industry that is considering being non-compliant.

Expanding complexity of export control

The term 'export controls' has commonly been used to describe the control of security-related items leaving the host country. However, the term 'trade controls' more accurately reflects reality as it relates to, among other things, controls on brokering, transit, trans-shipment, financial flows, technology transfer (especially by electronic means) and technical assistance (e.g. manual services and the oral transfer of know-how), all of which create new demands and challenges from both a legal and practical enforcement perspective. Consequently, the focus of non-proliferation efforts has partially shifted from the physical movement of goods to analysis of which elements of a transaction are relevant to, and should be subject to, controls. This complexity can pose challenges for prosecuting offences.

VI. ENHANCING THE EUROPEAN UNION'S CAPACITY TO PROSECUTE WMD-RELATED DUAL-USE TRADE CONTROL OFFENCES

Proliferators are assumed to identify and seek to target both real and perceived weaknesses, although this is difficult to prove. If an EU member state is seen as not detecting, investigating, and ultimately prosecuting breaches it may be targeted by those seeking to acquire goods or technology for WMD programmes. However, proliferators also make use of countries with the best trade facilities, ports, export agencies, airports and so on. Consequently, there is a need for a range of measures to provide high and consistent establishment, application and enforcement of non-proliferation

norms across the EU. This includes forums at different levels of the hierarchy and within different enforcement communities (e.g. policy, legislation, investigation, prosecution) to exchange experiences and allow for a better understanding of different systems and policies to encourage convergence in enforcement and penalties across the EU.

The four overarching objectives of the NLA are: (a) to raise the profile of non-proliferation measures; (b) to identify and spread existing best practice; (c) to encourage better coordination and; (d) to identify areas where EU action must be stepped up. Within these objectives, a number of actions could be taken to take forward the specific goal of preventing and punishing acts of proliferation.

It should be highlighted that some of these steps require action not only (or even primarily) on the part of prosecutors, but also from the range of actors involved in drafting laws, detection, investigation, prosecution and sentencing. Some steps relate to the national level, while others concern the EU level. Moreover, they relate to different aspects of penal law: establishing the facts of a case, defining the legal norms and applying the legal consequences.

Raising the profile of non-proliferation measures

These steps relate to turning the issue into a ‘cross cutting priority of EU and Member States’ policies’.⁴⁸

1. Raise awareness of the crucial role of customs and licensing authorities in non-proliferation in ministries of finance and of economy, respectively, as these are typically responsible for these issues.
2. Raise awareness of the security function of customs agencies, which complements the traditional focus on revenue collection, and of the need to implement this commitment through the allocation of corresponding financial and staff resources as well as legal competences, particularly given the financial crisis which reinforces fiscal functions.
3. Raise awareness of the need to include international cooperation and capacity building in the core tasks of enforcement officers, without which EU programmes are neither sustainable nor credible.

4. Involve customs and other enforcement authorities in legal developments, reviews and strategies, not only at the detection, investigation and prosecution stages (particularly by ensuring that customs law, export control law and relevant penal law fit the reality on the ground).
5. Raise awareness of national, EU and international law relevant to dual-use trade controls with enforcement agencies, prosecutors and judges.

Identifying and spreading existing best practice

6. Update, expand and build on the 2005–2006 EU surveys of penalties in place and applied (e.g. add penalties for embargo breaches and for brokering, transit and transshipment).
7. Explore legal options and constructions that correspond to changing proliferation patterns and responses.
8. Exchange experiences on legal constructions and concepts that have been tested in court.
9. Establish a database of proliferation-related prosecutions and systematically build up institutional memory.
10. Follow through on the recommendation to ‘survey current practices and legislation and regulations relating to the prevention and punishment of acts of proliferation in order to identify any shortcomings’, as established by the NLA, through a peer review.

Encouraging better coordination

11. Recognize and implement the horizontal nature of non-proliferation and export control (e.g. by exploring and exploiting synergies between relevant capacity-building programmes, such as the EU Instrument for Stability programmes and the WCO’s Columbus Programme to implement the SAFE Framework of Standards) in order to support the deliverable of ‘intensifying coordination/collaboration with, and contribution to, relevant regional and international organisations’.
12. Enhance coordination, cooperation and communication at intra-agency, inter-agency and international levels (and establish and

⁴⁸ Council of the European Union (note 2).

strengthen structures, procedures and agreements as required).

investigations and prosecutions should continue to reflect national legal systems and traditions, much could be done by pursuing the steps outlined here.

Identifying areas where European Union action must be stepped up

13. Provide individual enforcement officers with the incentive, legal powers, resources, backing and information to act when confronted with a suspicious shipment or activity, in both the detection and investigation phases. Prosecution requires detection, with a key role for intelligence agencies.
14. Reinforce operational cooperation by strengthening the frequency with which licensing and enforcement officers meet, and by establishing a dedicated EU enforcement working group.
15. Strengthen information exchanges on denials, past prosecutions and—to the extent legally possible—ongoing cases.
16. Increase internal capacity building in enforcement to strengthen EU trade controls and effective and credible third country cooperation, in particular for the aim of ‘increasing assistance and cooperation with regarding to combating the proliferation of WMD’, as internal and external action are mutually reinforcing, and inform actors of gaps in and options for strengthening existing systems.
17. Match political priorities with operational resources.

While consistency in terms of penalties is not feasible in the current EU legal setting—and may not even be desirable—a number of steps could be taken to address challenges and reduce contradictions or imbalances. Items subject to control in one EU country but not another, as well as different classifications of the same product, pose challenges for investigations, not only from the perspective of a level playing field, but in particular when an item is transferred between EU countries using the free movement of goods in the common market and is exported from a country where the catch-all is not applicable.

More broadly, giving systematic and equal importance to enforcement of dual-use provisions across the EU is crucial to the implementation of consistent and credible EU trade controls. While

LIST OF ABBREVIATIONS

BIS	UK Department for Business Innovation and Skills
BTWC	Biological and Toxin Weapons Convention
CWC	Chemical Weapons Convention
DTI	UK Department of Trade and Industry
NLA	New Lines for Action
NPT	Non-Proliferation Treaty
WMD	Weapons of mass destruction

A EUROPEAN NETWORK

In July 2010 the Council of the European Union decided to create a network bringing together foreign policy institutions and research centres from across the EU to encourage political and security-related dialogue and the long-term discussion of measures to combat the proliferation of weapons of mass destruction (WMD) and their delivery systems.

STRUCTURE

The EU Non-Proliferation Consortium is managed jointly by four institutes entrusted with the project, in close cooperation with the representative of the High Representative of the Union for Foreign Affairs and Security Policy. The four institutes are the Fondation pour la recherche stratégique (FRS) in Paris, the Peace Research Institute in Frankfurt (PRIF), the International Institute for Strategic Studies (IISS) in London, and Stockholm International Peace Research Institute (SIPRI). The Consortium began its work in January 2011 and forms the core of a wider network of European non-proliferation think tanks and research centres which will be closely associated with the activities of the Consortium.

MISSION

The main aim of the network of independent non-proliferation think tanks is to encourage discussion of measures to combat the proliferation of weapons of mass destruction and their delivery systems within civil society, particularly among experts, researchers and academics. The scope of activities shall also cover issues related to conventional weapons. The fruits of the network discussions can be submitted in the form of reports and recommendations to the responsible officials within the European Union.

It is expected that this network will support EU action to counter proliferation. To that end, the network can also establish cooperation with specialized institutions and research centres in third countries, in particular in those with which the EU is conducting specific non-proliferation dialogues.

<http://www.nonproliferation.eu>



FOUNDATION FOR STRATEGIC RESEARCH

FRS is an independent research centre and the leading French think tank on defence and security issues. Its team of experts in a variety of fields contributes to the strategic debate in France and abroad, and provides unique expertise across the board of defence and security studies.

<http://www.frstrategie.org>



PEACE RESEARCH INSTITUTE IN FRANKFURT

PRIF is the largest as well as the oldest peace research institute in Germany. PRIF's work is directed towards carrying out research on peace and conflict, with a special emphasis on issues of arms control, non-proliferation and disarmament.

<http://www.hsfk.de>



INTERNATIONAL INSTITUTE FOR STRATEGIC STUDIES

IISS is an independent centre for research, information and debate on the problems of conflict, however caused, that have, or potentially have, an important military content. It aims to provide the best possible analysis on strategic trends and to facilitate contacts.

<http://www.iiss.org/>



STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE

SIPRI is an independent international institute dedicated to research into conflict, armaments, arms control and disarmament. Established in 1966, SIPRI provides data, analysis and recommendations, based on open sources, to policymakers, researchers, media and the interested public.

<http://www.sipri.org/>