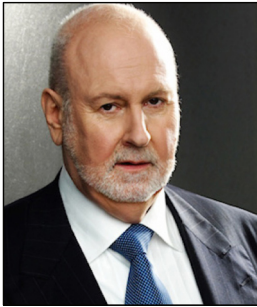


Switzerland and the EU have gone astray with their sanctions policy against Russia

Russians, whether sanctioned or not, are placed under general suspicion in the sense of collective punishment. A reorientation is overdue

by Carl Baudenbacher, Switzerland*



Carl Baudenbacher
(Picture <https://baudenbacher-law.com>)

February 24, 2024 marks two years since Russia invaded Ukraine. The European Union then imposed sanctions, which Switzerland joined. In Europe, the United Kingdom has also set up its own sanctions regime. In addition to companies and organizations, the sanctions list includes individu-

als accused of supporting, financing or carrying out actions that undermine the territorial integrity, sovereignty and independence of Ukraine, or of profiting from such actions. Sanctions include travel bans and asset freezes.

The Swiss sanctions system is characterized by numerous shortcomings. Russians, whether sanctioned or not, are placed under general suspicion in the sense of collective punishment. Certain Swiss banks treat Russian customers as people of inferior status. The tone in letters and emails is inappropriate.

Russian customers who want to withdraw the money that belongs to them are confronted with alleged rules that do not exist. In other cases, people sit on their high horse, shrug their

shoulders and refer to compliance regulations, saying that they cannot put their “good reputation” at risk. Sanctions imposed by countries that Switzerland is not even obliged to adopt are used as an excuse to refuse to pay out money to Russian clients.

The legal understanding of certain Swiss banks regarding the scope of foreign sanctions regimes and their “autonomous” implementation by these same banks as well as the creation of their own sanctions compliance rules (“Swiss banks’ finish”) give rise to serious constitutional concerns. There is a tendency to instinctively apply any international sanctions regime, citing an alleged extraterritorial effect.

I often hear the argument that as a Swiss financial institution that provides services worldwide, the bank must also comply with foreign laws and regulations within the framework of Swiss banking regulations. And it is obliged to take a strict approach when interpreting all sanctions provisions.

In other words: The banks apply foreign restrictive measures and thus give them a direct effect in Switzerland. This does not stand up to legal scrutiny.

In a recent case where the client was designated by the British sanctioning authorities (and only by them), a Geneva private bank active in asset management has blocked the assets and categorically refuses to execute payment orders from the client, despite the British sanctions for various reasons are not applicable to the banking relationship in question.

Instead of responding to the customer's legitimate questions and seeking dialogue with him, the bank is playing for time in the hope that the customer will refrain from taking legal action for reasons of opportunity or end up on another sanctions list. A customer does not have to put up with such behavior. Consequently, lawsuits from affected customers against banks can be expected in the near future. Does it really have to come to this?

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The authorities contributed to this situation. They talk directly to the banks, sometimes behind the customer's back, claiming that they are overloaded and taking their time answering even the smallest of inquiries. In individual cases even the presumption of innocence is turned on its head.

A company from the EU, which has bank accounts in Switzerland and is not sanctioned in either Brussels or Bern, was denounced by a Swiss bank to the responsible federal office with the claim that there were uncertainties in a larger transaction.

Since then, it has had the status of an unsanctioned company, which is not provided for by law, but has not been declared not to be subject to sanctions. Every small transaction needs to be approved. And this despite the fact that the authorities did not even check the legitimacy of the smear.

The way in which the sanctions lists are created is also shocking. In the EU, there is information about those sanctioned that feels like it was put together by an intern through Googling. Contact guilt seems to be sufficient. Wives whose only offense is marriage to a sanctioned man are also happily sanctioned. In Switzerland the lists are then simply copied and pasted. At least the courts abroad seem to be intervening.

On January 19, 2024, the Hamburg Regional Court prohibited the US business magazine *Forbes* from carrying out an unsubstantiated character assassination campaign against the Uzbek entrepreneur *Alisher Usmanov*. In the EU and Switzerland, individuals have defended themselves in court against being included in the sanctions lists. In any case, there is a tendency in the EU towards an unjustifiable fundamental rights relativism.

The attempt to justify interference with freedom of property by claiming that they are only of a temporary nature – for example when freezing assets – is not convincing. Anyone who is left with their “nuda proprietas” and has to have every expense approved by the authorities for the needs of everyday life no longer works, and they do not know when or if it will work again at all. He is in the same situation as the person whose property was confiscated without compensation.

US President *Woodrow Wilson* was particularly obsessed with the idea of sanctions, describing sanctions as «something more violent

than war» in 1919, immediately after the end of the First World War. What is threatened is “absolute isolation [...] that brings a nation to lose its senses, just as suffocation deprives the individual of any inclination to fight [...]” “Use this economic, peaceful, silent, lethal means and there will be no need for violence.” [...] “It is a terrible remedy. It costs no life outside the boycotted nation, but it puts a pressure on that nation that I believe no modern nation could withstand.” Whether Wilson himself believed in the accuracy of his prediction is unknown. But the fact is that it was already falsified when it was submitted.

Here it is sufficient to point out the failure of the continental blockade imposed by Napoleon against Great Britain in November 1806. After World War II, U.S. sanctions against Cuba and Iran were enormous failures.

The EU and Switzerland's sanctions against Russia are also a failure. As always in such cases, there were workarounds. Representatives of the German Economic Institute stated as early as October 2023 that the sanctions had «clearly failed». Other observers and even politicians share this view.

But this cannot be without consequences for the answer to the question of whether the sanctions are legally permissible. The interference with fundamental rights thus become disproportionate.

The principle of proportionality is a classic European legal principle. In Switzerland, the *principle of proportionality* is even codified in the federal constitution. Article 5 paragraph 2 stipulates: “Government action must be in the public interest and proportionate.”

The *Court of Justice of the European Union*, the *European Court of Human Rights*, the *EFTA Court of Justice* and the *Swiss Federal Court* have developed a finely detailed case law on the principle of proportionality, which can be summarized as follows: To be lawful, an interference with fundamental rights must (1) pursue a legitimate aim, (2) be suitable for achieving the goal, (3) be necessary for achieving the goal (i.e. the mildest means).

The Russia sanctions pursue a legitimate goal, namely to effectively thwart Russia's ability to continue aggression. On the other hand, there is a lack of suitability for achieving the goal and a lack of necessity.

The EU and Switzerland have made a mistake with their sanctions policy against Russia. A re-

orientation is overdue. Until that happens, the basic rights of those affected must be protected. Abuse of power by authorities cannot be tolerated.

We in Western Europe are lucky to live in constitutional states. Our constitutions (supplemented by supranational regulations such as the ECHR) guarantee fundamental rights to everyone who lives or works within our borders. These regulations were mostly enacted after this continent's darkest period.

The principle of good faith and the prohibition of abuse of rights should also prevent business

partners from using the sanctions regulation as an excuse for disregarding legitimate contractual claims.

Unfortunately, it appears to be a willingness to ignore the most important principles of our legal system when a measure is aimed, even indirectly, at a Russian person or entity. This is, to paraphrase Talleyrand, worse than a crime, it is a mistake.

Source: <https://insideparadeplatz.ch/2024/02/01/schweiz-und-eu-haben-sich-mit-sanktionspolitik-gegen-russland-verrannt/>, February 1, 2024

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