

International economic sanctions – guide for entrepreneurs

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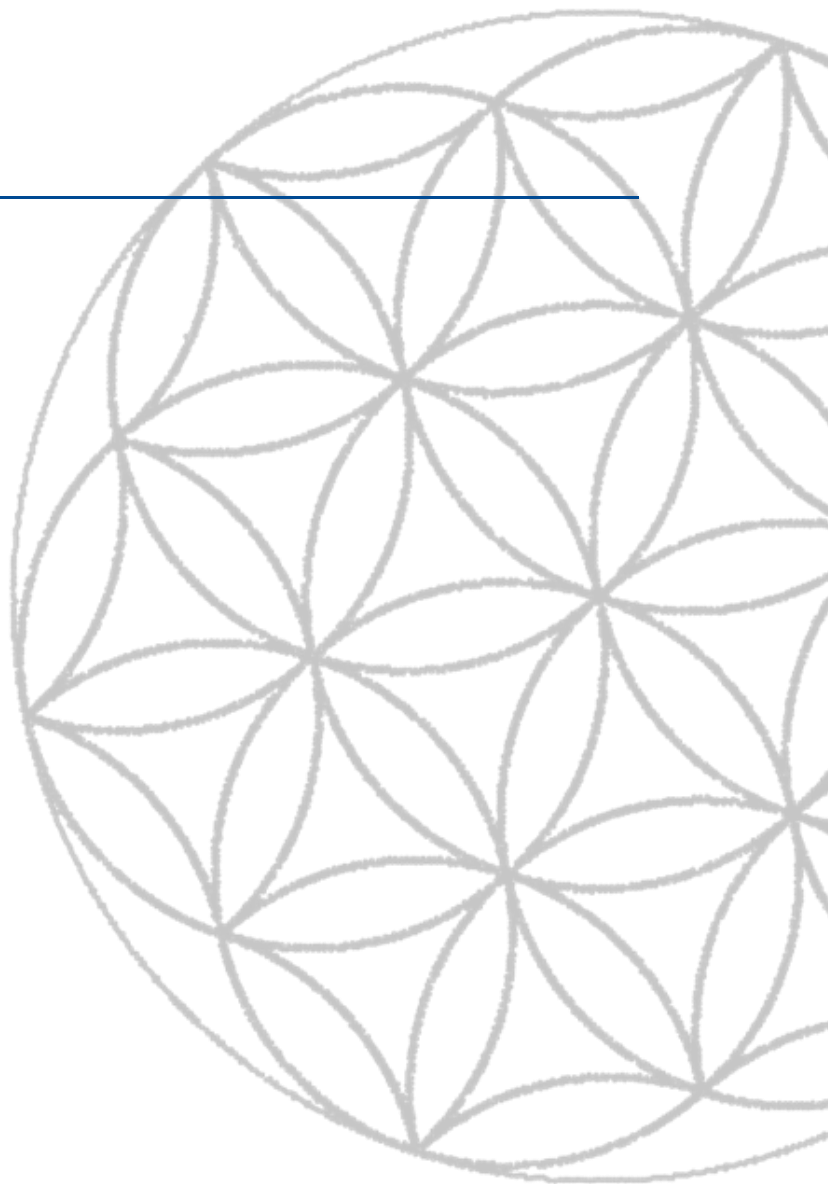


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1. INTRODUCTION

Economic sanctions (also called restrictive measures) are an instrument of influence of states or international organisations (EU, UN) on states and individuals whose activities violate international law and pose a threat to peace and security.

Sanctioning states impose certain restrictions on sanctioned entities (e.g., entry bans on certain persons or freezing of assets in their territories) or require persons under their jurisdiction to cease or limit their cooperation with sanctioned entities (e.g., prohibiting the export of specific goods to recipients in a particular state).

Sanctioned entities may be identified as such or through indication of their characteristics. Restrictions may apply to any cooperation or collaboration in a particular field (e.g., prohibited export of goods excluding medicines, etc.). Sanctions may restrict or prohibit the establishment of new relationships while permitting the enforcement of existing agreements. At times, however, sanctions may require the cessation of prior commitments. The international sanctions regime is very diverse and dynamic.

This guide explains which sanctions should be applied by entities operating in Poland, how to set up a sanctions compliance system, and what effects sanctions may have on trade agreements.

2. SANCTIONS BINDING ENTITIES OPERATING IN POLAND

As a member of the UN and EU, Poland is bound by all UN and EU sanctions. Poland may implement sanctions in addition to those imposed by the **UN** and the **EU** through domestic regulations.

In the UN system, the Security Council (SC) is the body authorised to impose sanctions. According to Chapter VII of the UN Charter, if the Security Council determines that there is a threat to peace, breach of peace, or act of aggression, it may pass resolutions or adopt measures that do not involve the use of armed force (sanctions). The addressees of UN regulations are member states of the United Nations.

The EU implements sanctions (uses the term 'restrictive measures') imposed by the UN Security Council. In addition, the EU can impose its own autonomous restrictive measures under the Common Foreign and Security Policy (CFSP).

As for the latter measures, the Council first adopts CFSP **decisions** under art. 29 TEU. Measures such as arms embargoes or entry restrictions are implemented directly by Member States. Other measures to disrupt or restrict economic relations with a third country, including the freezing of funds and economic resources, shall be applied by means of **regulations** adopted by the Council acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission pursuant to art. 215 of the Treaty on the Functioning of the European Union.

3. WHO MUST OBSERVE SANCTIONS?

Responsibility for compliance with sanctions rests with public and private actors. In practice, some sanctions, due to their nature, can only be applied by public actors (e.g., entry bans to the EU are enforced by border guards). Other types of sanctions are applied by private actors (e.g., sanctions for not providing certain services).

As for private parties, EU sanctions must be observed by:

- a. **any person within the European Union** (including its airspace and on board any aircraft or vessel under the jurisdiction of a subject Member State).
- b. **citizens of EU Member States**, regardless of their location of stay,
- c. **any legal person, group or entity incorporated or constituted under the law of an EU Member State**,
- d. **any legal person, group or entity conducting business within the EU**.

Our company has subsidiaries in Russia. Do they have to comply with EU sanctions?

Companies must be careful not to take actions that have the purpose or effect of circumventing sanctions. For example, although non-EU companies are not subject to EU sanctions for activities conducted entirely outside the EU, EU parent companies cannot use non-EU subsidiaries as a manner to engage in EU-sanctioned activities. Therefore, if a non-EU subsidiary proposes to engage in EU-sanctioned activity, its relationship with its EU parent company would have to be carefully analysed to assess the risk of circumventing sanctions.

We are a non-governmental organisation engaged in charitable activities in an EU-sanctioned country. We do not conduct business. Can sanctions affect our business?

Yes. Sanctions are binding on all entities. However, it should be borne in mind that acts entailing financial restrictions, restrictions on entry and other restrictive measures allow exemptions considering, in particular

- basic needs of the persons against whom these measures are directed,
- costs of legal assistance,
- extraordinary expenses,

as well as, where appropriate, humanitarian needs or international obligations.

4. EXTRATERRITORIAL NATURE OF FOREIGN SANCTIONS

Entrepreneurs often consider whether they should also comply with sanction laws of other countries, especially those of an extraterritorial nature. Entities operating in Poland are required to comply with sanctions imposed by the EU (or any sanctions to be introduced by Poland).

In practice, non-compliance with foreign sanctions may also expose such entities to legal consequences in that foreign jurisdiction. They can vary widely, such as a ban on the export of goods and services, ban on entry or the freezing of assets.

A violation of US sanctions by an entity operating in Poland can, for example, result in such entity being placed on a US sanctions list or a large fine. Whenever there is a risk of violating foreign sanctions, it is important to seek expert advice from the relevant jurisdiction regarding legal risks of entering into or continuing a particular business relationship.

States seek to counter the extraterritorial effects of foreign sanctions. The EU has adopted a specific blocking regulation ([Council Regulation \(EC\) no. 2271/96 dated 22 November 1996](#)), intended "coerce" European entities not to comply with foreign sanctions listed in its annex (currently, US sanctions on Cuba and Iran). The regulation stipulates that European entities cannot refuse to do business with Cuban or Iranian entities on grounds of US sanctions. The Regulation also guarantees European entities the ability to seek compensation for damages incurred in compliance therewith. In specific situations where potential consequences may be significant, European entities may request permission from the European Commission to comply with foreign sanctions.

Practical question: We export products to Belarus. The recipient is not on an EU sanctions list, but is subject to US sanctions. In this situation, are exports subject to US sanction laws??

The US has a very extensive sanctions regime. The primary regulator of US sanctions programs is the Treasury Department, Office of Foreign Assets Control (OFAC). The OFAC is responsible for coordinating sanctions laws, administering the Specially Designated Nationals (SDN) list, and enforcing restrictive measures. The OFAC imposes fines for violations, but criminal sanctions are handled by the Department of Justice. The Department of State works with OFAC but is also a key player in the licensing and business conduct guidelines for government agencies and plays a central role in managing extraterritorial ("secondary") sanctions. Sanctions administered by the OFAC are binding on US or US-based entities but are generally not binding on non-US companies operating in the EU. As there are exceptions to this rule (e.g., trade in US-origin products or goods containing US-made components or US-dollar transactions), a detailed assessment of whether a particular transaction falls within the scope of sanctions regulations should be made by a US law firm. At the same time, payments under an export contract are likely to be settled through a Polish bank and an exporter would like to secure a counterparty's credit risk with a letter of credit or export insurance issued by a Polish or EU financial institution. An adopted settlement scheme and security arrangement should be consulted with a cooperating bank or insurance company as soon as possible. Financing providers generally may not be prepared to participate in transactions that are inconsistent with US sanctions.

5. WHO MAY BE SUBJECT TO SANCTIONS (SANCTIONED ENTITIES)?

Sanctions may target many different entities or areas of their operations and may include:

Natural persons: specific individuals or groups of individuals may be the target of various measures such as asset freezes or travel bans.

Enterprises and other entities: companies and other entities (e.g., terrorist groups) may be subject to asset freezes or more targeted restrictions.

Economic sector: restrictions may apply to a particular industry in a particular country and may cover, for example, trade in petroleum products, precious metals or dual-use items, or goods used in the manufacture or production of tobacco products.

The state: at times a comprehensive sanctions regime covers virtually all trade with a country.

6. TYPES OF SANCTIONS

Personal sanctions (sanctions that target specific individuals, groups or entities)

- freezing of all funds and economic resources,
- ban on the provision of funds or economic resources (directly or indirectly),
- prohibition on engaging in commercial transactions or relationships,
- visa-issue prohibition or travel ban.

Subject sanctions

- ban on exports or imports (sanctions may cover trade with a particular country or territory or specific products (sectoral sanctions) such as arms, oil, timber or diamonds),
- prohibition on investments, payments and capital flows,
- withdrawal of tariff preferences,
- flight ban.

Financial sanctions

- prohibition on financing or provision of financial services,
- limitations in obtaining sources of financing,
- ban on providing certain services (brokerage, financial services, technical assistance).

7. CONSEQUENCES OF FAILURE TO OBSERVE SANCTIONS

EU Regulations on sanction provide that EU Member States shall lay down rules on **effective, proportionate and dissuasive sanctions** for breaches of relevant Regulations and shall take

all measures necessary to ensure their implementation. Penalties for violations of the sanctions rules therefore vary depending on the Member States.

Failure to apply provisions of the Anti-Money Laundering and Countering of Terrorism Act of 1 March 2018 regarding specific restrictive measures (currently, measures directed against terrorist organisations) is subject to the administrative penalties stipulated in the Act (e.g. such penalties in the Act include: withdrawal of a licence or permit, removal from the register of regulated activities, or fine of up to twice the amount of the benefit gained or loss avoided by an obligated institution as a result of a breach, whereby it is up to the equivalent of EUR 1,000,000 if not possible to determine the amount of such benefit or loss - art. 149 and 150 of the Act). However, it should be recalled that the Act imposes obligations on specific entities and serves to apply only selected EU regulations on restrictive measures to combat terrorism.

Polish law, however, has no general provisions on penalties for violation of a sanctions regime. Neither the Criminal Code nor other laws provide specific provisions regarding a violation of sanctions or misconduct in connection with their compliance. A special situation applies to financial institutions subject to supervision by a market regulator with respect to business conducted in a lawful manner and are subject to administrative sanctions.

However, this does not mean that entities cannot incur **contractual liability** for breach of obligations assumed in the course of business.

Non-compliance with sanctions regulations can also result in **loss of reputation**, refusal to cooperate or exclusion from a bidding process. Companies placing a premium on corporate compliance may avoid work with a sanctions violator because they will seek to ensure that they meet their own regulatory obligations.

8. CUSTOMER DUE DILIGENCE, THE STRATEGY OF VERIFYING CLIENTS WHEN ESTABLISHING AND MAINTAINING RELATIONS

All entities that conduct any international business should verify that their international cooperation is consistent with international sanctions.

The first step is to determine whether the **country** in whose territory an entity with which a trading relationship is potentially established is subject to sanctions.

If export is to a sanctioned country, the next step is to check whether an exported **product** is restricted.

If there are no sanctions-related obstacles to exporting goods, the next step is to make sure that the **business partner and other persons and entities involved in a transaction** in a sanctioned country are not subject to entity-based sanctions.

Our counterparty is not listed, but the company controlling it is. Can we proceed with a transaction?

The provision of funds or economic resources to persons or entities not on sanctions lists but owned or controlled by persons or entities on such lists will generally be considered as making these funds or resources indirectly available to persons or entities on sanctions lists.

An exception to this rule is when it can be determined on a case-by-case basis, using a risk-based approach, and taking all relevant circumstances into account, that funds or economic resources will not be used by or for the benefit of these persons or entities.

Criteria to be considered in risk assessment include, but are not limited to:

- a. the date and nature of contracts between entities involved (e.g., sales or distribution contracts),
- b. importance of the non-listed entity's sector of activity to the listed entity,
- c. assessment of financial resources, including, for example, the ease with which they can be provided to a listed entity.

ATTENTION: Ensured compliance with sanctions regulations **does not release from compliance with export and import control regulations**. When dealing in items or technologies with military or dual-use purposes, consideration should be given to the need for an authorisation or notification of intent to export or import an item or technology.

We have received an inquiry from a state-owned company in a sanctioned country. Can we submit an offer and conduct a possible export?

Persons and entities subject to sanctions are always listed in annexes to a relevant regulation. Sanctions are generally not directed against a state itself, but rather a specific sector or specific executives, ministries, or companies associated with the state administration.

Thus, state ownership alone is usually not an obstacle to export unless a company or its owner is listed. However, if sanctions are imposed on that country's administration, potential exports may carry an increased risk of so-called indirect transfer of funds to sanctioned entities.

We sell a production line to a sanctioned country that may contain prohibited or restricted components.

Each case is subject to individual evaluation. The determining factor is usually whether a restricted item is an integral part of the production line in question and can be separated from the whole without disassembly. If this is the case, the prohibited component cannot be exported.

We export our products to a sanctioned country. Some of the technology and components we use come from our non-EU partner. Should we also consider the export regulations of this country?

Some countries, such as the United States, restrict further exports of components and technology produced there. Exporters should carefully check whether the products and technologies they are sourcing are subject to such restrictions.

My company exports goods to Turkey but I know they will eventually reach Iran. Is this relevant to my trading activities?

Yes. If an exported product is known or suspected to enter a sanctioned country through a third country, it should be treated as an export directly to the sanctioned country. All obligations under the EU Regulation, including product restrictions and prohibition on making funds or economic resources available, directly or indirectly, to the sanctioned entity should be taken into account during export.

Where can we make an initial verification?

The EU publishes and regularly updates a consolidated list of persons, groups and entities subject to EU financial sanctions as a result of various sanctions regulations adopted under the CFSP: https://ecas.ec.europa.eu/cas/login?loginRequestId=ECAS_LR-6257873-oFqtlaSVx9O9qtakyXBsBxpVxzsMk4SEadIIHfzioJziWeVPS8O4jlfzzUMLxoM8YLLzWEiVniEsM5PjHSAsXxl0-yntOf97TTHgozwcSofbotzm-XrJb4zobJ4xjlzoBzcVeo9w0RU8Q79mtE0udlMoP0ARuoIzD3NNWNfcE5YvDGyOhbMM8fFrfd8ZaSnWBPzziwIS. A consolidated list of financial sanctions is also available in PDF format.

An EU sanctions map (<https://sanctionsmap.eu/#/main>) provides detailed information on all EU entity and territorial sanctions regimes and corresponding legal acts, including those adopted by the UN Security Council and transposed at the EU level.

Nevertheless, attention should always be paid to when a particular search engine has been updated. The most up-to-date source of information on sanctions is the Official Journal of the EU: <https://eur-lex.europa.eu/oj/direct-access.html?locale=pl>.

To what extent are we required to perform a due diligence in verifying customers and transactions?

There is no standard due diligence mechanism to ensure compliance in the sanctions area. The level of required due diligence is highly case-specific and risk-based.

Due diligence regarding compliance in the sanctions area is an ongoing obligation for anyone conducting cross-border business. Laws may change, individuals may be added to sanctions lists and a particular sector of a country's economy may be prohibited from trading.

9. SANCTIONS AND TRADE AGREEMENTS

Sanctions extended to certain entities or activities may have consequences for contracts already entered into or to be concluded.

Sanctions may prevent contract execution.

Essentially, in a situation of so-called consequential inability not attributable to any of the parties (art. 495 of the Civil Code), a party unable to provide its service is no longer liable for it. Also, it cannot demand a reciprocal service and, if received, must reimburse it. If it becomes impossible to provide only a part of a contractually stipulated service, a contractor does not have to provide that particular part and loses the right to an appropriate part of what was to be received in return from a contractor. However, a contractor remains liable for that part of a service that is still possible and is entitled to an appropriate part of consideration, unless partial provision would have no economic significance to the counterparty. The counterparty may then withdraw from a contract. In such case, the parties must reimburse each other all service received under a contract (or its equivalent). However, each party may withhold reimbursement until the counterparty itself has made or secured return.

However, penalty provisions may interfere with such settlements and, for example, prohibit repayment or recovery of a service under a contract that has become impossible to execute. Indeed, repayment of a benefit under an unenforceable contract, as execution of that contract, may constitute a prohibited provision of funds or economic resources to a party subject to sanctions. Reimbursement from such person for consideration rendered under an unenforceable contract may be viewed as complicity in the use of frozen funds. There are exceptions and procedures for obtaining consent, for example, to continue execution of an existing contract or to obtain payment for past execution. However, the need to obtain consent may interfere with contract execution and make it unreasonably difficult. This particularly applies to parties from countries such as Poland, which do not have adequate procedures, experience or sound practice in this area.

Sanctions can also otherwise not so much prevent as unduly hinder execution of a contract, e.g., by forcing a change in location of an investment, forcing a party to seek an alternative and more expensive source of supply, etc. If these burdens exceed the effects of ordinary business risk or risk knowingly assumed by a contractual party, it may seek court adjustment or termination of the contract by invoking what is known as an "extraordinary change in circumstances" (art. 357¹ CC.).

The distinction between impossible and unreasonably onerous execution may be difficult to make but has important legal consequences. Such issues may be resolved differently in different legal systems and a contract with a foreign counterparty may be governed by foreign law. As a rule, however, such contracts contain special force majeure and renegotiation clauses in the event of an extraordinary change in circumstances. It is advisable to start an analysis of a situation with their review. Unjustified refusal to execute a contract or attempt to terminate it may result in liability for damages to the counterparty. Contracts may also include so-called sanction or anti-sanction clauses. The former specify what occurs to a contract if

international sanctions prevent its execution in whole or in part. They may provide that contract execution shall be suspended or when such a situation may be the basis for withdrawal from a contract. Therefore, they are essentially force majeure clauses addressing a specific type of force majeure. More controversial are anti-sanctions clauses allocating the risk of sanctions between the parties. Generally, they state that a party that cannot execute a contract due to sanctions will still be liable to the counterparty for proper contract execution and, for example, must pay damages to the counterparty. Such clauses must be carefully analysed to ensure that they are not contrary to the law or serve to circumvent it. In principle, however, they may also be regarded as a variation of force majeure clauses specifying what the parties do not consider to be a fortuitous event exempting liability for proper contract execution.

It should be taken into account that counterparties in sanctioned countries are unlikely to respect foreign sanctions. Their laws may even require them to disregard sanctions on pain of criminal prosecution. Moreover, their courts adjudicating disputes over contracts affected by sanctions will disregard foreign sanctions laws. They may deem a foreign contractor's failure to execute or terminate a contract due to sanctions imposed by its home country to be indefensible or even punishable (similarly, they may deem sanction clauses specifying the contractual effect of foreign sanctions not recognised in a subject country to be prohibited). It is also possible that sanctioned countries such as Russia will allow their citizens prohibited affected by foreign sanctions to take legal action against foreign counterparties at home, regardless of the forum agreed upon in advance. Of course, the enforceability of such judgments outside the home country is likely to be limited. Entrepreneurs enforcing sanctioned contracts, however, face very difficult legal challenges, especially if they have facilities or employees and representatives in sanctioned countries exposed to liability under local law.

A month ago, we received an order from a company in an EU-sanctioned country. Since then, the Council decided to extend sanctions and the export of goods to which the order relates is now prohibited. What can we do?

New restrictive measures often include a transition period to ensure the protection of bona fide traders and to allow for the performance of a contract concluded prior to entry of a sanction into force. However, existence and length of a transition period are subject to case-by-case assessment and analysis of adopted restrictions. In some cases, continued execution of a contract after a sanction has taken effect may require permission from a relevant authority.

Our university conducts classes remotely for non-EU students. Can sanctions affect our business?

Yes. Sanctions regulations often restrict the transfer of certain goods and technology described in more detail in annexes to those regulations, as well as so-called "technical assistance." Technology refers, for example, to knowledge or skills needed to develop, produce, or use the items listed, whereas technical assistance can be in the form of training or advice.

These prohibitions may impose restrictions on research, project, or teaching collaboration in certain sectors with institutions and researchers with ties to a sanctioned country.

10. VIOLATION OF SANCTIONS AS A TRANSACTION RISK

Acquirers evaluating potential mergers or acquisitions and parties considering commercial transactions should ensure that their due diligence includes a detailed assessment of the legal and business risks of sanctions and their ability to meet the expectations of relevant regulators regarding ongoing due diligence and compliance.

In the context of mergers and acquisitions (M&A), sanctions compliance testing is necessary to assess the risk of successor liability for sanctions violations. When purchasing a partial stake, shares or assets of a company, losses incurred by a company due to sanctions violations committed prior to the transaction, as well as associated reputational costs, will reduce the value of a buyer's investment.

A primary way to protect against sanctions risk is through representations and warranties from a seller in which the seller declares to the buyer that the company has a sanctions compliance policy, that neither it nor any group entity is directly or indirectly subject to sanctions and that the business is fully compliant with all applicable sanctions laws.

Moreover, if a contemplated transaction is long-term, it must be ensured that a contract provides a basis and conditions for its termination or suspension if sanctions violations or changes to the law (placement of counterparty on a sanctions list, prohibition of export/import of a particular product) make it unlawful to continue a relationship.

If a due diligence uncovers sanctions risks, the path forward will depend on whether a relationship cannot be established as a result of such finding (for example, if the party is on a sanctions list), or whether it is possible (and worthwhile) to enter into a relationship despite risks, provided that certain conditions precedent are met, e.g. receipt of an export license or implemented policy of compliance with sanctions regulations of the jurisdiction in question.

Prior to a transaction, the seller who discovers violations has the primary responsibility to cease unlawful conduct and take corrective action. However, whereas some steps can be taken quickly (to prevent further violations before transaction closing), systemic solutions (such as implementing or fundamentally altering compliance procedures) should be left to the buyer, especially if the buyer has an appropriate compliance program that can be implemented at the acquired company.

Other areas of potential liability when conducting a due diligence on EU companies include verification of compliance with US sanctions for foreign-made products. Many European companies are unaware that their products may be subject to US export controls and sanctions because they contain US-origin components or were manufactured using US technology or equipment (*the de minimis rule*).

11. EXPORT CONTROL

Ensured compliance with sanctions regulations **provides no exemption to export or import control regulations.**

Export controls are laws that regulate and restrict the flow of strategic products and technology, information and services (including technical assistance and brokerage) for reasons of a country's foreign policy and national security.

Export controls particularly concern **arms and dual-use items and technologies** (a list of dual-use goods is an integral part of Regulation (EU) 20 May 2021 of the European Parliament and of the Council (EC) and includes more than 2,000 different types of equipment, measurement devices, materials or technologies such as, for example, certain carbon fibres, chemicals or steel products, telecommunications equipment, robots, lasers, navigation systems, devices with encryption functions, etc.).

Export restrictions are particularly important for new or emerging technologies such as IoT, 5G, digital platforms or clouds. It is vital to bear in mind that technology and know-how transfer is not only the physical transfer of products, but above all the transfer of intangible technologies, i.e., via electronic means (e.g., sending of an e-mail, imparting of information by telephone or during a virtual meeting), as well as the transfer of knowledge and skills (e.g. technical assistance, research papers presented at scientific conferences, etc.).

The extent of regulatory restrictions and obligations (e.g., receipt of an export license, declaration of an import) depends on the **type of commodity, country of origin or destination, recipient, or end use.**

12. AUTHORS



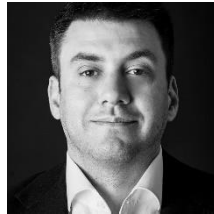
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