Sensitive Trade
The Perspective of European States
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Portugal

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General Introduction

In general, Portugal has consistently shown a high level of commitment to nuclear non-proliferation and arms control. It is a member of several relevant international organisations (UN, EU, Euratom, IAEA, OECD, etc.) and a Party to the most relevant international treaties (1968 Non-Proliferation Treaty; 1979 Physical Protection Convention, without the 2005 amendments; Safeguards Agreement and Additional Protocol, etc.) and initiatives (Proliferation Security Initiative, Megaports Initiative, Nuclear Suppliers Group, Zangger Committee, Wassenaar Agreement, etc.).

There are no known examples of exports of home-grown goods or technologies subject to safeguards. Irradiated nuclear fuel, used in the only nuclear reactor on national territory, (the one Megawatt research reactor at the Nuclear and Technological Institute) is periodically returned to the USA (original provider). There was one recent case, reported in the media, of attempted traffic (purchase) of uranium by a founder of a religious sect, leading to a court case. Another case, reported in Wikileaks, claimed an attempted sale of uranium on national territory by an “unidentified ex-Russian General now living in Portugal”.

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1 Portugal’s Safeguards Agreements with the IAEA was ratified in 1979, and completed by the Additional Protocol in 2001. Portugal is also a Party to the Agreement between the Non-Nuclear Weapon States Members of the EU, Euratom and the IAEA relating to the NPT (1973) and to a specific Safeguards Agreement between Portugal, the USA and the IAEA (1965). It has also ratified the OECD Security Control Convention (1957) and its Tribunal Protocol, but the safeguards mechanism established under this Treaty are suspended.


On the other hand, there are occasional, but very limited, exports of dual-use items (e.g. shipment of valves to Iran that could potentially be used in centrifuges). Only global statistics are available. There seems to be no publicly available information on Portugal’s role as a transit state for dual-use items.

There is a slightly higher degree of transparency in what concerns trade in military items. A list of all the companies that have been authorised, or have requested to be authorised, to carry out industrial or trade activities relating to military goods or technologies may be consulted in the website of the Ministry of National Defence.\(^4\)

As a EU Member State, Portugal’s enforcement of rules on dual-use goods and technologies focuses primarily on the implementation of Regulation (EC) 428/2009.

As for the national legal framework, with the exception of the part relating to weapons trade, it has become drastically outdated (and is apparently under review for quite some time). It is made up of the following:

- Decree-Law No. 436/91,\(^5\) establishes the legal framework for the control of imports and exports of goods which may affect national strategic interests;
- Ministerial Order No. 439/94,\(^6\) approves the list of goods and technologies subject to prior licensing and certification;
- Communication No. 83/2003 of the Directorate General for Customs and Excise;
- Law No. 49/2009,\(^7\) regulates the conditions of access to and exercises the activities of trade and industry in the area of military goods and technologies;
- Decree-Law No. 1/86,\(^8\) creates means to prevent, by the transfer of goods or services by nationals to foreign persons, possible transfers of technologies that would be detrimental to national interests; and

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\(^7\) Official Gazette No. 150, Series I-A, 05/08/2009.
\(^8\) Official Gazette No. 1, Series I, 02/01/1986.
- General Regime of Fiscal Infractions, adopted by Law No. 15/2001, last revised by Decree-Law No. 73/2010. The licensing authority for dual-use items is the Directorate General for Customs and Excise (DGAIEC), Licensing Services Division, of the Ministry of Finance.

The licensing authority for military items is the Directorate General for Armament and Defence Equipment (DGAED), Import and Export Control Division, of the Ministry of National Defence.

An Inter-ministerial Commission for Trade in Strategic Products had been set up, made up namely by representatives of the Ministry of National Defence (DGAED), Ministry of Foreign Affairs (Directorate-General for Foreign Policy), Ministry of Economy (Directorate-General of Companies), Ministry of Health, and Ministry of Science, Technology and Higher Education (Nuclear and Technological Institute and Universities).

It should be kept in mind that subsequent reshuffling of competences within the government has led the above quoted legal regime to be outdated in what concerns the authorities mentioned.

Furthermore, it should be noted that trade in weapons and associated equipment not classified as meant for military use is subject to a different licensing regime, run by the Public Safety Police under Law No. 5/2006.

**Scope of the Export Control Regime**

Decree-Law No. 436/91 encompasses the "import, export, temporary export and re-export" of the items listed in Ministerial Order No. 439/94. This terminology is typical of the time when this Decree-Law was adopted and is, therefore, expectably outdated in relation to the terms of Regulation (EC) 428/2009.

Ministerial Order No. 439/94 provides a list of items (107 pages long) divided into the following categories: (i) advanced materials; (ii) treatment of materials; (iii) electronics; (iv) computers; (v) telecommunications and information security; (vi) sensors and lasers; (vii) navigation and avionics; (viii) navy; (ix) propulsion; (x) precursors of chemical

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9 Official Gazette No. 130, Series I-A, 05/06/2001.
11 Contact person: dsl@dgaiec.min-finance.pt. Address: Rua Terreiro do Trigo (Edificio da Alfândega), P-1149-060 Lisbon.
12 Contact person: dgaed@dgaed.mdn.gov.pt. Address: Av. Ilha da Madeira, No. 1, P-1400-204 Lisbon.
weapons and manufacturing equipment; (xi) dual-use paranuclear equipment, materials and associated technology; (xii) nuclear materials, facilities, equipments, logistic support and technologies; (xiii) missile equipments and technology; and (xiv) war material.

Category (xi) materials, i.e. the category specifically relating to dual-use items, is divided into eight categories: (1) industrial equipment; (2) materials; (3) equipments and components for separating uranium isotopes; (4) equipment connected to heavy water manufacturing facilities; (5) equipment for the development of implosion systems; (6) explosives and related equipment; (7) equipment and component for nuclear tests; and (8) others (e.g. neutron generators, radiation proof cameras...).

Category (xi) materials are divided into two categories: nuclear facilities, equipments and software, and nuclear materials. The latter are divided into: (1) natural and impoverished uranium; (2) fissionable material; (3) deuterium; (4) heavy water; and (5) nuclear-level graphite.

The obsolete national regime differs from the current EU regime on dual-use items at many levels, beyond the updates to the list of items. It does not cover brokerage. Also, it is arguable whether ITT, transit, transhipment and transfers are included, since the terminology does not expressly encompass those concepts. No catch-all clause was included.

As the regulatory framework has not yet been revised to take into account changes to EU Law, some possibilities allowed by Regulation (EC) 428/2009 are not included in the national legal framework. This is the case of general export authorisations. It is expected that the legislative review currently under way will adapt the existing procedural provisions to the above-mentioned Regulation.

It must however, be noted that, aside from procedural issues necessary to the implementation of Regulation (EC) 428/2009, the fact remains that this national legislation has been superseded by EU Regulation, and it is neither necessary nor legitimate for Member States to legislate on the same issues that have already been uniformised at the EU level.

**Industrial Operator Awareness**

There is no specific data available to assess industry awareness. However, the extremely limited number of licences requested each year suggest that industry awareness is low and that there may be a significant number of exports of dual-use items not reported to the authorities. In this sense, the contrast between the number of licences issued for dual-use items and for military items is particularly revealing.
That being said, recent years have seen repeated efforts by DGAIEC to raise awareness of legal obligations and of the applicable procedure. This has namely been pursued by organising events specifically tailored as outreach to companies, in parallel with training activities for customs agents. According to DGAIEC annual reports, two such activities were organised in 2008, and two others in 2009.

The authorities have also repeatedly stated their openness to provide clarifications to industry and have made an effort to broaden and improve the user-friendliness of the information available on their respective websites.\(^\text{14}\)

Communication No. 83/2003 has officially instituted a policy of “When in doubt, ask”, directed towards the industries.

**National Jurisdiction**

An infringement of the dual-use items regime under Portuguese jurisdiction is subject to general and specific sanctions.

Under the General Regime of Fiscal Infractions, a breach of mandatory licensing for import or export of goods or technologies may lead to a penalty of up to three years imprisonment or of a fine of up to 360 days.\(^\text{15}\)

Specific sanctions have, however, been set up in the framework of the dual-use items licensing procedure. False statements provided in such procedures are punishable with up to two years imprisonment. Any unlawful export or re-export (or an attempt to do so) of dual-use items is punishable with imprisonment between one month and five years. A violation of the obligation to return certificates after execution or non-use is subject to a fine of up to Euros 30,000.

Depending on the infringement in question, jurisdiction for such offences will, in principle, be awarded to criminal courts or to administrative and fiscal courts.

The licensing of the import/export of military goods and technologies have also been subject to specific sanctions. The illegal research, planning, testing, assembly, manufacture, transformation, maintenance or demilitarization of military goods or technologies is punishable with


\(^{15}\) Under Portuguese criminal law, fines are calculated by number of days. Each day currently corresponds to an amount to be set on a case-by-case basis, between Euros 5 and 500 (for natural persons) or Euros 100 and 10,000 (for legal persons).
imprisonment between four and fourteen years. Other offences, such as false statements and non-communication of mandatory information is punishable with a fine between Euros 500-70,000 (natural persons) or between Euros 1,000-200,000 (legal persons), with the possibility of additional accessory penalties (seizure of the goods and profits in question, and interdiction of exercise of management or administrative positions in companies subject to this licensing regime, for a period of ten years).

Jurisdiction for such offences is awarded by the criminal courts.

Additionally, the general regime on weapons (Law No. 5/2006) provides sanctions for the unauthorised holding and transfer of weapons not subject to special rules for the military sector. For example, under this regime, the unlawful holding, acquiring, transferring, mediating, importing or exporting of products or substances which may be used to develop, keep, store or use nuclear weapons or “dirty bombs”, or transport devices is subject to imprisonment, varying between two and twelve years, depending on specific characteristics of the infringement. The criminal liability of legal persons is explicitly provided for.

Additional Elements

As can be seen from the tables below, the dual-use items licensing regime is not often implemented in Portugal, in stark contrast to the licensing of export/import of military goods and technology.

The following information has been collected from the annual reports of DGAIEC and DGAED, available in their respective websites (only until 2009, in the first case, and until 2008, in the second case).

<table>
<thead>
<tr>
<th>Licences relating to dual-use goods and technologies (industrial products)</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
</tr>
</thead>
<tbody>
<tr>
<td>Export licences</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>14</td>
<td>13</td>
</tr>
<tr>
<td>Import certificates</td>
<td>2</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Delivery guarantee certificate</td>
<td>3</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Licences relating to military goods and technologies</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
</tr>
</thead>
<tbody>
<tr>
<td>Definitive exports</td>
<td>231</td>
<td>290</td>
<td>238</td>
<td>259</td>
</tr>
<tr>
<td>Temporary exports</td>
<td>681</td>
<td>420</td>
<td>370</td>
<td>347</td>
</tr>
<tr>
<td>Exports not carried out</td>
<td>-</td>
<td>11</td>
<td>10</td>
<td>40</td>
</tr>
<tr>
<td>Definitive imports</td>
<td>619</td>
<td>599</td>
<td>521</td>
<td>789</td>
</tr>
<tr>
<td>Temporary imports</td>
<td>133</td>
<td>111</td>
<td>75</td>
<td>159</td>
</tr>
<tr>
<td>Imports not carried out</td>
<td>-</td>
<td>30</td>
<td>26</td>
<td>67</td>
</tr>
</tbody>
</table>

No information is available to the public regarding the compulsory enforcement of the dual-use items regime (e.g. fines for companies that
do not require mandatory licences), and no examples of such enforcement are known by the author.

There are no known specific national security exceptions. Authorities have made it known that they comply with UN, EU and OSCE restrictions and embargoes.

In what concerns the licensing of the import/export of military items, DGAED has made it known that: "Only authorized companies can apply for export licences and all applications are considered and assessed on a case-by-case basis. Each application is also considered by the Ministry of Foreign Affairs, in the light of foreign policy interests, including observation of the criteria enshrined in the EU Code of Conduct on Arms Exports".\textsuperscript{16}

Recent years have seen an increase in transparency from both competent authorities, particularly through the publication of information on official websites and the organisation of awareness-raising events. But the practical results of those efforts, in what concerns dual-use items, are clearly still insufficient.

There seems to be much room for improvement, both in what concerns the legal framework – which, in relation to dual-use items, has not been revised since 1994 – and in what concerns the enforcement of existing EU and national laws.

A first crucial step would be to bring the national legislation in line with Regulation (EC) 428/2009, as well as with country specific Regulations and relevant Security Council Resolutions adopted under Chapter VII of the United Nations Charter. It is unclear what has prevented the long ongoing legislative review process from arriving at its conclusion.

Portugal seems to be a good demonstration of the reason why the EU’s intervention in this domain should be carried out through a directly applicable and enforceable Regulation. Other instruments, such as Directives or Guidelines, would lead to a very significant disparity of the control regime between Member states, which are entirely incompatible with security concerns in the context of the internal market. It also makes a case for the EU Regulation to be as precise and self-sufficient as possible.

\textsuperscript{16} See: \url{http://www.mdn.gov.pt/mdn/pt/mdn/Servi%C3%A7os+Centrais+de+Suporte+DG+Armamento+e+Infraestruturas+de+Defesa/ControlPolicy.htm}. 