



PRAGER
DREIFUSS

PD Newsletter / January 2025

EU and Swiss Sanctions Regimes compared

Despite being surrounded by EU members states and its importance as a global financial centre, Switzerland maintains an own sanctions regime. Though inspired by and moulded after the EU sanctions, there are nevertheless important differences between the two regimes.

1. Introduction

On December 16, 2024, the Council of the European Union adopted its 15th sanctions package against the Russian Federation. On December 24, 2024, the Swiss Federal Department of Economic Affairs, Education and Research (EAER), in its capacity as the competent body for sanctions, updated the Swiss sanctions list, bringing it in line with the sanctions decided by the European Union (EU) on December 16, 2024.

The implementation offers an opportunity to review the sanctions regimes of the EU and Switzerland after nearly three years of armed conflict in the Ukraine.

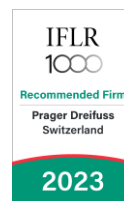
Prager Dreifuss AG is one of Switzerland's leading law firms for business law. We strive to find integrated, innovative solutions for our clients that are adapted to legal and economic realities. Our attention is equally focused on legal issues as on controlling business risks.



Marcel Frey
Counsel
marcel.frey@prager-dreifuss.com



Tim Schneider
Trainee
tim.schneider@prager-dreifuss.com



2. Background

On April 24, 2024, the EU Parliament passed two directives in connection with its sanctions legislation, firstly the "*Directive on Criminal Offences and Penalties for the Violation of EU Restrictive Measures*" (2024/1226) (hereinafter "Violation Directive") and secondly, the "*Directive on Asset Recovery and Confiscation*" (2024/1260).

Although these directives were developed in the context of the EU's reaction to Russia's war against the Ukraine to combat sanctions circumvention and to more easily confiscate Russian assets, they have a broader scope and apply to all EU sanctions. These directives aim to establish a uniform minimum legal standard throughout the EU.

This uniform legal basis is binding on all member states, although they are free to go further and introduce stricter rules. This creates a common denominator that no EU country may fall below, while at the same time leaving room for stricter national legislation (e.g. criminal or administrative prosecution). The EU 2024/1226 directive on the violation of restrictive measures, which will be examined in more detail below, entered into force on May 29, 2024 and must be transposed into national law by the EU member states within twelve months, i.e. by May 20, 2025.

3. Review of Swiss sanctions

At its meeting of November 27, 2024, the Swiss Federal Council (national government) adopted two reports on the two EU directives referred to above. In both reports, the EU directives were compared with applicable Swiss law with a view to establishing whether there were differences between the two legal approaches.

The report on the sanctions found that despite a common ground with regard to the general prosecution of sanctions breaches in both legal realms, there exist three main areas where the law is applied differently.

4. Swiss legal framework

Switzerland's legal basis for prosecuting violations of sanctions comes in the form of the Federal Embargo Act (EmbA) of 2003. This is a framework law with generally applicable aspects, which is why, in accordance with art. 2 para. 3 EmbA, it forms the basis for government ordinances which specify the relevant individual obligations with regard to particular sanctions, the transgression of which may then constitute a felony or a misdemeanour under the EmbA (art. 9 and art. 10 para. 1 let. b EmbA). One example of such an ordinance is the one dealing with the sanctions against the Russian Federation of March 4, 2022 going by the name of "*Ordinance on Measures related to the Situation in Ukraine*". This ordinance enumerates which goods may no longer be traded with Russian counterparts, which assets are frozen and the other ancillary measures.

Currently, there exist more than 20 Swiss sanctions ordinances dealing with relations to countries such as Syria, Yemen or the Sudan or targeting individuals or organisations.

It is important to note at the outset, that Switzerland only enacts compulsory trade measures to the extent as to which these are aimed at implementing sanctions that have been ordered by the United Nations Organisation, by the Organisation for Security and Cooperation in Europe or by Switzerland's most significant trading partners (i.e. the EU) and which serve to secure compliance with international law, and in particular the respect of human rights. Switzerland does – in other words

– not issue own sanctions but rather adopts foreign measures into own law.

5. Sanctions against individuals

Both the EU Violation Directive and Swiss law provide for fines, monetary penalties or imprisonment for violations of sanctions provisions by individuals, depending on the severity of the crime or offence.

In Switzerland, negligently committed acts are also punishable (by a fine up to CHF 100,000), whilst the EU Violation Directive, however, limits negligence to certain types of violations in the area of prohibited (dual-use) goods. While custodial sentence ranges are similar – between one and five years depending on the offence and its severity – the EU Violation Directive, unlike the EmbA, does not set a maximum amount for fines, as long as they are proportionate and constitute an effective deterrent. By contrast, Swiss law stipulates that violating enforcement measures can be penalised with a fine of up to CHF 100,000 (see art. 9 and 10 EmbA).

Further, the EU Violation Directive explicitly introduces two ancillary measures (of a criminal and a non-criminal nature) not comparable to Swiss law: the EU has the option of withdrawing licences or approvals for activities and a ban on standing for public office can also be ordered. Swiss law, on the other hand, includes the option of deporting foreign nationals who have committed a felony or misdemeanour under art. 9 EmbA (in connection with art. 66a^{bis} Swiss Criminal Code, "SCC"), an option that is not explicitly provided for in the EU Violation Directive.

6. Sanctions against companies

The criminal liability of companies for violating sanctions differs significantly between Swiss law and the EU Violation Directive. While the latter provides for the direct criminal liability of companies and knows an array of measures (fines, cutting of financial aid, prohibition of exercising an occupation, court supervision, liquidation, publication of judgment), Swiss law – with the exception of the specific case in art. 102 of the SCC – does not provide for the criminal liability of companies. In Switzerland, the natural persons who have committed the unlawful act in the course of the company's business are held responsible for such acts (art. 9 and 10 EmbA in conjunction with art. 6 para. 1 Criminal Administrative Law Act [CALA]).

In Switzerland, companies are only charged with penalties under the CALA if, according to its art. 7, the costs of proceedings to identify the responsible natural person within the company would be disproportionate in view of the maximum amount of the fine of CHF 5,000.00. In this case, the company can be ordered to pay a fine of no more than CHF 5,000.00. However, according to the prevailing legal view, ordering such a fine does not entail any criminally relevant accusation, but the company is merely held liable for payment of the fine that should otherwise have been imposed on the natural person if he or she had been identified.

While Switzerland can only impose a fine of up to CHF 5,000.00 in specific individual cases, EU member states can enforce fines on companies for breach of sanctions of up to EUR 40 million or even 5% of the company's total worldwide turnover. While the penalties imposed in Switzerland are limited to fines, the list in the EU

Violation Directive is more comprehensive (including administrative and criminal measures).

7. Confiscation

In the area of asset confiscation, there is also a difference between EU and Swiss law. The EmbA and the EU Violation Directive both provide for the possibility of assets confiscation. However, the EU Violation Directive allows for extensive confiscation (the modalities of which are governed in the EU Directive on the Asset Recovery and Confiscation), including of assets that are themselves subject to sanctions.

The Swiss regulations are much more restrictive and follow the principle that assets can only be confiscated under very limited conditions. Art. 13 EmbA provides for the possibility of confiscating objects and assets (i.e. all types of financial benefits) that are subject to a sanction, regardless of whether a specific person is criminally liable, only if their further lawful use is not guaranteed. It is therefore not possible to generally confiscate funds, as their continued lawful use can be guaranteed.

Furthermore, Switzerland does not allow the confiscation of assets or economic resources that have not been acquired through criminal activity and are therefore not considered unlawful until proven otherwise. Goods that have been unlawfully imported into Switzerland may however be confiscated.

8. Conclusion

This short comparison shows that both the EU and Switzerland have comparable legal instruments at their disposal to ensure sanctions compliance and prosecute transgressions. Where the Swiss regime is

stricter when dealing with individuals, extending criminal culpability also in instances of negligence, the EU law is more severe when it comes to the height of fines imposable on companies running afoul of sanctions rules.

A major difference is to be found with regard to the issue of confiscation where the Swiss rules are more curtailed: expropriating individuals without compensation outside the realms of a criminal procedure would in all likelihood be tantamount to a breach of the Swiss constitution and Switzerland's international obligations.