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Legal and Comparative Aspects of Swiss Sanctions against Russia

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I. Swiss sanctions in relation to the Ukraine – An Overview

The Ordinance instituting measures in relation to the situation in Ukraine (the "Ukraine Ordinance") issued by the Swiss Federal Council has entered into force on 4 March 2022 and has since been amended several times. The latest amendments have entered into force on 4 May 2022 and mirror all measures contained in EU's fifth package of sanctions against Russia[1]. In particular, the Ukraine Ordinance provides for measures to restrict trade in military goods, goods for oil refining, the energy sector and luxury goods, as well as far-reaching financial sanctions and entry and transit bans[2].

Generally, the Swiss sanctions provision of the Ukraine Ordinance are addressed to Swiss authorities, companies, organizations as well as individuals in Switzerland. The sanctions are designed to limit economic and financial interaction with Russia, the Russian Central Bank, Russian companies and Russian citizens. However, Swiss-Russian dual nationals and Russian citizens who hold a valid residence permit in Switzerland are exempt from the measures in various cases.

II. Legal aspects

1. International law

In the current Ukraine crisis, the UN Security Council was unable to adopt sanctions because Russia, as a permanent member of the Security Council, used its veto power to block adoption of UN Security Council sanctions.

Otherwise, however, Switzerland would have a legal obligation under Article 41 of the UN Charter to adopt the non-military sanctions decided by the Security Council. Switzerland has been obliged to implement these sanctions since it became a member of the UN in 2002.

In contrast, Switzerland is under no obligation under international law to adopt sanctions issued by the EU. Nevertheless, the adoption of EU sanctions is often politically necessary for Switzerland's efforts to align its financial policy and regulation with that of the EU. Since the 1990s, Switzerland has supported the majority of sanctions the EU has issued. Accordingly, Article 1 of the Federal Act on the Implementation of International Sanctions (Embargo Act, EmbA) provides that the Federal Council may adopt coercive measures to enforce sanctions

[1] Switzerland also implemented the sanctions against Belarus contained in EU's fifth sanction package.
[2] For legal updates on the topic of Swiss sanctions issued against Russia, see https://pestalozzilaw.com/en/sanctions-resource-center/.

decided by the OSCE or "by Switzerland's most important trading partners [...]", which undoubtedly is the EU. EU sanctions are therefore not automatically adopted by Switzerland, but are subject to a case-by-case examination and assessment of interests by the Federal Council. From a political point of view, however, an adoption is often indicated.

2. Domestic law
   a. Legal basis of sanctions

      The Ukraine Ordinance was issued on the basis of Art. 184 para. 3 BV and Art. 2 EmbA. Since the EmbA came into force on 1 January 2003, the non-military measures adopted by the Federal Council have been based almost exclusively on the EmbA. The EmbA is conceived as a technical framework law. It only regulates the jurisdiction, surveillance, data protection, administrative and legal cooperation as well as the appeal process and the criminal law penalties in the context of coercive measures. The sanctions decided in individual cases are then issued by the Federal Council in the form of ordinances.

   b. Legal nature of ordinances issued by the Federal Council

      The Federal Council issues sanctions based on the EmbA in the form of ordinances. Ordinances are generally abstract legal provisions. However, regularly such ordinances contain very specific measures against individuals, i.e. transit and entry bans or the freeze of assets of individuals. It can be argued that in such cases, the provisions qualify as legal orders and not ordinances[3]. This is problematic insofar as the issuance of orders is governed by the Federal Act on Administrative Procedure (APA) and, among other, basic procedural rights such as the right to be heard of the involved must be respected. In addition, a legal order must be dispatched to the affected parties, it must contain a reasoning, and the appeal process differs from the appeal against an ordinance.

      Annex 8 to the Ukraine Ordinance lists the individuals targeted by the entry and transit bans as well as the individuals, companies and entities targeted by the financial sanctions. Such provisions could be qualified as legal orders under Swiss Law which would consequently require the observance of the right to be heard and other procedural provisions. Although it is conceivable that non-military sanctions directed specifically at individuals in ordinances could be qualified as legal orders, this problem does not seem to have received much attention in the authorities' practice.

[3] Cf. for detailed analysis MATTHIAS OESCH, UNO-Sanktionen und ihre Umsetzung im schweizerischen Recht, SZIER 2009, p. 337 (p. 347 et seq.).

3. Principle of proportionality and civil rights

When Swiss authorities act on the basis of public law, they are obliged to observe fundamental rights of the Federal Constitution, the ECHR and other principles of administrative law such as the principle of proportionality. The principle of proportionality requires that official measures are suitable, necessary, and reasonable for the person concerned, which in each case requires a weighing of public and private interests. These legal guidelines must also be observed with regard to legal orders made on the basis of the Ukraine Ordinance.

In the past, Switzerland has already been criticized once by the ECtHR in the prominent case "Nada"[4] for - in this case - not having implemented UN-sanctions in conformity with the ECHR. Switzerland had violated the civil rights of Youssef Nada, a dual Egyptian-Italian citizen living in an Italian enclave in Switzerland, by directly adopting an entry and transit ban against him provided for in the UN sanctions instead of implementing it in conformity with his fundamental rights. The ECtHR held that Switzerland is obliged to use its discretionary powers to make the implementation of Security Council sanction orders compliant with the ECHR. This is particularly true when Switzerland adopts sanctions outside the UN context, where - at least legally speaking - it has sole discretion in implementation. The ruling confirms clearly that restrictions of fundamental rights must be proportionate in the context of sanctions.

4. Appeal process

With regard to appeals against legal orders issued on the basis of the EmbA, Art. 8 EmbA refers to the general administrative procedural rules. These include the APA, the Administrative Court Act and the Federal Supreme Court Act (BGG). Orders issued by SECO (the Swiss State Secretariat for Economic Affair) on the basis of a Federal Council ordinance on sanctions will regularly contain an instruction on the right of appeal. In the appeal process, the accessory review of the underlying ordinance would also be possible.

However, it is not entirely clear whether the Administrative Court and subsequently the Federal Supreme Court is competent to deal with appeals in public law matters concerning sanctions issued by the Federal Council, as it is the Federal Council that is the competent appeal authority for rulings in the field of internal and external security as well as other foreign affairs, insofar as international law does not grant a right to judicial review (Art. 72 lit. a APA). With

[4] ECtHR decision Nada v. Switzerland (No. 10593/08) dated 12 September 2012.

the same reasoning, the Message[5] on the EmbA provides that the Federal Council is the competent appeal authority.

However, precisely because of the reservation of international law and the right to judicial review granted by Art. 6 ECHR, Art. 72 lit. a APA is interpreted restrictively. In the past, the Federal Supreme Court has also ruled in favor of its competence to hear such cases.

5. Enforcement and legal consequences of non-conformance with sanctions

Art. 32 of the Ukraine Ordinance provides that the violation of various provisions is sanctioned according to Art. 9 and Art. 10 EmbA. Art. 9 EmbA provides for a monetary sanction or even imprisonment. In the case of negligent violation of a provision, the penalty is lowered. Art. 10 EmbA provides for the imposition of a fine.

The Message on the Embargo Act states that the prosecution of cases under administrative criminal law has shown that criminal law measures are suitable for preventing the circumvention of sanctions and for increasing the general preventive effect. In addition, Switzerland's neighboring countries such as the U.K., Spain, Germany, France and many others also provide for imprisonment as a penalty, which is why a corresponding sanction was introduced in Switzerland with the EmbA.

The enforcement of the Ukraine Ordinance is largely the responsibility of SECO. The monitoring of the entry and transit bans is carried out by the SEM.

6. Enforcement of sanctions in a comparative perspective

In contrast, the United Kingdom has historically operated its own sanctions regime, which was distinct from, and often more far-reaching than European Union sanctions regulations. The U.K.'s overarching domestic sanctions regime is established under the authority of the Sanctions and Anti-Money Laundering Act 2018 (SAMLA), which grants the U.K. government wide-ranging powers to introduce and enforce new sanctions. The SAMLA was updated with increased powers for U.K. Government Ministers to make sanctions designations under the Economic Crime Act 2022.

U.K. sanctions are binding on both individuals and legal entities within (or undertaking activities in) the U.K., as well as U.K. persons (U.K. nationals and entities incorporated under the law of the U.K.) wherever they may be in the world ("U.K. Persons"). They include financial sanctions, as well as trade, immigration and aircraft and shipping sanctions. Some financial sanctions (e.g.,

[5] Message on the Federal Act on the Implementation of International Sanctions dated 20 Dezember 2000, BBl 2001 1433 ff. (cit. Message EmbA), p. 1459.

investment prohibitions and asset freezes) are also targeted at categories of firms or individuals which are not specifically designated but should be considered in addition to those named on the U.K. sanctions lists.

The U.S. sanctions regime consists of a number of sanctions programs with a combination of country-wide, sectoral, targeted and secondary sanctions. The sanctions program related to Russia and Ukraine is implemented primarily by the US Treasury Department's Office of Foreign Assets Control (OFAC)—along with the State Department and Commerce Department's Bureau of Industry and Security (BIS)—pursuant to Executive Orders (EOs) issued by the President and legislation passed by Congress. OFAC has laid out additional measures in response to the Russian invasion of Ukraine in a series of new directives with certain wind-down periods and exceptions authorized through general licenses. General licenses to conduct a range of transactions that would otherwise violate US sanctions rules can be obtained, along with specific licenses that allow a person to perform a specific transaction with a sanctioned entity, can be obtained (depending on the transaction) from the BIS and/or OFAC.

The U.S. sanctions regime is binding on all U.S. persons, including all U.S. citizens and permanent resident aliens regardless of their location, all persons and entities within the United States and all U.S.-incorporated entities and their foreign branches. Non-U.S. persons may also be exposed to secondary sanctions risk if they transact with individuals or entities subject to sanctions—including, if they materially assist, sponsor, or provide financial, material, or technological support for, or goods or services to or in support of, certain activities, a person whose property and interests in property are blocked. Non-U.S. persons may also expose themselves to liability if they "cause" a violation of U.S. sanctions by unlawfully introducing some U.S. nexus to a prohibited transaction. Violations of U.S. sanctions can lead to significant criminal or civil penalties.

The US makes heavy use of administrative sanctions which consists of both corrective measures and punitive measures. Moreover, the US sanctions regime is designed to be risk-based requiring firms and individuals to adopt controls that identify and monitor risky behaviour that might lead to sanctions violations. US regulatory authorities work with all firms, financial institutions and individuals to ensure that they adopt adequate compliance practices and policies to reduce the risk of violating economic sanctions.

This compliance-based approach that emphasises the use of corrective measures and risk-based practices to identify and monitor the risks of violating sanctions appears to be missing in the Swiss sanctions regime. SECO does not take a regulatory approach to mitigating sanctions violations and instead follows an enforcement approach that heavily emphasises the use of criminal sanctions against firms and individuals for violating sanctions. The criminal law approach requires a higher level of evidence to obtain convictions as compared to the regulatory approach that requires a lower evidentiary standard to impose liability for sanctions breach. Moreover, SECO's primary reliance on criminal law

against sanctions misconduct does not work well with a risk-based approach for firms and institutions that seeks to develop internal controls that reduce the risk of sanctions. Evidence from other states shows that sanctions implementation and compliance is more effectively achieved through a regulatory approach that places primary reliance on administrative corrective orders for firms to correct their misconduct when found in violation of sanctions restrictions and less use of punitive measures. SECO should adopt a more coherent sanctions regime that requires a risk-based approach by firms and individuals in which administrative sanctions are used for both corrective and punitive purposes. At present, SECO's sanctions regime lacks any meaningful use of administrative sanctions and risk-based measures for firms to comply with. This will undermine Swiss sanctions over time.