

Restrictions to the provision of legal services under EU Sanctions against Russia

Heleen over de Linden, Attorney at Law,
Rechta Advocatuur B.V. Amsterdam.
PhD student at the University of Groningen.

Brussels, 9 June 2023.
Conference EU sanctions against Russia

Content of the presentation

- **Background of the prohibition to provide legal services, scope of the prohibition and practical issues.**
- On 7 October 2022 the prohibition on legal advisory services entered into force. 8th package of EU sanctions, Council Regulation EU 2022/1904 and Council Decision (CFSP) 2022/1909.
- Article 5n (2) and (5) of Regulation (EU) No 883/2014 (in Dutch art. 5 quindecies):
2. It shall be prohibited to provide, directly or indirectly, architectural and engineering services, **legal advisory services** and IT consultancy services to: (a) the Government of Russia; or (b) legal persons, entities or bodies established in Russia.

Background of the prohibition

to provide legal services to the Russian government and persons and legal entities established in Russia

The period **before** 7 October 2022:

- Scope of “economic resources”. Legal services = economic resources? Uncertainty. FAQ 24 June 2022, legal services are not covered by the prohibition of art. 5 n (1), such as civil law, family law or company law, and also transfers of immovable property.
- The concerns of the Dutch bar were related to art. 2 (1) EU regulation 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. (2) **No 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.

The Russian Perspective



The *bars* of Paris and Brussels filed cases at the General Court against the prohibition

- **The annulment procedure of the Paris bar consists of three pleas in law (T-828/22, filed 23 December 2022)**
 - 1. Infringement of EU law and, in particular, of several judgments of the Court of Justice and of European directives, 2. Infringement of Article 47 of the EU Charter and of Article 6(1) of the ECHR and 3. Infringement of the first subparagraph of Article 52(1) of EU Charter of Fundamental Rights.
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=270768&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=604574>
- **The annulment procedure of the (Dutch) Brussel's bar consists of three pleas in law (T-797/22 of 26 December 2022)**
 - 1. Infringement of the fundamental rights, 2. Infringement of the principle of proportionality, the principle of legal certainty, and 3. The prohibition is neither clear nor precise and does not allow any foreseeability as to its application.
<https://eur-lex.europa.eu/legal-content/NL/TXT/?uri=CELEX:62022TN0797>

Clarification of French and Belgium pleas in law



Scope of the prohibition. A countermeasure against requests such as:

- To legalize activities on the territory of the Netherlands;
- Consultancy to prevent that the measures will be applicable;
- To assist in “ringfencing”;
- To assist understanding the sanctions regulation which most likely will transform into litigation;
- To provide services in the field of export, import, due diligence, transport, corporate services and payments;
- Determination of legal position in the Netherlands.

Guidance of the Dutch Ministry of Foreign Affairs, before the prohibition became into force

- The prohibition of article 5 n Regulation (EU) Nr. 833/2014 does not prohibit services to be rendered to non Russian entities outside the Russian Federation, such as subsidiaries of a Russian entity. However, if the provision of services to these subsidiaries are **of the benefit** of the parent company in the Russian Federation, the prohibition does apply.
- FAQs (Last update: 24 June 2022)
 - *“Article 5n(3) allows the provision of any services prohibited by Article 5n(1) in so far as they are strictly necessary for the exercise of the right of defence in judicial proceedings and the right to an effective legal remedy. This is meant to ensure that the abovementioned judicial rights cannot be affected by restrictions on any type of service”*

Paragraph 19 preamble Council Regulation (EU) 2022/1904 (7 October 2022):

- **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 proceeding.
- <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R1904>

Exemptions on the prohibition

- Art. 5 (n) 6. and art. 5 aa (g) (art. 5 quindecies and art. 5 bis bis lid 3 (g) in Dutch). Paragraphs 1 and 2 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.
- Exemption: art. 5 (n) 10: the competent authorities may authorise the services referred to.... Summarized: humanitarian purposes, civil society activities.
- Important: Judges do not fall under a sanctions provision and may become part of a prohibited restructuring. See: Sberbank 6 september 2022 and 29 december 2022.
<https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBAMS:2022:5466&showbutton=true&keyword=sberbank&idx=1>
<https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:GHAMS:2022:3691&showbutton=true&keyword=sberbank&idx=2>

Practical issues

Licencing of legal services?

- In the Netherlands general licenses are not provided (own experience).
- In the UK the General Licence does exist, and has been prolonged. Users can make use of the legal fees caps (£500,000 inc. VAT). General licence - INT/2023/2954852. The GL distinguishes between legal services commenced 'pre-designation' (Part A) and legal services commenced 'post-designation' (Part B).
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1153972/Legal_Services_GL_Publication_Notice_INT20232954852.pdf
- Benefit for the Government: more clarity about what is going on. In the Netherlands: black box and no supervision on attorneys-at-law as far as it concerns restrictive measures.
- Benefit for the lawyer: a prior permission to receive funds of (sectoral) listed persons or entities.
- EU prohibition on legal services: no difference between pre-, and post designation. Related to pre designation FAQ 6 chapter 2 can be helpful: "If a certain structure was created in order to assist a person to evade the effects of its possible future listing, then current, ongoing participation in that structure can amount to circumvention of the restrictive measures, if done knowingly and intentionally".

The importance of the prohibition:

- Restrictions on the access to capital markets, to engage transactions or to provide all kind of services.

Related to art. 5 or art 5 a or 5 aa (EU) Regulation 833/2014.

Prohibited legal services implicates:

No advice on: ownership and control, participation in profits, acting on behalf or at the direction, for the benefit of, etc. etc.

- Summarized: most likely it is about sectoral listed legal entities or bodies established in Russia, which are publically controlled or with over **50 % public ownership** or in which Russia, its Government or Central Bank **has the right to participate in profits**.
- To hinder (in future) enablers to circumvent the **price cap on oil** and the oil embargo. Article 3m and 3 n (EU) Regulation 833/2014.
- https://finance.ec.europa.eu/system/files/2023-03/guidance-russian-oil-price-cap_en.pdf

Thank you for your attention and participation

- **Questions/recommendations?**

ReCHta[®]
a d v o c a t u u r
www.rechta.com

- Heleen over de Linden
 - Attorney-at-law
- PhD student at the University of Groningen.