International Comparative Legal Guides

Sanctions 2021

A practical cross-border insight into sanctions law

Second Edition

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Sanctions 2021

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1 Overview

1.1 Describe your jurisdiction's sanctions regime.

Germany applies all sanctions imposed by the United Nations Security Council ("**UNSC**") ("**UN Sanctions**") and, as a European Union ("**EU**") member state, all sanctions imposed by the EU ("**EU Sanctions**").

Germany does not unilaterally impose sanctions. However, Germany maintains a discrete national export control regime that – in very limited circumstances – is used to impose unilateral export control measures that are sometimes referred to as "German Sanctions" externally. For details, please refer to question 2.10 below.

Germany's sanctions regime distinguishes between sanctions with a focus on a specific jurisdiction ("*Länderbezogene Embargomaßnahmen*") and sanctions with a focus on specific individuals/entities ("*Personenbezogene Embargomaßnahmen*"). In the following, we shall refer to both as "*sanctions*" and use the terminology explained below.

Sanctions with a focus on a specific jurisdiction can further be divided into (full) embargoes, comprehensive sanctions and targeted sanctions. Embargoes prohibit all trade with or for the benefit of the sanctioned party. Comprehensive sanctions prohibit most forms of trade with or for the benefit of the sanctioned party. Targeted sanctions prohibit only specific forms of trade with or for the benefit of the sanctioned party.

Embargoes and comprehensive sanctions are regularly implemented in the form of economic sanctions. Targeted sanctions may also be implemented in the form of economic sanctions or in the form of financial sanctions.

Economic sanctions, broadly comparable to U.S. sectoral sanctions, are designed to restrict trade, usually within a particular economic sector, industry or market – *e.g.*, the oil and gas sector or the defence industry ("**Economic Sanctions**").

Financial Sanctions are restrictive measures taken against specific individuals or entities that may originate from a sanctioned country or may have committed a condemned activity ("**Financial Sanctions**"). These natural persons and organisations are identified and listed by the EU in the EU Consolidated List of Persons, Groups and Entities Subject to EU Financial Sanctions ("**EU Consolidated List**") (see question 2.4 below for details), broadly comparable to U.S. Specially Designated Nationals ("**SDN**") listings, resulting in targeted restrictions like travel bans or asset freezing. With the application of EU Financial Sanctions, all funds and economic resources belonging to, owned by, held by or controlled by natural or legal persons, entities and bodies listed are frozen. Moreover, no funds or economic resources can be made available, directly or indirectly, to or for the benefit of the listed parties. Finally, the knowing and intentional participation in activities intended to circumvent the aforementioned asset freezes is also prohibited.

1.2 What are the relevant government agencies that administer or enforce the sanctions regime?

The government agencies that administer or enforce the sanctions and export control regime in Germany are:

(i) the German Federal Bank ("*Deutsche Bundesbank*"), the competent authority for administering Financial Sanctions;
(ii) the Federal Office for Economic Affairs and Export Controls ("*Bundesamt für Wirtschaft und Ausfuhrkontrolle*" ("**BAFA**")), the competent authority for administering Economic Sanctions and the export control regime;
(iii) the public prosecutor's office ("*Staatsanwaltschaft*"), the competent authority to enforce breaches of sanctions amounting to a crime; and
(iv) the German customs administration ("*Zoll*"), the competent authority to, *inter alia*, enforce breaches of sanctions that constitute an administrative offence.

Furthermore, the Federal Office for the Protection of the Constitution ("*Bundesamt für Verfassungsschutz*") ("**BfV**"), in close co-operation with the domestic intelligence services of the German federal states and with other agencies, including BAFA, is responsible for uncovering any activities of proliferation concern in order to prevent any illegal procurement efforts of foreign countries.

Finally, the EU Commission is the competent authority for certain sanctions-related authorisation requests.

1.3 Have there been any significant changes or developments impacting your jurisdiction's sanctions regime over the past 12 months?

Yes.

The U.S. sanctions on the North Stream II project, as well as on the International Criminal Court ("**ICC**"), have been heavily criticised in Germany. To counter such development, it is being discussed whether to expand the scope of the EU Blocking Statute (see question 2.11 below) to counter the extraterritorial effects of these new U.S. sanctions. At the same time, German Foreign Minister Heiko Maas noted on September 6, 2020 that Germany was planning to discuss possible sanctions on Russia with its EU partners in light of the poisoning of Russian opposition leader Alexei Navalny. Some voices, including Katrin Göring-Eckardt, the co-chair of the Green Party in the German

Parliament, have also called for a termination of the finalisation of the North Stream II project in this context.

Regarding enforcement activities, in a noteworthy case, the Hamburg Higher Regional Court sentenced a Russian citizen to seven years in prison for violating European sanctions by selling sensitive dual-use technology worth over EUR 1.83 million to Russians with military backgrounds between 2014 and 2018. In doing so, this individual both forged the necessary documents and violated the export ban under Council Common Position 2008/944/CFSP. He sold, among other things, two hot isostatic presses. As these can be used for civilian or military purposes, exporting them to Russia is prohibited. He further sold up to 15 kilograms of decaborane chemicals, also to a Russian military recipient. The chemicals can be used as rocket fuel or explosives. The items, which can be used for military purposes, fall under the EU Russia economic sanctions.

2 Legal Basis/Sanctions Authorities

2.1 What are the legal or administrative authorities for imposing sanctions?

Germany does not unilaterally impose sanctions, but applies all UN and EU Sanctions, see question 1.1 above.

UN Sanctions are first implemented at the EU level, see question 2.2 below.

The legal authority for EU Sanctions is article 29 of the Treaty on the EU ("**TEU**") (in the case of arms embargoes) and article 215 of the TEU (in the case of Economic and Financial Sanctions).

In the case of arms embargoes, the Council of the EU (the "**Council**"), the institution representing the governments of the EU member states, adopts a respective decision as part of its Common Foreign and Security Policy ("**CFSP**"). This decision is binding on EU member states, which, in turn, implement the decision on an EU member state level. In Germany, the legal authority for such implementation and enforcement is the Foreign Trade and Payments Act ("**AWG**"), flanked by the administrative authority, the Foreign Trade and Payments Regulation ("**AWV**").

In the case of EU Economic Sanctions and EU Financial Sanctions, the Council again adopts a respective decision as part of its CFSP and, additionally, an EU Sanctions regulation which is directly applicable in all EU member states. While the EU member states thus do not need to implement such EU Sanctions regulations in national EU member state law, the EU Sanctions regulations require the EU member states to create authorities to assure enforcement of the EU regulation on an EU member state level.

2.2 Does your jurisdiction implement United Nations sanctions? Describe that process. Are there any significant ways in which your jurisdiction fails to implement United Nations sanctions?

Yes.

Germany is a member state of the UN; regarding the process of implementation, see the chapter on "The Implementation of UN Sanctions at the EU Level" found at https://iclg.com/practice-areas/sanctions/4-the-implementation-of-un-sanctions-at-the-eu-level.

There are no significant ways in which the EU and/or Germany have failed to implement UN Sanctions.

2.3 Is your jurisdiction a member of a regional body that issues sanctions? If so: (a) does your jurisdiction implement those sanctions? Describe that process; and (b) are there any significant ways in which your jurisdiction fails to implement these regional sanctions?

Yes, Germany is a member state of the EU and implements EU sanctions; regarding the process of implementation in the case of arms embargoes and EU Economic Sanctions and EU Financial Sanctions, the Council adopts a respective decision as part of CFSP. In Germany, the legal basis for implementation into German law and respective enforcement of such decision is the AWG, flanked by the administrative authority AWV.

In the case of EU Economic Sanctions and EU Financial Sanctions, the respective additional EU Sanctions regulation is directly applicable in all EU member states. Therefore, while the EU member states do not need to implement such EU Sanctions regulations in national EU member state law, the EU Sanctions regulations require EU member states to implement authorities to assure enforcement of the EU regulation on an EU member state level, in Germany via the AWG, flanked by the administrative authority AWV.

There are no significant ways in which Germany has failed to implement EU Sanctions.

2.4 Does your jurisdiction maintain any lists of sanctioned individuals and entities? How are individuals and entities: a) added to those sanctions lists; and b) removed from those sanctions lists?

Germany does not maintain a list of sanctioned individuals and entities, but applies the EU Consolidated List. For the process of the implementation of such EU Financial Sanctions, see questions 2.1 and 2.3 above; for further details on (de-)listing, see https://www.consilium.europa.eu/en/policies/sanctions/adoption-review-procedure/.

Individuals and entities are added to or removed from the EU Consolidated List upon a proposal of the High Representative of the EU for Foreign Affairs or an EU member state. Various bodies and committees of the Council discuss the respective proposal before the Council decides on the addition/removal by unanimous vote.

2.5 Is there a mechanism for an individual or entity to challenge its addition to a sanctions list?

Sanctioned persons may submit a request to the Council, asking for the reassessment of the listing decision (see here for details: https://www.consilium.europa.eu/en/policies/sanctions/adoption-review-procedure/).

According to articles 275 and 263 of the Treaty of the Functioning of the EU, sanctioned persons may also challenge the Council's listing decision before the EU General Court of the European Union.

The European Court of Justice ("**ECJ**") may also review whether UNSC Sanctions, specifically related listings, are in accordance with EU primary law. For illustration purposes, a respective judgment can be found at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62005CJ0402&from=DE.

2.6 How does the public access those lists?

The sanctions search tool maintained by the EU, the so-called

"EU Sanctions Map" (available at https://www.sanctionsmap.eu), serves as a good starting point for an initial assessment on whether Germany maintains sanctions against a particular jurisdiction, individual or entity.

An overview of sanctions with a focus on specific jurisdictions can be found at https://www.bafa.de/SharedDocs/Downloads/DE/Aussenwirtschaft/afk_embargo_uebersicht_laenderbezogene_embargos.pdf?__blob=publicationFile&v=6.

An overview of sanctions with a focus on specific individuals/entities, the so-called EU Consolidated List of persons, groups and entities subject to EU Financial Sanctions, can be found at https://data.europa.eu/euodp/en/data/dataset/consolidated-list-of-persons-groups-and-entities-subject-to-eu-financial-sanctions.

How can companies manage those lists?
Companies often have to rely on external vendors and third parties with compliance expertise to provide leading technology and screening solutions. Sanctions screening should be performed at the onboarding phase of a transaction or relationship, and ongoing monitoring should continue throughout the relationship cycle. While screening at the onboarding stage appears straightforward, one of the key challenges can be adopting an automated screening system integrated with the organisation's onboarding systems including, *inter alia*, Enterprise Resource Planning ("**ERP**"), Customer Relationship Management ("**CRM**") and Human Resources ("**HR**") systems. The integration of screening solutions that combine technology and advanced analytics can facilitate faster screening and monitoring for review and reporting requirements.

Ongoing monitoring includes a review of an organisation's relevant key data sets against any new updates to the sanctions watch lists. It also takes into consideration records where key know-your-customer ("**KYC**") attributes such as address, nationality and other personal identification indicators may have been updated as a part of the organisation's AML KYC refresh regime. While most screening systems and solutions today support automated ongoing review requirements, there is a significant operational optimisation that can be achieved through effective technology system configurations. This includes review and mapping of the organisation's data with the corresponding data available in the watch lists. A well-tuned technology solution will assist the organisation in reviewing potential matches through a framework that can support internal system integrations and real-time triggers based on automated watch list updates.

How can companies manage false positives?
Many advanced screening solutions offer capabilities based on machine learning to optimise false positives. These include technology functions that optimise the potential matches based on variations in word boundaries, native character variations (such as "ö" to "oe"), extra words or spelling errors in commonly found names, which are often caused by unintentional error(s) or introduced intentionally to evade detection. Another functionality that can assist organisations to optimise false positives is effective "whitelisting". This feature can allow organisations to list entities that could be exempted from the screening process. False positive optimisation is increasingly important as it can manage false positive matches that may also reduce the likelihood of breaching other areas of law such as the principle of data minimisation or data accuracy in Article 5 of the EU General Data Protection Regulation ("**GDPR**").

2.7 Does your jurisdiction maintain any comprehensive sanctions or embargoes against countries or regions?

For an explanation of the different types of sanctions, please see question 1.1.

The UN, the EU and, correspondingly, Germany currently do not apply an embargo against any country or region.

However, North Korea is currently subject to comprehensive sanctions and the Republic of Crimea is currently subject to a broad set of targeted sanctions.

2.8 Does your jurisdiction maintain any other sanctions?

Germany, as of August 31, 2020, applies sanctions targeting 34 non-EU countries: Afghanistan; Belarus; Bosnia and Herzegovina; Burundi; Central African Republic; China; Democratic Republic of the Congo; Egypt; Guinea; Guinea-Bissau; Haiti; Iran; Iraq; Lebanon; Libya; Mali; Moldova; Montenegro; Myanmar (Burma); Nicaragua; North Korea; Russia; Serbia; Somalia; South Sudan; Sudan; Syria; Tunisia; Turkey; Ukraine; United States; Venezuela; Yemen; and Zimbabwe.

2.9 What is the process for lifting sanctions?

The same procedure for the imposition of sanctions applies to the revocation of sanctions; please refer to question 2.1 above.

Accordingly, the decision by the Council must also be unanimous. This requirement has led to the fact that EU Sanctions regulations often contain an end date, so that instead of a uniform decision to lift them, a uniform decision to maintain the sanctions will usually be required every six months.

2.10 Does your jurisdiction have an export control regime that is distinct from sanctions?

Yes.

Germany maintains a discrete and complex national export control regime. The German export control regime is regulated by the AWG. The AWV governs both the transfer to EU member states and the export to non-EU member states of certain goods.

The German export control regime implements requirements from the relevant international agreements, such as the Wassenaar Arrangement, the Nuclear Suppliers Group, the Australian Group and the Missile Technology Control Regime. It is a discrete national regime, yet Germany regularly aligns with the CFSP, specifically via the EU Dual Use Regulation and the EU Common Military List.

2.11 Does your jurisdiction have blocking statutes or other restrictions that prohibit adherence to other jurisdictions' sanctions or embargoes?

Yes.

Germany enforces the EU Blocking Statute (as amended, the "**EU Blocking Statute**"), and the AWV also includes the prohibition against declaring adherence to a foreign boycott. Further, the GDPR, while having the primary function of protecting the personal data and privacy rights of EU data subjects in practice, can sometimes act as a "Blocking Statute" prohibiting transfers to non-EEA countries or the processing of personal data

pursuant to obligations that arise outside of EU or EU member state law.

EU Blocking Statute

On August 6, 2018, the EU enacted Commission Delegated Regulation (EU) 2018/1100, which amended Council Regulation (EC) No 2271/96. The effect of the EU Blocking Statute is to prohibit compliance by EU entities with, *inter alia*, the re-imposed U.S. sanctions on Iran as well as certain U.S. sanctions on Cuba, most relevant those deriving from the application of certain parts of the U.S. Cuban Liberty and Democratic Solidarity Act of 1996, the so-called "Helms-Burton Act".

The EU Blocking Statute was originally enacted in 1996 as a countermeasure to certain U.S. extraterritorial sanctions against Cuba, Libya, and Iran. The EU viewed these sanctions as a violation of international law, a threat to international trade, and an impairment of the interests of "EU Operators". Consequently, pursuant to its preamble, the regulation sought to protect against the "*effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom*". To achieve that goal, the statute, *inter alia*, prohibits compliance with any legal acts listed in the regulation which "*purport to regulate activities of natural or legal persons under the jurisdiction of a Member State*". The member states of the EU are responsible for implementing sanctions to be imposed in the event of a breach. Germany does so by penalising a breach of the EU Blocking Statute as an administrative offence with a maximum fine of EUR 500,000 with the potential of additional forfeit of gains.

In addition, the EU Blocking Statute nullifies the effect of foreign court judgments based on these legal acts in the EU, hinders service and discovery requests, such as those deriving from Helms-Burton Act claims and establishes a reporting obligation as well as a right to recover damages. These effects and obligations have been discussed in depth at https://www.gibsondunn.com/new-iran-e-o-and-new-eu-blocking-statute-navigating-the-divide-for-international-business/.

Boycott declaration prohibition

Section 7 of the AWV states: "*The issuing of a declaration in foreign trade and payments transactions whereby a resident participates in a boycott against another country (boycott declaration) shall be prohibited (…).*"

There is no precedent clarifying the exact scope, but it is a common understanding among sanctions practitioners in Germany that, unlike the EU Blocking Statute, section 7, AWV does not prohibit mere compliance with foreign sanctions; rather, it specifically prohibits the *issuing of a declaration* to do so.

On December 19, 2018, section 7 of the AWV was amended, clarifying that "[*The boycott declaration prohibition] shall not apply to a declaration that is made in order to fulfil the requirements of an economic sanction by one state against another state against which the Security Council of the United Nations in accordance with Chapter VII of the United Nations Charter, the Council of the European Union in the context of Chapter 2 of the Treaty on European Union or the Federal Republic of Germany has also imposed economic sanctions*".

This revision only leaves a narrow window of application of section 7 AWV. As an example, due to no UN, EU and, accordingly, German Sanctions implemented or applied against Cuba, the issuing of a boycott declaration relating to Cuba in a context with a German nexus should be approached carefully.

General Data Protection Regulation

Sanctions screening involves screening customer data against designated sanction lists. The very act of inputting a name (or, indeed, other details such as address, nationality, passport, tax ID, place of birth, date of birth, former names and aliases) into a sanctions screening tool or the filing of a Suspicious Activity Report ("**SAR**") could qualify as an act of personal data processing under the GDPR.

The processing of personal data is lawful under the GDPR when conducted in line with one of the legal bases provided in the regulation, such as when it is "(…) *necessary for compliance with a legal obligation to which the controller is subject (…)*", as per Article 6(1)(c) of the GDPR. While a German company may be able to rely on EU sanctions law as a "*legal obligation*" justifying the screening of personal data under some circumstances, this may not necessarily be the case for sanctions screening due to U.S. and other third-country sanctions and export control laws and regulations – which stems from a "*legal obligation*" arising outside of EU or EU member state law.

Further, the "*Schrems II*" judgment (CJEU Case C-311/18) on July 16, 2020 invalidated the EU-US Privacy Shield and consequently put into doubt the legality of personal data transfers to the United States without additional safeguards. However, for now, personal data that is transferred to courts, tribunals, and administrative authorities outside the EEA (pursuant to a mutual legal assistance treaty or equivalent) or under an Article 49 GDPR derogation do not seem to be affected by the judgment. In practice what this means is that German companies should continue to monitor this area of the law for potential developments.

2.12 Does your jurisdiction impose any prohibitions or threaten any sanctions consequences for transactions that do not have a connection to that jurisdiction (sometimes referred to as "Secondary Sanctions")?

No.

However, please note that EU Sanctions regularly apply to business done in whole or in part in the EU.

3 Implementation of Sanctions Laws and Regulations

3.1 What parties and transactions are subject to your jurisdiction's sanctions laws and regulations? For example, do sanctions restrictions apply based on the nationality of the parties involved? Or the location where the transactions take place?

Broadly speaking, any parties and transactions with a nexus to Germany and/or the EU may be subject to sanctions as well as export control laws and regulations applicable in Germany.

In Germany specifically, any trade in goods, services, capital, payments and other types of trade with foreign (*i.e.*, non-German) territories, as well as the trade in foreign valuables and gold between residents of Germany ("*Außenwirtschaftsverkehr*"), while not restricted *per se*, is subject to Germany's sanctions and export control laws and regulations, specifically to the restrictions of the AWG and AWV.

This also includes restrictions of international agreements, which the German legislative bodies have approved in the form of federal acts, such as the Wassenaar Arrangement, the Nuclear Suppliers Group, the Australian Group and Missile Technology Control Regime, and legal provisions of the bodies of international organisations to which the Federal Republic of Germany has transferred sovereign rights (*i.e.*, the EU).

EU Sanctions, in turn, generally apply: (i) within the territory of the EU; (ii) on board any aircraft or vessel under the jurisdiction of an EU member state; (iii) to any person inside or outside the territory of the EU who is a national of an EU member state; (iv) to any legal person, entity or body, inside or

outside the territory of the EU, which is incorporated or constituted under the law of an EU member state; and (v) to any legal person, entity or body in respect of any business done in whole or in part within the Union (for more information, please refer to the factsheet for EU restrictive measures, available at https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/135804.pdf).

3.2 Are parties required to block or freeze funds or other property that violate sanctions prohibitions?

Yes.

Any individual or entity obliged to comply with EU Financial Sanctions, regularly EU banks and financial institutions, that know or have reasonable cause to suspect that they are in control or in possession of, or are otherwise dealing with, the funds or economic resources of a person subject to EU Financial Sanctions, must (i) freeze the funds and specifically not deal with them or make them available to, or for the benefit of, the designated person, and (ii) report the funds or economic resources to the competent authority of the EU member state (in Germany, the Federal Bank). See question 3.4 for further details on reporting.

Making payments to a bank account of a sanctioned person is prohibited, unless specifically authorised by competent authority or unless it is reasonably determined that the funds will not be made available to the sanction person. EU banks may credit frozen accounts insofar it can be ascertained that the incoming funds are frozen upon being credited to the account.

For specific questions on freezing of funds and/or making available economic resources, please see a respective Commission opinion of June 19, 2020, available at https://ec.europa.eu/info/sites/info/files/200619-opinion-financial-sanctions_en.pdf.

3.3 Are there licences available that would authorise activities otherwise prohibited by sanctions?

Yes.

For EU Financial Sanctions, *e.g.*, based on *Council Regulation (EU) 269/2014 of March 17, 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine* as amended, the competent authorities of the EU member state to enforce such EU Financial Sanctions (in Germany, the Federal Bank) may authorise the release of certain frozen funds or economic resources, or the making available of certain funds or economic resources, after having determined that the funds or economic resources concerned are necessary to satisfy the basic needs of the sanctioned person or if the funds or economic resources concerned are intended exclusively for payment of reasonable professional fees or reimbursement of incurred expenses associated with the provision of legal services.

For EU Economic Sanctions, *e.g.*, based on *Council Regulation (EU) 833/2014 concerning restrictive measures in view of Russia's actions destabilizing the situation in Ukraine* as amended, the competent authorities of the EU member state to enforce such EU Economic Sanctions (in Germany, BAFA) may authorise certain transactions, *e.g.*, the sale of certain items for use in Russia used for oil exploration and production in waters deeper than 150 metres.

For specific licences related to the EU Blocking Statute, the respective request should be sent to the EU Commission's dedicated EU Blocking Statute team at: EC-AUTHORISATIONS-BLOCKING-REG@ec.europa.eu.

The German export control regime also includes exceptions and authorisation requirements. A more detailed description on the respective process can be found at https://www.bafa.de/EN/Foreign_Trade/Export_Control/export_control_node.html.

3.4 Are there any sanctions-related reporting requirements? When must reports be filed and what information must be reported?

Yes.

According to the respective provisions of EU Financial Sanctions, *e.g.*, *Council Regulation (EU) 269/2014 of March 17, 2014*, those who are subject to EU Financial Sanctions must supply immediately any information which would facilitate compliance with the Regulation to the competent authority of the EU member state authority, in Germany accordingly to the Federal Bank; must transmit such information to the EU Commission; and must cooperate with the competent authority.

Further, there are additional reporting obligations in place, e.g. financial institutions, traders of goods, notaries, lawyers, auditors, tax consultants and real estate professionals are all required to report suspicious activities and transactions. Such organisations are expected to report information about sanctioned individuals through reporting of SARs, or Suspicious Activity Reports. These must be reported to the Deutsche Bundesbank, which is responsible for the implementation of EU Regulations on Financial Sanctions in Germany, and/or the Financial Intelligence Unit ("**FIU**"). Specifically, in case of asset freezes due to EU Financial Sanctions, banks and financial institutions must provide information about any funds, accounts, assets, BIC codes, reference numbers, amounts and dates connected with the sanctioned individuals and entities.

How can technology support regulatory reporting?

Advanced screening tools can facilitate automated regulatory reporting. The identified suspicious sanctions activity is reviewed through a case management workflow. Once the required information is consolidated and review remarks are updated, the system enables consolidation of information in the requisite regulatory reporting format. The goal is to reduce errors that may arise on account of multiple manual entries. This use of technology also has the added benefit that it can enable an audit trail for the reported information, which is particularly useful if a sanctions lookback needs to be conducted.

In addition to the above, many organisations apply "Robotics Automation" for the elimination of the excessive manual touchpoints in the sanctions review processes and information consolidation requirements. This can assist organisations in increasing operational efficiencies, reduce sanctions review timelines and applicable costs.

3.5 How does the government convey its compliance expectations? Are certain entities required to maintain compliance programmes? What are the elements of a compliance programme required (or recommended) by the competent regulator(s)?

Both the EU, via EU Commission guidance (see https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019H1318&from=EN and https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.CI.2018.277.01.0004.01.ENG&toc=OJ:C:2018:277I:TOC), and the German government, via BAFA (see http://www.bafa.de/SharedDocs/Downloads/DE/Aussenwirtschaft/

afk_merkblatt_icp_en.pdf?__blob=publicationFile&v=3), have recently become more vocal on how they expect individuals and companies under their jurisdiction to implement sanctions and export control laws and regulations.

In principle, while there is no obligation to maintain a compliance programme, the responsible persons must prove "the due care of a prudent manager faithfully complying with his duties", see http://www.bafa.de/SharedDocs/Downloads/DE/Aussenwirtschaft/afk_merkblatt_icp_en.pdf?__blob=publicationFile&v=3 [referring to section 93 of the German Stock Corporation Act], which will be – to say the least – facilitated by maintaining a risk-based compliance programme.

The guidance provided by the EU Commission and BAFA is similar and suggests that management, in the area of sanctions and export control, set up an internal export control programme, which should include the following components: a regularly repeated risk assessment, management commitment to the objectives of sanctions and export control compliance; an organisational structure and distribution of responsibilities reflecting the results of the risk assessment; sufficient human and technical resources and other (IT) work equipment to address the identified risks; appropriate process organisation; record-keeping and storage of documents; diligent staff selection, training and awareness raising, as well as regular reviews of process and system controls (ICP audits), taking appropriate corrective actions if the need may be; the establishment of a whistle-blower system; and assuring physical and technical security.

4 Enforcement

4.1 Are there criminal penalties for violating economic sanctions laws and/or regulations?

Yes.

Violations of EU Sanctions and German foreign trade law, including Germany's export control regime, may be punished as criminal offences or as administrative offences.

Intentional violations constitute criminal offences. According to section 17 para 1 AWG, for example, a violation of an arms embargo constitutes a criminal offence and is punishable by imprisonment of up to 10 years. Furthermore, a fine may be imposed and determined according to the offender's individual financial situation/income and the offence.

Negligent violations of EU Sanctions and German foreign trade law, including Germany's export control regime, are generally considered administrative offences. "Negligence" is defined as not exercising the necessary standard of care ("*Fahrlässigkeit*"). As per section 19 para 6 AWG, such administrative offence may result in a fine of up to EUR 500,000 per offence and forfeit of gains resulting from the administrative offence committed.

Further details can be found at http://www.bafa.de/SharedDocs/Downloads/DE/Aussenwirtschaft/afk_merkblatt_icp_en.pdf?__blob=publicationFile&v=3.

4.2 Which government authorities are responsible for investigating and prosecuting criminal economic sanctions offences?

The authority responsible for investigating and prosecuting criminal Economic Sanctions is the public prosecutor's office at the court which exercises local jurisdiction over the breach of sanctions (section 143 I of the Courts Constitution Act ("**GVG**")).

The competent public prosecutor's office will be assisted by the competent authority administering the sanctions (in case of Financial Sanctions, the Bundesbank, and in case of Economic Sanctions, the BAFA); see question 1.2 above.

Only in rare and extreme exceptional cases, the Federal Prosecutor General may take over the investigation (section 142a GVG); *e.g.*, if the sanctions violation investigated has the potential to disrupt or endanger national security or external security of the foreign relations of the German Federal Republic.

4.3 Is there both corporate and personal criminal liability?

Yes.

While the concept of corporate criminal liability does not exist under German law, corporations still may face administrative penalties based on the Act on Regulatory Offences ("**OWiG**").

Specifically, under section 30 OWiG, the corporation may be fined if certain executive employees, specifically executive employees with the power to represent the corporation, have committed a criminal offence or a regulatory offence, *e.g.*, a breach of applicable sanctions laws and regulations, as a result of which duties incumbent on the corporation have been violated, or where the corporation has been enriched or was intended to be enriched.

Furthermore, under section 130 OWiG, if the owner or certain executive employees, specifically executive employees with the power to represent the corporation, intentionally or negligently omit to take the supervisory measures required to prevent contraventions, *e.g.*, breaches of applicable sanctions laws or regulations, such owner or executive employee may be held liable. An example of this would be the failure to implement an effective internal compliance programme resulting in a breach of sanctions laws or regulations by an employee whom the owner or the executive employee was supposed to supervise.

Currently, Germany is contemplating the introduction of a Corporate Sanctions Act which would introduce a hybrid system, establishing corporate sanctions law as a field of law between German criminal law and the law of administrative offences. The main changes to the current legal situation would eliminate the prosecutorial discretion in initiating proceedings, tighten the sentencing framework and formally incentivise the implementation of compliance measures and internal investigations. For further details, please see https://www.ey.com/de_de/assurance/wie-das-verbandssanktionengesetz-e-unternehmen-ehrlicher-machen-soll and https://www.gibsondunn.com/webcast-german-corporate-sanctions-act-government-plans-mandatory-prosecution-of-companies-for-corporate-crimes/.

The proposed penalties under the new draft law contemplate that these can potentially be reduced if there are significant contributions by the company to internal investigations and compliance. Investment by companies in technology can be useful and assist with the following:

- lookback transaction reviews and investigations – data mapping and extracting data across multiple jurisdictions and various data management systems through a combination of eDiscovery and mapping keyword-based linkages;
- a secure and GDPR-compliant host for uploading and storing records; and
- watch list sanctions screening.

4.4 What are the maximum financial penalties applicable to individuals and legal entities convicted of criminal sanctions violations?

In general, and if a maximum fine is not specified in the particular law, the maximum fine for individuals should not exceed EUR 1,000, section 17 I OWiG. However, section 19 VI AWG punishes administrative offences of individuals in the context of sections 19 I, III No. 1 lit. a, IV 1 No. 1 with a maximum fine of up to EUR 500,000. Other administrative offences regarding the AWG are to be punished with a maximum fine of up to EUR 30,000. The exact amount depends on the economic circumstances of the offender.

According to section 30 I OWiG, if the institution or a member of the institution authorised to represent a legal entity, the executive or a member of the board of directors of an association, a shareholder authorised to represent a legal entity or any other executive commits a criminal or administrative offence which violates the responsibilities of or enriches or was supposed to enrich the legal entity, it – this means the legal entity itself – can be punished with an administrative penalty. In the case of an intentional criminal offence, a fine of up to EUR 10 million can be imposed; in the case of a negligent criminal offence, a fine of up to EUR 5 million can be imposed (section 30 II 1 OWiG). If the violation in the context of section 30 II OWiG is an administrative offence, the maximum fine is governed by the particular violated law, section 30 II 2 OWiG. If the particular law governing the administrative offence refers to section 30 II 3 OWiG, the maximum fine multiplies by 10.

In any case, the maximum fine can be significantly higher if section 17 IV 1 OWiG is applicable. Section 17 IV 1 OWiG states that the fine is supposed to be higher than the economic advantage for the offender. According to section 17 IV 2 OWiG, every particular maximum fine can therefore be exceeded significantly if the economic advantage for the offender is higher than the maximum fine. Section 17 IV 1 OWiG is also applicable regarding fines according to section 30 I OWiG, section 30 III OWiG.

4.5 Are there other potential consequences from a criminal law perspective?

Yes.

As further consequences of a violation of sections 17, 18, 19 AWG, objects to which the offence or administrative offence relates, and objects that were used or intended for their commission or preparation, may be confiscated pursuant to section 20 AWG.

In practice, a breach has practical consequences with regard to the customs authority. In response to a breach, the customs authority may suspend or revoke authorisations or customs simplifications that have been granted. The consequences particularly affect export-oriented companies. Finally, the audits carried out by a customs authority depend on the risk profile of the company. Thus, if the customs authority has noticed an increase in the number of infringements committed by the company in foreign trade and has already imposed fines, the frequency of the company's audit automatically increases.

As a further potential consequence, according to section 124 I Nr. 3 GWB, contractual authorities may exclude a company from participating in any award procedure if the company has committed serious misconduct while doing business questioning its integrity. As the awarding authority has scope for assessment when determining if a company has committed serious misconduct questioning its integrity, possibly a violation of sections 17, 18, or 19 AWG, this could lead to an exclusion according to section 124 I Nr. 3 GWB.

4.6 Are there civil penalties for violating economic sanctions laws and/or regulations?

Yes.

The AWG also provides for civil law consequences of a negligent violation against economically imposed sanctions. The requirements for a fine are found in section 19 para 1 AWG in connection with 18 para 1 AWG. Furthermore, as an example, the courts might find a termination void and, therefore, unenforceable in case such termination was itself a breach of the EU Blocking Statute. See question 2.11 above.

4.7 Which government authorities are responsible for investigating and enforcing civil Economic Sanctions violations?

The local public prosecutor's office and customs, with assistance of the Bundesbank and BAFA, are responsible. See question 1.2.

4.8 Is there both corporate and personal civil liability?

Yes, see question 4.3 above.

4.9 What are the maximum financial penalties applicable to individuals and legal entities found to have violated economic sanctions?

According to section 19 para 6 AWG and section 30 para 2 OWiG, a fine may be imposed up to a maximum of EUR 500,000. It should be noted that section 17 para 4 OWiG provides the possibility to impose fines higher than the maximum fines regulated by law in cases where the economic benefit which the offender received is greater than the maximum fine regulated by law ("*disgorgement*").

However, the maximum fine can be significantly higher if section 17 para 4 No. 1 OWiG is applicable. Section 17 para 4 No. 1 OWiG states that the fine is supposed to be higher than the economic advantage for the offender. According to section 17 para 4 No. 2 OWiG, every particular maximum fine can therefore be exceeded significantly if the economic advantage for the offender is higher than the maximum fine. Section 17 para 4 No. 1 OWiG is also applicable regarding fines according to section 30 para 1 OWiG, section 30 para 3 OWiG.

4.10 Are there other potential consequences from a civil law perspective?

Yes, see question 4.5 above.

4.11 Describe the civil enforcement process, including the assessment of penalties. Are all resolutions by the competent authorities public?

The public prosecutor's office and the German customs administration are in charge of investigating and enforcing administrative offences. The particular penalty is assessed by (district) court.

The principle of individualised sentencing is regulated in section 46 of the German penal code ("*Strafgesetzbuch*") (the "**StGB**"). This means that the assessment of penalties is especially based on the individual economic and personal circumstances of the convict, as well as the factual circumstances of the offence. The penalty, expressed in so-called "*Tagessätze*", which means a daily rate over a certain time is subdivided into the amount of the penalty per day and the number of days the convict needs to pay. This means that the particular penalty can be adjusted to the economic circumstances of the convict.

The imposition of fines is regulated in section 17 para 3 OWiG. The assessment of fines is also based on the individual circumstances of the convict as well as the factual circumstances of the offence.

4.12 Describe the appeal process. Have companies challenged penalty assessments in judicial proceedings?

In principle, the person or company concerned may appeal against the imposition of a fine. As a consequence, the public prosecutor may decide to grant the appellant's request. Otherwise, the matter is brought before the court.

4.13 Are criminal and civil enforcement only at the national level? Is there parallel state or local enforcement?

The public prosecutor's office, with assistance of the Bundesbank and BAFA, enforces sanctions on a national level; see questions 1.2 and 4.3 above.

Public prosecutor's offices on the level of the German federal states, with assistance from the Bundesbank and BAFA, enforce German national sanctions and export control law. There is no parallel state or local law applicable to sanctions and export control violations.

Only in rare and exceptional cases does the Federal Prosecutor General take over (section 142a of the Courts Constitution Act ("**GVG**")) the investigation. This only applies if the investigation reaches such a scale that its existence could disrupt or endanger national security or external security of the foreign relations of the German Federal Republic.

4.14 What is the statute of limitations for Economic Sanctions violations?

The statute of limitations applicable is based on whether the sanctions violation is considered a crime or an administrative offence. Further, the statute of limitations applicable in case the sanctions violation is considered a crime depends on the maximum prison term associated with the specific sanctions violation.

In case the sanctions violation is a crime, specifically in case of an intentional violation of an arms embargo, the limitation period is 10 years (section 17 para 1 AWG, section 78 para 3 No. 3 StGB). In certain offender-related circumstances (*e.g.*, gang membership), the limitation period is also 10 years (section 17 para 3 AWG, section 78 para 3 No. 3 StGB). For reckless violations of arms embargoes and intentional violations of EU Sanctions, the limitation period is five years (section 17 para 4 AWG, section 78 para 3 No. 4 StGB).

In case the sanctions violation is an administrative offence, *e.g.*, in case of negligent breaches of EU Sanctions, the limitation period is three years (section 19 AWG, section 31 para 2 No. 1 OWiG).

5 General

5.1 If not outlined above, what additional Economic Sanctions–related measures are proposed or under consideration?

Recently, there have been increasing discussions about sanctioning China for its actions in Hong Kong in light of the adoption of the National Security Law.

Further, EU Sanctions on Belarus are contemplated in light of the political situation after the recent presidential election.

5.2 Please provide information for how to obtain relevant Economic Sanctions laws, regulations, administrative actions, and guidance from the Internet. Are the materials publicly available in English?

Official information regarding sanctions in non-EU states is published and frequently updated on a sanctions map provided by the German Bundestag and can be accessed at https://www.sanctionsmap.eu/#/main.

The above-mentioned EU law can also be found via Internet. See https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012E%2FTXT and for the TEU see https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012M%2FTXT.

German law is publicly accessible at https://www.gesetze-im-internet.de/titelsuche.html. A list of laws available in English can be accessed at https://www.gesetze-im-internet.de/Teilliste_translations.html (please be aware of the disclaimer under "*User-Notice*").

The leaflet published by the BAFA is very comprehensive and valuable to those new to this area of law as well as experienced practitioners. This nearly 20-sided document can be downloaded free of charge from https://www.bafa.de/DE/Aussenwirtschaft/Ausfuhrkontrolle/Allgemeine_Einfuehrung/allgemeine_einfuehrung_node.html.

Further guidance for those new to the area of sanctions law can be found on the sanctions page of the European Union. Here, in a structure comparable to this article, individual questions regarding European sanctions law are answered; see https://eeas.europa.eu/headquarters/headquarters-homepage/423/sanctions-policy_en.

A basic overview of the institutions and the legislative process in the EU can be obtained at https://europa.eu/european-union/about-eu/institutions-bodies_de#rechtsetzung.

For comprehensive current developments and more detailed information, in particular, individual sanctions, see https://www.gibsondunn.com/2019-year-end-sanctions-update/; for detailed information on ICPs, see https://www.gibsondunn.com/new-guidance-on-internal-compliance-programs-what-regulators-on-both-sides-of-atlantic-expect-from-international-business/.

See https://www.gibsondunn.com/u-s-eu-and-un-sanctions-navigating-the-divide-for-international-business/ for a comprehensive overview of sanctions law, in particular a deeper insight into U.S. sanctions law is recommended: Adam Smith/Stephanie Connor/Richard Roeder, in *U.S., EU, and UN Sanctions: Navigating the Divide for International Business*, published by Bloomberg Law in 2019. Gibson Dunn's International Trade practice and the lawyers on our global sanctions team can help navigate the complex web of varying obligations and restrictions.

EY Forensic & Integrity Services can help companies with sanctions compliance and investigations along with remediation, see https://www.ey.com/en_gl/forensic-integrity-services.

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