

[LETTERHEAD]

CH-3003 Bern

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[REDACTED]

Reference: SECO [REDACTED]

Your reference:

Clerk: [REDACTED]

Bern, March 11, 2024

Penalty Notice

pursuant to Art. 64 of the Federal Act of March 22, 1974 on Administrative Criminal Law
(ACLA; SR 313.0) in administrative criminal proceedings

against

[REDACTED] representing [REDACTED]

[REDACTED]

Violation of Art. 11a para. 1 and Art. 9 para. 1 of the Ordinance of the Federal Council of March
4, 2022 on measures in connection with the situation in Ukraine (SR 946.231.176.72;
hereinafter; "Ukraine Ordinance")

I. Facts of the Case

1. The Federal Office for Customs and Border Security FOCBS (hereinafter “FOCBS”) informed SECO on December 1, 2022 and June 6, 2023 that the following two consignments of [REDACTED] intended for export (on November 16, 2022 and May 22, 2023) were provisionally seized by Zurich Customs (hereinafter “goods”):

- Consignment [REDACTED] containing 3 pieces of [REDACTED] foam generators and 1 [REDACTED] (spray plate) with a total value of approx. 1,120 euros (hereinafter consignment 2022)

- Consignment [REDACTED] containing 4 “level sensors” with a total value of approx. 780 euros (hereinafter consignment 2023)

2. By letter from SECO dated 8 February 2023 (consignment 2022) and 15 January 2024 (consignment 2023) to the BAZG, the provisionally seized goods were released for lawful use to [REDACTED].

3. By order dated January 17, 2024, SECO opened administrative criminal proceedings against [REDACTED] on suspicion of violating Art. 11a para. 1 and Art. 9 para. 1 of the Ukraine Ordinance and requested it to comment on the alleged conduct within 30 days and to submit the requested information and documents.

4. By letter dated February 19, 2024, [REDACTED] notified SECO that [REDACTED] had instructed it to protect its interests and submitted a statement on the alleged conduct within the deadline (hereinafter Statement). This statement will be addressed in the considerations below (III.), insofar as legally relevant.

5. By e-mail and letter dated March 4, 2024, [REDACTED] stated that they had no comments on the final minutes and would not request any additions to the investigation.

II. Legal Bases

6. Violations under Art. 9 of the Federal Act on the Enforcement of International Sanctions (Embargo Act, EmbG, SR 946.231) are prosecuted and assessed by SECO (Art. 32 para. 3 Ukraine Ordinance). The Federal Act on Administrative Criminal Procedure (VStrR, SR 313.0) is applicable (Art. 14 para. 1 EmbG). If an offense is committed while managing the affairs of a legal entity, general or limited partnership, sole proprietorship or group of persons without legal personality or otherwise in the performance of business or official duties for another person, the criminal provisions apply to the natural persons who committed the offense (Art. 6 para. 1 VStrR).

7. The sale, supply, export, transit and transportation of goods for the strengthening of industry in accordance with Annex 23 to or for use in the Russian Federation are prohibited (Art. 11a para. 1 Ukraine Ordinance). Annex 23 to the Ukraine Ordinance lists goods with the customs tariff number 8424. The sale, supply, export and transit of goods listed in Annex 3, which are suitable for use in the aerospace industry, directly or indirectly to natural or legal persons or organizations in the Russian Federation or for use in the Russian Federation are prohibited (Art.

9 para. 1 Ukraine Regulation). Annex 3 to the Ukraine Regulation lists goods with the customs tariff number 9026.

8. Anyone who violates Art. 11a para. 1 or Art. 9 para. 1 of the Ukraine Ordinance will be punished in accordance with Art. 9 EmbG (Art. 32 para. 1 of the Ukraine Ordinance). The penalty for an intentional offense is a custodial sentence of up to one year or a fine (Art. 9 para. 1 EmbG) and for a negligent offense a fine of up to CHF 100,000 (Art. 9 para. 3 EmbG).

9. If a fine of no more than CHF 5,000 can be imposed and the investigation of the persons liable to prosecution under Art. 6 VStrR would require investigative measures that would be disproportionate to the penalty imposed, the prosecution of these persons may be dropped and the legal entity, the general or limited partnership, the sole proprietorship or the group of persons without legal personality may be ordered to pay the fine instead (Art. 7 VStrR). Fines of up to CHF 5,000 are to be assessed according to the seriousness of the offense and the degree of culpability; other grounds for sentencing need not be taken into account (Art. 8 VStrR).

10. Unless the law expressly stipulates otherwise, only those who intentionally commit a felony or misdemeanor are punishable (Art. 12 para. 1 SCC). The negligent violation of Art. 11a para. 1 and Art. 9 para. 1 of the Ukraine Ordinance is punishable (Art. 9 para. 3 EmbG / Art. 2 para. 3 EmbG). A felony or misdemeanor is committed intentionally by anyone who carries out the act with knowledge and intent. Anyone who considers the realization of the act to be possible and accepts it (Art. 12 para. 2 StGB) is already acting intentionally. A person commits a felony or misdemeanor negligently if he fails to consider the consequences of his conduct due to carelessness contrary to his duty or fails to take them into account. Carelessness is contrary to duty if the offender fails to observe the caution to which he is obliged under the circumstances and according to his personal circumstances (Art. 12 para. 3 SCC).

III. Considerations

Objective Elements of the Offense

In fulfillment of a purchase contract, [REDACTED] shipped three [REDACTED] with a value of approx. 1,120 euros (invoice [REDACTED] to [REDACTED], [REDACTED]) on November 16, 2022. These goods bear the customs tariff number 8424, which is listed in the applicable Annex 23 of the Ukraine Regulation on November 16, 2022 (date of seizure of the goods). The objective facts of Art. 11a para. 1 Ukraine Ordinance (Annex 23) are fulfilled with this sale or shipment to Russia.

[REDACTED] also shipped four “level sensors” with a value of approx. 780 euros [REDACTED] to [REDACTED] on May 22, 2023 in fulfillment of a purchase contract. These goods bear the customs tariff number 9026, which is listed in the applicable Annex 3 of the Ukraine Regulation on May 22, 2023 (date of seizure of the goods). The objective element of 9 para. 1 Ukraine Regulation (Annex 3) is fulfilled with this sale or shipment to Russia.

Subjective Facts

11. [REDACTED] is not accused of having acted intentionally within the company in the present case. It must be examined whether the facts of Art. 11a para. 1 (Annex 23) or Art. 9 para. 1

(Annex 3) of the Ukraine Ordinance were fulfilled negligently. With regard to consignment 2022 (November 16, 2022), [REDACTED] stated that internal investigations into the consignment had revealed that the invoice and the delivery bill for the [REDACTED] order had been issued on November 15, 2022. On November 16, 2022, the goods to be exported were inspected by [REDACTED]. The [REDACTED] department came to the conclusion that the sale of [REDACTED] with the customs tariff number 8424 to a company domiciled in Russia, which is not itself sanctioned, was permissible under Swiss Ukraine sanctions at that time. [REDACTED] also pointed out that goods with the customs tariff number 8424 were newly included in Annex 20 (Economically Significant Goods) of the Ukraine Ordinance as of November 23, 2022. The corresponding change had already been published at the time of the company's internal review of the shipment on November 16, 2022. Accordingly, it was conceivable that during the examination of customs tariff number 8424, it was concluded from the fact that it was only about to be included in Annex 20 that this customs tariff number would generally only be subject to restrictions from November 23, 2022. The fact that customs tariff number 8424 was already listed in Annex 23 (goods for the strengthening of industry) at that time would have been overlooked in this case. In this context, it should also be noted that the content of Annex 23 was neither available in the Official Compilation of Federal Law nor in the Systematic Compilation of Federal Law, but was only published via a reference to the SECO website.

12. With regard to the 2023 shipment (May 22, 2023), [REDACTED] wrote that internal clarifications had revealed that the invoice and delivery bill for the [REDACTED] order had been issued on April 25, 2023. On the same day, the goods to be exported were checked by the [REDACTED] department. [REDACTED] came to the conclusion that the sale of the level sensors with the customs tariff number 9026 to a company domiciled in Russia, which is not itself sanctioned, was permissible under Swiss Ukraine sanctions in this case. Art. 9 para. 1 of the Ukraine Ordinance prohibits the sale of goods listed in Annex 3 that are suitable for use in the aerospace industry. Annex 3 of the Ukraine Regulation lists, inter alia, goods with the customs tariff number 9026. [REDACTED] had understood Art. 9 para. 1 of the Ukraine Regulation to mean that goods listed in Annex 3 were not generally subject to restrictions, but only if they were specifically intended for use in the aerospace industry (e.g. sensors for aircraft fuel nozzles). This is due to the wording of Art. 9 para. 1 Ukraine Ordinance, which according to the wording only prohibits the sale of goods according to Annex 3 if they are "suitable for use in the aerospace industry". In the present case, the level sensors were supplied as a component [REDACTED], which is used for cleaning purposes. This type of level sensor can only be used in [REDACTED]. [REDACTED] therefore assumed that the sensors in the specific case would not fall under Annex 3 of the Ukraine Regulation due to their intended use.

13. The above statements [REDACTED] made regarding the 2022 shipment illustrate that the responsible persons of the company did not know at the time of the sale or shipment on November 16, 2022 that the customs tariff number 8424 is listed in Annex 23 and that the sale and export of the foam generators and the spray disc to Russia is prohibited and punishable. However, it is not the actual knowledge of the persons concerned of the criminal nature of the sale and export transaction that establishes criminal liability, but it is sufficient if the knowledge of the criminal nature should have been present in the company with due diligence. This must be affirmed in the present case. A globally active company that sells and distributes products to numerous countries (including Russia), with [REDACTED] and an export department, can be expected to be aware of the exact Russia sanctions that apply or that the responsible employees

should have made appropriate clarifications regarding the admissibility of exports to Russia in good time and should have recognized that the goods with tariff number 8424 fall under Annex 23 of the Ukraine Ordinance - in other words, the lack of caution within the company is to be regarded as “contrary to duty” or negligent (Art. 12 para. 3 StGB), which means that the offence of Art. 11 a para. 1 (Annex 23) Ukraine Ordinance is also subjectively fulfilled.

14. Furthermore, the statements [REDACTED] show that the responsible persons of the company assumed at the time of the sale or shipment of the level sensors (May 22, 2023) that the export transaction is permitted because the specific intended use of the level sensors is not in the aerospace sector. With regard to the aerospace sector, however, Art. 9 para. 1 of the Ukraine Ordinance is based solely on the fact that the goods are “suitable for use in the aerospace industry”. All goods listed in Annex 3, including level sensors under tariff number 9026, are in principle suitable for use in the aerospace industry. The specific intended use is not important. It would have been reasonable to expect [REDACTED] to inquire about the exact, aforementioned interpretation of Art. 9 para. 1 of the Ukraine Regulation (e.g. at customs or SECO) - especially because they should have known at least since the 2022 shipment was seized that there are sanctions applicable in connection with exports to Russia that must be observed by [REDACTED]. The failure to recognize the applicable sanctions in connection with the 2023 consignment is therefore also to be regarded as “in breach of duty” or negligent (Art. 12 para. 3 SCC), which means that the elements of Art. 9 para. 1 (Annex 3) Ukraine Ordinance are also subjectively fulfilled.

Sentencing

15. It must first be examined whether [REDACTED] can identify individual or several persons to whom the criminal conduct can be attributed. In response to SECO's question as to who was responsible for the alleged conduct, [REDACTED] stated that the export department and the [REDACTED] department were involved in the processing and assessment of the two orders. In view of the structure of the [REDACTED] department and the usual work processes there, it will no longer be possible to reconstruct who specifically authorized the transactions.

16. Based on the aforementioned statements by [REDACTED], the criminal liability of individual persons within [REDACTED] cannot be proven. In order to obtain additional and possibly sufficient information, additional investigative measures would be necessary (such as the interrogation of possible perpetrators and possible witnesses). As SECO is considering a maximum fine of CHF 5,000 (see “Sentencing” below), such further investigative measures would be disproportionate. SECO therefore refrains from prosecuting the natural persons specifically responsible and instead imposes a fine on [REDACTED] (Art. 7 VStrR).

17. [REDACTED] is accused of two unauthorized exports. Despite a consignment already seized by customs on November 16, 2022 and the resulting “warning” on May 22, 2023, those responsible again committed a sanction violation. The value of the sanctioned goods in both consignments, which were part of larger deliveries, is low at a total of EUR 1,900. In addition, the goods of both shipments were intercepted at customs and not delivered to Russia, which means that the intended sanction effect was realized. The objective wrongdoing is therefore in the low range. The failure to recognize the inclusion of the goods (consignment 2022) in Annex 23 of the Ukraine Regulation and the misrepresentation of the export transaction regarding the

level sensors (consignment 2023) are each to be regarded as slight negligence. [REDACTED] finally assured in its statement that the company had taken the necessary precautions and adapted the controls where necessary and that every export transaction was checked by [REDACTED] and checked for compliance with the sanctions measures applicable in Switzerland. These statements by [REDACTED] indicate a willingness to deal responsibly and carefully with the sanctions to be complied with, which is taken into account to reduce the penalty. Overall, the severity of the offense and the degree of culpability must be assessed as light.

18. The penalty for negligence is a fine of up to CHF 100,000 (Art. 9 para. 3 EmbG). In the present case, the fine is in the lowest range of the penalty scale. Taking into account the seriousness of the offense and the degree of culpability (Art. 8 VStR), SECO considers the imposition of a fine of CHF 2,300 to be appropriate.

IV. Procedural Costs

1. The costs of the present administrative penal proceedings are set at an adjudication fee of CHF 900 and a writing fee of CHF 70 (Art. 94 para. 1 VStR / Art. 6a f. and 12 of the Ordinance on Costs and Compensation in Administrative Penal Proceedings, SR 313.32). The total amount of the procedural costs of CHF 970 is imposed on [REDACTED], as it is convicted (Art. 95 para. 1 VStR).

Based on these considerations

the State Secretariat for Economic Affairs (SECO)

recognized:

1. [REDACTED] is declared guilty of violating Art. 11a para. 1 and Art. 9 para. 1 of the Ukraine Ordinance.
2. [REDACTED] is sentenced to pay a fine of CHF 2,300.
3. The procedural costs of CHF 970, consisting of an adjudication fee of CHF 900 and a writing fee of CHF 70, are ordered to be paid by [REDACTED].
4. The present penalty decision is opened to [REDACTED].

Right of Appeal

The person concerned may lodge an objection to the penalty notice within 30 days of it being issued. 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 objector may request that the objection be dealt with directly as a request for assessment 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 (fine and procedural costs) of CHF 3,270 must then be transferred to the account IBAN CH 7709000000300063895 of the State Secretariat for Economic Affairs (SECO) within a further 5 days.

State Secretariat for Economic Affairs SECO

[REDACTED]

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