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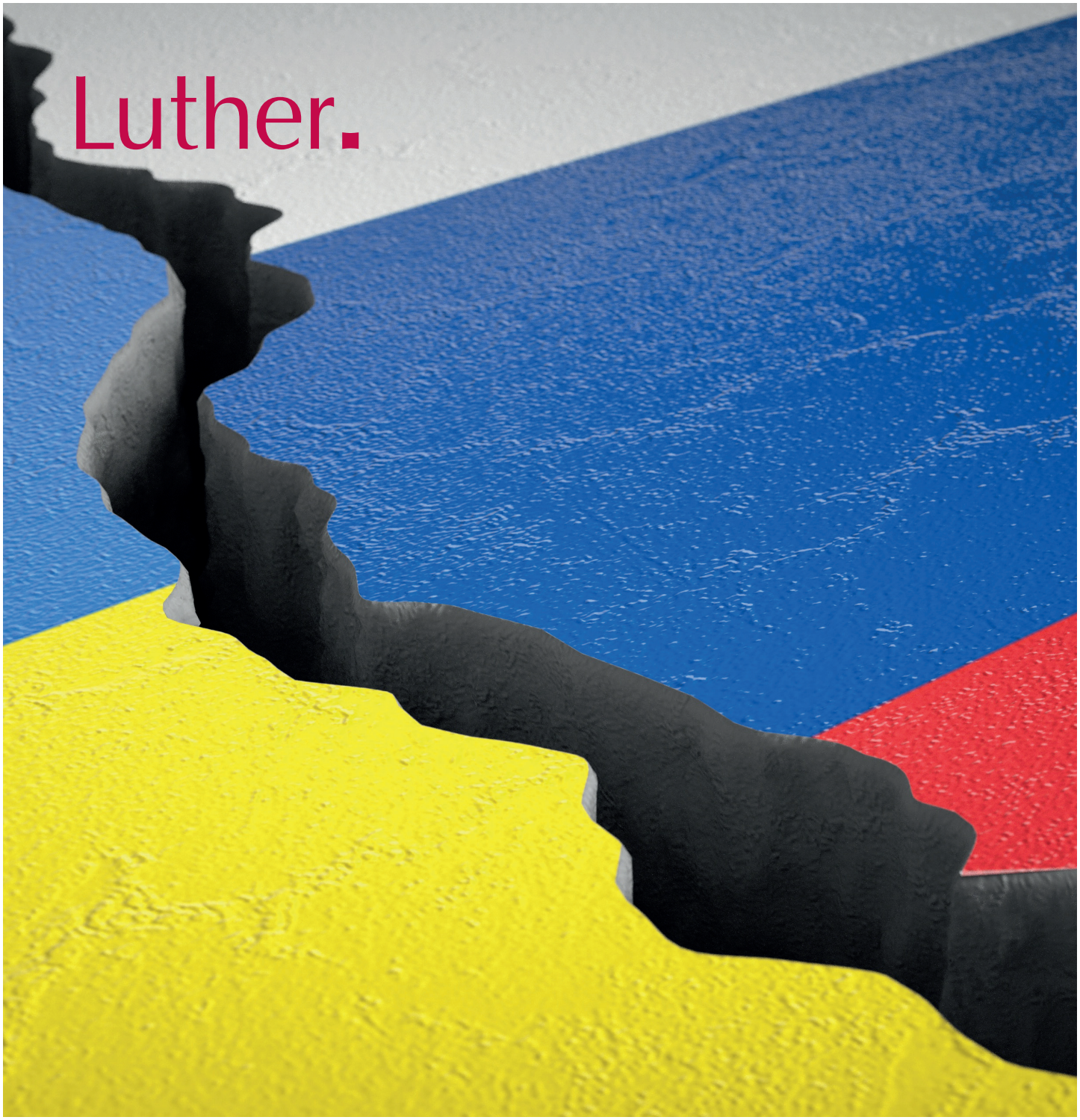

Russia. Ukraine. Europe. Legal implications for your company

24 April 2022

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Content

Overview of the new EU sanctions imposed on Russia and Belarus

As a result of the armed conflict in the Donetsk and Luhansk oblasts of eastern Ukraine (regions that emerged from the Euromaidan protests in the spring of 2014) supported by the Russian Federation and the annexation of Ukraine's Crimean peninsula in March 2014, but also because of the human rights violations committed by the former government of Ukraine under President Viktor Yanukovych, the European Union imposed numerous sanctions on Russia (and also on Ukraine and Crimea) as recently as 2014, which have been continuously expanded and extended and are still in force today. In response to President Vladimir Putin's recognition of the independence and sovereignty of the self-proclaimed People's Republics of Donetsk and Luhansk that was announced on 21 February 2022 and the deployment of troops (initially only) to these areas, the EU expanded the existing list of sanctions on 23 February 2022. The EU responded to the Russian military invasion of all of Ukraine, which began on the morning of 24 February 2022, by imposing additional sanctions and restrictions on 25 February 2022 and then again expanded, strengthened and added to these and also imposed them on Belarus, because of its support activities.

Background

The sanctions that had already been imposed since 2014 comprise the following:

- Council Regulation (EU) No **208/2014** of 5 March 2014: Sanctions against certain persons, bodies and entities identified as being responsible for human rights violations in Ukraine or for the misappropriation of Ukrainian State funds
- Council Regulation (EU) No **269/2014** of 17 March 2014: Sanctions against persons responsible for actions which undermine or threaten the territorial integrity, sovereignty and independence of Ukraine
- Council Regulation (EU) No **692/2014** of 23 June 2014: Restrictions on the import into the EU of goods originating in Crimea or the city of Sevastopol; restrictions on trade and services; investment ban
- Council Regulation (EU) No **833/2014** of 31 July 2014: Trade restrictions on dual-use goods and equipment for the energy sector; restrictions on access to the EU capital markets; the arms embargo imposed at the same time had to be regulated nationally by the Member States (imple-

mented in Germany in Sections 74 et seqq. of the Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung,* AWV)

In addition, Belarus has also been subject to an embargo since 2006:

- Council Regulation (EC) No **765/2006** of 18 May 2006: Various restrictive measures against Belarus

New EU sanctions imposed on Russia

The new sanctions imposed since 23 February 2022 are mostly extensions of embargo regulations 269/2014 and 833/2014. In addition, a new embargo regulation was issued, which - like all EU regulations - is generally binding in all Member States in the same way as national law.

Personal measures (Council Regulation (EU) No 269/2014)

Pursuant to Article 2 (1) of Council Regulation (EU) No 269/2014, all funds and economic resources belonging to, owned, held or controlled by any natural persons or natural or legal persons, entities or bodies associated with them as listed in Annex I shall be frozen (prohibition of disposal). In addition, pursuant to Article 2 (2), no funds or economic resources shall be made available, directly or indirectly, to or for the benefit of natural or legal persons, entities or bodies listed in Annex I (prohibition to make funds or economic resources available). This also applies to natural or legal persons, entities or bodies associated with, owned or controlled by the "listed" persons, entities or bodies. This Annex I (the so-called "sanctions list") has now been expanded as follows:

- Council Implementing Regulation (EU) **2022/260** of 23 February 2022:
  22 natural persons (from the highest political and military circles) and four bodies were added to the sanctions list.
- Council Implementing Regulation (EU) **2022/261** of 23 February 2022:
  336 natural persons (members of the Russian State Duma) were added to the sanctions list.
- Council Regulation (EU) No **2022/330** of 25 February 2022: - Amendment of the definition of persons, entities and bodies to be sanctioned pursuant to Article 3 (1) of Council Regulation (EU) No 269/2014 in order to be able to include a larger circle on the sanctions list.
- Council Implementing Regulation (EU) **2022/332** of 25 February 2022:
  Another 99 natural persons were added to the sanctions list, which again included numerous members of the Russian State Duma, but also various Belarusian military officers and politicians, high-ranking Russian representatives, and last but not least Interior Minister Vladimir Kolokoltsev, Foreign Minister Sergei Lavrov and President Vladimir Putin.
- Council Implementing Regulation (EU) **2022/336** of 28 February 2022:
  A further 26 natural persons (oligarchs) and one body were added to the sanctions list.
- Council Implementing Regulation (EU) **2022/353** of 2 March 2022:
  A further 22 natural persons (members of the Belarusian armed forces) were added to the sanctions list.
- Council Implementing Regulation (EU) **2022/396** of 9 March 2022:
  A further 160 natural persons (oligarchs and members of the Federation Council of the Russian Federation) were added to the sanctions list.
- Council Implementing Regulation (EU) **2022/427** of 15 March 2022:
  Another 15 natural persons (especially oligarchs and influential businessmen) and also nine bodies were added to the sanctions list.
- Council Regulation (EU) No **2022/580** of 8 April 2022:
  A new exemption (payments intended to be used for official purposes of a diplomatic mission) was added as Article 4 (1) (e). In addition, Article 6b has been reworded.
- Council Implementing Regulation (EU) **2022/581** of 8 April 2022:
  Another 216 natural persons (leading businessmen and persons who support the government, including family members) and also 18 bodies were added to the sanctions list.

By 8 April 2022 **896 natural persons and 32 bodies** or entities and companies had been added to Annex I of Council Regulation (EU) No 269/2014.

The listed bodies, entities and companies are:

- Internet Research Agency
- **Bank Rossiya**
- **PROMSVYAZBANK**
- **VEB.RF (aka Vnesheconombank; VEB)**
- Gas Industry Insurance Company SOGAZ
- ROSNEFT AERO
- JSC ROSOBORONEXPORT
- JSC NPO High Precision Systems
- JSC Kurganmashzavod
- JSC Russian Helicopters
- PJSC United Aircraft Corporation

- JSC United Shipbuilding Corporation
- JSC Research and Production Corporation
- JSC Zelenodolsk Shipyard
- JSC Arzamas Machine-Building Plant
- JSC Ruselectronics
- JSC Tactical Missiles Corporation (KTRV)
- JSC Kalashnikov Concern
- JSC UEC Klimov
- LLC Military Industrial Company
- PO More Shipyard
- JSC Omsk Transport Machine Factory (Omsktransmash)
- JSC RUSSIAN MACHINES
- JSC Sozvezdie Concern
- JSC RIC TECMASH
- PJSC United Engine Corporation
- Yantar Shipyard
- **Otkritie FC Bank (formerly NOMOS Bank)**
- **Novikombank**
- **Sovcombank (formerly Buycombank)**
- **VTB Bank**
- JSC GTLK State Transport Leasing Company

Goods and sector-related measures (Council Regulation (EU) No 833/2014)

Pursuant to Council Regulation (EU) No 833/2014, exports (and ancillary activities such as the provision of technical assistance and financial services) of certain goods and technologies (in particular dual-use goods and goods for exploration and production projects as listed in Annex II) had already been subject to restrictions, i.e., they required authorisation in any event. In addition, sanctions had already been imposed on the financial sector in order to make it more difficult for individual Russian banks and companies to access the capital markets. These goods and sector-related sanctions have now been extended quite considerably by additions and amendments to Council Regulation (EU) No 833/2014.

- Council Regulation (EU) No **2022/262** of 23 February 2022:
  Financial restrictions were further extended. Under the new Article 5a of Council Regulation (EU) No 833/2014, it shall be prohibited, inter alia, to directly or indirectly purchase, sell, provide investment services for or assistance in the issuance of, or otherwise deal with transferable securities and money-market instruments issued after 9 March 2022 by: Russia and its government, the Central Bank of Russia, or a legal person, body or entity acting on behalf of or at the direction of the Central Bank of Russia. Furthermore, it shall be prohibited to directly or indirectly make or be part of any arrangement to grant any new loans or credit to these bodies and entities.
- Council Regulation (EU) No **2022/328** of 25 February 2022:
  The prohibition of the export of dual-use items to Russia or for use in Russia under Article 2 (1) now applies without restriction (subject to narrow exceptions) and no longer only where such items are or may be intended for military use or for a military end-user or for certain named recipients. Article 2 (2) also now imposes a general prohibition of the provision of technical assistance, brokering services or other services and the provision of financing or financial assistance related to dual-use items.

  The redrafted Article 2a imposes (again subject to narrow exceptions) the prohibition of the export of certain goods and technologies that might contribute to Russia's technological enhancement in the defence and security sector (new Annex VII); the prohibition of the provision of technical assistance, brokering services or other services and the provision of financing or financial assistance related to these goods has been similarly imposed.
  According to Article 2e it shall be prohibited to provide public financing or financial assistance for trade with, or investment, in Russia.
  Articles 3b and 3c prohibit the export - again subject to narrow exceptions - of certain goods and technology that can be used for oil refining (new Annex X) or that are suited for use in aviation or the space industry (new Annex XI); they also prohibit the provision of technical assistance, brokering services or other services and the provision of financing or financial assistance related to these goods.
  Pursuant to Article 5 et seqq. the already existing financial restrictions were further extended, in particular the restrictions concerning the access of various Russian entities to the capital markets. It will also be prohibited to list and provide services on trading venues within the Union for shares in state-owned Russian companies. It also introduces new measures that significantly restrict financial inflows from Russia to the Union by prohibiting the acceptance of deposits from Russian nationals or natural persons residing in Russia in excess of certain amounts, the maintenance of accounts of Russian customers by Union central securities depositories and the sale of euro-denominated securities to Russian customers.
- Council Regulation (EU) No **2022/334** of 28 February 2022:
  Pursuant to the new Article 3 d), Russian aircraft are prohibited from overflying the territory of the Union and from taking off and landing in the territory. Article 5 a) was amended to prohibit transactions related to the management of reserves as well as assets of the Central Bank of Russia,

including transactions with any legal person, body or entity acting on behalf of or at the direction of the Central Bank of Russia.

- Council Regulation (EU) No **2022/345** of 1 March 2022: Pursuant to Article 2e (3), it is prohibited to invest, participate in, or otherwise contribute to projects co-financed by the Russian Direct Investment Fund. Under the new Article 5h, the following seven banks and their majority-controlled subsidiaries will be excluded from "specialised financial messaging services which are used to exchange financial data" (i.e. "SWIFT" in particular) as of 12 March 2022: Bank Otkritie, Novikombank, Promsvyazbank, Bank Rossiya, Sovcombank, VNESHECONOMBANK (VEB), VTB BANK. Under the new Article 5i it is prohibited to sell, supply, transfer or export euro denominated banknotes to Russia or to any natural or legal person, body or entity in Russia - including the Government and the Central Bank of Russia - or for use in Russia.
- Council Regulation (EU) No **2022/350** of 1 March 2022: Under the new Article 2f, the broadcasting licenses and permits for Russia Today (RT) and Sputnik will be suspended and the distribution of content through these channels prohibited.
- Council Regulation (EU) No **2022/394** of 9 March 2022: Under the new Article 3f it is prohibited to export certain maritime goods and technologies (new Annex XVI): navigation and radio equipment); similarly, it is prohibited to provide technical assistance, brokering services or other services and the provision of financing or financial assistance related to these goods.
- Council Regulation (EU) No **2022/428** of 15 March 2022: No authorisation will be granted for dual-use goods and goods for the defence and security sector (Annex VII), as far as the energy sector is concerned. Instead of the previous applicable authorisation requirements for the export of goods for exploration and production projects pursuant to Annex II, it is now prohibited to export such goods and also to provide technical assistance, brokering services or other services as well as financing or financial assistance.
  Under the new Article 3a, prohibitions apply to new investments in the Russian energy sector.
  The new Article 3g standardises the prohibition of the purchase, import and transport of iron and steel products as listed in a new Annex XVII; similarly, it is prohibited to provide technical assistance, brokering services or other services and to provide financial resources or assistance in connection with these prohibitions.
  Under the new Article 3h it is prohibited to export "luxury goods" as listed in the new Annex XVIII (in the value of EUR 300 per item unless otherwise specified therein). The newly inserted Article 5aa standardises the prohibition of engaging in any transaction with certain state-owned companies as listed in the new Annex XIX (including majority-owned subsidiaries outside the EU and representatives of these companies); these include, for example, Rosneft, Transneft, Gazprom Neft, Kamaz and others. This prohibition does not apply to transactions which are strictly necessary for the purchase, import or transport of fossil fuels, in particular coal, oil and natural gas, as well as titanium, aluminium, copper, nickel, palladium and iron ore from or through Russia into the Union, and also to transactions related to energy projects outside Russia in which a legal person, entity or body listed in Annex XIX is a minority shareholders.
  Finally, pursuant to the new Article 5j, it will be prohibited as of 15 April 2022 to provide credit rating services.
- Council Regulation (EU) No **2022/576** of 8 April 2022: Further restrictions were placed on the ability to obtain authorisation for dual-use goods and defence and security sector goods (Annex VII); various goods have been added to Annex VII.
  The prohibition of the export of oil refining goods (Annex X) was expanded to include goods for the liquefaction of natural gas, and Annex X was redrafted.
  The prohibition of the export of goods for the aviation or the space industry has been expanded to include jet fuels and fuel additives as listed in a new Annex XX. At the same time, an exemption (possibility of authorisation being granted) for the execution of aircraft financial leases was added in Article 3c (6). Under the new Article 3ea, it is prohibited to provide any Russian vessels (including those that have re-flagged or changed their registration after 24 February 2022) access to ports in the EU (exemptions for imports of natural gas and crude oil, including refined petroleum products, titanium, aluminium, copper, nickel, palladium and iron ore as well as certain chemical products and ferrous products as listed in a new Annex XXIV, and for imports of coal and other solid fossil fuels as listed in the new Annex XXII until 10 August 2022, see below).
  Annex XVII has been redrafted with regard to the prohibition of the import of iron and steel products in accordance with Article 3g.
  Annex XVIII concerning the export ban on luxury goods according to Article 3h was expanded.
  The newly inserted Article 3i in conjunction with Annex XXI imposed a "collective import ban" (including a ban on the provision of technical assistance, brokering and other services, financing and assistance with an exemption until 10 July 2022 for existing contracts) with respect to various goods that generate significant revenues for Russia, e.g.,

from crustaceans, caviar and furniture to phosphates, hydrocarbons and phenols as well as cement, wood, glass, and machinery parts.
Under the new Article 3j in conjunction with Annex XXII it is prohibited to import coal and other solid fossil fuels (including the prohibition of providing technical assistance, brokering and other services, funding and assistance with an exemption until 10 August 2022 for existing contracts).
The new Article 3k in conjunction with Annex XXIII standardises a "collective export ban" (including a ban on the provision of technical assistance, brokering and other services, financing and financial assistance, and with an exemption for existing contracts until 10 July 2022) with respect to various goods that could contribute to strengthening Russia's industrial capacity, e.g., from plants, printing inks and stamp pads to nitrogen, oxygen and calcium carbonate to lubricants, paper and various machinery.
Under the new Art. 3l Russian road transport undertakings are prohibited from transporting any goods on roads within the EU. Authorisation may be given for, among other things, the import of natural gas and petroleum, including refined petroleum products, as well as titanium, aluminium, copper, nickel, palladium and iron ore.
The exemptions from the prohibition of engaging in any transaction with state-owned enterprises as listed in Annex XIX have been revised in Art. 5aa (3).
The prohibition of accepting deposits from Russian persons, bodies and entities under Article 5b has been revised and expanded to include a prohibition of providing services related to crypto-asset wallets, crypto-accounts or crypto-custody.
Under the newly worded Article 5f it is prohibited to sell securities denominated in an official currency of a Member State (not only euros as before). Similarly, the prohibition of the export of banknotes under Article 5i has been extended to those denominated in an official currency of a Member State.
Under the new Article 5k it is prohibited to award (and continue the execution of) public contracts to Russian persons, bodies or entities or companies in which these hold a majority shareholding or which act on their behalf, including subcontractors or suppliers. Exemptions until 10 October 2022 are granted, inter alia, for existing contracts.
The newly inserted Article 5l establishes a comprehensive "prohibition of support" with respect to legal persons, bodies or entities established in Russia with over 50% public ownership or public control.
Finally, the newly inserted Article 5m imposes sanctions on trusts and similar legal arrangements insofar as Russian natural or legal persons, bodies or entities are trustors or beneficiaries.

New embargo regulation concerning Donetsk and Luhansk

The completely new Council Regulation (EU) No **2022/263** "*concerning restrictive measures in response to the recognition of non-government controlled areas of the Donetsk and Luhansk oblasts of Ukraine and the ordering of Russian armed forces into those areas"* was issued on 23 February 2022 at the beginning of the crisis. Under this new sanction regulation, new and further goods-related restrictions were imposed in addition to already existing measures under Council Regulation (EU) No 833/2014, which were limited to the Donetsk and Luhansk oblasts (so-called "specified territories"). These are in particular:

Pursuant to Article 2 it shall be prohibited to import into the European Union goods originating in the specified territories and to provide, directly or indirectly, financing or financial assistance as well as insurance and reinsurance related to the import of such goods. Article 3 prohibits, inter alia, the acquisition (even partial) of real estate or ownership or control of entities in the specified territories or the establishment of companies there (investment ban). Article 4 prohibits the sale, supply, transfer or export of the goods and technology listed in Annex II to any natural or legal person, entity or body in, or for use in, the specified territories and also the provision of technical assistance or brokering services as well as financing or financial assistance. This involves goods and technologies from the areas of: transportation, telecommunications, energy, prospecting, exploration and production of oil, gas and mineral resources. The norm of Article 5 contains a prohibition of the provision of technical assistance or brokering, construction or engineering services directly related to infrastructure in the specified territories in the aforementioned sectors. Article 6 prohibits the provision of services directly related to tourism activities in the specified territories.

New EU sanctions imposed on Belarus

Apart from the inclusion of various Belarusian persons on the sanctions list under Council Regulation (EU) No 269/2014 (see above), the restrictions under the embargo regulation Council Regulation (EU) No 765/2006 with respect to Belarus have also been comprehensively expanded:

- Council Regulation (EU) No **2022/355** of 2 March 2022: The prohibition of the export of dual-use items to Belarus or for use in Belarus under Article 1e (1) now applies wit-

hout restriction (subject to narrow exceptions) and no longer only where such items are or may be intended for military use or for a military end-user or for certain named recipients. Article 1e (2) now also imposes a general prohibition of the provision of technical assistance, brokering services or other services and the provision of financing or financial assistance related to dual-use items.
The redrafted Article 1f imposes (again subject to narrow exceptions) the prohibition of the export of certain goods and technologies that might contribute to technological enhancement in the Belarusian defence and security sector (new Annex Va); the prohibition of the provision of technical assistance, brokering services or other services and the provision of financing or financial assistance related to these goods has been similarly imposed.

Article 1g (1a) prohibits the provision of technical assistance and brokering services and the provision of financing or financial assistance related to goods required for the production and manufacture of tobacco products as listed in Annex VI. The same applies according to Article 1i (1a) with regard to the potassium chloride products as listed in Annex VIII. The previous regulations for existing contracts (performance of contracts concluded before 25 June 2021) were also deleted.

Under the new Article 1o an import ban applies to certain timber products as listed in Annex X. The same applies under the new Article 1p to certain cement products as listed in Annex XI, under the new Article 1q to certain iron and steel products as listed in Annex XII and under the new Article 1r to certain rubber products as listed in Annex XIII, in each case combined with the prohibition of the provision of technical assistance and brokering services and the provision of financing or financial assistance.
Finally, under the new Article 1s, it is prohibited to export various machinery as listed in Annex XIV, again combined with a prohibition of the provision of technical assistance and brokering services and of the provision of financing or financial assistance. The regulations for existing contracts apply in each case (performance of contracts entered into prior to 2 March 2022 by 4 June 2022) with regard to these new prohibitions.

- Council Regulation (EU) No **2022/398** of 9 March 2022:
  The restrictions in relation to Russia now also apply similarly in relation to Belarus: Expansion and tightening of financial transactions. Prohibition to provide public financing or financial assistance for trade with, or investment, in Belarus. It is prohibited to export euro denominated banknotes. Under the new Article 1zb, the persons, bodies and entities as listed in Annex XV (Belagroprombank, Bank Dabrabyt and Development Bank of the Republic of Belarus) will be excluded from "specialized financial messaging services which are used to exchange financial data" (i.e. "SWIFT" in particular) as of 20 March 2022.
- Council Regulation (EU) No **2022/577** of 8 April 2022:
  The prohibition of the sale of securities and the export of banknotes was extended to the official currencies of the Member States (previously only the euro). Belarusian road transport undertakings are also prohibited from transporting any goods on roads within the EU. Authorisation may be given for, among other things, the import of natural gas and petroleum, including refined petroleum products, as well as titanium, aluminium, copper, nickel, palladium and iron ore.

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Legal protection and state liability for measures taken under EnSiG

The occurrence of a gas shortage and declaration of the emergency level for the supply of gas by the Federal Government cannot be ruled out at this time. In this case, the Federal Network Agency (*Bundesnetzagentur*) would be authorised to intervene extensively in the gas supply under the Act to Ensure the Supply of Energy 1975 (*Gesetz zur Sicherung der Energieversorgung,* EnSiG). It may then issue instructions under the Ordinance to Ensure the Supply of Gas in a Supply Crisis (*Verordnung zur Sicherung der Gasversorgung in einer Versorgungskrise,* GasSV*)* to both alter supply contracts and prohibit industrial plants from continuing to consume natural gas. The precondition for this is that these measures are absolutely necessary to remove or alleviate a danger or disruption to the vital supply of gas.

The Federal Network Agency does not act as a regulatory authority under EnSiG. Instead, it is responsible for the classic special regulatory task of emergency response management. Administrative proceedings may therefore be instituted against such instructions issued by the Federal Network Agency under the Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung,* VwGO). Under Section 5 EnSiG objections raised and actions challenging measures ordered do not have a suspensive effect. However, interim relief may be granted by the administrative court pursuant to Section 80 (5) VwGO by way of an order of suspensive effect. It may be possible as a precaution to apply for summary legal protection aimed at the issuing of a temporary injunction prohibiting the Federal Network Agency from taking onerous measures. However, a legitimate interest in bringing legal proceedings and the unreasonableness of applying to the courts only after the instructions have been issued must be asserted for this purpose.

Onerous interventions by the Federal Network Agency in the gas supply may also render the Federal Government liable even if they are lawful. Under Section 11 EnSiG compensation is payable where there is particularly extensive interference in the ownership of, for example, an industrial plant. Under Section 12 EnSiG, hardship compensation must be paid if official restrictions on gas supplies put at risk or even destroy economic livelihoods. There is a legal entitlement to these compensation payments if the conditions specified by law are met. These are not equitable benefits, which are subject to a budget reservation. Compensation payments must be asserted against the Federal Network Agency. Special procedural rules apply under the Ordinance on the procedure for determining compensation and hardship compensation under EnSiG.

If measures taken by the Federal Network Agency prove to be unlawful, state liability claims may be considered under the principles of intervention equivalent to expropriation. Further claims for damages by affected companies against the Federal Government under the principles of official liability, Article 34 of the Basic Law (*Grundgesetz,* GG*)* and Section 839 of the German Civil Code (*Bürgerliches Gesetzbuch,* BGB), are also possible in the event of breaches of official duty by the Federal Network Agency or the Federal Government.

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Antitrust implications

Bottlenecks in the supply of goods often lead to the question: which of my (existing) customers should, may or must I supply and to what extent if my ability to supply is limited? And vice versa: may my supplier preferentially supply goods to customers competing with me? The answer to these questions must take into account the prohibition of abusive practices and discrimination under antitrust law. Under German law this may even be the case if there is no market dominance.

Background

The current delivery and supply difficulties as well as the geopolitical upheavals are leading to bottlenecks in the supply of goods of all kinds in many areas. According to a recent survey conducted by the DIHK, around 60% of companies surveyed expect additional disruptions to the supply chain and logistics industry as a result of the Russian invasion of Ukraine - and the problems were already evident beforehand. For many companies, this raises a new type of question that has not (any more) arisen in the globalised world for a long time: which of my (existing) customers should, may or must I supply and to what extent if my ability to supply is limited? And vice versa: may my supplier preferentially supply goods to customers competing with me?

National prohibition of discrimination also in the case of only “relative market power”

The answer to these questions must take into account the prohibition of abusive practices and discrimination under antitrust law. According to this, similar companies may not be treated unequally without any objective justification, e.g., individual (existing) customers may not be simply cut off completely from supplies. Under European antitrust law, these provisions only apply to companies with a dominant market position - so most suppliers are unlikely to fall within the scope of this provision. However, many may not be aware that the national law on abusive practices may provide for stricter regulations.

The prohibition of discrimination under German antitrust law also applies to companies with only “relative market power”. Even in the absence of a dominant market position, a supplier is therefore subject to the prohibition of discrimination with regard to those customers who (a) do not have “*sufficient and reasonable possibilities* for *switching to third parties*” (i.e., are dependent on the supplier) and where (b) there is *“a significant imbalance*” between the power of an undertaking and the countervailing power of the other undertaking (Section 20 (1) sentence 1 of the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen,* GWB).

Introduction in connection with the “oil crisis” in 1973

The original version of this provision was introduced in connection with the “oil crisis” in 1973, when mineral oil companies, faced with scarce gasoline supplies, began to give pre-

ference to supplying their own distribution network at the expense of independent service stations. Ultimately, however, the prohibition of discrimination was rarely applied in such cases of so-called shortage-related dependency. Of more practical relevance were situations involving providing options to use other scarce resources (e.g., spatially limited areas for exhibitions or trade fairs).

Customer dependency due to shortages in the event of supply bottlenecks

The regulation could now enjoy a renaissance: dependency due to shortages can occur quickly in the event of general supply shortages because customers generally have no alternative supply options in the market. A customer must then prove that no other supplier can meet its additional demand - which, given the current shortage of certain raw materials and goods, should be increasingly easy.

In individual cases, it can be more difficult to prove a "*significant imbalance*". There is likely to be a lack of mutual, largely symmetrical dependency between supplier and customer. Conversely, a "*significant imbalance*" is indicated if non-delivery would have very different consequences for the two contracting parties. However, such a situation is possible in many industries at present, especially where so-called "hidden champions" are involved in supply chains.

It is no longer required that customers be "*small or medium-sized enterprises*." This requirement was abandoned in the 10th GWB amendment that came into force on 19 January 2021. German antitrust law now also protects "large" customers from relatively powerful "small" suppliers.

Legal consequences: equal supply of similar customers

The legal consequences of the existence of a relative market power are typically that the supplier has a so-called allocation obligation vis-à-vis the customers concerned. It must therefore supply all similar customers equally (pro rata). However, it may differentiate in the selection of the companies to be supplied and the respective delivery quantities, provided it applies appropriate and uniform criteria. This may mean that it reduces delivery quantities for all existing customers by the same percentage. However, it also seems possible - with appropriate justification - to cease supplying individual dependent customers in favour of other customers. In this respect, it depends very much on the circumstances of the individual case.

The question of the extent to which vertically integrated suppliers are allowed to give preferential treatment to their affiliated customers is likely to be an interesting one. The 1973 explanatory memorandum to the first extension of the prohibition of discrimination to cases of relative market power expressly denied this. However, case law on the general prohibition of discrimination has always held that preferential treatment of the Group's own customers is permitted. It is therefore likely to be also important today that a supplier - proven or only presumed to be relatively powerful in the market - provides good reasons for reducing delivery quantities in any event and counters in advance the accusation that it wants to use this opportunity to disadvantage "unwelcome competitors" at the same time.

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The Emergency Plan for Gas and possible precautionary measures to be taken by industrial companies

The Federal Ministry of Economic Affairs and Climate Action (BMWK) initiated the first level of the Emergency Plan for Gas, the so-called early warning level on 30 March 2022. At the same time, the Ministry emphasised that the security of supply continues to be safeguarded. Nevertheless, it is important for industrial companies to take suitable precautionary measures in order to be prepared for possible supply restrictions on Russian gas or even non-delivery.

1. Background: The Emergency Plan for Gas

The "Emergency Plan for Gas" is based on Regulation (EU) 2017/1938 of the European Parliament and of the Council of 25 October 2017 concerning measures to safeguard security of gas supply (hereinafter referred as "SoS Regulation"). It regulates the gas supply in Germany in a crisis situation. The Emergency Plan for Gas has three escalation levels - early warning level, alert level and emergency level. Pursuant to Article 11 (1) of the SoS Regulation, the early warning level is to be declared where there is concrete, serious and reliable information that an event which is likely to result in significant deterioration of the gas supply situation and is likely to lead to the alert or the emergency level being triggered. At the early warning level, nothing changes for companies for the time being. There is no market intervention at the early warning level. However, this would change if the emergency level were to be triggered.

2. Role of the Federal Network Agency in an emergency

If the emergency level is triggered, the Federal Network Agency will become the so-called federal load distributor. It is then responsible for distributing gas in coordination with the network operators. In this context, certain groups are especially protected by law, i.e., they are to be supplied with gas to the last. These protected consumers include social institutions such as hospitals, private households and facilities that also serve to supply heat. For industrial companies, on the other hand, there is no legal protection against restrictions on the gas supply. Gas suppliers could therefore be instructed by the Agency to cut companies off the grid. By its own admission, the Federal Network Agency would make such decisions on a case-by-case basis; there is currently no abstract cut-off sequence in place.

3. Data survey by the Federal Network Agency

The Federal Network Agency is currently preparing a data survey in order to be able to react accordingly in the event of a gas shortage. In the first step, those end consumers are to be addressed who have at least one gas extraction point with a technical connection capacity of more than 10 MWh/h. According to information provided by the Federal Network Agency, the survey is to be conducted at the beginning of May. Companies with natural gas power plants are already currently being contacted as part of an upstream survey and asked to provide certain technical information.

4. Our recommendation: Company-specific application for protection

In view of the approximately 2,500 data records forecast by the Federal Network Agency and the accompanying flood of information from the planned data survey, we recommend that companies proactively approach the Agency at this stage and submit an application for supply protection for their own company.

In this way, the information required by the Federal Network Agency can already be provided (at least in part), thereby ensuring that those responsible can obtain a comprehensive picture of the situation required for each individual decision. Furthermore, in the event of an emergency, a positive decision on such an application can at best maintain all or part of the production operations to prevent interruptions in important supply chains. We would also recommend that an application for protection be filed with the Federal Network Agency in order to safeguard possible later claims for damages in the event of a supply stoppage. Providing the most comprehensive information possible should prevent the possible objection being raised of not having pointed out the importance of an uninterrupted gas supply for one's own company in good time. The application should therefore also not be insignificant with respect to management's duty to prevent the company from suffering damage or loss.

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Dispute resolution

Sanctions imposed on the Russian economy may lead to significant disputes, both directly and indirectly. Disputes arise directly when sanctions disrupt business relationships with Russian business partners. Disputes arise indirectly when the sanctions or the war disrupt business relationships between German companies or between German and other non-Russian companies. Sanctions imposed on Russia, which prevent the export of raw materials or commodities, are a good example of this. Another example would be a boycott of Russian natural gas, which would indirectly affect a significant part of the value-added chain in Germany.

The question then arises as to how these disputes can be optimally resolved. For example, how do the sanctions affect arbitration agreements with Russian companies? And how should you position yourself optimally in a supply chain?

The resulting legal issues are complex. These disputes not only involve different legal systems that may result in conflicting outcomes. Incompatible jurisdiction and arbitration clauses may also clash in supply chains. The following overview is not necessarily exhaustive. Neither are the sanctions final - rather, a constant evolution is to be expected - nor are all situations comparable. Each case must be assessed individually.

1. Different jurisdictions and legal venues in case of direct disputes

If the sanctions lead to disputes with Russian companies, it is initially relevant that under Russian law Russian companies affected by sanctions do not have to comply with an agreement concerning the place of jurisdiction or an arbitration agreement. As early as June 2020, Article 248 of the Russian Commercial Procedure Code ("APC") was amended to give Russian commercial courts exclusive jurisdiction over disputes with Russian citizens and companies adversely affected by sanctions. If there is a contractual arbitration or place of jurisdiction provision with a legal venue not situated in Russia

(i.e., courts or arbitral tribunals in the EU, for example), the Russian party therefore need not comply with it. Russian courts broadly interpreted this earlier this year to mean that the existence of the sanctions in themselves is sufficient as an adverse effect within the meaning of Article 248 APC, regardless of whether the Russian party is actually negatively affected. The Russian party may even obtain an injunction in Russian courts against the conduct of court or arbitration proceedings abroad. However, such proceedings conducted outside Russia will probably have no effect before Russian courts.

If you have agreed on a Russian arbitral tribunal in your contracts, such as the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (ICAC), it is questionable whether the arbitral tribunal constituted according to its rules may and will even consider the sanctions under Russian law. This then raises further questions if, for example, an arbitral award is made against you that does not take the sanctions into account. Its enforceability should be at least regarded as doubtful.

An EU-based arbitral tribunal will have to take the EU sanctions into account. This follows from the fact that an arbitral award that ignores the sanctions may not be enforceable and may be set aside by EU courts. However, this outcome does not necessarily apply provided that and insofar as the arbitral tribunal is not required to make a decision under the law of an EU Member State and is perhaps not located in the EU.

In principle, the sanctions do not preclude the conduct of arbitration proceedings. In general, arbitration institutions have to take more administrative steps than normal in disputes involving sanctioned companies. These include, for example, a detailed compliance review and dialogue with the relevant government authorities on the practical aspects of the measures required in an - anticipated - EU regulation. This increased administrative burden on the arbitration institutions will perhaps have a negative impact on the duration of the proceedings, but certainly on the costs of arbitration. In principle, however, proceedings are feasible; they may just take longer and be more expensive.

If you have agreed on a German place of jurisdiction, this may have an advantageous effect due to the sanctions. Although the institution and conduct of proceedings will take longer and the outcome may not be recognised in Russia, as German judgments, especially if they award sanctioned benefits, are likely to be unenforceable. However, if the Russian counterpart has assets in Europe that are frozen by sanctions, they can be seized with a court ruling.

2. Different and conflicting legal systems and dispute resolution clauses in indirect disputes

The situation is more complex in the case of indirect disputes, e.g., when disputes arise because the consequences of sanctions mean that certain raw materials required for production are no longer available or are only available at greatly increased prices, or when the consequences of a gas boycott and the disconnecting of companies from the gas network that was imposed by the state eat their way through the value-added chain.

On the one hand, difficult substantive legal questions arise, e.g., whether force majeure or frustration of contract is involved in the specific case, and what the resulting consequences are. These questions may be answered differently in different jurisdictions. In this respect, it is advisable, where several parties from different nations are involved, to check whether different jurisdictions can be considered for a potential legal dispute and then to strategically file suit in the jurisdiction most favourable to one's own position, insofar as this has an impact on the applicable substantive law. In addition, multi-person relationships in supply chains give rise to further complex questions, such as whether and against whom - possibly also the state - recourse is possible, and whether it is appropriate to proceed by way of assignment, class suits or third-party liquidation.

On the other hand, however, procedural problems also arise when a company is in the supply chain and has, for example, an arbitration agreement with upstream suppliers on the one hand and, for example, a choice of court agreement with customers on the other. How can different outcomes be prevented? The third-party notice mechanism known from court proceedings only works well if court proceedings can be conducted in Germany on both sides of the supply chain. And what about a large number of customers, with some of whom different choice of court or arbitration clauses have been agreed? How will enforcement - possibly on assets abroad - succeed in the end?

There is no standard solution to these questions. But it is true that the "right" solution is the one that minimises the risks for a company. However, it will not be possible to exclude these risks, as forecasts about the outcome of legal proceedings are like weather forecasts: the more long-term, the more uncertain.

Conclusion

The direct and indirect impact of sanctions give rise to complex legal issues in the event of a dispute, as not only conflicting legal systems but also conflicting dispute resolution mechanisms may play a role. In particular, companies that are in a supply chain should carefully plan their litigation strategy in advance.

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Protection of German investments in Russia

In response to Russia's invasion of Ukraine, the EU, the US and the UK have imposed sanctions on more than 2,000 individuals, 155 companies, and 141 bodies. In addition, sanctions have been imposed on certain sectors of the economy, such as the oil sector, the aviation industry or marine supply industry. More sanctions are being added on a regular basis. A 5th sanctions package has been approved in the meantime. Reasonably up-to-date information can be retrieved here.

Russia initially imposed restrictions on capital movements to mitigate the impact of sanctions on its economy. For example, debts may now only be paid in Russian rubles, dividends may not be remitted abroad and companies from "unfriendly states" may no longer sell shares. The Russian government classifies those countries that have imposed sanctions on Russia as "unfriendly". In light of the crash in the exchange rate, the restrictions on capital movements are significantly disrupting capital flows between Russian subsidiaries and foreign parent companies.

Russia threatens expropriation

However, the countermeasures are more and more directed against foreign companies and their business. For example, Russia, has announced that it will remove protection for intellectual property rights and approve compulsory licenses for patents with remuneration reduced to zero.

Since early March, there have been discussions about possible forced administration and nationalisation, if foreign companies from "unfriendly states" ceasing business temporarily or permanently as a result of the sanctions. After an initial draft bill was presented by the Russian Ministry of Economy and aroused much interest, there was silence.

New bills were introduced on 8 and 12 April that are again disturbing, to say the least. A bill would amend the Russian Criminal Code to make it a criminal offence to implement foreign sanctions inside Russia. A second bill authorises the ex-

propriation without compensation of the property of nationals of unfriendly states. The third bill sets out a slightly weakened version of the law on forced administration.

It remains to be seen whether and how these bills will be adopted and applied in practice. Expropriation measures would finally destroy the confidence of foreign investors in Russia as a business location. It may therefore just be a threat to keep companies in the country. When sanctions were imposed in 2014 because of the annexation of Crimea and rumours of expropriation arose, the Russian government promised it would not kill the goose that lays the golden eggs. However, nationalisation and subsequent privatisation would not be a surprise. In the 1990s, today's oligarchs became rich through similar sales of state property. The Yukos case has shown how to deal with unwelcome companies, where tax claims drove the Yukos Group into insolvency and it was then bought at a bargain price. It is therefore quite possible that the Russian government will use the opportunity to bring large parts of the economy under Russian control.

Protection under the German-Russian Bilateral Investment Treaty (BIT)

However, German companies are by no means unprotected in the face of these measures. The German-Russian Bilateral Investment Treaty of 1989 protects German capital investments in Russia

Article 4 protects investors from expropriation and measures having similar consequences (so-called indirect expropriation). These measures may only be applied where they are in the public interest, in compliance with the established procedure and include the payment of compensation and are not discriminatory in nature. The compensation must correspond to the real value of the expropriated capital investment immediately prior to the time when the expropriation measures which have actually been taken or are to be taken were made public.

Article 5 affords protection against restrictions on capital movements and, in particular, guarantees the right to freely transfer capital, dividends and profits in convertible currency. Unusually, the Treaty stipulates that a transfer must be made "*at the exchange rate in effect on the date of the transfer*." This clause should be seen against the background of the 1989 Treaty that is still in force with the Soviet Union. At that time, the Soviet ruble was not legally freely convertible.

The restrictions on capital movements could violate Article 5, and the planned forced insolvencies, if they occur, could violate Article 4. It is safe to assume that Russia will see things differently and will refer in particular to the economic crisis caused by the sanctions. However, the extent to which a currency crisis can justify government action was clarified by arbitral tribunals at the beginning of the millennium in the context of the Argentine currency crisis. And it is recognised in case law and the literature that court-ordered insolvency proceedings with a subsequent forced sale can also constitute expropriation.

If there is a disagreement about the amount of compensation under Article 4 or the free transfer under Article 5, a German investor may refer the matter to an international arbitral tribunal. This meets outside Russia and applies the Bilateral Investment Treaty and international law. The arbitral award made in 1998 in the case of Sedelmayer versus Russia shows that disputes as to whether expropriation for which compensation is due exists at all are also covered by Article 10 (2) of the BIT. Investment protection arbitration is efficient in principle and can take place even if Russia does not participate in the proceedings. This has been demonstrated by arbitration proceedings against Russia as a result of expropriation measures taken in annexed Crimea. The quite high costs of proceedings could be taken over by litigation funding specialists.

In addition to the German-Russian Bilateral Investment Treaty, Russia is still bound by the Energy Charter Treaty until 2029. The Energy Charter Treaty was provisionally applicable until 2009, Russia then declared that it never wanted to become a party to the Treaty, thus ending this provisional applicability. However, for investments made in the energy sector up to that point, the Treaty will continue to apply for another 20 years.

Practical questions

Of course, at least under the current government, Russia would never voluntarily comply with such an arbitral award. Russia has not done so in the past and there is no reason why this should be any different now.

However, an arbitral award would be enforceable in the 169 contracting states to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This is not just something for large companies, as nowadays arbitral awards can also be sold to specialised funds, and it can ultimately lead to success against Russia. And there are currently significant amounts of Russian assets frozen around the world that may be subject to enforcement.

Legal remedies are therefore by no means hopeless. They only require persistence. In the end, even the “pen” of the lawyer may be mightier than the Russian sword.

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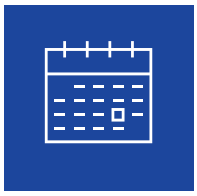
Events, publications and blog



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You will find a list of our current publications here.

You will find our blog here.

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