

# Keep an eye on the developments

## Impact of the EU sanctions against Russia on employers in Germany

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Early in 2022, the European Union enacted several Regulations in quick succession to impose far-reaching sanctions on Russia as a reaction to the conflict with Ukraine. These sanctions can also have an impact on employment relationships in Germany which involve any activities that are prohibited. This article gives an overview of the sanctions, the consequences of a violation, and the options for action for employers in Germany if they are affected by the EU Regulations.

### Overview of the EU sanctions against Russia

The sanctions concern, among other things,

- the financial sector by prohibiting any form of lending to and buying of securities issued by certain Russian banks and government, and by imposing a full prohibition on any transactions with certain Russian state-owned enterprises across different sectors.
- the energy sector by banning exports of specific refining technologies and new investments.
- the transport sector by banning exports, sales, supply, or transfer of all aircraft, aircraft parts and equipment to Russia, including the provision of all related repair, maintenance, or financial services, and by imposing restrictions on the export of maritime navigation goods and radio communication technology.
- dual-use goods (i.e., sensitive goods, services, software, and technology that can be used for both civil and military purposes) and advanced technology items by tightening existing export controls on dual-use goods to target sensitive sectors in Russia's military industrial complex and limiting Russia's access to crucial advanced technology.
- trade restrictive measures, namely import and export bans, on items such as steel products, coal, cements, rubber products, wood, liquor, and luxury goods. The



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luxury goods ban target products worth over EUR 300 and includes, among other things, clothing, shoes, leather, jewelry, watches, precious metals, precious stones, suitcases, and handbags, as well as vehicles worth over EUR 50,000.

## Who is subject to the sanctions?

The sanctions apply not only within the territory of the EU, but also (a) on board any aircraft or any vessel under the jurisdiction of a member state, (b) to any person inside or outside the territory of the EU who is a national of a member state, (c) to any legal person, entity, or body, inside or outside the territory of the EU, which is incorporated or constituted under the law of a member state, and (d) to any legal person, entity, or body in respect of any business done in whole or in part within the EU.

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Hence, employers established in Germany and employees who are nationals of an EU member state, even if they are working in a third country outside the EU (e.g., in Russia), must abide by the EU sanctions. The sanctions also provide for broad anti-circumvention provisions, according to which it is prohibited to participate knowingly and in-

tentionally, in activities the object or effect of which is to circumvent prohibitions in the sanctions. As a result, there is no loophole for deploying non-EU nationals in a third country to do business that violates the sanctions: If that is done with the knowledge that the employees would primarily or to a significant extent participate in sanctioned activities, or if the employer in Germany is able to instruct the individuals, or approves (even implicitly) sanctioned transactions, the employer will be hit just as hard for violating the sanctions.

## What are the consequences of a violation of the sanctions?

Violations of the sanctions constitute criminal or administrative offenses pursuant to Sections 18 and 19 of the Foreign Trade and Payments Act (Außenwirtschaftsgesetz) and Section 82 of the Foreign Trade and Payments Ordinance (Außenwirtschaftsverordnung). In general, prison sentences from three months up to five years shall be imposed for the (attempted) violation of export prohibitions, the sale, supply, or transfer of goods, the provision of services or the making of investments where this is prohibited, and for violation of asset freeze measures. Where the aforementioned violations are committed negligently, i.e. without intent, this constitutes an administrative offense. Such an administrative offense is punishable with a fine of up to EUR 500 000.

In this connection, it is worth noting that Section 22 para. 4 of the Foreign Trade and Payments Act provides for the possibility of voluntary self-disclosure in case of negligent

violations. If the violation is uncovered by in-house controls or audits and voluntarily reported to the competent authority, and if appropriate measures are taken to prevent a violation due to the same reason, the administrative offense will not be prosecuted. A notification to the competent authority is considered voluntary if the authority has not yet started investigations into the violation.

Companies cannot be held criminally liable under the German Criminal Code (Strafgesetzbuch), which only applies to individuals. However, companies can be liable under Section 30 of the Act on Regulatory Offenses (Ordnungswidrigkeitengesetz) in a situation where a company representative commits a criminal or administrative offense, which leads to the violation of the company's incumbent duties. The applicable administrative fines may amount to EUR 10 million in case the offense was committed with intent and EUR 5 million where the offense was committed negligently.

## Options for action under German employment law

In light of the far-reaching sanctions and the serious consequences of a violation, employers should carefully check whether their employees are engaged in any prohibited activities within the scope of their employment. If necessary, the employees' tasks must be adjusted. In some cases, this may be possible simply by giving directions (Weisung) in accordance with the job description in the employment agreement. In other cases, especially where a significant part of the job activities is prohibited under the

sanctions, a reassignment (Versetzung) or amendment of the employment agreement (Vertragsänderung) may be required. In this case, the employer must also abide by certain participation rights of the works council if one has been established in the business in question.

As the sanctions do not only apply within the territory of the EU, but also to any EU national inside or outside EU territory and to any legal entity inside or outside the territory of the EU that is incorporated or constituted under the law of an EU member state, employers established in Germany must not only monitor their employees' activities within Germany or the EU, but also if they are working in a third country outside the EU, including Russia. Hence, employers must check which employees they have posted to another country (Entsendung) and whether their activities there are compatible with the sanctions. If the activities of employees posted to other countries are not compatible with the sanctions and it is not possible to adjust their tasks by giving directions or assigning other tasks while maintaining the posting, employers have to terminate the posting, recall the employees, and assign them to another job that does not violate the sanctions. In case the employee is not willing to return to Germany, the employer should terminate the employment contract to avoid (further) violations of the sanctions.

Under German law, employers are furthermore subject to certain fiduciary duties (Fürsorgepflicht des Arbeitgebers) towards their employees and must ensure that any risks to the safety, health, and other legal interests of their employees are avoided. In case employees are engaged in any prohibited activities in the course of their employment, em-

ployers are obliged to inform their employees about the pending legal risks and assign them to other activities not violating the sanctions. This also applies with regard to employees posted to other countries.

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If employers in Germany experience a significant loss of work due to the sanctions, it may be possible to apply for short-time work (Kurzarbeit) and corresponding short-time work allowance (Kurzarbeitergeld) with the employment agency (Arbeitsagentur) if the statutory requirements are met. The Federal Employment Agency (Bundesagentur für Arbeit) explicitly states on its website that employers affected by sanctions against Russia may generally receive short-time work allowance if they suffer a significant loss of work. Sanctions or a trade embargo against Russia are considered an unavoidable event if the employer's business is directly affected by them. In their application for short-time work allowance, employers must explain what the effects of the sanctions on their business are and to what extent this causes the significant loss of work, e.g. which activities can no longer be carried out as they would constitute a violation of the sanctions. To receive short-time work allowance, the other legal requirements have to be met as well: in particular, at least 10 percent of the workforce must experience a loss of pay of more than 10 percent in the respective calendar month (this minimum requirement is temporary until 30 June 2022; there-

after one-third of the workforce must have a loss of pay of more than 10 percent).

## Future developments

Just like the conflict itself, the political and legal situation are highly dynamic. Employers are well advised to keep an eye on the developments and possible changes to the legal framework. This not only applies to possible further sanctions imposed by the EU on Russia, but also on potential countermeasures that are currently being contemplated by the Russian government and that target companies and individuals who comply with EU sanctions against Russia. ←