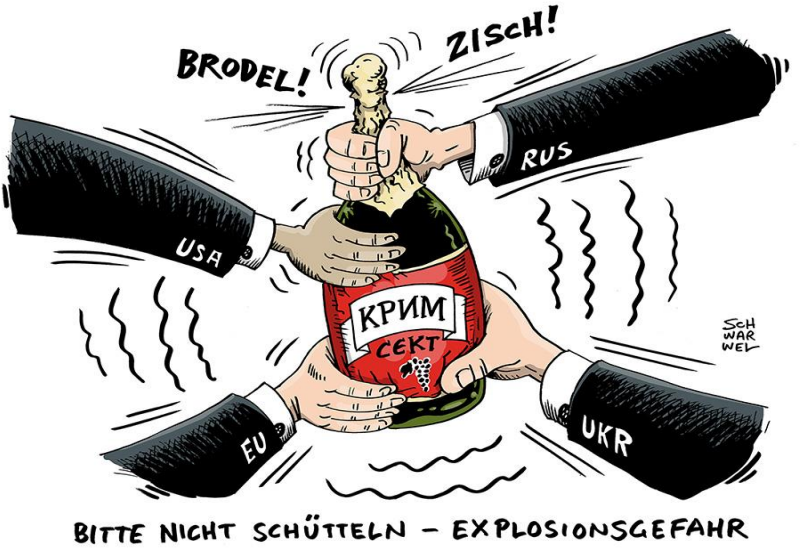
NEWS ABOUT THE SANCTIONS AGAINST CRIMEA

Known and unknows facts and figures

July 2018



This memo has been written go give a view on the legal aspects and implications of the sanctions against Crimea

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- **About the Ukraine referendum in the Netherlands**
- **(April 2016)**

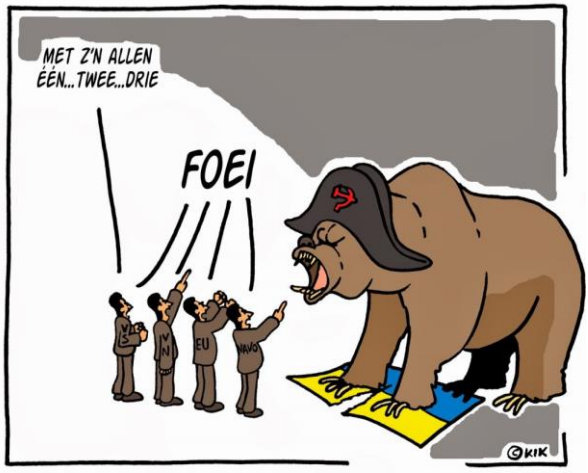
The content of the underlying memo is based upon questions, recently asked to the author of this memo.

The source language of this memo is Dutch.

PREFACE

The first memo in this series about sanctions (restrictive measures), appeared ultimate 2014 when not more was known that that in 2014 four rounds of sanctions have been proclamed and that the sanctionsdecisions have been extended and amended serveral times. Ultimo 2014 there were no publicly known scandals and no court decisions related to the santions against Russia, Eastern-Ukraine and Crimea. Over the last four years this situation of ‘’no news’’ changed. On the level of court decisions, the Court of Justice in Luxemburg made several judgements[i]. On national, Dutch level, only a few decisions appeared[ii]. Questions, before answered hypothetically, nowadays can be answered more concrete. This memo does not pretend to give a complete overview. That would be even impossible. The content of this memo is based upon questions from journalists to the author.

There are likely three kind of enterpreneurs infringing the sanctions: the first group is only interested in profit and does not fear risks because entrepreneurship is inherent to risks. The second group does principally not agree with these political decisions and the third group does even not know that there are sanctions applicable. This third group consists also of persons and companies doing business with a Dutch or Russian company not registered at the peninsula Crimea reason why they have not thougt about the possibility of applicable sanctions.



Text on the caricature: "all toghether: BAD"

Be aware of

In order to understand if you are infringing the sanctions it is important to know the person or company with whom you are doing business or with whom you are planning to do business. Is this person or company on the sanctions list. If not, is a related person possibly listed? This is the so-called end-user check. Check also if the person or company with whom you are doing business has a so called dominant influence over another person or entity (who is effectively leading the company). Check also if another entity with dominant influence is not in a so called fiscal unit with the sanctioned person and/or does not publish a so-called consolidated annual report. Consolidated annual reports are daily practise of multi-nationals: the world wide turn-over is consolidated and published. Furthermore: check if the delivered goods or services are sanctioned. Check if the final destination of the goods is not Crimea or Sebastopol. Most of the goods and services

exported to Crimea are sanctioned and all import from Crimea to the EU is sanctioned. Beside, alle investments and participations in companies in Crimea are sanctioned. An additional problem with the so called Crimea-sanctions is the applicability of Ukrainian law on the territoria of Crimea. With other words: even in case there are no EU restrictions on the export of a product or service, the export can be hit by Ukrainian sanctions and/or legislation. The export to Crimea or the development of a business at Crima is mostly sanctioned by Ukrainian law (I will come back later to this topic).

The suggestion to ‘’check’’, implies the risk of getting tangled. Initially the official website of the Dutch government related to international business (“RVO”), provided a link to the EEAS[iii] website and the actual sanctions list. However, currently first of all a profile has to be made before you can log in and check. The question raises: how anonyme is this exercision.

There is the so called “Handbook of doing business in Russia”[iv]. This handbook is updated in case of necessity. The handbook is criticised because of late updates, insufficient practical information and the so called lack of a helicopter view, reason why errors can be made when you rely only on the information of the handbook. An example: in case more than one sanctionregulation is applicable, and both regulations have to be taken into account. Or in case the handbook provides general infomation about the situation of foreign daughters of Dutch legal entities. The handbook refers to “generally spoken”. In such a case you need to know the applicable jurisprudence, but nothing is said about the jurisprudence in the handbook. There is no single example of applicable jurisprudence at all. No information is provided about the fact that also Ukrainian mandatory law is applicalbe in Crimea. The handbook refers to the possibility of applicability of US sanctions, without giving examples or being more explicit. The reference could have been made that doing business in USD (also in the EU) implicates applicability of the US sanctionregulations.

..

The four applicable sanctionregulations against Russia, Eastern-Ukraine, Crimea and the former regime of Yanukovych:

- 5 March 2014: Sanctionregulation “Yanukovych and his clan”. EU regulation EU 208/2014. This regulation oblige to freeze the assets of these initially 18 listed persons because of the so called “embezzlement of statefunds and bringing the funds illegaly abroad”. It is also forbidden to do business with these persons.

- 17 March 2014: Sanctionregulation “integrety of Ukraine”. EU regulation 269/2014. This regulation oblige to freeze the assets of persons and companies who supported the fact that Crimea became Russian and the so called destabilization of Eastern-Ukraine. There is a ban on doing business with these persons and companies. Listed are Russians and Ukrainians residing in Eastern-Ukraine and Crimea.

- 23 June 2014: Sanctionregulation “Crimea/Sebastopol”: EU regulation 692/2014 with an extensive extension at 18 December 2014. The initial regulation consisted of an import ban on goods from Crimea to the EU. As of December 2014 the regulation has been extended to an exportban for almost all goods from the EU, including a ban on investment, tourism, financial services and insurances of the banned sectors. (The regulation Crimea/Sebastopol is more detailed, this is just a general summary of the bans).

- 31 juli 2014 Sanctionregulation EU 833/2014. “Russia: a ban on export of ‘’double use’’ goods, restrictions on the international capital marked for mayor Russian banks and a ban on export to Russia of specific goods destinated for the Russian oilsector. with an extensive extension at 8 september 2014. On 8 September 2014 Russian oilcompanies and companies related to the production of military goods have been added to the list.

In this memo I will not elaborate on the aforementioned sanctionregulations because the memo has been written as an answer to several questions from journalists. It is not the intension to give a complete view or lecture about the applicable sanctionregulations and also not about the possible implications. It is even more likely that the implications are not foreseeable.

Doing business infringing the sanctions: profitability versus penalties.

In the first memo about sanctions I reffered to the amounts of the penalties. Pennalties apparently “speak to the imagination” reason to provide more detailed information.

An infringement of the sanctionsregulation, can fall under the Dutch Santionslaw (sanctiewet 1977), the Law on Ecnomical Crimes (WED) or the Dutch criminal law.

Art. 1 of the WED sounds: “Economic crimes are: 1) infringements of the regulations, determined by the articles 2, 7 and 9 of the Dutch sanctionslaw as far as they concern subjects as reffered to under article 3”. Summarized the aforementioned articles confirm that persons and companies do to comply with the international regulations.

An infringement of the WED can be signalled by the customs, followed by an official report, may seize goods and data and can provide the file to the Dutch prosecutors office.

An infringement of het sanctions can be signalled by a supervising authority such as The Dutch Central Bank (DNB) or the authority Financial Markets (AFM). The supervisor will check if the obligations with respect to Dutch mantatory law concering article 10 to 10 h of the Sanctiewet have been fulfilled. For more detailed information about the scope of competence of the law enforcementauthorities see endnote[v]. Banks and trustoffices are obliged to inform the autorities in case a (possible)the sanctioned banktransfer takes place. The DNB and AFM can make use of different articles of mandatory law, such as the Wwft (Law against moneylaundring and financing terrorism) and the information request paragraph 5.2 of the Awb (general administrative law).

In case an infringement has been reported to the supervising authority, the autority can impose according to art. 10[e] of the Sanctiewet a penalty up to € 4.000.000,-. The supervising authority may also decide to impose a penalty amounting to twice the profit of the infringing party in case the profit amounts to more than € 2.000.000,-. Trustoffices have to inform the supervising authority in case of a possible ‘’suspect” transaction. An enterpreneur likely will not inform the autorities in case he receives a possible suspect payment

on an invoice. If this is the case, banks will take over the position of the entrepreneur and inform the authorities.

Apart from the abovementioned situation, the so called ‘’long arm” of the American legislator can be of influence. A holder of a dollar account in a Dutch bank, doing business in USD, falls under the American mandatory law regarding to sanctions (see the presentation of the author of this memo July 2014).

Dutch newspapers mentioned for the first time in September 2017 about infringements of the sanctionregulations by the building of the Crimea bridge (more detailed iinformation will follow in this memo). The Dutch newspaper De Gelderlander informed the reader about the possible high penalties for Dutch companies who participated in the building of the bridge over the Azov sea to the peninsula Crimea. De Gelderlander also named the two companies who infringed the sanctions. In May 2018 the Dutch prosecution office made public that it has set up a criminal offences against these two companies, including five other “no-name” companies. In case of a court decision in favour of the Dutch prosecution office, the enterpreneur can be held lialbe to pay a penalty up to € 82.000,-. (art. 6 sub 1 sub 1 WED). The amount can raise up to (€ 820.000,- for the company depending on the level of the profit the company gained with the transaction, ex art 6 sub 2 WED.

Persons, liable for the infringement of the sanctions may be condemned for additional sanctions such as: prison and a ban of doing business during one year (art. 7 WED). This means that both entrepreneur and company may suffer of additional penalties.

Infringing sanctionsregulations may have the consequence that also other articles of the WED or criminal law will apply. For example, art. 3 WED “the person or company who participates at an economic offence in The Netherlands is liable, also in case the offence took place outside the Netherlands”.

An enterpreneur can be held liable also under article 10 of the Sanctiewet and art. 1 of the WED. These articles may apply for example when sanctioned goods are exported (delivered) or in case of delivery of goods to a sanctioned region (such as the peninsula Crimea) and the Dutch accountmanager of the bank labels the payment on the transaction as ‘’suspect”. It is also possible persons will be held liable under both regimes: Sanctiewet and WED in case of doing business with a listed company or person. For example: sanctioned goods have been delivered to Crimea for building the Crimea bridge. Due to the fact that mr. Arkadi Rotenberg is the maincontractor of the bridge the transactions falls also under the regulation with sanctioned persons. In case the payment for the services provided, takes place on a Dutch bankaccount this transaction is suspect because the debitor mr. Rotenberg, doing business via his company Strojgazmontazj, is a listed person.

The risk of being caught

Since the sanctionregulations became into force in 2014, it was not clear if the regulations will be complied. In 2018 it became clear that several companies infringed the regulations, on purpose or because of not being sufficiently informed. Currently only the the iceberg has been discovered. The media is ‘’discovering” infringements and publishing about it.

There are no statistics about the percentage of goods exported in contradiction with the sanctionregulations and which have been discovered by the customs. It is not clear how the goods have been exported to Russia or Crimea from the EU. Since the Dutch prosecutor-office anounced in May 2018 that seven Dutch companies will be prosecuted, and more and more of the names of these seven companies are known, there is no doubt that Dutch companies infringed the sanctionregulations with respect to Crimea. The question is if the goods have been delivered from the Netherlands or from other countries. Maybe they have been delivered as spareparts. Possibly the

Russian partners had not informed their contractor about the end-user, possibly nobody even have asked or thought about the end-user and just delivered goods to a not sanctioned person or region in Russia. In fact the main goal of the enterpremeur is selling his products, he will not ask an unlimited amount of questions in order to understand who is the (possible) end-user, because if he does that, he probably won't get the order.

The only Dutch published court decision until now related to the Russia-, and Crimea sanctions. District court of Amsterdam (23 November 2017, ECLI: NL:RBAMS:2017:8591)

Delivery of military goods to Russia in contradiction with sanctionregulation 833/2014 (*the italic text is cited from the Amsterdam court decision).*

A transport-, and storage company has to pay a penalty of EUR 50.000,- (for 50 % conditionally) for the transportation of military goods to Russia.

On 17 March 2015 the customs of Schiphol stopped a transport. The transport concerned a transfer of Royal Malaysia Airforce on the way to Ural Optical & Mechanical Plant in Ekatarinaburg in Russia. Due to the fact that the transport has been stopped, team POSS (precusors, strategic goods and sanctionregulations) of the customs started an investigation".

On purpose?

For the evidence of the (subjective) part of the criminal offence "on purpose" only 'colorless purpose" has to be proven. The ''purpose'' which has to be proven, is not the purpose on the unlawfullnes of the activity or on purpose neglecting, but it only concerns the factual behavior, the purpose on the transportation of the military goods in question to Russia. This 'colorless purpose" can be proven, since the behaviour of the suspect person was focused on the export of the goods to Russia. In the current situation plays also a role that the suspect person, in his role of professional transporter, knows that the activity or neglection falls under the regulation. The fact that the suspect person had not the intention to infringe the regulation and even did not knew about the regulation, is not evidence for the 'colorles' purpose and not of any imporance and is not reason for disculpation. Based upon the opinion of the court, the suspect person acted on purpose and infringed the prohibited action consequently.

With respect to the amount of the penalty, the following plays a role: "transporting the goods knowing that the boycot for exporting goods to Russia is applicable, both the sanctions and the Dutch goverment have been undermined. These circumstances the court takes into account when deciding about the level of the penalty due".

The evidence in case of suspicion

Beside the risk to be cached, the evidence plays an imporant role. Currently thee kind of cases can be distinguished in the sense that on three different ways the evidence can be provided to the prosecutors office.

1) The person/company exporting from the Netherlands, is stopped by (for example) the customs at the moment of the transportation. A verdict will be made and the evidence is without doubt (like the jurisprudence I refered to before).

2) The second type of cases. The Dutch newspaper De Gelderlander published on 1 and 4 september 2017 articles that there are two Dutch companies who helped building the Crimea bridge[vi].. As a result of "loose lippness" of the director of one of the companies and evidence on the internet,

the infringement of the sanctionregulations became public. After eight month' at 4 May 2018 the Dutch prosecutors office anounced that seven Dutch companies will be prosecuted as a result of the possible infringement of the sanctionsregulations. The amount of seven companies includes the two Dutch companies, already known by name. Again De Gelderlander was the newspaper who published first of all this information[vii]. The information has not been published on the website of the Dutch prosecutors office. In these so called ''second type' of cases the prosecution probably started as a result of a hint or via the massmedia. The prosecution in these kind of cases will take place differently then in case an investigating officer stops the offender at the moment of the act (beside the fact that the offender voluntarily confesses his or her guilt). In case of the two Dutch companies named in the Dutch newspapers, the director of the first company argued that he exported to Russia and not to Crimea and the director of the second company argued that he exported to a Dutch entity in the Netherlands. Finaly they exported a huge pile-driver to the Russian site of the bridge which at that time still has to build. The director of the company who exported to Russia was of the opinion that the sanctionregulations are not infringed because the Russian side of the brigde is not Crimea. This answer is definitely not right, sanctions apply to all activities related to the infrastructure of Crimea, including the bridge. (The end-user history). In this specific case another sanctionregulation is applicalbe also, the so-called "sanctionregulation integrity Ukraine". One of the listed persons is mr. Arkadi Rotenberg, I refered to earlier. Mr. Rotenberg is on the sanctionslist as of 30 July 2014. There is a ban on doing business with sanctioned persons and to provide them economic resources. Economic resources means: "assets of every kind, whether tangible or intangible, movable or immovable, which are not funds, but which may be used to obtain funds, goods or services"[viii]. Summarized, according to EU sanctionsregulation EU 267/2012 all goods with an economic value are sanctioned when delivered to a sanctioned person[ix].

The fact that mr. Rotenberg is maincontracter of the Crimean bridge and that

he is listed, is no secret in Russia. The Western media initially did not refer to mr. Rotenberg. You had to be a sanctionspecialist in order to know that mr. Rotenberg is maincontracter and on the sanctionslist “undermining or threatening the territorial integrity, sovereignty and independence of Ukraine”. With reference to my citation on page 13 of this memo, the arguments “I did not knew or how could I knew” are not valid and does not help not to be prosecuted for the infringement of the sanctionsregulation. In this sense the regulations can be compared with taxlaw, where exactly the same principle applies.

3) The third type of cases is much more complicated. At 6 and 7 July 2018 the Dutch newspaper De Gelderlander published an article about the Ukrainian prosecutors office which confirmed that Dutch companies, being present at a list which appeared on the Russian and Ukrainian internet, are in fact suspect and prosecuted by the Ukrainian prosecutors office. On that list are well known multi-nationals of good standing. To convince the judgde with evidence in this third type of cases will be much more difficult than the other types of cases because much will depend on what the Ukrainian prosecutors office has found or is willing to share with the EU prosecutors offices. At the internet is no direct evidence available, also not on the Russian or Ukrainian internet. From a legal point of view, the only correct answer of these multi-nationals will be: ‘we don’t know anything about a possible infringement of the sanctions”. (I will come back later in this memo on this topic).

Court proceedings, and, furthermore?

Sanctionsregulations are political motivated. This is a *very* important fact. The result for the suspected persons is that the risk of a condemnatory verdict is higher than in for example commercial cases. Sanctionsregulations are based on the so called **Common foreign-, and security policy (CFSP).** The word “security” is not just in the head of the regulation. In case a sanctionsregulation has been infringed, theoretically a security risk occurred for the EU. The infringement of a sanctionsregulation can be compared with

Tax law. Why? Over the years 2016-2018 the author of this memo attended several hearings at the Court of Justice in Luxembourg. Surprisingly, it became clear that even in cases the sanctioned persons have good reasons to win their annulmentprocedures because of an infringement of one or more articles of the European Charter of fundamental rights, they lost their cases. The way the European Court of Justice ruled in the cases of Yanukovych and his entourage, is described in the PhD research of the author of this memo. It is not clear if the Dutch courts are as severe as the Court of Justice in Luxemburg, however the court decision of Eastern-Brabant (Oost-Brabant) of 4 September 2017 (as summarized hereafter), figues as an example of the worst case scenario.

Currently there is no public accessible Dutch jurisprudence related to the sanctions against Russia, Eastern-Ukraine and Crimea, besides the abovementioned one. However there is a comparable case with Iran of the year 2017[x]. In the Iran case a Dutch company intended to export indirectly sanctioned goods to Iran. However the Dutch customs intercept the goods. During the court proceedings, the Dutch procecutor argued that: "*the behaviour of the suspected person during the hearing and the fact that as a result of his acts the international pressure on Iran to be transparant with the development of the nuclear programs, has been affected.*"

The court ruled concerning the term of imprisonment: "*The court has to determine if the suspected person acted 'on purpose'. The person who committed an economic crime in the sense of the Dutch Law on the Economic crimes, is guitly* ***in case he acted on purpose*** ***<u>or neglected on purpose</u>*** *as described in the penalty clause. The* ***purpose*** *of the person who infringed the regulations has to be* ***focused on the forbidden factual behaviour*** *(in the underlying case: the direct or indirect exportation of economic goods to (company 2) and* ***not on the infringement of the law****. In the underlying case the perpetrator is the legal entity (company 1), consequently it has to be verified if this company acted on purpose.*

In the abovementioned case the court ruled that the person, guilty for the infringement has to be in jail for the period of 20 month. The term was based also on the fact that the condemned person provided fraudulent invoices to the court.

The abovementioned paragraphs of the judgements have been described to underline that companies can álso be held liable for the infringement of the sanctions because the company *on purpose* neglected that it had to prevent the sanctioned transaction. During the presentation of the first Rvo so called Dutch Handbook of doing business in Russia, one of the participants asked: *"if the EU sanctions apply to a daughtercompany of a 100 % Dutch mothercompany with Russian personnal in case the Russian daugther entered into a sanctioned transaction".* The answer in the Handbook is that "in principle" this transaction does not fall under the sanctions. However, during the presentation of the Handbook, a Dutch official stated that the transaction is sanctioned in case the mothercompany knew about the transaction, or could have known and **had not prevented** that the transaction took place[xi]. This statement is in line with the abovementioned jurisprudence. My personal opinion is that in case of the building of the Crimea bridge it concerned mega and very profitable orders. The goods to be delivered were unique in the sence that in the Netherland is no demand for similar goods. The transaction can be compared with the building of the so called Zuiderzee werken (the closing of the Zuiderzee to the North seas with a damb in order the Zuiderzee became a

lake).These kind of orders are no daily business, and have to be prepared, performed and monitored very secure. The argument that that the Dutch mother company does not know anything about the transaction of the Russian daugthercompany and even could not have known is obviously naif. The evidence which has to be provided to the Dutch prosecutor will give the answer on the question: to which level the mothercompany was involved in the transaction.

In fact the statement of the Dutch multi-national who's name appeared at 6 July 2018 in the Dutch press is the only right answer from a legal point of view. They "don't know anything" because ''knowing'' implies "being involved:" should have known and should have prevented (according to Dutch jurisprudence, refered to at page 15 of this memo) with the result: being accomplice.

On the saw in mentioned: "sanctions".

The main rule of the sanctionsregulation is that "directly and indirectly" providing services or goods to a sanctioned person or entity is prohibited. It is

prohibited also to participate, knowingly and intentionally, in activities the object or effect of which is to circumvent the sanctions.

It is prohibited also to provide intermediary services. In case an enterpreneur is under suspicion of having infringed the sanctionsregulation, he may argue that a Russian factory, incorporated under Russian law, a 100 % daughter of an EU entity, who indepentently enters into contracts and delivers from own stock, where the ingredients or asseccories of the product are made in Russia, where the EU affiliated company could not have known that there has been delivered to a sanctioned entity because such trade is the daily business of the Russian entity, where no consultation is required, nor accordance of the headoffice in the Netherlands, that the restrictions of the sanctionregulations are not applicable. I can imagine that a Russian factory, being a 100 % daughter of an EU entity, knowing that goods are or have to be delivered to Crimea, will and may not take that decision independently because all Russians know that EU sanctions apply to the construction of the Crimeabridgde. Even worth: in the confirmation of the Russian government to mr. Rotenberg as maincontractor, one article concerns the ‚sanctions: the sanctions are no reason for force majeur because of late delivery. A Russian manager definitely does not want to risk his own job by delivering sanctioned goods without accordance of the Dutch headoffice.

At this point the legal squabbels start because the situation may differ from case to case. Beside the jurisprudence I reffered to, and the fact that “all circumstances play a role”, the Dutch consolidated annual accounts play a role aswell. When a 100 % Russian daughter has been financed by the Dutch mother and the profit of that Russian daughter(s) has been added to the profit of the Duch mothercompany, there is an additional reason to argue that the transactions of the Russian daughter falls under the prohibited transactions because an EU investment in Russia, generating local profit as a result of a sanctioned transaction finally resulted in a profit of the Dutch headoffice.

Fake Prosecutors office? Ukrainian mandatory law applicable at Crimea

Coming back to the earlier mentioned subdivision into three types of cases. The third one leads to the remarkable phenomena of the “fake procecutors office”.

Reading the Russian and Ukrainian massmedia about Crimea, the construction of the Crimea bridge entered into another demension. The Ukrainian procecutors office of Crimea, located in Kyiv prosecutes criminal cases at Crimea[xii]. Everybody knows that the EU does not recognise the annexation of Crimea. This means that all Russian governmental organisations, active at Crimea are not recognized by the EU. One of the results is that also court decisions of a Russian court at Crimea or concerning a Crimean issue, are not recognized by the EU and cannot be executed within the territory of the EU. In an earlier newsletter I referred to the Russian and Ukrainian tax authorities and how they solved the issue that a taxpayer is not constantly infringing taxlaw when not recognizing the fact that Crimea is currently Russian. (Newsletter op 21 april 2015, page 15). Actually a new interesting phenomena became reality: Russia does not recognize the Ukrainian prosecutors office active at Crimea and argues that it is fake. In the meantime this “fake prosecutors office” is actively collecting data and evidence about persons and companies, infringing the sanctionsregulations. As a result of the ‘’collectors activity’’ the Ukrainian prosecutors office started to publish the names of the companies towards whom they set up pre trial investigations. Both in the Netherlands and in Ukraine, the person or company involved in the pre trial investigation, has been informed directly afer the pre trial investigations started. The fact that Ukraine started pre triall investigations facilitates the EU in finding the infringing parties or persons. This situation is currently the case with the Dutch companies about whom the Dutch Newspaper De Gelderlander informed us 6 an 7 July 2018.

Generally spoken the following activities are performed by the Ukrainian prosecutors office. Prosecutors are at location and register in a spreadsheet which visitors of the EU for example visited the fourth Jalta International Economic Forum in April 2018.[xiii] It appeared that Frencht, German and Italian politicians were present at the forum. Based upon the Ukrainian legislation EU citizens have not the right to visit the peninsula without permission of the Ukrainian ministry of Foreign Affairs. The permission can be obtained exclusively in very urgent cases such as that a relative, permanently residing at Crimea passed away or is in the situation that he or she will pass away within the coming weeks. Concerning the persons, who infringed the travel ban, Germans are at the first place. In February 2018 German parliamentarians travelled to the peninsula and a schoolclass of German pupils visited Crimea for the exchange programme: “academy for young diplomaty”. Currently criminal proceedings by the Ukrainian prosecutors office for Crimea have been set up against these politicians[xiv]. Apparently the persons procecuted for having visited Crimea without permission are not very impressed about their cases. Probably they don’t realize that the Ukrainian court decisions can be executed in the EU. On the contrary, decisions of the Russian court at Crimea are not recognized in the EU (!). An EU citizen cannot legally visit Crimea. He or she always has to ask for a permission. The single fact that a person visits the temporarily occupied territoria of Crimea with the intension to harm the interests of Ukraine, infringes art. 332 sub `of the so-called criminal code of Ukraine. (For the complete article see translation at page 24).

Beside persons who are spotted and registered at the airport of Simferopol by the Ukrainian prosecutors office, also persons and companies who participated in the construction of the Crimea bridge are followed by them. Based upon Ukrainian law the bridge has been built in contradiction with the environmental protection law, more specific with art. 236 of the criminal code of Ukraine[xv]. As a result, the names of all companies who participated at the

building of the Crimea bridge are published in the Ukrainian newspapers. As mentioned before, probably no single company will confirm towards the press that he or she participated at the building of the bridge, because, as mentioned before: one single word of “knowing” can be too much.

Sanctions: the Crimean perspective

As a result of four years of sanctions, the Russian newspaper Vedomosti (The Russian Financial Times) published an article about: “who invests in Crimea?” In the article one paragraph is related to the investorsrisk at Crimea. The article refers to the fact “that most of the investors are scared to infringe the sanctions. For example Herman Gref, director of the Sberbank declared that the reason the bank did not open a branch at Crimea are the applicable sanctions. As a result most of the companies, working in the region, will keep their presence silent, according to the words of a representative of a huge company, active at Crimea. Just because of the risk of infringing the sanctions, huge companies are not very interested to do business at Crimea,

also because a lack of customers. As a result the risk to infirnge the sanctions while investigating at Crimea, the peninsula is not very interesting for huge companies. The risk of infringing increases when financing comes from abroad or when personnel has to be recruited abroad to work at Crimea". according to a journalist of Vedomosti.

Furthermore the interview in Vedomosti gives an answer to the question of how projects can be hided: "definitely foreign companies are working at Crimea, according mr. Nazarov (co chairman of the business organization Delovaya Rossia and organizer of the fourth International Economic Forum in Jalta at Crimea). In order to avoid the sanctions, companies register or buy a Russian entity, who is aible to perform transactions in the region, according to Nazarov. Beside at the request of of investors the authorities of Crimea do not make available information about who is douing business in Crimea, they do an effort the names cannot appear. One year ago (2017), the head of Crimea, Sergei Aksjonov declared that a huge company investigated for 8 billion rubles in the gambling business. The company is Russian but their name has to stay strictly confident, confirmed the local authorities. The authorities promised that the gambleparadise will open is doors already in September 2019[xvi]".

"We are not infringing the sanctionsregulations"

Several EU multi-nationals in food-, and retail have branches in Crimea. For example in the capital Simferopol. These companies stated that no sanctionsregulations are infringed. The companies in question are (not limited) the French Auchan and Metro (supermarkets), the French Renault, the German DHL Express, Adidas AG and Puma SE and the Dutch booking.com

The Ukrainian prosecutors office set up court proceedings against Booking.com in December 2016. The offence sounds: "trading in stolen goods". The Ukrainian parlemetarian Heorhiy Lohvynsky who encouraged the

initiative to set up court proceedings against Booking.com, explained the case as follows: “Booking.com facilitates the entrance to he occupied territory of Crimea, actively cooperates with a gang of false persons in power and make **publicly advertises for trade in property, stolen from Ukraine**[xvii]. Moreover, the website also offered the possibility to stay in resorts, formerly owned by the Ukrainian parliament and the presidential administration. Booking.com stated (to the press agency IPS[xviii]) that “taking into account that booking.com is an international operating company, doing business from the Netherlands, and being complient with the EU and Dutch traderestrictions towards Crimea.” Doing business with ownherships at Crimea is not forbidden”, confirms the company. I will come back later to this statement.

Booking.com realizes that EU sanctions are applicable for the tourist branche at Crimea. As a result, booking.com voluntarily changed the reservation tool at the website, in order persons can only travel to Crimea for business and not for leisure[xix].

According to the information the Ukrainian prosecutors office of Crimea made availabe, booking infringed article 191 sub 5 of the Ukrainian criminal code (to appropriate goods of third parties on the temporarily occupied territoria Crimea), and article 332 sub 1 (to be present at the temporary occupied territoria of Crimea). Furthermore booking.com denies to assist and provide information in the pre trial investigation, which is an infringement of article 242 of the criminal code of Ukraine.

Art. 332 Criminal code of Ukraine: Illegal movement of persons across the state border of Ukraine

1. Organizing of illegal movement of persons across the state border of Ukraine, coordinating or facilitating any such actions by advice, instructions, provision of means or removal of obstacles, -
shall be punishable by imprisonment for a term of two to five years with the forfeiture of transport or any other means used to commit the offense.

2. The same actions, if repeated, or committed by a group of persons upon their prior conspiracy, -
shall be punishable by imprisonment for a term of three to seven years with the forfeiture of means used to commit the offense[1].

The answer on the question if a company is infringing the ban on investment at Crimea when companies open branches at the peninsula, the answer has currently not been crystallized yet. The most appropriate answer is: “that depends on all the facts an details”. The investment via a Russian legal entity, legally not related to an EU branch, may fall under the prohibition as well. The same answer can be given to companies who uses another trademark at Crimea than in the rest of the world (special for Crimea in order not to be found by the EU authorities[xx]).

Based upon the Council regulation against Crimea and Sebastopol, which has been amneded at 18 December 2014, according to art. 2 a lid 1 sub c of the regulation it shall be prohibited to:

(c) grant or be part of any arrangement to grant any loan or credit or otherwise **provide financing**, including equity capital, **to an entity** in Crimea or Sevastopol, or for the documented purpose of financing such entity;

Further: e) provide investment services directly related to the activities referred to in points (a) to (d)[xxi]”.

Beside the abovementioned, stores such as Auchan, having a branch at Crimea, are full of goods disembarked at the sanctioned port of Kerch. It is unclear who is paying for the transport and the embarkment and disembarkment of the goods. Directly or indirectly this will be the owner of the store at Crimea.[xxii]

[1] Bron: http://www.wipo.int/wipolex/fr/text.jsp?file_id=438599

Summarized, based upon my opinion, in case an EU company opens a branch at Crimea, enters into a rent agreement, is changing the premisses in the so called “home style” and is selling own trademarkproducts under the own tradename or a new one, is infinging the sanctionsregulations because the company is financing and investing amounts at the economy of Crimea.

When taking into consideration the Dutch meaning of the word “to purchase goods” versus “to invest”, then according to Dutch taxlaw *the meaning of “to purchase goods” is applicable when planning to sell the goods, possibly after they have been changed (ameliorated). To investigate means: buying assets. Assets are used during a longer period of time in the company. For example: machines, cars, trucks, tools, inventory or computers*[xxiii]*. Also goodwill and licences can be seen as investments*[xxiv]. Investments are activated at the balance of the company and are subject to amortization. A look into the annual accounts of the company will give probably give the answer. Financing will be the case, when capital is provided, regardless if it concerns own capital or a bank loan.

Based upon my opinion franchise falls also under the sanctions because the franchiser enters into agreements with the franchisee about the fee for the use of the trademark. In exchange, technical and commercial assistance will be provided, possibly also a webshop will be available and a supporting trainingsprogramme will be facilitated. The franchiser then provides a loan to the franchisee or will be guarantee for the loan and if not, definitely agreements will be made similar to “the participation for arangements to the provision of loans”, which is, as mentioned before sanctioned.

About the results of the abovementioned applicable Ukrainian law: more detailed information will follow in a next memo

It would be interesting to elaborate more detailed on the pending Ukrainian court cases related to the presence of EU companies at Crimea. However, in

the context of this memo, this will be too much new information and the goal of a ‘’short informational memo” will not be reached anymore. Interesting questions are for example: the presence of EU companies at Crimea trading in not sanctioned goods, does this trading fall under the investment ban for Crimea? An interesting topic also: the Siemenscase and other pending cases at the Court of Justice in Luxemburg, such as the Rosneft and the Sberbank cases. Another interesting question is to understand how companies in Russia, having EU mothercompanies, are locally advised to behave in case they can obtain a nice order knowing that sanctions are applicable and that they infringe the following prohibition: “to participate, knowingly and intentionally, in activities the object or effect of which is to circumvent the prohibitions laid down in the sanctionsregulations”. Last but not least, intesting is also to understand the new Russian legislation concering the penalties for EU companies not willing to do business with a Russian counterpartner in Russia because they possibly may infringe the EU sanctionsregulations. So, his behaviour may result in a Russian criminal offense.

Summarized: four years of sanctions, foreseeable and unforeseeable results

1) Who is going to pay the bill? The santions (restrictive measures) are infringed constantly. Only the top of the iceberg is currently known (per July 2017). In the worth case, persons who infringed the regulations, will end up in jail for a shorter or longer period. Being aware of these results, mr. Putin and his friends will not sleep one day less. This cannot be the desired goal of the EU foreign-, and security policy, althougt, this would not be my personal desire if I was a lawmaker.

2) The imaginative read line. Already in the year 2014 it became clear that the information about the sanctions is not as clear as it has to be. Sanctions are complicated to understand, even for the more experienced lawyer. An

average entrepreneur cannot understand all the sanctionsregulations without consultancy. What he has to know or to do? Problably he has “not to enter” into the transaction in case he is not sure if sanctions are applicable. The result is that he even does not enter into an agreement with a Russian or Crimean company in case it would have been possible. Assuming that this was the initial goal of the EU, the sanctions have not been coercive enough.

Based upon my opinion, not only the entrepreneur, also the government bears the responsibility for the result of (not) having been sufficiently informed.

3) Handbook versus court decisions

The ministry of foreign affairs published the so called “Handbook doing business in Russia”. The handbook has been criticized very much. There have been for example questions in the Dutch parliament, such as that the book was not updated in time and that important issues are not in the updated version (such as the company check), which has to be in it. The handbook can lead also to misunderstandings because of “regulation on regulation”: two sanctionsregulations are applicable when the handbook refers to a certain regulation and the entrepremeur only checks that single regulation. The Ukrainian legislation concerning Crimea plays also an important role. The handbook does not refer to the applicable Ukrainian law in Crimea at all. Also, the handbook does not refer to existing jurisrpudence and new jurisprudence. The backside of this reality is in my opinion that the entrepreneur who has to appear in court in front of the prosecutor is not going to win the case arguing that “in the handbook is mentioned that”. The handbook is no legislation and also not a ministrial regulation, it is just an informative handbook, at the frontpage whereof is mentioned that “all rights are reserved”. The same conclusion can be made for lawyers opinions provided to the court. As mentioned before: it concerns regulations on European level to protect the security of the EU and to comply with the foreign policy. The fact that someone ‘brings in danger” the European security, will be punished seriously.

The sanctions can be compared with taxlaw, more specific with the subsidies (toeslagen) people can obtain from the national government in case the have a low or no income. Once during a hearing, were a mother of four children had to pay back an enourmous amount of subsidy (kinderopvangtoeslag) to the taxinspectorate, the argument of the judge was that it concerns community money (money other taxpayers paid before to the government). In that case is did not matter that good and well funded arguments have been brought into the court. All the arguments went directly into the trashbucket, because of this principle: if the subsidy probably has been received on false gounds, it does not matter if there are lacks or unclearities in the underlying legislation, also the arguments of the lawyers did not matter, the amounts had to be paid back to the government. This experience was a lesson for me, because now I understand that there are specific laws where 'good or convincing arguments" do not play a decisive role….the intention of the legislator is crucial.

4) Questions of the Dutch parliament: unclearness. At the end of the year 2017 several questions have been asked by mrs. Becker of the liberal party of the Dutch parliament to the Minister of foreign trade and international social development. The reason to ask the questions was a lot of unclearity related to the EU export sanctions. On 19 December 2017 the questions have been answered by minister Kaag to the Parliament[xxv]. At 24 January 2018 the questions and answers have been published[xxvi]. An answer on the questions was that "the EU sanctions on Russia are difficult regulations, reason why the Dutch government developend more instruments to help entrepreneurs to obtain clearity, such as the so called Handbook Russia." Some month' before the questions have been asked to the minister, the minister of foreign trade and international social development of that time, mrs. Ploumen, declared as a result of the building of the Crimia bridge that: "The Netherlands is not willing to contribute to the 'normalisation' of the situation at Crimea, the

building of the bridge can be seen as helping to normalise the situation. Also in case there are no legal infringements of regulations, the Dutch government relies on the Dutch companies that they act social responsible"[xxvii]. Minister Ploumen promised to investigate "to the dregs" in order to find out what exactly happened. The question if she promised to set up the investigation by her ministry or that the Dutch prosecutor has to to that remains open. It is a fact that we never heard again from Ploumen nor the new minister Kaag about the (results of) the investigation. The adverse side of not fulfulling the promisses is that the public currently possibly is not properly informed. An example: the so called Hengelose case. On 12 July 2018 it became clear that a company located in Hengelo possibly infringed the sanctions. This company however argues that there is no infringement when the goods have been provided to the Russian side of the bridge. This opinion was in line with a statement of a Dutch journalist on TV. This is painfull because the misunderstandigs for others are 'born", with possible very serious consequences.

Based upon my opinion, there will always be unanswered questions about the sanctions because sanctions are not "black or white". Also in the Handbook are not described all the possible infringements of one ore more regulations. Several situations are not cristallized yet in jurisprudence. The entrepreneur possibly does not realize the applicability of criminal law on the infringements. Probably the organizations, providing information, such as the Rvo, do a good job. However, when an entrepreneur asks a question to the Rvo and the Rvo answers that the intentional transactions causes an infringement of the sanctions, he will search for a solution and enters the so called grey area. Also possibly the entrepreneur has not completely explained the case to the Rvo, but only in headlines. However, the question if the sanctionregulations are infringed or not, depends on **all circumstances of the case**. For example, a *not* sanctioned good is exported to Crimea, but how the transaction took place? Does the EU company has influence (directly or indirectly) on the local company, or even more severe, should the EU

entrepreneur had to stop the transaction? How the goods are insuranced, which bank possibly financed the goods, how the transport to Crimea took place and where is the red line between “investment” (forbidden), and ‘’sale" (generally spoken not sanctioned in case the goods are not on the sanctionslist, and the goods are not used for sanctioned investments or sold to a person or company on the sanctionslist). To furnish and decorate a shop with the corporate identity of the brand, is this an investment? Same question when the company enters into a (long term) loanagreement. The purchase of goods (eventually financed by the bank) which goods still have to be sold, looks like an ivenstment. To generate profit, which profit is distributed to the EU mothercompany (with the so called Dutch participation exemption) means, based upon my opinion a “return on investment”.

5) End-user check, not realistic or an useless exercition? The entrepreneur has to do an effort to check if the companies or persons involved in the transaction are listed (sanctioned). The government counts on the professionality of the entrepreneur in this matter. This implicates that the entrepreneur has to do research on questions such as the end-user check. The obligation to check the end-user is easy to say but not easy to comply with, because structures are huge and it takes weeks or even months’ to collect all the necessary information, if a customer already agrees to provide. Having received the information, it has to be translated. This means that no business can be started as long as the end user is not known. The result is a A difficult situation is the result because a nice order can be obtained, but not confirmed because of the end-user story. On the other hand the end user-check implicates that the government assumes that everything is ok if the end-user is known. However, in Russia this possibly works differently. In the Netherlands exists the so called “old boys network”. The equivalent in Russia is that doing business is based on trust and the principle of “this is our man” (svoj tsjelovek). Possibly the end-user is a “straw man”[xxviii] which on his turn will provide the goods to a sanctioned person or entity without informing the EU entrepreneur about it. With other words: also with the end-user check

there is no hundred percent guarantee. Is the entrepreneur liable in case the goods he sold to Russia finaly will be used by a sanctioned person or company?

6) The Dutch VOC mentality appeared in sanctionsland? The EU entrepreneur has to be critical towards his contractors. He has to ask critical questions in case of unclearity or contradictions before the contact shall be signed. The mentality of “don’t worry” is not the right attitude. An entrepreneur has to have doubts in case his relatively small Dutch company receives a huge Russian order which order is unusual in the sense of volume for that relatively small Dutch company.

7) Did somebody slept? Mega orders are always very specific. Normally an entrepreneurs travels to the spot to understand the specifities of the situation. Several Dutch companies which are currently under prosecution, confirm that they have been in Crimea to understand the local situation. The question then raises: who slept? The customs? The banks? Or have there been set up clever structures which apparently work perfectly, but where the Ukrainian “fake” prosecutors office has been overlooked. From the Russian perspective this is understandable but not from the EU.

8) Behave if nothing happened. Mega orders are always specific, reason why the Dutch mothercompany, in case of a mother-daughter relation, definiltey had to be aware of the negotiations in precontractual phase, just because it concerns mega-orders. Probably the local branches or factories are not aloud to decide mega-orders without the consent of the EU mothercompany. Assumable Dutch technical staff had to verify the details of the order at location. Furthermore an order has to be financed and insured, which is sanctioned as well. Last but not least, the location of the Crimeabridge in the Kerch gulf is seismological and climatological complicated location, initially not appropriate to build a bridge. Germans already during World War-II tried to built the bridge, which appeared to be technically impossible at that time (!)

9) The Russians outsmarted the EU. The fact that the authorities of Crimea promised the investors and companies who are willing to do business at Crimea “confidentiality”. In the confirmation for the building of the Crimea bridge, which had been unically provided to mr. Arkadi Rotenberg, is mentioned the remarkable clause that the fact of applicability of the sanctions cannot be a reason of force majeur for mr. Roterberg.This means that the Russian government has been aware of the fact that the building of the bridge would be difficult without EU assistance and that the local (Crimean) authorities did not want to bring EU companies, willing to assist with the building of the bridge, into problems.

10) When the sanctions are going to be lifted? No single entrepreneur knows what will bring the future in EU ‘’sanctionsland”. The sanctions*decisions* became into force for the fixed period one year or half a year. The sanctions*regulations* became into force for an indefinite period of time, but can be lifted directly after the council decides not to prolounge a certain sanctiondecision. The sanctionsdecions are prolounged always for the same period as the previous period. Lifting is currently not in question, which is a complicating factor, because entrepreneurs are takings risks assuming that the sanctions will be lifted soon. The question is how pending criminal cases will be treated in case the sanctions will be lifted for example in the summer of 2019. From a legal point of view of course, the proceedings have to be finalized. However, the cases are based on the European foreign security policy. In case there is no security issue anymore, the reason to litigate may become senseless. The remaining question then is: was it worth and what have been the enforcement costs for the community?

ENDNOTES

[i] Bij het Hof van Justitie in Luxemburg zijn vele nietigheidsprocedures aangespannen door Russische en Oekraïense personen en bedrijven tegen wie de sancties zijn ingesteld.

[ii] Bij de Nederlandse rechter worden de strafzaken behandeld. In Luxemburg de zaken tegen de oplegging van de sancties zelf.

[iii] Het checken van de actuele sanctielijst kan via: https://eeas.europa.eu/headquarters/headquarters-homepage_en/8442/Consolidated%20list%20of%20sanctions The European External Action Service (EEAS) is the EU's diplomatic service. It aims to make EU foreign policy more coherent and effective.

[iv] https://www.rvo.nl/file/handboek-rusland versie 18 mei 2018.

[v] AFM – Leidraad Wwft, Wwft BES en Sanctiewet, hoofdstuk 12. En: DNB LEIDRAAD WWFT EN SW Voorkoming misbruik financiële stelsel voor witwassen en financieren van terrorisme en beheersing van integriteitrisico's, hoofdstuk 9.

[vi] https://www.gelderlander.nl/rivierenland/nederlandse-bedrijven-bouwen-mee-aan-foute-brug-naar-de-krim~a335c8b5/ en https://www.gelderlander.nl/rivierenland/hele-brug-naar-krim-valt-onder-sancties-eu~abb3c4a0/

[vii] https://www.gelderlander.nl/neder-betuwe/verdachten-aanleg-krimbrug-hangen-zware-straffen-boven-het-hoofd~a8e3bdec/

[viii] EU verordening 269/2014 van 17 maart 2014. Art 2 lid 2. Er worden geen tegoeden of economische middelen, rechtstreeks of onrechtstreeks te beschikking gesteld aan of ten behoeve van de in de lijst in bijlage I vermelde natuurlijke personen of met hen verbonden natuurlijke personen of rechtspersonen, entiteiten of lichamen.

[ix] Rechtbank Oost-Brabant, 04-09-2017. ECLI:NL:RBOBR:2017:4666 = vergelijkbaar met

[x] Rechtbank Oost-Brabant, 04-09-2017. ECLI:NL:RBOBR:2017:4666

[xi] Aldus een hooggeplaatst medewerker van de DNB tijdens de eerste informatiebijeenkomst van de Nederlandse overheid in Den Haag op 21 augustus 2014, gehouden in het gebouw van VNO-NCW op de Bezuidenhoutseweg.

[xii] "Het openbaar ministerie van de autonome republiek Krim" genaamd.

[xiii] www.forumyalta.com

[xiv] https://ark.gp.gov.ua/ua/news.html?_m=publications&_c=view&_t=rec&id=223368

[xv] https://ecology.unian.net/naturalresources/10117337-stroitelstvo-rossiey-krymskogo-mosta-vyzvalo-ekologicheskoe-zagryaznenie-znachitelnoy-territorii-ukrainy-prokuratura.html Порушення порядку здійснення оцінки впливу на довкілля, правил екологічної безпеки під час проектування (deel van strafrechtelijke bepaling in het Oekraiens).

[xvi] https://www.vedomosti.ru/economics/articles/2018/03/16/753933-investiruet-krim

[xvii] https://www.hospitality-management.nl/oekrane-start-rechtszaak-tegen-bookingcom

[xviii] IPS is het Vlaamse persbureau: Inter Pers Services.

[xix] https://www.mo.be/nieuws/oekraine-sleept-bookingcom-voor-de-rechtbank

[xx] https://primechaniya.ru/home/news/13496/kto_i_kak_vkladyvaet_dengi_v_ekonomiku_kryma/

[xxi] Letterlijke tekst uit sanctieverordening 1351/2014 van 18 december 2014.

[xxii] https://www.kauppalehti.fi/uutiset/reuters-how-eu-firms-skirt-sanctions-to-do-business-in-crimea/ewAe9WBn

[xxiii]

https://www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/belastingdienst/zakelijk/ondernemen/bedrijfskosten_en_investeren/investeren_en_inkopen/

[xxiv]

https://www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/belastingdienst/zakelijk/ondernemen/bedrijfskosten_en_investeren/investeren_en_inkopen/wat_is_investeren/investeren_wat_is_het_en_waarmee_krijgt_u_te_maken

[xxv] Aan de Voorzitter van de Tweede Kamer der Staten-Generaal, 19 december 2017. Betreft Beantwoording vragen van het lid Becker (VVD) over Het bericht ‘EU exportsancties Rusland te onduidelijk’.

[xxvi] TK Aanhangsel van de Handelingen, nr. 1329. Vergaderjaar 2017-2018.

[xxvii] https://www.gelderlander.nl/rivierenland/nederlandse-bedrijven-bouwen-mee-aan-foute-brug-naar-de-krim~a335c8b5/

[xxviii] Voor een definitie van het begrip stroman zie onder andere art. 4.1.2 van de DNB leidraad wwft.

This memo has been written in order the discussion about the sanctions will be continued and that more will become clear. Reactions are welcome.

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