Article

Legal services and the EU's Russia sanctions: some remarks from the Dutch perspective

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1. Introduction

The various sanctions[1] packages introduced by the EU following the Russian invasion in Ukraine in February 2022 were unprecedented on multiple levels. Although sanctions have been part and parcel of both EU and Dutch law for decades, they have never had an impact comparable to the 'Russia sanctions'.[2] On the one hand, this was the result of the unprecedented scope of the various sanctions with certain measures being introduced which had until then been unthinkable. On the other hand, economic ties between Russia and the Netherlands were simply much deeper. As a result of both these factors, the Russia sanctions were also the first sanctions which affected the work of hundreds of Dutch lawyers[3] rather than the odd lawyer with a client who wants to do business in Iran or North-Korea. This article will discuss the impact of the Russia sanctions on the permissibility of legal services provided by Dutch lawyers. It will do so by first describing the general legal framework on both the Dutch and EU level (par. 2), followed by a discussion of how sanctions are interpreted and the role of guidance and fundamental rights in doing so (par. 3). These introductory paragraphs are necessary to properly understand the core paragraphs of this article which discuss the EU's Russia sanctions and legal services (par. 4), the circumvention prohibition (par. 5) and the due diligence obligations for Dutch lawyers (par. 6). The article will conclude with some closing remarks (par. 7).

2. General legal framework: Dutch and EU law

Generally speaking, any sanctions analysis under Dutch law would start with the Dutch Sanctions Act (*Sanctiewet*; DSA). For the present article the DSA is of limited relevance though. This because following the Russian invasion of Ukraine the Netherlands has not imposed any sanctions itself which could impact the provision of legal services and the payment thereof. Rather these sanctions all follow from EU law.

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1 Strictly speaking the term 'sanctions' is not correct, at least not from the EU perspective which uses the term 'restrictive measures' in all its legislative instruments. Although this latter term emphasizes the non-punitive nature of the instrument (and is as such to be preferred), use of the term 'sanctions' has become so common that it will also be used in this article.

2 This article will only discuss the main body of sanctions imposed following the invasion of Ukraine by the Russian Federation in 2022. It would go beyond the scope of this article to also discuss other sanctions regimes (such as sanctions regarding other countries including Belarus as well as certain non-government-controlled areas of Ukraine). That said, given the EU's tendency to use standard 'templates' for all its sanctions instruments, the analysis in this article will to a large extent also apply to those other sanctions regimes.

3 Under Dutch law, a person admitted to the Dutch Bar is called an *advocaat*. Strictly speaking, the English term 'lawyer' has a broader scope and refers to anyone practicing law. As the term 'lawyer' is commonly associated with persons who carry out the same activities as an *advocaat*, I will use that term throughout this article.

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Generally speaking, those EU sanctions are adopted on two levels. First, the Council of the European Union ('the Council') adopts a Decision on the basis of the Common Foreign and Security Policy (CFSP).[4] This Decision is addressed to the Member States. Subsequently (often on the same day), the Member States (partially) implement the Council's Decision by adopting a Regulation.[5] Such a Regulation has general application and is directly applicable in the legal order of the Member States. As such, it does not require implementation in domestic law (i.e. the provisions are not 'copy-pasted' into a national law).[6] By way of example: Regulation 269/2014[7] is based on Decision 2014/145/CFSP.[8] This process of Decision followed by Regulation is repeated every time EU sanctions are amended.

Given the above, when it comes to EU sanctions, Dutch law in general, and the DSA in particular, only provides a legal basis for the *enforcement* framework. This includes penalization of violations of the relevant Regulations as well as determining which Dutch authorities are competent to decide on requests for derogations and authorizations. To the extent that this requires practical implementing measures, a mere Ministerial Decree (*Ministeriële Regeling*) suffices as additional legal basis.[9]

Under Dutch law, EU sanctions are primarily enforced by means of criminal law.[10] A lawyer violating the EU's Russia sanctions risks being convicted to a maximum term of imprisonment of six years.[11] It is likely that a violation of EU sanctions can also constitute a disciplinary offence (*tuchtrechtelijk verwijt*).[12]

In practice, however, a criminal or disciplinary case appears to be a theoretical possibility only, at least for the time being. Although there have been reports of several criminal investigations regarding involvement of Dutch companies in the construction of the Crimea bridge[13] and, as of 4 March 2023, the Dutch authorities are said to be investigating 45 cases of possible violations of the Russia sanctions,[14] the first trial (let alone one leading to a conviction) is yet to take place. Furthermore, none of these cases under investigation appear to involve lawyers as suspects. There are no (published) disciplinary cases for alleged sanctions violations by a lawyer.[15]

4 See Article 29 of the Treaty on European Union (TEU).

5 See Article 215 of the Treaty on the Functioning of the European Union (TFEU).

6 See Article 288 TFEU.

7 In full: Council Regulation (EU) No. 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine. Regulation 269/2014 has been amended several times since its adoption in 2014. A consolidated version is available via EUR-LEX.

8 In full: Council Decision 2014/145/CFSP of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.

9 *Cf.* Article 2(2) DSA. The Ministerial Decree implementing the EU's Russia Sanctions is the '*Sanctieregeling territoriale integriteit Oekraïne 2014*'. This six-page Decree stipulates that it is prohibited to violate the various EU Russia sanctions (Article 1-1c), which Ministries are competent to decide on exemption/authorization requests (Article 2) as well various provisions on the exchange of data (Article 2a-2e) between the relevant Dutch authorities.

10 An important exception is the Dutch financial sector. Several types of financial institutions (banks, insurance companies etc.) are subject to administrative supervision by the Dutch Central Bank (*De Nederlandsche Bank*) or the Dutch Financial Markets Authority (*Autoriteit Financiële Markten*) (see Article 10 DSA *jo.* Article 1 of the Designation of Legal Entities Sanctions Act 1977 (*Aanwijzing rechtspersonen Sanctiewet 1977*). A revision of the DSA – which would also allow for enforcement in administrative proceedings for other economic sectors (including lawyers) – is currently being prepared by the Dutch Government. See Letter of the Ministry of Foreign Affairs of 4 November 2020, *Kamerstukken II* 2022/23, 36200 V, nr. 56, p. 6.

11 *Cf.* Article 1 *jo.* Article 6 of the Dutch Economic Crimes Act (*Wet op de economische delicten*) taken in conjunction with Article 2 DSA and Article 1-1c of the Ministerial Decree implementing the EU's Russia sanctions (see *supra* note 9).

12 The general standard for a disciplinary offence is 'an act or omission which is unbecoming of a decent lawyer' (*enig handelen of nalaten dat een behoorlijk advocaat niet betaamt*) (cf. Article 45 of the Dutch Lawyers Act). Interestingly, both Regulation 269/2014 (Article 10(2)) and Regulation 833/2014 (Article 10) provide for a general exclusion of '*any liability of any kind*' for actions by (legal) persons '*if they did not know, and had no reasonable cause to suspect, that their actions would infringe the measures set out in the* [Regulations].' Given the explicit reference to '*liability of any kind*' it seems reasonable to assume that the exclusion will also cover criminal and disciplinary liability. What '*no reasonable cause to suspect*' means is less clear. It seems evident that it will cover *factual* matters (*error facti*), for example when a lawyer has been lied to about the identity of the client or the background of a transaction (and it could not reasonably be expected of the lawyer to see through this lie). Whether the exception will also cover *legal* matters (*error ius*), for example reliance on guidance by the Commission or national authorities which later proves to be wrong (e.g. because it is not followed by the courts), is less clear but this would certainly not be unreasonable in light of the importance of such guidance (see further below).

13 See, for example, 'Nog altijd geen Nederlandse bedrijven voor de rechter om schenden Krim-sancties', *Trouw* 6 March 2022.

14 See, for example, 'Bedrijven omzeilen Rusland-sancties: 45 strafrechtelijke onderzoeken' *RTL Nieuws* 4 March 2023.

15 Although strictly speaking not a disciplinary case, there was a case, however, concerning the refusal of the Dean of the Bar in The Hague to appoint a new lawyer for the Russian Federation. The Russian Federation had been unable to find a new lawyer ever since its 'house lawyer' (Houthoff) withdrew from representing the Russian Federation in March 2022 after immense public pressure. As the Russian Federation was involved as a party in various civil cases (in which representation by a lawyer is mandatory), it turned to the Dean and requested her to designate (*aanwijzen*) a lawyer for it on the basis of Article 13 of the Dutch Lawyers Act. The Dean refused to do so, inter alia arguing that the provision of legal services to the Russian Federation was prohibited under EU sanctions. The Russian Federation filed an objection against this decision. In its decision of 8 August 2022 (ECLI:NL:TAHVD:2022:132), the Disciplinary Court of Appeal (*Hof van Discipline*) ruled that the Dean had been wrong to refuse the request and that it was not prohibited to provide legal services to the Russian Federation. The Dean subsequently appointed a lawyer (see 'Haagse deken wijst advocaat aan voor Russische Federatie' *Advocatie* 23 November 2022.

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3. Interpretation of EU sanctions: fundamental rights and (Commission) guidance

It follows from the foregoing that – unless enforcement issues are at stake – EU law is by far the most relevant source of law in the Dutch sanctions landscape. Interpretation and scope of this EU law is therefore key. When it comes to the provision of legal services by lawyers, the following two sources of (soft) law have proven to be of particular importance in this regard.

First, there is the Charter on Fundamental Rights of the European Union ('the Charter'). As instruments of EU law, the various sanctions regulations must respect and be interpreted in line with the Charter.[16] This is also explicitly confirmed in the sanctions regulation.[17] Among these fundamental rights is the right to a fair trial and the right of access to a court (Articles 47/48 of the Charter). As we will see below, these rights have played a decisive role in the Dutch authorities' dealings with the provision of legal assistance to (legal) persons sanctioned by the EU.

Secondly, there are the various documents issued by (Dutch) governmental bodies in which they set out their interpretation and application of a particular sanctions regulation. Such documents are usually called 'best practices', 'guidelines' or 'guidance'.[18] They often take the form of questions and answers (Q&A) or overviews of frequently asked questions (FAQs). The interpretation advocated in such guidance documents, however, is not binding. Not for the government body which has issued it, nor for the Dutch courts when asked to interpret the relevant provisions of the sanctions regulations. Nor can it be. After all, the substantive norm being interpreted is always a rule of EU law, not of national law. Only the Court of Justice of the European Union ('CJEU') can provide a binding interpretation of provisions of EU law.[19] In a way, guidance documents are therefore comparable to a legal opinion. Depending on the author, they are more or less authoritative (but they are never binding). Although equally not binding, guidance by the European Commission ('the Commission') is considered very authoritative by the Dutch authorities.[20] Their own interpretations of the sanctions regulations are not seldomly submitted to the Commission for 'approval',[21] and guidance documents issued by them often expressly indicate that the Commission's guidance is leading.[22] Dutch courts have also referred to the Commission's Guidance in their judgements.[23] As we will see below, it is therefore not surprising that the Commission's guidance has played a major role in the way the Dutch authorities (initially) approached the issue of providing legal services to sanctioned (legal) persons.

4. The EU's Russia sanctions and legal services

When analysing the EU sanctions framework and the impact it has on the provision of legal services, a distinction should be made between so-called 'personal sanctions' (Regulation 269/2014[24]) and 'sectoral sanctions' (Regulation 833/2014[25]). *Personal sanctions* target specific individuals or companies, generally in the form of an asset freeze, travel ban etc. The (legal) persons to whom these sanctions apply are listed in an annex to the regulation which is frequently updated. *Sectoral sanctions*, on the other hand, target specific economic sectors of a country, generally in the form of an export ban on certain products or a ban to provide certain ser-

16 See, for example, CJEU 21 December 2021, C-124/20, ECLI:EU:C:2021:1035 (*Bank Melli Iran*), par. 70.

17 See also preambular paragraph 6 of Regulation 269/2014: '*This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union and in particular the right to an effective remedy and to a fair trial* […]. *This Regulation should be applied in accordance with those rights and principles.*'

18 As this last term is the one used most often in practice, I will also use it in the rest of this article.

19 In view of the above, the various guidance documents regarding the Russia sanctions each state that they are non-binding, and no rights can be derived from their content. This also applies to the guidance issued by, for example, the Commission. See the Consolidated Commission FAQ available on the Commission's website (https://finance.ec.europa.eu) ('*This document is not a legal act. It is a working document drafted by the Commission services in order to help and give guidance to national authorities, EU operators and citizens for the implementation and the interpretation of Council Regulation No 833/2014 and Council Regulation No 269/2014. It has no binding effect. Only the Court of Justice of the EU can give an authoritative interpretation of Union legislation.*')

20 In its role as guardian of the treaties, the Commission monitors the implementation of Union law by Member States under the control of the Court of Justice of the European Union. In the context of restrictive measures adopted pursuant to Article 215 TFEU, national competent authorities (NCAs) of the Member States may request the Commission to provide its views on the application of specific provisions of the relevant legal acts or to provide guidance on their implementation. NCAs may also ask the Commission to provide guidance on the interpretation of Article 215 TFEU itself.

21 See, for example, the explanation of 22 July 2022 from the Ministry of Foreign Affairs regarding the admissibility of attorney services to sanctioned parties ('*The Ministry of Foreign Affairs has submitted this line to the European Commission and is awaiting a response. Depending on the response from the European Commission, the above preliminary line may be adjusted in some respects.*'). This explanation is available via the website of the Dutch Bar Association (www.advocatenorde.nl).

22 See page 3 of the 'Addendum I bij Leidraad Financiële Sanctieregelgeving' of 17 August 2022 (version 6 March 2023) ('*The Addendum will be regularly updated, for example, if new Q&As from the European Commission warrant it. The text of the regulations covered by this Addendum and the European Commission's explanations of them are leading.*') The addendum is available via the website of the Dutch Ministry of Finance (www.rijksoverheid.nl).

23 See, for example, Amsterdam Court of Appeal 29 December 2022, ECLI:NL:GHAMS:2022:3691, par. 4.9; and Amsterdam Court of Appeal, 16 May 2023 ECLI:NL:GHAMS:2023:1058, par. 3.17 and 3.18.

24 See *supra*, footnote 7.

25 In full: Council Regulation (EU) No. 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine. Regulation 833/2014 has been amended several times since its adoption in 2014. A consolidated version is available via EUR-LEX.

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vices to specific companies in that country or nationals of that country. The products, services or companies to which these sanctions apply are generally listed in various annexes to the regulation which are also frequently updated.

Both personal and sectoral sections can impact the permissibility of providing legal services (and receiving payment for these services).

4.1 Regulation 269/2014 (personal sanctions)

- *Provision of legal services as such*

Article 2(2) of Regulation 269/2014 provides that '[n]*o funds or economic resources shall be made available, directly or indirectly, to or for the benefit of natural persons or natural or legal persons, entities or bodies associated with them listed in Annex I.*' Already in 2020, the Commission took the position that labour and services can – generally speaking – be considered 'economic resources' within the meaning of the EU sanctions regulations and can enable a designated person to obtain benefits. The Commission left it to the national authorities of the Member States to assess to what extent this general rule applies to a specific service (such as legal services).[26]

In light of this opinion and the importance of Commission guidance, there was considerable uncertainty in the Dutch legal community about the permissibility of providing legal services to sanctioned (legal) persons, particularly in the first few months following the Russian invasion in Ukraine and the rapid expansion of sanctions also targeting Russian entities involved in pending litigation. This even prompted the Dean of the Amsterdam Bar to inform all lawyers in Amsterdam in February and March 2022 of this uncertainty and the necessity to exercise 'utmost caution' when representing (sanctioned) Russian clients.[27]

Part of this uncertainty resulted from the fact that there is not one central authority in the Netherlands responsible for the enforcements of EU sanctions. Instead, enforcement responsibilities are scattered over various ministries. This proved particularly problematic in case of legal services. Payments for legal services are considered '*funds of a financial nature*' for which the Ministry of Finance is responsible (see also below).[28] The legal services themselves, however, are considered '*economic resources of a non-financial nature*' for which the Minister for Foreign Trade and Development Cooperation ('FTDC') is ultimately responsible.[29] To complicate matters further, the Minister for FTDC has partially delegated his responsibilities in this regard to the Central Import/Export Service (*Centrale dienst voor in- en uitvoer*, 'CDIU'), a division of the Dutch Customs Agency (*Douane*).

To obtain clarity from the Minister for FTDC about the status of legal services under Regulation 269/2014, lawyers designated by the Dean of the Amsterdam Bar Association to represent sanctioned entities in various (pending) civil cases submitted so-called 'classification requests' (*indelingsverzoeken*) to the CDIU.[30] Problem for the CDIU, however, was that although it has tremendous expertise and experience in dealing with dual-use goods and services, classifying legal services under EU Regulations providing for personal sanctions was something completely new to them. The CDIU ultimately decided to pass on the classification requests to the Ministry of Foreign Affairs for advice which finally led to an official provisional[31] position in July 20022.

It follows from this position, that the Dutch authorities take the view that '*the defence or representation of a sanctioned (legal) person in the context of or in connection with legal proceedings*' does not fall within the scope of Regulation 269/2014. This carve-out includes '*legal services that are necessary for the ascertainment of the legal position of the client or for the institution or avoidance of legal proceedings*'.[32] Legal advice '*for the purposes of obtaining a waiver of EU sanctions*' is also not covered by Regulation 269/2014, according to the Dutch authorities.[33] However, the providing of all other legal services – such as legal advice for the purpose of establishing, merging or acquiring a business – will require prior authorization from the Minister for FTDC.[34]

It can be deduced from the official position that the Charter played an important role in the interpretation

26 See *inter alia* C(2020) 4117 final (Commission Opinion on Article 2 of Council Regulation (EU) No. 269/2014, 19 June 2020).

27 See 'Advocaten worstelen met sancties tegen Russische cliënten' *FD* 30 May 2022.

28 See Article 2 of the Ministerial Decree implementing the EU Russia Sanctions (supra footnote 9).

29 *Ibid.*

30 It is noted that the author of this article submitted these requests on behalf of his clients.

31 The opinion explicitly indicates that it is a 'provisional' one which the Dutch authorities have submitted to the Commission for review. As far as this author is aware though, the opinion is still valid up until this day and has not (yet) been 'overruled' by the Commission. See also question 2 of the Dutch Bar Association's FAQ on sanctions: '*The Ministry of Foreign Affairs has submitted this line to the European Commission and is awaiting a response. Depending on the response from the European Commission, the above preliminary line may be adjusted in some respects.*') (translation TD). The FAQ is published on the Dutch Bar Association's website (www.advocatenorde.nl).

32 This phrasing seems to have been taken from Recital 17 of EU Directive 2001/97. This directive *inter alia* concerns the obligation for lawyers in the EU to, under certain circumstances, report suspicious transactions in the context of anti-money laundering (AML) measures. It is noted here that in this AML framework, '*ascertainment of the legal position of the client*' is interpreted by the Dutch authorities as the first exploratory meeting/conversation with a client and does not extend further than that (see *Kamerstukken II* 2007/08, 31 238, nr. 3, p. 15-16; and *Kamerstukken II* 2017/18, 34 808, nr. 3, p. 36). Whether this very restricted interpretation will also be adopted by the Dutch authorities in the context of EU Sanctions remains to be seen.

33 See *inter alia* the explanation of 22 July 2022 from the Ministry of Foreign Affairs regarding the admissibility of attorney services to sanctioned parties (*supra* footnote 21).

34 *Idem.*

advocated by the Dutch authorities.[35] This was later also emphasized by the Minister in response to parliamentary questions about legal services and the Russia sanctions. According to the Minister, '[i]*n the Netherlands, access to justice applies to everyone. This means that sanctioned (legal) persons must also be able to turn to a Dutch court or defend themselves*.'[36]

- *Payment for legal services*

In the view of the Dutch authorities, the issue of permissibility of the *provision* of legal services to legal persons sanctioned under Regulation 269/2014 should be distinguished from the *payment* for these legal services. Even if the legal services themselves are permitted, receiving payments from a sanctioned client, for example for an invoice or as a retainer, is not permitted without prior authorization by the Dutch Minister of Finance.[37]

The Dutch authorities take the position that an authorization is also necessary in cases where payment for the legal services is made by or on behalf of the sanctioned (legal) person from outside the EU (e.g. Russia). Their reasoning seems to be that even though the final destination of the transfer is the bank account of the law firm (which is not sanctioned), the monies remain an 'asset' of the sanctioned (legal) person during the transfer process (including when the monies arrive at the Dutch bank). The monies will only become an 'asset' of the law firm once the bank credits them to the law firm's bank account. For this reason the bank should freeze the money immediately upon arrival in the Netherlands and may not credit the payment to the law firm's bank account. The practical consequence is that the addressee of the authorization by the Dutch Minister of Finance for receiving the invoice/retainer payment is also not the law firm but the bank. That said, the authorization can be applied for on the bank's behalf by the law firm.

It goes without saying that the necessity for lawyers to obtain an authorization from the Ministry of Finance and disclose who they are working a for, what they are doing for this client and how much they are paid for these services is highly problematic when looked at from the perspective of attorney-client privilege. On the other hand, the Dutch authorities are constrained by the fact that Regulation 269/2014 only allows for an authorization when the payment is intended exclusively for reasonable attorneys' fees.[38] A practical way out of this bind was found in a compromise which creates an intermediate role for the Dean of the regional bar association of which the lawyer is a member.[39] The Ministry of Finance grants the authorization under the condition that it only applies to payments which have been 'approved' by the Dean. To obtain such approval, the lawyer will submit his invoices to the Dean. The Dean will assess the reasonableness of the fees and whether they pertain to permissible legal services (see above). If he finds this is the case, the Dean will issue a declaration to this effect which the lawyer can then submit to the bank so that the funds can be released.[40]

- *Not just sanctioned (legal) person, also entities 'controlled' etc. by them*

Although the above applies, in the first place, to the (legal) person specifically designated in the annex to the regulation it follows from the definitions of Article 2 of Regulation 269/2014 that the scope of the sanctions is wider in practice. This because the restrictive measures in question also apply to assets 'owned' or 'controlled' by a listed party. The Commission is of the opinion that '*if the listed person is deemed to own or control a non-listed entity, it can be presumed that the control also extends to the assets of that entity, and that any funds or economic resources made available to that entity would reach or benefit the listed person*.'[41] Practical consequence of this position is that the non-listed entity should be treated as if it were listed itself including for the purposes of providing legal services and receiving payment for these services. Also in this regard, a Dutch lawyer (contemplating) working on a matter with a Russian 'link' should therefore tread with utmost caution.[42]

35 See page 1 of the explanation dated 22 July 2022 ('*In interpreting the prohibition of Article 2 of the regulation and the interpretation of the authority of Article 4 of the regulation, a balance has been sought between effective and proper implementation of the EU sanctions on the one hand and safeguarding fundamental rights within the EU and the Netherlands on the other.*')

36 See *Kamerstukken II* 2022/23, Aanhangsel nr. 88, p. 2 (translation TD). In a similar vein – albeit already as a result of a textual interpretation of Article 1 and 2 of Regulation 296/2014 – the Amsterdam District Court has ruled that a sanctioned (legal) person is not barred from submitting a claim (even if of a financial nature) for adjudication by the Dutch courts. Whether the judgement, if the claim is awarded, can be enforced is an issue to be resolved in the execution phase. See Amsterdam District Court 5 April 2023, ECLI:NL:RBAMS:2023:2040, par. 5.15-5.17.

37 The legal basis for this authorization is Article 4, par. 1 sub b of Regulation 269/2014 which provides: '*1. By way of derogation from Article 2, the competent authorities of the Member States may authorise the release of certain frozen funds or economic resources, or the making available of certain funds or economic resources, under such conditions as they deem appropriate, after having determined that the funds or economic resources concerned are:* […] *(b) intended exclusively for payment of reasonable professional fees or reimbursement of incurred expenses associated with the provision of legal services.*'

38 See the previous footnote.

39 It should be noted in this regard that Article 45a of the Dutch Lawyers Act (*Advocatenwet*) explicitly releases Dutch lawyers from their confidentiality obligation *vis-à-vis* the Dean when he is acting in his supervisory capacity. In such a case, however, the Dean is bound by a separate confidentiality obligation which can also be invoked towards the Dutch authorities.

40 The text to be used by the Dean has been standardized and reads: '*On [date] you sent me invoices of your work for [client] for [period] under proceedings [name]. I have noted invoices with [invoice numbers] attached specifications. We have discussed your fees and work. On the basis of this I declare, with due regard for confidentiality, that I find the total fee proposal ad [Z], as sent by you, reasonable. I confirm that fees mentioned in invoice X and Y with amount Z relate to:*
   - *(necessary) work in a proceeding [name] in court [name], being work necessary for the defence or representation of [client] in the context of, or in connection with, litigation, including legal services necessary to determine the legal position or to institute or avoid that litigation; or*
   - *work necessary to obtain an exemption from EU sanctions.*' (my translation).

41 See Consolidated Commission FAQ, *supra* footnote 19 (Chapter 2, FAQ 1). This is also the position of the Council. See Doc. No. 10572/22, par. 66 ('EU Best Practices for the effective implementation of restrictive measures (updated 27 June 2022)')

42 See further also below, par. 6 (Due diligence obligations for lawyers).

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The Commission's position – which is also adopted by the Dutch authorities[43] – is that an entity can be presumed to be 'owned' / 'controlled' by a listed (legal) person if there is a share ownership of more than 50%.[44] If two or more listed persons are each minority shareholders of a non-listed entity, but their aggregate ownership amounts to more than 50% of that entity, the entity should also be deemed to be 'owned' / 'controlled' by a sanctioned party and treated accordingly.[45] This presumption of control can be rebutted on a case-by-case basis, for example if appropriate 'firewall' or 'ring fencing' measures are in place which have satisfactorily removed the control of the listed person.[46]

- *Reporting and cooperation obligation and attorney-client privilege*

Article 8 of Regulation 269/2014 provides – in short – that any (legal) person in the EU is under an obligation to '*supply immediately any information which would facilitate implementation*' of Regulation 269/2014. Non-exhaustive examples of such helpful information are '*information about assets within EU territory which have not been treated as frozen by the natural and legal persons, entities and bodies obliged to do so*' (Article 8(1) sub a) and – stated succinctly – information about movements of assets etc. in the two weeks prior to an entity being sanctioned (Article 8(1) sub b).[47]

Initially, Article 8 provided for an exception if a national confidentiality obligation or privilege (such as attorney-client privilege) would stand in the way of complying with these reporting/cooperation obligations. However, on 21 July 2022 the words '*without prejudice to*' – which preceded '*applicable rules concerning reporting, confidentiality and professional secrecy*' – were changed into '*notwithstanding*'.[48] As a result, even attorney-client privilege no longer justified refraining from reporting to or cooperating with national authorities. Although the amending regulation stated in preambular paragraph 5 – in rather broad terms – that it respected '*the lawyers' duty of confidentiality to their clients*', the Commission opined on 26 July 2022 that this exception should be limited to '*information received as part of legal representation in court proceedings*.'[49] In other words: information received by a lawyer in the context of non-contentious proceedings would have to be disclosed.

This very narrow exception to only court proceedings was not adopted by the Dutch authorities. This is somewhat surprising as rumour has it that it was (also) the Netherlands which had been pushing hard to have Article 8 amended in the first place.[50] Be that as it may, the Dutch authorities indicated at the end of July 2022 that their understanding is that Article 8 does not apply to '*information from or about a sanctioned client that the lawyer becomes aware of in the course of his professional practice and that is necessary for the defence or representation of the sanctioned client in the context of or in connection with legal proceedings, including information that is necessary for determining the legal position or for instituting or avoiding legal proceedings*.'[51] Although this guidance provided by the Dutch authorities significantly reduced the scope of the amended text of Article 8, it remained a highly problematic provision. Given the recent ruling of the CJEU's Grand Chamber regarding a somewhat similar provision in the DAC6 Directive it also seemed unlikely to stand up to judicial scrutiny.[52]

Probably for this reason, Article 8 of EU Regulation 269/2014 was amended again in June 2023.[53] The article now specifically provides that any exception to confidentiality obligations should be '*consistent with respect for the confidentiality of communications between lawyers and their clients guaranteed in Article 7 of the Charter of Fundamental Rights of the European Union*'. Even though

43 See 'Addendum I bij Leidraad Financiële Sanctieregelgeving', *supra* footnote 22, p. 8; and the Dutch Bar Association's sanctions FAQ, *supra* footnote 31 (FAQ 5).

44 This is also the position of the Council. See 'EU Best Practices for the effective implementation of restrictive measures', *supra* footnote 41, par. 6.

45 Consolidated Commission FAQ, *supra* footnote 19 (Chapter 1, FAQ 8). It should be noted that even in the absence of a formal position as shareholder there can still be 'control' within the meaning of Article 2 of Regulation 269/2014. This is the case, for example, if the sanctioned (legal) can appoint or remove a majority of the members of the management or supervisory body of such a legal entity. See C(2021) 4223 final, p. 2 ('Commission Opinion on Article 2(2) of Council Regulation (EU) No. 269/2014 of 8 June 2021') See also 'EU Best Practices for the effective implementation of restrictive measures', *supra* footnote 41, par. 63. Dutch authorities take a similar position, see 'Addendum I bij Leidraad Financiële Sanctieregelgeving', *supra* footnote 22, p. 8.

46 Consolidated Commission FAQ, *supra* footnote 19 (Chapter 1, FAQ 1 and 2). See also 'Addendum I bij Leidraad Financiële Sanctieregelgeving', *supra* footnote 22, p. 10-11.

47 More precisely: '*information held on funds and economic resources within Union territory belonging to, owned, held or controlled by natural or legal persons, entities or bodies listed in Annex I and which have been subject to any move, transfer, alteration, use of, access to, or dealing referred to in Article 1(e) or 1(f) in the two weeks preceding the listing of those natural or legal persons, entities or bodies in Annex I*'.

48 See Council Regulation (EU) 2022/1273 of 21 July 2022 amending Regulation (EU) No. 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.

49 See Consolidated Commission FAQ, *supra* footnote 19 (Chapter 1, FAQ 30).

50 This following a very critical report ('Rapport van de nationaal coördinator sanctienaleving en handhaving') of 13 May 2022 on the Dutch implementation of the Russia Sanctions in the first few months following the Russian invasion of Ukraine. The report *inter alia* recommended to dispose of confidentiality obligations to enhance sanctions enforcement. The report is available via www.rijksoverheid.nl.

51 See the Dutch Bar Association's sanctions FAQ, *supra* footnote 31 (FAQ 7). It should be noted though that also this position is a preliminary one and the Dutch authorities have indicated that '*communications from the Commission regarding this provision, such as further guidance, or the results of discussions between EU member states and the Commission regarding the scope of Article 8, may possibly lead to adjustment of the above line.*' As far as this author is aware though, this position has not (yet) been 'overruled' by the Commission.

52 See CJEU 8 December 2022, C-694/20, ECLI:EU:C:2022:963, (*Orde van Vlaamse Balies*). The CJEU ruled in this case that the obligation imposed on a lawyer acting as an intermediary under the DAC6 Directive to notify another intermediary of their reporting obligation was invalid in the light of Article 7 of the Charter.

53 See Council Regulation (EU) 2023/1215 of 23 June 2023 amending Regulation (EU) No. 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.

the phrasing ('consistent with') still leaves room for interpretation, the reference to Article 7 of the Charter (private life) rather than Articles 47/48 of the Charter (fair trial) makes clear that the scope of the exception is broader than just legal advice provided in the context of contentious proceedings.

4.2 EU Regulation 833/2014 (sectoral sanctions)

- *Provision of legal services: specific ban for certain Russian SOEs*

Legal services were targeted by means of sectoral sanctions for the first time in March 2022[54] when, as a result of the newly introduced Article 5aa of Regulation 833/2014, it became prohibited to (in)directly engage in any 'transaction' with certain specifically designated Russian state-owned-enterprises (SOEs),[55] their subsidiaries or parties acting on behalf of or at the direction of these SOEs.

What constitutes a 'transaction' is not defined in Regulation 833/2014. The Commission, however, is of the view that the concept should be defined broadly and includes '*the provision of any sort of economically valuable benefit (such as services or payments), even in the absence of* [a] *contractual relationship*'.[56] The Dutch national competent authority (NCA) has followed this approach, also referring to the broad definition of 'contracts or transactions' in EU Regulation 269/2014.[57] Legal services and receiving payments for these legal services are therefore also covered by the prohibition of Article 5aa(1). This means that a Dutch lawyer cannot, in principle, provide legal advice to an entity listed in Annex XIX. Article 5aa(3)(g), however, provides for a (limited) exception, namely for legal services '*which are strictly necessary to ensure access to judicial, administrative or arbitral proceedings in a Member State, as well as for the recognition or enforcement of a judgment or an arbitration award rendered in a Member State and if such transactions are consistent with the objectives of this Regulation and Regulation (EU) No 269/2014.*'[58]

What is meant by 'strictly necessary' in Article 5aa(3)(g) is not defined in Regulation 833/2014 and there is not yet any (Commission) guidance on this point. It seems likely, however, that the Commission would take the same position here as it does in relation to Article 5n (see above) – i.e. 'strictly necessary' means that there is no other way to ensure access to justice or the rights of the defence.

- *Provision of legal services: general ban for all Russian entities*

The second time legal services were targeted by means of sectoral sanctions was in October 2022, when the EU implemented its eighth sanctions package.[59] This package provided for a more general prohibition which did not just apply to certain SOEs, but to all Russian entities. More specifically, the amended Article 5n(2) of Regulation 833/2014 prohibits the direct or indirect provision[60] of 'legal advisory services' to (a) the Government of Russia; or (b) legal persons, entities or bodies established in Russia. The prohibition only applies in case of *legal* persons. It does not apply when the legal services are provided to a *natural* person.[61] Pursuant to Article 5n(7) the prohibition also does not apply if the services are provided to a Russian entity owned or controlled by a legal person – but not a natural person![62] – from the EU or certain other countries.[63] According to the Commission, *exclusive* EU ownership/control is not

54 See Council Regulation (EU) 2022/428 of 15 March 2022 amending Regulation (EU) No. 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

55 Namely those listed in Annex XIX to Regulation 833/2014. At the time of writing of this article (July 2023), 14 Russian SOE's were listed in this annex.

56 See Consolidated Commission FAQ, *supra* footnote 19 (Chapter 5, FAQ 5).

57 See 'Addendum I bij Leidraad Financiële Sanctieregelgeving', *supra* footnote 22, p. 12.

58 This exception was introduced on 21 July 2022 by Regulation 2022/1269. It is noted here that the only refers to '*access to judicial, administrative or arbitral proceedings in a Member State*' (underlining, TD). This means that, on the face of it, the exception does not apply to arbitral proceedings outside the EU. To what extent such a literal interpretation would be compatible with Article 47 of the EU Charter on Fundamental Rights remains to be seen. Before the inclusion of Article 5aa(3)(g), the Commission advocated – what appeared to be – an exception which was both wider and narrower. Narrower, because the Commission argued the exception only applied to legal services strictly necessary '*for the exercise of the rights of defence in judicial proceedings and the right to an effective legal remedy as referred in Article 47 of the EU Charter of Fundamental Rights and Article 6 of the European Convention on Human Rights*'. Whether this exception would have applied to, for example, legal assistance in arbitration (rather than judicial) proceedings in a purely commercial case in which the sanctioned entity is the claimant (rather than the defendant) could have been a matter of debate (In this author's view Article 5aa(3)(g) without doubt also covers this scenario as long as the legal services in question are 'strictly necessary'). On the other hand, the Commission's exception was also wider, because it did not limit the scope of the exception to proceedings in a Member State. Interestingly, this 'old' guidance (dated 26 June 2022) is still included in the latest versions of the Commission's FAQ (which also does not refer to the 'new' Article 5aa(3)(g)). See Consolidated Commission FAQ, *supra* footnote 19 (Chapter 5, FAQ 5).

59 See Council Regulation (EU) 2022/1904 of 6 October 2022 amending Regulation (EU) No. 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

60 According to the Commission, an indirect provision of legal advisory services is constituted when another operator than the recipient of services is (also) benefitting from them. Whether this is the case has to be determined on a case-by-case basis where certain legal services are more likely than others to be (also) for the benefit of the Russian parent company. The Commission gives the example of legal advice on a car lease for local staff in an EU Member State (not banned) and a legal consultation to set up a new globally operating corporate structure (banned).

61 See also Consolidated Commission FAQ, *supra* footnote 19 (Chapter 8, FAQ 14). Unless, of course, this would result in the 'indirect' provision of legal services to a Russian legal entity and/or when doing so would constitute circumvention of the sanctions as prohibited by Article 12 of Regulation 833/2014.

62 See also Consolidated Commission FAQ, *supra* footnote 19 (Chapter 8, FAQ 18). According to the Commission the exception provided for in Article 5n(7) is meant to only apply to Russian subsidiaries of EU companies.

63 More specifically, if the legal advisory services are '*intended for the exclusive use of legal persons, entities or bodies established in Russia that are owned by, or solely or jointly controlled by, a legal person, entity or body which is incorporated or constituted under the law of a Member State, a country member of the European Economic Area, Switzerland or a partner country as listed in Annex VIII*'. At the time of writing of this article (July 2023) the countries mentioned in Annex VIII were: United States Of America, Japan, United Kingdom, South Korea, Australia, Canada, New Zealand and Norway.

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required in this regard, *partial* ownership/control already suffices.[64]

What constitutes 'legal advisory services' is not defined in Article 5n, but can be deduced from preambular paragraph 19 to the amending regulation:

> *''Legal advisory services' covers: the provision of legal advice to customers in non-contentious matters, including commercial transactions, involving the application or interpretation of law; participation with or on behalf of clients in commercial transactions, negotiations and other dealings with third parties; and preparation, execution and verification of legal documents.*
> *'Legal advisory services' does not include any representation, advice, preparation of documents or verification of documents in the context of legal representation services, namely in matters or proceedings before administrative agencies, courts or other duly constituted official tribunals, or in arbitral or mediation proceedings.'*

In short: legal services related to contentious proceedings are allowed, anything else is prohibited. According to Commission guidance, the prohibition applies regardless of the type of law advised on (EU law, Russian law or other)[65] and regardless of whether or not the legal services are paid for.[66]

Interestingly, Article 5n(5) also provides that the prohibition shall not apply to the provision of services '*which are strictly necessary to ensure access to judicial, administrative or arbitral proceedings in a Member State, as well as for the recognition or enforcement of a judgment or an arbitration award rendered in a Member State, provided that such provision of services is consistent with the objectives of this Regulation and Regulation (EU) No 269/2014.*'[67] Furthermore, pursuant to Article 5n(6) the prohibition also does not apply to services 'that are strictly necessary for the exercise of the right of defence in *judicial proceedings and the right to an effective legal remedy*'. Although these exemptions make sense for the other types of services prohibited under Article 5n,[68] they are rather confusing – to say the least – when one tries to apply them to 'legal advisory services'. After all, legal services in contentious proceedings (i.e. services which are strictly necessary for the right of defence and/or access to a court) are already excluded from the prohibition by virtue of the definition of 'legal advisory services' cited above.

To further compound the confusion, the Commission opined in guidance issued in December 2022 that Article 5n(6) only applies to legal proceedings *in a Member State*. This means that – according the Commission – law firms and lawyers subject to EU jurisdiction cannot rely on this exemption when the judicial, arbitral or administrative proceedings are taking place *outside the EU*. In such a case, the provision of legal advisory services would only be allowed if it falls within the scope of the exception of Article 5n(5) – *i.e.* if the services are strictly necessary for the exercise of the rights of the defence in judicial proceedings or the right to an effective legal remedy.[69] This Commission guidance (also) seems to be at odds with the definition of 'legal advisory services' cited above. After all, the exclusion in this definition of legal services in contentious proceedings is not limited to legal proceedings in Member States. In other words: reliance on Article 5(5) or (6) is not even necessary in the scenario described by the Commission (law firm or lawyer subject to EU jurisdiction representing a Russian entity in legal proceedings outside the EU).

Although this apparent confusion is far from helpful, it clearly illustrates that the EU legislator (and the Commission) are mindful that bringing legal advisory services within the scope of EU sanctions touches upon various fundamental rights and that at least some exemptions are necessary to avoid an outright violation of these rights. However, even taking into account the current 'safety valves' in the form of the definition of 'legal advisory services' and the exemptions provided for in Article 5n(5) and (6) it seems far from certain that Article 5n would survive a challenge in court. Key issue remains if providing and receiving legal advice in non-contentious matters is a fundamental right protected by Articles 7 (private life) and 47 (fair trial) of the Charter and – if so – whether enjoyment of these rights by certain (legal) persons can be limited by means of restrictive measures. Several Belgian and French lawyers believe this is not possible and have brought an action for annulment of the amending regulation. At the time of writing of this article (July 2023), this action is still pending before the General Court of the CJEU.[70] Apart from an access to justice and legal advice angle, the pro-

64 See Consolidated Commission FAQ, *supra* footnote 19 (Chapter 8, FAQ 16). It should be noted though that as far as the Commission is concerned, what matters is *ultimate* ownership/control. If the shares in the Russian entity are held by an EU entity in which the shares are held by a Russian entity, the prohibition will still apply. See Consolidated Commission FAQ, *supra* footnote 19 (Chapter 8, FAQ 17).

65 See Consolidated Commission FAQ, *supra* footnote 19 (Chapter 8, FAQ 25). According to the Commission, the ban therefore also prohibits sanctions compliance advice (*idem*, Chapter 8, FAQ 26).

66 *Ibid.* (Chapter 8, FAQ 23). According to the Commission, the ban therefore also applies to legal services provided *pro bono*.

67 According to the Commission 'strictly necessary' in Article 5n(5) and (6) indicates that the exception is to be interpreted strictly and is only applicable when there is no other way in order to ensure the right of access to a court etc. than to rely on the otherwise prohibited services. See Consolidated Commission FAQ, *supra* footnote 19 (Chapter 8, FAQ 3).

68 Article 5(n) bans various types of services to the Russian Government and Russian entities. Other services banned under Article 5n(1) and (2) are: accounting, auditing, including statutory audit, bookkeeping or tax consulting services, business and management consulting or public relations services, architectural and engineering services and IT consultancy services.

69 See Consolidated Commission FAQ, *supra* footnote 19 (Chapter 8, FAQ 24).

70 See cases T-797/22, T-798/22 and T-828/22. Whether these cases will result in a substantive answer by the CJEU on the compatibility of Article 5n with the Charter remains to be seen. One of the preliminary questions which will have to be resolved is whether the Belgian and French lawyers (associations) have standing to challenge the Regulation in the first place. Given the CJEU's strict case law on the standing of individual

hibition of non-contentious 'legal advisory services' also raises serious concerns from the perspective of the right to property guaranteed by Article 17 of the Charter. This because in some jurisdictions (such as the Netherlands and Germany) the involvement of a notary public is mandatory when buying immovable property. The Commission has opined that notarial services are also covered by the prohibition of Article 5n.[71] A German court was unsure, however, and submitted several preliminary questions to the CJEU which – at the time of writing – are also still pending.[72]

- *Limited possibility for authorization in individual cases by the Dutch authorities*

Both Articles 5aa and 5n of Regulation 833/2014 initially did not provide for a possibility for the national competent authority (NCA) to authorize (payments for) legal services not covered by any of the exceptions contained in these articles. This meant that the legal services were either prohibited or they were not. There was no discretion for the Dutch authorities to make exceptions in individual cases. This clearly led to undesirable situations, particularly when the (legal) services were necessary to facilitate so-called 'divestments' or 'wind downs' – *i.e.* ceasing commercial activities in the EU (for Russian companies) or in Russia (for EU companies). This undesirable situation probably prompted the introduction of a limited authorization possibility in February 2023.[73] Under the newly introduced Article 5aa(3a) 'transactions' with Russian SOEs (which as we have seen above includes legal services) can be authorized when they are strictly necessary for divestment and withdrawal of those companies (or their subsidiaries) from the EU by 31 December 2023. A similar provision was included in Article 12(2a) for services (including legal services) to all Russian entities which are otherwise prohibited under Article 5n.[74] Further possibilities for authorizations in individual cases were introduced in the most recent sanctions package of June 2023 (11th package).[75] The new Article 5n(9a) allows for an authorization for (legal advisory) services strictly necessary for the setting-up, certification or evaluation of a so-called 'firewall' (i.e. removing control of a designated legal person over a Russian entity). Furthermore, the newly introduced Article 12b(2b) allows for an authorization (until 31 March 2024) for legal advisory services which are legally required for the completion of a sale or transfer of proprietary rights directly or indirectly owned by legal persons, entities or bodies established in Russia in a legal person, entity or body established in the Union.[76]

- *Payments for legal services*

Unlike its sister regulation, Regulation 833/2014 does not contain any explicit prohibitions on receiving payment for legal services (not) permitted under the regulation. As indicated above, however, Article 5aa of Regulation 833/2014 prohibits all 'transactions' with certain Russian SOEs. The concept of 'transaction' is likely to include payments as well. In other words: Article 5aa not only precludes providing legal services to the Russian SOEs, but also receiving payment for these services. For legal services prohibited by Article 5n the accompanying prohibition to receive payment does not explicitly follow from the regulation itself. Instead a lawyer receiving such payment would risk committing the offence of money laundering now that violating EU sanctions constitutes a criminal offence under Dutch law (see above). Any payments for these services can therefore be said to originate from a criminal offence.[77]

- *Not just Russian SOEs, also entities owned by them and those acting on their behalf*

As with Article 2 of Regulation 269/2014 the scope of Article 5aa of Regulation 833/2014 extends beyond the Russian SOEs themselves. It also applies to entities whose '*property rights are directly or indirectly owned for more than 50%*' by a listed SOE (Article 5aa sub b) and entities acting on their behalf (Article 5aa sub c). A similar expansion does not exist for the prohibition of Article 5n. This means a (Dutch) lawyer may provide legal advisory services to a (100%) subsidiary of a Russian entity as long as this subsidiary is not itself a Russian entity.[78] If, however, the services in question would actually be for the benefit of the parent company, this would constitute a prohibited form of 'indirect' provision of legal advisory services to Russian entities. This means that if a Dutch lawyer formally advises a subsidiary in the Netherlands, but everything points in the direction that the advice is actually for the benefit of the Russian

(legal) persons to bring an action for annulment an affirmative answer to this question is, unfortunately, not a shoe-in.

71 See Consolidated Commission FAQ, *supra* footnote 19 (Chapter 8, FAQ 21).

72 See Case C-109/23. Interestingly, the referring court also discusses the Commission guidance on the issue, but finds that this guidance is not binding. In the referring court's view, however, the Commission guidance leads to such a significant degree of uncertainty as to the correct interpretation of Article 5n that it felt it could not rule against the guidance, but rather had to refer the matter to the CJEU.

73 See Council Regulation (EU) 2023/427 of 25 February 2023 amending Regulation (EU) No. 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

74 Albeit that Article 12(2a) not only requires that the provision of the legal services is strictly necessary, but also that (a) such services are provided to and for the exclusive benefit of the legal persons, entities or bodies resulting from the divestment; and (b) the competent authorities deciding on requests for authorisations have no reasonable grounds to believe that the services might be provided, directly or indirectly, to the Government of Russia or a military end-user or have a military end-use in Russia.

75 See Council Regulation (EU) 2023/1214 of 23 June 2023 amending Regulation (EU) No. 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

76 It is noted that use of the term 'legally required' in this exception significantly limits the scope thereof to – most likely – legal advisory services provided by notaries public and the like. Although certainly desirable, assistance of a lawyer – at least under Dutch law – is not 'legally required' when transferring proprietary rights.

77 It goes without saying, however, that if legal services are prohibited under Article 5n, the Dutch lawyer who has nevertheless provided such services cannot lawfully accept payment for them. After all, doing so would, as a minimum, constitute the crime of money laundering (Article 420*bis et seq.* of the Dutch Criminal Code).

78 See also Consolidated Commission FAQ, *supra* footnote 19 (Chapter 8, FAQ 5).

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parent, he/she should refrain from providing the requested services.[79]

- *Reporting and cooperation obligation*

Regulation 833/2014 also contains a general reporting and cooperation obligation (Article 6b).[80] The scope thereof is similar to that of Article 8 of Regulation 269/2014 albeit that, unlike its counterpart, Article 6b does not give (non-exhaustive) examples of what kind of information would be considered as facilitating the implementation of the regulation.[81] For Dutch lawyers this will not necessarily pose any problems though. Just as Article 8 of Regulation 269/2014, Article 6b explicitly provides that the reporting and cooperation obligations it provides for should only apply to the extent that they are '*consistent with respect for the confidentiality of communications between lawyers and their clients guaranteed in Article 7 of the Charter*'. As indicated above, a reasonable interpretation of this exception implies that if doing so would violate attorney-client privilege, the lawyer does not have to comply with the reporting and cooperation obligations.

5. The circumvention prohibition

Both Regulation 269/2014 (Article 9) and Regulation 833/2014 (Article 12) contain a provision prohibiting anyone '*to participate, knowingly and intentionally, in activities the object or effect of which is to circumvent the measures* [in the regulation]'. It goes without saying that an attorney-at-law cannot participate in any activity aimed at circumventing EU sanctions. According to the Dutch Bar Association, this could already be the case if the attorney 'stretches' the exception for legal services under Regulation 269/2014 and provides services to a sanctioned client which are not covered by this exception.[82] Additionally, the Commission takes the view that there can also be circumvention in case of *future* sanctions, for example when '*a certain structure was created in order to assist a person to evade the effects of its possible future listing*'. In such a case the '*current, ongoing participation in that structure can amount to circumvention of the restrictive measures, if done knowingly and intentionally.*'[83] A Dutch lawyer advising in relation to such 'pre-designation' transactions therefore runs a considerable risk of violating the circumvention prohibition and would do well to steer clear from such advisory work.

6. Due diligence obligations for lawyers

It follows from the above that it will not always be easy to determine for a Dutch lawyer whether a case with a Russian 'link' can be accepted. Particularly in light of the drastic (legal) consequence of an error of judgement (namely the commission of a criminal offence) any Dutch lawyer would therefore do well to carry out enhanced due diligence before accepting the mandate. Unfortunately, there is little guidance on what such a due diligence could (or should) entail.

Commission guidance on the subject is rather general and therefore not particularly helpful. According to the Commission: '*EU operators have to perform appropriate due diligence calibrated according to the specificities of their business and the related risk exposure.*'[84] It is, according to the Commission, '*for each operator to develop, implement, and routinely update an EU sanctions compliance programme that reflects their individual business models, geographic areas of operations and specificities and related risk-assessment regarding customers and staff*'.[85] What this could entail in practice remains rather vague, however, other than that '*a risk based approach*' is recommended which should consist of '*risk assessment, multi-level due diligence and ongoing monitoring*'.[86] According to the Commission, the due diligence '*may in particular consist in screening of beneficiaries of funds or economic resources against sanctions lists & adverse media investigations. Adverse media investigations refer to searches on the internet and news (media investigations) to find evidence that a contractual counterpart, even if not designated (so it passes the screening against the sanctions list), is actually controlled by a designated persons.*'[87]

Guidance by the Dutch Bar Association is somewhat more specific:

> '*The purpose of the obligation to investigate is to identify the ownership and control relationship over the client. The exact investigation obligations depend on the risks associated with the conduct of the client's business and identity and the provision of services to the client. It is up to each lawyer to set its own policy on this point.*

79 See also above footnote 60.

80 Unlike its sister regulation, this reporting obligation was only introduced in June 2023. Before that, Regulation 833/2014 only contained a limited reporting obligation provided for in Article 5a, which applied to – stated succinctly – (transactions related to) assets of the Central Bank of Russia.

81 From a legal certainty perspective this is very undesirable, particularly because non-compliance with the obligation constitutes a criminal offence under Dutch law. This wide scope may also prove counterproductive. Legal (persons) may simply report what they know under the guise of 'better safe than sorry', swamping national authorities with information that they already have or which for other reasons is not helpful at all.

82 See the Dutch Bar Association's sanctions FAQ, *supra* footnote 31 (FAQ 3).

83 See Consolidated Commission FAQ, *supra* footnote 19 (Chapter 2, FAQ 6).

84 See Consolidated Commission FAQ, *supra* footnote 19 (Chapter 2, FAQ 1).

85 *Idem.*

86 *Idem.*

87 *Idem.*

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In addition, the lawyer will also need to investigate the client's counterparty(ies) to ensure that no circumvention prohibition is violated and to ensure that he does not provide funds or economic resources to that counterparty if that counterparty is found to be sanctioned.
The investigation that the Sanction Regulation presumes has a broader scope than the investigation obligations under the Wwft [Dutch AML/TF Act; TD] *because the concept of 'related parties' is broader than that of UBO. However, the fact that someone qualifies as a UBO does indicate that there may be a 'relation' with that UBO. Thus, the results of a Wwft investigation may be helpful in the investigation requirement under the Sanctions Regulation.*
The lawyer will also need to investigate the client's counterparty(ies) to ensure that there is no violation of the circumvention prohibition and to ensure that he does not provide assets or economic resources to that counterparty.'[88]

All in all, as a rule of thumb (Dutch) lawyers should treat any potential case with a clear 'Russian' link as a high risk-case and carry out, as a starting point, an enhanced due diligence (*verscherpt cliëntenonderzoek*) similar to that in high risk AML/TF cases. Of particular importance in this regard will be the *who*, *what* and *why* of the engagement: who as in: who is really my client – and in case of a legal entity who are the UBOs of this client; what as in: what is it exactly that the client wants me to do; and why as in: why does the client want to do *this* and why does he want *me* to this. When answering these questions the lawyer would do well to apply a healthy critical attitude towards the client. 'Unnatural' as this may be for a lawyer, the client should not necessarily be taken at his word when, for example, the rationale of a certain transaction is explained. When things do not (immediately) make sense, further clarification and supporting documentation should be requested. Straightforward as it may seem the mantra of '*if something sounds too good to be true it probably is*' is still one of the best ways for a lawyer to avoid missteps, also in sanctions matters.

7. Concluding remarks

It is fair to say that most of the uncertainty about the permissibility of legal services by Dutch lawyers that prevailed since February 2022 has now abated. In particular, it has become clear that legal services in contentious proceedings are permissible regardless of whether the sanctions in question are of an individual or sectoral nature. That does not mean, however, that there no longer is any uncertainty or that all issues have satisfactorily been resolved. It remains to be seen, for example, if the watershed between contentious (permissible) and non-contentious (prohibited) legal advisory services introduced by the Dutch and EU authorities will stand up to judicial scrutiny. The compromise reached with the Ministry of Finance regarding payment of the legal services is workable in most contentious court proceedings (which are public anyway), but remains highly unsatisfactory in other, non-public, situations. Furthermore, challenges for Dutch lawyers remain. The biggest one without doubt being how to avoid crossing the red lines. To give just one example, where contentious work begins and non-contentious work ends is not always clear cut. In addition, Dutch lawyers – particularly transaction lawyers – remain vulnerable in becoming unknowing participants in attempts to circumvent sanctions. To some extent this is probably unavoidable. Lawyers who do not want to take any risk in this regard should steer well clear of 'Russia'-related work (if you can't stand the heat, get out of the kitchen). On the other hand, given the critical position of lawyers within the Dutch (and European) society as the primary persons to turn to when someone wants to know what the law is and how it applies to his or her situation, it is unacceptable that sanctions result in entire groups of (legal) persons being categorically deprived of access to legal advice, simply because lawyers are unwilling to accept the risks involved. As a minimum – and until the question of the lawfulness on the prohibition of non-contentious legal advice work is settled by the CJEU – this requires much more detailed guidance from both the Commission and the Dutch competent authorities on what it is *exactly* they expect from lawyers in terms of due diligence before accepting Russia-related engagements.

88 See the Dutch Bar Association's sanctions FAQ, *supra* footnote 31 (FAQ 8).

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