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Swiss sanctions policy

Improvements and shortcomings in implementation

Par Sandrine Giroud le 4 December 2023

On November 14, 2023, the Control Committee of the Council of States (CdG-E) published its follow-up report on the Confederation's involvement in the implementation of economic sanctions.

Following recurrent criticism of Switzerland's policy in this area, which some consider too strict, others too lax, the Management Committees of the Federal Chambers of Parliament (CdG) had already decided in 2016 to commission the Parliamentary Control of Administration (CPA) to evaluate the Confederation's involvement in the application of economic sanctions. The task was assigned to the CdG-E. In its 2018 report, it made five recommendations to the Federal Council :

Transparent application of the criteria used to assess the appropriateness of ordering sanctions ;
Examination of control instruments and their use ;
Examination and improvement of data quality in the field of customs declarations ;
Systematic use of information from customs data and declaration and authorization systems ;
strengthening SECO's monitoring and coordination role.

Following the Federal Council's opinion, CdG-E published a summary report on March 26, 2019 and closed its inspection. The resumption of European Union (EU) sanctions against Russia led CdG-E to launch a follow-up inspection.

With regard to its 2018 recommendations, CdG-E concludes that the basic data on the application of economic sanctions has been improved and that the movement of goods is being monitored more accurately.

With specific regard to measures relating to the situation in Ukraine, the CdG-E considers that the Federal Council's adoption of the sanctions ordered by the EU has been adequate. It also acknowledges the work of SECO, which is facing major resource challenges. According to the Federal Council, the Ordinance instituting measures in connection with the situation in Ukraine (O-Ukraine) is the most comprehensive and detailed ordinance that the Federal Council has adopted for the resumption of sanctions, and its implementation thus poses partly unprecedented challenges.

However, CdG-E has identified a number of shortcomings, and has made the following

recommendations :

Clarification of the scope of the obligation to declare lawyers : The doubt raised by the Federal Council's statements concerning the need for clarification in case law of the limits of the obligation to declare lawyers under art. 16 O-Ukraine is problematic. CdG-E recommends that the legal framework of the obligation to declare and its relationship to lawyer-client confidentiality be defined with sufficient precision to avoid any ambiguity.
Integration of the cantons' role in implementing sanctions : Several cantons were not aware of their role in this area, and the CdG-E recommends better integration.
Clarification of the role of the land register in the implementation of sanctions : The CdG-E noted in particular a doubt as to the legal bases applicable to the mention of a freeze in the land register and suggested examining the advisability of a legal basis giving SECO the competence to validate acquisitions in connection with sanctions.
Assessment of the adequacy of SECO's crisis concept : CdG-E considers that SECO has sometimes reacted too late to uncertainties relating to the obligation to announce, the mention of a freeze in the land register and the obligations incumbent on lawyers. CdG-E calls on the Federal Council to assess the adequacy of SECO's crisis concept and to ensure that it is more flexible and responsive in times of crisis.
Improving the guarantee of the rule of law in connection with the list of sanctioned persons : According to SECO's explanations, the Confederation is taking over the EU's list of sanctioned persons as it stands, as Switzerland does not have the necessary information via the Confederation's intelligence service (SRC) to assess all the entries on these lists one by one. CdG-E considers that this raises questions from the point of view of the rule of law. It also points out that, while the persons concerned can request a delisting, this process is tedious. Furthermore, the political nature of economic sanctions means that this option is not a legal one, and that the rapid resumption of sanctions and the corresponding lists often take precedence over other considerations. CdG-E asks the Federal Council to examine how the material validity and legal conformity of the list of sanctioned persons drawn up by the EU and taken over by Switzerland can be guaranteed and improved. It also asks the Federal Council to examine ways of improving judicial control of this legal conformity and the speed of the related control procedures.

The report also mentions the Federal Council's position on a number of recurring issues :

The overcompliance of major Swiss banks in applying international sanctions in addition to those that are binding in Switzerland. Under supervisory law, banks are required to identify, limit and control legal and reputational risks. These risks may also arise from foreign legislation, including sanctions. Case law to date has established that the application of foreign sanctions by banks and companies in Switzerland is, in certain cases, in line with Swiss law.
The primacy of the obligation to denounce (art. 16 O-Ukraine) over tax secrecy.
The confiscation of frozen assets for the reconstruction of Ukraine, which was deemed to contravene current law and in particular constitutional guarantees.

The report provides a useful overview of Switzerland's application of sanctions, and points to significant shortcomings in the current system. One point not addressed is the ban on providing certain legal services under art. 28e O-Ukraine, whose European counterpart is currently the subject of an annulment appeal initiated by the Belgian and Paris Bars, supported in particular by the Geneva Bar Association.

Although legitimate in principle, sanctions must respect the guarantees of a state governed by the rule of law, as the CdG-E helpfully reminds us. The Federal Council must adopt a position on the CdG-E's recommendations by February 15, 2024. Future developments in Swiss sanctions law can therefore be expected.

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