

Options paper by the European Commission **on the use of frozen assets to support Ukraine's reconstruction**

I. Introduction

The World Bank estimates the overall damage in Ukraine between the beginning of the war and May 2022 to be close to EUR 350 billion. This figure is expected to grow significantly as the war continues.

The European Council, in its conclusions of 20-21 October 2022, invited the Commission to present options in line with EU and international law enabling the use of Russian frozen¹ assets to support Ukraine's reconstruction.

By 25 November 2022, the total amount of private assets frozen in the EU within the framework of the Common Foreign and Security Policy (CFSP) amounted to almost EUR 18,9 billion. As regards Russian public assets, the precise total amount '*immobilised*' in the EU due to transaction prohibitions is currently unknown. The Russian Central Bank's international reserves are '*immobilised*', to the extent that they are in the G7 countries and the EU, for a total amount estimated at USD 300 billion.

Against this background, this options paper aims at clarifying the international context (section II); identifying ways to strengthen the tracing and identification of assets as preliminary steps for potential confiscation (section III); exploring avenues that could lead to the confiscation of frozen Russian assets (section IV); framing the way to transfer proceeds stemming from confiscated assets from the Member States to support Ukraine (section V); and envisaging a temporary measure allowing to use frozen and '*immobilised*' Russian assets (section VI).

II. International cooperation

In March 2022, in the aftermath of Russia's aggression against Ukraine, the Commission set up the 'Freeze and Seize' Task Force to ensure EU-level coordination of Member States' actions in enforcing Union restrictive measures ('sanctions') in the field of asset freezes. The Task Force also aims to explore the extent to which Ukraine's reconstruction can be supported via criminal law measures adopted in the EU.

At the international level, the 'Freeze and Seize' Task Force works alongside the G7 Russian Elites, Proxies, and Oligarchs (REPO) Task Force, in which the EU participates together with the G7 countries and Australia.

¹ The notion of '*frozen*' assets also covers assets which are subject to prohibitions of transactions related to their management under Article 5a(4) of Council Regulation 833/2014 (hereafter '*immobilised* assets').

The Commission is determined to continue and advance reflections on the options identified in this paper in close coordination with the members of the REPO Task Force, other like-minded partners and Ukraine, as well as relevant international organisations as appropriate.

III. Tracing and identification of assets as preliminary steps

On the basis of EU law as it stands, EU operators are obliged to inform Member States' competent authorities about assets they have frozen, and also to provide any information in their possession about assets not being treated as frozen². In addition, designated persons and entities are obliged to report funds or economic resources within the jurisdiction of a Member State belonging to, owned, held or controlled by them, to the competent authorities of the Member States where those funds or economic resources are located³. Member States need to ensure the effective implementation of these reporting obligations and take the necessary measures to follow up on cases of non-compliance.

In turn, Member States must provide this information to the Commission in an aggregated form, i.e. Member States only report the total amount of assets they have frozen without further details on the single frozen assets.

Member States are also obliged to check the veracity of information contained in the beneficial owner registries.

The tracing and identification of those assets could be further strengthened by the following measures.

III.1. Strengthen existing reporting obligations under the EU sanctions regime

In addition to the launch of a revamped IT tool to facilitate asset reporting and allow for more granular information to be reported, the Commission could provide further and more detailed guidance to improve Member States' reporting. It could also consider proposing new rules requiring the Member States to report and publish detailed data on the assets frozen, rather than only aggregate data, thus enabling better international cooperation in view of possible confiscation.

III.2. Strengthen the role of national competent authorities

Under the proposed Directive on asset recovery and confiscation⁴, when cooperating with one another, Member States' asset recovery offices would be entrusted with the task of tracing assets of designated persons and entities in relation to the prevention, detection, and investigation of

² Article 8 of Council Regulation (EU) No 269/2014, as amended by the 7th sanctions package in July 2022.

³ Article 9 of Council Regulation (EU) No 269/2014, as amended by the 7th sanctions package in July 2022.

⁴ Proposal for a Directive of the European Parliament and of the Council on asset recovery and confiscation of 25 May 2022, COM(2022)245.

criminal offences. The proactive tracing of assets of designated persons and entities is essential to detect and prevent sanctions violations.

The Commission calls on the Parliament and the Council to rapidly agree on the proposed Directive.

The Commission stands also ready to provide guidance to Member States on how they can, ahead of the adoption and transposition of the proposed Directive, as an immediate step share information between them, which the Commission strongly recommends.

III.3. Identification of beneficial owners

The Commission calls on the Parliament and the Council to advance quickly on the Commission's anti-money laundering (AML) package proposal of June 2021⁵.

This is without prejudice to the obligation of the Member States to transpose the Beneficial Ownership provisions of the 5th AML Directive⁶, and does not prevent them from putting in place other measures in order to facilitate those restrictive measures are implemented in a meaningful and effective manner.

The Commission will also explore further measures to facilitate national competent authorities' access to information contained in the different registries, including beneficial owner information, for the purposes of identifying assets linked to designated persons and entities.

IV. Confiscation of frozen Russian assets

Freezing of assets⁷ 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

⁵ The AML package presented in June 2021 is composed of: a Regulation establishing a new EU AML/counter-terrorist financing (CFT) Authority; a Regulation on AML/CFT, containing directly applicable rules, including in the areas of Customer Due Diligence and Beneficial Ownership; a sixth Directive on AML/CFT, replacing the existing Directive (EU) 2015/849 (the fourth AML Directive as amended by the fifth AML Directive), containing provisions that will be transposed into national law, such as rules on national supervisors and Financial intelligence units; and a revision of the 2015 Regulation on Transfers of Funds to trace transfers of crypto-assets (Regulation 2015/847/EU).

⁶ Directive (EU) 2018/843 of 30 May 2018 on anti-money laundering and countering the financing of terrorism.

⁷ This section does not concern the reserves of the Central Bank of Russia, which are subject to prohibitions of transactions related to their management under Article 5a(4) of Council Regulation 833/2014.

confiscation of frozen assets on the sole basis of these assets having been frozen under EU restrictive measures⁸.

Assets can today be confiscated by the Member States on the basis of criminal confiscation regimes which are to a large extent already harmonised at EU level⁹.

These regimes only apply in the framework of proceedings in criminal matters¹⁰. They generally require either evidence of a specific criminal offence, typically through a conviction. In some cases, confiscation may also be possible even without a conviction (for instance, currently in case of illness or absconding), provided that the court is satisfied that all elements of a specific criminal offence are present. Criminal confiscation regimes may also allow confiscation in the absence of evidence of a specific criminal offence if at least a nexus with a criminal activity exists: this will be in particular the case under the new confiscation model of unexplained wealth *linked to* criminal activities, primarily those criminal activities committed within the framework of an organised crime group. Criminal offences on which criminal confiscation of frozen Russian assets can be based include participation in a criminal organisation, money laundering, terrorism (including financing of terrorism), corruption, and criminal offences related to the violation of EU restrictive measures (in those Member States where such conduct is already criminalised)¹¹.

⁸ As a general rule, EU sanctions adopted under Articles 29 TEU and 215 TFEU, and asset freezes in particular, are of a temporary and non-punitive nature (see e.g. judgment of the ECJ in Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, para. 358; judgment of the General Court in Case T-47/03, *Sison v. Council*, para. 101). Although sanctions inevitably entail a restriction of the right to property, they are not intended to result in a permanent deprivation thereof. This has several implications, notably on the standard of proof required for the adoption of CFSP sanctions, the assessment of their proportionality (notably with respect to the right to property), and the (absence) of the need to prove a criminal offence (under Article 49(1) of the Charter of Fundamental Rights of the EU). Therefore, from both legal and sanctions policy perspectives, it is important to preserve the temporary and non-criminal nature of sanctions to avoid raising the procedural and evidentiary thresholds required for the adoption of sanctions in the first place.

⁹ See in particular Council Framework Decision 2005/212/JHA and Directive 2014/42/EU.

¹⁰ To step up efforts to enable the confiscation of Russian assets, the Commission already asked Eurojust and Europol to cross-check the list of designated individuals and companies against their databases, and Member States' authorities were invited to do the same. To this end, on 11 April 2022, Europol launched Operation OSCAR to support the exchange of information on criminal investigations linked to EU restrictive measures, so far with the participation of all Member States (except Hungary), 13 third countries (including Ukraine), Eurojust and Frontex. The operation has identified criminal links relating to 71 physical designated persons and three designated companies linked to 82 ongoing high-priority cases. Eurojust's cross-check has resulted in 26 potential links, five of which are confirmed and being followed by Member States.

¹¹ Further reflections could include possibilities for considering some Russian entities as criminal organisations or terrorist organisations and considering their individual members as criminally liable for participation in an organised crime or terrorist organisation, with the same consequences (i.e. confiscation) applying on their assets. Such a reflection should also take into account possibilities under national laws and discussions at national level in the EU and like-minded states.

Criminal confiscation may also be based on international crimes as provided for by national law, e.g. war crimes¹².

Once the link between the assets (proceeds) and the criminal activity from which they originate has been established, they can be confiscated. In other words, the assets of designated Russian individuals and entities that are currently frozen could not be confiscated simply because they are owned by those persons and entities. A link with criminal activities would always be needed to confiscate assets. In addition, confiscation could only take place after the lifting of the restrictive measure or the release of frozen assets under an applicable derogation by authorising decision of the competent national authority.

IV.1. Confiscation in the framework of proceedings in criminal matters

The new Directive on asset recovery and confiscation proposed by the Commission in May 2022 will reinforce national authorities' confiscation powers across the EU, extend the scope of non-conviction-based confiscation and introduce a new confiscation model based on unexplained wealth. The proposed Directive also extends the scope of application of confiscation measures to more criminal offences, such as firearms trafficking, migrant smuggling as well as, if carried out in the framework of a criminal organisation, counterfeiting, trafficking in cultural goods, and others.

On 28 November 2022 the proposal for a Council decision identifying the violation of Union restrictive measures as an EU crime under Article 83(1) TFEU was adopted. This opens the door for the Commission to propose a directive on the definition of criminal offences and penalties for the violation of EU restrictive measures. This proposal will be linked to the asset recovery and confiscation Directive, so that the latter directive will apply to property stemming from or used for violations of restrictive measures.

Moreover, that latter proposal could also clarify the notion of 'proceeds' in relation to the criminal offences of circumventing EU restrictive measures. Especially where a designated person commits or participates in specific circumvention offences, the notion of 'proceeds' could be understood to include the funds and/or economic resources subject to EU restrictive measures, which therefore could be subject to confiscation under certain conditions.

Nonetheless, it should be noted that any new criminal law measure would not be applicable retroactively, thus it would only target activities committed after its entry into force.

IV.2. National civil regimes of certain Member States

¹² Currently, 14 Member States reported to have initiated criminal investigations into alleged international crimes committed in Ukraine on the basis of personal or universal jurisdiction. In case of final conviction, instrumentalities and proceeds arising from those offences may be subject to confiscation, if national law so provides. Furthermore, on 2 March 2022, the Prosecutor of the International Criminal Court (ICC) announced the opening of an investigation into the situation in Ukraine on the basis of States Parties' joint referral. It should however be noted that any proceeds potentially confiscated as a result of ICC trials would directly feed into the ICC Trust Fund for Victims.

In addition to their current or future obligations under EU law, Member States can rely on civil confiscation, where the national legal order provides for these options. In these Member States, civil confiscation measures can be adopted by means of a judicial decision against the property (*in rem* procedure)¹³, for which usually a lower standard of proof (‘balance of probabilities’) is required.

V. Transfer of money stemming from confiscated assets from the Member States to support Ukraine

Eventual proceeds coming from assets confiscated by the Member States, or from their sale, could be channelled to the EU – either to a stand-alone ‘Common Fund’ or the EU instrument envisaged for Ukraine’s reconstruction purposes (e.g. Rebuild Ukraine Facility) – by means of either a voluntary or a mandatory transfer. In both cases, Article 21(5) of the Financial Regulation¹⁴ could be used to assign these revenues to a special part of the EU budget, so as to directly channel the assets concerned to the EU instrument that will be established for reconstruction purposes.

A system of voluntary contributions could be set up. Member States could agree among themselves through a formal or informal intergovernmental agreement. In this context, the EU could envisage, where appropriate, a system of incentives to transfer the relevant revenues to the EU for Ukraine’s reconstruction.

A system of mandatory transfer from the Member States to the EU budget could be based on Article 311 TFEU, by means of creating a new own resource.

VI. Temporary use of frozen and ‘immobilised’ Russian assets

The G7 REPO Task Force has just started reflections on the possible confiscation of frozen and ‘*immobilised*’ Russian assets and further discussions on this matter are expected to take place in December.

As a consequence of EU restrictive measures, public Russian assets located in the territory of the EU have been frozen and prohibitions of transactions, with a similar effect to freezing, have been introduced.

¹³ This is the case, for instance, of Bulgaria, Ireland and Slovenia.

¹⁴ Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012, OJ L 193, 30.7.2018, p. 1.

Given the unprecedented context of the war and its effects on the financial, economic and social situation within the EU, additional measures under the CFSP could consist in linking the lifting of the restrictions on these assets to the conclusion of a peace agreement between Russia and Ukraine, which settles the issue of reparation of the damage.

Until then, it could be explored with international partners that have adopted similar sanctions whether an active management of frozen and '*immobilised*' assets, in particular of liquid assets of state-owned enterprises and of the Russian Central Bank and affiliated entities, could be put in place under the CFSP, aiming at ensuring a stable and fair net return to be used, as external assigned revenue, to finance the reconstruction of Ukraine. To that effect, appropriate financial instruments would need to be set up, preferably at international level. In addition, the existing EU restrictive measures legal acts would have to be amended for such a proposal to be taken forward.

These administrative measures would be tailored so as to respect the principle of sound financial management and remain compliant with EU and international law, including the right to property and the principle of State immunity¹⁵. They would, in particular, guarantee the return of the assets, when the restrictive measures are lifted.

¹⁵ This is based on customary international law, as reflected in the UN Convention on Jurisdictional Immunities of Foreign States and Their Property (not yet in force).