

EU Sanctions against Russia and the Rule of Law

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Abstract

The EU can freeze Russian State and private assets as sanctions. This is justified as “countermeasure” to exert pressure upon Russia that it ends its criminal war of aggression. However, sanctions do not cover definitive measures; freezing cannot be considered as a first step to confiscation. Therefore, the Commission plans “active management” of the frozen assets in order to obtain net return while ensuring the return of the assets themselves. Moreover, assets can be confiscated by the Member States on the basis of criminal confiscation regimes which the Union can harmonize. Such confiscations generally require evidence of a specific criminal offence, typically through a conviction. In some cases, confiscation may also be possible without a criminal conviction provided that a court is satisfied that all the elements of a specific criminal offense, or at least a nexus with criminal activity, are present. To make possible more confiscations, the EU has created the new crime of violation or circumvention of sanctions. The idea is that the “proceeds” of such Euro-crimes would have to be transferred to the EU or to Ukraine. In any way, some nexus to a severe crime needs to be established for confiscations compatible with the rule of law.

Keywords: Sanctions for International Crimes, Seizing and Freezing of Russian Assets, State Immunity, Rule of Law

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A. Introduction

“Russia must pay for its horrific crimes,” this tweet of Commission president *von der Leyen* reflects general sense of justice. But how to force Russia to pay? Besides the establishment of another hybrid international criminal court¹ to investigate and prosecute Russia’s crime of aggression, the Commission president targets the oligarchs and Russian central bank money.² The damage suffered by Ukraine is estimated at 600 billion euros. The EU has blocked 300 billion euros of the Russian Central Bank reserves and has frozen 19 billion euros of Russian oligarchs’ money. Headlines in the press like “Make Russia pay: EU moves ahead with confiscation of frozen assets, despite legal pitfalls”³ may lead to the assumption that the EU may simply seize the frozen assets of Russian private parties and the central bank, irrespective of legal pitfalls as the fundamental rights to property or due process and the principle of State immunity.

The Ukrainian people need indeed help from the EU and a perspective. However, the EU must remain true to its own principles. The EU’s fundamental values are the rule of law and human rights, which are granted to every person, irrespective of their origin or nationality. On the other hand, the atrocity of Russia’s aggression seems unprecedented against the background of the post-World War II peace period in Europe. Therefore, there is a strong impetus to overcome potential obstacles.

Nevertheless, the Union aims to pursue its goals in accordance with the law and its values. Therefore, the current proposals go less far as one might have thought at the beginning. However, potential legal obstacles need to be addressed. I will first discuss freezing and then confiscations.

B. Freezing as Sanctions

“Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties” (Art. 5(2) TEU). In the framework of the Common Foreign and Security policy,⁴ the Union may “provide for the interruption or reduction ... of economic and financial relations with one or more third countries”. If so decided, the Council may also adopt restrictive measures against natural or legal persons and groups or non-State entities, as Art. 215(2) TFEU explicitly states. Restrictive measures cover the freezing of the Russian assets, both State assets as central bank money and private assets. As

1 Hybrid national-international, sufficiently international to avoid State immunity.

2 *Ursula von der Leyen*, LinkedIn, Post consulted on 17/1/2023, 1mo Edited, // Statement on Russian accountability and the use of Russian frozen assets //.

3 Cf. e.g. *Liboreiro*, ‘Make Russia pay’: EU moves ahead with confiscation of frozen assets, despite legal pitfalls, EUROPE NEWS, Updated: 30/11/2022; *Ballweber*, Erstes EU-Land will eingefrorenes russisches Vermögen an Kiew weitergeben, FR, 5/1/2023.

4 Art. 23 ff. TEU.

counter measures⁵ or non-belligerent “reprisals”⁶ under older terminology, such freezing is also compatible with public international law.⁷ “Countermeasures are responses that would be unlawful under international law, but for the fact that they respond to another State’s unlawful action and are designed to put an end to it and/or secure reparations for harm suffered.”⁸ Countermeasures allow “an injured State” (the State against which the unlawful activity was or is directed) to engage in otherwise unlawful actions against the “responsible State” (the State that engaged in the unlawful conduct). Obviously, Russia’s horrific aggression allows Ukraine to take countermeasures.

The EU is not attacked by Russia. However, any State may claim from the responsible State “performance of the obligation of reparation... in the interest of the injured State” in two cases: a) if “the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or b) if “the obligation breached is owed to the international community as a whole”.⁹ EU Member States, Ukraine, Russia are all member of the Organization for Security and Cooperation in Europe. In any way, Russia’s war of aggression endangers the security of the region, including the security of EU Member States. Insofar, the EU’s countermeasures could be justified as “collective countermeasures”. Furthermore, Russia’s war of aggression may amount to the international crime of genocide as found plausible by the International Court of Justice.¹⁰ Then, any State can take countermeasures.

As countermeasures allow otherwise unlawful action, they are subject to strict limitations. Thus, the question may arise under what conditions and standards of evidence persons can be listed, kept on the list and for how long.¹¹ Under public international law, counter-measures must be proportionate, thus suitable to achieve the goal. From that perspective, even a Russian businessman not involved in crime could be sanctioned. However, he should be able to influence Russian politics; otherwise the freezing would not be suited to reach its intended purpose.

Moreover, countermeasures must be terminated once the wrongful conduct ceases.¹² However, after the war freezing Russian assets could possibly continue to ensure that Russia pays reparations for reconstructing Ukraine. Taking or continuing

5 International Law Commission/ILC, Draft articles on State Responsibility with commentaries, Arts. 22, 49–54 with commentaries.

6 Cf. e.g. *Doehring*, ZaöRV 1987, pp. 44 ff.

7 Some examples from State practice: On 26 February 2022, Canada, the European Commission, France, Germany, Italy, the United Kingdom and the United States decided to prohibit transactions with the Russian Central Bank; on 9 March 2022, the EU approved a similar measure in respect of the Central Bank of Belarus; the U.S. froze the assets of the respective central banks of Iran, Venezuela and, more recently in 2021, Afghanistan.

8 *Schmitt*, Lieber Institute White Paper: Responding to Malicious or Hostile Actions under International Law (26 April 2022).

9 Cf. Art. 48 ILC Draft Articles on State Responsibility.

10 ICJ, order of 16 March 2022, *Allegations of genocide under the Convention on the prevention and punishment of the crime of genocide* (Ukraine v. Russian Federation).

11 In the long run, freezing may amount to creeping confiscation.

12 Cf. Art. 49 Draft Articles on State Responsibility.

countermeasures after the end of the international crime could be exceptionally possible to secure reparations still due to the injured State.¹³ Lifting the sanctions could be linked to a peace agreement, which compensates Ukraine for the damages it has suffered. According to President *von der Leyen*, the assets that would need to be returned could be offset against this war reparation.¹⁴ Usually, however, such claims resulting from unlawful acts in international conflicts are determined and settled by mixed claims commissions or tribunals as for example the Iran-United States Claims Tribunal.¹⁵

Thus, the EU, and not only Ukraine, can take countermeasures. However, countermeasures may only be taken in order to induce the responsible State to comply with its obligations, namely, to cease the internationally wrongful conduct, if it is continuing, and possibly to provide reparation to the injured State. They are of a preliminary or provisional nature. Therefore, sanctions or counter measures in principle do not cover definitive measures as confiscation, but only the freezing of the foreign assets.

In this context, President *von der Leyen* referred to the creation of “a structure to manage these funds and invest them. We would then use the proceeds for Ukraine”.¹⁶ It is nevertheless not completely clear whether taking the proceeds of foreign property is still covered as “sanctions” or countermeasures. In any case, another legal basis is needed for taking the very assets and using them for the reconstruction of Ukraine, thus, for confiscation.

C. From Freezing to Confiscation

Regarding the legality of confiscations, one has to distinguish between the assets of the Russian State and private assets, in particular of the oligarchs.

I. Assets of the Russian State

Russia’s central bank assets are protected by the customary international law principle of State immunity.¹⁷ Absent an explicit waiver they can neither be subject to court proceedings nor to execution in another State.¹⁸ The principle of State immunity is derived from the principle of sovereign equality of States and serves the sta-

13 Such argument could be read from Art. 48 Draft Articles on State responsibility, which is considered to reflect customary international law.

14 See also Press release of 30 November 2022, Ukraine: Commission presents options to make sure that Russia pays for its crimes.

15 Cf. *Dolzer*, Max Planck Encyclopedias of International Law 2011.

16 *Ursula von der Leyen*, LinkedIn, Post consulted on 17/1/2023, 1mo Edited, // Statement on Russian accountability and the use of Russian frozen assets //.

17 Cf. e.g. *Steinberger*, in: Bernhardt (ed.), pp. 615 ff.

18 Cf. *Wuerth*, in: Ruys/Angelet/Ferro (eds.), pp. 266 ff.; Art. 18, 19 United Nations Convention on Jurisdictional Immunities of States and Their Property, which is considered to reflect customary international law. However, those articles refer to pre- and post-judgments situations.

bility of international relations. That very reason of state immunity confirms that it does not only apply in the context of court proceedings.

Russian central bank money is currently blocked as transactions related to the management of reserves as well as of assets of the Central Bank of Russia are prohibited by Council Regulation 833/2014 based on the Common Foreign and Security Policy.¹⁹ Such immobilization of the central bank money is justified as EU sanction and countermeasure against Russia's war of aggression.

Definitive taking or confiscation of the central bank money is, however, not justified as countermeasure (cf. *supra*). It would need another justification based on public international law. Art. 38 of the Statute of the International Court of Justice lists the sources of public international law: conventions, international custom and general principles.

The inherent right of individual and collective self-defense is laid down in the UN Charter.²⁰ Collective self-defense may also cover indirect help, such as taking away Russian State money. That money could then be used for Ukraine's self-defense instead of the continuation of Russia's criminal war of aggression.²¹ In that case, the measures should have been immediately reported to the Security Council under Art. 51 UN Charter. Or, one may try to find a justification for denying Russia's immunity on the basis of a general principle, as forfeiture or the prohibition of abuse. Thus, one might argue that Russia forfeited its immunity by its gross violations of public international law.²² However, there seem to be no precedents for such novel approaches.

Another novel approach, which is therefore discussed,²³ is "active management of frozen and 'immobilized' assets, in particular liquid assets of state-owned enterprises and of the Russian Central Bank". Its aim is to thereby ensure a stable and fair net return to finance the reconstruction of Ukraine while ensuring the return of the assets themselves once the restrictive measures will be lifted. This, according to the Commission, could still be based on the Common Foreign and Security Policy and would be compliant with EU and international law, including the right to property and the principle of State immunity.²⁴

II. Confiscation of Russian Private Assets

Council Regulation (EU) No 269/2014 of 17 March 2014 provides restrictive measures in respect of actions undermining or threatening the territorial integrity, sover-

19 Art. 5a(4) Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine as amended.

20 Art. 51 UN Charter.

21 Cf. *Buchan*, ICLQ, 2023/1, pp. 1 ff.

22 On forfeiture cf. *Kokott*, in: Beyerlin/Bothe et al. (eds.), pp. 135 ff.; *Doehring*, ZaöRV 2007, pp. 385 ff.

23 *Ursula von der Leyen*, LinkedIn, Post consulted on 17 January 2023, 1mo Edited, // Statement on Russian accountability and the use of Russian frozen assets //.

24 *Commission*, options paper on the use of frozen assets to support Ukraine's reconstruction, 30 November 2022, p. 7.

eignty and independence of Ukraine. Assets owned or held by natural persons and entities listed in its Annex I are to be frozen. The annex is constantly being expanded. As of 22 December 2022, it contained 1412 natural persons, mostly men, and 174 entities (companies, foundations, associations, movements...). However, contrary to what some newspaper articles seem to suggest, it is neither planned nor legally possible to confiscate all frozen assets. In its options paper on the use of frozen assets to support Ukraine's reconstruction of 30 November 2022, the Commission clearly and repeatedly sets forth that the freezing of assets under EU restrictive measures adopted within the framework of the CFSP "cannot be considered as a first step towards confiscation. There is no legal avenue allowing the confiscation of frozen assets on the sole basis of these assets having been frozen under EU restrictive measures."²⁵

However, assets can be confiscated by the Member States on the basis of criminal confiscation regimes applying in the framework of criminal proceedings. The EU can harmonize these on the basis of Art. 83 TFEU. Such confiscations generally require evidence of a specific criminal offence, typically through a conviction. In some cases, confiscation may also be possible without a criminal conviction provided that a court is satisfied that all the elements of a specific criminal offense, or at least a nexus with criminal activity, are present.

On the level of the EU, this regime is currently laid out in Directive 2014/42, but it only applies to certain specific crimes where the EU has already adopted harmonized measures. Those crimes reflect the scope of Art. 83 TFEU because this provision only provides a competence with regard to specific areas of particularly serious crimes with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. Moreover, Art. 83 TFEU specifically identifies these areas as 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, computer crime and organised crime. It cannot be excluded that some of the frozen Russian private assets are linked to those crimes, but it seems unlikely that these rules will allow the confiscation of substantial amounts.

However, the EU is currently working to extend this regime. As a first step, the Council has identified the violation of Union restrictive measures as another area of particularly serious crime with a cross-border dimension that justifies EU harmonization.²⁶ Art. 83 TFEU allows for such an extension of its scope by unanimous Council decision and consent of the European Parliament.

The second step is the proposal of a new directive on asset recovery and confiscation.²⁷ If it is adopted, it will extend the scope of the EU regime to the violation of restrictive measures. Should owners of frozen Russian private assets try to "libera-

25 *Commission*, options paper on the use of frozen assets to support Ukraine's reconstruction, 30 November 2022, pp. 3 ff.

26 Council Decision 2022/2332 of 28 November 2022.

27 Proposal for a directive on asset recovery and confiscation of 25 May 2022, COM(2022) 245 final.

te” them, these assets shall therefore be subject to confiscation. However, the notion of proceeds of a crime could be clarified²⁸ as the frozen assets as yachts and villas may as such neither be instruments nor proceeds of the new Euro-crime of sanctions-infringement. Moreover, the mandatory transfer of the money stemming from confiscated Russian assets from the Member States to the EU is being discussed. Thus, a new EU own resource could be created (on the basis of Art. 311 TFEU).²⁹

Finally, the amendments will reinforce national authorities’ confiscation powers, extend the scope of non-conviction-based confiscation and introduce a new confiscation model based on unexplained wealth.³⁰ Proceeds or other property can also be taken from third parties who knew or ought to have known that the purpose of a transfer or acquisition was to avoid confiscation.³¹

In spite of these extensions of the confiscation regime, the confiscation of frozen Russian private assets still requires due process of law and respect of the right to property. Non-conviction based confiscation is not necessarily easier.

Under the Engel criteria developed by the ECtHR, the criminal procedural guarantees may also apply outside criminal proceedings, depending on the severity of the State measure.³² Confiscation may affect a private party very severely. Therefore, the guarantees applicable in criminal proceedings as in particular *in dubio pro reo* may apply. Art. 1 of the First Additional Protocol to the European Convention of Human Rights guarantees the right to property, but subject to the conditions provided by the general principles of international law. However, Art. 17 of the EU Charter on Fundamental Rights allows confiscations only “subject to fair compensation being paid in good time for their loss”. Taking Russian assets against fair compensation is certainly not what is intended to raise funds for the reconstruction of Ukraine.

D. Conclusions

The EU is a union based on the rule of law in which individual parties have the right to challenge before the courts the legality of any decision or other national

28 As the Commission sets forth in its options paper on the use of frozen assets to support Ukraine’s reconstruction, 30 November 2022.

29 *Commission*, options paper on the use of frozen assets to support Ukraine’s reconstruction, 30 November 2022, pp. 5 ff.

30 Art. 13 ff., 16 Proposal for a directive on asset recovery and confiscation of 25 May 2022, COM(2022) 245 final.

31 Art. 13 Proposal for a directive on asset recovery and confiscation of 25 May 2022, COM(2022) 245 final. Such responsabilisation of private parties is a critical trend known from combating money laundering as well as base erosion and profit shifting in international taxation. Private sector actors are more and more burdened with tasks in the realm of law enforcement, traditionally performed by public authorities. This may touch upon their individual rights.

32 ECtHR, judgment of 8 June 1976, Appl. no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 – Engel, no. 82.

measures relating to the application to them of an EU act.³³ Where the EU explores new ways to assist Ukraine in defending itself against Russia's criminal war of aggression, the EU must still observe the values and fundamental legal principles on which it is founded. The repeated statements of the Commission that freezing is not the first step to confiscation reflect the legal service's concern to help Ukraine while complying with the rule of law. Today's challenges are: Mobilizing funds to help Ukraine while at the same time respecting the fundamental principles as legal certainty, fair trial including fair standards of proof with regard to establishing the nexus to an EU crime and the right to property. Thereby, it should be kept in mind, that Russia, China, and all other States could be inspired by what the EU does to Russian persons and companies. Those other States may for example also take assets from EU-persons and companies. Similarly, non-observance of State immunity may set unwanted precedents. Thus, only the International Court of Justice³⁴ could stop Italian³⁵ and Greek courts³⁶ from seizing German property as schools, Embassies, or the Villa Vigoni to compensate Nazi atrocities. Therefore, it can imply risks to create new public international law.

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