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Federal Department of Economy,
Education and Research WBF

State Secretariat for Economic Affairs (SECO)
Law

CH-3003 Bern

SECO;

POST CH AG

Registered mail with acknowledgement of receipt (AR)

[REDACTED]

[REDACTED]

Ref.: SECO-471.4-2/32/43
Your sign:
Clerk: [REDACTED]
Bern, 22 June 2023

PENALTY NOTICE

pursuant to Article 61 of the Federal Act of 22 March 1974 on the Administrative
Penalty Law (VStrR; SR 313.0)

in administrative criminal proceedings of the State Secretariat
for Economic Affairs (SECO)

against

[REDACTED]

because of

Suspicion of violation of Art. 11a para. 1 of the Ordinance of the Federal Council
of 4 March 2022 on measures related to the situation in Ukraine (SR) 946.231.176.72;
hereinafter referred to as the “Ukraine Ordinance”) in conjunction with Article 9 of the
Federal Act of 22 March 2002 on the Enforcement of International Sanctions (SR
946.231, hereinafter referred to as the “Embargo Act”)

State Secretariat for Economy SECO [REDACTED]
Holzikofenweg 36
3003 Bern
Tel. [REDACTED]
[REDACTED] @seco.admin.ch
<https://www.seco.admin.ch>

I. Facts

1. On 19 September 2022, the Federal Office for Customs and Border Security (FOCBS) notified the State Secretariat for Economic Affairs (SECO) of a consignment from the company [REDACTED] (headquarters: [REDACTED] [REDACTED] hereinafter referred to as [REDACTED] or the “accused”) with the country of destination Russian Federation. The consignment was provisionally seized by the St. Margrethen customs office.

The delivery of [REDACTED] was to be sent to the consignee [REDACTED] in accordance with the export list of 16 September 2022 Russian Federation be executed. The Supply of food colouring matter [REDACTED] of customs tariff No 3203, headings 1 to 6 of the export duty declarations gross weight 10,583.9 kg, value according to invoice no. FVNNNN22090140: approx. 47,000 euros.

2. On 29 September 2022, this dossier concerning possible violations of the Ukraine Regulation by the accused was transferred from the Bilateral Economic Relations Export Controls/Industrial Products Division (BWIP) to the Legal Affairs Division (GARE) of SECO with the request to consider the opening of administrative criminal proceedings.
3. By e-mail of 28 October 2022, SECO informed the FOCBS. that the goods may be released by the FOCBS and returned to the consignor [REDACTED]) for lawful use.
4. By order of 14 April 2023, SECO initiated administrative criminal proceedings against the accused or against the persons responsible on suspicion of a violation of Article 11a(1) of the Ukraine Regulation and ordered them to file an administrative complaint by 12 May 2023 to comment on the alleged conduct and to submit the requested information and documents.
5. The defendant has complied with this request by submitting its observations of 4 May 2023. The opinion was drafted by RA [REDACTED] and RA [REDACTED], the legal representatives of [REDACTED].

In the statement, acknowledge [REDACTED] the facts of which it is accused. She stated that she had assumed the sale of food colours to a company domiciled in the Russian Federation is permitted. It is not clear on what basis it came to that conclusion at the time.

6. The investigations in those administrative criminal proceedings were concluded on 31 May 2023 with the final protocol pursuant to Article 61(1) of the VStrR. On the same day, pursuant to Article 61(2) of the VStrR, the [REDACTED] [REDACTED] was given the opportunity to consult the file and to request that the investigation be supplemented.
7. By letter of 2 June 2023, [REDACTED] informed SECO that it had no comments on the Final Minutes.

III. Legal

8. Article 11a(1) of the Ukraine Regulation prohibits the sale, supply, export, transit and transport of industrial goods listed in Annex 23 to or for use in the Russian Federation.

9. Annex 23 to the Ukraine Regulation, under customs number 3203, mentions the following:

Colours of vegetable or animal origin (including colour extracts, other than animal blacks), whether or not chemically united; preparations based on vegetable or animal colours referred to in Note 3 to this Chapter (excl. Preparations of Nos 3207, 3208, 3209, 3210, 3213 and 3215)
10. Any person who infringes Article 11a(1) of the Ukraine Regulation shall be punished in accordance with Article 32(1) of the Ukraine Regulation pursuant to Article 9 of the EmbG (Federal Act of 22 March 2002 on the Enforcement of International Sanctions, Embargo Act, SR 946.231).
11. Anyone who intentionally violates Article 11a(1) of the Ukraine Regulation is liable to imprisonment for up to one year or a fine of up to CHF 500,000 (Article 32(1) of the Ukraine Regulation in conjunction with Article 9(1) of the EmbG). In serious cases, the penalty is imprisonment for up to five years. The custodial sentence can be accompanied by a fine of up to CHF 1 million (Art. 9 para. 2 EmbG). If the offence is committed negligently, the penalty is imprisonment for up to three months or a fine of up to CHF 100,000 (Art. 9 para. 3 EmbG).
12. These threats of punishment are welcome. Art. 333 of the Criminal Code (SCC, SR 311.0) adapted to the new sanctions of the General Part of the Criminal Code.
13. Infringements pursuant to Articles 9 and 10 of the EMBG are prosecuted and assessed by SECO (Article 32(3) of the Ukraine Regulation). The Criminal Law on Immigration (VStrR) is applicable (Art. 14 para. 1 EmbG).

IV. Considerations

Negative Offence

14. Article 11a(1) of the Ukraine Regulation prohibits the sale, supply, export, export and transport of industrial goods referred to in Annex 23 to or for use in the Russian Federation. Colourants are mentioned in Annex 23 of the Ukraine Decree under customs number 3203.
15. The accused arranged for the export of food colours to the value of EUR 47,000 to the recipient [REDACTED] in the Russian Federation. The consignment was provisionally seized by the customs office of St. Mararethen and therefore did not reach the intended consignee [REDACTED] (see para. I/1.). In its statement of 4 May 2023, the accused confirmed this fact (see para. I/5.).
16. By arranging for the dispatch to the Russian Federation of food dyes covered by Annex 23 to the Ukraine Regulation, [REDACTED] infringed the prohibition on exports of industry-strengthening goods laid down in Article 11a(1) of the Ukraine Regulation.

Subjective Offence

17. Unless the law expressly provides otherwise, only a person who commits a crime or misdemeanour intentionally is liable to prosecution (Article 12(1) of the Criminal Code). Article 9 of the Embargo Act in conjunction with Article 32 (1) of the Ukraine

Regulation criminalise both intentional and negligent violations of Article 11a (1) of the Ukraine Regulation.

18. A crime or misdemeanor is committed intentionally by a person who carries out the act with knowledge and will. Anyone who considers the realization of the act to be possible and accepts it is already acting intentionally (Art. 12 para. 2 SCC). A crime or misdemeanor is negligent if he does not consider or does not take into account the consequence of his conduct due to negligent carelessness. Imprudence is a breach of duty if the perpetrator fails to observe the precaution to which he is obliged under the circumstances and according to his personal circumstances (Art. 12 para. 3 SCC).
19. The accused is not accused of having acted intentionally in the present case.
20. In her observations of 4 May 2023, the accused claims, inter alia, that she was not aware that food colouring was subject to a prohibition enshrined in the Ukraine Regulation.
21. The accused did not appear to be aware of the breach of duty until SECO drew her attention to the legal situation.
22. Against this background, the conduct of the accused constitutes imprudence in breach of duty and is to be qualified as negligent within the meaning of Article 12(3) of the Criminal Code. The accused would have been obliged to examine more closely whether the export of the goods to or for use in the Russian Federation is permissible. In breach of duty, she carelessly omitted to carry out more detailed investigations. Thus, the accused has also fulfilled the subjective criminal offence of a violation of Article 11a(1) of the Ukraine Regulation.

V. Sentencing

23. Anyone who negligently violates Article 11a (1) of the Ukraine Regulation is liable to imprisonment for up to three months or a fine of up to CHF 100,000 (Article 9 (3) of the Embargo Act in conjunction with Article 32 (1) of the Ukraine Regulation). These threats of punishment are becoming popular. Art. 333 of the Criminal Code has been adapted to the new sanctions of the General Part of the Criminal Code.
24. If an offence is committed in the course of managing the affairs of a legal person, the penal provisions are, in principle, applicable to the natural persons who committed the offence (Article 6(1) of the VStrR). If the principal, employer, client or representative fails, intentionally or negligently in breach of a legal obligation, to avert or annul the effects of an infringement by the subordinate, agent or representative, he or she is subject to the penal provisions that apply to the perpetrator acting accordingly (Art. 6 para. 2 VStrR). If the principal, employer, principal or representative is a legal person, Art. 6 para. 2 VStrR applies to the guilty bodies, board members, managing partners, actual managing persons or liquidators (Art. 6 para. 3 VStrR).
25. If a fine of not more than CHF 5,000 is possible and the identification of persons liable to prosecution under Article 6 of the VStrR would require investigative measures which would be disproportionate in the light of the penalty forfeited, the prosecution of those persons may be avoided and the legal person, the collective or limited partnership or the sole proprietorship may be ordered to pay the fine in their place (Art. 7 para. 1 VStrR). Fines of up to CHF 5,000 are to be assessed according to the seriousness of the

offence and the culpability; other reasons for sentencing do not have to be taken into account (Art. 8 VStrR).

26. In its observations of 4 May 2023, the defendant described the tasks of the employees involved in the transaction. However, according to [REDACTED], it is hardly possible to reconstruct who ultimately authorized the transaction.

In view of the fact that, in the present case, a fine of no more than CHF 5,000 is possible due to the minor fault and the minor offence (see the following paragraphs) and that the identification of the natural persons punishable under Article 6 of the VStrR would require investigative measures that would be disproportionate in view of the penalty forfeited, the prosecution of these persons is taken on the basis of Article 7 (1) of the VStrR and in their place ordered the accused to pay the fine.

27. The fault is not particularly great. The accused acted out of negligent imprudence, without any particular criminal energy. The execution of the export transaction by the accused is due to a chain of unfortunate circumstances. In addition, the goods were ultimately not exported to the Russian Federation, but could be returned by the FOCBS to the [REDACTED] for lawful use. Accordingly, there is no apparent violation of the Ukraine Regulation.
28. Finally, it should be noted that the defendant was cooperative from the beginning of the proceedings and, moreover, readily admitted the facts alleged by SECO.
29. In the light of the above-mentioned sentencing factors, a fine of CHF 4,500 is appropriate.

VI. Costs of Proceedings

30. In accordance with Articles 94 and 95 of the VStrR, the costs of the proceedings are to be imposed on the convicted persons, consisting of the trial fee and the writing fee.
31. On the basis of Articles 64 and 94 of the VStrR and Article 7(2)(a) and Article 12(1) of the Regulation of 25 November 1974 on costs and compensation in administrative criminal proceedings (SR 313.32), those are set at CHF 1,260 (award fee of CHF 1,200 and writing fee of CHF 60).

**On the basis of those considerations,
the State Secretariat for Economic Affairs (SECO)**

Recognized:

1. [REDACTED] shall be deemed to have infringed Art.11a(1) of the Ukraine Regulation.
2. [REDACTED] is sentenced to a fine of 4,500 francs.
3. [REDACTED] will also pay the costs of the proceedings totalling CHF 1,260 consisting of a casting fee of 1,200 francs and the writing fees of 60 francs.
4. The present penalty notice shall be served to the [REDACTED] in two copies and by registered letter with acknowledgement of receipt.

Information on Legal Remedies

The [REDACTED] may lodge an objection to the penalty notice within 30 days of its issue. The objection must be submitted in writing to the SECO Legal Service (State Secretariat for Economic Affairs SECO, Legal Division, Holzikofenweg 36, 3003 Bern). The objection must contain a specific request and state the facts on which it is based; the evidence should be specified and, if possible, attached (Art. 67 and 68 VStrR).

The opponent may request that the objection language be treated directly as a request for judgment by the competent criminal court (Art. 71 VStrR).

If no objection is lodged within the statutory period, the penalty notice is equivalent to a final judgment (Art. 67 para. 2 VStrR). The total amount of CHF 5,760 must then be transferred to the IBAN CH7709000000300063895 account of the State Secretariat for Economic Affairs (SECO) within a further 5 days.

State Secretariat for Economic Affairs SECO

[REDACTED]