

## Freezing, Forfeiture and Restitution of Illicit Assets of Politically Exposed Persons Abroad: New Regime Applicable as of July 1st, 2016

As the 'Arab Spring' (2011) and the Ukraine Crisis (2014) have shown, absent any appropriate legal framework, the Swiss Federal Council had no choice but to recourse to an emergency clause of the Swiss Federal Constitution to freeze the assets of the overthrown political leaders and members of their inner circle.

In order to provide the Federal Council and the other competent authorities with a formal legal basis to the deployment of Switzerland's policy in the area of the recovery of illicit assets, the Swiss Parliament has adopted the Federal Act on the Freezing and Restitution of Illicit Assets of Politically Exposed Persons Abroad ("**Federal Act on Illicit Assets**") on December 18, 2015.

The Federal Act on Illicit Assets will enter into force on July 1st, 2016. Its contents is of particular relevance not only for those who are directly impacted by the measures ordered by the Federal Council, but also for any person managing, dealing with or otherwise aware of assets of foreign Politically Exposed Persons ("**PEPs**") on Swiss soil. The purpose of this briefing is to provide an overview of the mechanics and some of the key provisions.

### Freezing of Assets

There are two distinct grounds that may lead to the freezing of assets.

#### Freezing in View of Mutual Legal Assistance (Art. 3)

This provision codifies the practice developed by the Federal Council under the Swiss Federal Constitution. It enables the Federal Council to freeze assets in Switzerland that are either placed under the disposal power of, or beneficially owned

by PEPs or their closely related persons, whether in person or via a legal entity. For consistency purposes, the notions of PEPs and closely related persons are inspired by the definitions provided by the Financial Action Task Force and the Anti-Money Laundering Act.

The aim of the preventive freezing of assets pursuant to Art. 3 is to avoid the dissipation of assets and give time for the State of origin to request mutual legal assistance, provided however that, cumulatively:

- The government of the State of origin or certain of its members have lost their power or a change of the regime in place appears inexorable.

It means that the Federal Council is not allowed to intervene if the government of the State of origin is corrupted, but still in place;

- The degree of corruption of the State of origin is notoriously high;
- It is likely that the relevant assets were acquired by corruption, mismanagement or other crimes;
- The safeguarding of Switzerland's interest requires the freezing of such assets.

The asset freezing is ordered by the Federal Council by issuing an ad hoc ordinance, to which is enclosed the nominative list of the targeted individuals (Art. 5). Such list will be available online and may be amended under certain requirements.

The freezing ordinance itself is not subject to appeal (Art. 21 III). To challenge the freezing of assets, the concerned person has to request its removal from the list before the Federal Department of Foreign Affairs ("**FDFA**") (Art. 20 I), which will render a decision subject to appeal.

Any freezing ordinance based on Art. 3 may be rendered for a period of four years (Art. 6 I), which may be renewed for additional periods of one year, provided however that it shall never exceed ten years.

## Freezing in Case of Failed Mutual Legal Assistance (Art. 4)

In the event that mutual legal assistance has failed, the Federal Council may decide, in view of their forfeiture, to freeze assets in Switzerland that are either placed under the disposal power of, or beneficially owned by PEPs or their closely related persons, whether in person or via a legal entity. Such freezing is subject to the following cumulative requirements:

- The assets were previously frozen in the frame of mutual legal assistance proceedings initiated at the demand of the State of origin;
- The State of origin is unable to meet the requirements of the mutual legal assistance proceedings because of the collapse of all or

a substantial part of, or the dysfunction of, its judicial apparatus (failing State situation);

- The safeguarding of Switzerland's interest requires the freezing of such assets.

The freezing of assets is however also possible if, after the receipt by Switzerland of a request for mutual legal assistance, it appears that the cooperation with the State of origin is excluded because of concerns that the latter is unable to comply with the elementary procedural principles set forth in the European Convention for the Protection of Human Rights or in the International Covenant on Civil and Political Rights (Art. 4 III).

The rationale hereof is that it would not serve Switzerland's interests if the efforts deployed to return illicit assets are jeopardized for the only reason that the State of origin is not complying with procedural principles.

The freezing decision rendered in case of failed mutual legal assistance may be appealed before the Federal Administrative Tribunal ("**FAT**") (Art. 21 I).

## Forfeiture of Assets (Art. 14)

Following the freezing of assets based on Art. 4, an administrative forfeiture may be requested by the Federal Department of Finance ("**FDD**"), upon instruction of the Federal Council, before the FAT. A legal presumption that assets have a criminal origin will apply where (i) the wealth increased in an exorbitant fashion, and (ii) the degree of corruption of the State of origin was notoriously high during the relevant period of office.

In case of a forfeiture, the restitution of assets to the State of origin will be made through the financing of programs of public interests.

## Money Laundering Reporting Office Switzerland ("MROS") as a "One-stop-shop"

### Duty to Report and to Inform (Art. 7)

Any individual or entity holding or managing (e.g. banks, wealth managers, fiduciaries, etc.) or otherwise aware of assets in Switzerland subject to freezing measures in view of mutual legal assistance (Art. 3) shall promptly report such assets to MROS. Due to their professional secrecy, attorneys and notaries are exempted from such duty to report.

The information collected by MROS is shared with the FDFA and the Federal Office of Justice.

Subject to certain restrictions, in particular if there is a risk of depreciation, the relevant assets may continue to be managed whilst frozen.

Non-compliance with freezing orders or the breach of the duty to report to MROS may trigger criminal sanctions (Art. 25-27).

### Transmission of Information to the State of Origin (Art. 13)

As part of the catalogue of measures intended to support the State of origin in view of the restitution of frozen assets, the Federal Act on Illicit Assets contains a central innovation: subject to certain restrictions, MROS is entitled to spontaneously transfer any information – including banking information – gathered in application of such Act to its foreign counterpart, for the purposes of assisting the State of origin with the filing, or completing of a request for mutual legal assistance (Art. 13).

No actual means of evidence can be provided, however MROS' report to the attention of its foreign counterpart may contain detailed information, such as the bank account number, account holder and beneficial owner's name, etc.

The information sharing set forth above may not be appealed by the concerned person, which will

have to challenge the transmission of information in the context of an appeal either against a freezing decision based on Art. 4, or against a closing order in the context of the mutual legal assistance proceedings.

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