

Ownership, control and the reach of the freeze

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The freeze in Article 15 extends to entities owned or controlled by listed persons, although the ordinance does not define ownership or control. In the first period after the invasion practitioners relied on EU guidance and on SECO's informal answers, until SECO published criteria of its own, which it last updated on 13 June 2024. Ownership exists where a person holds more than 50 per cent of the ownership rights in an entity. Holdings of several sanctioned persons are aggregated, and indirect holdings count. Control is assessed by a non-exhaustive list of criteria, of which one suffices. The list comprises the right, formal or de facto, to appoint or dismiss the majority of the board, a majority of voting rights, a controlling influence by contract, deed or articles of association that may be exercised through third parties, control over the allocation of funds and assets, the management of business operations, liability or financial guarantees for the entity and influence through loans. Where assets are transferred to third parties, SECO examines whether the listed person retains control by looking at family and close relationships, the economic independence of the recipient, the frequency of benefits after the listing, agreements between the parties and compliance with the arm's length principle.¹

These criteria resemble those of the European Union, while they differ from the American rule in two respects. Under OFAC's 50 Percent Rule, which dates in its revised form from 13 August 2014, entities owned 50 per cent or more in the aggregate by one or more blocked persons are themselves blocked. The American rule is a pure ownership test. An entity controlled, but less than 50 per cent owned, by blocked persons is not automatically blocked, although OFAC may designate it separately.² The Swiss and EU test is thus narrower on ownership, where it requires more than half, and wider on control, where it captures entities without any equity link. Contrary to a view sometimes voiced in practice, neither Swiss nor EU law contains a threshold of 35 per cent or any other intermediate

percentage. A minority holding is relevant only if it is combined with other holdings of listed persons to exceed half or if it gives rise to control.

For Zurich institutions the main practical difficulty lies in establishing the facts. Private banking clients from Russia often held their assets through layered structures in Cyprus, the British Virgin Islands, Luxembourg or Liechtenstein, with trusts or foundations at the top and nominee directors in between. After February 2022 many listed persons transferred shares to family members, business associates or foundations. Such transfers are not unlawful in themselves if they take place before the listing, but SECO examines whether the listed person continues to control the assets through them. Banks must therefore reconstruct ownership chains, obtain declarations from clients, examine powers of attorney and board minutes and, where doubts remain, report the relationship to SECO and wait for its assessment. The largest single case of recent years, the freeze of about CHF 1.3 billion in a foundation connected with the family of a listed oligarch, arose from exactly such a transfer, as Section VII explains.

The control test also affects the Swiss subsidiaries of foreign groups. A Swiss company whose parent is owned more than 50 per cent by a listed person is itself frozen, even if it was founded long before the war and has no Russian business. Groups with Russian shareholders may respond by reorganising their ownership so that the listed persons fall below the thresholds and lose control, a step that is lawful only if the loss of control is genuine. The legal risk remains with the institution and its advisers.

1 Notes

1. TA Advisory, “Sanctions Compliance – SECO Finally Defines Criteria for Ownership and Control”, <https://taadvisory.law/sanctions-compliance-seco-finally-defines-criteria-for-ownership-and-control/>, summarising SECO guidance updated on 13 June 2024. ↩
2. OFAC, “Entities Owned by Blocked Persons (50% Rule)”, FAQs 398 to 402, <https://ofac.treasury.gov/faqs/topic/1521/print>. ↩

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