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Federal Department of Economic Affairs,  
Education and Research WBG  
State Secretariat for Economic Affairs SECO  
Law

[REDACTED]

CH-3003 Bern SECO; LOF POST CH AG

**Registered mail with return receipt (AR)**

Reference No.: SECO-4714-2/32/27  
Your sign:  
Administrator: Florian Lortscher  
Bern, November 21, 2022

## **PENALTY NOTICE**

**pursuant to Article 64 of the Federal Act of 22 March 1974 on Administrative Criminal 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 Board of Directors of 4 March 2022 on measures in connection with the situation in Ukraine (SR 945.231.176.72; hereinafter: "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 "Embargo Act")**

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## I. Facts Of The Case

1. On May 24, 2022, SECO's Export Controls / Industrial Products Division (BWIP) was notified by the Federal Office for Customs and Border Security (FOCBS) of a consignment from the company [REDACTED] [REDACTED] (hereinafter: [REDACTED] or the "defendant") with the destination Russian Federation. The consignment was provisionally seized by the Mendrisio customs section.

According to the export list dated May 18, 2022, the delivery from [REDACTED] [REDACTED] to the consignee [REDACTED] to the Russian Federation \_\_\_\_\_ Lubricant [REDACTED] gross weight 1850 kg, value according to invoice no. 8312: 17'440 Euro.

2. On the basis of the defendants' correspondence with SECO (BWIP), it appears that [REDACTED] was not aware of the sanctions imposed on the Russian Federation and did not carry out the necessary clarifications in this regard.
3. On 24 May 2022, this dossier concerning possible breaches of the Ukraine Regulation by the accused was transferred from the BWIP department to the legal affairs department (OARE) of SECO, with the request to consider the opening of administrative criminal proceedings.
4. By order of 5 September 2022, 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 requested them to comment on the alleged conduct by 4 October 2022 and to submit the requested information and documents.
5. The accused complied with that request within the prescribed period by submitting her observations of 20 September 2022. The statement was drafted by Mr. [REDACTED], Managing Director and Chairman of the Board of Directors of [REDACTED]. In it, the [REDACTED] Jen acknowledges the facts of which it is accused. On 28 April 2022, an order was received from [REDACTED] for the lubricant [REDACTED]. On the 20th of time 2022, lubricant [REDACTED] value of 17,440. - Euros from the factory [REDACTED]. That consignment was subsequently seized by the Mendrisio customs office.

In its statement, the defendant also explained that all sales products were manufactured by [REDACTED].

Lastly, the defendant points out that the prohibition enshrined in Article 11a(1) of the Ukraine Regulation was not known to Herrm [REDACTED] loch to its employees. In the opinion, Mr [REDACTED] emphasises that he takes full responsibility for the administrative criminal proceedings.

6. The investigations in these administrative criminal proceedings were concluded on 26 October 2022 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] was given the opportunity to submit its observations, to inspect the file and to request that the investigation be supplemented.

7. By letter dated 31 October 2022, [REDACTED] informed SECO that the facts had been correctly presented in the final minutes of 26 October 2022. At the same time, she requested that the proposed fine of CHF 4,500 be reduced or suspended. In support of that request, it argues that SECO itself stated that the fault of [REDACTED] Licht was particularly great and that the proceedings did not involve a great deal of effort on the part of SECO.

### **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 Decree mentions the following under customs number 3403;  
  
Lubricants prepared (including cutting oils, preparations for loosening screws, prepared anti-rust or anti-corrosion preparations and mould release agents, with a basis of lubricants) and preparations of a kind used as a malting agent for textile materials, for oiling or greasing leather, furs or other materials, other than those containing as an essential constituent 70% or more by weight of petroleum oils or oil obtained from bituminous minerals.
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). Administrative criminal law (VStrR) is applicable (Art. 14 para. 1 EmbG).

### **IV. Considerations**

#### **Objective criminal offence**

14. 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. Prepared lubricants are mentioned in Annex 23 of the Ukraine Decree under customs number 3403
15. The debtor arranged for the export of lubricants to the value of EUR 17,440 to the receptions [REDACTED] the Russian Federation. The consignment was provisionally

seized by the Mendrisio customs office and therefore reached the intended consignee [REDACTED] nicht (see para. 1/1.). In its statement of 20 September 2022, the accused confirmed this fact (see para. I/5 ).

16. By arranging for the shipment [REDACTED] to the Russian Federation of lubricants covered by Annex 23 to the Ukraine Regulation, the company infringed the prohibition on exports of industrial 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 the intentional and negligent violation 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 realisation of the offence to be possible and accepts it is already acting intentionally (Article 12 (2) of the Criminal Code). A crime or misdemeanor is negligent if he does not consider or does not take into account the consequence of his conduct due to negligence in his or her duties. Imprudence is a breach of duty if the perpetrator fails to observe the precaution to which he is obliged according to the circumstances and his personal circumstances (Art. 12 para. 3 SCC).
19. The accused is not accused of having acted intentionally in the present case.
20. In its observations of 20 September 2022, the defendant claims, inter alia, that both [REDACTED] and its employees were not aware that the lubricants were 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. Any person who negligently violates Article 11a (1) of the Ukraine Regulation shall be punished with 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 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 envisaged and the identification of persons liable to prosecution under Article 6 of the VStrR would require investigative measures which would be disproportionate in view 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 (Article 7(1) of the VStrR). Fines of up to CHF 5,000 are to be assessed according to the seriousness of the offence and culpability: other reasons for sentencing do not have to be taken into account (Art. 8 VStrR).
26. In its statement of September 20, 2022, the defendant described the tasks of the employees involved in the transaction with [REDACTED]. Nevertheless, in the present case, the misconduct cannot be clearly attributed to a specific person. He took over the sowing of [REDACTED] as managing director and chairman of the board of directors of [REDACTED] the full responsibility for the administrative criminal proceedings conducted by SECO is too general to qualify as an admission in the criminal sense. 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 their Ask the accused to pay the fine.
27. The fault is not particularly great. The accused acted out of negligence in breach of duty, without any particular criminal energy. Also, the lubricant contained in the consignment did not have a particularly high value (17,440 euros). Accordingly, there is only a minor 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 its response of October 31, 2022 to the final minutes of October 26, 2022, [REDACTED] [REDACTED] requested that the proposed fine of CHF 4,500 be reduced or suspended. On the one hand, it justified this request by stating that SECO itself had stated that [REDACTED]'s culpability was not particularly great. This is true, but the proposed fine is already set at a very high level and the not particularly high level of fault has already been taken into account, as a negligent violation of Art. 11a para. 1 of the Ukraine Ordinance can result in a fine of up to CHF 100,000 (see para. 23). The proposed fine of CHF 4,500 is therefore at the very low end of the penalty range for a violation of Art. 1a para. 1 of the Ukraine Ordinance. On the other hand, [REDACTED] points out that the proceedings did not cause SECO any great effort. SECO's expenses in the present administrative criminal proceedings are not relevant for the assessment of the penalty. This expense is taken into account in the procedural costs, which are imposed separately on the defendant (see points 31 and 32).

30. In the light of the above-mentioned sentencing factors, a fine of CHF 4,500 must be maintained.

#### **VI. Costs of Proceedings**

31. In accordance with Articles 94 and 95 of the VStrR, the costs of the proceedings are to be ordered to consist of the defendant's fee and the writing fee.
32. 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 (adjudication 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. The [REDACTED] is found guilty of violating Article 11a(1) of the Ukraine Regulation.
2. The [REDACTED] is sentenced to a fine of 4,500 francs.
3. [REDACTED] is also ordered to pay the costs of the proceedings totalling CHF 1,260, consisting of an additional fee of CHF 1,200 and the typing fees of CHF 60.
4. The present penalty notice shall be served to [REDACTED] in two copies and by registered letter with acknowledgement of receipt.

**Instruction on 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 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 of CHF 5,760 must then be transferred to the account of the State Secretariat for Economic Affairs (SECO) within a further 5 days with the enclosed payment slip.

**State Secretariat for Economic Affairs SECO**

Jurg Herren, lic., iur./LL.M.  
Leiter Ressort Recht

Florian Lörtscher, Attorney at Law  
Research Assistant/Principal Investigator