

Caspian Week 2019

Trade Sanctions - The Swiss Perspective

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Why is it relevant?

- > *Delisting* procedure for individuals and entities on Swiss sanctions lists
- > Companies operating out of Switzerland : understand the regulatory, criminal and contractual risks and how to best mitigate them
- > Agenda
 1. Legal Framework
 2. Types of measures
 3. Effects of UN, EU and other sanctions in Switzerland
 4. Consequences of a breach of sanction
 5. Delisting procedure
 6. Mitigation of the risk of being sanctioned

1. Legal Framework

- > Article 184(3) of the Federal Constitution / Foreign Illicit Assets Act
 - Autonomous / Unilateral measures
 - Urgent freezing of assets to safeguard Switzerland's interests
 - Main targets are PEPs
 - > E.g. Certain nationals of Ukraine, Egypt, Tunisia

- > Federal Act on Embargos (EmbA)
 - Dependent on measures by “Switzerland's most significant trading partners”
 - > Specific measures in relation to a particular state or regime contained in separate ordinances issued by the Federal Council
 - Individuals, groups and companies affected listed in annexes to the ordinances (continuously updated)
 - > Currently 23 Swiss sanction programmes
 - > Enforcement by State Secretariat of Economic Affairs (SECO)

2. Various types of measures

Overview of the various types of measures

- > Financial sanctions: freezing of funds and other financial assets
- > Embargo: trade restrictions relating to certain categories of goods or services (including financial or technical assistance)
- > Travel restrictions for nationals of the targeted states
- > Diplomatic constraints
- > Cultural and sports restrictions
- > Air traffic restrictions

3. Implementation of UN and EU sanctions

- > UN Security Council sanctions: automatic transposition into Swiss law
- > EU sanctions: case-by-case basis, weighing up Swiss national interests
- > Other sanctions
 - No alignment (see, e.g., US sanctions on Russian individuals and entities)
 - FINMA's position following violations of US sanctions by Credit Suisse and BNP Paribas Switzerland
 - > Despite no breach of Swiss sanctions, a bank violates Swiss supervisory law if it exposes itself “to unduly high legal and reputational risks” in a foreign jurisdiction which results in a lack of “adequate organization, including risk management”

3. Implementation of EU sanctions: criteria

Foreign policy	Foreign economic policy	Legal
Nature of sanctions in relation to foreign policy	Circumvention of sanctions	Compliance with international law
Sovereignty and independence	Legal certainty	Immunity
Relations with the EU	Avoidance of secondary sanctions	Rule of law
Solidarity and community of values	Economic costs	Proportionality
Neutrality	Competitive neutrality (niche activities)	
Good offices		
Mandates of peace policy		
Security		
Switzerland's reputation		

4. Consequences of breach of sanctions

- > Regulatory consequences
 - Banking and export licenses (FINMA and SECO)
- > Criminal sanctions (EmbA)

Unlawful Act	Punishment
Breach of a sanctions ordinance (e.g. re Ukraine)	Imprisonment for up to 1 year and/or Fine to up to CHF 500,000 (default) Imprisonment for up to 5 years Fine to up to CHF 1 million (serious case)
Refusal to provide information, hand over documents or permit access to business premises	Detention and/or Fine to up to CHF 100,000
Failure to prevent a breach committed by a “subordinate” in a company	Criminal liability of managing directors, employers, delegators or principals
Prosecution time-bar: 5 years	

- > Impact on commercial contracts (illegality, subsequent impossibility, default, frustration, *force majeure*)

5. Legal protection of listed individuals and entities

- > Any individual/entity added to list of targeted individuals/entities may request delisting

- > Pursuant to recent case law of the Swiss Federal Tribunal, formal listing is not subject to appeal “in the absence of an abstract review”:
 - SECO ordinance cannot be challenged as such
 - only decisions based on a specific ordinance may be appealed, i.e. rejection of a request for delisting to SECO
 - *Nada v. Switzerland* : ECHR Judgement (right to an effective appeal)

- > Claim damages from Swiss government?

6. Mitigation of sanctions risks (companies)

- > Establishment of a robust sanctions programme
 - Corporate culture matters: programme implemented by senior management

Prevent	Detect	Respond
Set tone from the top	Channels for raising concerns: compliance hotline for escalation by employees	Post-event mitigation: detection and prevention services to minimise likelihood of future events
Policies and procedures: define a person in charge, training programmes for employees and best practices	Monitoring compliance programmes: in-house and independent audits	Incident management programmes: designing procedures / providing support in response to risks triggered by a sanction event or investigation
Risk assessment and due diligence: legal and regulatory monitoring, media monitoring	Investigations: evaluating suspicious activities using internal and external resources	Self-reporting to regulators (SECO and FINMA)

- > Informal rulings from SECO before entering into a transaction

Thank you for your attention.

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