LALIVE/Peters & Peters Seminar


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Overview

I. Context
   A. Unresolved cases
   B. The 2011 Arab Spring

II. The Swiss solution
   A. Current legal regime
   B. Federal Act on the Freezing and Restitution of Assets of PEPs obtained by Unlawful Means (FRIAA)

III. Key elements for banks and financial intermediaries

IV. Conclusion
I. Context – Unresolved cases

- **Duvalier case**
  - 1986: approx. CHF 7,5 million frozen
  - 2010: decision of the Swiss Federal Supreme Court to release the assets (*failure of MLA proceedings*)
  - 2010: immediate freezing order of the Swiss government (Art.184(3) Cst.)
  - 2011: RIAA → action in confiscation pending

- **Mobutu case**
  - 1997: approx. CHF 7,7 million frozen
  - 2009: Switzerland had to return the assets to Mobutu’s heirs → *failure of mutual legal assistance proceedings*
## I. Context – The 2011 Arab Spring

<table>
<thead>
<tr>
<th>Country</th>
<th>Case</th>
<th>Date</th>
<th>Amount frozen (approx.)</th>
<th>Legal basis</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tunisia</td>
<td>Ben Ali</td>
<td>19.01.2011</td>
<td>USD 60 million</td>
<td>Art. 184(3) Cst.</td>
</tr>
<tr>
<td>Ivory Coast</td>
<td>Gbagbo</td>
<td>19.01.2011</td>
<td>USD 60 million</td>
<td>Art. 184(3) Cst.</td>
</tr>
<tr>
<td>Egypt</td>
<td>Mubarak</td>
<td>11.02.2011</td>
<td>USD 700 million</td>
<td>Art. 184(3) Cst.</td>
</tr>
<tr>
<td>Libya</td>
<td>Gaddafi</td>
<td>21.02.2011</td>
<td>USD 100 million</td>
<td>Art. 184(3) Cst.</td>
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<td></td>
<td></td>
<td>30.03.2011</td>
<td>USD 100 million</td>
<td>Art. 2 Embargo Act (UN sanctions)</td>
</tr>
<tr>
<td>Syria</td>
<td>Assad</td>
<td>18.05.2011</td>
<td>USD 100 million</td>
<td>Art. 2 Embargo Act (EU sanctions)</td>
</tr>
</tbody>
</table>
II. The Swiss solution – Current legal regime (1/2)

- Art. 184(3) Cst.  
  “Where safeguarding the interests of the country so requires, the Federal Council may issue ordinances and rulings. Ordinances must be of limited duration.”

- Switzerland’s interest to prevent the misuse of its financial centre

- E.g. foreign policy, human rights, economy
II. The Swiss solution – Current legal regime (2/2)

Problem of **legality**:

- Insufficient legal basis to freeze assets of ousted PEPs
- No legal basis to freeze assets of heads of States about to be ousted
- Insufficient legal basis regarding the disclosure of banking information (banking secrecy)

**Third parties’ rights** excluded

**Legal remedies** unclear
II. The Swiss solution – FRIAA (1/2)

FREEZING

- Disclosure obligation
  - Assistance
    - Technical assistance
    - Transfer of information

Pre-MLA

- Ousted or about to be ousted PEPs

Failing State

- Assets held/知识 of
- Exclusion of third party rights
- Even outside MLA procedural standards (ECHR)

CONFISCATION

- Failing State

RESTITUTION

- Public interest programs

Legal remedies

- Listing/delisting
- No compensation
### II. The Swiss solution – FRIAA: Points of concern (2/2)

<table>
<thead>
<tr>
<th>FRIAA</th>
<th>Problems</th>
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<tr>
<td>“the first of its kind in the world”</td>
<td>• Revolutionary legislation but no level playing field</td>
</tr>
<tr>
<td></td>
<td>• New business (2,5% rate)?</td>
</tr>
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<td>Targets assets of ousted PEPs or about to be deposed</td>
<td>Issue of immunity</td>
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<tr>
<td>Imbalance regarding parties’ rights</td>
<td>• No guidelines for listing/delisting</td>
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<td>• Absence of procedural safeguards (e.g. ECHR)</td>
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<td>• Limited legal remedies</td>
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<td>Exclusion of third parties’ rights</td>
<td>No legal avenues/compensation for victims</td>
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<td>Strong political component &amp; several notions undetermined</td>
<td>Legal uncertainty</td>
</tr>
</tbody>
</table>
III. Key elements for banks and financial intermediaries

Points of focus

► Enhanced due diligence duties
► Definition of PEPs in line with FATF Recommendations
► Disclosure obligations (assets held/knowledge of)
► Political assessment

Risks

► Criminal liability in case of non-compliance (Art. 24–26) → Individual liability or offences in business operations
► Civil liability in case of unjustified disclosure of clients’ data (breach of contract)
IV. Conclusion

- **(+)** Consolidation of Swiss practice and legal framework → Legal basis for the freezing, disclosure, confiscation and restitution of PEPs assets

- **(-)** Imbalance regarding parties’ and third parties’ rights → Listing/delisting, limited legal remedies → Lack of legal avenues for potentates’ victims

- **(-)** Swiss finish → Several notions undetermined or unclear

- **(-)** Strong political component → Lack of predictability and legal certainty
Thank you

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