Sanctions against Russia – blocking of funds and economic resources

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Key takeaways

- **Financial intermediaries have to immediately freeze funds and other economic resources belonging to or controlled by Subjects of Sanctions**
- **Any direct or indirect transfer of funds or provision of economic resources to Subjects of Sanctions is prohibited**
- **Financial intermediaries holding or managing such assets that should be frozen must declare them to SECO without delay**

Introduction

Since 28 February 2022, 6:00 p.m., any financial intermediary holding or managing funds and economic resources which belong to or are controlled by individuals or entities designated in Annex 8 (Subjects of Sanctions) to the Ordinance on Measures in connection with the Situation in the Ukraine (Ordinance) has to comply with Article 15 et seq. of the Ordinance. This newsletter shall give a short overview of the scope and the implications of said provisions.

Blocking of funds and economic resources

All funds and economic resources belonging to or controlled by Subjects of Sanctions are subject to an immediate freeze.

Definition of the term "funds"

According to the Ordinance, the term "funds" comprises all financial assets, including cash, checks, money claims, bills of exchange, money orders or other payment instruments, balances, debts and debt obligations, securities and debt instruments, certificates representing securities, bonds, notes, warrants, debentures, derivatives; interest income, dividends or other

income or appreciation on assets; loans, rights to set-off, guarantees, performance bonds or other financial commitments; uncertificated securities; crypto-based assets; letters of credit, bills of lading, assignments for security, documents evidencing securitisation of interests in fund assets or other financial resources; and any other financing instrument for exports.

Definition of the term “economic resources”

The term "economic resources" includes assets of every kind, irrespective of whether tangible or intangible, movable or immovable, including but not limited to real estate and luxury goods, with the exception of funds as described above.

Definition of the term “belonging to or controlled by”

While the criterion of ownership of funds or economic resources should be easier to determine, determining control over the latter is arguably far more difficult. It would be desirable if the Swiss Embargo Act would be expanded to include a legal definition on control structures in connection with financing prohibitions in the future. Until then, special attention should be paid to verification of whether the criterion of control is fulfilled in the specific case. In our view, the criterion of control should be defined on the basis of various characteristics such as the ability of the designated individuals or entities to access the assets.

Definition of the term “blocking”

The term “blocking of funds” encompasses the prevention of any action that enables the management or use of funds, except for normal administrative acts of financial institutions.

The term “blocking of economic resource” encompasses the prevention of the use of economic resources to acquire funds, goods or services, including the sale, lease, or pledge of such resources.

No transfer of funds or provision of economic resources

Article 15 para. 2 of the Ordinance further prohibits the direct or indirect transfer of funds to Subjects of Sanctions as well as the provision of funds and economic resources to the latter.

Direct and indirect provision of economic resources

While the direct provision prohibition – i.e. the direct provision of monetary benefits to listed persons or entities – is plausible, the indirect provision of economic resources proves to be problematic.

In our view, an indirect provision of economic resources occurs when the transfer is not made directly to the listed person, institution or organisation, but via a third party. For instance, a third party receives funds that are used to repay debts of the listed person. Indirect provision also exits if the resource is not passed on, but the listed person has an influence on the non-listed person and thus benefits indirectly from the provision of the resources. Thus, indirect provision also occurs when the non-listed business partner is owned or controlled by Sanctioned Persons.

Reporting

According to Article 16 of the Ordinance, persons or entities holding or managing assets or resources that should be frozen must report to the Swiss State Secretariat for Economic Affairs (SECO) without delay. The same applies to persons who have knowledge of resources that must presumably be subject to an asset freeze. The reports must include the names of the beneficiaries and information on the nature and value of the funds and economic resources concerned.

Reporting to SECO does not exempt a financial intermediary from carrying out additional investigations pursuant to Art. 6 of the Anti Money Laundering Act (AMLA) in the event of suspicious circumstances and, if it is unable to eliminate these suspicions, from immediately filing a report with Money Laundering Reporting Office Switzerland (MROS) pursuant to Art. 9 AMLA.

Exceptions

Article 15 para. 3 of the Ordinance provides for exceptional cases in which SECO may authorise payments from blocked accounts, transfers of blocked assets, and the release of blocked economic resources in order to:

- avoid cases of hardship;
- perform or fulfil existing agreements;
- fulfil claims that are subject to an existing court decision, administrative body or arbitration tribunal;
- fulfil official purposes of Russian diplomatic or consular missions; and
- safeguard Swiss interests.

Furthermore, SECO may request the release of certain frozen funds or economic resources held by the organisations listed in Appendix 8 under SSID numbers 175-48057, 175-48067 and 175-48076, or exceptionally authorise the making available of certain funds or economic resources to such organisations upon a determination that such funds or economic resources are necessary to finance transactions entered into with such organisations before 23 February 2022, including the appropriate banking relationships, not later than 24 August 2022.

The above exceptions are exclusively granted by SECO after consultation with the competent offices of the Federal Department of Foreign Affairs (FDFA) and the Federal Department of Finance (FDF). Given that exceptions may only be granted by SECO itself, this will likely pose logistical difficulties and delays, in particular with respect to the performance or fulfilment of existing agreements according to Article 15 para. 3 and 4 of the Ordinance.

Next steps

In view of the above, affected financial intermediaries must without delay:

- examine whether they hold or manage assets or resources belonging to or controlled by individuals or entities that are Subjects of Sanctions, with special attention to be given to the criterion of control;
- in the event of identified business relationships with Subjects of Sanctions, immediately block the corresponding funds and financial resources of the latter;
- report the business relationships with Subjects of Sanctions to SECO;
- pursue additional investigations pursuant to Art. 6 AMLA in the event of suspicious circumstances.

Pestalozzi has set up a team to address the wide range of legal issues companies are facing with regard to sanctions. Visit our Sanctions Resource Center to receive fast, practical and effective advice.

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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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