



PEACE NEGOTIATIONS
POST-CONFLICT CONSTITUTIONS
WAR CRIMES PROSECUTION

REPURPOSING FROZEN RUSSIAN ASSETS: ANALYSIS UNDER THE LAWS OF THE EUROPEAN UNION

Prepared by the

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**REPURPOSING FROZEN RUSSIAN ASSETS:
ISSUES UNDER THE LAWS OF THE EUROPEAN UNION**

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Statement of Purpose

This memorandum summarizes and analyzes the legal framework that underlies the freezing, seizing, and potential repurposing of Russian frozen assets under the laws of the European Union. This document is a corollary memo to the Policy Planning White Paper on Repurposing Frozen Russian Assets, which can be found [here](#).

What is the Framework under EU law to Freeze Assets?

Asset freeze is a restrictive measure (more commonly referred to as sanction) that may be used to pursue the objectives set out within the framework of the EU's Common Foreign and Security Policy. These objectives can be found in Article 21(2) of the Treaty on the European Union and include, among other things, safeguarding the Union's values, preserving peace, strengthening international security and supporting democracy, the rule of law and human rights.¹

The European Union (“EU”) can adopt restrictive measures under the specific rules of the Common Foreign and Security Policy, regulated by Chapter 2 of Title V of the Treaty on the European Union, more specifically Article 29, which states the following:

The Council shall adopt decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature. Member States shall ensure that their national policies conform to the Union positions.

Therefore, the Council of the EU can adopt sanctions against governments of third countries (non-EU countries), non-state entities (for example, companies), and individuals (for example, terrorists) to make them change their policies or activities. It is standard practice for the EU to decide on international sanctions by adopting Council Decisions based on the aforementioned Article 29. As a rule, unanimity is required for such a decision, as stated in Article 31 of the Treaty on the European Union. Because of the binding nature of the Treaty, EU Member States are required to furthermore ensure that their national policies are compatible with the Treaty.

¹ Consolidated version of the Treaty on European Union (2012) OJ C326/13, *available at* https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF.

Article 215 of the Treaty on the Functioning of the European Union allows the Council to adopt necessary measures to implement decisions made under Article 29 of the Treaty on the European Union, to ensure that they are applied uniformly in all Member States. Article 215 of the Treaty on the Functioning of the European Union states the following:

1. Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof.
2. Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities.
3. The acts referred to in this Article shall include necessary provisions on legal safeguards.²

Therefore, the Council may decide to suspend or restrict, in whole or in part, economic and financial relations with one or more third countries. The Council may also, pursuant to the same article, adopt the measures necessary to implement decisions adopted under Article 29 of the Treaty on the European Union to ensure a uniform application in all Member States. The Council may thus adopt restrictive measures against natural or legal persons and groups or non-state entities. One such type of sanction is the freezing of funds and economic resources of individuals. Freezing means:

[...] temporarily prohibiting the transfer, destruction, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority.³

Asset freeze is adopted based on Article 215 of the Treaty on the Functioning of the European Union and, therefore, must be "necessary." The requirement of necessity can be considered to correspond to the principle of

² Consolidated version of the Treaty on the Functioning of the European Union, 2012, OJ L. 326/47-326/390, available at

<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF>.

³Article 1 of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, available at <https://rm.coe.int/168008371f>.

proportionality, as set out in both Article 5(4) of the Treaty on the European Union and Article 296(1) of the Treaty on the Functioning of the European Union. This principle means that the measures must not "go beyond what is necessary to achieve the objectives of the Treaties." As for the proportionality assessment itself, a balance has to be struck between the objectives arising from the general interest of society and the interest of the individual.⁴

What are the Sources Allowing for the Confiscation of all Relevant Assets in EU Law?

Confiscation is the final step in the process of preventing criminals from gaining access to their illicit assets. The term "confiscation" is defined as "a definitive deprivation of property ordered by a court in connection with a criminal offence."⁵

There are several phases required for a confiscation to be effective. The first phase is an investigative phase to identify and track suspected assets to eventually confiscate them. Once the suspected assets have been identified, the next phase is to freeze the assets. It is necessary that the frozen assets are well managed in order to preserve their value. The third phase is when the court orders the confiscation of the identified and possibly frozen assets. The fourth phase is the execution of the confiscation order. The fifth and last phase is the disposal of the confiscated assets, which may result in their reuse for public or social purposes.⁶ This memorandum will only focus on the third phase, which is when different types of assets may be confiscated.

Article 83(1) of the Treaty on the Functioning of the European Union allows the EU to adopt directives establishing minimum rules for certain specific cross-border offences (so-called "EU crimes"). These specific offences are terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, cybercrime, and organized crime. Only those cross-border EU crimes that are particularly serious deserve to be dealt with at the EU level.⁷ Therefore, the list in Article 83(1) is exhaustive

⁴ In Joined Cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation against Council of the European Union, p. 360, *available at* <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62005CJ0402>.

⁵ Article 2 of the Directive 2014/42/EU of the European Parliament and of the Council on freezing and confiscation of instrumentalities and proceeds of crime in the EU, *available at* <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0042&from=EN>.

⁶ Johan Boucht, Asset confiscation in Europe - past, present, and future challenges, 26 JOURNAL OF FINANCIAL CRIME 526, pp- 526-548 (2019) *available at* <https://doi.org/10.1108/JFC-04-2018-0043>

⁷ See the definition in Article 83(1) of the Treaty on the Functioning of the European Union.

and new crimes can only be added with the consent of the European Parliament followed by a unanimous decision of the Council.⁸

The Directive 2014/42/EU ("**Confiscation Directive**") is based on Article 83(1) of the Treaty on the Functioning of the European Union and addresses confiscation of assets. Article 3 of the Confiscation Directive lists a number of EU legal acts covering serious crimes such as corruption, terrorism and human trafficking, that may lead to confiscation of assets.⁹

Asset confiscation is largely aimed at preventing the offender from obtaining financial benefits from their illegal conduct. The challenge with the confiscations law is to ensure an effective confiscation while still respecting the rights of the individual. Therefore, the EU legal rules on confiscation largely revolve around the fact that confiscation of assets should have occurred in the context of a conviction. However, the purpose of confiscation is not to act as an additional punitive measure, but rather to restore the status quo ante.

Conviction Based Confiscation (Article 4(1))

The "regular" type of confiscation is when assets are confiscated because of a criminal conviction. The purpose of such confiscation is to deprive the offender of their unlawful assets. The rules on this can be found in Article 4(1) of the EU Confiscation Directive, which states the following:

Member States shall take the necessary measures to enable the confiscation, either in whole or in part, of instrumentalities and proceeds or property the value of which corresponds to such instrumentalities or proceeds, subject to a final conviction for a criminal offence, which may also result from proceedings in absentia.

Therefore, this type of confiscation is dependent on a final conviction for a crime. However, the asset that is confiscated must, first, be deemed to give rise to financial gain for the crime and, second, it must be linked to the specific crime for which the person has been convicted. Therefore, the article requires **causality** between the assets and the offence. An illustrative example of this is the profits from a drug sale.

However, it is often difficult to prove that certain assets derive from a specific crime for which the person in question has been convicted. Even if it is

⁸ Article 83(1) Sec 3 of the Treaty on the Functioning of the European Union.

⁹ Directive 2014/42/EU of the European Parliament and of the Council on freezing and confiscation of instrumentalities and proceeds of crime in the EU, *available at* <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0042&from=EN>.

most likely that a particular asset has been derived from criminal activity, the claim for confiscation may be rejected under this article if the assets cannot be linked to the criminal activity for which the person has been convicted.

Criminal Non-Conviction Based Confiscation (Article 4(2))

Criminal non-conviction based confiscation covers situations where criminal proceedings have been initiated but the accused is either **ill** or has **absconded** and cannot be brought to trial. This form of confiscation is described in Article 4(2) of the Confiscation Directive, which states the following:

Where confiscation on the basis of paragraph 1 is not possible, at least where such impossibility is the result of illness or absconding of the suspected or accused person, Member States shall take the necessary measures to enable the confiscation of instrumentalities and proceeds in cases where criminal proceedings have been initiated regarding a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, and such proceedings could have led to a criminal conviction if the suspected or accused person had been able to stand trial.

By illness it is meant that the accused is unable to attend the criminal proceedings for an extended period, which prevents the proceedings from being completed. The person in question may need to present a medical certificate to prove their illness but the court can ignore this if they do not think that the evidence is sufficient.¹⁰ However, to confiscate one's assets in such a situation, it is necessary that such proceedings, if they had continued, would have resulted in a conviction. This type of confiscation is thus not based on a conviction in the same way as a "regular conviction based confiscation". Furthermore, only property that may lead directly or indirectly to financial gain can be confiscated under this regime.

Extended Criminal Confiscation (Article 5(1))

The scope of an extended criminal confiscation is more far-reaching than a regular "criminal confiscation" because the requirement here is not as strict that the assets must derive from the specific offence for which the person has been convicted. Article 5(1) of the Confiscation Directive states the following:

Member States shall adopt the necessary measures to enable the confiscation, either in whole or in part, of property belonging to a person

¹⁰ Directive 2014/42/EU of the European Parliament and of the Council on freezing and confiscation of instrumentalities and proceeds of crime in the European Union, p. 41, *available at* <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0042&from=EN>.

convicted of a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, where a court, on the basis of the circumstances of the case, including the specific facts and available evidence, such as that the value of the property is disproportionate to the lawful income of the convicted person, is satisfied that the property in question is derived from criminal conduct.

Therefore it is possible, on the basis of this article, to confiscate assets allegedly linked to other criminal conduct, even if the person has not been convicted of the specific crime. It is not necessary to prove that the asset is derived from criminal conduct, but it is, however, sufficient for the court to be **convinced** that the assets are derived from criminal conduct. Member States even have the possibility to decide that it is sufficient for the court to make an assessment of probability. This means that the court may then assume that it is more likely than not that the property was derived from criminal activity. To make such an assessment, the court needs to consider the specific circumstances of the case. One such indication may be that the person's property is disproportionate to their lawful income.¹¹

Confiscation from a Third Party (Article 6)

In addition, it is possible to seize assets from a third party, as set out in Article 6, which states the following:

1. Member States shall take the necessary measures to enable the confiscation of proceeds, or other property the value of which corresponds to proceeds, which, directly or indirectly, were transferred by a suspected or accused person to third parties, or which were acquired by third parties from a suspected or accused person, at least if those third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation, on the basis of concrete facts and circumstances, including that the transfer or acquisition was carried out free of charge or in exchange for an amount significantly lower than the market value.
2. Paragraph 1 shall not prejudice the rights of bona fide third parties.

The purpose of a confiscation from a third party is to prevent a suspected or accused person from directly or indirectly transferring property to a third party to avoid confiscation. However, it is required that the third party knew or should have known that the purpose of the transfer or acquisition was to avoid

¹¹ Directive 2014/42/EU of the European Parliament and of the Council on freezing and confiscation of instrumentalities and proceeds of crime in the EU, p. 42, *available at* <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0042&from=EN>.

confiscation. The assessment must be made based on concrete facts and circumstances. Examples of such circumstances are whether the price of the transfer is free or significantly lower than the market value. The third-party rules apply to both natural and legal persons. However, a third party that has acquired the assets in good faith should not be negatively affected. Therefore, in such a situation, such assets are not subject to confiscation.¹²

Non-Conviction Based Confiscation

A non-conviction based confiscation can be an option in cases where it is not possible to carry out a confiscation in the context of criminal proceedings. It is a civil forfeiture that does not require the person to have committed a crime or engaged in any criminal conduct. The confiscation is not directed against the defendant but rather against the property itself. Civil confiscation has been introduced in some Member States but has not been adopted at an EU level, so there is currently no possibility to use civil confiscation at an EU level. It has however been implemented in some Member States, such as Ireland, Italy, Bulgaria, and Slovenia.¹³

Unexplained Wealth Mechanisms

Unexplained wealth mechanisms can serve different purposes. One of its purposes is to put the burden on those deemed to possess unexplained wealth to demonstrate that they have a legitimate source for their assets to prevent subsequent civil forfeiture. Therefore, the burden of proof is placed on the holder of the unexplained wealth to actually prove the legality of the assets.

Unexplained wealth mechanism is only implemented in a few countries (Australia and Colombia) and has not yet been adopted at EU level.¹⁴ In the UK, unexplained wealth orders have already been implemented.¹⁵

What are the Amendments that are being Considered by the EU?

¹² Directive 2014/42/EU of the European Parliament and of the Council on freezing and confiscation of instrumentalities and proceeds of crime in the EU, p. 42, *available at* <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0042&from=EN>.

¹³ Johan Boucht, Asset confiscation in Europe - past, present, and future challenges, 26 *JOURNAL OF FINANCIAL CRIME* 526, pp- 526-548 (2019) *available at* <https://doi.org/10.1108/JFC-04-2018-0043>

¹⁴ Johan Boucht, Asset confiscation in Europe - past, present, and future challenges, 26 *JOURNAL OF FINANCIAL CRIME* 526, pp- 526-548 (2019) *available at* <https://doi.org/10.1108/JFC-04-2018-0043>

¹⁵ Sections 1-6 of the Criminal Finances Act 2017 introduced new sections 362A – 362R and 396A – 396U of POCA 2002.

Proposal from the European Commission to add Sanctions Violation to the list of EU Crimes Provided by Article 83 of the Treaty on the Functioning of the European Union

Due to Russia's military aggression against Ukraine, the EU has adopted restrictive measures (such as asset freezes) against both Russia and Belarus. As mentioned above, EU restrictive measures are adopted based on Articles 29 of the Treaty on the European Union and 215 of the Treaty on the Functioning of the European Union. However, violations of these measures are not enumerated in the list contained in Article 83(1) of the Treaty on the Functioning of the European Union. Therefore, they do not count as one of the serious EU crimes. For this reason, a breach or violation of restrictive measures is not of a criminal nature yet and does not entail criminal sanctions at EU level. Consequently, currently the national systems in Member States differ significantly with regards to the criminalisation of restrictive measures. In addition, the criminal penalty systems in Member States differ.¹⁶

Given this context, the Commission proposed on 25 May 2022 that the Council should add "violation of restrictive measures" to the list of EU crimes in Article 83(1) of the Treaty on the Functioning of the European Union. The aim of this proposal is to make it easier to investigate and prosecute individuals in a uniform manner in all Member States.

This amendment proposed by the Commission is possible under the third subparagraph of Article 83(1) of the Treaty on the Functioning of the European Union. The Article states that "on the basis of developments in crime, the Council may adopt a decision identifying **other areas of crime** that meet the criteria specified in this paragraph." However, it should only apply to areas of particularly serious cross-border crimes.

Violations of the union's restrictive measures constitute a lasting threat to international peace and security and human rights. In addition, such a violation is often related to the EU crimes listed in Article 83(1) of the Treaty on the Functioning of the European Union, such as terrorism. That is why violations of the union's restrictive measures should be considered as a particularly serious crime, as it is otherwise impossible to effectively implement union policies.¹⁷

¹⁶ European Commission's proposal for a Council decision on adding the violation of union restrictive measures to the areas of crime laid down in Article 83(1) of the Treaty on the Functioning of the European Union, p. 2, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022PC0247&qid=1669299923515&from=SV>.

¹⁷ European Commission's proposal for a Council decision on adding the violation of union restrictive measures to the areas of crime laid down in Article 83(1) of the Treaty on the Functioning of the European Union, p. 6-8, available at

Proposal from the European Commission on Amended Rules on Asset Recovery and Confiscation

Freezing the assets of Russian oligarchs and other individuals linked to Russia's war against Ukraine is seen as an important step to stop Russia's aggression. However, their assets are usually controlled through complex structures to hide the real owner. That is why the Commission is proposing amended rules to make it easier and to strengthen the ability of competent authorities to trace and identify, then freeze and manage, and, last, to confiscate the assets.¹⁸

The aim of these amendments is to harmonise the rules across the EU and to ensure an effective implementation of the union's policy on restrictive measures, facilitate cross-border cooperation, and increase the effectiveness of the fight against organized crime. The proposed legislative change should also have a deterrent effect. The new proposal will extend the possibilities for confiscation of all relevant assets, and the Commission considers that confiscation should cover all relevant criminal activities carried out by organized criminal groups. Therefore, the Commission believes that the proposal is a helpful tool to improve cooperation between all authorities involved in asset recovery. To achieve the common objectives in this area, it is considered that a greater commitment from these different authorities is needed.

Furthermore, the Commission has proposed that Article 15 of the new Directive should allow for a wider confiscation of property without the need for a prior conviction. This would apply to cases where the person is ill, has absconded, is deceased, has immunity from prosecution under national law, or has been granted amnesty under national law. Illness and absconding are already included in the current Article 4(2) of the Confiscation Directive, but the remaining circumstances are entirely new proposals. Confiscation here is only proposed for those offences with a maximum penalty of at least four years' imprisonment.

In addition, the Commission proposes that Article 16 of the new Directive should allow for the confiscation of unexplained wealth derived from criminal activity. This is aimed at cases where there is a suspicion of involvement in organized crime but where other provisions of the directive do not apply. Confiscation may only be allowed if the national court is absolutely convinced

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022PC0247&qid=1669299923515&from=SV>.

¹⁸ European Commission's Proposal for a Directive of the European Parliament and of the Council on asset recovery and confiscation, (May 25, 2022), *available at* <https://eur-lex.europa.eu/legal-content/SV/TXT/PDF/?uri=CELEX:52022PC0245&from=EN>

that the assets derive from criminal activity. The court must make an overall assessment of all the circumstances of the case. Confiscation here is only proposed for those offences with a maximum penalty of at least four years' imprisonment.

However, it is doubtful whether these two new articles (Articles 15 and 16) can be based on Article 83(1) of the Treaty on the Functioning of the European Union, as they are not based on criminal liability. However, they may still be covered by Article 83(2) Treaty on the Functioning of the European Union which states the following:

If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned.

The European Commission proposal presented on Nov. 30, 2022

The Commission has put forward options for Member States to hold Russia accountable for the crimes against Ukraine. The Commission states that they will continue to fully support the International Criminal Court (ICC) in order to investigate and prosecute Russia's crimes of aggression. All EU Member States are currently parties to the ICC. However, Russia does not accept the jurisdiction of the ICC and therefore its crimes against Ukraine cannot be prosecuted by the ICC.

Therefore, the Commission is ready to resort to alternative solutions to ensure justice. The Commission is ready to work with the international community to establish a special independent ad hoc international tribunal or a specialized "hybrid" tribunal. The ad hoc international tribunal would be established on the basis of a multilateral treaty. The hybrid tribunal would be a special court integrated into a national justice system with international judges. The Commission believes that strong support from the UN is needed to establish both of these alternative tribunals.¹⁹

Subsidiarity and Proportionality

The question that arises is whether it is the EU or the individual Member States that are best suited to regulate these issues. The subsidiarity principle is set out in Article 5 of the Treaty on the European Union and means that, in areas

¹⁹ Press release: Ukraine: Commission presents options to make sure that Russia pays for its crimes, 30 November 2022, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7311

where the union does not have exclusive competence, the union may only take action if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and therefore, can be better achieved by the Union.

The Commission argues that the rules of the national systems in the EU differ considerably in this matter and, therefore, the issue must be regulated at the EU level. The Commission also considers that individual actions by Member States are not sufficient to combat cross-border organized crime, as the majority of criminal groups operating in the EU are active in more than three Member States. The natural and legal persons whose assets have been frozen are still able to access the assets today and they can also benefit from the support schemes subject to restrictive measures. They may even go so far as to choose to operate only in Member States that have less stringent rules on breaches of the union's restrictive measures and thus avoid penalties. Therefore, the Commission considers that the proposal to regulate the issue at union level is compatible with the principle of subsidiarity.²⁰

It must also be assessed whether the Commission's proposal meets the requirement of proportionality. The Commission believes that the proposal is proportionate since the criteria for "violations of restrictive measures" to be considered to be at the same level of other criminal offences already listed in Article 83(1) of the Treaty on the Functioning of the European Union have been met. Most of the Member States have already categorized the violations of restrictive measures as a criminal offense because it is considered to be a particularly serious crime. Therefore, the proposal is considered to merely harmonize the rules within the Union.

Is it Possible to Confiscate Russian Frozen Assets?

The remaining question is whether it is possible for the EU to confiscate the Russian frozen assets. As described above, it is not possible with the existing regulations to permanently confiscate the frozen assets without proving they are linked to criminal activities. However, the changes proposed by the Commission may make it easier to confiscate certain assets. It is worth noting that it is unlikely that the rules will affect Russian state-owned assets in the same way as privately owned assets, as described below.

²⁰ Europol, *European Union Serious and organized crime threat assessment, A Corrupting Influence: The infiltration and undermining of Europe's economy and society by organized crimes*, (2021), available at https://www.europol.europa.eu/cms/sites/default/files/documents/socta2021_1.pdf; also see European Commission's Proposal for a Directive of the European Parliament and of the Council on asset recovery and confiscation, p. 6, (May 25, 2022), available at <https://eur-lex.europa.eu/legal-content/SV/TXT/PDF/?uri=CELEX:52022PC0245&from=EN>;

Privately Owned Assets

The EU's proposals will only affect Russian privately owned assets, and thus not state-owned assets. The proposal aims to make it easier to confiscate the assets of sanctioned individuals or entities, provided they are convicted in criminal proceedings. This means that the EU will need to argue each individual case in court and the court process could take several years. Furthermore, there must be a link between the assets in question and the crime for which they are suspected. It should also be borne in mind that a person who acquires property lawfully has the right to use and dispose of it under Article 17 of the Charter of Fundamental Rights of the European Union. Therefore, the court must also consider the person's right to the property and determine whether the property was acquired lawfully.

State-Owned Assets

The Russian state enjoys immunity from enforcement under customary international law, which means that the EU's proposal for confiscation cannot apply to Russian state-owned assets.²¹ However, it is possible to discuss whether this sovereign immunity can be waived by one of the exception rules, such as the *jus cogens* norm. A *jus cogens* norm is a mandatory rule that protects an interest so fundamentally that it stands against any other norm that conflicts with it. *Jus cogens* cannot be negotiated away and it is not permissible to depart from or override the rule. Therefore, it can be argued that the confiscation of Russian state-owned assets is subject to third-party countermeasures in response to Russia's violation of a mandatory international norm, i.e. *jus cogens*.

The right to property (stated in Article 17 of the Charter of Fundamental Rights of the European Union) applies to every natural or legal person, but does not extend to state-owned property. Therefore, it may be easier to meet the proportionality requirement when confiscating Russian state-owned assets. However, this still assumes that the immunity barrier can first be breached.

Furthermore, in Western countries, the principle of immunity from enforcement has evolved towards a **restrictive theory**. This means that immunity from enforcement only applies to state property used for state purposes. However, if property is used or intended to be used for commercial purposes, enforcement is permitted under this theory. In addition, the theory may

²¹ Wuerth I., *Immunity from Execution of Central Bank Assets*, in THE CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW, 266, (T. Ruys, N. Angelet and L. Ferro, eds., 2019), available at <https://www.cambridge.org/core/books/abs/cambridge-handbook-of-immunities-and-international-law/immunity-from-execution-of-central-bank-assets/058AFADB27AB317EB2DB8E4C3E8C5A2D>

require that the assets are proven to have a close connection or are directly linked to the invasion.²² However, there is a risk that Russian oligarchs and the state will sue if their assets are confiscated. It is therefore important that EU Member States protect themselves from any potential legal proceedings. It is not only a question of being able to adopt new confiscation rules, but it is also necessary to consider the potential consequences after a confiscation. In order for a confiscation to be carried out successfully, everything must be done with a high degree of precision.

In addition, it may be difficult to confiscate certain assets from oligarchs because of offshores and co-ownership. One solution to this could be to require sanctioned persons to surrender their property, or it would be considered a "violation of the sanctions."

In conclusion, there are some legal challenges in converting the Russian temporary frozen assets into a permanent confiscation of them. Namely, State-owned property is protected from enforcement by immunity rules and confiscation of privately owned assets may raise constitutional and human rights concerns.

Alternative Solutions

An option might be to continue freezing those Russian assets and use them as leverage to encourage Russia to make concessions. This leverage could be useful after the war to encourage the Russian government to pay reparations to Ukraine and thus restore economic relations with the outside world. Another option is to impose a tariff on Russian oil exports, with the proceeds going to Ukraine. In addition, payments for Russian oil could be redirected to escrow accounts that cannot be released until Russia complies with EU requirements to provide financing to Ukraine. This could result in Russia still bearing a significant part of the cost of Ukraine's reconstruction.²³

²² Lagrådsremiss, Immunitet för Stater och deras egendom, STOCKHOLM, (Apr. 16, 2009), available at <https://regeringen.se/contentassets/97a232d4bc424bae8bef9427d87e6df8/immunitet-for-stater-och-deras-egendom>

²³ European Parliament, *Confiscating Russian sovereign assets to fund Ukraine's reconstruction: Mission impossible*, (Oct. 25, 2022), available at [https://www.europarl.europa.eu/thinktank/en/document/EPRS_ATA\(2022\)738180](https://www.europarl.europa.eu/thinktank/en/document/EPRS_ATA(2022)738180).

About the Public International Law & Policy Group Policy Planning Initiative

PILPG's Policy Planning Initiative supports the development of long term, strategic policy planning that is crucial to international accountability, global conflict resolution, and the establishment of international peace. The Initiative provides timely and accurate policy planning analysis and work product on pressing and future policy conundrums by leveraging PILPG's deep network of talent within the international legal and policy communities and experience with its *pro bono* clients globally. PILPG Policy Planning focuses on advising policymakers, policy shapers, and engaged stakeholders on pressing issues within the arenas of international law, war crimes prosecution, and conflict resolution efforts. This includes identifying and addressing gaps within existing policies, anticipating key conundrums and questions that will riddle future policy decisions, applying lessons learned from comparative state practice, and proactively producing and sharing work product to inform such policies and avoid crisis decision making.