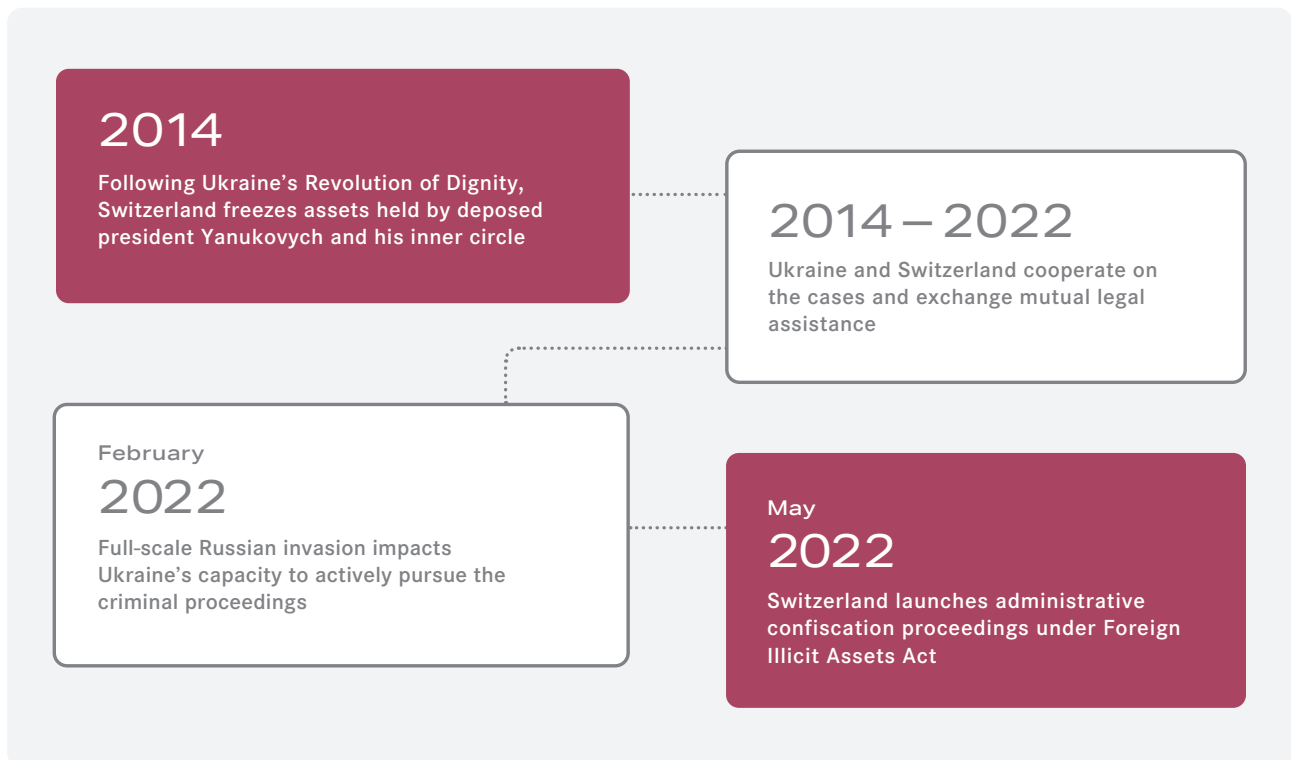


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## Using full legal means to confiscate illicit assets in a time of war

How Switzerland is putting to the test a rarely used but powerful law in order to confiscate assets connected to Ukraine's 2014 Revolution of Dignity, with the aim of returning these to Ukraine.



### Key points

- Switzerland is in the midst of administrative proceedings to confiscate around CHF 130 million in assets linked to the regime of former Ukrainian president Viktor Yanukovich.
- This case study examines the first of a series of cases concerned by these proceedings. Announced in May 2022, it involves over CHF 100 million in assets held by a close associate of the former president, Yuriy Ivanyushchenko and his family. They have been frozen in Switzerland since Yanukovich was deposed in Ukraine's 2014 Revolution of Dignity.
- These efforts are significant as they may allow the return of assets to the people of Ukraine at a time of immense need.
- Just as importantly though, the move demonstrates how states can proactively seek ways to use their full legal toolkit to confiscate illicit assets linked to political exposed persons and ensure they are put to good use.
- It also demonstrates how states have opportunities to strengthen their adoption and use of established asset recovery mechanisms to interrupt the type of kleptocracies that have enabled the war in Ukraine in the first place.

## The case

1. Following Ukraine's Revolution of Dignity in 2014 that saw the deposition of former President Yanukovich, the Swiss Federal Council ordered assets in Switzerland held by Yanukovich and his inner circle to be frozen. These included over CHF 100 million held by a close associate of the former President, Victor Iwanyushchenko.
2. Ukraine subsequently initiated criminal proceedings and requested that the same assets are also frozen under mutual legal assistance (MLA), in the anticipation and hope to confiscate them as part of Ukraine's criminal proceedings and to have them returned to Ukraine. The two countries cooperated extensively on the case.
3. The MLA request to freeze the assets was granted; similarly the administrative freeze on the assets was upheld and renewed in the following years as a consequence of the ongoing cooperation.
4. The full-scale Russian invasion in February 2022 changed the situation. Though Ukraine is still willing to cooperate, the war places extraordinary levels of stress on its state structures, including its criminal justice system. This has negative consequences on its capacity to actively pursue the criminal proceedings in Ukraine.
5. In May 2022, the Swiss Federal Council instructed the Federal Department of Finance to launch confiscation proceedings before the Federal Administrative Court. These proceedings are based on a law in force in Switzerland since 1 July 2016, the Federal Act on the Freezing and the Restitution of Illicit Assets held by Foreign Politically Exposed Persons or Foreign Illicit Assets Act (FIAA). The accused were also ordered to compensate the complainant bank severally and jointly in an amount of USD 1,250,000,000.
6. The FIAA governs (Article 1) "the freezing, confiscation and restitution of assets held by foreign politically exposed persons or their close associates, where there is reason to assume that those assets were acquired through acts of corruption, criminal mismanagement or by other felonies."
7. Article 4.2 of the FIAA sets out the exceptional conditions under which assets can be frozen in anticipation of initiating confiscation proceedings. These include that assets must already be frozen at the request of the country of origin within the framework of MLA, and that the country of origin can no longer "satisfy the requirements for MLA owing to the total or substantial collapse, or the impairment, of its judicial system".
8. This is exactly the case in Ukraine where, among other, law enforcement and anti-corruption officers have been redeployed to national defence, authorities' priorities have shifted to prosecuting war crimes, and access to evidence in Russian-occupied territories is no longer possible.
9. Following the formal issuance of the proceedings, the Federal Administrative Court needs to determine whether the conditions under the FIAA are met.
10. If the FIAA is applied, there is a legal presumption that the assets are of illegal origin unless the holder of the assets is able to demonstrate that they were acquired legitimately. The asset holder (in this case Iwanyushchenko) may appeal the verdict of the Federal Administrative Court before the Swiss Federal Tribunal, which will decide definitively.
11. If the freeze and then the confiscation are definitively pronounced by the courts at the end of this process, the Federal Council has already announced that it intends to return the confiscated assets to Ukraine under an international agreement.

## What can we learn from this case?

### Making full use of the legal toolkit

The case demonstrates how states can proactively seek ways to use their full legal toolkit to confiscate illicit assets linked to political exposed persons and ensure they are put to good use. Laws that may have been largely dormant can become highly relevant when circumstances change. And with that, new jurisprudence can emerge and lead the way forward in boosting the recovery of stolen assets, both in the concerned jurisdiction and by inspiring others to consider similar legal pathways.

This may require legal reforms and the adequate resourcing and empowerment of law enforcement. Above all, it requires political will to live up to international commitments on asset recovery.

### Seeking broader benefits for the fight against kleptocracy

The first cases under any asset recovery law are inevitably challenging, but they often set important precedents.

Moreover, if states take proactive measures to enhance the effectiveness and scope of established asset recovery measures, additional benefits can be derived for the broader fight against financial crime and kleptocracy.

### Use of established legal mechanisms that do not violate the rule of law

Though this case is not linked to Russian sanctions, it underscores an important point. In the context of the war in Ukraine, calls have been growing for states to confiscate Russian-linked assets frozen under sanctions in order to redirect them to provide support to Ukraine.

The desire to raise funds to support Ukraine's reconstruction is fully justified, as is the notion that Russia should pay for damages. However, passing new laws that enable a state to confiscate assets purely on the basis of sanctions without proof they are criminal in nature and without adequate judicial review, as for

example Canada has done, is a dangerous path. It risks violating fundamental principles of the rule of law, defeating the purpose of sanctions and undermining global efforts to combat financial crime.

We advocate that instead, existing laws should be more carefully examined to see if they offer a viable – and tested – alternative. The use of the FIAA in Switzerland is an example, even if not directly relevant in the context of assets frozen under sanctions. This will significantly increase the chance of recovering assets without subsequent legal challenges, as well as maintain the rule of law that Ukraine's people are fighting for.

## Further reading

- See the Swiss Government's press releases on 25 May 2022: *Confiscation proceedings in connection with 2014 Ukraine revolution* (<https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-89033.html>) and on 16 February 2023: *Over CHF 130 million from entourage of former Ukrainian President Yanukovich targeted in confiscation proceedings* (<https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-93078.html>).
- Learn about the *Foreign Illicit Assets Act* at: <https://www.fedlex.admin.ch/eli/cc/2016/322/en> (English translation).
- See the Basel Institute's Working Paper 42: *Confiscating assets frozen under sanctions without undermining the rule of law*, by Andrew Dornbierer, <https://baselgovernance.org/publications/wp-42>.
- The Basel Institute has been supporting the relevant authorities in Ukraine since 2014 with the support of the Swiss Agency for Development and Cooperation in Ukraine and our core donors for asset recovery, namely the Governments of Jersey, Liechtenstein, Norway, Switzerland and the United Kingdom.

## Keywords

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## About this Case Study

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