

Export Controls and International Sanctions Compliance

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The case of Mr. G.

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Mr. G. was the shipping manager for a US company manufacturing and supplying certain electronic products. Some products of this company are subject to export controls and need a license for export.

The company became aware that Mr. G. had committed violations of export control regulations and, therefore, the company submitted a voluntary self-disclosure to the Department of Commerce's Office of Export Enforcement.

Mr. G. admitted having violated the law, but claimed that the company did not devote sufficient resources to ensure compliance and that he had to give priority to other tasks.

Mr. G. was sentenced to 42 months in prison and USD 1,000 fine.

The company was fined USD 500,000 by the US District Court for Pennsylvania due to inadequate management of export controls risks.

What is trade compliance?

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- One of various compliance areas
- Framework of rules on trade of goods, software, technology, economic resources
- Restrictions on movement and/or use, licensing requirements, administrative obligations, as well as financial restrictions – all of which take precedence over any contractual arrangements
- Targets: countries or persons (sanctions) or specific goods (export controls)

Why trade compliance?

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Legal and political developments

- Increasing and expanding legislation
- Political issues

Preventing damages

- Fines
- Void / revoked / denied licenses
- Frozen / blocked funds
- Seizure / forfeiture of goods
- Reputation

Protecting executives, employees and company against

- civil liability
- custodial sentences (in CH up to 10 years*; in the US up to 20 years...) and other penalties

* The competent Swiss export authority SECO does not keep public statistics on violations of sanctions and export controls. Also, no Swiss Federal Supreme Court decisions have been published regarding major violations (e.g. BGer 6B_425/2011 with non-guilty verdict) . However, media have reported, in general terms, on a few cases of companies punished for breaches of Swiss trade restrictions (e.g. in October 2015 two Swiss companies have been punished for having exported luxury goods to Syria).

Case BNP Paribas (2014/2015)

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In June 2014 US investigation authorities proved that BNPP knowingly and willfully processed more than USD 8.8 billion through the U.S. financial system between 2004 and 2012 on behalf of sanctioned entities in Cuba, Iran and Sudan. The implicated transactions led to more than 3,800 apparent violations of U.S. sanctions programs.

In May 2015 BNPP was sentenced by a US court to 5 years probation and was ordered to forfeit USD 8.9 billion (representing the proceeds derived from the transactions at issue) and to pay a USD 140 million fine.

FINMA examined whether the Swiss company, “BNP Suisse”, had breached Swiss supervisory law in this regard (not Swiss sanctions) and concluded in July 2014 that the bank persistently and seriously violated its duty to identify, limit and monitor the inherent risks, subsequently breaching supervisory provisions as it had an inadequate risk management in place. FINMA has ordered additional capital requirements for operational risks and banned the bank from conducting business with companies and persons subject to EU and US sanctions.

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International sanctions

Regulations and authorities

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Switzerland	Embargogesetz (EmbG) Based thereon: sanctions/embargos https://www.seco.admin.ch/seco/de/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/exportkontrollen-und-sanktionen/sanktionen-embargos/sanktionsmassnahmen.html	State Secretariat for Economic Affairs (SECO) (appeal to federal jurisdiction)
EU	EU restrictive measures decided by the EU Council following the EU Common Foreign and Security Policy http://eeas.europa.eu/topics/sanctions-policy/8442/consolidated-list-of-sanctions_en	Member states' authorities respectively
US	Various country and person/entity based sanctions https://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx	US Department of Treasury / Office of Foreign Assets Control (OFAC)

Why sanctions and what types?

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Reasons: international or national security, weapon of mass destruction proliferation, terrorism, violations of human rights or other international law, and other foreign policy considerations.

Types:

- *International*, e.g. UN sanctions and OSCE sanctions, adopted by EU, CH etc.,
→ whereby Switzerland, as UN member, must adopt the sanctions, Art. 25 UN Charta
- *Unilateral*, e.g. many US sanctions; certain EU sanctions against Iran, Russia, etc.;
→ Switzerland increasingly aligns its sanctions with the EU sanctions, although there is no legal obligation; No alignment with US sanctions
- *Country based*
- *Person and entity based*

Country based sanctions

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Country based

- *Comprehensive* (e.g. US OFAC sanctions against Iran, Cuba, N. Korea, Syria) →
Virtually all business, exports, re-exports prohibited
(but changes in Cuba sanctions are currently taking place)
- “*Smart sanctions*”, i.e. targeted against specific persons and entities or restricting trade with key commodities, e.g.
 - freezing of funds,
 - ban on transactions,
 - license requirements and investment restrictions,
 - trade restrictions on certain goods / services,
 - travel restrictions,
 - diplomatic constraints,
 - air traffic restrictions, etc.

Person and entity based sanctions

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Person and entity based (international lists of restricted parties), e.g.

- EU and CH sanctions against “Designated Persons”
- US sanctions against (a) specially designated nationals (“SDNs”), (b) terrorists, (c) narcotics traffickers, (d) WMD proliferators, (e) transnational criminal organizations

Instruments:

- (a) **Freezing** of funds and economic resources belonging to, owned, held or controlled by sanctioned parties
- (b) Prohibitions on **making funds or economic resources available**, directly or indirectly, to or for the benefit of sanctioned parties. → Risk of **indirect dealings**: prohibited relationships may include subsidiary, shareholder (EU: majority in votes, shares or other influence), director, contractor, family member

→ Required **review of the lists** and **screening of the partners**

Applicability of sanctions

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Applicability:

- to **exports** as well as to **domestic activities or dealings**
- to the **persons subject to a certain jurisdiction**, i.e. generally, to
 - citizens of a certain jurisdiction,
 - companies incorporated or active within a certain jurisdiction as well as their foreign branches and rep offices,
 - any business conducted within a certain jurisdiction

Examples of applicability of sanctions

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- Swiss sanctions apply to a Swiss citizen who travels abroad and pays a fee to a consultant listed in a Swiss sanctions list.
- US sanctions apply to a French citizen living in the US who exports goods to Cuba;
- EU sanctions apply to a Turkish company purchasing in the EU items for a listed Syrian company;
- Swiss sanctions apply to a Swiss citizen employed by a Chinese company and providing technical post-sales services to a customer listed in a Swiss sanctions list;
- EU sanctions apply to a German citizen based in UAE and negotiating sales to an Iranian company

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Export controls

Regulations and authorities

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Switzerland	<p>Güterkontrollgesetz (GKG) + verordnung https://www.seco.admin.ch/seco/de/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/exportkontrollen-und-sanktionen/industrieprodukte--dual-use--und-besondere-militaerische-gueter.html</p> <p>Kriegsmaterialgesetz (KMG)+verordnung https://www.seco.admin.ch/seco/de/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/exportkontrollen-und-sanktionen/ruestungskontrolle-und-ruestungskontrollpolitik--bwrp-.html</p>	<p>State Secretariat for Economic Affairs (SECO)</p> <p>(appeal to federal jurisdiction)</p>
EU	<p>Regulation (EC) No 428/2009, annex 1 http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=uriserv:OJ.L .2009.134.01.0001.01.ENG</p>	<p>Member states' authorities respectively</p>
US	<p><i>Commerce Control List</i> (to identify goods subject to export controls) in connection with <i>Country Chart Part 738 of EAR</i> (to see whether or not a license is required based on ECCN "Reason for Control") – http://www.bis.doc.gov/index.php/regulations</p>	<p>Buro of Industry and Security (BIS)</p>

What is export controlled?

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Controlled items:

- **Dual use items** (i.e. goods on control lists which can be used for civilian and military ends) and **military items** (incl. components specially designed or subsequently modified for such purposes), outlined in national lists
- **Any other (not listed) items** if it is known or the circumstances give reason to suspect that they are intended to be used for military end-use or for an end-use related to weapons of mass destruction (**Catch-all rule**)

Prohibition

- Export without an export license

Relevant regulations

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Relevant regulations

- of the country from which a product is physically exported
- of the country of origin in some cases of re-exports
(e.g. US law as soon as US origin content of the product exceeds 10% or 25% of the re-sale price – „De-minimis rule“)

CH:

- **International good control regimes:** Australia Group, Nuclear Supplier Group, Missile Technology Control Regime, Wassenaar Agreement, Chemical Weapons Treaty, Biological Weapons Treaty, Nuclear Weapons Non-Proliferation Treaty, Arms Trade Treaty
- Increasing alignment with EU
- Dual use goods: (a) General export license for certain countries, (b) Individual export license in other cases (license is refused only in case of concrete indications of an illegal use), (c) Import certificate only upon request, (d) statement of end use, (e) notification duty for “catch all clause” cases.

Applicability of export controls

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Applicability

- to export by **physical shipment** or **intangible transfer**, e.g. by email, fax, download from company intranet (in the US even “deemed export”)
- to **goods, software and technology** related thereto (e.g. specifications, drawings)

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Application Examples

- (1) Laurent is Swiss, has lived in Shanghai for 10 years, and works for a Chinese company with operations in China and USA. Is he subject to CH trade sanctions?
- (2) Vincent is French and lived and worked for a Chinese company in Shanghai for the past 5 years. He travels from China to Iran on business and wants to bring his laptop, which is manufactured in France but purchased in China. Is the laptop subject to EU export controls?
- (3) Controls on dual use products are concerned with the export of goods, software and technology by any means, but not transfers between companies that are part of the same corporate group. Right?
- (4) Pascal is a Swiss citizen and is going to travel on business to India with a USB stick, containing technical drawings regarding controlled machines of its company. He will not distribute the drawings, but just refer to them personally. Is he concerned by CH export controls?

- (5) Bernhard is in India at a supplier's site and access the technical drawings of a 5 axis milling machine (export controlled) from the company's sharepoint. Is this subject to export controls?
- (6) If you determine that your product is neither military nor dual use, is no license required?
- (7) You sell a non-controlled item with potential prohibited end-uses. You have however previously obtained a license for the same product to a different destination and a license for a similar product. Can you avoid to request a license?
- (8) A Spanish subsidiary has the opportunity to sell a machine to a customer in Cuba, which is subject to comprehensive US sanctions. Because the value of the contract exceeds a certain amount, approval has to be obtained by the head of the business unit who is a US citizen living in Switzerland. Can he approve?

- (9) The above transaction has been consummated. For after sales services, the Spanish subsidiary asks the US affiliate to send an employee from Miami in order to limit the costs. Can the employee go?
- (10) A potential customer is a designated party under international sanctions. Can you (a) contact him by letter, email, phone? (b) offer him goods and services? (c) supply to him software and technology? (d) return to him a down-payment due to difficulties of the business?

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How to deal with these issues?

Internal compliance /control program

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1. Management commitment and policy statement
2. Organization and responsibilities for due implementation
3. Licensing requirements and processes (in particular for classification of items)
4. Due diligence on business partners, related persons, end users and end uses / risk based and red flags approach
5. Training and information to relevant employees
6. Internal audits

(following SECO best practices)

Management commitment, policy statement

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- Code of Conduct
- Directive defining
 - Objectives and basic principles (compliance with export controls and sanctions, due diligence and investigation of suspect cases, screening of partners, no deal in suspicious cases, no circumvention, legal advise);
 - Procedures (item classification, due diligence and screening process, reporting)
 - Red flags (examples) and
 - Responsibilities

Organization and responsibilities

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- **Top management and CCO**: organization and trainings;
- **Local management** for execution / ensuring adherence to law;
- **Local export controls appointees** at each relevant company for supporting local management (assessing and identifying risks, advising the local management, ensuring compliance, keeping abreast of all requirements and legal developments, interacting with other export controls appointees re cases, reporting risks and suspicious cases)
- Further departments, e.g.
 - **technical engineers** for item classification,
 - **logistics and procurement** for suppliers' information (e.g. controlled US origin components),
 - **sales** for control of intermediaries (e.g. contractual compliance obligations) and screening process.

Licensing requirements and processes

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- **Where to? (sanctioned territories?)**

Do any sanctions apply to the specific export?

Is the destination country used for onward supply to sanctioned countries?

- **What is my item? (products controlled?)**

Is it export controlled in the export country (in lists)?

Does it contain any US controlled component? If so, with value of >10% or 25% of the total price? → Ask supplier and get written confirmation

- **What for? (sensitive end use?)**

Never export for prohibited end-uses

- **To whom? (sanctioned receivers?)**

Know your customer and watch for red flags

What is my item?

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Export classification

- **Switzerland:** *Güterkontrollgesetz, annexes 1 and 2*
- **EU:** *Regulation (EC) No 428/2009, annex 1*
- **USA:** *Commerce Control List - CCL (to identify items subject to export controls) in connection with Country Chart Part 738 of EAR (to see whether or not a license is required based on ECCN “Reason for Control”)*
- **China:** *Catalogue of Dual-Use Items and Technologies Subject to Import & Export License Administration*

All relevant commercial documents for goods under export license must clearly indicate that the items are subject to export controls if exported ([declaration on products, packaging, invoices and delivery papers](#)).

What for and to whom? Due diligence

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- **Know your customer and watch for red flags** (Do you really know your customer, its background and its typical business? Does it know its customer? What is the end-use of your product? Will your customer “use” or resell your product? Are you sure your customer/end-user is not on one of the restricted end-users/uses lists? Who is the exporter/re-exporter of record?)
- **Screening** of business partners, third parties (agents, distributors, agents, freight forwarders, banks etc.) and related persons (in particular in sensitive countries also directors and shareholders) against information in your possess: You should at least know what the authorities know from public sources. Advisable use of IT tools.
- **Risk based approach** for more problematic territories / due diligence accordingly. In suspect cases, **investigate further and ascertain the facts to a reasonable extent**.
- **Document** (a) standard screening process as well as (b) individual screening analysis and the investigation measures.

Further security measures

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- Protection of the company through compliance language in contracts, e.g.
 - providing intermediary/reseller with **information on your company's policy**,
 - including a **clause into agreements** with resellers re (1) obligation to comply with export control regulations and sanctions and (2) your company's right to give notice of termination in case of violation,
 - entering into an overall **compliance agreement**.
- **Prevent any involvement** of persons who may be subject to sanctions (e.g. US nationals, U.S. residents or persons holding a U.S. green card) if your dealing is otherwise legally allowed under your jurisdiction.

No circumvention

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- If it is suspected that the products to be exported are likely to be misused, the **contemplated transaction will not be carried out.**
- Any **evasion of export restrictions is forbidden**, e.g.
 - making shipments via domestic or foreign dealers or other intermediaries
 - splitting order into smaller orders falling below statutory thresholds
 - keeping end-user statements unclear, incomplete or even false
 - ignoring a likely misuse of the product for illegal purposes

Thanks for your attention!

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Questions?

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