

IRAN, RUSSIA, CHINA: WHO'S NEXT?

U.S. EXPORT CONTROLS AND ITS EXTRA-TERRITORIAL APPLICATION

Philip Haellmigk

AUTHOR

Professor Dr. Philip Haellmigk ,LL.M., is the head of boutique law firm HAELLMIGK Lawyers in Munich, Germany, specializing in international trade, export controls, sanctions and compliance (www.haellmigk.com). Philip is qualified both as a German attorney and as a solicitor in England & Wales. Further, he holds law degrees from the University of Montpellier (France), a PhD from the University of Osnabrueck (Germany) and a LL.M. from Edinburgh Law School (Scotland). Philip is also a Professor of Law at the FOM University of Munich (Germany). Philip is fluent in English, French and German. He also speaks Spanish and Italian and has a basic knowledge of Mandarin. Philip is a frequent contributor to legal and business publications and regularly speaks at national and international conferences.

ABSTRACT

Since the Trump election, the subject of extra-territorial application of national law – in particular U.S. law – has received considerable attention. This is so because the U.S. administration increasingly uses this legal tool to enforce its foreign policy interests. A legal area with a particularly strong reach of extra-territoriality is U.S. export controls as this allows the U.S. to control foreign states' business. A very recent and vivid example is the Huawei trade ban by the U.S. The purpose of this article is to show the (harsh) legal and economic effects, which the extra-territorial application of U.S. export-related laws have on international trade.

The article will focus on the approach taken by the U.S. to impose its export controls outside the U.S. It will analyze the legal framework of extra-territorial U.S. export controls and explore to which extent the U.S. laws apply to foreign business, i.e., business outside the U.S. The article will define the cases in which foreign companies are subject to U.S. export controls and therefore must comply with U.S. regulations. It will show that the applicability of U.S. export controls to foreign companies and their business is considerably broad. It rigorously controls the destiny of U.S. origin products and components once they have been exported from U.S. territory and also regulates the worldwide export of products that have been manufactured by using

U.S. technology. In addition, U.S. export controls impose economic sanctions on countries (e.g., Iran) or companies (e.g., Huawei) and prohibit foreign companies from doing business with these sanctioned parties.

Understanding U.S. export controls and its extra-territorial reach are a challenge for foreign companies. It is a rather complex legal system that requires deeper knowledge of the underlying concept. However, foreign companies are well advised to comply with U.S. export controls, as the penalties for violations can be severe, including millions of dollars in fines and even imprisonment. In addition, the U.S. may blacklist foreign companies with the effect that business with the U.S. or elsewhere is no longer possible. Therefore, understanding U.S. export controls and its extra-territorial reach is vital to foreign companies.

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I. INTRODUCTION

At least since the U.S. authorities placed the Chinese company Huawei and its foreign subsidiaries on the blacklist in 2019 and subjected them to trade sanctions (the most recent restrictions against Huawei were implemented in August 2020), the issue of U.S. export controls & U.S. sanctions has once again moved to the forefront of attention for European businesses.

The reason why not only U.S. companies, but also European companies have to comply with U.S. export controls, is as follows: U.S. export controls have worldwide validity. That means that the U.S.A. demand that those companies trading outside the territory of the U.S. also comply with their export control regulations.

If companies fail to comply with U.S. export control regulations, then they face heavy fines and/or risk being placed on a U.S. trade blacklist. This was for example the case in the years 2014/15, when the French bank BNP Paribas and the German bank Commerzbank AG were ordered to pay about 9 and 1.5 billion USD in fines, respectively. In 2018, the Chinese telecom company ZTE was fined 1 billion USD and placed on a blacklist.

Against this background, it is essential for companies to be familiar with the basics of extra-territorial application of U.S. export controls and to integrate them into their compliance procedures.

The present contribution therefore provides a consolidated overview of the concept of U.S. export controls, explains the content and scope of its extra-territoriality and sets out the conditions under which U.S. export controls also apply to the trading activities of European companies.

II. THE CONCEPT OF GENERAL U.S. EXPORT CONTROLS

General U.S. export controls of cross-border trade outside the U.S.A. apply in two situations:

- the item to be exported is a U.S. item (criterion 1).
- a U.S. person is involved in the cross-border trade (criterion 2).¹

A. Criterion 1: The Item to Be Exported Is a U.S. Item

There are three constellations in which the item qualifies as a U.S.-made item according to the understanding of U.S. export controls:

1. Constellation 1: The Item to Be Exported Has a U.S. Origin

An item is of U.S. origin if it was produced in the U.S.. Therefore, the relevant criterion is the place of

¹ Occasionally, other criteria are mentioned such as “US territory” or “U.S. dollar transactions”. This article, however, deals with U.S. export controls on foreign business outside the U.S.A., thus it is not concerned with business within, or from, the U.S. The processing of U.S. dollar transactions outside the U.S. always takes place in conjunction with commercial banks in the U.S. resulting in a U.S. person (U.S. bank) being involved in the foreign business. Therefore, this constellation is already covered by criterion 2.

production, respectively.² As regards the classification of an item as a U.S. item, it is thus irrelevant whether it has transited the U.S. or whether it was stored there. Furthermore, an item that was originally made abroad, but enhanced, reconditioned, assembled, or improved in its functionality in the U.S.A. is also classified as a U.S. item according to the practice of the U.S. authorities.³

If an item was produced in the U.S., then the U.S. origin of this item, as a general rule, remains unchanged. Therefore, an item produced in the U.S. does not lose its character as a U.S.-origin item even if it has been shipped to or transited through several countries after its manufacture in the U.S. Even when the item is repeatedly exported outside the U.S. it is and remains a U.S.-origin item.

However, an exception from this principle applies when the U.S.-made item is transformed into another item outside the United States. The new foreign-made item basically supersedes the original U.S.-made item.⁴

2. Constellation 2: The Item to Be Exported Is Made Outside the United States, But Contains U.S.-Origin Content

An item made outside the U.S. that contains U.S.-origin content is subject to U.S. export controls. However, this applies only if the U.S.-origin controlled content equals or exceeds a specified percentage value of foreign-made content (so-called *de minimis* rule).⁵ The percentage value is 25%.

However, for deliveries to countries that are accused by the U.S. of supporting terrorism (Cuba, Iran, North Korea, Syria, Sudan), the allowed percentage value is merely 10%.

However, when applying the *de minimis* rule, the following aspects must be observed:

First of all, it must be noted that the *de minimis* rule must not be applied to all foreign-made items incorporating U.S.-origin content. For example, certain foreign-produced military commodities, peak performance computers or encryption technology are excluded from the rule. In these cases, the item is subject to U.S. export controls even if the value of the U.S. content incorporated in the foreign-produced item is minimal.⁶ However, the *de minimis* rule can be used for the vast majority of foreign-made items incorporating U.S. content.

However, when calculating the percentage value, U.S. export controls do not require that all U.S.

² Cf. § 734.3(a)(2) Export Administration Regulations (EAR). From time to time, some authors comment that if the focus is on the question of the item's place of production, one fails to recognize that U.S. export controls also apply to items located in the U.S.A., i.e. the controls apply regardless of whether the items were produced there or not. This allegation may be true, but misses the point. In so far as exports from the U.S.A. are concerned, U.S. export controls, of course, also apply to the export of items located in the U.S.A. The term "U.S. item" then also refers to items that are located in the U.S.A. but have not been produced there. The present case, however, deals with the export of U.S. items outside the U.S.A., i.e., with so-called reexports. With regard to reexports, the term "U.S. item" is defined slightly different and refers to an item that has been produced in the U.S.

³ Cf. Bureau of Industry and Security (BIS), *Complete list of Key terms used in the De minimis/Direct Product Decision Tool (as modified on 11 April 2018)*, https://www.bis.doc.gov/wrappers/ddpr/ddpr_interactive_tool_files/docs/Key%20terms%20used%20in%20Direct%20Product%20and%20De%20Minimis.pdf (accessed September 4, 2020).

⁴ See for example Sec. 560.205 (b) (1) of the Iranian Transactions and Sanctions Regulations.

⁵ § 734.3(a)(3)(ii) EAR. The *de minimis* rule also applies to foreign-made software and technology with incorporated (or commingled with) U.S.-origin controlled software and technology; cf. § 734.4(c), § 734.4(d) EAR.

⁶ § 734.4(a)EAR.

contents incorporated in the foreign-made item be taken into account.

The most relevant exceptions include:

U.S.-origin content that is not classified under any Export Control Classification Number (ECCN) listed on the American dual-use list (i.e. Commerce Control List) can be disregarded when calculating the de minimis value. This applies to all U.S. contents that are designated as EAR99.⁷

However, even if the U.S. content is classified under an ECCN, this does not necessarily mean that it must be taken into account when calculating the de minimis value. This only applies if – assuming that the U.S.-origin content would be delivered separately – the ECCN for the country to which the U.S. content is to be shipped actually requires an export license. U.S. export controls refers to this as controlled U.S.-origin content. According to the concept of U.S. export controls, a U.S. content or U.S. item is not considered as controlled (subject to license) when it has an ECCN, but instead when the control reason stated in the respective ECCN, i.e. the reason why the item is listed on the Commerce Control List, also applies to the specific country of destination.⁸

There is even an exception to the principle that controlled U.S. content must be included in the de minimis calculation, namely, when certain control reasons apply and when it is possible to use a general license (license exception) for the specific country of destination. If, for example, the U.S. content has an ECCN because of “national security” control reasons only and the general license “GBS – Country to Group B Shipments” can be used, then it can be disregarded when calculating the value of the U.S. content in the foreign-produced item.⁹

3. Constellation 3: The Item to Be Exported Is Produced Outside the United States, But Is Based on U.S. Technology or U.S. Software

If the foreign-produced item uses U.S. technology, i.e. is directly produced by the use of said technology, then general U.S. export controls generally consider this to be a U.S.-origin item as well. The same applies if the foreign-produced item is the direct product of a plant located outside the U.S.

⁷ Cf. BIS, *De minimis Rules and Guidance, § 734.4 and Supplement No. 2 to part 734 of the EAR (as modified on 5 November 2019)*, <https://www.bis.doc.gov/index.php/documents/pdfs/1382-de-minimis-guidance/file> (accessed September 4, 2020). However, in case of certain (embargoed) countries, the EAR99 content must be taken into account as well; cf. in this regard Philip Haellmigk, *Das Konzept der US-Re-Exportkontrolle – Eine systematische Erläuterung im Lichte des aktuellen US-Iran-Embargos*, 3 CORPORATE COMPLIANCE ZEITSCHRIFT, 135, 138 (2019); see also III.A.1 below.

⁸ What matters in this respect are the reasons as to why the item was included on the Commerce Control List (reasons for control). For each country, a list of countries sets out whether the respective reason for control applies (Commerce Country Chart, cf. Supplement 1 to Part 738 EAR). Only a combination of the reason for control and the country of destination thus reveals whether the export of the item requires a license; for detailed information see Philip Haellmigk, *Das Konzept der US-Re-Exportkontrolle – Eine systematische Erläuterung im Lichte des aktuellen US-Iran-Embargos*, 3 CORPORATE COMPLIANCE ZEITSCHRIFT, 135, 137 (2019); Gabriele Burkert-Basler, *Fallstricke in der Operative: Reexportbeschränkungen der Export Administration Regulations*, 9 US-EXPORTBESTIMMUNGEN, 151, 151 (2019); Philip Haellmigk, *Die US-Re-Exportkontrolle: Konfusion oder Konzeption?*, 2 AW-PRAX – AUßENWIRTSCHAFTLICHE PRAXIS, 57, 58 (2019).

⁹ Cf. § 740.4 EAR; cf. Supplement 2 to Part 734 – Guidelines for *de minimis* Rules, (1) (a); see also BIS, *De minimis Rules and Guidance, § 734.4 and Supplement No. 2 to part 734 of the EAR (as modified on 5 November 2019)*, <https://www.bis.doc.gov/index.php/documents/pdfs/1382-de-minimis-guidance/file> (accessed September 4, 2020); Philip Haellmigk, *Das Konzept der US-Re-Exportkontrolle – Eine systematische Erläuterung im Lichte des aktuellen US-Iran-Embargos*, 3 CORPORATE COMPLIANCE ZEITSCHRIFT, 135, 137 (2019); regarding the content and the conditions for using the various license exceptions cf. Philip Haellmigk, *Die License Exceptions in der US-Exportkontrolle*, 2 AW-PRAX – AUßENWIRTSCHAFTLICHE PRAXIS, 60, 60 et seq. (2020).

that was established using U.S. technology.¹⁰

However, the qualification of such a foreign-produced item as a U.S.-origin item does not apply without exception, but instead is subject to restrictions. It essentially depends on whether the item is to be shipped to certain critical countries and on for what control reasons the U.S. technology or U.S. software was classified under the relevant ECCN.¹¹

B. Criterion 2: A U.S. Person Is Involved in The Cross-Border Trade

General U.S. export controls define a U.S. person as any

- natural person having U.S. citizenship including Green Card holders, regardless of their place of residence;
- natural persons permanently residing in the U.S., regardless of their nationality;
- a company incorporated under the laws of the U.S. including its dependent branch offices abroad.¹²

Vice versa, it follows that the following companies are not U.S. persons:

- A company incorporated under European laws;
- A company incorporated under European laws, even if it is the subsidiary of a U.S. company.

According to the above definition, general U.S. export controls only apply to those companies that were incorporated under U.S. laws. The relationship of a subsidiary of a U.S. company to the U.S. resulting from its U.S. group affiliation does not matter in this case.¹³

Thus, there is only one exception to the principle that companies incorporated under foreign laws are not U.S. persons and, therefore, do not have to comply with general U.S. export controls. This is the case when a U.S. employee holds a senior position (e.g., management) directly relating to the company's export transactions. Due to this employee's U.S. citizenship, the company basically becomes a U.S. person and is thus subject to general U.S. export controls.¹⁴

¹⁰ § 734.3(a)(4); § 736.2(b)(3) EAR.

¹¹ Cf. BIS, *General Prohibition No. 3: Direct Product Rule - § 736.2(b)(3) of the EAR*, <https://www.bis.doc.gov/index.php/licensing/reexports-and-offshore-transactions/direct-public-guidelines> (accessed September 4, 2020). For specific sensitive items, special provisions apply; see for example § 736.2(b)(3)(iii) EAR. Regarding reexports to Huawei, the Foreign Direct Product rule has been modified to further restrict Huawei's access to sensitive U.S. technology and U.S. software, cf. Supplement 4 to Part 744 EAR – Entity List, footnote 1, see IV.B.1. below.

¹² Part 772 of the EAR – Definition of Terms: U. S. person.

¹³ ERIC HIRSCHHORN, *THE EXPORT CONTROL AND EMBARGO HANDBOOK*, 199 (2nd ed., 2005); ED KRAULAND/PETER JEYDEL, *Iran: sanctions minefield for non-U.S. companies*, 52 *WORLDDECOR – THE JOURNAL OF EXPORT CONTROLS AND SANCTIONS* 16, 16 (2016). However, the U.S. group affiliation does play a role if shipments to embargoed countries are concerned, see below under III.A.2.

¹⁴ In such a case, the company can lay down in the form of what is called a recusal policy that the U.S. person is debarred from carrying out export transactions (“walled off from export-related business”), so that the company is not considered as a U.S. person; cf. Office of Foreign Assets Control (OFAC), *Frequently Asked Questions Relating to the Lifting of Certain U. S. Sanctions Under the Joint Comprehensive Plan of Action (JCPOA) on Implementation Day*, last updated on December 15, 2015, C.16, https://home.treasury.gov/system/files/126/jcpoa_faqs.pdf (accessed September 4, 2020).

III. THE CONCEPT OF SPECIAL U.S. EMBARGO LAWS

From a systemic perspective, special U.S. embargo laws tighten the general U.S. export controls by extending the existing rules of general U.S. export controls or by establishing additional rules.

General U.S. export controls are tightened in two ways:

- Approach 1: Tightening the general criteria for U.S. item and U.S. person
- Approach 2: Introduction of a criterion: secondary sanctions.

A. Approach 1: Tightening Criteria U.S. Item and U.S. Person

Special U.S. embargo laws extend the existing criteria for general U.S. export controls, i.e. the criteria for U.S. item and U.S. person.

1. Tightening Criterion U.S. Item

First of all, the principle, that U.S. content classified under EAR99 is not included in the de minimis calculation, no longer applies. In case of specific embargoed countries, U.S. content classified under EAR99 must also be included in the de minimis calculation.¹⁵

In addition, the principle that the maximum admissible percentage value of U.S. content be valued at 25% or less is removed. For deliveries to certain countries embargoed by the U.S., the U.S. content in a foreign-made product must be valued at 10% or less. The U.S. embargo against Iran includes the extension of this criterion, for example. In this case, the U.S. content must be valued at less than 10%. Otherwise, it is a U.S.-origin item.¹⁶

2. Tightening Criterion U.S. Person

The principle that only businesses incorporated under U.S. laws are U.S. persons no longer applies. From now on, foreign subsidiaries of a U.S. parent company are treated as U.S. persons, too.¹⁷

The U.S. embargo against Iran, for instances, includes an extension of this criterion. Foreign companies belonging to a U.S. group are treated as U.S. persons. Consequently, they must observe the same trade restrictions on Iran as apply to their U.S. parent company as the U.S. person.¹⁸

¹⁵ For deliveries to Cuba cf. § 746.2 (a) EAR; for deliveries to North Korea cf. § 746.4 (a) EAR; for deliveries to Crimea cf. § 746.6 EAR; see also Philip Haellmigk, *Die US-Re-Exportkontrolle: Konfusion oder Konzeption?*, 2 AW-PRAX – AUßENWIRTSCHAFTLICHE PRAXIS, 57, 59 (2019).

¹⁶ Further examples of this include deliveries to or Cuba North Korea, Syria, Sudan, cf. § 734.4 (c), (d) EAR in conjunction with Country Group E:1, E:2 of Supplement No. 1 to Part 740 EAR.

¹⁷ The treatment of U.S. foreign subsidiaries as equivalent to U.S. persons does not only apply if the U.S. company holds 50% or more of the shares, but also if it exercises a comparable controlling influence on the activity of the non-U.S. company; cf. in more detail Philip Haellmigk, *Das aktuelle US-Iran-Embargo und seine Bedeutung für die deutsche Exportwirtschaft: Das US-Sanktionsregime der Primary und Secondary Sanctions*, 1 CORPORATE COMPLIANCE ZEITSCHRIFT, 33, 34 (2018); Philip Haellmigk, *Das Konzept der US-Re-Exportkontrolle – Eine systematische Erläuterung im Lichte des aktuellen US-Iran-Embargos*, 3 CORPORATE COMPLIANCE ZEITSCHRIFT, 135, 138 (2019).

¹⁸ ED KRAULAND/PETER JEYDEL, *Iran: sanctions minefield for non-U.S. companies*, 52 WORLDECR – THE JOURNAL of EXPORT CONTROLS AND SANCTIONS 16, 16 et seq. (2016); Philip Haellmigk, *Das aktuelle US-Iran-Embargo und seine Bedeutung für die deutsche Exportwirtschaft: Das US-Sanktionsregime der Primary und Secondary Sanctions*, 1 CORPORATE COMPLIANCE ZEITSCHRIFT, 33, 34 (2018).

B. Approach 2: Introduction of A New Criterion: Secondary Sanctions

In addition to the first approach of tightening up, i.e. the extension of the criteria for general U.S. export controls, U.S. embargo laws introduce a new criterion.

It sets forth that non-U.S. companies who neither export U.S. items nor qualify as a U.S. person within the meaning of general U.S. export controls are also subject to U.S. export controls. This new rule therefore applies to all non-U.S. companies.

Depending on the content of the U.S. embargo concerned, all non-U.S. companies worldwide are therefore prohibited from shipping specific products to a sanctioned country or to supply specific industries or companies in this country. The regulatory framework, which is using trade bans to target non-U.S. companies that neither export U.S. items nor are U.S. persons within the meaning of general U.S. export controls, is called secondary sanctions.¹⁹

The U.S. embargo against Iran, for example, includes secondary sanctions. Iran is, among others, subject to trade bans concerning, i.a., the following products, industries, and companies:

- the Iranian metal sector;
- the Iranian mining sector;
- the Iranian textiles sector;
- the Iranian automotive industry;
- the Iranian marine and shipbuilding sector;
- the Iranian oil industry;
- the Iranian construction sector;
- the Iranian energy sector
- the Iranian textile sector.

IV. THE U.S. SANCTIONS LISTS

A. The Concept of U.S. Sanctions Lists

Like the EU, the U.S. also maintains numerous lists, which include natural persons, companies, and entities (collectively referred to as “companies”) that are subject to U.S. trade sanctions.²⁰

The reasons as to why the U.S. draws up sanctions lists and puts a company on a sanctions list are numerous. The U.S. is, among others, interested in fighting international terrorism and drug trafficking,²¹ in preventing the spread of weapons of mass destruction, and in other activities that pose

¹⁹ For detailed information on the concept and content of secondary sanctions see Philip Haellmigk, *Das aktuelle US-Iran-Embargo und seine Bedeutung für die deutsche Exportwirtschaft: Das US-Sanktionsregime der Primary und Secondary Sanctions*, 1 CORPORATE COMPLIANCE ZEITSCHRIFT, 33, 36 et seq. (2018); Philip Haellmigk, *Das Konzept der US-Re-Exportkontrolle – Eine systematische Erläuterung im Lichte des aktuellen US-Iran-Embargos*, 3 CORPORATE COMPLIANCE ZEITSCHRIFT, 135, 138 (2019); see also Jeffrey A. Meyer, *Second Thoughts on Secondary Sanctions*, 1 U. Pa. J. Int'l L., 905, 905 et seq. (2009).

²⁰ Cf. in this regard Philip Haellmigk, *Die US-Sanktionslisten und ihre Bedeutung für europäische Unternehmen – Eine systematische Darstellung zu ihrem Inhalt, Umfang und ihrer Reichweite*, 3 CORPORATE COMPLIANCE ZEITSCHRIFT, 147, 147 et seq. (2020).

²¹ Specially Designated Nationals and Blocked Persons List.

a threat to their national security.²² The reason why a company is listed on a U.S. sanctions list can also be down to the fact that it has violated U.S. export controls.²³ Moreover, if there is no reliable information on the company, it will be classified as untrustworthy.²⁴

Different U.S. authorities such as the Bureau of Industry and Security (BIS), the Office of Foreign Assets Control (OFAC), or the Directorate of Defense Trade Controls (DDTC) administer the U.S. sanctions lists.

These U.S. sanctions lists include:

- The Entity List
- The Denied Persons List (DPL)
- The Unverified List²⁵
- The List of Administratively Debarred Parties
- The List of Statutorily Debarred Parties²⁶
- Specially Designated Nationals and Blocked Persons List (SDN List)²⁷
- The Foreign Sanctions Evaders List
- The Sectoral Sanctions Identifications List
- The Non-SDN Palestinian Legislative Council List
- The List of Foreign Financial Institutions Subject to Correspondent Account or Payable-Through Account Sanctions (CAPTA List)
- The Non-SDN Iranian Sanctions Act (NS-ISA) List.²⁸

Further, the extra-territorial claim of the U.S. sanctions lists is based on the same criteria with which general U.S. export control laws and special U.S. embargo laws control foreign business outside the U.S. territory (U.S. item, U.S. person, and secondary sanctions).

Therefore, the U.S. sanctions lists can be divided into three categories.

- Category 1: The U.S. sanctions list concerns a U.S. item
- Category 2: The U.S. sanctions list concerns a U.S. person
- Category 3: The U.S. sanctions list concerns a person or company against whom a worldwide embargo has been imposed (secondary sanctions).

²² Cf. the Entity List.

²³ See the Denied Persons List.

²⁴ Cf. the Unverified List.

²⁵ Responsibility for the Entity List, the Denied Persons List, and the Unverified List lies with the BIS; they are summarized under the term “List of Parties of Concern”; cf. the BIS’s homepage: <https://www.bis.doc.gov/index.php/policy-guidance/lists-of-parties-of-concern> (accessed September 4, 2020).

²⁶ The List of Administratively and the List of Statutorily Debarred Parties are administered by the DDTC; see the DDTC’s homepage: https://www.pmdotc.state.gov/ddtc_public?id=ddtc_kb_article_page&sys_id=c22d1833dbb8d300d0a370131f9619f0 (accessed September 4, 2020).

²⁷ The SDN List also includes the List of Persons Identified as Blocked Solely Pursuant to Executive Order 13599 (“the 13599 List”).

²⁸ Responsible for all other sanctions lists is the OFAC; cf. OFAC’s homepage: <https://www.treasury.gov/resource-center/sanctions/Pages/default.aspx> (accessed September 4, 2020). The starting point for the OFAC’s sanctions lists are what are called sanctions programs (i.e., legal acts), on the basis of which the U.S. sanctions lists and the list of companies are drawn up. Contrary to widespread opinion, a separate Non-Proliferation List (which is identified as such) does not exist. Instead, the “Non-Proliferation” sanctions program was used as a basis to identify companies involved in proliferation that were then listed on the SDN List. The various SDN entries refer to the respective sanctions program. Thus, an SDN List entry made on the basis of the sanctions program “Non-Proliferation Sanctions” contains the information “NPMWD” (Weapons of Mass Destruction Proliferators Sanctions Regulations); an entry on the SDN List based on the sanctions program “Counter Terrorism Sanctions” includes for example the information “FTO” (Foreign Terrorist Organization Sanctions Regulations) or “SDGT” (Global Terrorist Sanctions Regulations).

B. The Content & Scope of The Various U.S. Sanctions Lists

1. The Entity List

The BIS's Entity List includes companies that, from the U.S. point of view, threaten their national security or foreign policy interests.²⁹ It (only) applies to any trade with U.S. items by the listed companies.³⁰ The Entity List therefore belongs to the first category of U.S. the sanctions lists.

The (re)export of U.S. items requires a license from the BIS, and the Entity List already provides some information as to the chances of success of a license application (case-by-case review, presumption of approval, presumption of denial).³¹

2. The Denied Persons List

The BIS's Denied Person List designates companies against which a denial order has been issued due to violations of U.S. export controls.³² This denial order deprives the companies on the list of the right to trade with U.S. items. At the same time, third parties are prohibited from trading with companies listed on this list in so far as it involves U.S. items.³³ This U.S. sanctions list therefore belongs to the first category of U.S. the sanctions lists.

The respective denial order on the company sets out the scope of the prohibition to trade with U.S. items. The BIS regularly issues a standard denial order that includes a comprehensive trade ban.³⁴ The denial order can be issued for an unlimited period or for only a limited period of time (temporary denial order), whereas this period may be as long as 50 years.

3. The Unverified List

The BIS's Unverified List includes companies whose (real) existence is not verifiable so that special care must be taken when dealing with companies on this list (red flag). It applies to the trade with U.S. items.³⁵ Hence, this U.S. sanctions list likewise belongs to the first category of the U.S. sanctions lists.

The unverified list generally does not contain any trade restrictions. Prior to the delivery, the exporter merely needs to obtain what is known as an unverified list (UVL) statement signed by the customer which, among others, includes information regarding the end use and an agreement to consent to

²⁹ Supplement 4 to Part 744 of the EAR.

³⁰ The Entity List indicates, for each company listed, whether the entry applies to all or only certain U.S. items. Generally, all U.S. items are listed, thus also EAR99 items. Regarding Huawei, BIS has amended the Foreign-Made Direct Product rule (see II.A.3. above) to further restrict Huawei's access to sensitive U.S. technology and U.S. software.

³¹ Cf. § 744.16 EAR. Sometimes, the chances of success are generically stated for all U.S. items; sometimes, the evaluation is made with respect to individual U.S. items.

³² Cf. <https://www.bis.doc.gov/index.php/the-denied-persons-list> (accessed September 4, 2020).

³³ Cf. Philip Haellmigk, *Bedeutung der U.S. Denied Persons List für deutsch-europäische Unternehmen*, 7/8 US-EXPORTBESTIMMUNGEN, 102, 103 (2018).

³⁴ However, the standard denial order does not prohibit any trade with foreign-produced items that are the direct product of U.S.-origin technology (for more on this type of item see II.A.3. above, cf. Philip Haellmigk, *Bedeutung der U.S. Denied Persons List für deutsch-europäische Unternehmen*, 7/8 US-EXPORTBESTIMMUNGEN, 102, 104 (2018).

³⁵ Supplement No. 6 to Part 744 of the EAR.

post-shipment controls.³⁶

4. The List of Administratively / Statutorily Debarred Parties (Debarment List)

The DDTC's debarment list, which is divided into the List of Administratively Debarred Parties and the List of Statutorily Debarred Parties, lists companies that have violated U.S. arms export controls. They are debarred from purchasing U.S. military items, whereas the period of debarment is usually three years.³⁷

As a result, the companies listed on the debarment list cannot participate in the trade with U.S. military items.³⁸ Therefore, these U.S. sanctions lists also belong to the first category of U.S. sanctions lists.

5. The Foreign Sanctions Evaders List

The OFAC's Foreign Sanctions Evaders List includes companies that have violated U.S. sanctions against Iran or Syria (pursuant to Executive Order 13608) or were implicated in business with persons who are subject to U.S. sanctions.

With respect to these companies, a comprehensive trade ban applies.³⁹ It is aimed at U.S. persons.⁴⁰ This U.S. sanctions list therefore belongs to the second category of U.S. sanctions lists.

6. The Sectoral Sanctions Identifications List

The OFAC's Sectoral Sanctions Identifications List cites Russian companies (such as banks and companies operating in oil-producing and oil-exploring industries) with whom certain trading activities are prohibited. The individual trade restrictions are provided in Directives 1, 2, 3 and 4 and, among others, contain prohibitions relating to credit and finance operations as well as to the delivery of items for oil production and exploration.⁴¹

These trade bans are aimed at U.S. persons.⁴² Therefore, this U.S. sanctions list also belongs to the second category of the U.S. sanctions lists.

7. The Non-SDN Palestinian Legislative Council List

The OFAC's Non-SDN Palestinian Legislative Council List summarizes those persons who were elected to the Palestinian Legislative Council as representatives of a terrorist organization.

³⁶ § 744.15(b) EAR.

³⁷ § 127.7 ITAR.

³⁸ Hence, the trade ban does not cover civilian or dual-use items; cf. also Matthias Merz, *Compliance im Außenwirtschaftsrecht, in Corporate Compliance no. 77 et seq.* (Christoph E. Hauschka et al. eds., 3rd ed. 2016).

³⁹ The trade ban thus also applies to business within the U.S.A., cf. the definition of U.S. persons under II.B.

⁴⁰ Cf. https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_iran.aspx#fse (accessed September 4, 2020).

⁴¹ In certain cases, however, general licenses can be used, see <https://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives> (accessed September 4, 2020); in addition, it is possible to request an individual license from the OFAC for a commercial transaction which is, in principle, prohibited, although the chances of success of obtaining such a license are usually very low.

⁴² The trade ban therefore also applies to business within the U.S., cf. the definition of U.S. persons under II.B.

Doing business with persons on this list is prohibited; the trade ban is aimed at U.S. persons.⁴³ Therefore, this U.S. sanctions list likewise belongs to the second category of U.S. sanctions lists.

8. The List of Foreign Financial Institutions Subject to Correspondent Account or Payable-Through Account Sanctions

The OFAC's List of Foreign Financial Institutions Subject to Correspondent Account or Payable-Through Account Sanctions lists financial institutions that are subject to restrictions or prohibitions relating to the opening of correspondent or payable-through accounts in the U.S.A.⁴⁴ Currently, there is only one foreign (Chinese) financial institution on the list.

These prohibitions are addressed to U.S. persons (U.S. financial institutions). Consequently, this U.S. sanctions list also belongs to the second category of U.S. sanctions lists.

9. The Non-SDN Iranian Sanctions Act List

The OFAC's Non-SDN Iranian Sanctions Act List identifies companies that are subject to various Iran-related trade bans.⁴⁵ The trade bans are addressed at U.S. persons (above all, U.S. financial institutions).

As a result, this U.S. sanctions list can likewise be attributed to the second category of U.S. sanctions lists.

10. The Specially Designated Nationals and Blocked Persons List

The OFAC's Specially Designated Nationals and Blocked Persons List is the largest U.S. sanctions list. On the one hand, it includes companies from countries that are subject to a U.S. embargo (country-specific). On the other hand, it lists companies that have connections with international terrorism or drug trafficking (not country-specific). With respect to these persons and companies on the list, a comprehensive trade ban applies.

With regard to the addressees of the trade bans, the Specially Designated Nationals and Blocked Persons List makes a distinction. Some trade bans are addressed to U.S. persons only, however, some are also addressed to non-U.S. persons.

Whether a trade ban also applies to non-U.S. persons can be recognized by the fact that the company's entry on the list contains the information "subject to secondary sanctions".⁴⁶ If this is the case, doing

⁴³ Provided that the members of the Palestinian Legislative Council have not been elected as representatives of a terrorist organization it is legal to do business with them, see General License No. 4, https://www.treasury.gov/resource-center/sanctions/Programs/Documents/plc_gl4.pdf (accessed September 4, 2020).

⁴⁴ This U.S. sanctions list corresponds to the former List of Foreign Financial Institutions Subject to Part 561 (the Part 561 List).

⁴⁵ Cf. Section 6 Iran Sanctions Act.

⁴⁶ See for example the listing of Mines and Metals Engineering GmbH, a company subject to secondary sanctions: <https://sanctionssearch.ofac.treas.gov/Details.aspx?id=2292>; and the listing of Mamoun Darkazanli Import-Export Company, a company not subject to secondary sanctions: <https://sanctionssearch.ofac.treas.gov/Details.aspx?id=343> (accessed September 4, 2020).

business with the company is prohibited, regardless of whether U.S. items are involved or not.⁴⁷

If this entry is missing, the trade ban is restricted to U.S. persons.⁴⁸ As a result, this U.S. sanctions list belongs both to the second as well as to the third category of U.S. sanctions lists.

V. RESULTS

The question as to whether cross-border operations outside the U.S.A. are subject to U.S. export controls depends both on general U.S. export controls as well as on special U.S. embargo laws.

According to the rules established by general U.S. export controls, non-U.S. companies have to comply with U.S. export control law if the item to be exported is a U.S. item or if a U.S. person is involved in the cross-border trade.

An item is a U.S. item if the following conditions are met:

- The U.S. item has a U.S. origin.
- The item is produced outside the U.S. but has a U.S. content value of 25% or more.
- The item is made outside the U.S. but is produced directly with the use of U.S. technology.

A U.S. person is any

- natural person having U.S. citizenship including Green Card holders, regardless of their place of residence;
- natural persons permanently residing in the U.S., regardless of their nationality;
- a company incorporated under the laws of the U.S. including its dependent branch offices abroad.

Special U.S. embargo laws, such as for example the U.S. embargo against Iran, tighten these general rules. On the one hand, the content of the two criteria “U.S. item” and “U.S. person” is increased. Thus, items with a U.S. content value of 10% or more are classified as U.S. items. Also, non-U.S. companies that belong to a U.S. group are treated as a U.S. person.

Furthermore, a new criterion in the form of secondary sanctions is introduced. Secondary sanctions, as for example the U.S. embargo against Iran, include trade bans that target all non-U.S. companies, regardless of whether they export U.S. items or whether they are a U.S. person.

The U.S. sanctions lists reflect the approach taken by general U.S. export controls and specific U.S. embargo law. Therefore, the U.S. sanctions lists can be divided into three categories. Some U.S. sanctions lists (only) restrict the trade with U.S. items, but apply regardless of whether a U.S. company or a foreign company (re)exports the U.S. items. Other U.S. sanctions lists are expressly (only) addressed to U.S. persons. Finally, there are also sanctions lists that are expressly also aimed at

⁴⁷ Misleading Matthias Merz, *Compliance im Außenwirtschaftsrecht*, in *Corporate Compliance* no. 69 et seq. (Christoph E. Hauschka et al. eds., 3rd ed. 2016).

⁴⁸ As regards companies listed on the SDN List that are not subject to secondary sanctions but listed due to their connections with terrorism, the BIS adds the following additional trade restrictions on non-U.S. persons: if a non-U.S. person wants to supply such a company with U.S. items, it must seek a license from the BIS, cf. § 744.12(a)(4) EAR, § 744.13(a)(4); § 744.14(a)(3) EAR.

non-U.S. persons, regardless of the nature of the items being traded.

The content of the trade restrictions of the various U.S. sanctions lists also varies. Sometimes, the trade requires an export license, sometimes the sanctions lists set out prohibitions that either apply to only certain transactions or to all transactions.

VI. CONCLUSIONS

Due to their extra-territorial application, European companies also have to comply with the requirements of U.S. export controls. Special caution is required when trading with companies from states that are subject to a U.S. trade embargo.

If they fail to observe U.S. export control regulations, they face severe fines by the U.S. authorities on the one hand. On the other, the companies are at risk of being placed on a blacklist by the U.S. authorities with the effect that U.S. companies will be prohibited from trading with them. The corresponding exclusion from the U.S. market can be life threatening to the company.

Therefore, European companies should ensure that their internal compliance procedures do not only comply with national and European export control regulations, but also reflect the requirements of U.S. export controls. It is vital to have an Internal Compliance Program for U.S. export controls.