

# SANCTION CONTROL AND BUSINESS INFECTION RISKS

COMPLIANCE WITH EU AND US  
SANCTIONS AGAINST RUSSIA AND  
BELARUS

Tobias Kohler / Truls Johannesen  
Oslo, 30 August





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Tobias Kohler is a German Attorney-at-law, working with Rödl & Partner since 2003. He started his career in Riga/Latvia, before he moved on to Warsaw/Poland. Since 2005 he is heading the office in Vilnius/Lithuania. In addition, he took over the management of the office in Minsk/Belarus in 2013.

Mr. Kohler advises local and international businesses in the areas of M&A, corporate law and foreign direct investments with a focus on the energy, manufacturing, automotive, transport and retail industries.

As a member of the International Practice Group of Rödl & Partner he is leading the Baltic M&A Practice Group. In addition, Mr. Kohler is active as a member of numerous working groups, business associations and organizations, e.g. as Vice-President of the Belarusian-German Business Club.

Within the 19 years of his professional career, Mr. Kohler has acted as a lead counsel on a wide range of international projects, among them more than 50 multinational and interdisciplinary transactions with single project transaction volumes of up to 300 million Euro. He also advised some of the largest and most complex FDI projects in the Baltic States and Belarus.

Due to his work in Belarus, Mr. Kohler has been dealing with export control issues, compliance requirements and the risks of sanction violations already for many years. Mr. Kohler is a member of Rödl & Partner's internal sanctions expert panel and the Export Control Practice Group.



# YOUR SPEAKERS



## **TRULS JOHANNESSEN**

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Truls Johannesen leads the litigation department in Advokatfirmaet Seland | Rödl & Partner AS.

Johannesen has worked in the Department of Justice, in the courts as a judge, in the Customs Department and as a lawyer.

In regards to the current situation in Europe, Johannesen has spoken about the war and its effect on force-majeure regulation in contracts.

Austria • Azerbaijan • Belarus • Brazil • Bulgaria • China • Croatia • Cyprus  
Czech Republic • Denmark • Estonia • Finland • France • Georgia • Germany  
Hong Kong • Hungary • India • Indonesia • Italy • Kazakhstan • Kenya • Latvia • Lithuania  
Malaysia • Mexico • Myanmar • Norway • Philippines • Poland • Portugal • Romania • Russian  
Federation • Serbia • Singapore • Slovakia • Slovenia • South Africa • Spain • Sweden • Switzerland  
Thailand • Turkey • Ukraine • United Arab Emirates • United Kingdom • USA • Uzbekistan • Vietnam

## 5,200 Colleagues

## 107 Offices

## 49 Countries



# AGENDA

- |   |  |
|---|--|
| 1 | Sanctions – effects and business relevance |
| 2 | Norwegian sanction regime                  |
| 3 | EU sanctions against Russia                |
| 4 | U.S. sanctions against Russia              |
| 5 | Sanctions check and screening              |
| 6 | Violations – risks and consequences        |
| 7 | Influence on commercial contracts          |
| 8 | Case studies                               |
| 9 | Recommendations                            |



# 1 SANCTIONS – EFFECTS AND BUSINESS RELEVANCE



# 1.1 PURPOSE AND CONSEQUENCES OF SANCTIONS

## General

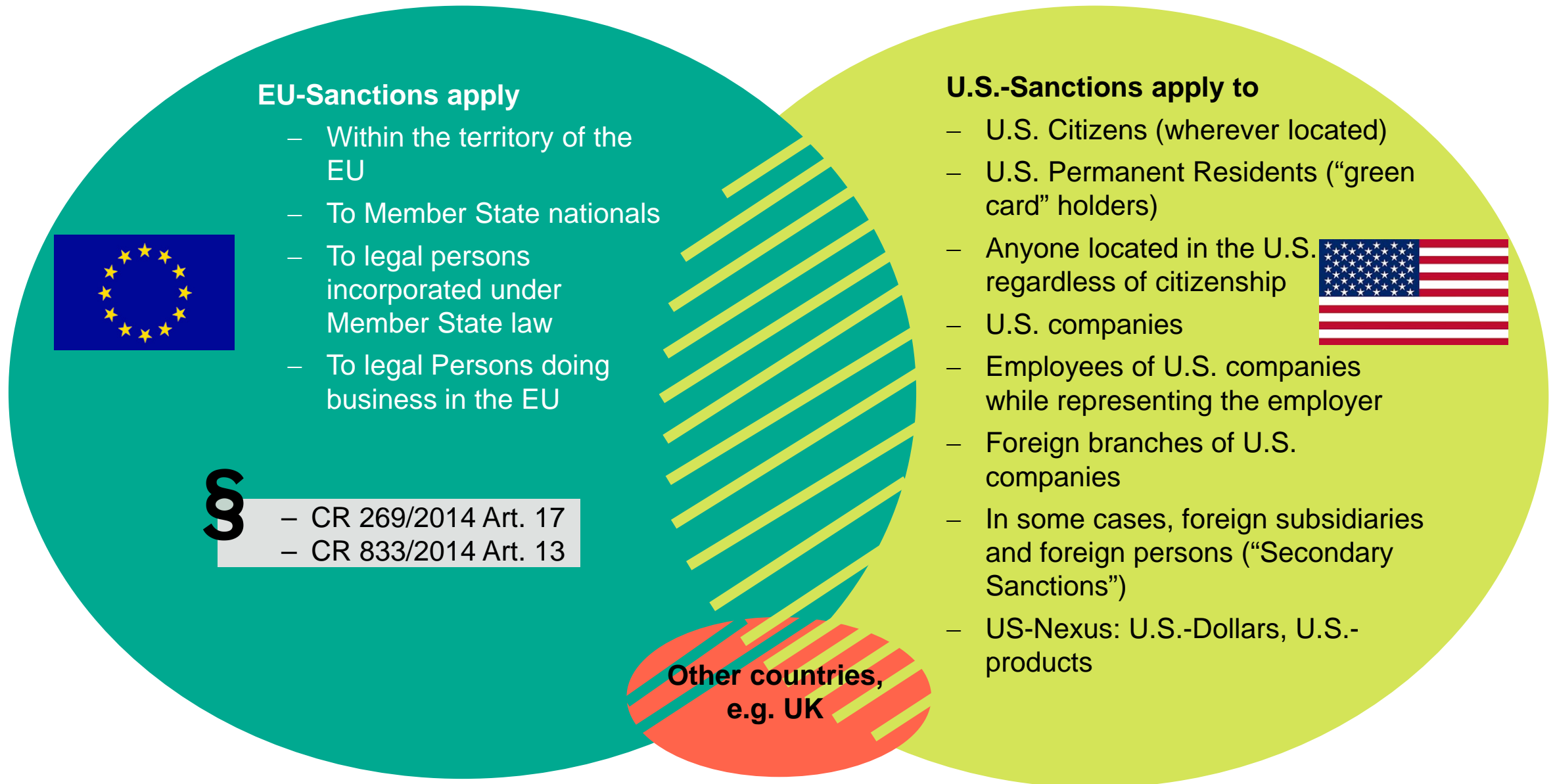
- Embargo / Sanctions
- Sanctions against Russia and Belarus: "Smart Sanctions" (?)
- Other export control measures (national / EU)

## Reaction pattern

- Currently in practice three approaches can be observed:
  - Indifference
  - Precautionary approach (controlled risk)
  - Zero-risk approach / overcompliance (?)
- Which approach is the right one?
  - “it depends“
  - especially on the individual risk exposure:
    - Financing structure
    - Goods
    - Company/group/shareholder structure
    - Customer/supplier structure
    - Existing control mechanisms

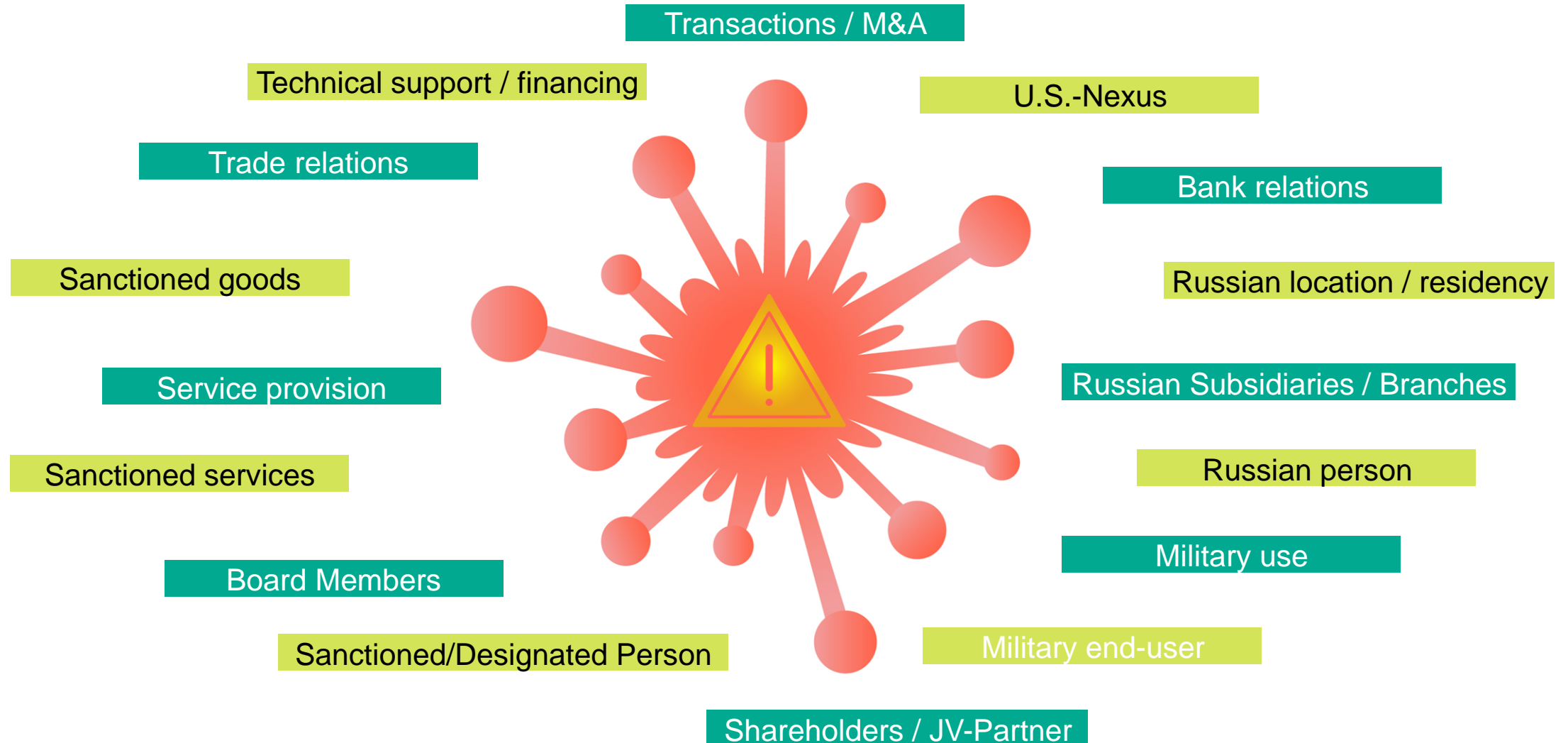


## 1.2 APPLICABILITY OF SANCTION REGIMES - JURISDICTION



# 1.3 BUSINESS INFECTION RISKS

## Evaluation of Risk Exposure (trigger points – samples)



## 1.4 CASE STUDIES

### APPLICABILITY OF SANCTION REGIMES – Case A „Attribution of actions by Russian entities“

#### *Situations:*

- a) Sanctioned products originating in the EU are in stock of a Russian company in Russia.  
The Russian company wants to sell these products to Russian costumers.
- a) Sanctioned products produced by a Russian subsidiary of a German company are sold to Russian clients.

#### *Question:*

Can such sales constitute a sanction violation of the Russian entity and/or the German shareholder?

#### *Answer:*

EU-sanction law only applies to EU legal entities or natural persons.

Can the activity of the Russian entity be attributed to the EU entity?

It depends e.g. on whether or not the Russian seller company is a subsidiary of an EU-company or a company controlled by non-EU-persons.

› No general attribution of actions. Attribution is depending on the individual case.

Circumvention Art. 12 (e.g. instructions, permission, controlling influence)

Problematic: Cases where the origin of the product has undergone a change of country of origin through processing.



## 1.5 CASE STUDIES

### APPLICABILITY OF SANCTION REGIMES – Case B „Usage of third country“

#### *Situation:*

German steel importer.

Original delivery scheme: Steel export from Russia to Germany/US

New delivery scheme: Steel export from Russia to a Turkish subsidiary; Re-manufacturing of the steel in Turkey; further export to Germany/US

#### *Questions:*

- a) Is the German Steel import company in violation of sanctions?
- b) Can a legal advisory company in Turkey (which is a subsidiary of a German law office), support in the establishment of the subsidiary in Turkey?

#### *Answers:*

Possible infringement of prohibition of circumvention Art. 12 CR 833/2014

- Scope (Art. 13 CR 833/2014)

- a) Turkish company to be established: Business in Germany
- b) Turkish advisory company: Business will be conducted in whole or in part in EU (client is located in Germany) / German citizenship of advisors
- c) Decision of German Management to accept the client (decision takers in DE)

Art. 12 CR 833/2014 Prohibition of Circumvention

Which sanction provision to be avoided?

- a) Art. 3g CR Annex XVII – Prohibition to import Russian steel to the EU
- b) Art. 3g d) Prohibition of technical support

Legal advisory services as technical support? No, technical, product related

“Participation” Art.12, also legal consultancy services / “knowingly”, “intentionally”

Advisor has knowledge of planned circumvention

Result: client is in violation – acceptance of assignment is violation of advisor

## 2 THE NORWEGIAN SANCTION REGIME



## 2.1 NORWEGIAN SANCTIONS

### THE NORWEGIAN SANCTIONS LAW:

- LOV-2021-04-16-18: Lov om gjennomføring av internasjonale sanksjoner (sanksjonsloven)
- Norway **has to** implement sanctions imposed by the UN Security Council
- Norway **can choose** to implement sanctions imposed by the EU

### IMPLEMENTATION:

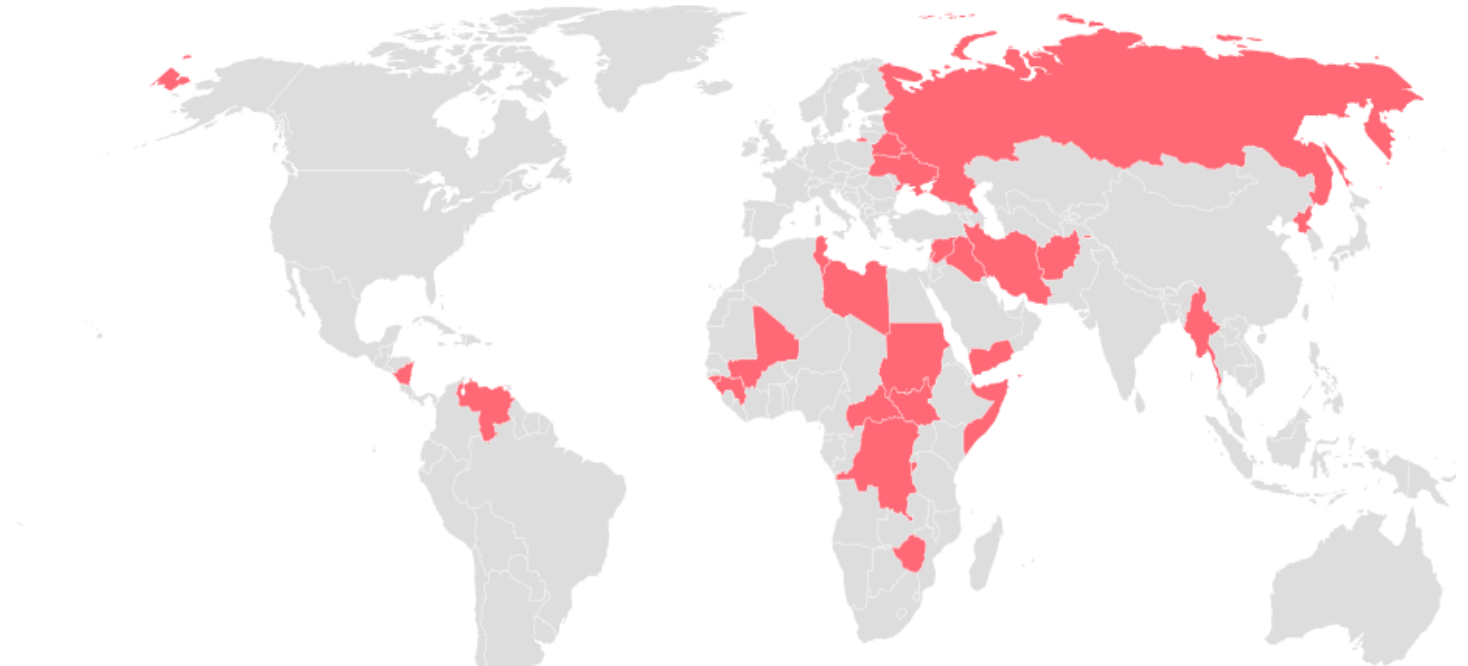
Sanctions are implemented by

- government regulations (forskrifter)
- The Foreign Department (UD) lists 29 such regulations as of March 2022

#### Gjeldende sanksjoner og tiltak

Sist oppdatert 13. april 2021

■ Sanksjoner eller tiltak gjelder





## 2.2 SANCTIONS AS A PART OF RESTRICTIVE MEASURES

### 1. Sanctions

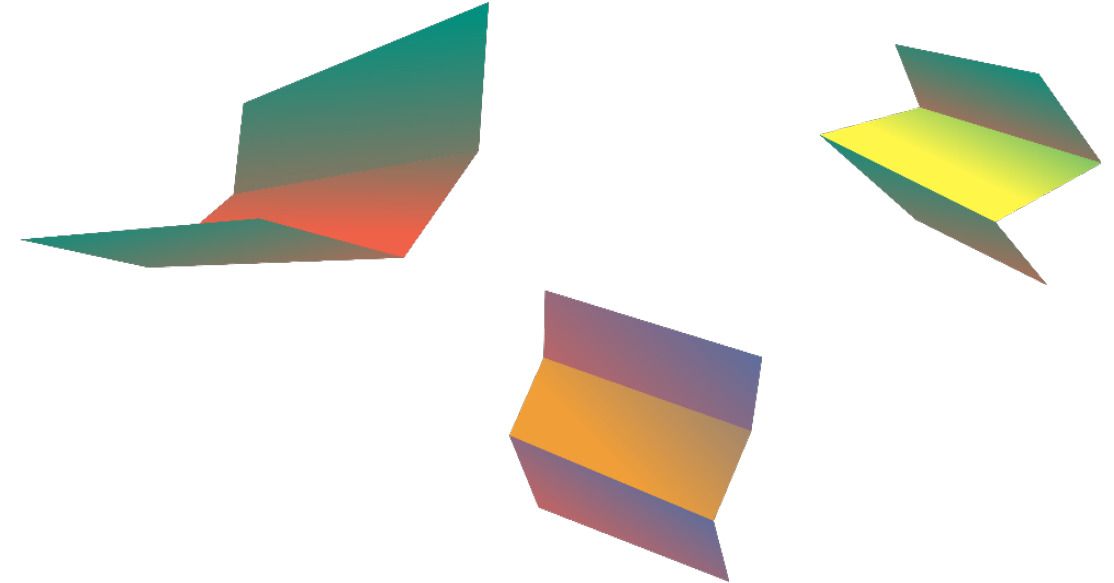
Norway has implemented ALL restrictive measures imposed by the EU, **except** censoring the media Sputnik and Russia today.

### 2. Export control

Certain goods and services can not be exported without a license from the Foreign Department (UD)

### 3. Travel restrictions

The Norwegian Directorate of Immigration (UDI)



### 3 EU SANCTIONS AGAINST RUSSIA



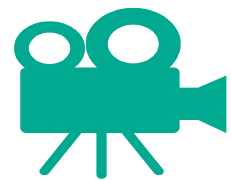
# 3.1 SIXTH SANCTIONS PACKAGE ENTERED INTO FORCE

## INDIVIDUAL SANCTIONS

The EU imposed sanctions on another 65 individuals and 18 organizations.

## MEDIA

The EU suspended the broadcasting activities of three other Russian state-owned media in the EU: Rossiya RTR/RTR Planeta, Rossiya 24 / Russia 24 and TV Centre International.



## EXPORT RESTRICTIONS

- The EU is expanding the list of persons and entities affected by export restrictions on dual-use goods and technologies.
- Both Russian and Belarusian organizations were added to the list.
- Furthermore, the EU has expanded the list of goods and technologies that could contribute to the technological improvement of the Russian defense and security sector. The additions include 80 chemicals that can be used for the production of chemical weapons.

## CONSULTING SERVICES

- The EU has banned the provision of accounting, auditing, tax consulting, public relations and other consulting services, as well as the provision of cloud services to Russia.
- Bann on services in relation to certain trust or similar structures.



## SWIFT EXCLUSION OF MORE RUSSIAN AND BELARUSIAN BANKS

The EU extends the existing ban on the provision of special payment services (SWIFT) to three more Russian credit institutions - the largest Russian bank Sberbank, the Credit Bank of Moscow, the Russian Agricultural Bank and the Belarusian Bank for Development and Reconstruction.





## 3.2 OVERVIEW ON CURRENT EU SANCTIONS

### EU SANCTIONS IN RESPONSE TO RUSSIA'S INVASION OF UKRAINE: EMBARGO – SANCTIONS – BANS

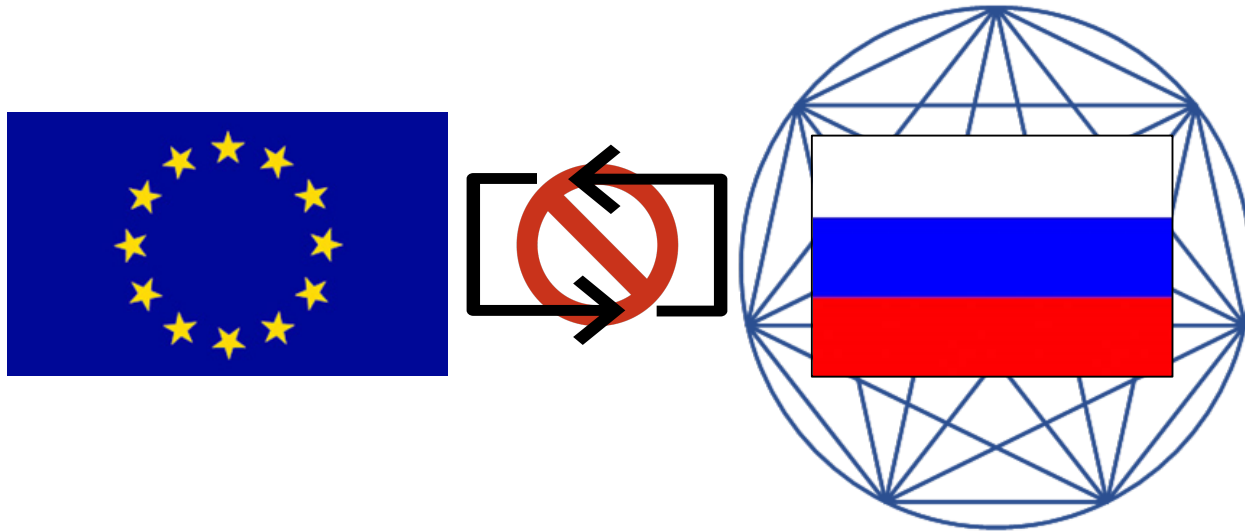
#### Individual sanctions

Asset freeze and travel ban against

- Natural persons
- Organizations

#### Economic sanctions / sectoral sanctions / Import and Export

- Finance / Banks
- Transport and logistics
- Energy / oil and gas industry
- Defense: dual-use / technology for military use
- Raw material and good-related sanctions
  - EU-import ban (e.g., iron, steel, wood, cement)
  - EU-export ban (e.g., luxury goods)



## 3.3 OVERVIEW ON CURRENT EU SANCTIONS

### INDIVIDUAL SANCTIONS / DESIGNATED PERSONS



Assets freeze and travel bans against

#### 1229 Individuals

- Vladimir Putin
- Sergey Lavrov
- Roman Abramovich
- members of the Russian State Duma
- members of the National Security Council
- high ranking officials
- Businesspeople and oligarchs



#### 111 Entities (Organizations, legal persons)



CR (EU) 269/2014 – 21 June 2022)

#### Art. 2

- (1) Assets Freeze
- (2) No provision of funds

#### Art. 11

No satisfaction of claims if made by Designated Persons

- **Asset freezes** means that
  - all accounts belonging to listed persons and entities in EU banks are frozen.
  - all funds and economic resources belonging to, owned, held or controlled by any listed natural persons or natural or legal persons, entities or bodies associated with them shall be frozen.
- **No provision of funds:** No funds or economic resources shall be made available, directly or indirectly, to or for the benefit of listed natural persons or natural or legal persons, entities or bodies associated with them.
- **Travel bans** prevent listed individuals from entering or transiting through EU territory, by either land, air or sea.

## 3.4 OVERVIEW ON CURRENT EU SANCTIONS

### DEFENCE

Ban on **exports** to Russia of dual-use goods and technology for military use

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#### EU Export Restrictions

CR 833/2014

**Art. 2 Dual Use – Annex I CR 2021/281**

(1) Prohibition to provide: Art.1 (“prohibited to sell, supply, etc.) DU-goods and technology (DUGT) to any natural or legal person, entity or body in Russia or for the use in Russia”) Dual Use

(2) Prohibited

- a) Technical Assistance or other services related to DUGT
- b) Financing related to DUGT

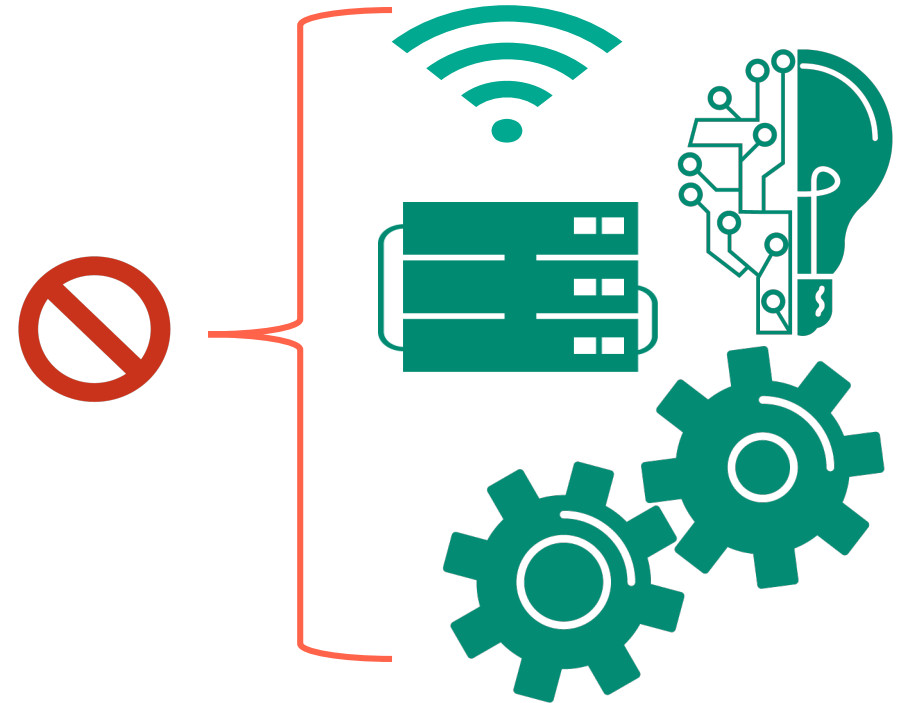
**Art. 2a High-Tech**

(1) Prohibition to supply (**Annex VII**)

(2) Prohibition of

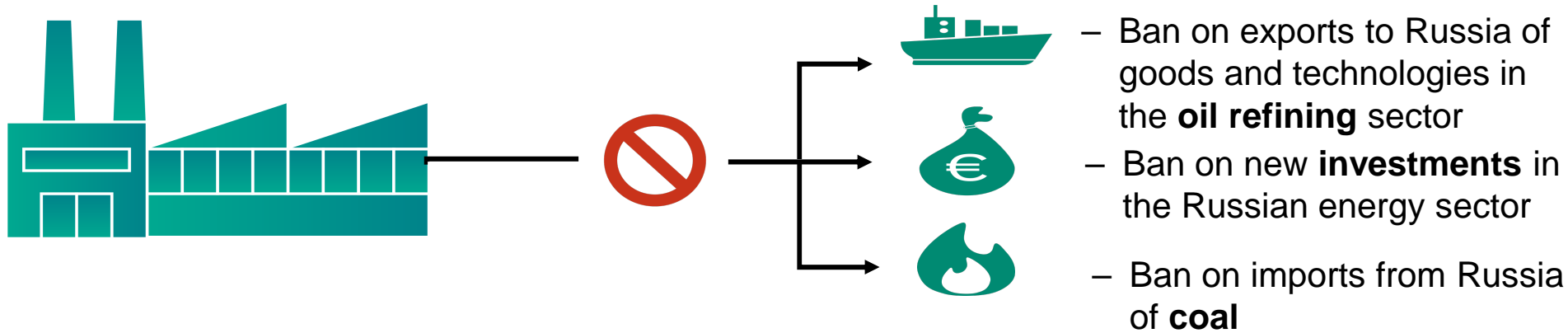
- a) Technical Assistance
- b) Financing

**Art. 4 Common Military List – technical assistance/financing**



## 3.5 OVERVIEW ON CURRENT EU SANCTIONS

### ENERGY



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#### EU Export Restrictions

CR 833/2014

**Art. 3** Energy goods equipment / Prohibition to sell, supply

(1) Prohibition to supply (**Annex II**)

(2) Prohibition of

a) Technical Assistance

b) Financing

**Art. 3a** Prohibition to acquire, extend participation in energy companies/ JV / Financing

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#### EU Import Restrictions

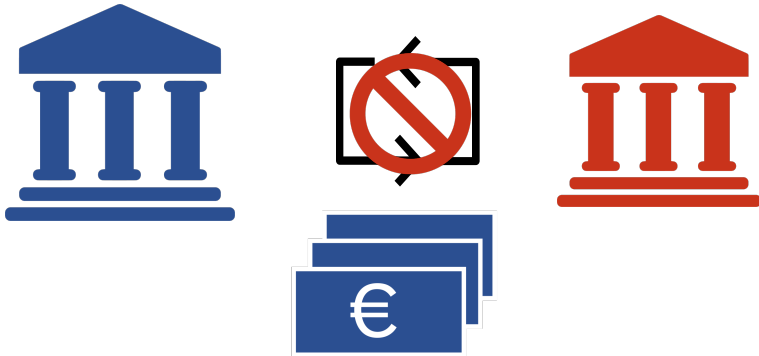
CR 833/2014

**Art. 3j Annex XXII** Coal products Coal/Peat/Tar

**Art. 3m/n Annex XXV** Oil/Petroleum products / Support for third countries in relation to Russian Oil

## 3.6 OVERVIEW ON CURRENT EU SANCTIONS

### FINANCIAL MEASURES



- **SWIFT ban for 10 Russian Banks\***
- Restrictions on Russia's access to the EU's **capital and financial** markets
- Ban on **transactions with the Russian Central Bank**
- **Ban on supply of Euro-denominated banknotes to Russia**
- **Ban on deposits to crypto-wallets**

\*Bank Otkritie / Novikombank / Promsvyazbank / Bank Rossiya / Sovcombank / VNESHECONOMBANK (VEB) / VTB BANK / Sberbank / Credit Bank of Moscow / Joint Stock Company Russian Agricultural Bank, JSC Rosselkhozbank

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**CR 833/2014**

**Art. 2e** Public financing or financial assistance for trade with or investment in Russia; Investment Guarantees etc.

**Art. 5** Dealing with transferable securities and money market instruments

**Art. 5a** Dealing with transferable securities and money market instruments (Russian Government/Central Bank)

**Art. 5aa** No Dealings with persons controlled by Russia/Central Bank (List Annex XIV)

**Art. 5b**

(1) No deposits from Russians over EUR 100.000

(2) No crypto-asset wallet over EUR 10.000

**Art. 5h SWIFT** (specialized financial messaging services) Annex XIV

**Art. 5i** no banknotes in EU-currency to Russia

**Art. 5l** no EU-Funding to companies with more than 50% RU state control.



## 3.7 OVERVIEW ON CURRENT EU SANCTIONS

### RAW MATERIALS AND OTHER GOODS



- Ban on **exports** to Russia of e.g. **luxury goods**
- Ban on imports from Russia of **iron, steel, wood, cement, seafood** and **liquor**

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#### EU Import Restriction

CR 833/2014

**Art. 3g Import/purchase/transport – direct or indirect – iron and steel products** into the Union (Annex XVII) Technical Assistance/Financing)

**Art.3i Annex XXI Food, etc.** Caviar, Seafood, Alcohol vodka, Fertilizer, Wood, wood coal, paper, cement, glass, silver, aluminum, gas turbines, boats

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#### EU Export Restriction

CR 833/2014

**Art. 3c Annex XI** Goods/technology air and space/insurance/repair

**Art 3f** Maritime navigation goods and technology

**Art. 3h** Luxury goods (Annex XVIII) ›EUR 300 per item

**Art. 3k** Flowers, Stones, Minerals, rubber, fabrics

## 3.8 OVERVIEW ON CURRENT EU-SANCTIONS

### SERVICES

The newly introduced Article 5n of the Regulation prohibits, among other things, the direct and indirect provision of services in certain economic sectors to **companies established in Russia** as well as the Russian Government.

According to the conclusive list in Article 5n (1) of the Regulation, the economic sectors in which services are prohibited include the following

- **Auditing, including statutory audits**
- **Accounting and tax consulting**
- **Business, management and public relations consulting**

There are significant exceptions to this prohibition, such as activities for companies established in Russia **but controlled by a legal entity registered in an EU Member State** (Article 5n (4) of the Regulation).

**Legal services** in general are not covered by the prohibition of services. This applies in particular to legal advice and representation in judicial and extrajudicial legal proceedings, which are explicitly excluded.



**CR 833/2014**

**Art. 5j** no **credit rating** services

**Art. 5m** no **trust** or similar services

**Art. 5n** no **direct or indirect services:**

accounting/bookkeeping, tax consulting,  
business and management consulting or  
public relations services

In addition, further prohibitions are included such as the prohibition for persons defined therein with a connection to Russia to register a **trust or similar legal structures** or to otherwise act and support in this context.

## 3.9 CASE STUDIES

### SANCTIONS ON SERVICES – Case A „Audit for Russian subsidiary“

#### *Situation:*

German entity (client) with subsidiary in Russia

Russian subsidiary has been sold to a Russian buyer in April 2022

Russian subsidiary of a German Audit company should be assigned by the German entity to conduct an audit on the previous Russian subsidiary (FY 2021)

#### *Answers:*

Art. 5n Sec.1 CR 833/2014

Prohibition of Audit Services

Art. 5n Sec.4 – Exception for EU Subsidiaries

Not applicable

Relevant?

Yes – if assignment by Russian entity.

No – if non-statutory audit for German Company/contract with German company/necessary for group-audit report/consolidation

#### *Question:*

Can the Russian subsidiary of the German Audit company accept the assignment to audit the Russian (previous) subsidiary of the client?

## 3.10 OVERVIEW ON CURRENT EU SANCTIONS

### TRANSPORT - Air / Ship Road Transport

- Closure of EU **airspace** to all Russian-owned aircraft
- Closure of EU **ports** to Russian vessels
- Ban on Russian **road** transport operators
- Ban on exports to Russia of **goods and technology** in the aviation, maritime and space sectors

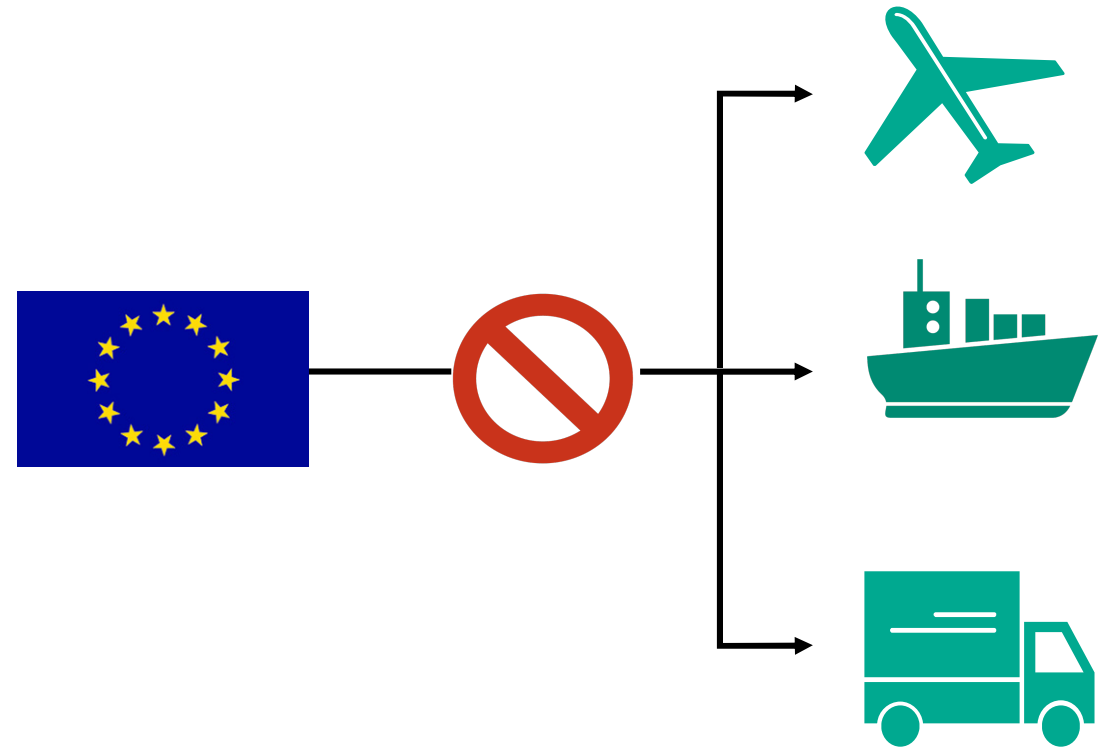
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CR 833/2014

**Art. 3d/e Aircraft** – landing, taking off, overflying

**Art. 3ea Ships/vessels** no access to ports under Russian Flag

**Art. 3l Road Transport** – no Transport in EU



## 3.11 OVERVIEW ON CURRENT EU SANCTIONS

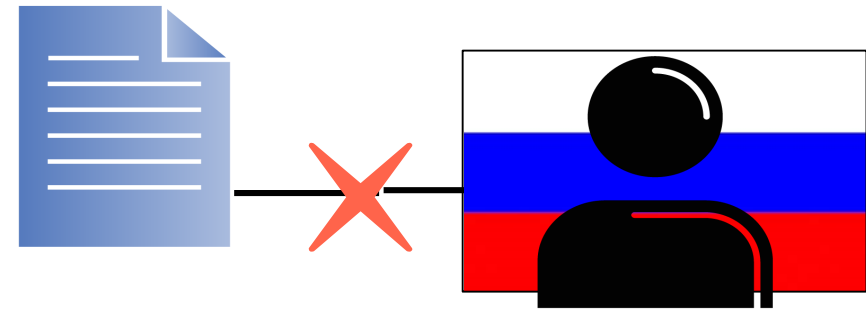
### RESTRICTIONS ON MEDIA

Suspension of broadcasting in the EU of state-owned propaganda outlets of **Sputnik** and **Russia Today**, Rossiya RTR/RTR Planeta, Rossiya 24 / Russia 24 and TV Centre International.



### DIPLOMATIC MEASURES

Suspension of **visa facilitation** provisions for Russian diplomats and other Russian officials and business people





## 3.12 OVERVIEW ON CURRENT EU SANCTIONS

### OTHER IMPORTANT PROVISIONS OF EC 833/2014

#### Public Procurement

Art. 5k

No parties with a *connection to Russia* are to be involved in procedures for the **award of public contracts in the EU**.

For the purposes of this provision, a **connection to Russia** exists in the case of

- (a) Russian nationals or natural or legal persons, entities or bodies established in Russia;
- (b) a legal person, entity or body in which more than **50 %** of the shares are owned, directly or indirectly, by an entity referred to in point (a); or
- (c) any natural or legal person, entity or body acting on behalf or at the direction of an organization referred to in point (a) or (b).

Other persons with a connection to Russia, such as **subcontractors or suppliers**, may not be involved in a contract awarded by public procurement to the extent that these persons would account for more than **10 %** of the contract value.

#### Penalties

Art. 8 Member States

#### Liability

Art. 10 Liability in case of non-intentional infringement of sanctions

Art. 11 Legal claims / civil claims of sanctioned persons

#### No circumvention

Art. 12

“It shall be prohibited to **participate, knowingly and intentionally**, in activities the object or effect of which is to circumvent prohibitions in this Regulation.”

## 3.13 OVERVIEW ON CURRENT EU SANCTIONS

### IMPORTANT TERMS AND DEFINITIONS

#### “DIRECTLY AND INDIRECTLY” (PROHIBITION OF INDIRECT SUPPLY)

- According to many sanction provisions also the **indirect supply** is prohibited.
- Indirect supply is when funds or economic resources flow not to a listed company/person itself, but to another company/person controlled by the listed company.
- In principle, an indirect supply of goods and indirect provisions of services exists if a dedicated person **controls** the dedicated company. Control is assumed, if it holds **more than 50%** of the shares in a non-listed company.
- *Note:* Control may also exist if a minority shareholder exercises **direct influence on business policy**

#### “TECHNICAL ASSISTANCE”

Technical assistance means:

- any technical support related to repairs, development, manufacture, assembly, testing, maintenance, or any other technical service, and
- may take forms such as instruction, advice, training, transmission of working knowledge or skills or
- consulting services, including verbal forms of assistance



## 3.14 SEVENTH SANCTION PACKAGE

### Additional sanctions

- Import restriction for Russian gold and jewelry (Art. 30 / Annex XXVI) Prohibition of export from RU to EU or third country (exception: if exported before 22. July)
- Additional control for Dual Use Goods
- Access restrictions for harbors are amended by prohibition of use of locks
- Clarifications of existing sanctions, e.g. in the area of public procurement, air travel and justice
- Additional individual sanctions against 54 persons and 10 organizations – incl. the major of Moscow and Sberbank. Sberbank was previously only excluded from SWIFT. As Sberbank is now an individually sanctioned person, any and all dealings with Sberbank are prohibited, if no exception applies.

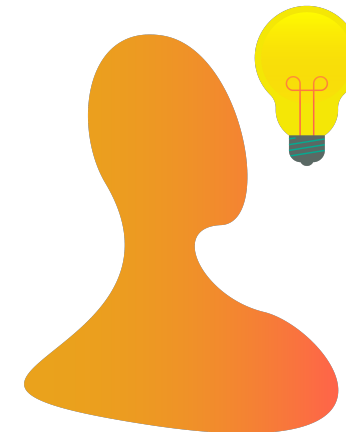
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**CR (EU) 2022/1279 (21 July 2022)**

**CIR (EU) 2022/1274 (21 July 2022)**

**Decision (GASP) 2022/1272 (21 July 2022)**

**CR (EU) 2022/1273 (21 July 2022)**



## 4 U.S. SANCTION REGIME



# 4.1 U.S. SANCTIONS AND EMBARGOES

## OVERVIEW

Three major components of U.S. sanction regime:

- Primary Sanctions
- Secondary Sanctions
- Re-Export Bans



## PRIMARY SANCTIONS

- SDN and other sanctions
- Sanctions against energy sector
- Other Sanctions

## SECONDARY SANCTIONS

- Application
- Enforcement

## RE-EXPORT BANS

- Application and scope
- Foreign Direct Product Rule
- Regulations in the Entity List



## 4.2 U.S. SANCTIONS AND EMBARGOES

### GENERAL TYPES OF SANCTIONS PROGRAMS

- Asset freezes
- financial sanctions
- prohibitions on foreign investment
- Import and/or export embargoes and license requirements



### LEGAL BASIS

- Diverse legal bases; sanctions are implemented either
  - by presidential executive orders or
  - by corresponding acts of Congress;
  - in some cases, individual states have also enacted sanctions, e.g., banning certain Russian products
- The most important authority for implementing sanctions is the Office of Foreign Asset Control (OFAC), which reports to the U.S. Department of Treasury

### SANCTIONS ARE IMPOSED VIA

- Trade and economic sanctions imposed by U.S. Department of **Treasury's Office of Foreign Assets Controls (OFAC)**
- Export controls imposed by the U.S. Department of Commerce's **Bureau of Industry and Security (BIS)**

## 4.3 OVERVIEW OF OFAC SANCTIONS - RUSSIA

### OFAC ECONOMIC SANCTIONS REGULATIONS RELATING TO RUSSIA

- Russian Harmful Foreign Activities Sanctions (RuHSR)
- Ukraine-/Russia Related Sanctions Regulations (Ukraine Sanctions)

### IMPORT RESTRICTIONS ON GOODS FROM RUSSIA OR THAT ARE OF RUSSIAN ORIGIN

- Import ban on crude oil, petroleum, and related energy products
- Import ban on items from key sectors (e.g., seafood, alcohol, and non-industrial diamonds)

### RESTRICTIONS ON THE EXPORT OF SERVICES TO RUSSIA

Export ban on accounting services, trust and corporate formation services, and management consulting services to any person located in Russia.



### SPECIALLY DESIGNATED NATIONAL AND BLOCKED PERSON DESIGNATIONS

Additional SDN designations, including oligarchs, Russian elites, TV stations, and key industry entities

### RESTRICTIONS REGARDING FINANCIAL INSTITUTIONS, FINANCIAL TRANSACTIONS, AND RELATED TRANSACTIONS WITH RUSSIA

- Investment prohibition (e.g. energy sector, other sectors)
- Prohibition relating to U.S. denominated banknotes
- New debt and equity restrictions reg. various entities
- Designations of financial institutions, and executives and board members of financial institutions, as Specially Designated Nationals (SDNs)

### OFAC RESTRICTIONS ON DOING BUSINESS IN UKRAINE

Imposition of embargo on Donetsk and Luhansk People's Republic Regions of Ukraine / investments / import-export restrictions

## 4.4 BIS EXPORT CONTROLS

### JURISDICTION

The EAR apply to both U.S.-origin items and certain non-U.S.-origin items. A commodity, technology, or software (“Item”) is subject to the **EAR (“Export Administration Regulations”** created by BIS) if it falls into any of the following four categories

- It is exported from United States;
- Its origin is the United States (“U.S.-origin”), irrespective of its current location;
- It is the **“foreign direct product” of certain U.S.-origin controlled technology or software** – i.e., the Foreign Direct Product Rules (“FDPR”) apply; or
- The **non-U.S.-origin product** incorporates more than a *de minimis* amount of controlled U.S.-origin parts, materials, components, software, etc. – i.e., the “De Minimis Rule.” (e.g. 25%)

E.g. Due-Use goods control, military items

Also luxury goods, etc.

More non-U.S. produced items are subject to EAR for Russia and Belarus than other countries due to enhanced controls

### APPLICATION

EAR apply to U.S. and non-U.S. persons equally

### SCOPE

- Independent from where the item is located
- Direct and indirect (no support of third persons)
- Also trading within Russia
- Not export of any goods to military end user (no coffee cup)



## 4.5 BIS LICENSE REQUIREMENTS – OVERVIEW RUSSIA

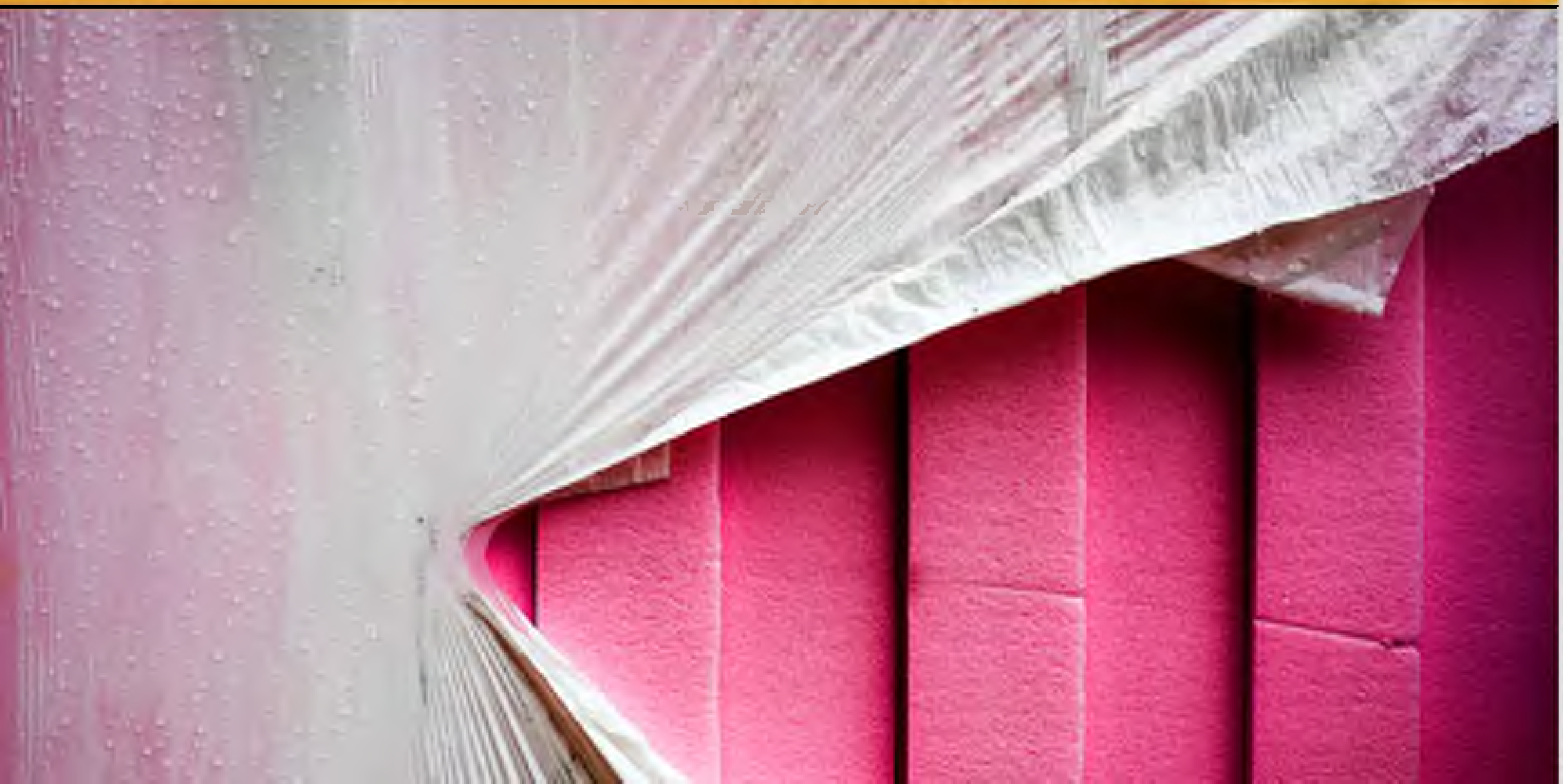
### LICENSE REQUIREMENTS

Exports (direct or indirect), reexports (from one third country to another), and transfers (in-country) of the following Items are subject to license requirements:

- All Items on the EAR's Commerce Control List
- Luxury goods (EAR99) listed in Supplement 5 to Part 746 of the EAR
- Sector specific Items (EAR99) listed in Section 746.5 and Supplements 2 or 4 to Part 746 of the EAR
- **Any Items subject to the EAR going to a military end-use or end-user**
- Foreign Produced Items that are subject to the EAR under the FDPR, including the specific Russia-Belarus rules in Section 746.8 and Sections 734.9(f) and (g) of the EAR
- Any Item subject to the EAR **if a person/entity on the BIS Entity List or Denied Persons List or other sanctioned persons list is involved in the transaction**



## 5 SANCTIONS CHECKS AND SCREENING





# 5.1 DUTY OF CARE FOR COMPANIES

## DUE DILIGENCE MUST BE EXERCISED IN THE FOLLOWING CASES

### Business presence

The company should check whether it has a presence in the sanctioned territories.

### Supplier relationships

The company needs to fully understand its supply chain, such as which companies are involved, including logistics providers and agents, where they operate from, and their status under international sanctions regimes.

### Logistical aspects / payment execution

Companies may need to consider whether their goods can be transported, and money transaction can be conducted.

### Relationships with Customers

The Company should consider whether customers are sanctioned entities or controlled by them.

### Relationships with "Designated" Persons

Various countries and organizations (e.g., EU, U.S., UK) have imposed sanctions prohibiting the provision of financial services or the conduct of financial transactions with "designated persons." If a person is on the respective sanctions list, he or she is considered to be a "designated person" subject to the financial sanctions.



## 5.2 EXPORT CONTROL CHECK

### 1. Sanctions lists screening

- FISALIS (EU)
- OFAC (USA)
- Other related countries

### 2. Classification of goods

Commodity code / list of codes / value / built-in elements - commodity codes

- Dual-Use-Good
- Export lists
- U.S. law (listed U.S. product; ECCN numbers - EAR99, mass products)

### 3. Embargo lists - country-specific sanctions

e.g. Russia, Belarus

- Personal restrictions
- Restrictions on goods / Certain goods (list)
- Dual-use (generally prohibited / independent good component / military use (end user confirmation)/listed persons).
- Sectoral restrictions (e.g. banks, financing)

## 5.3 SANCTIONED PERSON SCREENING – OFAC AND BIS

### Screening Process

- Review of business partners with regard to their listing on the relevant EU and US sanctions lists.
  - It is essential that **all parties to a transaction** are screened to verify that they are not covered by any applicable U.S. or EU (or other countries) prohibited parties list.
  - Best practice is to screen at beginning of transactions and prior to making payment, export, etc.
- |  |   |
|--|---|
| <ul style="list-style-type: none"><li>– Sanctions list screening using specialized software with corresponding compliance modules</li><li>– Crucial:<ul style="list-style-type: none"><li>– Data quality and granularity (UBO/affiliated companies).</li><li>– Transliteration</li></ul></li><li>– Scope: customers, suppliers, end customers, addressees</li><li>– Software deployment/automated reconciliation</li><li>– Matching - identity check</li></ul> | <p><b>Available Screening Tools (free of charge/manual)</b></p> <ul style="list-style-type: none"><li>– EU: Manual check under (FiSaLis): <u><a href="https://finanz-sanktionsliste.de/">Financial Sanctions List 2022 (finanz-sanktionsliste.de)</a></u>.</li><li>– U.S.: Check the SDN list (OFAC) at: <u><a href="https://www.treas.gov/sanctions/">Sanctions List Search (treas.gov)</a></u>.</li></ul> <p><b>Commercial Trade and Export Compliance software</b></p> <p>e.g. AEB <a href="https://www.aeb.com/en/export-controls/index.php">https://www.aeb.com/en/export-controls/index.php</a></p> |
|--|---|

### U.S. – OFAC AND BIS

OFAC lists apply not only to those listed, but also to entities owned, 50% or more, in the aggregate, by listed persons.



## 5.4 SANCTION SCREENING

### OTHER IMPORTANT ISSUES TO BE CHECKED BEFORE DELIVERY

#### Payment restrictions (legal/practical)

- Have you received the payment from your business partner?
- Can you receive it?
- Please ask all banks involved about the current situation.

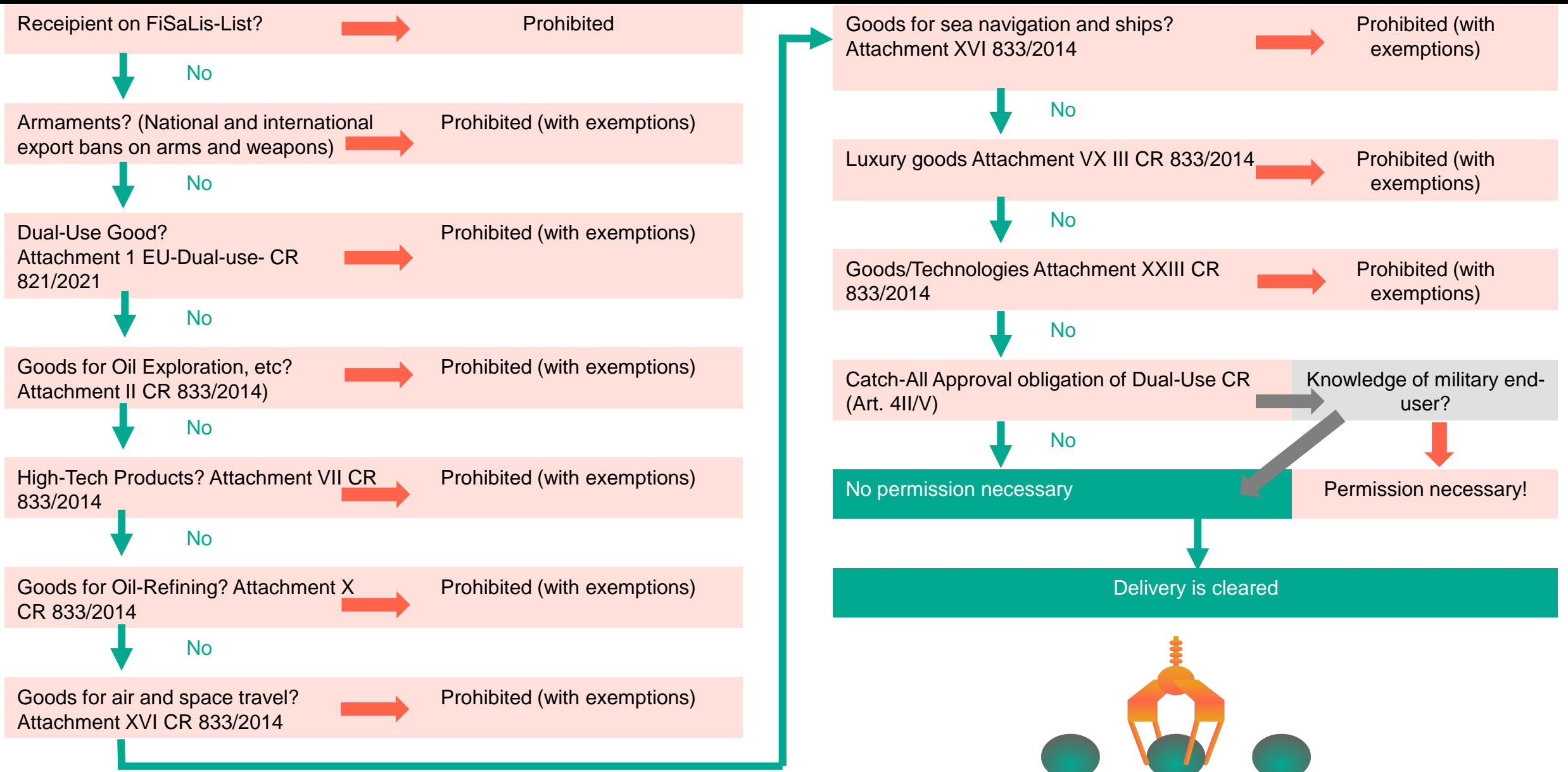


#### Transport restrictions and conditions

- Can the transport take place under current conditions?
- Check if your Russian business partner can pick up the goods
- Attention: Transport ban for Russian and Belarusian transport companies



## 5.5 SANCTION SCREENING – CHECK-LIST EU



## 5.6 EXPORT LICENSE, DECLARATIONS AND NOTIFICATIONS

### EXCEPTIONS: DECLARATION AND NOTIFICATION

- Various exceptions in export restrictions, if goods/financing not intended for military use/end user; e.g., humanitarian purposes, civilian use, medical purposes, temporary export, personal use during travels
- **Declaration in customs declaration** that items being exported under the relevant exception.
- **Notification** of competent authority of the Member State of the first use of the relevant exception within 30 days, when the first export took place.

### PROCEDURE – COMPETENT AUTHORITIES

- Exemptions/permits (e.g. Germany: goods-related sanctions: BAFA / financial sanctions: Bundesbank)
- The rules and procedures are laid down in Regulation (EU) 2021/821, which shall apply mutatis mutandis.
- Registrations with the electronic System for all kind of applications and notifications (DE: ELAN-K2-System), incl. confirmation that no authorization/permit is necessary.
- Request of Information via Electronic System (DE: AzG)

### NEED FOR AUTHORIZATION

- Competent authorities may authorize the action as a derogation from prohibition in the stipulated cases.
- e.g. Civil nuclear operations, maritime safety, intended for the exclusive use of entities owned, or solely or jointly controlled by a legal person, entity or body which is incorporated or constituted under the law of a Member State or of a partner country.

### TRANSITION PERIODS

- „Grandfather exceptions“; existing contractual relationships/transitional provisions (e.g., contract concluded before 26 February 2022/ancillary contracts)
- Authorization necessary (e.g., requested before 1 May 2022)
- General transition periods (with/without notification)

## 6 SANCTION VIOLATIONS – RISKS AND CONSEQUENCES



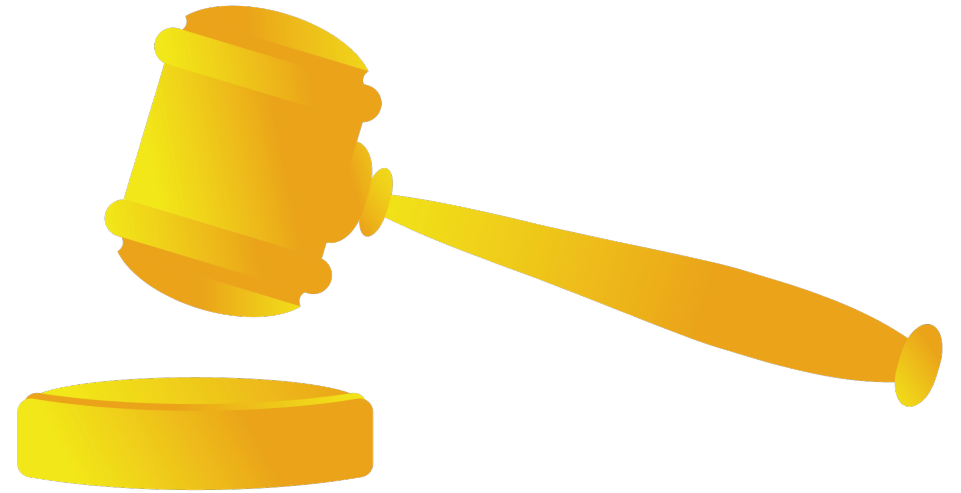


# 6.1 VIOLATION CONSEQUENCES

## EU Sanctions

Level of penalties for violation of EU sanctions:

- Since there are no official statistics in the EU countries about imposed penalties and fines, it is difficult to make reliable statements.
- Amount of fines ultimately depends on the severity of the violation
- Provided there are no criminal proceedings, the amount of the fines can be estimated on the basis of known proceedings in Germany at approx. 30 - 40 % of the respective order volume, but at a maximum of EUR 500,000 per infringement.



*Example of benefit skimming:*

In the case of Heckler & Koch, the German Federal Court of Justice ruled that the economic advantage can be skimmed off in full:

- I.e., the company "obtained an advantage through the acts of the defendants, namely the purchase price for the delivered goods. The fact that this pecuniary advantage did not accrue to it directly from the act, namely the obtaining of the export license by fraud, does not change this. The advantage is obtained through the act within the meaning of Section 73b (1) sentence 1 no. 1 StGB, for example, if it was aimed at providing the principal with a pecuniary advantage as a third party beneficiary (cf. Fischer, StGB, 68th ed., Section 73b nos. 5, 7). The immediacy of the third party acquisition is not important. Rather, the context of enrichment results from the operational relationship of attribution (cf. BGH, judgments of October 19, 1999 - 5 StR 336/99, BGHSt 45, 235, 245 f.; of May 30, 2008 - 1 StR 166/07, BGHSt 52, 227 marginal no. 76)".
- In the case of Heckler & Koch, the entire sales proceeds from illegal arms exports amounting to approximately EUR 3.73 million were confiscated.
- Transferred to other case constellations, this means that the entire proceeds from a transaction that is illegal from an export control perspective can be siphoned off.
- This can be, for example, the proceeds from the sale of a product, or the transportation costs charged, or even storage fees.

## 6.2 CONSEQUENCES OF SANCTIONS VIOLATIONS

### Norway

#### 1. Criminal Law

Fines and/or jail for up to three years

Both intentional and negligent, unintentional violations

Trying to circumvent the regulations is also punishable

#### 2. Administrative Law

Especially: The Financial Supervisory Authority

Banks, financial institutions, lawyers, auditors  
etc.

#### 3. Other Consequences

Goodwill and public perception



## 6.2 VIOLATION CONSEQUENCES

### Germany

#### Fines and imprisonment

- In the Foreign Trade and Payments Act (Außenwirtschaftsgesetz, AWG), the legislator provides for a severely high range of penalties for embargo violations: **The minimum penalty is 1 year imprisonment.**
- Violations of **arms embargoes** can even result in **up to 10 years in prison.**
- In addition to embargo violations, international trade transactions can also be punished for **tax evasion or tax fraud.** Here, too, the range of penalties is correspondingly high: Fines or imprisonment of up to five years are possible.
- Even if export restrictions are only **negligently disregarded** - companies can be fined **up to 500,000 euros** if accused of such an administrative offense - for example, if a product listed in the Dual-Use Regulation is exported without an export license.

#### Sales levy instead of profit levy

- Irrespective of the threat of imprisonment, there are also economic consequences in the event of a sanctions violation. Companies that violate an embargo should also be penalized in financial terms, according to the legislator's intention behind the so-called **gross principle.**
- In the case of certain violations, therefore, not only the corresponding profit from the affected business is withdrawn - **but the entire turnover from the business.** This is intended to have a deterrent effect on companies and prevent further embargo violations.

#### Loss of reputation / suspension of licenses

In addition to the economic consequences, such as the threat of insolvency, exporting companies face a considerable loss of reputation in the event of an embargo violation.

- Customary trade facilitations and privileges such as seals of approval can be revoked.
- The press also helps to sanction prohibited export transactions in the public eye.
- Companies thereby risk their market position and damage to their image.

## 6.2 VIOLATION CONSEQUENCES

### U.S. Sanctions

- Consequences even more difficult to assess than for EU sanctions; for example, OFAC may publish individuals/companies who are themselves placed on the SDN- list for violating U.S. export control regulations
- Imposition of **civil monetary penalties of up to USD 1,000,000 per individual case.**
- Additional **withdrawal of export privileges** for up to 25 years possible ("Denial Order")
- The company concerned may also be placed on the "**Denied Persons List**" for a limited period of time ("Temporary Denial Order").
- Additional penalties possible by Office of Foreign Assets Control (OFAC) and State Department
- The addressees of sanction measures are not only the exporter or re-exporter of the goods, but also e.g. **transport companies**



## 6.3 U.S. SANCTION VIOLATIONS - PENALTIES

### Example 1:

#### UPDATE 1-DHL to pay \$9.4 million for US sanctions violations

By Reuters Staff



(Adds company statement)

WASHINGTON, Aug 6 (Reuters) - Global logistics company DHL [DHL.UL] has agreed to pay a \$9.4 million fine to resolve allegations it aided and abetted illegal shipments of goods to Iran, Sudan and Syria, the U.S. government said on Thursday.

DHL is the only major shipper that services the three countries, which are subject to U.S. sanctions.

## 6.4 U.S. SANCTION VIOLATIONS - PENALTIES

### Example 2:



THE UNITED STATES ATTORNEY'S OFFICE  
EASTERN DISTRICT *of* NEW YORK

[U.S. Attorneys](#) » [Eastern District of New York](#) » [News](#)

Department of Justice

U.S. Attorney's Office

Eastern District of New York

FOR IMMEDIATE RELEASE

Tuesday, February 28, 2017

### **Exporter Of Microelectronics To Russian Military Sentenced To 135 Months In Prison Following Convictions On All Counts At Trial**

Earlier today in United States District Court in Brooklyn, Alexander Posobilov was sentenced to 135 months' imprisonment for conspiring to export and illegally exporting controlled microelectronics to Russia, as well as for conspiring to launder money.

Posobilov, together with ten other individuals and two corporations – ARC Electronics, Inc. (ARC) and Apex System, L.L.C. (Apex) – were indicted in October 2012. Posobilov and two co-conspirators were subsequently convicted at trial on all counts in October 2015. Of the remaining defendants, five pleaded guilty and three remain at large. ARC is now defunct, and Apex, a Russian-based procurement firm, failed to appear in court.

## 6.5 U.S. SANCTION VIOLATIONS - PENALTIES

### Example 3:

#### **Florida Firm Fined \$27 Million for Export Violations**

WASHINGTON, DC – The U.S. Department of Commerce's Bureau of Industry and Security today announced that it has reached a \$27 million civil settlement with Access USA Shipping, LLC ("Access USA"), of Sarasota, Florida, to settle allegations that it committed violations of the Export Administration Regulations (EAR) during April 21, 2011 through January 7, 2013.

Access USA settled 129 counts of evasion, 17 counts of exporting or attempting to export crime control items without the required license, and 4 counts of exporting or attempting to export to a sanctioned entity on the BIS Entity List without the required license. \$17 million dollars of the penalty was suspended for a two-year probationary period. They illegally shipped rifle scopes, night vision lenses, weapons parts, and EAR99 items.



## 6.6 U.S. SANCTION VIOLATIONS - PENALTIES

### Example 4:



FOR IMMEDIATE RELEASE  
April 29, 2021  
[www.bis.doc.gov](http://www.bis.doc.gov)

BUREAU OF INDUSTRY AND SECURITY  
Office of Congressional and Public Affairs  
(202) 482-1069

### **SAP RESOLVES ALLEGATIONS OF EXPORT CONTROL LAW VIOLATIONS WITH \$3.29 MILLION ADMINISTRATIVE SETTLEMENT**

WASHINGTON – On April 29 2021, Kevin J. Kurland, Acting Assistant Secretary for Export Enforcement, Bureau of Industry and Security (BIS) of the U.S. Department of Commerce, announced an administrative settlement of \$3,290,000 with SAP SE (SAP), a multinational software company based in Walldorf, Germany. SAP also agreed to complete three audits of its export compliance program over a three year period. SAP voluntarily self-disclosed potential violations of the Export Administration Regulations (EAR) to BIS, and cooperated with the investigation conducted by the Boston Field Office of BIS's Office of Export Enforcement.

## 7 INFLUENCE ON COMMERCIAL CONTRACTS



# 7.1 INFLUENCE ON COMMERCIAL CONTRACTS

## Legal and contractual instruments in case of sanction effects on contractual obligations

In cases where the above sanctions prevent a company from fulfilling its contractual obligations, the following instruments may provide a solution.

### Frustration

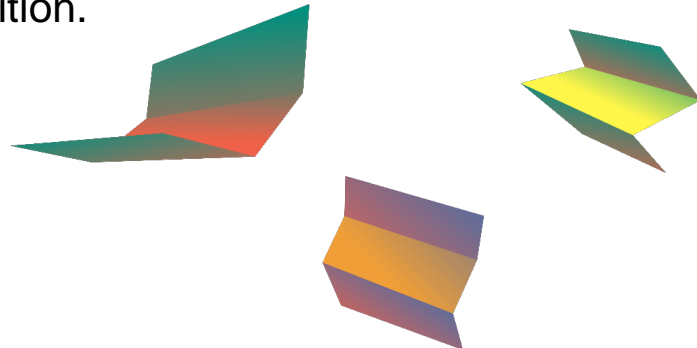
Frustration is a contractual instrument recognized by the courts in many countries without a clause to that effect being included in the contract.

### „Force majeure” clauses

In many jurisdictions to recognize force majeure, the parties must have agreed a clause defining the events that relieve them of their contractual obligation. The war sanctions must then fall under this definition.

### „Sanction“ clauses

### MAC clauses



Due diligence measures encouraged for exporters and importers include, for example, including provisions in import and export contracts to **ensure that imported or exported goods are not subject to the restrictions.**

This can be done, for example, by

- a **statement/obligation of compliance** with such a provision
- contract clauses obliging the importer in a third country **not to re-export the goods in question to either Russia or Belarus,**
- including the obligation **not to resell** the goods in question to a third party business partner who has not undertaken not to export the goods in question to either Russia or Belarus.

## 8 CASE STUDIES



## 8.1 CASE STUDIES

### HYPO “INDIRECT SUPPLY”

#### Case A

*Situation:*

A listed person holds 49.9% of the shares in a non-listed RUS company.

*Consequence:*

The “indirect supply prohibition” does not apply, delivery can in principle be made from the EU to RUS.

#### Case B

*Situation:*

Two listed persons each hold 35% shares in a non-listed company.

*Consequence:*

The “indirect supply prohibition” applies, a delivery to RUS would be a violation of sanctions.

#### Case C

*Situation:*

One listed person holds 25% shares but determines the business policy (e.g. supply contracts are only concluded with companies of the minority shareholder).

*Consequence:*

The “indirect supply prohibition” applies, a delivery to RUS would represent a violation of the sanctions.

## 8.2 CASE STUDIES

### HYPO A: “LISTED COMPONENTS”

#### *Situation:*

- An EU-registered company wants to supply a machine to produce dairy products to a non-listed Russian customer.
- The machine contains some technical components that are on the “List of goods and technology referred to in Articles 2a(1) and 2b(1) EC 833/2014 ANNEX VII.
- The components are subject to export license by competent authorities.

#### *Questions:*

- Would the delivery of the machine be in violation of respective sanction provisions?
- Is it necessary to apply for the respective export license?

#### *Answer:*

- Here the so called “**component regulation**” applies.
- The term comes from the handling of the **EU Dual Use Regulation** by the EU control authorities.
- Guiding principles:
  - listed parts are subject to approval if exported **separately (enclosed/attached)**;
  - in case of **incorporation into a non-listed good**:
    - No licensing requirement for listed incorporated **non-essential components**.
    - **Easily removable** listed **major components** result in licensing requirement for the entire article, even if the article itself would not be listed
- When assessing whether the listed component(s) constitute(s) a major component, the quantity, value and technological know-how used, as well as other special conditions, must be taken into account.
- Currently, we are not aware of any special regulation related to the Russia embargo that differs from the regulation in the area of the EU Dual-use Regulation.



## 8.4 CASE STUDIES

### HYPO B: “DELIVERY OF MACHINE”

#### *Situation:*

- German seller
- Delivery of machine including control elements
- Control elements partly from US production
- Buyer/contracting partner is a Chinese company.
- Recipient (end-user) is a Belarusian company.
- Delivery via Chinese customer to BY company (end customer).
- Shares of the Belarusian end-user are “under administration” of a state company included in SDN list.

#### *Question:*

Would the delivery of the machine violate U.S. sanctions:

- Individual sanctions (SDN-listed entity)
- Goods related sanctions

#### *Answer:*

- US-Nexus: Subsidiary in the USA? (-) if not involved in the business
- US citizen is active at German location / if involved in this business (+) - if not (minus)
- US goods: machine itself (-), but listed parts produced in US / value ? - de minimis
- Result: commodity codes? Central unit, CPU, control element; e.g. commodity code 99
- US share up to 25% (10%); de minimis rules /EAR (Export Administration Regulations), for commodity code 99 typically no export license required;
- Violation of "Ten General Provisions" (prohibited end-user (blacklist)/end-use);
- Listing customer - end customer e.g. on SDN list / Residual risk: customer: Chinese; But: management of end-user's shares by Belarusian state-owned company, which is on SDN list. 50% ownership regulation OFAC; Here it depends on how the "administration" is legally structured (control sufficient?).
- No export license under US law;



## 9 RECOMMENDATIONS



## 9.1 RISK CONTROL MEASURES



### 1. Sanction Task Force

Legal - IT - Finance - Personnel - PR



### 2. Strategy and Internal Processes

Financial and economic plan with several scenarios; development of internal compliance processes; communication strategy

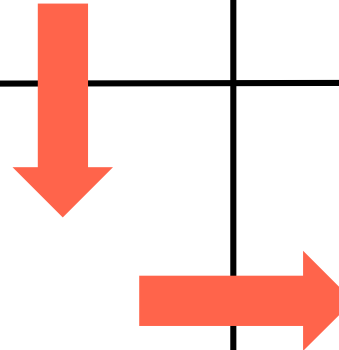


### 4. Current Review, Update and Adjustment of (counter-)sanctions control and compliance measures / monitoring process



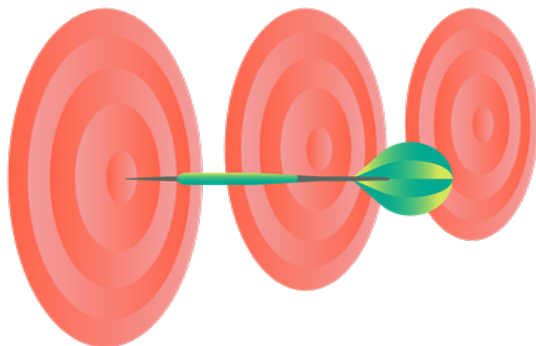
### 3. Application of Compliance Program

Situation monitoring, legal assessment, contract review, sanction checks and screening, risk assessment (SPL), internal and external audit process



## 9.2 RECOMMENDATIONS

- Creation of **clear rules of responsibility and accountability** with regard to sanctions within the company, with the involvement of management (duty of legality)
- Creation of a **task force**: initiation, follow-up and monitoring of the appropriate measures and making the appropriate decision
- **Transaction-related individual review of current risk-related transactions and contracts** (e.g. ongoing plant construction project in Russia, financing transactions, deliveries due at short notice, delivery of preliminary products, spare parts, etc.) - also with the involvement of specialist experts.
- If you identify a risk, suspend the contract to review the penalties



- Implement/revise **internal export control compliance** process:
  - Establish a monitoring process to track the development of current sanctions
  - Introduction of a Group-wide standardized sanction screening (**SPL-SanctionPartyList-Screening**) process.
  - Establishment of a **sanctions embargo compliance program** covering not only the measures related to Belarus/Russia, but in general all sanctions embargo programs in force worldwide (EU, US, UK).
  - Introduction of a **group-wide standardized export control compliance questionnaire** to business partners (e.g. integrated with the customs declaration questionnaire); request for corresponding evidence
  - Introduction of a Group-wide **export compliance internal or external audit function**
  - Introduction of a **dual control principle** with regard to compliance regulations

## 9.3 RECOMMENDATIONS

- Secure your payments by using **collateral/collateral providers** outside Belarus/Russia and other countries affected by sanctions
- Note possible Russian/Belarusian **counter-sanctions**
- Depending on your international activities, ensure that no direct or indirect business transactions (import, export, technical and commercial assistance, etc.) are prohibited or require **prior authorization (or subsequent information)**
- Regularly check that your Russian/Belarusian business partners (legal and natural persons, executives, final beneficiaries) and the **Russian/Belarusian financial institutions** involved in these transactions are not affected by sanctions measures
- Analyze the consequences of continuing contracts that are not directly affected by sanctions and embargo programs (e.g., if your partner's bank is affected by **SWIFT measures**)
- Integrate the potential consequences of sanctions measures into your **due diligence** as part of your M&A transactions
- Review your **contractual agreements** to ensure that they contain appropriate provisions in case one of the actors is affected by a sanction or embargo (sanctions clauses); guarantees and indemnification of the business partner regarding export control risks (where possible/permissible); MAC, Force-Majeur.



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