

# Wilhelm AVOCATS

## DROIT DES SOCIÉTÉS

Il règne un certain flou juridique en lien avec les sanctions russes



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## Legal uncertainty surrounding Russian sanctions

The sanctions taken by Switzerland against Russia following the invasion of Ukraine are unprecedented in their nature and scope, and undermine certain basic principles of the rule of law. In this article, the authors are highlighting certain problems with regards to the Federal Council Ordinance enacting these sanctions that they have encountered in the course of their practice.

Indeed, on February 28, 2022, the Federal Council decided to take over the European Union's sanctions against Russia by means of a virtually complete overhaul of the Ordinance instituting measures in connection with the situation in Ukraine ("the Ordinance"), already in force since 2014 following Russia's invasion of Crimea. Since its entry into force in 2014, the Ordinance has been amended no fewer than 64 times, including 27 times since its total revision on March 4, 2022.

The Ordinance contains a series of measures such as the freezing of assets and economic resources, a reporting obligation concerning the freezing of assets and economic resources, prohibitions concerning securities and money market instruments, a ban on granting loans, a ban on accepting deposits of over CHF 100,000 from Russian nationals or legal entities or individuals in Russia, as well as a whole series of prohibitions linked to transactions with the Central Bank of Russia, certain state-owned companies, trusts and Russian public institutions. Art. 32 of the Ordinance also contains a penal provision which applies to anyone infringing articles 2a, 3 to 6, 9 to 15, 16, 17 to 20, 21, 22 to 30 of the Ordinance.

Only a few issues relating to the freezing of assets and economic resources and the prohibition on accepting deposits of over CHF 100,000 from Russian nationals will be addressed in this article, as will the exchange of information and examples of practical contacts with the State Secretariat for Economic Affairs ("SECO").

## The problem of freezing assets and economic resources

Article 15 of the Ordinance lays down the obligation to freeze assets and economic resources belonging to certain persons whose identity is published in Appendix 8 of the Ordinance. However, this Annex 8 is not published in the official or systematic collection on the website of the Swiss Confederation (admin.ch), but merely by reference, to a link –<https://fedlex.data.admin.ch/eli/oc/2023/632> > – which appears to be a database of the Swiss Confederation, but which does not work. To access this (updated) Appendix 8, one must go on another link, i.e. [Measures in connection with the situation in Ukraine \(admin.ch\)](#), and then consult the latest version under [Situation in Ukraine 2023-11-02 \(PDF, 2 MB, 02.11.2023\)](#), which consists of a PDF document of no less than 535 pages, written solely in English.

This document contains the names of politicians known to the general public in the West, who are or have been part of President Vladimir Putin's inner circle, such as former president Dmitry Medvedev, oligarch Roman Abramovich, companies with links to Yevgeny Prigozhin, former leader of the Wagner paramilitary group, who died in a plane crash in August 2023, as well as personalities largely unknown in the West, such as for example singer Grigoriy Viktorovich Lepseveridze, who is sanctioned for giving concerts in support of the Russian invasion.

The Swiss assets of all these people and entities mentioned in this PDF document must be frozen. But that's not all. Article 16 of the Ordinance also requires *all persons and institutions who hold or manage assets, or who have knowledge of economic resources, which are likely to fall within the scope of the asset freeze provided for in Art. 15, para. 1, to report them to SECO without delay.*

This standard applies not only to financial intermediaries, but to all persons and institutions who have knowledge of economic resources which are likely subject to the asset freeze. As mentioned above, any violation of Article 16 entails criminal consequences. This is not a special offence (*Sonderdelikt*), but a common offence (*gemeines Delikt*), in other words, a criminal offense that might apply to all of us.

Furthermore, the wording "*which likely fall within the scope of the asset freeze*" is extremely problematic given its vagueness and need for interpretation.

One might legitimately ask whether it is now compulsory in Switzerland for every institution and every ordinary citizen to understand English, to know about Russian singers such as Grigoriy Viktorovich Lepseveridze listed in Appendix 8, and to regularly check the exhaustivity of the PDF document (Appendix 8) presented above? Under what circumstances should Russian assets be "*likely*" to fall under the asset freeze? Do all institutions and ordinary citizens now have to report any Russian assets of which they are aware of, as a precautionary measure against possible criminal prosecution?

In view of the above, and according to the point of view defended in this article, there is every reason to believe that the Federal Council has exceeded its legislative competence, that it has failed in its duty to publish Appendix 8 in the official and systematic collection on the Swiss Confederation's website (www.admin.ch), that it has omitted to translate Appendix 8 into the various Swiss national languages, and that it has shown a lack of precision with regard to the wording of Article 16 of the Ordinance.

## The ban on accepting deposits of over CHF 100,000 from Russian nationals or legal entities or individuals in Russia.

However, the Ordinance contains restrictions that go far beyond the sanctioned persons and entities listed in Appendix 8.

In particular, article 20 of the Ordinance *prohibits persons and institutions that accept deposits and grant credit on a professional basis from accepting deposits from Russian nationals, or from natural persons residing in the Russian Federation, if the total value of the deposits exceeds CHF 100,000 (Swiss francs).*

At first glance, the notion of "*accepting deposits*" is unclear. Indeed, it is not clear whether this notion is to be understood in the restricted sense of the definition of bank as per art. 1a of the Federal Law on Banks and Savings Banks (LB), or on the contrary, whether this notion is to be understood more broadly, encompassing also all the exceptions of art. 1 al. 3 let. b (LB), i.e. asset managers, notaries and business agents who merely administer their clients' funds without engaging in banking activities, or the exceptions

provided for in the *Sandbox clause* derived from art. 6 para. 2 of the Banking Ordinance (OB), which applies to entities that limit themselves to accepting deposits from the public of less than CHF 1 million in total, or that do not engage in interest-bearing transactions.

In all cases, persons and institutions accepting deposits are required to provide SECO with a list of deposits in excess of CHF 100,000 held by Russian nationals (article 21 of the Ordinance).

In view of the criminal consequences to which persons and institutions accepting deposits are exposed, the authors are of the opinion that the Federal Council should have further clarified the scope of this regulation.

In practice, the consequence seems to be chaos, since most banks, custodians or asset managers almost systematically block any transaction order relating to ordinary Russian nationals in light of the legal uncertainty and the risks involved, in order to clarify the legal situation in relation to such transaction orders.

In any case, Russian citizens with assets of over CHF 100,000 in Switzerland should still be able to transfer certain amounts to other banks, as long as the CHF 100,000 threshold is not reached, or transfer the balance to another account held in Russia with a non-sanctioned bank which is not listed in Annex 8. However, many Swiss banks seem to have issued internal guidelines that are even stricter than the Ordinance, so that many ordinary Russian nationals encounter major difficulties in transferring or recovering their assets.

#### **Practical point of view: discussions with SECO**

In view of the many questions and legal uncertainties surrounding the Ordinance, we advise our customers to have certain solutions validated directly by SECO, in order to ensure maximum legal certainty. In practice, however, this does not appear to be an easy task. In view of the many uncertainties, SECO has set up a hotline staffed by legal experts. However, the availability of SECO is extremely limited: lawyers only answer calls from Tuesday to Thursday, from 10.00 a.m. to 12.00 noon. Even though some of their staff show competence and good faith in trying to clarify SECO's position on the legal chaos, they always advise that the proposed solution be validated by SECO in writing. Thus, a written request must be sent by e-mail to [sanctions@seco.admin.ch](mailto:sanctions@seco.admin.ch). Depending on the nature of the request, it then takes between 3 and 5 working days to obtain a response from SECO. However, SECO's responses are often very brief and merely underline the behaviours which are expressly prohibited by the Ordinance, and rarely propose concrete legal solutions to the problems encountered in practice. What's more, the written responses from SECO sometimes contradict the information and guarantees previously obtained orally during previous phone conversations.

Ultimately, we advise anyone dealing with Russian assets to contact a lawyer to work out a solution and have it validated immediately with SECO in order to obtain maximum legal guarantees.

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**Source :** <https://www.wg-avocats.ch/en/actualites/company-law/legal-uncertainty-surrounding-russian-sanctions/>