European Dual-Use Trade Controls
Beyond Materiality and Borders

Non-Proliferation and Security
Portugal and Spain

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Introduction to the Iberian context

As a result of the European Union’s harmonisation of national legislation, export control of defence and dual-use items in Portugal and Spain is, expectably, quite similar. That being said, significant differences exist between the two countries, not so much at the substantive legislative and regulatory level, but in what concerns administrative organisational options and economic dimension, with its implications on number and type of exports subject to control.

Both countries are parties to essentially the same international treaties, organisations and initiatives relevant in this field. This includes the Non-Proliferation Treaty, the Physical Protection Convention, the Safeguards Agreement and its Additional Protocol, the OECD Convention on the Establishment of a Security Control in the Field of Nuclear Energy, the Proliferation Security Initiative, the Nuclear Suppliers Group, the Zangger Committee, the Wassenaar Arrangement, etc.

The legal framework in both countries is topped by the applicable EU Regulations and Joint Action, already described in the European report.

In the Portuguese legal order, the main relevant acts include:

(i) Decree-Law 1/86 regulating transfer of technology harmful to national interest;
(ii) Law 49/2009 regulating conditions of access to trade, intermediation and industry of military goods and technology;
(iii) Law 37/2011 simplifying conditions of transfer of defence-related products (transposes directives 2009/43/EC and 2010/80/EC);
(iv) Ministerial Order 290/2011, on general licences; and
(v) Ministerial Order 109/2012, on licencing and certification models.

Since Decree-Law 493/94 was revoked (by Law 37/2011), there is no Portuguese legislation dealing specifically with dual-use items, the EU Regulation being directly applied.

In the Spanish legal order, the main relevant acts include:
(i) Law 53/2007, on the control of overseas trading of defence and dual-use materials;
(ii) Royal Decree 2061/2008, revised by Royal Decree 844/2011, regulating Law 53/2007; and
(iii) The Customs Code.¹

As defined by the scope of the present collection of reports, the following sections shall focus exclusively on export control of intangible transfers of defence and dual-use items and technology, as well as on issues of extraterritorial enforcement of national and foreign laws relating to such export control.²

**Portugal**

In Portugal, the Ministry of Defence (specifically, the Directorate-General of Armament and Defence Equipment)³ is responsible for licencing exports of defence items and technologies, while the Customs Office (specifically, the Directorate of Licencing Services)⁴ is directly responsible for licencing exports of dual-use items and technologies. The Intelligence Services (Security Information Services, or SIS)⁵ also

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¹ For a more complete listing, see: http://www.comercio.mityc.es/en/comercio-exterior/informacion-sectorial/material-de-defensa-y-de-doble-uso/Pages/legislacion.aspx.

² It is fitting to stress that the present report was made possible by, and prepared partly on the basis of, information kindly provided by the competent Portuguese and Spanish authorities. Special thanks are owed to Lieutenant Colonel Carlos Neves (Portuguese Ministry of Defence), Major Abel Oliveira (Portuguese Air Force), Ms Maria Oliveira (Portuguese Customs Office) and Mr Carlos Burgos (Spanish Ministry of Economy). That being said, any errors or omissions are the exclusive responsibility of the author.


Portugal and Spain

plays a role in identifying relevant situations and in outreach to national companies and universities.

In order to coordinate the intervention of the multiple authorities which can play a role in enforcement, an interministerial committee has been set up, in what concerns defence items, headed by the Ministry of Defence, and including the Ministry of Foreign Affairs, the Customs Office, SIS and the Police (Polícia de Segurança Pública, or PSP)\(^6\) (see Article 28 of Law 37/2011).

There is a comparatively limited number of exports of dual-use and defence items/technologies from Portugal. While exports of dual-use items are diverse, in the area of defence, these focus essentially – around 99 per cent – on ML10 (airplane equipment and repair services) and ML11 (communications equipment) items, the remainder being fundamentally ML7 items (security forces equipment).

**Intangible transfers**

In line with European Union legislation, Portuguese legislation specifically foresees the control of transfers, not only of items, but also of technology (see, e.g., Articles 1 and 2 of Law 49/2009; Article 2(a), (b) and (c) of Ministerial Order 290/2011). Article 2(2) of Law 37/2011 explicitly includes the intangible form of defence related materials, technologies and services in the scope of controlled items. Thus, on the one hand, intangible transfers are controlled, not by the nature of the manner in which the items are transferred, but by the nature or form taken by the items transferred. On the other hand, the national concept of “export” explicitly includes intangible means of transfer, such as by phone or electronic means, and the rendering of technical assistance or supply of technical data (see, e.g., Article 2(3)(b) of Law 49/2009).

The models for licences for defence-related items, adopted by Ministerial Order 109/2012, require a general description of the items to be transferred, but make no mention of the manner in which the transfer is to occur, nor do they brush upon the issue of intangible transfers in any other way.

The general licences foreseen in Ministerial Order 290/2011 are subject to different formal requirements in the case of tangible and intangible transfers (Article 5). However, it is not entirely clear, from the letter of the law, what formal requirements apply to obtaining general licences for intangible transfers, an issue, which can be clarified in communications with the authorities. In any case, a licence must be obtained prior

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\(^6\) PSP is currently responsible for licencing exports of certain weapons and ammunition.
to sharing controlled technical information with a foreign person, in or outside the national territory. It is possible to obtain an exemption on a case-by-case assessment.

Most recently, there have been no examples of licences issued for intangible transfers by the Ministry of Defence. The only case identified was that of a licence issued for a scientist working on lasers who wished to go to work in Germany. This licence was issued at the request of the German authorities.

The Ministry of Defence believes that, given the defence-related items involved in Portuguese external trade, possible intangible transfers falling within their area of attributions are very limited. That being said, a superficial assessment of the official list of companies registered as military products and technology traders/exporters (circa 80) suggests that some of these companies trade in items which, at least potentially, may be transferred through intangible means.

The same Ministry was able to provide several examples of situations of intangible transfers, which, at least potentially, might have been subject to mandatory licensing, but which were only detected a posteriori. These situations included: (i) a foreign worker employed in UAV industry; (ii) emailed information on rocket propulsion; (iii) telephone advice on chemical synthesis; (iv) postgraduate research in electronics and signal processing; and (v) downloadable encryption software. It was also noted, however, that some, if not all of these situations, fell within the category of dual-use, rather than defence items/technology.

On the other hand, the Customs Office, which deals with dual-use items, indicated that, in the last five years, only two licences for dual-use items were issued that concerned intangible transfers, representing circa 2.28 per cent of total licences issued during the same period. These concerned online transfers between servers of subsidiaries of the same company, located in different countries.

Infringements of export control rules are treated similarly for tangible and for intangible transfers. However, as it may be the case that many unlawful exports of intangibles occur unintentionally, the attenuated form of the sanctions (for negligent offenses) may be applicable (see, e.g., Article 34(4) of Law 37/2011).

Both the Customs Office and the Ministry of Defence perceived that a great number of Portuguese stakeholders are unaware of legal obligations in this field. One misconception of undertakings that has been

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frequently identified is that ITT control is relevant only for companies active in arms trade. The authorities understand a large component of their mission to be to conduct outreach programmes to undertakings (namely through business associations) and research centres, in order to increase compliance, and they have invested, and plan to continue investing significantly, in such efforts, demonstrating a strong, business-aware approach to the carrying out of their functions. The Ministry of Defence has outlined the following focal points for its *ex ante* and *ex post* control efforts:

(i) *Ex ante*: developing customised and user-friendly outreach programmes focused on awareness raising, focusing on recurrent contacts with the senior executive or person directly responsible for this area; promoting the implementation of self regulation programmes, best practices or internal compliance programmes; increasing end-user screening; incrementing pre-controls for visiting scientists and carrying out visa-screening; and

(ii) *Ex post*: enforcing record keeping and documentation requirements; promoting regular audits (focusing on access to data transmission systems); applying effective, proportionate and dissuasive sanctions.

On 26 May 2009, the two authorities conducted a joint action to raise awareness on the rules applicable, specifically, to the control of transfers of intangible items. This action (a presentation of which is available online)\(^8\) summarised the Portuguese authorities’ understanding of the scope of export control of intangible items: transfers of technology, technical information and/or knowledge, all of which can be done, *e.g.*, through: research and development projects, technical assistance, e-mail, phone, websites, guided tours of facilities, conferences, and lectures. This presentation also highlighted some scientific areas of great relevance in this respect: life sciences, materials sciences, electronics, guidance and control technologies, nanotechnology, propulsion, chemistry, etc.

A more recent presentation of the Ministry of Defence at an international forum (October 2012) identified the following means of intangible transfers: transfer to a person or place abroad by electronic means, such as email, fax or telephone (if reading out contents of a document that includes technology subject to control) or provision of technical assistance (instruction, skill, training, working knowledge, consulting services). It was also recalled that ITT control does not apply to information in the public domain or to basic scientific research.

Both authorities stressed that promoting self-compliance and strengthening the enforcement of the control of intangible transfers is currently one of their most prominent objectives. At the same time, they have taken part in international fora and, specifically, in international discussions concerning control of intangible transfers, e.g. in the framework of UNSC Resolution 1540. International cooperation between authorities has been singled out as crucial for the optimisation of the control of intangible transfers.

**Extraterritoriality**

In what concerns “inbound” extraterritoriality, national legislation does not regulate the matter specifically, except for requirements imposed by the authorities of other Member States. Article 25 of Law 37/2011 requires companies that request an export licence from Portuguese authorities (for defence-related items) to prove that they comply with export restrictions imposed by another Member State where the item originated, or that the prior authorisation of that Member State has been obtained.

The Customs Office has stated that it has never been directly contacted by foreign authorities for the purposes of extraterritorial application of export control rules, but that some national companies apply internal compliance programmes based on American or German export control laws, and that it is occasionally contacted in the framework of such programmes.

The Ministry of Defence has, on a few occasions, been faced with questions posed by American authorities, aimed at the extraterritorial enforcement of US export control laws in relation to specific items previously imported into Portugal. No example could be provided of situations of “inbound” extraterritoriality from other Member States. It has also been pointed out that a few Portuguese companies have developed internal compliance programmes to tackle, specifically, the extraterritorial application of US export control rules. It should be noted that some examples of extraterritorial application of USA law (Blue Lantern programme) in Portugal were noted in Wikileaks.9

In what concerns “outbound” extraterritoriality, Portuguese legislation naturally allows – as does EU law – for a certain degree of extraterritorial enforcement of licencing requirements imposed by the national authorities, as that is the essence of the export certificate and of the

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possibility of imposing conditions that extend to the recipient of the items.

Thus, for example, under Article 24(1) of Law 37/2011, exporters must inform their counterparts of conditions imposed in the export licence, including safeguards relating to final use and any restrictions on re-export (which may be imposed). Proof of having transmitted this information may be subsequently required by the authorities and must be kept for a period of ten years (no examples of the implementation of this requirement could be obtained). Article 6 of Ministerial Order 290/2011 includes certain automatic “extraterritorial” restrictions (interdiction of re-exports to embargoed or sanctioned countries) for exports carried out under general licences.

Article 27 of Law 37/2011 allows the authorities (through the Ministry of Foreign Affairs), when the item in question so justifies, to follow up on an exported item in another State, and specifically on compliance with restrictions imposed in the export licence (such as interdictions of re-exports). The Ministry of Defence is aware of this possibility, but has not recently used this option.

Spain

In Spain, the relevant competencies are currently centralised in the Ministry of Economy (specifically, the Under-Directorate-General for Foreign Trade in Defence and Dual-Use Items).\(^\text{10}\) To coordinate the intervention of other authorities whose functions overlap with this field, an Inter-Ministerial Regulatory Board on External Trade in Defence and Dual-Use Material was established, including representatives of the Ministries of Economy, Foreign Affairs, Defence, and of the Interior.

There is a very significant number of exports of dual-use items and defence-related items from Spain. Possibly as a result of this, but also of administrative centralisation and specialisation, and perhaps of significant scrutiny by NGOs (specific cases of exports to countries of concern are often discussed in the Spanish media), there is a very high degree of transparency and ease of access to information provided by the Spanish authorities in this domain, which is commendable.

According to official statistics for 2011,\(^\text{11}\) a total of 2,431.2 million Euros worth of defence-related items were exported (an increase of

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\(^{10}\) See: [http://www.comercio.mityc.es/en/comercio-exterior/informacion-sectorial/material-de-defensa-y-de-doble-uso/Pages/conceptos.aspx](http://www.comercio.mityc.es/en/comercio-exterior/informacion-sectorial/material-de-defensa-y-de-doble-uso/Pages/conceptos.aspx).

115 per cent in relation to the previous year). 56 per cent of these exports were to non-EU and non-NATO countries.

As for dual-use items, a total of 99.40 million Euros worth were exported (no significant variation in the two previous years). 18.7 per cent of these exports were to China and 16.9 per cent to Iran.

**Intangible transfers**

Similar to what was previously mentioned for Portuguese law, Spanish legislation specifically encompasses intangible transfers, incorporating concepts of EU law and soft-law guidelines (*e.g.* Wassenaar Arrangement). Thus, for example, Article 3(5) of Law 53/2007 complements the basic definition of exporter by stipulating that the concept shall also include “any natural or legal person who decides to transmit software or technology by electronic media, fax or telephone to a destination outside the Community“. Article 3(7)(iii) includes in the definition of export the “transmission of software or technology by electronic media, fax or telephone“, and specifying that this includes “oral transmission of technology by telephone only where the technology is contained in a document the relevant part of which is read out over the telephone, or is described over the telephone in such a way as to achieve substantially the same result.“

In the last five years, the Spanish authorities issued 106 licences of intangible items or that included intangible items (software or technology) out of 2102 total dual-use licences. In other words, five per cent of the total number of licences issued in the previous five years related to intangible transfers or to items potentially transferred by intangible means. The majority of these intangible exports belonged to Categories 2 (Materials processing), 5 (Telecommunication and information security) and 6 (sensors and lasers). One of the most frequent intangible transfers was that of a code (numerical control system) meant to increase the performance of the software used in numerical control units for machine tools previously exported.

The number of intangible transfers subject to export control was greater in dual-use items than in defence-related items.

The Spanish authorities have recently made an effort and have called on other countries to control visas to prevent intangible transfers of technology, and have worked on the issue of intangible transfers in international fora, specifically, within the Australia Group.

Internally, the authorities adopt a primarily pre-emptive approach, based on knowing national exporters and informing them about the relevant legal obligations. For this purpose, an outreach programme
focused on business associations and specific companies has been implemented.

**Extraterritoriality**

No information was obtained concerning national experiences with “inbound” extraterritoriality, which was described as a sensitive issue that is dealt with in several areas aside from control of dual-use and defence-related items, requiring an ensemble approach.

In what concerns “outbound” extraterritoriality, as discussed above, this will naturally manifest itself, namely, in imposing requirements relating to re-export of items. As a result of such requirements, in 2011, for example, a licence was refused based on the risk of diversion (absence of sufficient guarantees provided by the end user), in what can be seen as a manifestation of “preventive” extraterritoriality. Similar examples are provided in the official 2011 report for dual-use items.
The Chaudfontaine Group was established in 2010 in order to hold an annual two-day meeting gathering young Europeans with diverse academic backgrounds – lawyers, economists and political scientists – from relevant national authorities and European institutions, from industry and from European academic centres. Its members are invited to discuss their respective viewpoints on strategic issues concerning the European trade of sensitive goods in a constantly and rapidly evolving international context.

In November 2012, at its third conference, the Group debated the subject of the European dual-use trade controls from the perspective of EU members, institutions and industry, addressing the challenges linked to intangible technology transfers and the extraterritorial application of non-EU legislation. The objective was to review and discuss a rapidly evolving issue through the lens of individual member states’ export control regulations and experience, and from the perspectives of both industry and academia.

Exploring the way that export controls have evolved and analysing both “hard” and “soft” legal norms, the third conference set out to establish a critical understanding of new developments as well as looking at the more specific elements of export control, with a view to formulating propositions that would go “beyond regulations”.

Throughout this book, contributions from a wide variety of EU member states demonstrate that in the realisation of the European motto “United in diversity” the EU is once again searching for greater coherence on the international scene.

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