



# **FRANCE. LEGAL ASPECTS OF POSSIBLE CONFISCATION OF RUSSIAN CENTRAL BANK'S ASSETS AND RELATED RISKS**

by  
Régis Bismuth  
Professor at Sciences Po Law School



Original title

Legal aspects of the possible adoption by France of  
confiscation of Russian Federation assets

by

Régis Bismuth

Professor at Sciences Po Law School

(May 25, 2024)

Introduction.....	1
1 Could measures to confiscate Russian Federation assets as part of countermeasures taken in response to Russia's aggression against Ukraine be adopted at national level in France? How could such confiscation measures be implemented under national law? Does their implementation require a decision at EU level? .....	3
2 Are there any constitutional or legislative rules in France or bilateral or multilateral agreements concluded by France that would impose limits on such confiscation measures? .....	5
3 What are the prospects of such confiscation measures being challenged in a national court by Russia or the Central Bank of Russia? What are the chances that they will be deemed unconstitutional? Can their legality be challenged in administrative proceedings? Can their legality be challenged before the Court of Justice of the European Union (CJEU) or the European Court of Human Rights (ECtHR)?.....	7
3.1 Assessing the constitutionality of the law authorizing confiscation measures .....	7
3.1.1 Procedural aspects .....	7
3.1.2 Substantial aspects .....	8
3.1.3 Additional clarifications on the constitutional requirements relating to the litigation of confiscation measures	10
3.2 The administrative judge's assessment of the validity of the deed designating the assets to be forfeited... 11	
3.2.1 Principle .....	11
3.2.2 Consequences for other potential procedures .....	11
3.3 The CJEU's assessment of the conformity of the confiscation measure with EU law	
Union law .....	12
3.3.1 Procedural aspects .....	12
3.3.2 Substantial aspects .....	13
3.4 The EDH Court's assessment of the conformity of the confiscation measure with the ECHR .....	14
3.4.1 Ownership rights .....	14
3.4.2 Right of access to a court.....	15
4 Could the Russian Federation obtain a suspension of confiscation measures in the context of constitutional or administrative proceedings or before the CJEU or the Court of Human Rights? If so, for how long?.....	17
4.1 Procedures before the Constitutional Council.....	17
4.2 Proceedings before the administrative courts.....	17
4.3 Proceedings before the CJEU .....	18
4.4 Proceedings before the European Court of Human Rights .....	19

Introduction

1. The *International Center for Ukrainian Victory* Foundation has asked me to carry out a study on the legal aspects of France's possible adoption of measures to confiscate the assets of the Russian Federation, in particular the immobilized assets of the Central Bank of Russia.
2. Four sets of questions were posed - with the condition that answers should be brief and formulated in such a way as to be equally intelligible to non-lawyer readers (policy-makers, NGOs, journalists, etc.). The questions are listed below:
  - I.) Could measures to confiscate Russian Federation assets as part of countermeasures taken in response to Russia's aggression against Ukraine be adopted at national level in France? How could such confiscation measures be implemented under national law? Does their implementation require a decision at EU level?
  - II.) Are there any constitutional or legislative rules in France, or bilateral or multilateral agreements entered into by France, that would impose limits on such confiscation measures?
  - III.) What are the prospects of such confiscation measures being challenged in a national court by Russia or the Central Bank of Russia? What are the chances of them being deemed unconstitutional? Can their legality be challenged in administrative proceedings? Can their legality be challenged before the Court of Justice of the European Union (CJEU) or the European Court of Human Rights (ECtHR)?
  - IV.) Could the Russian Federation obtain a suspension of confiscation measures in the context of constitutional or administrative proceedings or before the CJEU or the Court of Human Rights? If so, for how long?
3. Before answering these questions, we would like to make the following comments:
  - We were asked to focus on the substantive and procedural aspects from the point of view of the French legal system, including any applicable international and European rules. It is therefore beyond the scope of this study to carry out an exhaustive analysis of the legality, from the point of view of public international law - in particular with regard to customary rules on State immunities and State liability - of such confiscation measures. A number of studies have already been devoted to this subject, highlighting the possible legality, options and legal uncertainties of such confiscation measures taken by third States of the assets of a State responsible for a violation, vis-à-vis an injured State, of a peremptory norm of international law<sup>1</sup>.

---

<sup>1</sup> See, e.g., European Parliament, *Legal Options for Confiscation of Russian State Assets to Support the Reconstruction of Ukraine*, European Parliamentary Research Service, February 2024, [https://www.europarl.europa.eu/RegData/etudes/STUD/2024/759602/EPRS\\_STU\(2024\)759602\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2024/759602/EPRS_STU(2024)759602_EN.pdf); Dapo Akande et al, *Legal Memorandum on Proposed Countermeasures Against Russia to Compensate Injured States for Losses Caused by Russia's War of Aggression Against Ukraine*, November 20, 2023, <https://united4ukraine.network/wp-content/uploads/2023/12/legal-memo-on-countermeasures.pdf>; Federica Paddeu, *Transferring Russian Assets to Compensate Ukraine: Some Reflections on Countermeasures*, Just

- Our study focuses on the possible confiscation of the Russian Federation's assets, in particular those of the Central Bank of Russia, since these represent the most significant amount of assets from a financial point of view, and since they are already subject to immobilization measures in the European Union (EU). This calls for two comments: from a strictly practical point of view, these immobilized assets may be more easily confiscated, and the fact that these assets are also subject to the EU restrictive measures raises specific legal issues that we will address below.
- Assets would be confiscated outside any court proceedings (extrajudicial confiscation).
- Our study focuses on the possible confiscation of assets of the Russian Federation, and not on the assets of private individuals, including Russians, who were subject to freezing measures by the EU following the invasion of Ukraine. Confiscating the assets of private individuals would raise a host of other legal issues that are not covered in our analysis.
- The possible confiscation of assets from the Russian Federation may also be examined in the light of political or economic considerations (need for collective (class) action, risk of retaliatory measures by the Russian Federation, etc.). Our analysis will be limited to the legal aspects. More specifically, the aim here is to provide a general overview of the main and very diverse legal issues that may arise.

**1 Could measures to confiscate Russian Federation assets as part of countermeasures taken in response to Russia's aggression against Ukraine be adopted at national level in France? How could such confiscation measures be implemented under national law? Does their implementation require a decision at EU level?**

4. Confiscation is a deprivation of property. The right to property, protected by articles 2 and 17 of the Declaration of the Rights of Man and of the Citizen (DRMC), therefore comes into play, and has constitutional value<sup>2</sup>. Article 34 of the Constitution also emphasizes that "the law determines the fundamental principles ... of the property regime". The Constitutional Council has deduced from this provision that it is the legislator's responsibility to define "the rules relating to the acquisition or conservation of property"<sup>3</sup>.

---

Security, March 1, 2024, <https://www.justsecurity.org/92816/transferring-russian-assets-to-compensate-ukraine-some-reflections-on-countermeasures>. See also *Just Security's Series on Reparations in Russia's War Against Ukraine*, <https://www.justsecurity.org/92429/introducing-just-securitys-series-on-reparations-in-russias-war-against-ukraine>.

<sup>2</sup> Conseil constitutionnel, Decision 81-132 DC of January 16, 1982, *Nationalization Act*, § 16.

<sup>3</sup> Conseil constitutionnel, Decision no. 2011-212 QPC of January 20, 2012, *Mme Khadija A., épouse M.*, § 4.

5. Consequently, a confiscation measure can only be envisaged within the framework of a law. For example, legislative provisions in the Criminal Code or the Customs Code make it possible to confiscate certain goods following the commission of an offence<sup>4</sup>.
6. Under French law, there is no law allowing confiscation measures such as those envisaged for Russian Federation assets to be taken unilaterally by France, outside of any criminal proceedings, and in particular not prescribed by Security Council resolutions or measures taken within the EU as part of the Common Foreign and Security Policy (CFSP).
7. As regards non-judicial measures affecting property rights that can be taken before an offence has been established, French law currently only allows administrative measures to freeze funds and economic resources by joint decision of the Minister of the Economy and the Minister of the Interior, for a renewable period of six months if the funds and resources "belong to, are owned, held or controlled" directly or indirectly by persons or entities that "commit, attempt to commit, facilitate or finance terrorist acts, or incite or participate in them"<sup>5</sup>.
8. Since there is currently no legal basis for confiscating Russian Federation assets, such measures could only be implemented in France by means of a new law passed by the French Parliament. As this law would not be able to list precisely all the assets of the Russian Federation that could be confiscated, nor the more technical aspects of the procedure, it would have to mention mainly the different categories of confiscable assets, the implementation of the confiscation procedure that would be set up and entrusted to the executive authority and, finally, the fate of the confiscated assets - which would in the hypothesis envisaged be transferred to Ukraine as reparation for the damage suffered by it and attributable to the Russian Federation.
9. The sole purpose of this question is to identify the legal vehicle for adopting such measures under French law - namely, an act of the French Parliament. At this stage, it is not a question of assessing the conformity of the proposed confiscation mechanism with the Constitution, EU law, the ECHR or other international standards.
10. The question of whether or not the implementation of such measures requires a decision at EU level is more delicate. The Russian assets likely to be confiscated include those of the Russian Federation, which are currently subject to EU restrictive measures under the CFSP, in particular Decision (CFSP) 2022/335 and Regulation 2022/334, both adopted by the Council on February 28, 2022. This raises the question of whether it is possible for EU member states, acting individually and unilaterally, to adopt different - and more restrictive - measures on the same object than those prescribed collectively under the CFSP. This question will be addressed in the third series of questions (see **3.3.2 below**).

---

<sup>4</sup> See, for example, Penal Code, article 131-21; Customs Code, article 434.

<sup>5</sup> French Monetary and Financial Code, article L.562-2.

**2 Are there any constitutional or legislative rules in France, or bilateral or multilateral agreements entered into by France, that would impose limits on such confiscation measures?**

11. Confiscation measures targeting assets from the Russian Federation deserve to be examined in the light of several constitutional or legislative rules in France, as well as certain international rules to which France is bound. We shall limit ourselves here to mentioning the rules likely to be raised to challenge the legality of these measures before the French courts, the CJEU or the European Court of Human Rights. Some of these will not require further analysis. Others merit a more detailed analysis, which will be carried out in the third part of this study (see **Part 3 below**). This analysis will, moreover, be combined with a study of the procedural aspects to clarify the jurisdictional bodies before which compliance with these rules could be raised.
12. As far as French constitutional rules are concerned, the legality of a legislative confiscation measure is likely to be examined in the light of the following rules:
  - articles 2 and 17 of the DRMC, which protect the right of ownership - since these measures would affect the right of ownership (question analyzed *infra Part 3*);
  - paragraph 14 of the Preamble to the Constitution of October 27, 1946, which states that "the French Republic, faithful to its traditions, conforms to the rules of public international law". Insofar as there is a debate on the legality of such confiscation measures with regard to the rules and principles of public international law (law of State responsibility, law of sovereign immunities, etc.), it will be necessary to examine whether the various French or European courts that may be seized are likely to examine this question in depth with regard to international law, or whether they would show a certain deference to choices made by the legislative power (question analyzed *infra Part 3*).
13. As far as the provisions of the European Convention on Human Rights are concerned, a legislative confiscation measure is likely to be examined in the light of article 1 of Protocol no. 1 to the ECHR protecting the right to property. As we shall also see, the litigation of confiscation measures before the administrative courts is likely to raise obstacles that may be examined in the light of the right of access to a court protected by article 6 § 1 of the ECHR (questions analyzed in **Part 3 below**).
14. As far as EU law is concerned, it will be necessary to examine whether the confiscation measures decided unilaterally by France are likely to conflict with restrictive measures already adopted by the EU within the framework of the CFSP and which concern the same assets (question analyzed *infra Part 3*).
15. On a secondary note, we would like to mention the following elements, which in our view do not need to be developed further in **Part 3**, but which are worth mentioning.

- Reference should be made to the investment promotion and protection treaty concluded between France and the Soviet Union on July 4, 1989, which entered into force on July 18, 1991<sup>6</sup>. It could in fact be argued that the confiscation measures envisaged constitute an illegal expropriation "the effect of which is to dispossess the investors of the other Contracting Party of investments belonging to them" within the meaning of article 4(3) of this agreement. The first question to be addressed is whether this agreement can be invoked before the French courts by a claimant whose assets have been confiscated (e.g. the Central Bank of Russia). The Conseil d'Etat has already ruled that investor protection provisions included in investment promotion and protection agreements cannot be invoked by investors<sup>7</sup>. The 1989 agreement could therefore not be invoked before the French courts if the Conseil d'Etat were to follow its earlier position. It should be noted, however, that this case law is based on the questionable argument that these foreign investment promotion and protection agreements create "obligations only between the two signatory States"<sup>8</sup>, an argument which has not been fully clarified by the Conseil d'Etat in its subsequent decisions. This jurisprudence is still being criticized<sup>9</sup> and it cannot be ruled out that the administrative court will change its position on this issue. In addition to invoking the agreement before the French courts, the Russian Federation could also initiate arbitration proceedings against France for breach of the agreement (procedure provided for in article 9). This international dispute would give rise to an examination of a whole series of questions (for example, whether the assets of the Central Bank of Russia constitute investments within the meaning of this agreement, whether the expropriation is illegal within the meaning of this agreement, etc.) which we cannot explore within the scope of our analysis. It should be noted that the Russian Federation could request provisional measures from the Tribunal in order to obtain a provisional suspension of the confiscation measures during the proceedings. This too would merit a separate analysis.
- Insofar as the question posed also refers to the legislative rules in force in France, mention should be made of the legislative provisions of particular interest to foreign state assets: articles L.111-1-1 et seq. of the French Code of Civil Enforcement Procedures (Code des procédures civiles d'exécution) concerning precautionary measures or forced execution measures implemented on property belonging to a foreign state, and article L.153-1 concerning the principle of unseizability of property belonging to foreign central banks, as well as its exceptions. Insofar as these provisions concern

---

<sup>6</sup> The text of the treaty is available at the following link: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1274/download>

<sup>7</sup> CE, December 1<sup>st</sup> 2007, no. 280264.

<sup>8</sup> Ibid.

<sup>9</sup> Evelyne Lagrange, "L'application des accords relatifs à l'investissement dans les ordres juridiques internes", in Sabrina Robert-Cuendet (ed.), *Droit des investissements internationaux - Perspectives croisées*, Bruxelles, Larcier, 2017, pp. 509-510.

enforcement measures applicable in the context of enforcement measures initiated by creditors, there would be no major risk of conflict with the future law on the confiscation of assets of the Russian Federation. For the sake of clarity, the confiscation law should no doubt state that article L.153-1 al. 1 of the French Monetary and Financial Code (which stipulates that "assets of any kind, in particular foreign exchange reserve assets, which central banks or foreign monetary authorities hold or manage on their behalf or on behalf of the foreign State or States to which they are subject, may not be seized") does not apply to the confiscation measures envisaged.

**3 What are the prospects of such confiscation measures being challenged in a national court by Russia or the Central Bank of Russia? What are the chances of them being deemed unconstitutional? Can their legality be challenged in administrative proceedings? Can their legality be challenged before the Court of Justice of the European Union (CJEU) or the European Court of Human Rights (ECtHR)?**

16. It is worth considering all the procedures by which French legislation and the implementing measures taken to apply it may be challenged on the basis of the constitutional, ECHR and EU standards mentioned above (see *supra* Part 2.).
17. Several types of procedure need to be considered, and we'll also be looking at appeals that are unlikely to be successful.
  - the Constitutional Council's assessment of the constitutionality of the law authorizing the adoption of confiscation measures (3.1) ;
  - the Conseil d'Etat's assessment of the validity of the deed designating the assets to be forfeited (3.2);
  - the CJEU's assessment of whether the confiscation measure complies with European Union law (3.3);
  - the ECtHR Court's assessment of whether the confiscation measure complies with the ECHR (3.4).

### **3.1 Assessing the constitutionality of the law authorizing confiscation measures**

#### ***3.1.1 Procedural aspects***

18. The assessment of the law's constitutionality could be carried out before the confiscation law is promulgated.

19. Indeed, as envisaged by article 61 of the Constitution, the constitutionality of a law may be examined after its adoption by the French Parliament and before its promulgation, in the event that the matter is referred to the Constitutional Council by the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate or 60 deputies or 60 senators. This hypothesis is particularly conceivable for two reasons: 1°) it is in the interest of the authorities behind the law to secure the legality of the implementing measures that will be adopted for its application. Consequently, it is likely that the President of the Republic, the Prime Minister or the President of the National Assembly will refer this law to the Constitutional Council; and 2°) it is also possible that a political group in opposition to this measure will bring together 60 deputies or 60 senators to refer this law to the Constitutional Council. It is important to note that only the above-mentioned authorities may refer a law to the Constitutional Council for *prior* review. The Russian Federation or any other person or entity would not be able to do so.
20. It is also worth considering the situation where the law is promulgated without prior review by the Constitutional Council. The question that arises is whether the law could be examined *a posteriori* in the context of litigation concerning enforcement measures taken in application of this law and ordering the confiscation of assets from the Russian Federation. In fact, it would be measures adopted by the ministerial authorities that would actually implement the confiscation measures - for example, the assets of the Central Bank of Russia. The Russian Federation or, as the case may be, the Central Bank of Russia or another Russian public entity whose assets are the subject of a confiscation measure, could wish to lodge an appeal on grounds of *ultra vires* before the administrative court to challenge the legality of these measures, within two months of their adoption. Since these measures would be taken on the basis of the proposed law, it would theoretically be possible for the claimant to raise a question *prioritaire de constitutionnalité* (QPC), i.e. to ask the Conseil d'Etat to refer the confiscation law to the Conseil Constitutionnel, arguing that it "infringes the rights and freedoms guaranteed by the Constitution" within the meaning of Article 61-1 of the Constitution, to which the right of ownership belongs. However, as we shall see below (3.1.2), confiscation measures taken by ministerial authorities as part of France's foreign policy would constitute "acts of government" for which the administrative judge is incompetent. Consequently, a QPC procedure to review *a posteriori* the constitutionality of the confiscation law would, in our view, be unthinkable in this context.

### 3.1.2 *Substantive aspects*

21. As part of its review of the constitutionality of legislation prior to promulgation, the Constitutional Council examines the legislation in the light of the entire body of constitutional law<sup>10</sup>. Two constitutional standards are likely to be raised in this procedure.
22. It could be argued that the confiscation law should be examined in the light of paragraph 14 of the Preamble to the Constitution of October 27, 1946, which states that "the French Republic, faithful to its traditions, conforms to the rules of public international law". This provision has not been recognized as one of the "rights and freedoms guaranteed by the Constitution", and could therefore only play a role in the context of the *a priori* control provided for in Article 61 of the Constitution. However, the Conseil Constitutionnel's case law has given this provision a very limited scope, as it confines itself to mentioning the principle of *pacta sunt servanda* in the context of the review provided for in Article 54 of the Constitution concerning *a priori* control of the constitutionality of treaties<sup>11</sup>. Case law thus indicates that the Constitutional Council is not likely to examine the conformity of the confiscation law in the light of the rules of customary international law relating to the international responsibility of the State or to the immunities of foreign States, which are the main rules invoked to examine the legality of the confiscation measures envisaged with regard to public international law. It should also be noted that the Constitutional Council cannot review the conventionality of the law as part of its examination<sup>12</sup>. It would therefore not be possible for the Conseil to examine the conformity of the confiscation law with international conventions, such as the investment promotion and protection treaty with Russia.
23. On the other hand, it is conceivable that the Constitutional Council will agree to examine in greater depth the constitutionality of the confiscation law with regard to articles 2 and 17 of the DRMC, which protect the right of ownership. The Constitutional Council distinguishes between measures that distort the right of ownership (covered by article 2 of the DRMC) and those that constitute a deprivation of ownership (covered by article 17 of the DRMC). The confiscation law should be examined in the light of the requirements of article 17 DRMC concerning deprivation of property: "Property being an inviolable and sacred right, no one can be deprived of it, except when public necessity, legally established, obviously requires it, and under the condition of fair and prior compensation".
24. The condition of public necessity for the deprivation of property is assessed in such a way as to leave a wide margin of appreciation to the legislator, with the Constitutional Council confining

---

<sup>10</sup> There is a difference with the reference standards that can be mobilized in the context of the QPC review - which in our view is unthinkable. There is in fact a slight difference between the *a priori* control referred to in Article 61 and the *a posteriori* control referred to in Article 61-1. The latter is limited to the "rights and freedoms guaranteed by the Constitution", whereas the *a priori* review referred to in Article 61 takes the entire body of the Constitution as its reference standard.

<sup>11</sup> Conseil Constitutionnel, Decision no. 92-308 DC of April 9, 1992, *Treaty on European Union*, § 7 and 11. See also, Conseil constitutionnel, Decision no. 2004-505 DC of November 19, 2004, *Treaty establishing a Constitution for Europe*, § 3.

<sup>12</sup> Conseil constitutionnel, Decision no. 74-54 DC of January 15, 1975, *Loi relative à l'interruption volontaire de la grossesse*, § 7.

itself to verifying the "absence of manifest error"<sup>13</sup> and ensuring that the deprivation of property makes it possible to achieve the objective set<sup>14</sup>. While deprivation of property must be subject to the payment of fair and prior compensation, the Constitutional Council has ruled that the alienation of property without compensation and intended for the payment of sentences pronounced against the owner does not disregard the requirement of prior compensation<sup>15</sup>. On these different aspects, we are of the opinion that the Constitutional Council would not consider as a manifest error of assessment the choice of the legislator, in the context of the French State's international relations, to proceed with a confiscation of the property of the Russian Federation in order to satisfy the latter's international obligation to compensate for damage resulting from the violation of imperative obligations.

### ***3.1.3 Further clarification of the constitutional requirements relating to the litigation of confiscation measures***

25. It is worth clarifying certain aspects of constitutional jurisprudence which may have a bearing on the other contentious aspects of the confiscation measures envisaged.
26. The French Constitutional Council has highlighted "the importance of the powers conferred on the judiciary to protect real estate property by the fundamental principles recognized by the laws of the Republic"<sup>16</sup>, and in particular to protect the jurisdiction of the judiciary (and not the administrative courts) in disputes concerning compensation in this area. Insofar as the assets likely to be subject to confiscation measures (the assets of the Central Bank of Russia) are movable property and do not fall within the scope of immovable property, the confiscation measures envisaged should not, in our view, fall within the jurisdiction of the judicial judge.
27. Secondly, in the case of expropriation, the French Constitutional Council requires that "in the event of disagreement over the determination of the amount of compensation, the expropriated party must have an appropriate means of redress"<sup>17</sup>. Litigation concerning measures to confiscate Russian property should not concern the amount of compensation for expropriated property, but the question of whether confiscation is justified. We may consider that this constitutional requirement of a remedy for compensation should not come into play in the context of litigation.

---

<sup>13</sup> Conseil constitutionnel, Decision no. 81-132 DC of January 16, 1982, *Nationalization Act*, § 20.

<sup>14</sup> Conseil constitutionnel, Decision no. 2014-426 QPC of November 14, 2014, *M. Alain L.*, § 6.

<sup>15</sup> Conseil constitutionnel, Decision no. 2011-203 QPC of December 2, 2011, *M. Wathik M.*, § 6.

<sup>16</sup> Conseil constitutionnel, Decision no. 89-256 DC of July 25, 1989, *Loi portant dispositions diverses en matière d'urbanisme et d'agglomérations nouvelles*, § 23.

<sup>17</sup> Conseil constitutionnel, Decision no. 89-256 DC of July 25, 1989, *Loi portant dispositions diverses en matière d'urbanisme et d'agglomérations nouvelles*, § 19.

### **3.2 The administrative judge's assessment of the validity of the deed designating the goods to be confiscated**

#### ***3.2.1 Principle***

28. As soon as the ministerial authorities adopt the confiscation measures, the Russian Federation (or, as the case may be, the Central Bank of Russia or another Russian public entity whose assets are subject to a confiscation measure) may consider challenging these measures before the administrative courts. As we have already seen, litigation concerning confiscation measures should not fall within the jurisdiction of the courts, and would not be a dispute concerning the amount of compensation for expropriated property, which requires an appropriate remedy (see **3.1.3 above**).
29. Under current French law, it does not seem likely that an action under ordinary law to challenge specific confiscation measures before the administrative courts would be successful. In fact, the contested act, which concerns France's choices regarding the reparations owed by Russia to Ukraine, relates to France's international relations, and more specifically to the French government's relations with a foreign state. This act would therefore clearly be considered an "act of government" which enjoys jurisdictional immunity and is not subject to contentious appeal before the administrative courts<sup>18</sup>. This conclusion does not seem to us to contradict the constitutional requirement of recourse in the case of expropriation, since the latter is limited to the evaluation of compensation and not to the assessment of the merits of the confiscation measure.
30. If, by chance, the administrative court were to set aside the theory of the act of government by considering that the confiscation measure in question was "detachable from the conduct of France's diplomatic relations"<sup>19</sup> and examine the case on its merits by assessing the legality of the confiscation measure with regard to the right of ownership, it would in any case have to follow the eventual decision of the Constitutional Council, which should in our view consider that the law permitting confiscation is not contrary to the right of ownership.

#### ***3.2.2 Impact on other potential procedures***

---

<sup>18</sup> See, for example, CE, ass. September 29, 1995, no. 92381; CE, April 17, 2006, no. 292539; CE, March 28, 2014, no. 373064.

<sup>19</sup> See, for example, CE, ass. of October 15, 1993, no. 142578.

31. The lack of jurisdiction of the administrative court based on the theory of the act of government would have two consequences:

- If the confiscation law has not already been subject to an a priori review by the Constitutional Council on the basis of article 61 of the Constitution, the administrative judge should not examine the claimant's possible argument consisting in raising a question prioritaire de constitutionnalité (QPC) asking the Conseil d'Etat to refer the examination of the confiscation law to the Constitutional Council, arguing that it "infringes the rights and freedoms guaranteed by the Constitution" within the meaning of article 61-1 of the Constitution.
- In the event that confiscation measures are contrary to EU law (a question which will be developed *further below in 3.3.2*), the administrative court's lack of jurisdiction would prevent it from initiating proceedings for a preliminary ruling if the dispute raises a question on the interpretation of the Treaties or of acts adopted by the institutions, bodies, offices or agencies of the Union (article 267 TFEU).

### **3.3 The CJEU's assessment of the conformity of the confiscation measure with European Union law**

#### ***3.3.1 Procedural aspects***

32. The legality of French confiscation measures may be challenged before the CJEU if they conflict with EU law. In this context, three procedures are worth mentioning:

- Firstly, both the Commission and the EU Member States may bring an action before the CJEU if they consider that a Member State has failed to fulfil one of its obligations under the Treaties (Articles 258 and 259 TFEU). The right of action under the infringement procedure is restricted to these privileged claimants, who are not required to establish an interest in bringing proceedings.
- Secondly, in the context of an action before the French administrative court, claimants may ask the court to refer the matter to the CJEU for a preliminary ruling if the dispute raises a question as to the interpretation of the Treaties or of acts adopted by the institutions, bodies, offices or agencies of the Union (Article 267 TFEU). However, as we have already seen, insofar as the act of confiscation issued by the executive authority constitutes an act of government and renders the administrative court incompetent, it would not be in a position to make such a reference for a preliminary ruling, as the answer to the question raised would not enable it to resolve the dispute (see **3.2 above**). If, out of the blue, the administrative court were to reject the "acte de gouvernement" theory, a preliminary ruling procedure could be envisaged.

- Thirdly and lastly, it should be pointed out that to date, in the context of its a priori review of the constitutionality of laws, the Constitutional Council has never referred a question to the CJEU for a preliminary ruling. Insofar as the Constitutional Council must rule within one month on the question of the law's conformity with the Constitution (article 61 al. 3 of the Constitution), it is considered that compliance with this mandatory deadline is incompatible with a preliminary ruling procedure.

### 3.3.2 *Substantive aspects*

33. The question to be examined would be whether a national measure to confiscate property subject to a freeze (or immobilization) of assets of the Russian Federation (including its Central Bank) would contravene EU law in that it would impede the measure adopted by the Council within the framework of the CFSP. In other words, and to take the more specific case of the immobilized assets of the Central Bank of Russia, it is possible to question whether the measure of immobilization of the assets of the Central Bank of Russia decided jointly within the framework of the CFSP would prevent the Member States from taking more restrictive measures. To our knowledge, the CJEU has not yet ruled on this question. It is likely to give rise to discussions both on the interpretation of the European text prescribing the restrictive measure, and in a constitutional logic on the applicable principles and the division of competences between Member States and the EU within the framework of the CFSP<sup>20</sup>.
34. It may in fact be argued that restrictive measures falling within the EU's competence and relating to the interruption or reduction of economic relations with a third country or those relating to the freezing of funds and economic resources are adopted in the form of a regulation under Article 215 TFEU and that, as a result, more restrictive confiscation measures which do not fall within the EU's competence in this respect may freely be taken by the Member States. It can also be argued that Regulation 2022/334 amending Regulation 833/2014 does not explicitly prohibit Member States from taking more restrictive measures on the assets of the Central Bank of Russia immobilized by the EU measure. In other words, this regulation would not exhaust the Member States' competence.
35. In turn, it can be argued that national confiscation measures interfere with the Central Bank of Russia's asset freeze measures. Indeed, immobilization measures, like asset freezing measures, are considered by their very nature to be temporary and reversible - an element which the CJEU recalls to justify that such measures do not disproportionately infringe the right to property<sup>21</sup>. Conversely, confiscation measures are by nature definitive and irreversible. They would

---

<sup>20</sup> Wessel. "General Principles in EU Common Foreign and Security Policy. In atja S. Ziegler, Päivi J. Neuvonen, and Violeta Moreno-Lax (eds.), *Research Handbook on General Principles in EU Law: Constructing Legal Orders in Europe*, Edward Elgar, 2022.

<sup>21</sup> See, e.g., Trib. EU, judgment of July 7, 2017, T-215/15, *Mykola Yanovych Azarov v. Council*, § 102.

therefore affect the strategy underlying the freezing or immobilization measures taken collectively by the member states as part of a strategy to exert pressure on the Russian Federation following the invasion of Ukraine. Moreover, a unilateral confiscation initiative by a Member State would be likely to expose the Central Bank of Russia's assets to different rules in different Member States. This raises the question of whether the provisions of Article 29 TEU relating to the CFSP ("Member States shall ensure that their national policies conform to the positions of the Union" defined by the Council) would be respected in the context of such initiatives.

36. In any event, these various arguments suggest that the possibility of a confiscation law raises a serious question of interpretation of EU law, which would justify the Conseil d'Etat referring the matter to the CJEU for a preliminary ruling.
37. In order to clarify this situation and avoid any risk to the legality of unilateral national confiscation measures, it would be useful for the Council to adopt a decision clarifying the scope of regulation 833/2014 as allowing member states to take such confiscation measures individually. On an issue that obviously does not have the same scope, Decision (CFSP) 2024/577 in a way clarifies the possible transfer to Ukraine of unexpected and exceptional income resulting from the extraordinary and unexpected accumulation of cash balances on the balance sheets of central securities depositories in connection with the immobilization of assets of the Central Bank of Russia.

### **3.4 The ECtHR Court's assessment of the conformity of the confiscation measure with the ECHR**

38. The confiscation measure is likely to be examined in the light of the right to property (article 1<sup>er</sup> of Protocol no. 1 to the ECHR) and, as regards a possible rejection of the request for examination by the French administrative court, in the light of the right of access to a court (article 6 of the ECHR).

#### ***3.4.1 Property rights***

39. There may be some discussion in the case law of the ECtHR as to whether the confiscation measure envisaged falls within the first sentence of Article 1<sup>er</sup> (deprivation of property) or the second sentence (regulation of property), the Court having often classified confiscation measures in the second category<sup>22</sup>. However, the ECtHR sometimes puts this distinction into perspective "*because the principles governing the question of justification are substantially the*

---

<sup>22</sup> ECHR, judgment of October 24, 1986, no. 9118/80, *Agosi v. United Kingdom*, § 51.

same, involving as they do the legitimacy of the aim of any interference, as well as its proportionality and the preservation of a fair balance"<sup>23</sup>. In either case, the interference with property rights must take place under conditions laid down by law, must pursue a public purpose/general interest, and must be proportional.

40. The question of compliance with the principle of legality poses no particular difficulty if, as envisaged, confiscation measures are adopted on the basis of a law that is sufficiently clear, accessible, precise and foreseeable in its application. As regards the objective of public utility/general interest, the Court leaves a very wide margin of appreciation in defining them, censuring the State party to the Convention only on very rare occasions on this basis. In this respect, it has had occasion to emphasize that "the national authorities are in principle in a better position than the international judge to determine what is of 'public utility'"<sup>24</sup> and that "the concept of public utility is necessarily extensive"<sup>25</sup>. As regards compliance with the principle of proportionality, the Court recalls that interference with the right to property "must strike a 'fair balance' between the requirements of the general interest of the community and the imperatives of safeguarding fundamental rights"<sup>26</sup>.
41. In this respect, without prejudging what the decision of the European Court of Human Rights might be in such a case, we are of the opinion that measures of confiscation of the Russian Federation's property taken under a national law in order to satisfy the Russian Federation's international obligation to compensate for damage resulting from the violation of *peremptory* obligations should not, in our view, be such as to violate Article 1<sup>er</sup> of Protocol No. 1 to the ECHR. It should also be noted that this obligation to pay compensation was reiterated in the multilateral context of United Nations General Assembly resolution ES-11/5 of November 14, 2022 ("Aggression against Ukraine: remedies and reparation").

### **3.4.2 Right of access to a court**

42. It should be noted that the administrative court's lack of jurisdiction based on the doctrine of acts of government constitutes a restriction on the right of access to a court protected by article 6 § 1 of the ECHR. The European Court of Human Rights has held that the jurisdictional immunity enjoyed by acts of government may be contrary to certain obligations under the Convention, for example the impossibility of access to a court in the context of the

---

<sup>23</sup> ECHR, judgment of 1<sup>er</sup> April 2010, no. 16903/03, *Denisa and Moiseyeva v. Russia*, § 55.

<sup>24</sup> ECHR, judgment of December 13, 2016, no. 53080/13, *Bélané Nagy v. Hungary*, § 113.

<sup>25</sup> *Ibid.*

<sup>26</sup> ECHR, judgment of January 5, 2000, no. 33202/96, *Beyeler v. Italy*, § 107.

implementation of Article 3 § 2 of Additional Protocol No. 4, a provision relating to the right not to be deprived of entry into the territory of the State of which one is a national<sup>27</sup> .

43. Any restriction on access to a court resulting from the doctrine of the act of government does not, however, necessarily entail a violation of the Convention. In this context, the Court examines whether the restriction resulting from the doctrine of the act of government is justified, i.e. whether it pursues a legitimate aim and is proportionate to that aim<sup>28</sup> . It considers that such a restriction pursues a legitimate aim where at stake is "the preservation of the separation of executive and judicial powers, and hence the absence of any questioning by the courts of diplomatic and military decisions"<sup>29</sup> . It also noted that French administrative jurisprudence has made it possible, on the basis of the concept of an act detachable from the conduct of diplomatic or foreign relations of the State, "to reduce the list of acts of government in the international field, so that the incompetence of the judge in this field is not general"<sup>30</sup> .
44. However, in the case of confiscations carried out on the basis of UN Security Council Resolution 1483 (2003), it may be noted that while these decisions implement "an objective compatible with the Convention"<sup>31</sup> , the Court in the *Al-Dulimi* case nevertheless stressed that the obligation resulting from the Security Council Resolution does not eclipse the need to provide a right of appeal, and that "the absolute impossibility of any challenge to this confiscation for years is scarcely conceivable in a democratic society"<sup>32</sup> ; the Court concluded that there had been a violation of Article 6 § 1 of the Convention in this case.
45. Without prejudging what the decision of the European Court of Human Rights might be in the event of confiscation of the Russian Federation's assets, we are of the opinion that the proposed measures are by their very nature diplomatic decisions, and that the application of the doctrine of acts of government in this context would not result in a violation of Article 6 § 1 of the Convention in this respect. As regards the transposition of the *Al-Dulimi* jurisprudence, it seems to us that the situation presents a significant difference with the measures envisaged, since this was a case concerning a private individual who had not had the opportunity to contest the merits of his individual inclusion on a list of persons and entities sanctioned by the Security Council. The situation is therefore different from the one we are concerned about, which gave rise to a UN General Assembly resolution recalling the Russian Federation's obligations to make reparation. We believe that the European Court of Human Rights could take this into account in order to avoid finding a violation of Article 6 § 1 of the Convention.

---

<sup>27</sup> ECHR, judgment of September 14, 2022, no. 24384/19 and 44234/20, *H.H and others v. France*, § 281.

<sup>28</sup> ECHR, judgment of April 4, 2024, no. 17131/19, *Tamazount and others v. France*, § 113.

<sup>29</sup> *Ibid.*, § 114.

<sup>30</sup> *Ibid.*, § 116.

<sup>31</sup> ECHR, judgment of June 21, 2016, application no. 5809/08, *Al-Dulimi and Montana Management, Inc. v. Switzerland*, § 132.

<sup>32</sup> *Ibid.*, §152

**4 Could the Russian Federation obtain a suspension of confiscation measures in the context of constitutional or administrative proceedings or before the CJEU or the Court of Human Rights? If so, for how long?**

46. In the context of this question, we are considering various types of precautionary measures that can be requested in the context of the procedures described above. We are even considering them for proceedings where we believe there is no prospect of success.

**4.1 Procedures before the Constitutional Council**

47. There is no procedure for applying to the Constitutional Council for precautionary measures as part of the a priori examination of the constitutionality of a law, since this is carried out before the law comes into force. There is also no such procedure for the QPC procedure, since any precautionary measures may be requested from the court before which the main application (giving rise to the QPC) has been lodged.

**4.2 Proceedings before the administrative courts**

48. The suspension of confiscation measures could be envisaged as soon as the Russian Federation or other public entities whose property has been targeted lodge an appeal for misuse of power challenging the legality of these measures. The Code of Administrative Justice provides for the possibility of :

- Refer the matter to the interim relief judge, who can order the suspension of the execution of the administrative decision, or of some of its effects, when this is justified by the urgency of the situation, and when a plea is made which, given the state of the investigation, creates a serious doubt as to the legality of the administrative decision<sup>33</sup> .
- Refer the matter to the "référé-liberté" (interim relief) judge, who can, when justified by the urgency of the situation, order any measures necessary to safeguard a fundamental freedom that has been seriously and manifestly illegally infringed<sup>34</sup> . It should be noted

---

<sup>33</sup> Code de justice administrative, article L.521-1.

<sup>34</sup> Code de justice administrative, article L.521-2.

that the right to property is one of the fundamental freedoms that can be protected under this remedy<sup>35</sup>.

49. It should be noted, however, that these procedures may not be invoked where it is clear that the main claim does not fall within the jurisdiction of the administrative court<sup>36</sup>. This is the case when it is clear that the contested decision "cannot be detached from the conduct of France's international relations"<sup>37</sup>. We have already pointed out that an application lodged by the Russian Federation would be liable to be dismissed for lack of jurisdiction of the administrative court insofar as the contested decision constitutes an act of government (see **3.2.1 above**). We are therefore of the opinion that interim suspension and interim release proceedings would not be fruitful in this context.

### **4.3 Proceedings before the CJEU**

50. A distinction must be made between possible infringement proceedings and less likely preliminary ruling proceedings.
51. Under the preliminary ruling procedure, the CJEU does not have jurisdiction to hear an application for interim measures<sup>38</sup> and cannot therefore order interim measures such as the suspension of confiscation measures. It is up to the referring national court to adopt the necessary interim measures where the claims are based on Union law<sup>39</sup>. As we have seen, it is unlikely that the administrative courts will be in a position to order such measures (see **3.2.1 above**).
52. As far as the infringement proceedings are concerned, the Court may prescribe the necessary precautionary measures in cases brought before it (TFEU, article 279). The granting of such measures is subject to a number of conditions, notably that the damage be "serious and irreparable"<sup>40</sup>. Purely pecuniary damage "cannot, in principle, be considered irreparable, or even difficult to repair, if it can be the subject of subsequent financial compensation"<sup>41</sup>. Consequently, in the event of an infringement action being brought against France for the confiscation measures envisaged, it seems to us that the CJEU could not issue interim measures consisting in suspending the confiscation measures.

---

<sup>35</sup> CE, March 23, 2001, n° 231559.

<sup>36</sup> Code de justice administrative, article L.522-3.

<sup>37</sup> CE, April 10, 2003, n° 255905, *Comité contre la guerre en Irak*. See also, CE, May 23, 2014, no. 380560.

<sup>38</sup> ECJ, Order of October 24, 2001, C-186/01 R, *Alexander Dory v. Germany*, § 8.

<sup>39</sup> ECJ, judgment of June 19, 1990, C-213/89, *Factortame Ltd and others*, § 21; ECJ, judgment of February 20, 1991, C-143/88 and C-92/89, C-143/88 - *Zuckerfabrik*, § 18-20.

<sup>40</sup> ECJ, Order of June 15, 1987, 142/87 R, *Belgium v. Commission*, § 14. *Commission*, § 14.

<sup>41</sup> CFI, Order of November 10, 2004, T-303/04 R, *European Dynamics SA v. Commission*, § 72.

#### **4.4 Proceedings before the European Court of Human Rights**

53. Under article 39 of its Rules, the Court may, "in exceptional circumstances", indicate to the parties any provisional measures it considers should be adopted. According to the same article, such measures may only be considered in the event of "an imminent risk of irreparable harm to a right protected by the Convention which, by its nature, would not be capable of adequate reparation, restoration or compensation". The Court has confined itself to issuing interim measures where particularly serious risks affecting certain essential rights have been identified for the persons concerned (risk to life or torture in deportation or extradition cases, risk of flagrant denial of justice, etc.).
54. For reasons similar to those mentioned for the CJEU, and given the essentially pecuniary nature of the confiscation measures envisaged, the ECHR could not, in our view, issue interim measures consisting in suspending confiscation measures.

