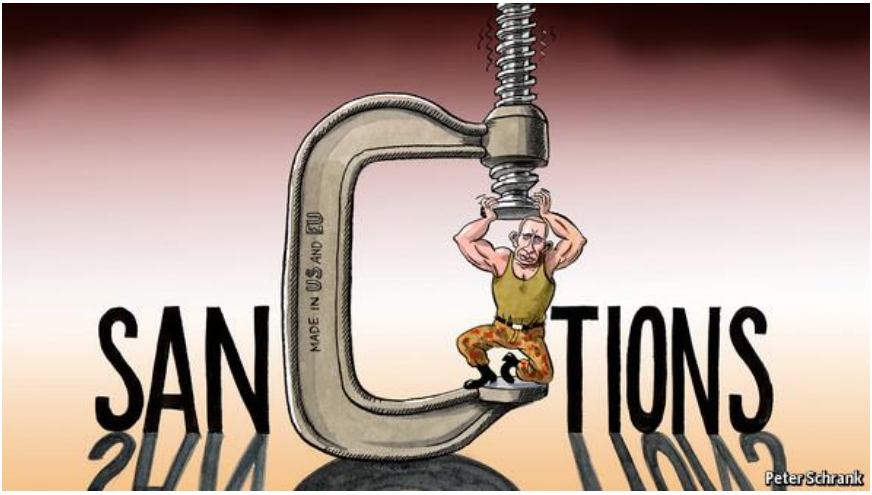
ACTUALITIES ABOUT THE EU SANCTIONS AGAINST RUSSIA, EASTERN-UKRAINE AND CRIMEA

A legal perspective on 7 years EU sanctions

21 February 2021



This booklet has been written to provide in inside view in the legal aspects of the sanctions against Russia and the former regime in Ukraine of Viktor Yanukovych and his associates.

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Previously in this series appeared:

- Sanctions against Russia, Crimea and Eastern-Ukraine (ultimo 2014)
- Sanctions against Russia, Crimea and Eastern-Ukraine (April 2015)
- About the Ukraine referendum in the Netherlands (April 2016)
- Actualities about the sanctions towards Crimea (July 2018)

The content of this memo is based on the results of scientific research. Accessed sources in Dutch, English and Russian.

The caricatures have been chozen from the Russian perspective. This memo appeared also in Dutch. Upon request, the memo can be translated into Russian.

PREFACE

The first MEMO in the series sanctions (restrictive measures)[1] against Russia, Eastern-Ukraine and Crimea appeared at the end of 2014. At that moment four rounds of sanctions have been issued by the Council of the EU, which can be ammended or completed with additional information. No infringements were known at that moment and no court decisions have been issued. After seven years of sanctions this situation is different, both on the level of infringements of the sanctions and the addition of new persons on the list, the changes in law-, and regulations and jurisprudence. On the level of the European Union, the Court of Justice in Luxemburg issued various decions on the level of the CFSP restrictive measures. Due to the reason that since my last MEMO in 2018, a lot has changed on the level of EU sanctions, I decided to write this memo.

In December 2014 I described the do's and dont's as a result of the sanctions. The following memo's I provided practical information. The underlying memo is written from a legal perspective. It is focused on the procedures at the court of Justice in Luxemburg and the influence of the decisions on the national court proceedings and recent amendments in the Russian legislation. It is

[1] Restrictive measures is the official term of 'sanctions'

definitely not a fact of common sense, but claimants are only admissable at the court of Justice in Luxemburg (hereafter: the Court) for possible infringements of the Fundamental Rights, laid down in the European Charter of Fundamental Rights.[2] This is both the case as it concerns the imposition of the sanctions as the procedures in Court. Former president of Ukraine, Viktor Yanukovych and his supporters all claimed that art. 17 of the Charter, the right of property is infringed. The sanctioned Russian banks, such as Sberbank and Russian petrol companies, such as Rosneft, claimed that they had no acces to their own file and evidence. This is an infringement of the right of a fair trial ex art. 41 sub 2(b) of the Charter. The statement of the Council that these companies should know the reason of designation because of the ‘’context.”

As mentioned already, this memo will shed light also on the Russian draft law on the incrimination of Russian persons and entities of not willing to enter into a business relation because that relation is on a former country sanctionslist. In case the draft law will be adopted, the Russian penal code will contain an article which incrimize not doing business with a sanctioned person or entity only because sanctions apply tot hat businesspartner. When the amendment will become into force and you are doing business in Russia with a Russian

[2] https://eur-lex.europa.eu/legal-content/NL/TXT/?uri=celex:12012P/TXT

multinational or huge company, it will be again more difficult to do business with Russia because :you wil be hit by the cat or the dog".

For completeness sake, the current memo is primarily about the sanctions against Russia, and secondarily about the sanctions against Eastern-Ukraine, Crimea and the former regime of of Ukraine – Viktor Yanukovych. Also, light will be shed on the so called EU Global Sanctions Act which became into force on 7 December 2020. The scope of this memo will not include all the other EU sanctionsregulations, such as against Egypt, Syria or Venezuela, only in case reference is made to the jurisprudence of these countries.

Sanctionsregulations in force at the moment

The EU sanctionregulations, issued in 2014 are still in force. These regulations are (as described already in previous memo's) as follows:

- 5 March 2014: EU CFSP regulation 208/2014 "Freeze of assets of Yanukovych and his supporters".
- 17 March 2014: EU CFSP regulation 208/2014 "Integrity Ukraine".
- 23 June 2014 EU CFSP, supplemented at 18 December 2014 EU CFSP regulation 692/2014 "Crimea/Sevastopol.

- 31 July 2014, supplemented at 8 September 2014 EU CFSP regulation 833/2014 “Export to Russia, prohibition of ‘’double use’’ goods, restrictions for huge Russian banks on the international capital marked and prohibition on the export to Russia of specific goods for the use in the Russian petrolsector.

- 7 December 2020: EU Global Sanctions Act: CFSP regulation 2020/1998 “against serious human rights violations’.

The EU CFSP sanctionrdecisions are prolounged on a half-year or yearly basis.[3] Theoretically a listed person can be delisted. However in practise, this is not the case.

The Dutch government issued the so called Handbook about doing business in Russia, issued in 2014 by the Ministry of foreign aAfairs. This Handbook is updated each moment there is a reason to update. The most recent version is of October 2020. The Handbook has been critisized because of its incompleteness and superficiality. Most of the amendments are on an editorial level. There is a lack of practical information and jurisprudence. Questions related to exceptions on the sanctionsregulations (such as export

[3] EU CFSP decisions first year: EU (CFSP) 2014/119 and EU (CFSP) 2014/145 and EU (CFSP) 2014/386 and EU (CFSP)2014/512 including appendices with the lists of sanctioned individuals and entities. Decision EU (CFSP) 2020/1999 = decision being part of the EU Global Sanctions Act.

permissions) and the exact scope of the sanctions can be asked to the Netherlands Enterprize Agency (RVO),[4]

Reasons to set up court proceedings at the Court of Justice in Luxemburg and the relationship with the Dutch procedures

In the Netherlands, the so called Sanctions Act (1977) is applicable. Infringement of the sanctionsregulation causes an economic crime or lliability as a result of the Money Laundering and Terrorist Financing (Prevention) Act (Wwft) or one of the tax laws.

Enforcement of the sanctionsregulation takes place on the basis of art. 10 until 10 h (see also my previous memo). The sanctionsystem implies that national courts of the EU countries are not competent to judge about the listing criteria. The Court of Justice in Luxemburg is exclusively competent. This means that a sanctioned person who agues that there was no good reason to add him to the sanctionslist cannot challenge the arguments in the National court, the only admissability is the Court in Luxemburg. The way the courtproceedings takes place in Luxemburg is part of this memo. Court

[4] https://www.rvo.nl/onderwerpen/internationaal-ondernemen/landenoverzicht/rusland/sancties-rusland

proceedings in Dutch courts (infringements of the Dutch Sanctions Act 1977) has been described in a previous memo. Such cases are related to the export of a double use goods (for civil and military purposes) or the provision of services and know-how for the building of the Crimea bridge (Kerch bridge).

Limitations to the right of property

In the introduction of this memo I reffered to the procedures at the Court of Justice in Luxemburg. When a desginated (sanctioned) person or entity sets up proceeding in Luxemburg, the grounds for admissability are the alledged infringements of Fundamental rights. This sounds as Human rights. In fact Fundamental and Human rights are narrowly related and the Chartes contains a lot of similarities. For example art. 17 of the Charter of Fundamental Rights

the right on an undisturbed enjoyment of property is the equivalent of art. 6 European Charter of Human Rights. An annulment procedure can be initiated at the Court of Justice in Luxemburg based upon an infringement of a Fundamental Right such as the right to property, art. 17 of the Charter.[5] This implicates that the Court is not competent to rule over claims concerning the legality of the amount of frozen assets or a claim that the assets were not confiscated but legally earned. The Court is not competent to rule on practical or factual issues. The EU national courts are also not compentent to rule on these kind of claims. Only the national criminal court of the country where the designated person or company originally resided, is competent to rule about the claim. Since June 2020 also the Russian Arbitrazh Courts are compentent to rule on cases if it concerns liability based upon a contract which cannot be fulfilled as a result of the santions. See paragraph “countersanctions”.

In the cases of Yanukovych and his associates, the National courts of Ukraine are compentent because the statement of reason for the issuing of sanctions was an assumed criminal offence in Ukraine. This means that judges, installed just after the regime change of February 2014 will rule about these claims. These judges have to decide if funds are earned properly or embezzled. WIth respect to the Russian cases, no single court is competent because the reason for listing is no criminal offense in the Russian

[5] https://ecer.minbuza.nl/ecer/eu-essentieel/handvest-grondrechten

Federation, because the fact that the Russian government holds 50 % or more of the shares in a petrolcompany is no criminal offence in Russia. As mentioned already, in case the court proceedings concern a contract between a sanctioned an non sanctioned person or entity, since June 2020 the Russian Arbitrazh Court is competent.

A complicative factor in the cases where companies are listed only because of the Russian state as shareholder, is these persons or entities have no acces to the European Court of Human Rights (ECHR). A claim is only admissable when the national court remedies are exhausted. In the Russian cases this implicates that the ECHR will not be competent to rule in these cases. In the Ukrainian cases (such as Yanukovych and his associates) another reason causes the inaccesability of the ECHR: due to extreme delays at the national level, it twill take possibly more than a decade until cases will be admissable at the ECHR. In the case of Yanukovych and his associates the Council[6] of the EU argues that sanctions have been imposed to repatriate embezzled funds, belonging to the Ukrainian State. The Court (Luxemburg) states that a restriction of Fundamental rights such as the right to property is aloud under the following conditions:

[6] Council of the EU = it meets in 10 different 'configurations', depending on the subject being discussed. Any of the Council's 10 configurations can adopt an act that falls under the remit of another configuration.Council meetings are attended by representatives (i.e. ministers) from each member state. https://www.consilium.europa.eu/nl/council-eu/configurations/

1] First, the limitation must be 'provided for by law'. In other words, the measure must have a legal basis. 2] Secondly, it must refer to an objective of general interest, recognised as such by the European Union. Those objectives include those pursued under the CFSP and referred to in Article 21(2) TEU. 3] Thirdly, the limitation may not be excessive. It must be necessary and proportional to the aim sought. In addition, the 'essence', that is, the substance, of the right or freedom at issue, must not be impaired.[7]

Those three criteria are based upon article 52(1) of the Charter, stating exactly those limitations.

Hereafter I will describe briefly how the Court ruled in the Yanukovych c.s. cases, that the criteria for restriction of property are fulfilled:

According to the Court, the legal basis is the 5 March 2014 decision and regulation.[8] According to my personal opinion, the Court ruled that a non legislative Act has the status of a 'legal base'. However, in the header of the sanctionregulations is mentioned literally: 'non legislative acts'. Beside, according to the standard legislative procedures, a legislative act is issued

[7] Case T-245/15, Klymenko/Council, 8 November 2017, para. 202 with reference to Ezz,: 27 February 2014, T-256/11.

[8] EU CFSP 2014/119 and EU Regulations 208/2014.

with the consent of the Parliament. The underlying Acts are issued by the Council, even without having consulted the European Parliament.[9]

Based upon the second criterium of the aforementioned restrictions. Reference is made by the Court to art. 21 sub 2 (b) TEU. The objective of art. 21 sub 2 (b) is 'to consolidate and support democracy, the rule of law, human rights and the principles of international law'. My opinion is that this second criteria has not the function to limitate the right to property of designated persons. There is no direct relation to an embezzlement on national Ukrainian level and art. 21 sub 2 (b) TEU. Also, art. 21 contains a variety of objective goals, such as to preserve peace, prevent conflicts and strengthen international security. In the case of the Maidan protests in Ukraine and regime change, it is very questionable if these objective has been reached.

A very important legal argument against the application of art 21 sub 2 (b) as argument for the impostion of sanctions is that there had not been a judicial review just before or after the freeze in order to verify if the limitation can be justified from a legal perspective.

Furthermore, according to the third criteria of the aforementioned restrictions, the limitation has to be necessary and proportional to the aim sought. The

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Court refers again to art. 21 sub 2 (b) stating that the objective of this article is to support the rule-of-law:

(…) 'consolidat[ing] and support[ing] the rule of law'. In so doing, those acts form part of a policy of supporting the Ukrainian authorities, intended to promote both the economic and political stability of Ukraine and, in particular, to assist the authorities of that country in their fight against the misappropriation of public funds.[10]"

How this art. 21 sub 2 b) can have direct effect on holding companies in the Netherlands. In case a desginated person or entity is director or shareholder in a Dutch holdingcompany with a Dutch director, it can happen that the bankaccount of Dutch holding has to be frozen and all activities has tob e annuled because of the listing. The result will be the end of the Dutch company because a company cannot exist without funds and activities. In the Netherlands there will be no court competent to decide on the legality of the asset freeze. Only the Luxemburg Court may annul the sanctonsdecions based upon an infringement of the Charter. Unitl today, only one single sanctioned person succeeded in his annulment procedure (mr. Andrei Portnov, 2015). [11] Beside this very low percentage of succes, court

[10] T-245/15, Klymenko/Council, 8 November 2017, r.o. 206. ECLI:EU:T:2017:792. With reference to Ezz, 27 February 2014.

[11] T-290/14, Portnov/Council, 26 October 2015. ELCI:EU:T:2015:806

proceedings takes at least two years from the beginning until the end. This means that in case of troubles in the Netherlands with an asset freeze, a solution of the problem is far away.[12]

Russian multi nationals [Rosneft, Sberbank] and the context criterium

Sanctions can be imposed against persons or entities. Certain Russian multi national petrolcompanies and banks, where the Russian government owns more than 50 % of the shares, are solily sanctioned because of the state ownership which may result in the destabilization of Ukraine as a result of the state ownership. This is just an assumption, not based on evidence. When the designated persons or entities requests the Council for a clarification, it appears that duet o the context, they should understand why they are sanctioned. The argument that it is not clear and that no evidence of destabilizing has been provided, are set aside because the court rules that the context is clear. The context criterium is introduces because the Council also doesn't have evidence. If there is evidence, this will be at the prosecutors office. They have the monopoly to set up criminal investigations. The facta bout a lack of evidence is confirmed by professor Ch. Eckes, stating that infringements of procedural rights are at stake because the EU institutions do

[12] There are some examples when certain frozen funds can be released to payments for foodstuffs, rent or mortgage, etc. or intended for payment of reasonable professional fees (legal services).

not have access to the relevant information, reason why they cannot share information with the courts.[13]

In the Rosneft case the court ruled that; *"it is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons is sufficient must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question In particular, the reasons given for a measure adversely affecting a person are sufficient if that measure was adopted in a context which was known to that person and which enables him to understand the scope of the measure concerning him. Moreover, the degree of precision of the statement of the reasons for a measure must be weighed against practical realities and the time and technical facilities available for taking the measure.*[14]

[13] Professor Ch. Eckes, (2012) "EU counter terrorist sanctions against individuals". European Foreign Affairs Review, p. 124, paragraaf 7.

[14] T-715-14, Rosneft, 18 September 2018, para. 112. (and other paragrapsh). ECLI:EU:T:2018:544

The Russian point of view

The sanctions are based on Council decisions and Council regulations, which are political motivated decisions.[15] The decions and regulations are no legal Acts, as indicated at the Acts. EU treaties (TEU and TFEU) do not provide a direct opening for (targetted) sanctions on individuals and companies. The relevant articles of the EU treaties are art. 215 TFEU and 29 TEU. The first one alouds countries to sanction other countries with the so called boycots and embargo's, to punish a country. Nowadays this article is very often used for targetted sanctions on individuals and companies. Until today arms embargos on military goods are issued based upon art. 215 TFEU.[16] This is appropriate. But the asset freezes of funds of designated persons are issued also based upon art. 215 TFEU and often directly after a regime change. This means that the santions are targetted on leaders of the former regime and not on the just installed new EU oriented regime. The initial objective of article 215 TFEU is country oriented and not individual oriented. The other relevnt article when it concerns sanctions is art. 29 TEU. Based upon my opinion this article also does not provide an evident basis for targetted sanctions against former autocratic rulers and state owned companies: Art. 29 TEU sounds:

[15] T-245/15, Klymenko/Council 8 November 2017, r.o. 208. ECLI:EU:T:2017:792. With ref. to Ezz, 27 February 2014.

[16] Such as EU Regulation 833/2014.

"The Council shall adopt decisions, which shall define the approach of the Union to a particular matter of a geographical or thematic nature".

Professor Eckes urged in 2012 the introduction of a new instrument or an additional administrative framework for the imposition of sanctions, She suggested to ad a sanction mechanism under Title V of the TEU "General provisions on the Unions External Action and Specific Provisions on the common foreign and secirity policy".[17] However, until today this did not happen. Also the Global Sanctions Act of December 2020 does not solve this problem. The Act is no treaty and no legislative act. In the title of the Act is indicated that it is a non-legislative Act.

The underlying reason for this apparantly inconsistency is based upon the initial way of imposing sanctions. Before the year 2009, when the Maastricht treaty still was in force, the EU sanctions were based upon UN security council decisions which had to be implemented in the EU. When doing so: *"The Council is committed to using sanctions as part of an integrated, comprehensive policy approach which should include political dialogue, incentives, conditionality and could even involve, as a last resort, the use of coercive measures in accordance*

[17] Ch. Eckes (2012) "EU counter terrorist sanctions against individuals". European Foreign Affairs Review, p. 121.

with the UN Charter.[18] These so called common positions (of all memberstates) are additional measures adopted in order to implement UN Security Council resolution. It was only a matter of implementing the UN security council sanctionsresolution with respect to Al Quida. This resolution was issued in 1999, based upon resolution 1267[19]. All members of the UN were obliged to implement the resolution. This means that assets of listed terrorists had to be frozen. Based upon the UN security council resolution, the EU adopted in the year 2002 the so called "common position[20]" resulting in the freeze of all funds of listed terrorists. In the Russian and Ukrainian cases, there is no UN security council resolution, only a Council decision, issued by a non legislative body, even worth: a political body.

Based upon my opinion the system of the common position resulted in 'the law of the sliding scale.' Initialy terrorists had to be punished by way of asset-freezes. Some years later it became clear that former presidents of autocratic countries should be punished in the same way. The fact that the first EU sanctions against Al-Qaida have been imposed as a result of UN security council resolutions clarify why no legislative body and no judge ruled about

[18] COUNCIL OF THE EUROPEAN UNION Brussels, 7 June 2004 10198/1/04 REV 1, point 5.

[19] http://unscr.com/en/resolutions/doc/1267

[20] Common Position, 2002/402/GBVB. eur-lex.europa.eu

the decisions to freeze assets of the former president of Ukraine and his associates

7 December 2020, the EU Global Human Rights Sanctions Act[21]

On 7 december 2020 the EU established the EU Global Sanctions Act which enables the EU to target persons and companies worldwide.[22] It took several years before the Act became into force. The Act shall not bear the name Magnitsky Act, however the death of Sergei Magnitskiy in 2009 was the direct reason to initiate negotiations about such an Act[23]. The US adopted the so-called Magnitskiy Act in 2012.

The Global Sanctions Act makes it much more easy to impose sanctions because it is not necessary anymore that 27 countries agree before a new regulation becomes into force. The statement of reasons to add a person or entity to the sanctionslist is identical to what I described in earlier memo's:

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[21] Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses.

[22] https://eur-lex.europa.eu/legal-content/NL/TXT/PDF/?uri=OJ:L:2020:410I:FULL&from=EN

[23] https://www.nhc.nl/the-magnitsky-act-comes-to-the-eu-a-human-rights-sanctions-regime-proposed-by-the-netherlands/

sufficient is the presumption of a criminal offence or a certain behavior, accompagnied with a letter of an authority.[24] No preliminary judicial review is required. As the structure of the 7 December 2020 Act is identical to the EU sanctionsregulations. The result is that when the Council has to clarify to the Court the status of the measures, the Council will declare that those measures are inherently temporary and reversible.[25] The qualification "temporary and reversible" is of crucial importance for the Council because the qualification of sanctions as a criminal measure would imply guarantees for the suspect such as the innocence presumption. Nevertheless the listing criteria is an assumed human rights violation. Human rights violations are definitely criminal offences. The alledged embezzlement of statefunds by Yanuovych, is a criminal offense. Nevertheles, the sanctions imposed against him, are according to the Council, of an adminstrative nature. In case the addition to the sanctionslist would have been qualified as a criminal offense, the Court should have no jurisdiction because of the ne-bis-in-idem principle[26] which implies that it is not aloud to prosecute a person twice for the same

[24] This can be different bodies, depending on the situation. It can be an Amnesty international report with photo's of human rights violations during peacefull demonstrations and statements of victims.

[25] Case T-245/15, Oleksandr Viktorovych Klymenko, para. 208 and T-258/17, Arbuzov 6 June 2018, para 65 en T-245/15 Klymenko 2017, para 207 (not limited tot his decision).

[26] The prohibition to be prosecuted twice for the same offence.

reason. In addition, if the sanctioned person is treated if he submitted a criminal offence, there has to be a judicial review of the asset freeze just before or just after the freeze had taken place. Evidence should then have played an important role. Also the presumption of innocense will apply, which means that nobody is guilty until proven guilty.

The qualification 'administrative measure' implies that evidence cannot be provided via the so-called request for mutual legal assistance. This kind of assistance can only be provided in criminal cases.[27] Which complicates the obtainment of evidence, it is not open accessable and the monopoly for criminal proceedings lays at the prosecutors office, both on national as on EU level. Nevertheless, the provided information to the court appeared sufficient. The court ruled that 'the decision is taken on a sufficiently solid factual basis".[28]' According to the case-law, the Council is not required to carry out, systematically and on its own initiative, its own investigations or checks for the purpose of obtaining additional information when it already has information provided by the authorities of a third country in taking restrictive measures

[27] However Eurojust signed Cooperation Agreements with different non countries on the assistance of liasson officers, who can be installed oficcialy in a third country. They are prosecutors and can provide legal assistance to the EU. https://www.eurojust.europa.eu/states-and-partners/non-EU-states/liaison-prosecutors/ukraine

[28] T- 242/16 Stavitsky/Council, 22 March 2018 para. 82. (not limited to this decision).

against nationals of that country who are the subject of judicial proceedings in that country."[29]

'The Council does not seek itself to punish the misappropriation of public funds being investigated by the Ukrainian authorities, but to protect the possibility of the authorities identifying such misappropriation and recovering the funds.[30]"

With the establishment of the EU Global Sanctions Act, existing regulations have not been set aside. On the contrary, in most of the cases the individual sanctions which are in force since 2014 are being prolounged each year. Also persons and entities are added to these lists on a very regular basis. When the statement is made in the Dutch Financieele Dagblad of 13 January 2021, that the EU until now does not make a clenched fist, the opposite is true. The fist is even more clenched than before because the requirement of the consent of 27 member States for the implementation of new sanctions, is not required anymore. The only reason to state that sanctions do not have a serious impact, must be a lack of information.

[29] T- 242/16 Stavitsky/Council, 22 March 2018 para. 83

[30] T- 242/16 Stavitsky/Council, 22 March 2018 para. 92 and para. 93

Russian countersanctions and legal Acts to neutralize foreign sanctions

(On the yelow ribbon the word: sanctions)

In this paragraph, I will describe two Russian laws related to foreign sanctions. The first one is still under construction. The second one became into force in June 2020 and concerns acces to the Russian Arbitrazh court in sanction related contractlaw disputes.

In May 2018 a draft law has been voted on in the Russian Duma. This law penalizes Russian entrepreneurs if the sole reason not to enter into a contract with another Russian entity is the fact that a person or entity is on a foreign sanctionslist.. The draft law penalize also the provision of information to other

states (such as the EU or US) in case this information later appeared to be used to designate persons or entities to the sanctionslists of foreign countries.

Due to serious complaints of the Russian business society, the law have not passed the Duma until the date of this memo. According to the business society, enforcement has not to take place via criminal law but administrative law.[31] The adverse effects of criminalization may result in not atracting foreign businesses anymore. On the other hand, the Russian economy should not be 'killed' because of foreign Sanctions (accoding to the explanation to the draft law).

Concerning the second part of the draft law: the provision of information to other States which can be used for the imposition of sanctions, the Duma agreed that this part of the law has to be implemented in the criminal code of the Russian Federation.

The draft law on the article which has tob e amended in Russia's criminal code[32] sounds as follows:[33]

[31] More specific, that the criminalization will not fall anymore under art. 284 (2) Russian penal code, as suggested in the draft law https://www.kommersant.ru/doc/3628426

[32] This draft'On the protection (countermeasures) against unfriendly behavior of the US and (or) other foreign States'[32] which has the working title: "Law on the punishment of the implementation of Western Sanctions

Art. 284 (2) ‘Restricting or Refusing to Perform Ordinary Business Operations or Transactions for the Purpose of Assisting the Enforcement of Restrictive Measures Imposed by a Foreign State, a Group of Foreign States or by an International Organization.’ Part 1 of the new article envisages liability ‘for action or the lack of action’ for the purposes of enforcing anti-Russian sanctions, if they restrict or deny Russian citizens, corporate entities, the Russian Federation, its regions or municipalities, and also their controlled entities the performance of ordinary business operations or transactions. Violations of this provision entail a penalty of up to 600.000,- rubles ($9,700) or placed in custody for a period of up to four years, or penal labor for the same period or imprisonment for a term of up to four years, along with fiscal penalties of up to 200.000,- rubles ($3,230).

A separate clause (part 2 of article 284 (2) proposes introducing criminal liability for aiding and abetting the imposition of restrictions against Russia. This is understood to mean "the performance of willful actions by a Russian citizen that help a foreign state or a group of foreign states or an international organization to impose restrictive measures on Russian public and private entities and also on their controlled entities." This provision also covers "the issuance of recommendations and the transfer of information" that have

[33] English version: https://tass.com/politics/1004115

caused or may have caused the imposition of restrictions against Russian companies and citizens.

Violations of this type envisage a penalty of up to 500.000,- rubles ($8,100), or placed in custody for a term of up to three years, or penal labor for the same period, or an arrest for up to six months, or imprisonment for a term of up to three years, along with fiscal penalties of up to 200.000,- rubles ($3,230).

Illustrative for the second part of the draft law is the case of Syria. The Syrian opposition made use of support of the US followed by sanctions against Assad and his associates. This is exactlly what Russia wants to penalize: sanctions as ‘democratizationtool’ against representatives of an ‘autocratic regime’ and to support ‘the opposition’ is used especially by the US and EU (according a journalist of the Vedomosti, Russian Financial Times). He added that factually this is a provocation to interfer in the domestic affairs of a foreign state. However, the result is the opposite: The Kremlin decided to penalize these kind of actions, which can have a negative effect on the businessrelations with the Russian Federation. As of the moment the legislation will be implemented, it will be totally unclear how the law will be enforced.[34] As mentioned already, currently this law has not became into force yet. However, the discussion in the Duma to adopt these kind of regulations is actual again because of the Nordstream and Navalny cases, where have been anounced sanctions. Also the Russian newspapers are reporting again about this topic after a period of silence. On the date of issuing this memo, it is not clear if and when the law on the punishment of the implementation of Western Sanctions will become into force.

[34] https://www.vedomosti.ru/politics/articles/2021/02/01/856280-nakazanie-sanktsiyam consulted on 19 February 2021

According to the Russian lawyers of the Law Firm Jones Day: 'when this draft law becomes into force, working in Russia for Western companies implicates a high level of vigilance and alertness of the applicable sanctions. Alertness is at stake also for future sanctions and the legal responsability for these sanctions for all jurisdictions who applied sanctions against Russian legal entities and physical persons'.[35]

Another very important Law for companies doing business with Russian sanctioned entities and for Russian companies, sufferering of having no acces to Western courts, is the recent amendment of the Russian Arbitration Law which makes it possible to litigate in Russia in cases where the doors are closed in foreign countries.

On 8 June 2020 [36], in the Russian Arbitration Law has been introduced art. 248 (1) and (2), which allows designated persons to submit contract-based disputes to the Russian arbitrazh courts. The law applies on foreign (including EU and US) sanctioned persons en entities. Art. 248 (1) and (2) expands the list of disputes that fall within exclusive jurisdiction of Russian

[35] https://www.jonesday.com/ru/insights/2018/05/unnamed-item

[36] the Russian President signed Federal Law No. 171-FZ "*On Amendments to the Russian Arbitrazh Procedure Code to Protect the Rights of Individuals and Legal Entities in Connection with Restrictive Measures Introduced by a Foreign State, Association and/or Union of States and/or State (Interstate) Institution of a Foreign State or Association and/or Union of States*

arbitrazh courts. The so-called sanction related disputes are now included, where one of the parties is subjected to foreign sanctions, or between Russian and foreign persons if the claim arises from the foreign sanctions imposed on the Russian individuals and legal entities. The Russian Arbitrazh court is compentent where at forehand is cleat that the foreign court is not compentent or when a case is stopped before a foreign court because the court ruled during the procedure that it is not compentent. For more details see the Russian Law Nr 171-FZ, issued at 8 June 2020.

This law has far reaching consequences for Dutch law, because of the Dutch Supreme Court decision Gazprombank arrest (HR 26-09-2014)[37].

[37] https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2014:2838 See also my article in Tijdschrift Scheidingsrecht January 2020, 2/2020. "Russian Roulette".

Sanctions do have effect, including the waterbed effect

The EU sanctions are imposed to deter and to change the attitude of the designated persons and entities. However, in most of the cases a so called waterbed-effect is the result. As of the moment of the moment the sanctions became into force in 2014, the Kremlin took the position not to resign and not to fulfil the obligations of the EU: to stop the assumed destabilization in Ukraine and to give back Crimea. New ways have been found to continue doing business despite the sanctions. The behavior of the Russian Federation

can be compared with that of a drugsdealer. When the law tightens up, the dearler will do his utmost best find new oportunities of distribution.

Hereafter some examples of the waterbed-effect or the unexpected effect of EU sanctdions.

Russia issued contra sanctions directly in the year 2014, on 6 August 2014.[38] The export of EU agro products and fruit stopped as a result of the Russian embargo, in force until today. The effect for Russia was that local producers had to set up local plants (importozamesjenije). They succeeded and the national production is a succes. Imposing the sanctions on Russia, the EU did not expect that Russia will take countermeasures as it did, because at that moment Russia seemed to be very dependent upon EU import.

As mentioned earlier, in the year 2014 EU sanctions have been imposed on Russian persons and entities because of the assumed destabilization of Ukraine. Instead of a behavior change and annulment of the transfer of Crimea to the Russian Federation, Russia reacted as if it is a strategic competition to win the battle. Russian parlamentarians and officials having facilitated the transfer of Crima to the Russian Federation have been added to the EU sanctionslist. They are still on the list until today. They will not change behavior and will not have feelings of regret for the harm they committed. The

[38] http://www.kremlin.ru/acts/bank/38809. Presidential Order 560 dated 6 August 2014.

opposite is the case, because for a substantive part of the Russian population Crimea historically and today belongs to the Russian Federation. Of course, the transfer has been illegal and in contradiction with the Sovereignty of Ukraine.

The EU presupposed signing the association agreement with Ukraine in 2014, is a good job and will bring prosperity and peace in Ukraine. However, during the association negotiations, Russia not once asked for ‘a seat at the negotiation table’. However the EU and Ukraine answered that the negotiations are bilateral and Russia has not to interferre. Instead of peace and prosperity Ukraine is in war with Russia already for seven years: in Eastern-Ukraine until January 2021 more than 14.000 people died and 2 million of people have left the country (mostly to the Russian Federation). Again, from the Russian perspective, it is obvious that it will not give up Eastern-Ukraine easily. That part of the country accomodates scalegaz resources and an immense mining industry, financed by Russian banks (currently on the sanctionslist). Also most of the inhabitants of Eastern-Ukraine are Russians.

Another effect of the EU sanctions was the wrongdoing by building of the Crimea brigde (Kerch bridge), published in August 2017. Dutch enterprises assisted Russian building companies despite the EU sanctions wich penalize all kind of help to the peninsula Crimea. (More details about this

sanctionregulation see my memo of July 2018 and my interviews with the Dutch newspapers). Also Ukraine decided to sanction persons and companies who assisted building the Kerch bridge.[39]

For the Dutch prosecutors office it was very difficult to obtain sufficient evidence to set up criminal proceedings against these Dutch companies who assisted the Russian Federation building the Crimea bridge. On National (Dutch) level the infringement of the EU sanctions is a criminal offence according to the Sanctiewet 1977. The sanctionsregulations itself is assumed to be of an administrative level, which means that when a person or entity is added to the list, the statement of reasons on the annex of the sanctiondecision, is an administrative measure.

The Crimea bridge have given Russia the 'winner takes it all feeling'. Already during WO-II the Germans tried to build a bridge over the Kerch Strait to connect the peninsula Crimea with the mainland. Due to climological reasons the Germans did not succeed. The Kerch Strait suffers of ice formation, wind and an unstable substrate. Nevertheless, the project succeeded, due to help of Dutch drilling and dregging companies. Before the annexation of Crimea,

[39] https://www.consilium.europa.eu/en/press/press-releases/2018/07/31/ukraine-eu-adds-six-entities-involved-in-the-construction-of-the-kerch-bridge-connecting-the-illegally-annexed-crimea-to-russia-to-sanctions-list/

the former president of Ukraine, Viktor Yanukovych proposed the EU to investigate in a common project to build the Kerch bridge.[40]

The description of the unexpected results of the imposition of sanctions, is non exhaustive. The scope of this memo is not to provide a complete impression of all issues and scandals.

A recent milestone for the EU is the enforcement on 7 December 2020 of the Global Sanctions Act[41] after years of negotiations between EU memberstates. The Russian answer on the enforcement is that it announced a possible breach of its diplomatic relations with the EU. The breach of diplomatic relations can have a direct effect on the succes of the EU Global Sanctionslist, which I will describe in the following paragraph.

[40] https://interfax.com.ua/news/economic/180988.html

[41] Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses.

Why the Russian Federation anounced that it possibly will breach the diplomatic relations with the EU

An old proverb sounds: ‘it takes two to tango’. The question: ‘who started’ will stay an important question. It is too easy to argue that Russia is guilty for hundred percent. Before the annexation of Crimea the EU negotiated with

Ukraine the association agreement which gave rise to problems. For years there have been issues between Russia and the Nato about infringements of agreements, such as the See Breeze exercises in the Black Sea. Ukraine is participating at these exercises, which is unacceptable for the Russian Federation.[42]

The list of confrontations leads always to the question: who started. The confrontations are much older than the annexation of Crimea.[43] I will not elaboreate on the question 'who started' or who is guilty because this memo has no political intensions. A lawyer looks into things otherwise than a politician. Legal reality differs from political objectives. Lawyers looks at what parties agreed and not the political wishes or objecctives. What parties agreed is the topic of my dissertation.

The Navalny case

In case Russia will breach the diplomatic relations with the EU, the EU shall react that Russia is a spoilsport as always. Instead of the liberation of Navalny, to recognise the poisoning of Navalny and to invite Borrell (the High

[42] The Sea Breeze exercises, taking place on a yearly basis already for years, condemned by the Kremlin. https://www.nato.int/cps/en/natohq/news_177384.htm?selectedLocale=en

[43] The first chapter of my Chapter I of my dissertation is about the way tot the "No"of Yanukovych against the association agreement with the EU.

Commissioner of the EU CFSP) respectfull, this al did not happen and has brought Borrell in a penible position during his visit to Lavrov in Moscow 5-7 February 2021. Lavrov requested Borrell to estimate the recent expulsion of three EU diplomats to their home countries Germany, Sweden and Poland. These diplomats took part in demonstrations in January 2021 against the emprisonment of Navalny. For Lavrov it was an unpleasant experience that Borrell did not agree and anounced he had contact with the lawyers of Navalny during is visit.[44] It has to be mentioned that the fact that Navalny has been sentensed now in the most severe prison of the Russian Federation without the right to have contact with the outside world cannot be justified.

With reference to the attendance of diplomats during protests, a parrallel can be made with the Maidan protests in december 2013, January and February 2014. Being present during the demostrations let to making photo's and films. This can be used as evidence for human rights violations. What happened in Ukraine, may not happen once again according to the Russian government. The diplomats who took part in the Maidan protests had good contacts with the opposition, NGO's and members of the Ukrainian parliament, reason why they had inside information. A predecessor of Borrell, Catharine Ashton regularly took part in the Maidanprotests and even served cookies to

[44] https://www.volkskrant.nl/nieuws-achtergrond/buitenlandchef-eu-roept-na-omstreden-bezoek-aan-moskou-op-tot-dialoog~bf1af8ab/

including the police officers.[45]. Direct after the regime change in Ukraine, a pro European Parliament has been installed and Western oriented ministers have been appointed. A brand new Prosecutor-General facilitated that the HR CFSP EU received a letter with a list of names of persons who had to be added to the sanctionslist. As I descdribed the Maidan protests from hour to hour including the regime change, so did the Kremlin. The Kremlin does not want that a situation similar to Maidan will occur in the Russian Federation. This is the reason EU diplomats are under a magnifying glass and Lavrov was severe to Borrell in his wording that the activities of the expulsed EU diplomats are incompatible with their capacity of foreign diplomat. Borrell answered that he does not agree on this point with Lavrov. Lavrov anounced that in case the EU will issue sanctions because of the emprisonment of Navalny, Russia will anounce these sanctions as illegal.[46] (I elaborated more detailed on this topic of illegality under Russian countersanctions).

Concering the tasks of diplomats. Apart from the HR EU, which according to art. 43 (2) TEU shall ensure coordination of the civilian and military aspects of

[45] Catharine Ashton. HR EU CFSP over the period as of 1 December 2009 until 1 November 2014 https://eeas.europa.eu/archives/ashton/index_nl.htm

[46] https://www.bbc.com/news/world-europe-55954162 geraadpleegd op 20 februari 2021

the tasks', the so-called Political and Security Commitee (PSC)[47] has been granted a pivotal role in CSDP. Irrespective of the fact that it is hardly mentioned in the CSDP section (concerning the issuance of sanctions) the PSC had developed into the centre around wich all CSDP actions converge. It meets at the ambassadorial level as the preparatory body for the Council to keep track of the international situation, help to define policies within CFSP and CSDP, and prepare a coherent EU response to a crisis."[48]

The PSC is composed of member states' ambassadors based in Brussels and is chaired by the representatives from the European External Action (EEAS) Service. It meets twice a week, and more often if necessary.''[49]

The institutionalisation of the CSDP included the creation of several specific organs some of which do not have an explicit Treaty basis. The European Council (Nice , December 2000) decidd to establish permanent political and

[47] The Political and Security Committee is responsible for the EU's Common Foreign and Security Policy (CSFP) and the Common Security and Defence Policy (CSDP)

[48] EU external relations law. Edited by R.A.Wessel en J. Larik. Hart Publishing, eerste druk.Hoofdstuk IX P. 317-318.

[49] https://www.consilium.europa.eu/en/council-eu/preparatory-bodies/political-security-committee/ accessed on 21 February 2021

military structures. Apart from the PSC, CDSP depends on a number of other bodies, which are partly embedded in the EEAS".[50]

Taking into account the abovementione, I can understand why Lavrov has to prevent the participation of foreign diplomats in demonstration. Due to their diplomatic immunity, diplomats can freely collect and forward information to the EU and US which can be used as basis for the imposition of sanctions.

The far reaching consequences of the judicial sovereignty of the EU

This memo is not to provide munition to the Kremlin for contesting the EU sanctions. The reason to write this memo is to analyse the legality of the EU sanctions in the light of the Charter, more specific the right to property. In that light it has to be stressed that the EU for years worked on the concept of becoming an autonome legal order. I explained already the issue of the possible infringement of the fundamental rights of the EU Charter and the effect on the legality of the imposition of the sanctions. What happened exactly is that the EU decided in 2014 not to enter into the European Convention on Human Rights, after a long period of negotiations, summarized

[50] EU external relations law. Edited by R.A.Wessel en J. Larik. Hart Publishing, eerste druk.Hoofdstuk IX p. 318

laid down in opinions. The convention has not been signed because it whould have threatened the autonomy of the EU legal order (opinion 2/13).[51]

According to professor Eckes: “Understood in this way, autonomy concerns the authority to determine the validity and interpretation of EU law as a self-contained and self-referential legal system distinguishable and independent from national and international law**.** Legal autonomy as construed by the ECJ is not relative as many authors have claimed. It has the purpose and effect of creating the jurisdictional element of sovereignty”.[52]

“The question that the Court answered in Opinions 2/13 and 1/175 is not one of gradation (how autonomous is the EU legal order?) The Court answered the question of whether the EU’s participation in international legal regimes, such as the ECHR and CETA, may be capable of undermining the absolute conceptual legal autonomy of the EU legal order – no more and no less”[53].

[51] Eckes, Ch. P. 2 The autonomy of the EU legal order. Published in: Europe and the World: A Law Review DOI: 10.14324/111.444.ewlj.2019.19

[52] Eckes, Ch, with ref. to Bruno de Witte, ‘European Union Law: How Autonomous Is Its Legal Order?’ (2010) 65 Zeitschrift für öffentliches Recht 141–2

[53] Eckes, Ch. P. 2 The autonomy of the EU legal order. Published in: Europe and the World: A Law Review DOI: 10.14324/111.444.ewlj.2019.19

"The autonomy of EU law was developed by the ECJ in a long line of case law. It construes EU law as autonomous, that is, not depending on national or international law for its validity. The Court's position entails that the autonomy of the EU legal order requires the Court to be in the position to maintain from the authoritative perspective of EU law the claim that EU law 'stems from an independent source of law.[54]' Reference is made by Eckes to the joined cases Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission.[55] These cases are the predecessors of the Yanukovych c.s. cases, as referred to already earlier in this memo: Al Qaida.

How this approach of the ECJ can be explained. According to Eckes: "The ECJ's autonomy claim is a prime example of its meta-teleological approach to interpretation, pursuant to which the Court refers on a very high level of abstraction to systemic values[56]." A meta teleological approach means a result oriented approach that defines ethical behavior by good or bad in order to make an ethical decision. Beside the meta-teleological approach Eckes describes the ECJ jurisdiction epistemic, which means that, the social aspect of science, a social process in generating judgments.

[54] Ch. Eckes, p. 3 para. 2.1

[55] C-402/05 P and C-415/05 P. ECLI:EU:C:2008:461.

[56] Ch. Eckes, p. 3

"Autonomy in this conceptual sense ensures the Court's jurisdictional authority as the final authority within this complete epistemic system. It allows the Court to protect the EU legal order from normative interference that could be 'liable to adversely affect the specific characteristics of EU law and its autonomy'. However, this should by no means be read as precluding (uitsluiten) international law from having effects within the EU legal order. It only establishes that the relationship between EU law and international law and the effects of the latter within the EU legal order can only be determined 'by reference to [the EU's] internal rules[57]'

"The ECJ's conception as explained in the previous section refers to conceptual legal (normative), rather than factual (empirical) autonomy. The latter refers to the factual ability to govern, adopt policies and implement them. The former requires that the interpretation of EU law must be established (and can only be challenged) by reference to EU law (within the conceptual framework established by EU law) and not by reference to other legal spheres, be they national or international. **Autonomy allows the ECJ to insist on the monopoly to determine the validity of all EU law, independent from the legal concepts used by international law or the different national legal orders of the Member States.**"[58] This text in bold is

[57] Ch. Eckes, p. 4 (para 2.1)

[58] Ch. Eckes, p. 4 (para 2.2)

factually the essense why all appeals at the ECJ of the Ukrainian and Russian sanctioned persons and entitties failed, despite the reasonable arguments having been put forward by claimants.

“This self-contained nature of EU law and the monopoly of interpretation rest on the use of precedents by the ECJ. The internal validity of all legal interpretations is in a precedent system established in a self-referential manner, that is, by reference to earlier case law. Any of these interpretations can be challenged. Many are challenged. However, they can only be challenged by reference to EU law as interpreted by the Court. Hence, one could conclude that the autonomy of EU law as a **self-contained and self-referential normative system** is implicitly reaffirmed in every decision that claims its legality and legitimacy by resting on earlier interpretations of the law. In other words, the ECJ’s entire body of case law reaffirms the self-contained reading of EU law.””[59]

The aforementioned statement of Eckes I inserted in this memo because this is one of the most appearant issues of the court proceedings in Luxemburg. The Court always refers to earlier own judgements. In the Yanukovych and his supporters cases this was Ezz. In the Ezz cases it was Kadi. The ECJ

[59] P. 4, Chr. Eckes

does not follow the principle of passivity, but is active and referes at its own initiative to earlier cases.

What to do? [60]

This question cannot be answered easily. Of course it is preferably when not oligarchs but democratic elected leaders rules the world. It has to be supported that the EU fights against these excesses by way of sanctions. However, as became clear with Russia, the opposite is often the case. Russia does not change behaviour but is challanged to resist every new regulation.

For me personally, an important point of criticism is that the EU sanctionssystem is not always in line with the Charter of Fundamental rights (as described above). To freeze assets without preliminary judicial review, without approved evidence, is remarkable. The behavior of the Council, imposing sanctions is like they are sovereign, not influenced by other jurisdictions or principles, also not by the jurisprudence of the ECHR. In my dissertation I compare the method the Council impose sanctions, with the Dutch Golden Age, the VOC mentality and how Hugo de Groot (Grotius) described ownership, the way(s) ownership moves from one person to the

[60] In Russian "Sjto delat'? The title of a famous Russian roman, written by the Russian writer, journalist and reviewer Nikolaj Tsjernytsjevski in 1862 during his emprisonment in St. Petersburg .

other and how a person becomes owner for the first time of a good, which had no owner before (like nature but also slaves) .

The sanctionsystem created factually a new iron curtain between the EU and Russia. Due to the EU Global Sanctions Act, wich became into force recently, the new sanctions because of the emprisonment of Navalny and the anouncement of amendments in Russian legislation which creates criminal liability if a Russian individual or company denies to do business with a designated Russian individual or company on the sole reason of designation, is really a situation, not at all comparable with the situation before 2014, before the sanctions became into force. No customer due dilligence can take away the risks of doing business in Russia with a person or company who is indirectly related to a ‘’blocked’’ person or entity. Of course the risk is low when doing business on the SME level, however even then, there is a risk, as we have seen with the Dutch companies, who helped building the Crimea bridge.

Unfortunately we are back on the level of Soviet relations: no trust and a very unfriendly contact on political level after more than two decades of approachment and cooperation programs such as Matra, PSO and PUM. Those who have done business in Russia in the nineties or have travelled in Russia as student or tourist, definitely remember the good times, the atmosphere and the opportunities under the Jeltsin regime. The souvenirs tot

hat period are generally spoken in superlatives: spectaculair, never earned so much money, never drunk so much, never had such nice, young, girlfriends etc. etc. This is all history. It is even more regrettable because a lot of Russians have the same good souvenirs as Western people. There was really a good match between the cultures and there was respect for the EU, the way of doing business and the history. Since the implementation of the sanctions, the opposite is a fact: for a lot of Russians it is hard to respect a country (the EU) when they impose political motivated sanctions under the pretext of the necessity to bring democracy. It is regretable that business suffers of politics and even more that EU politicians deny that the sanctions do have effect on others than only the friends of Putin or those who facilitated the transition of Crimea to the Russian Federation or the undefined status of Eastern-Ukraine.

Text on image: "We demand an investigation. Who poisoned Navalny "? "Ja, ok, I mean "yes, yes! " (In Russian this is a nice play of words: "Yes" means "Me" but Putin tries to speak German ...

Again, this memo has been written to inform the entrepreneur about the possible legal consequences, possibilities and risks of doing business in Russia, a country under sanctions. This memo has no political objective because the author feels only obliged to inform there where our Dutch government is not informing and to inform about amendments in Russian legislation were it concerns sanctions.

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ISBN: 9789082337969