'Complicated and overlapping': How Spain implements EU sanctions

In Spain, competence for the regulation, implementation and enforcement of economic sanctions is spread across several different government departments, leading to overlapping jurisdictions, complex rules – and potential confusion for business, write José Luis Iriarte Ángel and Fátima Rodríguez González, who attempt to bring some clarity.

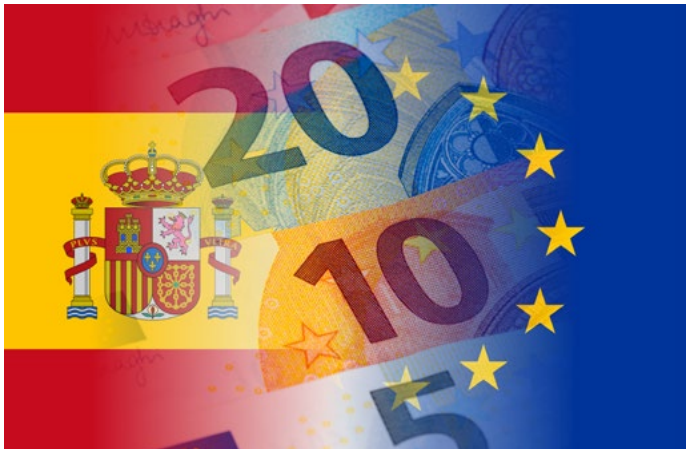
COMPETENT AUTHORITIES

In Spain, competence to apply EU restrictive measures (economic sanctions) is dispersed among a variety of administrative bodies. This can lead to confusion, given that sometimes the functions of such bodies overlap, alongside the complexity of regulation – and it is arguable that the Spanish government would be well advised to centralise responsibility for sanctions, if not within a single department, then certainly within fewer than at present. But such a move is not planned, and certainly not on the cards for the foreseeable future.

For the moment, the following describes the respective responsibilities of the government agencies with a sanctions or export control-related function:

A. Within the Ministry of Industry, Trade and Tourism[1] and, in particular, within the Secretariat of State for Trade:

- Responsibility for the issue of export and import licences for arms, military equipment and dual-use goods and technologies: *Subdirección General de Comercio Exterior de Material de Defensa y de Doble Uso*.
- Licences for the export and import of goods not covered above: *Subdirección General de Comercio Internacional de Mercancías*.
- Services other than financial or transport services: *Subdirección General de Comercio Internacional de Servicios y Comercio Digital*.
- Investment operations, both for Spanish investments abroad and foreign investments in Spain: *Subdirección General de Inversiones Exteriores*.



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B. Under the Ministry of Economic Affairs and Digital Transformation and within the General Secretariat of the Treasury and International Finance:

- Financial sanctions, i.e., freezing of assets and authorisations for financial transfers and disposal of frozen assets: *Subdirección General de Inspección y Control de Movimientos de Capitales*.

C. Within the Ministry of Finance and the Civil Service and within the State Secretariat for Finance:

- Customs control: *Subdirección General de Gestión Aduanera*.

D. Ministry of Transport, Mobility and the Urban Agenda within the framework of the General Secretariat for Transport and Mobility:

- Restrictions on maritime and air transport: Three bodies may have competence according to the specific matter in question: *Dirección General de la Marina Mercante, Puertos del Estado*, and *Dirección General de Aviación Civil*.

E. Competence in terms of travel restrictions, essentially prohibition of entry into the territory of EU Member States, is divided between two Ministries: *the Ministerio del Interior* (*Secretaría de Estado de Seguridad: Centro de Inteligencia contra el Terrorismo y el Crimen Organizado*, 'CITCO') and the *Ministerio de Asuntos Exteriores, Unión Europea y Cooperación* (*Dirección General de españoles en el Extranjero y de Asuntos Consulares*).

Given the limited scope and extent of this article, we will not go into the competences corresponding to EU institutions, such as the competence of the Commission to authorise EU operators to comply with the extraterritorial legislation listed in the Annex to the blocking statute.

APPLICABLE NATIONAL LEGISLATION

Spanish sanctions law is varied and dispersed. First we will tackle the legislation that establishes which criminal and administrative penalties are applicable when EU restrictive measures are breached.

The Organic Law 12/1995 of 12 December 1995 on the repression of smuggling[2] contains both criminal and administrative sanctions in this respect. With regard to the former, Article 2 states the following:

Article 2. Classification of the offence

1. The offence of smuggling is committed, provided that the value of the goods, merchandise, goods or effects is equal to or greater than €150,000, by those who carry out any of the following acts:

...

d) Import or export goods subject to commercial policy measures without complying with the existing applicable provisions; or when the operation was subject to prior administrative authorisation and such authorisation was obtained either by applying for it with false information or documents concerning the nature or final destination of such goods, or in any other unlawful means.

...

2. The offence of smuggling is committed, provided that the value of the goods, merchandise, goods or effects is equal to or greater than €50,000, by those who carry out any of the following acts:

...

(b) Importing, exporting, trading in, holding, transporting or circulating operations of:

Stalled or banned genera, including their production or rehabilitation, without complying with the requirements of the law.

…

c) Import, export, introduce, dispatch or carry out any other operation subject to the control provided for in the corresponding regulations concerning goods subject to the same by any of the following provisions:

1. The regulatory legislation of foreign trade in defence material, other material or dual-use products and technologies without the authorisation referred to in Chapter II of Act 53/2007, or having obtained it either by applying for it with false information or documents in relation to the nature or final destination of such products or in any other unlawful manner.

In essence, for the offences thus defined, prison sentences of one to five years and a fine of one to six times the value of the property can be imposed.

With respect to administrative offences, Article 11 of the aforementioned Law states:

Article 11. Classification of infringements.

1. Natural or legal persons and the entities mentioned in Article 35.4 of Law 58/2003 of 17 December 2003 on General Taxation shall be guilty of the administrative offence of smuggling if they carry out the actions or omissions provided for in paragraphs 1 and 2 of Article 2 of this Law, intentionally or with any degree of negligence, regardless of the value of the goods, merchandise, goods or effects, when such conduct does not constitute an offence.

For administrative infringements, penalties are provided for in the form of monetary fines proportional to the value of the goods.

On the other hand, in Law 10/2010 of 28 April on the prevention of money laundering and terrorism financing,[3] we must first highlight Article 42:

Article 42. International financial sanctions and countermeasures.

1. The financial sanctions established by the Resolutions of the United Nations Security Council on the prevention and suppression of terrorism and terrorist financing and on the prevention, suppression and disruption of proliferation of weapons of mass destruction and its financing shall be compulsorily applicable for any natural or legal person as provided by EU regulations or by Council of Ministers regulation adopted at the proposal of the Minister for the Economy and Enterprise.

2. Without prejudice to the direct effect of Community regulations, the Council of Ministers, on a proposal from the Minister of Economy and Enterprise, may resolve to apply financial countermeasures with respect to third countries which represent a higher risk of money laundering, terrorist financing or financing of the proliferation of weapons of mass destruction.

The resolution of the Council of Ministers, which may be adopted at its own initiative or in application of decisions or recommendations of international organisations, institutions or groups, may impose, *inter alia*, the following financial countermeasures:

a) Prohibit, limit or condition capital movements and the related collection or payment transactions, as well as transfers, from or to the third country or nationals or residents thereof.

b) Subject to prior authorisation any capital movements and the related collection or payment transactions, as well as transfers, from or to the third country or nationals or residents thereof.

c) Agree to freeze or block the funds or economic resources owned, held or controlled by natural or legal persons that are nationals or residents of the third country.

d) Prohibit the provision of funds or economic resources owned, held or controlled by natural or legal persons that are nationals or residents of the third country.

e) Require the application of enhanced customer due diligence measures in the business relationships or transactions of nationals or residents of the third country.

f) Establish systematic communication of the transactions of nationals or residents of the third country and of transactions entailing financial movements to or from the third country.

g) Prohibit, limit or condition the establishment or maintenance of subsidiaries, branches or representative offices of the financial institutions of the third country.

h) Prohibit, limit or condition the establishment or maintenance by financial institutions of subsidiaries, branches or representative offices in the third country.

i) Prohibit, limit or condition business relationships or financial transactions with the third country or with nationals or residents thereof.

j) Prohibit obliged entities from accepting due diligence measures by institutions located in the third country.

k) Require financial institutions to review, modify and, where applicable, terminate correspondent relationships with financial institutions of the third country.

l) Subject the subsidiaries or branches of financial institutions of the third country to enhanced supervision or to external examination or audit.

m) Impose on financial groups enhanced information requirements or external audit in respect of any subsidiary or branch located or operating in the third country.

With regard to the sanctioning regime, the aforementioned Law distinguishes between very serious and serious infringements. Article 51.2 establishes:

2. As provided for in the Community regulations establishing specific restrictive measures in accordance with articles 60, 301 or 308 of the Treaty establishing the European Community, the following shall constitute very serious breaches of this Act:

a) Wilful breach of the obligation to freeze or block the funds, financial assets or economic resources of designated natural or legal persons, institutions or groups.

b) Wilful breach of the prohibition on making funds, financial assets or economic resources available to designated natural or legal persons, entities or groups.

Article 52.4 states the following:

> 4. As provided for in the Community regulations establishing specific restrictive measures in accordance with articles 60, 301 or 308 of the Treaty establishing the European Community, the following shall constitute serious breaches of this Act:
>
> a) Failure to comply with the obligation to freeze or block the funds, financial assets or economic resources of designated natural or legal persons, institutions or groups, where this should not be classified as very serious breach.
>
> b) Failure to comply with the obligation to make funds, financial assets or economic resources available to designated natural or legal persons, institutions or groups, where it should not be classified as very serious breach.
>
> c) Failure to comply with the obligations of reporting to and notifying the competent authorities specifically established in Community regulations

The law establishes a system of penalties consisting of fines that can be very high.

LINKS AND NOTES

1 The names of some ministries may change as a result of restructuring by successive governments.
2 The law has been subject to several subsequent amendments. For this reason we recommend using the codified version: www.boe.es/buscar/pdf/1995/BOE-A-1995-26836-consolidado.pdf
3 The consolidated version can be found at: www.boe.es/buscar/act.php?id=BOE-A-2010-6737
4 Consolidated text: www.boe.es/buscar/act.php?id=BOE-A-2007-22437
5 Consolidated text: www.boe.es/buscar/act.php?id=BOE-A-2014-8926
6 Judgment no. 1237/2020. RJ\2020\3763.
7 Judgement no. 455/2021. ECLI:ES:APT:2021:1867.

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In addition, Law 53/2007 of 28 December 2007 on the control of foreign trade in defence and dual-use material,[4] and Royal Decree 679/2014 approving the Regulation on the control of foreign trade in defence, other material and dual-use material[5] must also be borne in mind.

SOME NOTES FROM THE OBSERVATION OF PRACTICE

The Spanish government's practice is such that it is difficult to draw broad conclusions and rules as regards the implementation of the law. However, there are interesting clarifications of the law to be found in judgments of the Spanish courts. For example, a judgment of the Supreme Court (Administrative Chamber, 3rd Section) of 1 October 2020[6] establishes that the effects of judgments of the Court of Justice of the European Union handed down in actions for annulment whereby provisions of a general nature are annulled produce effects *ex tunc* ('from the outset') and *erga omnes* ('are applicable to all') as soon as they are handed down, especially when the subject of the action for annulment is a rule of a punitive nature or one which produces restrictive effects on the rights of natural and legal persons. Consequently, the Spanish administration cannot sanction a Spanish financial institution for not freezing the assets of an Iranian bank which was sanctioned by the European Union, but which won an action for annulment and managed to be excluded from the lists of legal persons subject to restrictions.

The judgment of the Tarragona Provincial Court (3rd Section) of 12 November 2021[7] holds that it is a smuggling offence to export to Iran valves whose supply to that country is prohibited by European Union legislation, and that both the individuals involved and the Spanish company are criminally liable.

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