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REPURPOSING FROZEN RUSSIAN ASSETS: ANALYSIS UNDER THE LAWS OF GERMANY

Prepared by the

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REPURPOSING FROZEN RUSSIAN ASSETS: ANALYSIS UNDER THE LAWS OF GERMANY

Statement of Purpose

This memorandum summarizes and analyzes the legal framework that allows for the freezing, seizing, and potential repurposing of Russian frozen assets under the laws of Germany. German law incorporates international law and the laws of the European Union. As such, this memorandum addresses specific issues of German law.

Memoranda on international law and the laws of the European Union are available on the PILPG Policy Planning website [here](#). This document is a corollary memo to the Policy Planning White Paper on Repurposing Frozen Russian Assets. The legal analysis outlined within this document served as the underlying basis for that White Paper, which can be found [here](#).

Introduction

Germany is finding new ways to freeze, control and even expropriate domestic Russian-owned assets. According to open sources, as of February 2023, Germany has frozen Russian assets worth more than 5.3 billion Euros¹. The freezing of Russian assets currently leads to the control of assets or new ownership by German authorities.

Currently, a release of frozen Russian assets to Ukraine only seems possible in connection with legal assistance. New binding international regulations or treaties foreseeing an expropriation and release of seized assets to Ukraine would be necessary.

Purely domestic criminal proceedings alone appear to be unsuitable for the repatriation of assets to Ukraine. However, there are several opportunities to achieve canalizations of the transfer of confiscated assets under international law and based on foreign criminal proceedings or court decisions. German authorities can confiscate assets as support of foreign criminal proceedings. Foreign authorities can also request the release of seized assets from German authorities if the same assets are a means of committing a crime, a product of a crime, or its surrogate. There is also the possibility of special agreements between Germany and other states concerning the realization, restitution, and division of illegally obtained property. German law also foresees the possibility of non-conviction-based confiscation, where assets can be forfeited when

¹ *Germany has frozen Russian assets worth more than 5.3 billion euros*, Mind, (Feb. 18, 2023), available at <https://mind.ua/en/news/20253639-germany-has-frozen-russian-assets-worth-more-than-5-3-billion-euros>

foreign criminal proceedings have been initiated abroad and essential elements of the offense have already been proven.

International Sanctions - Only Ban on Disposal

In Germany, the seizure of assets of listed persons who are subject to financial sanctions in accordance with international sanctions regulations does not require an implementing act. Such regulations are directly applicable and must be observed by all German-located persons and authorities.² The enforcement authorities have to take actions that can safeguard the aim of upholding the prohibition of the disposal of assets from sanctioned persons.

Under German law, the listed persons and companies remain the owners of the frozen assets. The private use of economic resources remains possible in principle, as long as no income is generated from it. In contrast, the transfer of money or the renting out or sale of the property would violate the ban on disposal.

The rights of third parties also continue to exist. The competent authorities may, on a case-by-case basis, even authorize the release of frozen funds or economic resources for payments owed by the sanctioned parties to third parties, provided that this does not violate the so-called provision prohibitions.³

A reallocation of assets to Ukraine based on current financial sanctions alone is not possible under German law. Under the current sanctions regime, German authorities only seize assets as a precautionary measure if there are concrete indications that a listed person is violating the ban on disposal.

Expropriation of Assets under German Law

As ultimately the most massive form of state interference, expropriation is subject to strict conditions and can only be considered as a last resort, an ultima ratio. The German constitution protects both natural and domestic legal persons of private law. However, legal persons under public law, for example, Russian state-owned assets or companies, do not fall under constitutional protection. Therefore, an administrative expropriation, for example, for gas storage facilities, by the competent energy authorities is legally possible and has been

² See, e.g., Council Regulation (EU), *Concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty, and independence of Ukraine (No. 269/2014)*, Official Journal of the European Union, (Mar. 17, 2014), available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2014:078:0006:0015:En:PDF> (concerning European Union sanctions).

³ See, e.g., Council Regulation (EU), *Concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty, and independence of Ukraine (No. 269/2014)*, Official Journal of the European Union, (Mar. 17, 2014), available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2014:078:0006:0015:En:PDF>, art. 2.

conducted already.⁴ However, any transfer of expropriated assets cannot be based on German law but has to be regulated by international law regimes.

Constitutional Protection of Property

Art. 14 of the Basic Law foresees the following general principle and constitutional right:

- (1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws.
- (2) Property entails obligations. Its use shall also serve the public good.
- (3) Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute concerning the amount of compensation, recourse may be had to the ordinary courts.⁵

First, it must be justified by a sufficiently weighty and legitimate public interest, which is itself based on fundamental constitutional rights. The expropriation must be proportionate overall. It would have to be both suitable and necessary to achieve the public interest objective, and the intensity of this intervention would have to be appropriate.

Furthermore, expropriation requires a separate and sufficiently specific legal authorization. The (federal) legislature has the power to pass an expropriation law (“expropriation by operation of law”) quickly if there is a corresponding political consensus.

At least, by law, there must be a balanced system of compensation for the expropriation, defined by law.

⁴ *Germany nationalizes former Gazprom subsidiary*, Deutsche Welles, (Nov. 14, 2022), available at <https://www.dw.com/en/germany-nationalizes-former-gazprom-subsiary/a-63754453>.

⁵ Basic Law for the Federal Republic of Germany, (May 23, 1949), available at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html, art. 14.

Although Art. 14 of the Basic Law protects both natural persons⁶ and domestic legal persons of private law,⁷ legal persons under public law⁸ are not entitled to the fundamental right to property even if they do not perform any public duties. That is why, for example, Russian state-owned assets or companies do not fall under the protection of Art. 14 of the Basic Law.

Funds of the Russian state, such as the assets of the Russian Central Bank, are not protected under the constitutional guarantee. A possible valid argument is the polluter pays principle, which applies under German law. The Russian state is violating fundamental rules of international law in and outside of Ukraine (e.g., impending worldwide famine or the unlawful use of military force against another state). Potential claims for compensation filed by the affected subjects of expropriation can be legally reduced to zero. As an expression of the German legal principle of good faith, the general legal concept of contributory negligence can apply. Contributory negligence can also be taken into account under customary international foreign law, which also recognizes the principle of contributory negligence under the heading of “contributory fault,” for example, reflected in Article 39 of the International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts.⁹

Statements from the German government suggest that concrete models for such an expropriation mechanism of Russian state assets would have to be found at the international level and need to be issued on an international law basis.¹⁰

Even persons protected by Art. 14 of the Basic Law can fall under expropriation according to the above-mentioned requirements. The infringement needs then to balance personal reference of property, on the one hand, and on the

⁶ Definition: every individual, human being.

⁷ Definition: legal persons under private law are foundations under civil law and the following corporations under private law: association (registered association, old-law association, legally capable economic association), stock corporation, partnership limited by shares, limited liability company including the entrepreneurial company, registered cooperative and European Company, as well as companies that only have partial legal capacity, such as a limited partnership so that even a company in the legal form of a GmbH & Co. KG is also considered a legal person under private law.

⁸ Definition: legal entities under public law are corporations under public law, institutions under public law and foundations under public law. Public law entities can be territorial authorities (federal government, states, counties and municipalities), federation entities (associations of municipalities) and personal and real corporations (for example, chambers of industry and commerce, chambers of handicrafts and universities).

⁹ International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts (“Articles on the Responsibility of States”), art. 39 (“In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.”).

¹⁰ Michael Nienaber, Kamil Kowalcze, *Germany Open to Seizing Russian Assets to Help Ukraine Rebuild*, Bloomberg, (Jan. 3, 2023), available at <https://www.bloomberg.com/news/articles/2023-01-03/germany-is-open-to-using-seized-russian-assets-for-ukraine-s-reconstruction?leadSource=verify%20wall>.

other hand, the specific nature of the respective property and its importance for the owner and general public.¹¹

Example of Expropriations to Secure the Necessary Energy Resources

An administrative expropriation, for example, for gas storage facilities, by the competent energy authorities of the Länder could be made possible by Art. 45 (1) No. 2 of the Energy Industry Act.¹² This allows the (“necessary”) expropriation to secure the energy supply. The wording of the standard is broad (“other projects” of energy supply) and could also include the expropriation of gas storage facilities.

On 12 May 2022, the federal parliament (Bundestag) amended the Energy Security Act (“Energy Security Act”).¹³ In cases of a “concrete danger” that a German company is not fulfilling its tasks and there is a threat that the security of the supply will be impaired, the reformed law allows the company to be placed temporarily under trust administration by the government or federal authorities. In order to secure supply, the possibility of expropriation is also created for critical infrastructure companies as a “last resort.”¹⁴

Release of Expropriated Assets to Ukraine

Any possible expropriation always leads to the German state first as a new owner. The transfer of expropriated assets cannot be based on German law but has to be regulated by international law regimes, which are applicable under German law. However, the expropriation of purely privately-owned assets can trigger specific compensation claims under German law.

Forced Trusteeship of Russian Controlled Companies

In April and June 2022, the Federal Network Agency took the helm at Gazprom Germania GmbH in order to ensure that the natural gas storage facility in Rehden is filled, which Gazprom Germania GmbH predominantly owns.¹⁵

¹¹ Wissenschaftliche Dienste des Deutschen Bundestages (Scientific Services of the German Bundestag), Ausarbeitung WD 3 - 327/06.

¹² Energiewirtschaftsgesetz (Energy Industry Act of Germany), (Jul. 7, 2005), available at https://www.gesetze-im-internet.de/enwg_2005/BJNR197010005.html, art. 45(1), no. 2.

¹³ Energiesicherungsgesetz (Energy Security Act of Germany), (Dec. 20, 1974), available at https://www.gesetze-im-internet.de/ensig_1975/BJNR036810974.html.

¹⁴ Energiesicherungsgesetz (Energy Security Act of Germany), (Dec. 20, 1974), available at https://www.gesetze-im-internet.de/ensig_1975/BJNR036810974.html.

¹⁵ Bundesministerium für Wirtschaft und Klimaschutz (Federal Ministry for Economic Affairs and Climate Action of Germany), Anordnung gemäß § 6 des Außenwirtschaftsgesetzes bezüglich der Anteile an der Gazprom Germania GmbH, (Apr. 4, 2022), BANz AT 04.04.2022 B13, available at <https://www.bundesanzeiger.de/pub/publication/mZHHCRrR21huG70aMI/content/mZHHCRrR21huG70aMI/BAnz%20AT%2004.04.2022%20B13.pdf?inline>; Bundesministerium für Wirtschaft und Klimaschutz (Federal Ministry for Economic Affairs and Climate Action of Germany), Anordnung gemäß § 17 des Energiesicherungsgesetzes bezüglich der Anteile an der Gazprom Germania GmbH, (June 17, 2022), BANz AT 17.06.2022 B15, available at <https://www.bundesanzeiger.de/pub/publication/Bcp1CkBKWe738qGunNd/content/Bcp1CkBKWe738qGunNd/BAnz%20AT%2017.06.2022%20B15.pdf?inline>.

Recently, on 16 September 2022, the German government placed crude oil importers Rosneft Deutschland and RN Refining & Marketing GmbH under the trusteeship of the Federal Network Agency.¹⁶ The reasoning for that was to secure the operation of the oil refineries of these companies, PCK Schwedt, Miro (Karlsruhe) and Bayernoil (Vohburg).

The trusteeship was initially limited to six months. The companies themselves have to bear the costs of trusteeship. The Federal Network Agency can dismiss and re-appoint members of the Board of Management of the company and issue instructions to the Board of Management.

The background for the later decision was the oil embargo against Russia because of its invasion of Ukraine, which took effect on January 1, 2023, and the fact that the Russian operator Rosneft publicly showed little interest in moving away from Russian oil and in complying with the oil embargo. The maintenance of business operations at the affected refineries was in danger due to the ownership position of the companies. Additionally, crucial service providers such as suppliers, insurance companies, banks, IT companies, and customers were no longer willing to cooperate with Rosneft or its subsidiaries.

As stated above, an expropriation would also be possible if necessary. However, the German state would be the owner of expropriated assets to control the upholding of necessary resources in Germany.

Legal Basis of Forced Trusteeship

The legal basis for such a forced trusteeship can be found in the recently amended Energy Security Act. Pursuant to Section 17 (1) of the Energy Security Act, a company that operates critical energy infrastructure can be placed under trusteeship by the Federal Ministry of Economics and Climate if there is a risk that the company will otherwise fail to fulfill its tasks relevant to the public interest and thus threaten to impair the security of supply.¹⁷

From a constitutional point of view, the order according to Section 17 (1) of the Energy Security Act is not an expropriation according to Article 14 (3) of the Basic Law but a provision on the content and limits of the property principle.¹⁸ Nevertheless, according to current constitutional court case law,¹⁹ content and restriction provisions are also to be compensated by means of compensation in exceptional cases to ensure their proportionality if they are of

¹⁶ Bundesministerium für Wirtschaft und Klimaschutz (Federal Ministry for Economic Affairs and Climate Action of Germany), Anordnung gemäß S 17 des Energiesicherungsgesetzes bezüglich der Anteile an der Rosneft Deutschland GmbH und der RN Refining & Marketing GmbH, (Sept. 14, 2022), BAnz AT 16.09.2022 B1, available at <https://www.rosneft.de/wp-content/uploads/2022/09/Bundesanzeiger.pdf>.

¹⁷ Energiesicherungsgesetz (Energy Security Act of Germany), (Dec. 20, 1974), available at https://www.gesetze-im-internet.de/ensig_1975/BJNR036810974.html, section 17(1).

¹⁸ Basic Law for the Federal Republic of Germany, (May 23, 1949), available at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html, arti. 14 (1), sentence 2.

¹⁹ BVerfGE 100, 226, marginal no. 95 et seq.

an intensity beyond the social obligation of property.²⁰ The Energy Security Act therefore expressly foresees the possibility of such compensation for a trust administration in Section 17 (7) sentence 1 of the Energy Security Act.

This compensation option contained in Section 17 (7) sentence 1 of the Energy Security Act is excluded in Section 17 (7) sentence 3 of the Energy Security Act for persons,²¹ which cannot invoke Article 14 of the Basic Law. As a result, foreign legal entities under private law or domestic legal entities controlled by a foreign state are excluded from any compensation, irrespective of the intensity of the impairment of property resulting from the trusteeship.

Possible Claims of Affected Companies and Shareholders

From a legal point of view, it can be assumed that Section 17 (7) Sentence 3 of the Energy Security Act violates property-protecting norms outside of German fundamental rights (for example, principles based on general rules of international law), which are applicable in Germany via Article 25 of the Basic Law and therefore also bind the German state authority in its domestic actions.²² This concept of expropriation under customary international law not only covers formal expropriations but also extends to so-called indirect expropriations and thus would also include the forced trusteeships ordered. If the Energy Security Act is changed so that Section 17 (7) sentence 3 of the Act would also comply with international law principles applicable in Germany, compensation claims for Rosneft seem possible.

Russian companies can also file damage compensation claims based on the Investment Protection Treaty between Germany and Russia of 1989 (“DE-RUS Investment Protection Treaty”), which explicitly makes any direct or indirect expropriation of Russian investors in Germany (and vice versa) dependent on compensation.²³ According to its wording and the definition of “investors,”²⁴ publicly owned entities would also fall under the protection of the treaty. However, Art. 4 para. 5 of the DE-RUS Investment Protection Treaty provides for a relativization of the compensation obligation for (indirect) expropriations in addition to “war” and “armed conflicts” including “other exceptional situations.”²⁵ The current conflict between Russia and Ukraine can

²⁰ Basic Law for the Federal Republic of Germany, (May 23, 1949), *available at* https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html, art. 14 (2).

²¹ Energiesicherungsgesetz (Energy Security Act of Germany), (Dec. 20, 1974), *available at* https://www.gesetze-im-internet.de/ensig_1975/BJNR036810974.html, section 17.

²² Basic Law for the Federal Republic of Germany, (May 23, 1949), *available at* https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html, art. 20 (3).

²³ DE-RUS Investment Protection Treaty, *available at* <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1398/download>, art. 4 .

²⁴ DE-RUS Investment Protection Treaty, *available at* <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1398/download>, art. 1.

²⁵ DE-RUS Investment Protection Treaty, *available at* <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1398/download>, art. 4(5).

be interpreted as another exceptional situation, meaning a compensation of Russian companies would then be excluded.

Art. 10 of the DE-RUS Investment Protection Treaty provides that foreign investors can assert state impairments of their property rights guaranteed under investment protection law directly against the host state in a quasi-administrative procedure (investor-state dispute settlement) before an international arbitration court.²⁶

Even in the case that Rosneft or any other Russian state-owned enterprise would have a claim for damage compensation due to a forced trusteeship conducted by the German government order, the amount of the claim can be close to zero.

In determining the amount of compensation, which under German law takes place in a separate procedure pursuant to Section 17 (7) sentence 2 of the Energy Security Act,²⁷ contributory negligence can weigh in. The German principle of good faith includes the general legal concept of contributory negligence. This principle can be used for both German and investment protection treaty laws. Contributory negligence can also be taken into account under customary international foreign law, which also recognizes the principle of contributory negligence under the heading of “contributory fault,” for example, reflected in Article 39 of the International Law Commission.²⁸ The concept of contributory fault in the context of determining the amount of compensation for expropriations is also reflected in arbitral case law.²⁹

Seizure and Forfeiture of Assets in Connection with Criminal Activities

The Federal Constitutional Court allows forfeiture connected to criminal activities because confidence in the continued existence of rights acquired dishonestly is not worthy of protection.³⁰

However, the decision about what is illegal has to be decided by a court in each case. This determination of illegal assets is usually made following criminal proceedings. Being named on a sanctions list cannot replace the

²⁶ DE-RUS Investment Protection Treaty, *available at*

<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1398/download>, art. 10.

²⁷ Energiesicherungsgesetz (Energy Security Act of Germany), (Dec. 20, 1974), *available at* https://www.gesetze-im-internet.de/ensig_1975/BJNR036810974.html, section 17(7), sentence 2.

²⁸ International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts (“Articles on the Responsibility of States”), art. 39 (“In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.”).

²⁹ Yukos Universal Limited (Isle of Man) v. The Russian Federation, (PCA Case No. AA 227), Interim Award on Jurisdiction (Nov. 30, 2009). *See also* Martin Deitrich Brauch, *Yukos v. Russia: Issues and legal reasoning behind US\$50 billion awards*, (Sept. 2014), Investment Treaty News, *available at* https://www.iisd.org/itm/wp-content/uploads/2014/09/iisd_itn_yukos_sept_2014_1.pdf.

³⁰ *See, e.g.*, BVerfG, Judgment of the First Senate, 1 BvF 1/94, (Nov. 23, 1999), *available at* http://www.bverfg.de/e/fs19991123_1bvf000194en.html, para. 112.

required criminal proceedings. Purely domestic criminal proceedings alone appear to be unsuitable for the repatriation of assets to Ukraine. However, there are several opportunities to achieve canalizations of the transfer of confiscated Russian assets under international law and based on foreign criminal proceedings or court decisions.

Article 74 Criminal Code

The confiscation of assets under criminal law is the execution of a measure aimed at (1) depriving a person of the benefits of the property benefits obtained as a result of a criminal act (Art. 74 (1) of the Criminal Code);³¹ and (2) the confiscation of objects of crime, under the reservation of an express special statutory provision (Art. 74 (2) Criminal Code).³²

A situation may exist in which the violation of restrictive measures (for example, international sanctions) lies in the non-freezing or hiding of assets or other circumvention activities. In such a case, these assets are the object on which the crime is carried out (object of the crime) and they can be confiscated.

Sanctions Violations as a Separate Criminal Misconduct

The Bundestag has already extended the threat of punishment for sanctions violations in the Sanctions Enforcement Act at the end of May 2022. According to this law, any person on an EU sanctions list who does not "immediately" declare their assets in Germany to the German authorities is liable to prosecution.

According to the Foreign Trade and Payments Act, a violation of this reporting obligation could already lead to the confiscation of the concealed assets by the German state (for example, expropriation without replacement).

Recently, the Munich public prosecutor's office seized three apartments and a bank account belonging to a Duma deputy. Because he is on the EU sanctions list, he was no longer allowed to rent out the apartments. The Duma deputy can lose ownership of the apartments to the German state if the courts confirm the sanctions violation.

Release of Confiscated Assets to Ukraine

In purely domestic criminal proceedings, assets that have been finally seized under criminal law are transferred to the German state.³³ In this respect, purely domestic criminal proceedings alone appear to be unsuitable according to German law for the repatriation of assets to Ukraine.

³¹ Strafgesetzbuch (German Penal Code), (Nov. 13, 1998), available at https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html, art. 74(1).

³² Strafgesetzbuch (German Penal Code), (Nov. 13, 1998), available at https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html.

³³ Strafgesetzbuch (German Penal Code), (Nov. 13, 1998), available at https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html, arts. 73e, 74e.

If the confiscated funds are to benefit Ukraine, a particular legal basis would be required, which is currently lacking in Germany. The confiscation of assets for disbursement to Ukraine, because of a threat to the foreign and security policy interests and values of Germany or the European Union, is currently unknown to German criminal law.

For Ukraine, as a benefiting non-origin country, there would be a need for corresponding canalizations of the transfer of confiscated assets under international law.

Release of Assets in Connection with Legal Assistance

Foreign criminal proceedings can trigger a forfeiture of frozen or seized assets. The German Law on International Mutual Assistance in Criminal Matters ("Law on International Mutual Assistance") generally provides the possibility of enforcing final foreign decisions that do not deprive a person of liberty without being limited by a catalog.³⁴

German authorities can confiscate assets as support of foreign criminal proceedings.³⁵ Foreign orders may be forfeiture, confiscation, value replacement or third-party forfeiture.³⁶ German law on enforcement assistance considers foreign orders to be binding.

However, a foreign decision cannot be given more far-reaching effects than those provided for by the foreign law itself. Furthermore, the decision must not contradict a German civil law decision on the same matter or relate to the rights of third parties to a piece of land in Germany.

In the case of foreign proceedings still pending, there is the possibility of seizure and release of assets primarily for evidentiary purposes.³⁷

Foreign authorities can also request the release of seized assets from German authorities if the same assets are a means of committing a crime, a product of a crime, or its surrogate.³⁸ The same principles are applicable

³⁴ Gesetz über die internationale Rechtshilfe in Strafsachen (Act on International Mutual Assistance in Criminal Matters), (June 27, 1994), *available at* https://www.gesetze-im-internet.de/englisch_irg/englisch_irg.html, art. 48.

³⁵ Gesetz über die internationale Rechtshilfe in Strafsachen (Act on International Mutual Assistance in Criminal Matters), (June 27, 1994), *available at* https://www.gesetze-im-internet.de/englisch_irg/englisch_irg.html, arts. 67(1)-(2); UN Convention against Transnational Organized Crime and the Protocols Thereto, (Nov. 15, 2000), *available at* <https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html>, arts. 13(2), (3)(c).

³⁶ UN Convention against Transnational Organized Crime and the Protocols Thereto, (Nov. 15, 2000), *available at* <https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html>, art. 12, paras. 1- 5.

³⁷ Gesetz über die internationale Rechtshilfe in Strafsachen (Act on International Mutual Assistance in Criminal Matters), (June 27, 1994), *available at* https://www.gesetze-im-internet.de/englisch_irg/englisch_irg.html, art. 66(1), no. 1.

³⁸ Gesetz über die internationale Rechtshilfe in Strafsachen (Act on International Mutual Assistance in Criminal Matters), (June 27, 1994), *available at* https://www.gesetze-im-internet.de/englisch_irg/englisch_irg.html, art. 66(1), nos. 2-4.

analogously if a foreign state's final confiscation or forfeiture order is to be enforced, which relates to the compensation for the value.³⁹

Art. 56b Law on International Mutual Assistance also foresees the possibility of special agreements between Germany and other states concerning the realization, restitution and division of illegally obtained property.⁴⁰

German law also foresees the possibility of non-conviction-based confiscation,⁴¹ where assets can be forfeited independently of a criminal conviction or subject to lesser. The enforcement of foreign judgments issued in these proceedings requires that foreign criminal proceedings have first been instituted abroad and that essential elements of the offense have already been proven.

Releasing frozen Russian assets to Ukraine seems possible under the abovementioned requirements. German authorities can seize and transfer assets in connection with legal assistance and based on international law principles. German authorities can especially support and enforce foreign and international criminal law proceedings. Criminal proceedings outside of Germany against the Russian state, its military, and its government can be one legal basis for releasing Russian assets to Ukraine.

³⁹ Gesetz über die internationale Rechtshilfe in Strafsachen (Act on International Mutual Assistance in Criminal Matters), (June 27, 1994), *available at* https://www.gesetze-im-internet.de/englisch_irg/englisch_irg.html, art. 58(3) sentence 2.

⁴⁰ Gesetz über die internationale Rechtshilfe in Strafsachen (Act on International Mutual Assistance in Criminal Matters), (June 27, 1994), *available at* https://www.gesetze-im-internet.de/englisch_irg/englisch_irg.html, art. 56(b).

⁴¹ Strafgesetzbuch (German Penal Code), (Nov. 13, 1998), *available at* https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html, arts. 73d, 74a, 76a.

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.