

# THE CHALLENGES OF FREEZING AND SEIZING RUSSIAN ASSETS



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The reality of sanctions – and, more precisely, the limbo effect of sanctions freezes - is observable on a day-to-day level simply by walking along a number of roads in Central London.

One can see numerous Libyan properties that have been frozen since 2011. A brief view of such properties will often show that they are in need of extensive (and expensive) upkeep and upgrade work after such a long period of “freezing”, in order for them to maintain their value.

However, to obtain a licence from OFSI (the Office of Financial Sanctions Implementation) to enable even simple maintenance work to be carried out on such frozen properties requires a process to be undertaken. This process is not likely to be completed swiftly, given the staffing and workload issues that OFSI is wrestling with in the wake of the 2022 sanctions imposed following Russia’s invasion of Ukraine. Furthermore, the legal framework allows only for “necessary” maintenance work to be carried out. An applicant has also to explain in detail why the cost of this work can be considered reasonable – a task that may require the production of a huge amount of paperwork to be served as evidence. Given the fact that little is known officially about the maintenance

works that were granted by OFSI in the past - or whether there were any judicial reviews in connection with maintenance works - applicants may be rather reluctant to start lengthy test cases.

The state of Libyan properties can be viewed as a sign of this situation. These properties can also be seen as an indicator of the future for many properties that have been frozen in the wake of sanctions imposed on Russia.



## Freezing or unfreezing?

When it comes to frozen assets, the question that needs to be asked most often is “What’s next?” The answer may not be obvious. Assets cannot be frozen in eternity. They have to be either confiscated or unfrozen. There may be strong feeling against Russian activities in Ukraine but that does not make the legal situation any simpler. Politicians have proposed various “solutions” including seizing Russian

oligarchs’ properties and using them to temporarily house Ukrainian refugees. Such proposals might be popular with a large percentage of the general public, but it should always be remembered that any such course of action must not violate the rule of law.

It should also be pointed out that the use of the unexplained wealth orders (UWOs) in the UK to seize oligarchs’ assets is not a fast and straightforward method.

***Although their wealth might have been historically based on corruption, this wealth was acquired a substantial time ago and may have since become mixed with income from legitimate sources.***

It can, therefore, be quite hard to prove that a specific villa in London or yacht was acquired with tainted monies years ago.

The EU has also worked on a legal framework on how to best freeze, seize and confiscate “private” Russian assets. Yet the EU legislation faces two specific hurdles:

- \* Many EU countries do not have the power to confiscate and liquidate these frozen assets unless they are the proceeds of crime
- \* The penalties for a breach of sanctions vary from member state to member state. Some see such breaches of sanctions as a criminal offence while others impose only an administrative fine. This has recently led the European Commission to propose making breaching sanctions a 'Euro Crime' – to ensure that all member states criminalise it and apply similar penalties.

Although the EU aims to confiscate private Russian and Belarusian assets, it will still be very difficult to use those assets for Ukraine's reconstruction. Usually, a confiscation of assets requires unlawful conduct. This will require an assessment of whether mere association with the Russian regime is sufficient to take such a course of action. A confiscation will often require criminal proceedings in which member state prosecutors will have to prove that either sanctions breaches occurred or that the assets were the proceeds of crime. And sanctions evasion offences are likely to have only limited reach as a starting point for asset seizure, given that they would only catch the specific proceeds of the sanctions evasion itself.



## Challenges

The issue, therefore, is not as clear-cut as many would wish. Proving that assets were the proceeds of crime might be a far from straightforward procedure, as it is a route that will involve many challenges. Many of the so-called oligarchs bought assets in Europe more than twenty years ago, re-sold them and bought other assets, many of which now belong to family members and / or offshore companies. After so many years it will be hard to present convincing evidence that these assets were in fact proceeds of crime. Extensive legal challenges, legal proceedings lasting years and opposition by the respective sanctioned persons can be expected. Various yacht freezes and the legal challenges which French authorities are currently facing give a good insight into what is to be expected in the near future regarding other frozen assets.

When it comes to the freezing and seizure of an oligarch's assets based on allegations that the assets were proceeds of crime, one must also not forget the purpose of asset recovery. It is the process by which the proceeds of corruption transferred abroad are recovered and repatriated to the country from which they were taken or to their rightful owners.

***However, in the case of the oligarchs' wealth, which was originally amassed decades ago, the rightful owners are in fact the Russian people and not the Ukrainians.***

Thus, it is highly questionable how many "private" assets can in fact be seized and whether this amount will substantially contribute to the compensation of Ukraine.



## Russian state assets

Nearly \$300 billion of Russia's foreign reserves are held by seven sanction-imposing countries. The EU Commission recently made a proposal to start rebuilding Ukraine, whereby a structure would be set up to manage the frozen Russian state funds, invest them and use the proceeds in favour of Ukraine.

However, such a fund requires careful design, sound financial management to ensure its credibility and effectiveness, as well as procedures relating to oversight, monitoring, and accountability. What the decision-making process would look like, who would have ultimate decision-making power over such a fund, who oversees and audits the fund's investments (i.e., are transactions arms-length?) and who bears the ultimate responsibility and accountability would all be major issues that would have to be addressed and agreed upon.

The EU Commission further proposed that the return of the Central Bank assets to Russia should be linked to a peace agreement, which compensates Ukraine for the damages it has suffered. This may sound appealing and could prove popular with the general public. But there is the unanswered question of what happens if Russia does not voluntarily

agree with this approach and Vladimir Putin demands that all types of sanctions measures - including the unfreezing of state reserves - are dropped as a condition for ending hostilities.

Ultimately, Russian state assets could be confiscated. Yet this comes with additional hurdles. The confiscation of state assets requires an even higher legal bar to be cleared than has to be for confiscating private assets. State assets are protected by international law and by state immunity. For example, the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property (although not in force yet) is regarded, at least in part, as customary international law. It clearly states that central bank property is covered by immunity from measures of constraint (see Articles 18, 19(c) and 21(1)(c)).

One should also not miss sight of the geopolitical implications of such a move. Should Russia's vast foreign dollar reserves be confiscated, those countries who are not allies of the US or EU may be less inclined to use the US dollar as the international reserve currency any longer, due to fear of future confiscations. The dollar as currency would then no longer be viewed as a safe haven, in particular by countries like China and other non-US / European allies. This may have a significant impact on financial markets – as the central role the US plays in the global economy would be minimised - and may even encourage China and others to establish an alternative system. Furthermore, non-US / EU allies might be incentivised to confiscate others' assets and to disregard property rights on a wider scale, which could put US / European investments in other parts of the world at greater risk.

Moreover, the US and European countries need to be careful that they are not seen to be disregarding the rule of law and principles of international law by implementing measures normally associated with autocratic regimes.

## Conclusion

While there are many opinions being voiced about what could or should be done with frozen Russian assets, the situation may be one that takes years to be fully resolved. It is filled with legal challenges and is far from straightforward. And, as certain streets in London show, this may come to have an effect on the frozen assets themselves.

