International **Sanctions** as a **Risk** of **Responsibility** for Financial **Intermediaries**

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At a time when international sanctions adopted by Switzerland are on the rise, financial intermediaries are more and more exposed to the risk of running afoul of numerous ordinances regarding sanctions and anti-money laundering provisions, or even to risks of a prudential nature.

In Switzerland, since 2003, the law on international sanctions (Embargo Act or *EmbA/Loi sur les embargos*) enables the Confederation, through the agency of the Federal Council, to issue coercive measures in the form of ordinances to implement international sanctions. These sanctions can be decreed by the United Nations Security Council (which are directly applicable in Switzerland), by the OSCE or by Switzerland's major trading partners such as the European Union. Among these coercive measures figure notably restrictions on payments and circulation of capital. The most recent ordinance promulgated by the Federal Council under the *EmbA* is that of 4 March 2022, enacting measures linked to the situation in Ukraine. It comprises both trade restrictions, in particular in the area of arms and energy, and financial restrictions. Such restrictions designate by name the physical and legal persons targeted by the sanctions and also impose certain obligations in relation to persons generically designated (such as Russian nationals without a passport from Switzerland or from an EEA member state).

The drafting of ordinances on economic sanctions is under the authority of the State Secretariat for Economic Affairs (SECO), which is also required to publish sanctions lists on its site and to keep them up to date. It also publishes Frequently Asked Questions (FAQs) allowing constituents to find answers to their most common questions. However, these FAQs do not always cover the very numerous questions raised by sanctions regimes,

often decided upon in haste. Finally, the SECO site offers a useful search engine allowing one to determine if a specifically named person is sanctioned. Further, a subscription to the FINMA's flux rss offers the possibility of one being regularly notified of sanctions lists and their updates.

The SECO's mission is to receive the required declarations of persons and financial institutions holding or managing assets, or that have knowledge of economic resources, subject to a freeze. These persons are required to communicate to the authority the name of the beneficiary as well as the nature and value of the assets and economic resources concerned. However, these obligations are independent of the illicit origin of the assets. In other words, the funds of a person under sanction can have passed the anti-money laundering test and nonetheless be subject to an obligation to freeze and to report the funds if they belong to persons on the sanctions list.

The broad obligation to report to the SECO applies mainly to financial establishments directly or indirectly connected to persons under sanction. These persons may be subject to unannounced visits by the SECO or by other authorities, such as the cantonal or communal police or the Federal Customs and Border Security Office. All violations of sanctions issued by the Federal Council on the basis of the *EmbA*, even if resulting from negligence, are subject to criminal penalties, which run from three months to five years in prison in the most serious cases. Fines can run as high as CHF 500,000 in lieu of imprisonment. Lesser violations are subject to a fine.

If there are valid reasons, the persons under sanction can try to request a delisting (the removal from a name-specific sanctions list) by means of a long and formalist procedure and imposing an obligation to cooperate in the establishment of the facts. Nonetheless, the burden of proof is on the authority as regards justifying the listing of the person, which often involves political considerations.

Both the legislation and the Federal Council's ordinances on sanctions provide for the possibility of a partial unfreezing of assets, in particular in hardship cases, in cases necessitating the honoring of existing contracts or, occasionally, for humanitarian reasons.

What are the obligations of financial intermediaries?

The measures taken in implementing the *EmbA* generally impose obligations first of all on financial intermediaries, such as those who have a power of disposal over assets belonging to physical or legal persons subject to sanctions. These obligations include the freezing of assets and the requirement to communicate their existence to the SECO.

While the *EmbA* contains its own criminal provisions, the violation of sanctions can carry other risks for financial intermediaries. They are generally subject to the Anti-Money Laundering Act *(AMLA)*, which imposes strict requirements regarding the identification of clients, their beneficiaries and the origin of their wealth. These requirements are applicable when clients and/or their beneficiaries are designated as *politically exposed persons* or PEPs. Sanctions lists comport numerous PEPs, for sanctions are generally driven by political considerations and seek to weaken foreign governments and those close to them.

While banks are generally well organized and have substantial technical means (such as transaction monitoring systems) so as to ensure proper sanctions implementation, it is otherwise regarding lesser actors, of whom the legislation does not require the same level of technology but nonetheless expects the same level of vigilance. Such minor actors do not have the same transaction monitoring systems to screen their clients, the clients' beneficiaries and co-contractors and concomitant transactions, all in light of the published lists. Moreover, their personnel assigned to compliance work is modest and not necessarily specialized in the area of sanctions. This deficiency has an effect on the observance of a law that is nonetheless rigorous, effectively imposing a requirement of communication to the MROS in the event of a match between names on the sanctions lists for terrorism and the name of a cocontractant or an economic beneficiary. A match between clients' names and those on other sorts of sanctions lists requires that the financial intermediary undertake further clarifications in order to determine if the intermediary is required to send a communication to the MROS. In other words, the obligations to communicate to the SECO are independent of, and add to the obligations of, communication under the *AMLA* and to the duty to communicate under the criminal code. When in doubt, the financial intermediary will use its right to communicate.

From violation of the *AMLA* to sanctions by the FINMA there is but one small step. The FINMA is the oversight authority in the implementation of the *AMLA*. As such, it can recur to the arsenal of measures and sanctions provided for by law on the FINMA to sanction the non-observance of anti-money laundering measures, especially those applicable to the internal organization of financial intermediaries.

Violation of sanctions rules can come to the attention of authorities following audits of financial intermediaries. In the event of suspicion of serious violation, it can also come to light in the context of FINMA enforcement procedures. FINMA sanctions, of an administrative nature yet often very incisive, run from the rectification of the legal order to a blunt prohibition to practice. They are accompanied sometimes by the confiscation of the gain acquired by the financial intermediary in the framework of the relation(s) for which the law was broken.

Lastly, it is worth noting that the oversight bodies of asset managers and trustees can also impose sanctions, particularly in the form of fine or exclusion.

Conclusion

Sanctions regimes, the most recent of which concern Ukraine, are dealt with in publications that financial intermediaries are expected to keep up on. They are published on the SECO site and communicated by the FINMA to anybody requesting them. While certain financial intermediaries such as independent asset managers can, to some extent, count on the controls carried out by custodian banks, there is no lessening of their own obligation to report to the SECO in the event of a match between names of clients or economic beneficiaries and persons on the sanctions lists. This also applies to their responsibility regarding the fight against money laundering. Observance of these obligations must be scrupulous in that any failure can entail serious consequences of a prudential nature and put in jeopardy the authorization to practice from the FINMA. ■