

SANCTION. CONFISCATE. COMPENSATE.

**Briefing: Comparative Laws for Confiscating and
Repurposing Russian Oligarch Assets**

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Summary

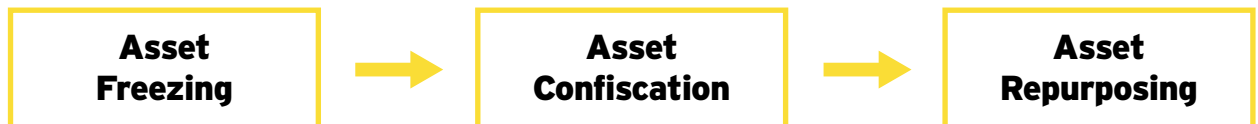
Governments around the world have expressed an interest in confiscating sanctioned Russian oligarch assets and repurposing them as reparations for victims in Ukraine. However, existing legislation is largely ill-equipped to achieve this goal. (See our [briefing: Repurposing Frozen Russian Assets for Victims in Ukraine](#)).

New laws are needed to enable the confiscation of frozen oligarch assets, as well as the assets of other individuals around world that have perpetrated grave human rights violations.

Freezing assets under sanctions means that they remain unable to be used until a decision is made to unfreeze them or a license granted to use them. In practice, this means that the assets can remain frozen indefinitely.

Confiscating or forfeiting the assets would pass ownership of them to the government, allowing it to sell-off the assets and repurpose the proceeds as reparations for victims.

This briefing reviews four laws in Italy, Canada, Switzerland, and France, which enable the freezing, seizing, confiscation and/or repurposing of assets of perpetrators for the benefit of victims. It is not suggested that these laws provide a perfect model to be replicated in other jurisdictions. However, elements of each may provide some inspiration for the development of progressive new laws which address problems of illicit wealth and the need for reparations for victims.



Recommendations

New laws to confiscate the frozen assets of sanctioned oligarchs must:

- Ensure compliance with the rule of law,
- Ensure compliance with human rights principles, including the rights to property and due process,
- Be applicable to serious violations of human rights and humanitarian law around the world, not just Russia's invasion of Ukraine, and
- Enable confiscated assets to be repurposed for victims of serious violations of human rights and humanitarian law around the world.

To achieve this, governments could consider:

- Administrative confiscation powers,
- A presumption that assets are of illicit origin in certain circumstances,
- Attaching asset confiscation powers to persons based on their involvement in or association with a group engaged in human rights abuses or corruption, without requiring proof that the assets specifically are proceeds of criminal conduct,
- Judicial oversight of a decision to confiscate assets, and
- Appeal rights.

Italy

Summary

To respond to the difficulties in prosecuting members of the mafia, Italy introduced a preventative confiscation regime, Legislative Decree 159/2011 (Anti-Mafia Code). The Anti-Mafia Code enables prosecutors to bring a claim before the District Court for the administrative seizure and confiscation of assets controlled by persons involved in a mafia-type or criminal associations. Preventative confiscation can occur independent of any criminal proceedings.

The Anti-Mafia Code is broader than typical non-conviction based confiscation measures, as it attaches to persons based on their involvement in or association with a criminal organisation, and does not require proof that their assets are proceeds of criminal conduct. It also reverses the burden of proof, requiring defendants to prove that their assets are lawfully acquired to avoid confiscation.

The European Court of Human Rights has held that the preventative measures are compliant with the rights to property and a fair trial under the European Convention on Human Rights.

Application

The Anti-Mafia Code applies not to the commission of a specific unlawful act, but to a pattern of behaviour establishing that the person is a danger to society.

It applies to, *inter alia*:

- Persons suspected of belonging to a mafia-type association,

- Persons suspect of having committed serious organised crime-related offences, such as election interfering; human trafficking; kidnapping; terrorism; causing an epidemic; weapons offences; and appropriating public funds.

- Persons or entities on the UN sanctions list.

A mafia-type organisation is defined as one whose members use the power of intimidation deriving from bonds of membership, the state of subjugation, and conspiracy of silence that it engenders, to commit offences, to acquire direct or indirect control of economic activities, licenses, authorisations, public procurement contracts and services, or to obtain unjust profits or advantages for themselves or others, or to prevent or obstruct the free exercise of vote, or to procure votes for themselves or others at elections.

Asset Seizing

A court may order the seizure¹ of assets where:

- The assets are at the direct or indirect disposal of the person of interest, and
 - a. The value of the assets is disproportionate to that person's declared income or economic activity, or
 - b. On the basis of sufficient evidence, there is reason to believe that the assets are the fruit of illegal activity.

¹ Seizure means that the assets are put under the temporary management a judicial administrator on behalf of the State, but ownership of the assets does not pass to the government.

Proceedings can continue against the person if they are abroad. Where the person is deceased, proceedings can continue against their heirs or successors.

A seizing order will expire after 18 months if the assets are not confiscated, which may be extended by six months in complicated cases.

Asset Confiscation

A court can order the confiscation of the seized assets if:

1. The person of interest appears to be the owner of the assets, including through an interposed natural or legal person,
2. The value of the assets is disproportionate to person of interest's income or economic activity, and
3. The person cannot prove the legitimate origin of the seized assets.

Seized assets can also be confiscated where they are the proceeds of unlawful activities.

The European Court of Human Rights has determined that Italy's preventative confiscation mechanism does not contravene the rights to property² and a fair trial,³ guaranteed by the European Convention on Human Rights, noting that:⁴

- The interference with the right to property is proportionate to the legitimate aim pursued,
- States have a wide margin of appreciation in addressing problems which affect the public interest,

2 Article 1, Protocol 1, European Convention of Human Rights.

3 Article 6 European Convention of Human Rights.

4 *Raimondo v. Italy*, European Court of Human Rights, (Application no. 12954/87), Judgement, 22 February 1994, *Arcuri & Three Others v. Italy*, European Court of Human Rights, (Application no. 52024/99), Decision, 5 July 2001.

- The rights of the defence are respected, including opportunities to be heard and to appeal,
- Confiscation only has the effect of transferring ownership to the State once there has been an irrevocable decision (i.e. it is final and can no longer be appealed), and
- The courts do not base their decision on mere suspicions, but on established and objectively-assessed facts.

Asset Repurposing

Confiscated funds can be used to compensate victims of mafia-type crimes or for the management of other confiscated property. Similarly, real estate and company assets may be sold to compensate victims of mafia-type crimes.

Canada

Summary

Canada is the first country to pass a law enabling the direct confiscation and repurposing of assets frozen under sanctions.

The C-19 budget implementation Act received royal assent on 23 June 2022. The Act amends the 1992 Special Economic Measures Act (**SEMA**) and the 2017 Justice for Victims of Corrupt Foreign Officials Act (**Magnitsky Act**) creating new powers to confiscate and sell-off assets owned by individuals and entities on Canada's sanctions list.

Canada's leadership on this issue is a positive step. However, it is unclear whether the law would meet the due process and right to property protections required in some jurisdictions.

Due process protections for the targeted person include:

- A sanctioned person can petition the government to delist them,
- Government decisions can be subject to judicial review, and
- Any person who, in the court's opinion, appears to have an interest in the property to be confiscated has a right to be heard in court before the order is made.

However, it is noted that:

- The threshold for the confiscation of assets is low, being based on the government's "opinion" as to which foreign national or State merits the treatment,

- No judicial finding of wrongdoing by the foreign national or State is required,
- The court's role in the forfeiture determination is limited to confirming that the assets are owned or controlled by the foreign national or State,
- Only those nominated by the court as appearing to have an interest in the property have a right to be heard on the forfeiture application, and
- For those who have a right to be heard, there is no defined legal threshold on which they can argue the merits of the forfeiture.

Asset Freezing

The Magnitsky Act allows the Minister of Foreign Affairs to freeze assets of foreign individuals where they are of the opinion that the following circumstances have occurred:

- a. Gross violations of human rights against whistle blowers or human rights defenders in a foreign State, or
- b. Significant acts of corruption.

SEMA enables the Minister of Foreign Affairs to freeze State or individual assets where they are of the opinion that the following circumstances have occurred:⁵

⁵ Note that SEMA applies to frozen State assets as well as assets of individuals.

- a. An international organisation like the UN has called for sanctions,
 - b. A grave breach of international peace and security has occurred,
 - c. Gross and systematic human rights violations have been committed in a foreign State, or
 - d. A foreign public official or their associate has been involved in significant acts of corruption.
- a. The reconstruction of a foreign State affected by a grave breach of international security,
 - b. The restoration of international peace or security, or
 - c. The compensation of victims of a grave breach of international peace and security, gross and systematic human rights violations or acts of significant corruption.

Asset Confiscation

Under both the Magnitsky Act and SEMA, a judge must forfeit the property on the application of the Minister of Foreign Affairs, if the judge determines that the property is:

- a. Frozen under the law, and
- b. Is owned, held or controlled, directly or indirectly, by the relevant individual or foreign State.

Before making the order, the court is required to give notice to any person who, in the court's opinion, appears to have an interest in the property and the court may hear that person. There is no guidance regarding whom the court may consider to have an interest in the property, and it is not clear whether this would provide victims of the underlying offences with the opportunity to raise a claim over the property for reparations.

Asset Repurposing

Under the Magnitsky Act, the proceeds of confiscated property can only be used to compensate victims of the circumstances for which the sanctions were imposed.

Under SEMA, the proceeds of confiscated property can only be used for:

Switzerland

Summary

Switzerland's 2016 Foreign Illicit Assets Act (FIAA) allows the assets of foreign corrupt officials or their close associates held in Switzerland to be frozen, confiscated, and restituted to the country of origin. The law was introduced in response to the failures of mutual legal assistance (MLA) in asset recovery.

The law provides an alternative, administrative route for confiscation and restitution where neither an independent criminal procedure for asset confiscation in Switzerland, nor a request for MLA in a criminal matter from the State of origin, have been successful.

The law is promising in developing a framework bridging asset freezing, confiscation and repurposing, and enabling the administrative confiscation of tainted assets. However, confiscation is only possible in very specific circumstances. Notably, it is only available following an MLA request from the country of origin, which would not occur if the perpetrator or their allies remain in power. Additionally, the law only enables the repatriation of assets to the country of origin, rather than allowing the repurposing of assets to victims no matter which country they are in.

Asset Freezing

Assets within the Swiss jurisdiction may be frozen for the purpose of MLA where four cumulative criteria have been met:

1. The government in the country of origin has lost or is about to lose power,

2. The level of corruption in the country of origin is notoriously high,
3. It is likely that the assets were acquired criminally, and
4. The freezing action is required to safeguard Switzerland's interests.

Assets can also be frozen for the purpose of confiscation where MLA proceedings have failed where three conditions are met:

1. The assets were subject to a provisional seizure order as part of MLA in criminal matters instigated at the request of the country of origin,
2. The country of origin is unable to satisfy the requirements for MLA owing to the substantial collapse or impairment of its judicial system, or cooperation with the country of origin proves impossible, and
3. The safeguarding of Switzerland's interests requires the freezing of the assets.

The maximum duration of the asset freeze is ten years.

Asset Confiscation

Where neither an independent criminal procedure in Switzerland, or an MLA request from the State of origin have been successful, the Swiss government can seek a court order to confiscate assets which:

1. Were frozen in anticipation of their confiscation,
2. Are subject to the power of disposal of a foreign politically exposed person (**PEP**) or their close associate, and
3. Are of illicit origin.

There is a presumption that assets are of illicit origin where the following conditions are fulfilled:

1. The wealth of the individual who has the power of disposal over the assets increased inordinately, facilitated by the exercise of a public function by the PEP, and
2. The level of corruption in the country of origin or surrounding the PEP was notoriously high during their term in office.

The presumption is reversed where it has been demonstrated with “overwhelming probability” that the assets in question were acquired legitimately. A causal link between the “inordinate increase” and the exercise in public function need not be concretely proved.

If confiscation proceedings are not instigated within 10 years from the date of the freezing order, the freezing order will be lifted.

In summary, administrative confiscation is only available where:

- An independent criminal procedure for asset confiscation in Switzerland has not been successful,
- The country of origin instigated MLA proceedings,
- The assets were made subject to a provisional seizure order in accordance with the MLA proceedings,
- The MLA proceedings failed,

- The assets were frozen for the purposes of confiscation,
- Confiscation proceedings were initiated within ten years of the freezing order,
- A presumption applies that the assets are of illicit origin, and
- The presumption that the assets are of illicit origin has not been reversed.

Asset Repurposing

Once the assets have been confiscated, Switzerland can seek to restore the assets to the country of origin for the purpose of improving the living conditions of the inhabitants of the country of origin, and strengthening the rule of law, thereby contributing to the fight against impunity.

France

Summary

In 2021 France passed [Law n° 2021-1031 on the programming relating to solidarity development and the fight against global inequalities \(Restitution Law\)](#). The law allows for assets confiscated in 'ill-gotten gains' cases to be repatriated to the populations in the countries of origin.

The law is advanced in ensuring that confiscated corrupt assets are returned to the rightful owners, rather than going into the French State budget. However, it only applies where assets have already been confiscated following a criminal conviction, and it does not introduce innovative routes to confiscation. As an anti-corruption focused law, the repurposing powers only enable the repatriation of assets to the people from where the funds were stolen, rather than the repurposing of assets to victims no matter which country they are in.

Asset Confiscation

The Restitution Law does not enable asset confiscation itself. For the law to have effect, the assets must have been already confiscated under French law following a successful criminal prosecution.

French laws allow for confiscation of the instruments and proceeds of corruption, as well as assets belonging to a convicted person who has not been able to justify the origin of the money with which the assets were purchased.

Asset Repurposing

Before the Restitution Law was introduced, confiscated illicit assets would be transferred to the French State budget, unless the State of origin requested asset recovery through mutual legal assistance or through the French courts.

The Restitution Law allows the funds from the sale of the confiscated assets to be restituted to population from which they were taken, even where the State of origin has not made a request for the return of the funds.

The proceeds from the sale of the confiscated property are allocated to a specific State budget programme dedicated to the restitution of ill-gotten gains, which is administered by the Official Development Assistance Mission under the responsibility of the Ministry of Foreign Affairs. The funds are ringfenced from the French government's general budget, and subject to Parliamentary oversight.

The funds are allocated to development projects in the country of origin, to improve the living conditions of the affected population, in compliance with principles of transparency and accountability and with the participation of civil society organisations. The modality of the restitution process is defined by the Ministry of Foreign Affairs on a case-by-case basis.

Conclusion

Laws around the world are increasingly invested in the freezing, confiscation and / or repurposing of assets associated with human rights abuses and corruption. The Italian, Canadian, Swiss, and French laws illustrate how laws could be developed to enable the confiscation of Russian assets and their repurposing as reparations for victims of serious violations of human rights and humanitarian law in Ukraine. Creative legal thinking, accompanied by robust legal safeguards, is required to achieve this aim.

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Kensington Palace Gardens in London, one of the most expensive streets in the world and home to several Russian oligarchs.

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