

**NIEDERER KRAFT FREY**

# Sectoral Trade Restrictions in Switzerland and China

Dr. Thomas A. Frick / Manuel Werder / Shu Bernet-Zhang

SCCC Legal Chapter 2019 Forum

Zurich — 12 June 2019

Geneva — 20 June 2019

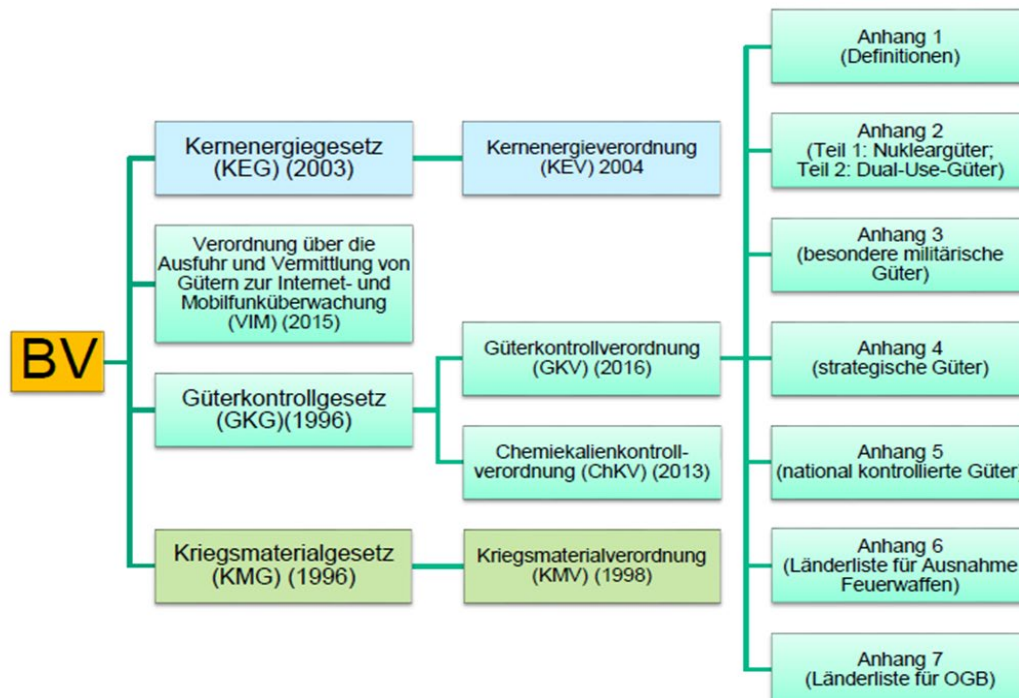
# Table of Contents

1. Sectoral Trade Restrictions in Switzerland
  - Dual Use: Import and Export Restrictions
  - Sanctions
2. Sectoral Trade Restrictions in China
  - Legal Framework
  - Import / Export Control: Prohibited
  - Import / Export Control: Limited
  - Import / Export Control: Unlimited
3. Foreign Investment Restrictions in Switzerland
  - Investment Restrictions in Switzerland
  - Regulated Industries
  - Bank or Financial Institution
  - Lex Koller

# Sectoral Trade Restrictions in Switzerland

# Dual Use: Import and Export Restrictions

- Background: Comecom (cold war, technology controls)
- Legal basis and structure:



- Competence for licenses: SECO (State Secretary Office for Economy)
- Enterprises need to prove internal compliance controls to get license

# Dual Use: Import and Export Restrictions

**Imports:** Few formal restrictions, but goods need to comply with technical regulations.

- Main groups:
  - foodstuff, agricultural products, animals, plants
  - machines, electrical and telecom devices; chemical and medicine products
  - cosmetics, toys; weapons, explosives; precious metals.
- Prohibited: drugs, falsifications, devices warning of radar speed controls, certain chemical products.
- Swissness-label: if label “Swiss” is used, a certain percentage (for foodstuff: 80%) of the product must be Swiss, otherwise import and sale is illegal.

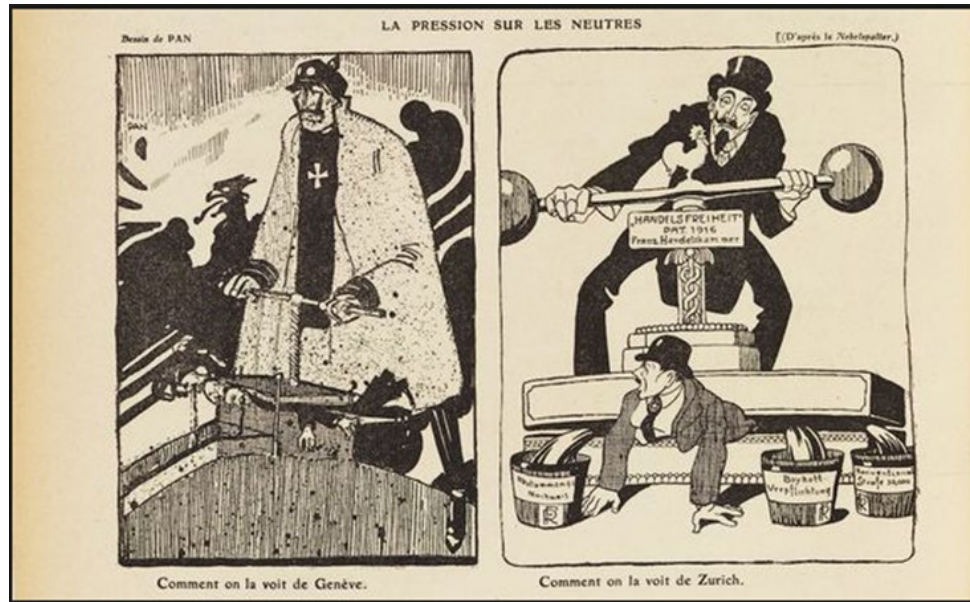
# Dual Use: Import and Export Restrictions

**Export:** Switzerland is member of all relevant export control regimes.

- In particular goods on Wassenaar-List (dual use), but also chemicals, weapons, nuclear technology export is restricted and may require an authorisation by SECO
- Assessment is made by exporter, responsibility is with the exporter.
- Exporter must prove that it has an internal compliance that reviews whether a license is required.
- E.g. dual use products may not be granted an export license if exported into a conflict zone.
- Decision may have political implications. E.g. no license will be given for tools to monitor internet traffic or mobile phones if SECO suspects that such tools will be used to suppress the population.

# Sanctions

- Not new: e.g. in WW I by both sides against Switzerland
- Effects: “In 22% of the cases, targeted sanctions achieve one of their purposes, but are “...more effective in signaling or constraining a target than they are in coercing a change of behavior (effective in coercing only about 10% of the time; in constraining activities nearly three times as frequently, or 28%)” [Targeted Sanctions Consortium, June 2013 (Geneva Graduate Institute and Brown University)]
- Legal basis: “Embargogesetz” and Constitution Art. 184 para 3 (safeguarding the interests of Switzerland)



# Sanctions

- Switzerland currently has sanctions against 21 (of 195) states
- It implements UN sanctions (as an UN member state), does not implement US sanctions, implements sanctions similar to EU sanctions if these are for humanitarian reasons (e.g. Sudan); if for political reasons (e.g. Russia), it only prevents circumvention of EU sanctions through Switzerland
- “Smart sanctions”: targeted against individuals/entities, certain goods/services (e.g. oil industry); territories (e.g. Crimea); financings. Caveat: apply to IP/KnowHow as well.
- Risk: custodial sentence up to 5 years, fine up to CHF 1 mio.; liability of management/board (Bührle-case)
- Foreign Sanctions in Switzerland: e.g. EU and US sanction laws apply to EU and US citizens, regardless of where they live/work; sanctioned persons/entities may differ from US/EU sanctions



# Sectoral Trade Restrictions in China

# Legal Framework

- The most prominent characteristic: scattered
- Competent Authority:
  - Technically the main responsible authority is the MOFCOM (Ministry of Commerce): Bureau of Industry, Security, Import and Export Control (established in 2014 under MOFCOM)
  - Others authorities: the current law and regulation framework was developed in an organic way. Many regulations were fruits of collaborations between MOFCOM and the competent authorities of specific sectors. These authorities became the competent bodies overseeing the enforcement of such regulations and administration of the respective import / export licenses, such as:
    - National Medical Products Administration
    - Ministry of Agriculture
    - Ministry of Natrual Resource
    - Adminstration of Science Technology and Industry for National Defence

# Legal Framework

## ➤ Legal Source:

- International treaties
- Foreign Trade Law and Customs Law
- Administrative Regulations
- Other administrative ordinances, guidelines,
- The on-the-way Export Control Law: the aim is to consolidate
- As a consequence of scattered administration, information source (such as product lists) are also lack of consolidation. One may have to consult multiple public sources and documents to obtain the correct information.

## ➤ Categories of Control

- Prohibited: goods and technologies under this category are banned from being imported and/or exported. The question of license or approval is not relevant.
- Limited: limited quota, import / export license required
- Unlimited: unlimited quota, import / export license required. Currently this category is only applicable to import.

# Legal Framework

➤ Licenses:

- More than 40 import / export licenses, administered by around 16 authorities, for example:
  - license of import/export of gold and gold products is administered by People's Bank of China (the Chinese central bank)
  - clearance of imported veterinary medicine is issued by Ministry of Agriculture
- Once imported, no domestic license or approval requirement for the imported goods to be transported from one place in China to another.

有毒化学品进出口环境管理放行通知单  
Clearance Notification for Environmental Management on Import/Export of Toxic Chemicals

1. 进出口单位(出口单位: Importer/Exporter)	2. 放行通知单号: Clearance Notification No.
3. 海关代码: Customs Code	4. 放行通知单有效截止日期: Clearance Notification Expiry Date
5. 商品名称: Name of Commodity	6. 化学名称: Chemical Name
7. 进出口编码: H.S. Code	8. 贸易方式: Terms of Trade
9. 数量: Quantity	10. 样品/副本: Sample/Copy
11. 收管单位/度管单位: Consignee/Consignor	12. 报关口岸: Place of Clearance
13. 备注: Supplementary Details	14. 签发机关/海关: Issuing Authority/Customs
	15. 签发日期: Seal Date

国家环境保护总局制 (2005)

# Import / Export Control: Prohibited

## ➤ Import Prohibition

- Certain chemicals, certain animal products, certain medical equipment, certain boilers, certain engines, certain electronics, certain wastes, endangered animals and plants and their products, other items that are temporarily prohibited from being imported pursuant to decisions of MOFCOM
- Main Source: MOFCOM website (no consolidated single list but a series of lists and categories)

## ➤ Export Prohibition

- Certain chemicals, certain animal products, endangered animals and plants and their products, certain antique (cultural relics), certain wood logs, wood charcoal, nuclear equipment, bio-chemical weapons and related technologies other items that are temporarily prohibited from being imported pursuant to decisions of MOFCOM
- Source: MOFCOM website (no consolidated lists but a series of lists and categories)

# Import / Export Control: Limited

- Limited in quota, import / export licenses required to be obtained
- The most complex category
  - Complex lists of products: no consolidated source
  - 16 governmental departments involved

- Main classes of goods including:

Certain dual-use goods and technologies, certain agricultural products, wild animals and plants, gold and gold products, cryptogram products, certain wastes, certain medicines, certain veterinary products, foreign currency, toxic chemicals, explosives, material related human genetics, certain antiques and artwork...

# Import / Export Control: Unlimited

- Unlimited in quota, import / export licenses required to be obtained (currently, there is only import control under this category)
- Relevant license: Import license «automatic approval», application of the automatic approval import license is rather straight forward and is more a matter of formality
- Single, consolidated list available on MOFCOM website (latest version 2019). The list is updated usually every year.
- Across 44 sectors including major agricultural and industrial sections such as: steel, petroleum products, mining products, chemicals, meat and dairy, automobile, telecommunication devices, aviation devices...

# Foreign Investment Restrictions in Switzerland



# Investment Restrictions in Switzerland

- No **general** foreign investment regime on the basis of national interest and regardless of the industry sector
- Therefore, foreign investors generally do not need formal approval for their investments in Switzerland and no special governmental authority monitors foreign investments.
- February 2019: the Federal Council decided against foreign investment controls for the time being; the Federal Council intends to conduct a monitoring procedure and review the matter within the next four years.
- However, on 17 June 2019, one chamber the of Swiss parliament made a motion to the Federal Council (yet to be confirmed by the other chamber) to introduce respective legislation, specifically targeted against Chinese SOEs
- There are few **sector specific** foreign investment control restrictions applying to M&A transactions involving Swiss target enterprises
- Approvals, state-licenses and concessions may be required mostly on a federal level, but sometimes also on a cantonal level

# Regulated Industries

Restrictions apply to sectors, such as

- Banking, insurance and financial services
- Air transportation
- Public transport (railway, cable cars, shipping)
- Radio and TV
- Post and telecommunications
- Energy (especially nuclear energy)
- Specific professions (university medical profession, lawyers etc.)
- Minerals and raw materials, mining
- Health services and products
- Casinos, lotteries and gambling
- Private security services
- Weapons and war material

# Banks or Financial Institutions

- Acquisition by a foreign investor of a bank, a securities trader or certain other prudentially-supervised entities active in the financial sector (finance company)
  - Requirement of an approval from FINMA
- Different tests apply to the acquisition of a qualified participation and the acquisition of a controlling stake
- Acquisition of a controlling stake:
  - Definition:
    - Foreign control means a foreigner holding a qualified participation directly or indirectly hold more than half of the voting rights or exert a controlling influence in any other way, e.g.
      - possibility to appoint board members
      - contractual means
      - other factors that create a dependency of the target from the foreign investor, e.g.
        - shareholder loan
        - close cooperation

# Banks or Financial Institutions

- Prerequisites :
  - The approval of an acquisition of a controlling stake will depend on the granting of reciprocal rights by the country in which the qualified participant is resident or domiciled.
  - Reciprocal rights do not have to be verified if international agreements to this effect exist, e.g. with member states of the WTO (164 countries, incl. China, Hong Kong).
  - In case of a financial group or a financial conglomerate: the foreign supervisory authority may need to give its consent and be in a position to ensure consolidated supervision of the group as a whole.
  - The corporate name of the legal entity may not suggest that the entity is controlled by Swiss persons.

# Banks or Financial Institutions

- Acquisition of a qualified participation
    - Definition:
      - Ownership of at least 10% of the capital or voting rights of a licensed institution or otherwise influence of its business activities in a significant manner
      - Prerequisites:
        - Report to FINMA
          - to ensure proper business conduct
          - including the disclosure of beneficial owners
          - guarantee that the influence acquired will not be used in a way that is detrimental to proper and prudential business operations
- Finma may impose additional conditions to the licence.

# Lex Koller

- (Federal Law on the acquisition of real estate in Switzerland by non-residents)
- restricts the direct or indirect acquisition of non-commercial real estate in Switzerland by foreign or foreign-controlled persons
- These rules may also apply to a target entity that has a commercial purpose and pursues commercial activities
  - if it owns residential real estate in its portfolio or
  - if it has significant unused land reserve.
- Such properties can only be acquired if an authorization is granted by the competent cantonal and federal authorities. Authorisation is not easily obtained and may take several weeks, if not months, to obtain.

## Other Industries

The relevant licensing authorities may refuse to grant a licence to companies incorporated under foreign laws

- under the telecommunications act for radio communication licenses,
- the nuclear act for nuclear power plants,
- the radio/TV act for broadcasting licences, and
- the aviation act for the professional transport of passengers or goods,

unless reciprocal rights are granted to Swiss persons by the respective foreign states.

In case of aviation companies, it is required that a company headquartered in Switzerland be under the actual control of Swiss citizens.

As a rule, the government is not entitled to golden shares but may make the approval or licence subject to certain conditions.

THANK YOU

# Your Contacts



Thomas A. Frick

[thomas.a.frick@nkf.ch](mailto:thomas.a.frick@nkf.ch)

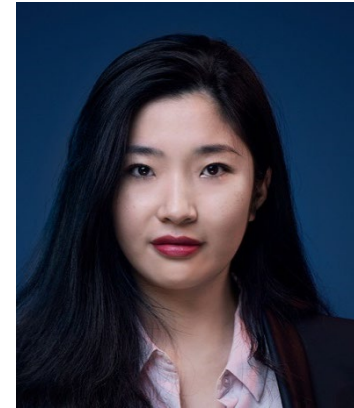
Partner, et lic phil I, Attorney-at-law, LL.M.



Manuel Werder

[manuel.werder@nkf.ch](mailto:manuel.werder@nkf.ch)

Partner, lic. iur., Attorney-at-law, LL.M.



Shu Bernet-Zhang

[shu.bernet-zhang@nkf.ch](mailto:shu.bernet-zhang@nkf.ch)

Associate, Solicitor of England and  
Wales, Attorney-at-law (China, inactive),  
LL.M.



**NKF**