

**LALIVE/Peters & Peters Seminar**  
***Draft Federal Act on the Freezing and  
Restitution of Potentates' Assets:  
A Critical Review***

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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

Country	Case	Date	Amount frozen (approx.)	Legal basis
Tunisia	<i>Ben Ali</i>	19.01.2011	USD 60 million	Art. 184(3) Cst.
Ivory Coast	<i>Gbagbo</i>	19.01.2011		Art. 184(3) Cst.
Egypt	<i>Mubarak</i>	11.02.2011	USD 700 million	Art. 184(3) Cst.
Libya	<i>Gaddafi</i>	21.02.2011	USD 100 million	Art. 184(3) Cst.
		30.03.2011		Art. 2 Embargo Act (UN sanctions)
Syria	<i>Assad</i>	18.05.2011	USD 100 million	Art. 2 Embargo Act (EU sanctions)

## 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.”*



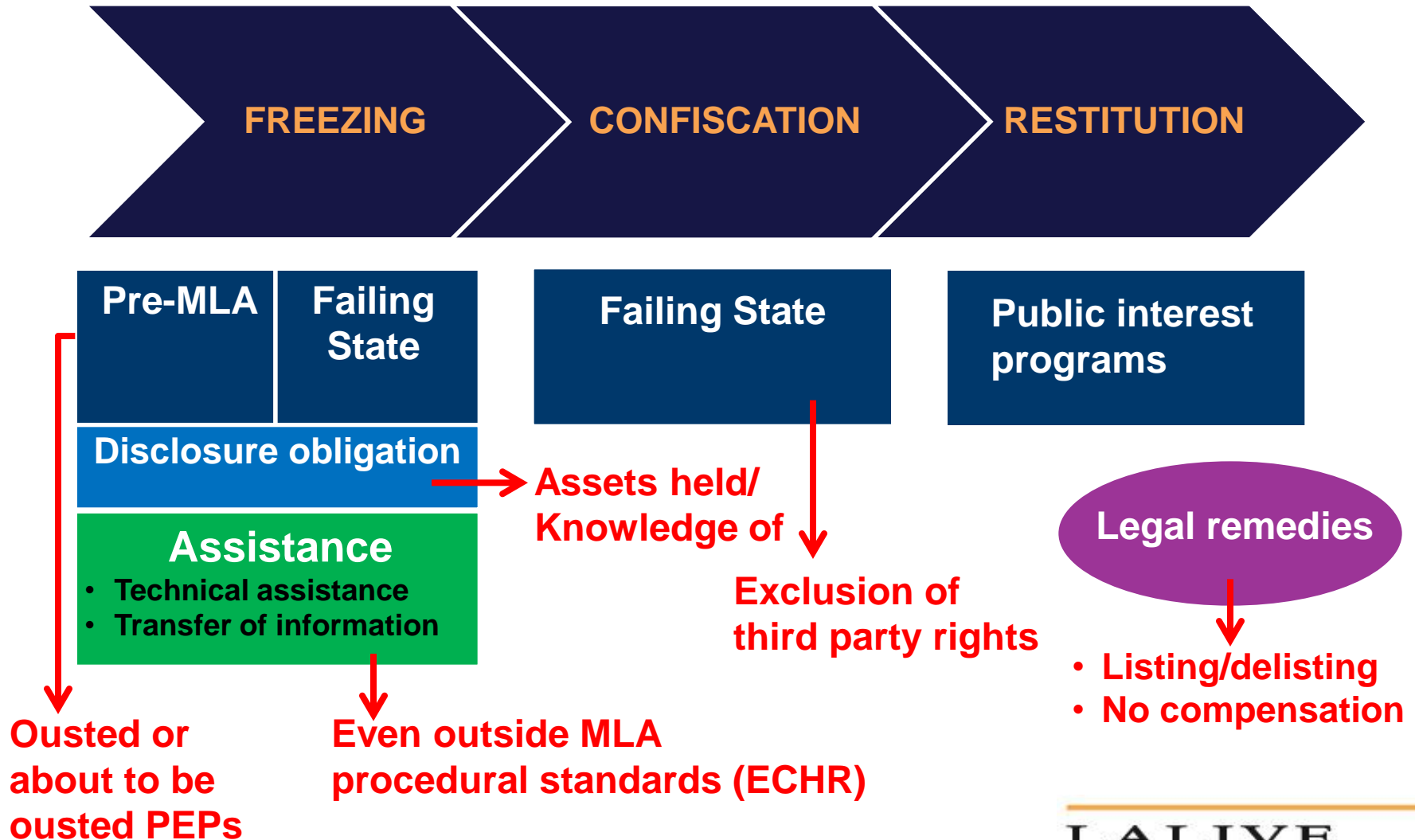
- Switzerland’s interest to **prevent the misuse of its financial centre**

- 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)



## II. The Swiss solution – FRIAA: Points of concern (2/2)

FRIAA	Problems
<p><i>“the first of its kind in the world”</i></p>	<ul style="list-style-type: none"> <li>• Revolutionary legislation but no level playing field</li> <li>• New business (2,5% rate)?</li> </ul>
<p>Targets assets of ousted PEPs or about to be deposed</p>	<p>Issue of immunity</p>
<p>Imbalance regarding parties’ rights</p>	<ul style="list-style-type: none"> <li>• No guidelines for listing/delisting</li> <li>• Absence of procedural safeguards (e.g. ECHR)</li> <li>• Limited legal remedies</li> </ul>
<p>Exclusion of third parties’ rights</p>	<p>No legal avenues/compensation for victims</p>
<p>Strong political component &amp; several notions undetermined</p>	<p>Legal uncertainty</p>



# 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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