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# Enforcing Sanctions Violations to Fund the Reconstruction of Ukraine

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## Introduction

As the Russian Federation's full-scale invasion of Ukraine continues into its second year, Ukraine's reconstruction and recovery is estimated by the World Bank to cost, at a minimum, \$411 billion. With no realistic prospect of a negotiated settlement to the conflict in sight, Ukraine and its international partners are rightfully seeking pathways to fund the rebuilding of Ukrainian infrastructure and the compensation of millions of Ukrainians that have suffered during the conflict, among other priorities. Particular attention has been paid to the possibility of seizing the assets of the Russian Central Bank and Russian individuals that have been frozen by sanctions. Nevertheless, this remains a legally and politically controversial proposal. In the shorter term, however, the enforcement of sanctions *violations* – the prosecution of individuals and legal entities for evading sanctions made against them or for doing business with sanctioned individuals and entities – may provide a feasible and legally sound approach to securing funds for Ukraine. Following an outlining of the key developments and concepts at play, this post will examine the United States (U.S.) and European Union (EU)'s approaches to the prosecution of sanctions violations as an alternative or additional approach to securing funds for Ukraine.



## Reparations for Ukraine

On 7 November 2022, the United Nations General Assembly passed Resolution L.6/2022, "Furtherance of remedy and reparation for aggression against Ukraine" with 94 states in favour, 13 against, and 74 abstaining (for a useful summary of the Resolution, see here). In addition to recognising the reparations owed to Ukraine by the Russian Federation for its violations of international law (para. 2), the Resolution:

‘3. *Recognizes* also the need for the establishment, in cooperation with Ukraine, of an international mechanism for reparation for damage, loss or injury, and arising from the internationally wrongful acts of the Russian Federation in or against Ukraine; [and]

4. *Recommends* the creation by Member States, in cooperation with Ukraine, of an international register of damage to serve as a record, in documentary form, of evidence and claims information on damage, loss or injury to all natural and legal persons concerned, as well as the State of Ukraine, caused by internationally wrongful acts of the Russian Federation in or against Ukraine, as well as to promote and coordinate evidence-gathering’.

Shortly afterwards, the government of the Netherlands made it publicly known that the proposed ‘international register of damage’ would be established in The Hague. On 17 May 2023, at the “Summit of the Heads of State and Government of the Council of Europe” held in Reykjavik, Iceland, it was further announced that the register of damage would be established under the auspices of the Council of Europe, involve the participation of 44 states (including non-members of the Council of Europe) and the EU, and include the establishment of a satellite office in Ukraine (see more details here). Whatever their final forms, both bodies will have significant running costs, particularly considering the scale of their potential mandates. Furthermore, the proposed compensation mechanism will require funds to substantiate its awards, as with other comparable bodies.

Similar to the rebuilding of Ukraine itself, seizing assets frozen by sanctions may appear as an attractive funding route. Indeed, since the Russian Federation’s full-scale invasion – and the occupation of Crimea in 2014 – numerous states and the EU have created a range of sanctions against Russian individuals, entities, and state bodies, including the large-scale freezing of assets within their respective jurisdictions. However, there are significant legal and policy obstacles to this approach (for useful assessments, see here, here, here, and here, among others), warranting the examination of additional funding avenues.

### **The Enforcement of Sanctions Violations: The United States’ Approach**

Recent developments in the U.S. may offer an approach to providing redress for harms caused by the Russian Federation’s invasion of Ukraine. To begin with, the violation of sanctions issued by the U.S. government violates U.S. criminal laws. Specifically, it is a crime to violate sanctions issued under the International Emergency Economic Powers Act (IEEPA), such as those made against the Russian Federation and affiliated persons and entities in response to the invasion of Ukraine. Moreover, as demonstrated in a series of recent high-profile indictments of sanctioned Russian nationals and their associates (see here, here, and here), schemes to violate sanctions may also be prosecuted under various U.S. laws criminalising money laundering, bank fraud, wire fraud, and other crimes. Assets frozen by U.S. sanctions are not generally subject to forfeiture under U.S. law. However, as shown above in the linked indictments, assets that constitute the proceeds of sanctions

violations or that are derived from proceeds traceable to sanctions violations *are* subject to forfeiture. Furthermore, where assets subject to criminal forfeiture are unavailable due to the conduct of persons accused of sanctions violations, U.S. authorities may seek the forfeiture of substitute assets of the accused person.

In December 2022, the U.S. passed a law that allows the use of proceeds from the sale of the forfeited assets of natural and legal persons subject to sanctions for the Russian Federation's invasion of Ukraine to be used to provide assistance to Ukraine. The U.S. is set to provide the first funds to Ukraine through the application of this process. In April 2022, the U.S. charged Mr. Konstantin Malofeyev, a Russian oligarch, with sanctions violations and issued a seizure warrant for U.S. investments that he allegedly conspired to transfer out of the U.S. in violation of sanctions issued against him in relation to the Russian Federation's invasion of Ukraine. In November 2022, the U.S. initiated a civil forfeiture action for more than \$5 million worth of Mr. Malofeyev's assets held in a U.S. bank account. On 2 February 2023, after the U.S. authorities attempted to notify the defendant and others and following the requisite internet notice period, a U.S. federal judge ordered the approximately \$5.4 million to be forfeited to the U.S. Following this, in a press conference with Ukrainian Prosecutor General Andriy Kostin, U.S. Attorney General Merrick Garland announced that he had ordered that these funds be sent to the U.S. Department of State for dispersal to Ukraine as "foreign assistance" in accordance with the new legal authority granted in December 2022. On 10 May, Attorney General Garland announced that he had authorised the transfer of these funds for use in Ukraine.

### **The European Union's Approach**

The U.S. approach to sanctions violations is particularly relevant for EU Member States considering the recent addition of the violation of EU restrictive measures (the EU's terminology for sanctions) to the list of "EU Crimes" (Treaty on the Functioning of the European Union (TFEU), Art. 83). Adding the violation of restrictive measures to the exhaustive list of EU Crimes – which, among other serious offences, includes terrorism and illicit drug trafficking – obliges all EU Member States (excluding Denmark) to domestically implement minimum definitions of these criminal offences and the form and severity of associated penalties (TFEU, Art. 83(1)). The impetus behind the EU Commission's proposal to add the violation of restrictive measures to this regime stemmed from remarkably inconsistent criminalisation and enforcement of such violations across EU Member States (Genocide Network, pp. 22-25). Indeed, although restrictive measures are created at EU level, they are implemented and enforced by the Member States (see here). Although a November 2022 Council Decision identified the violation of restrictive measures as an EU Crime, the EU Commission's draft Directive – which sets out the specific definitions and penalties – is currently before the European Parliament and has therefore not yet entered into force. Highlighting the current political focus on these developments, there have also

been proposals to establish an “EU sanctions enforcement headquarters” and to allow the recently established European Prosecutor’s Office to investigate violations of restrictive measures.

Within the draft EU Crime Directive, reference is made to the draft Directive on asset recovery and confiscation – also currently before the European Parliament – which, among others, aims to “reinforce and extend” EU Member States’ capabilities to recover and confiscate criminal assets (at “Explanatory Memorandum”). Importantly, the current draft EU Crime Directive indicates that assets frozen by EU restrictive measures can be considered proceeds of crime and therefore confiscated (similar to forfeiture in the U.S.) if either the assets themselves or the owner/beneficiary is concealed (here, Article 10; Article 3(2)(h)(i) and (ii)). Therefore, if both Directives enter into force, EU Member States will be empowered – in line with applicable safeguards and domestic laws – to confiscate (frozen) assets implicated in the circumvention of restrictive measures and repurpose them for Ukraine’s benefit, as also recommended by the European Economic and Social Committee’s Opinion on the draft EU Crime Directive (para. 4.7.). These funds could be used for the proposed register of damage, reparation mechanism, the reconstruction of Ukraine, and/or direct assistance to victims.

## **Looking Ahead**

Developments relating to the prosecution of sanctions violations, as outlined above, show promise in securing funds for Ukraine. However, both the U.S. and the EU could take additional steps to make funds linked to sanctions violations available to Ukraine. While such steps may require further legislative action, recent efforts suggest that there is sufficient political will at present.

Although a detailed exploration of all possibilities is beyond the scope of this post, one potential avenue is to use the funds gained through monetary fines based on sanctions violations for Ukraine. In the U.S., this would require amending U.S. law to allow for the use of fines levied against legal and natural persons that violate sanctions arising from the Russian Federation’s invasion of Ukraine to be used as foreign assistance to Ukraine. Amending the law so that funds from negotiated settlements of potential liability arising from the violation of sanctions levied as a result of the Russian Federation’s invasion of Ukraine would potentially make even more funds available. In the EU, the current draft EU Crime Directive already envisions minimum financial penalties for the violation of restrictive measures violations (Articles 3-6). As the Directive only sets out *minimum* requirements, Member States could also consider – in line with their domestic laws, as well as EU and international law – going further and permitting the use of funds gained through fines for violating sanctions, or a percentage thereof, to assist with the reconstruction of Ukraine and the compensation of victims. As the entrance into force of the draft EU Crime Directive will require Member States to harmonise their domestic legislation with the Directive, this is an opportune moment to consider further legislative changes.

## **Conclusion**

Using proceeds gathered from enforcing sanctions violations will not be sufficient to fund the rebuilding of Ukraine nor fully compensate the conflict's millions of victims: far from it. Nevertheless, the financial sums potentially involved are not inconsequential. If sanction violation prosecutions are based upon international law-compliant sanctions and strict procedural safeguards are in place for those prosecuted, the EU and the U.S. – and indeed other states – can contribute further legitimate funds to Ukraine.