Legal aspects of sanctions imposed by Switzerland against Russia

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Key takeaways

- **Unlike sanctions decided by the Security Council, Switzerland has no legal obligation to adopt sanctions issued by the EU. However, the political importance to take over such sanctions has been recognized by the Swiss legislator in Article 1 of the Embargo Act. Based on this, the Federal Council decided on 28 February 2022 to adopt the EU sanctions by enacting the Ukraine Ordinance.**
- **Rulings based on the Ukraine Ordinance need to observe the principle of proportionality and respect fundamental rights.**
- **Appeals against rulings by SECO need to be directed to the Federal Council; an appeal to the Federal Supreme Court remains unclear.**
- **The legal consequences in case of violations are far reaching. In serious cases, the penalty is 5 years in prison and a fine of CHF 1 million.**

Introduction

The Ordinance on Measures in Connection with the Situation in Ukraine (Ukraine Ordinance) issued by the Federal Council entered into force on 4 March 2022 and has already been amended several times (visit our Sanctions Resource Center for previous legal updates). The latest amendments entered into force on 10 June 2022.

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Imposed sanctions

The Ukraine Ordinance provides for far-reaching trade restrictions, financial sanctions, and entry and transit bans. The provisions of the Ukraine Ordinance are directed to Swiss authorities, natural persons, companies and organizations. By their very nature, they aim to restrict Russian nationals and their assets in Switzerland, as well as trade and financial services with Russia and Russian companies. However, Swiss nationals and Russian nationals who hold a valid residence permit in Switzerland are exempt from the measures on various occasions.

Legal aspects

International law

Based on Art. 41 of the UN Charter, Switzerland has a legal obligation to adopt the non-military sanctions decided by the Security Council. Their adoption has been binding on Switzerland since its membership of the UN in 2002. In principle, the sanctions decided by the Security Council enjoy direct applicability in Switzerland (principle of monism), without the need for a national act of implementation. Nevertheless, the practice of the Federal Council shows that such sanctions are meanwhile incorporated into national law by means of ordinances. In the current Ukraine crisis, as is well known, the Security Council could not adopt sanctions because Russia blocks the adoption of sanctions by its veto.

Unlike sanctions decided by the Security Council, Switzerland has no legal obligation to adopt sanctions issued by the EU. However, it is often politically imperative for Switzerland's position in the community of states to adopt these sanctions. This has also been recognized by the Swiss legislator: Article 1 of the Federal Act on the Enforcement of International Sanctions (Embargo Act) provides that the Federal Council may adopt coercive measures to enforce sanctions adopted by the OSCE or "by Switzerland's main trading partners [...]", which undoubtedly means the EU. Consequently, the adoption of EU sanctions is not automatic and is subject to a balancing of interests.

National law

The Ukraine Ordinance is based on Art. 184 para. 3 of the Federal Constitution and on Art. 2 Embargo Act. The Embargo Act is conceived as a framework law. The sanctions based on the Embargo Act are issued in the form of ordinances. Although ordinances are generally abstract orders, the ordinances often provide for very specific sanctions which can even be qualified as individual concrete rulings. This applies in particular to entry and transit bans of persons explicitly listed in the ordinance as well as to asset freezes of specific persons specifically ordered in the ordinance. Such concrete orders are legally problematic insofar as the injunction procedure is governed by the Administrative Procedure Act (APA) and therefore procedural fundamental rights such as the right to be heard must be respected. In addition, rulings must be issued to the persons concerned, reasons must be given for them, and the procedure for challenging them differs from that for ordinances.

The principle of proportionality and fundamental rights

Swiss authorities acting based on public law are obliged to respect fundamental rights under the Federal Constitution, the European Convention of Human Rights and other principles of administrative law such as the principle of proportionality. The principle of proportionality requires that official measures be suitable, necessary in personal, temporal and spatial terms, and reasonable for the person concerned, which in each case requires a balancing of public and private interests. These legal guidelines must also be observed when issuing rulings based on the Ukraine Ordinance.

Legal remedy

Art. 8 of the Embargo Act refers to the general provisions of the federal administration of justice for appeals against rulings based on the Embargo Act. These include the APA and the Federal Supreme Court Act (FSCA). Rulings issued by the State Secretariat for Economic Affairs (SECO) should contain an instruction on the right of appeal. In the proceeding, an accessory review of the underlying ordinance remains possible.

It is legally disputed whether the Federal Supreme Court has jurisdiction to hear appeals in public law matters concerning sanctions issued by the Federal Council. This is due to the fact that it is not the Federal Supreme Court but the Federal Council that is the competent appeal authority for rulings in the area of internal and external security and other foreign affairs, insofar as international law does not grant a right to judicial assessment (Art. 72 lit. a APA).

The dispatch on the Embargo Act stipulated that the Federal Council was the competent appeal authority which was criticized by the academic community. Due to the reservation of international law and the right to judicial review granted by Art. 6 of the European Convention on Human Rights, Art. 72 lit. a APA is interpreted restrictively. In the past, the Federal Supreme Court also accepted such appeals. With regard to the substantive review of UN sanctions that are implemented into national law, however, it has been unclear since the Federal Supreme Court case law in the "Nada ruling" (BGE 133 II 450) whether the national implementing acts can be reviewed by the Federal Supreme Court.

Legal consequences in case of violations of the ordinance

Experience has shown that criminal law measures are more likely to prevent violations. Switzerland's neighboring countries also provide for custodial sentences as a penalty for breach of sanctions. Art. 32 of the Ukraine Ordinance foresees that the violation of various provisions is punishable under Art. 9 and Art. 10 EmbG. This reference to the EmbG is mandatory, since in Switzerland custodial sentences must be regulated in a law in the formal sense. Art. 9 EmbG provides for a fine or even imprisonment. In the case of negligent commission, the threatened penalty is lower. Art. 10 EmbG provides for a fine as a penalty.

The enforcement of the Ukraine Ordinance is largely the responsibility of the SECO. The State Secretariat for Migration (SEM) is responsible for monitoring the entry and transit bans.

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No legal or tax advice

This legal update provides a high-level overview and does not claim to be comprehensive. It does not represent legal or tax advice. If you have any questions relating to this legal update or would like to have advice concerning your particular circumstances, please get in touch with your contact at Pestalozzi Attorneys at Law Ltd. or one of the contact persons mentioned in this Legal Update.

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