Trade Sanctions - The Swiss Perspective

Luka Groselj
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
  o Autonomous / Unilateral measures
  o Urgent freezing of assets to safeguard Switzerland’s interests
  o Main targets are PEPs
    > E.g. Certain nationals of Ukraine, Egypt, Tunisia

> Federal Act on Embargos (EmbA)
  o 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
    o 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
  o No alignment (see, e.g., US sanctions on Russian individuals and entities)
  o 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

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

> Regulatory consequences
  o Banking and export licenses (FINMA and SECO)

> Criminal sanctions (EmbA)

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<th>Unlawful Act</th>
<th>Punishment</th>
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<td>Breach of a sanctions ordinance (e.g. re Ukraine)</td>
<td>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)</td>
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<td>Refusal to provide information, hand over documents or permit access to business premises</td>
<td>Detention and/or Fine to up to CHF 100,000</td>
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<td>Failure to prevent a breach committed by a “subordinate” in a company</td>
<td>Criminal liability of managing directors, employers, delegators or principals</td>
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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”:
  o SECO ordinance cannot be challenged as such
  o only decisions based on a specific ordinance may be appealed, i.e. rejection of a request for delisting to SECO
  o 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

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

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