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Russia. Ukraine. Europe. Legal implications for your company

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New EU (economic) sanctions imposed on Russia (and Belarus)

As a result of the armed conflict in the Donetsk and Luhansk oblasts of eastern Ukraine (regions that emerged from the Euromaidan protests in the spring of 2014) supported by the Russian Federation and the annexation of Ukraine's Crimean peninsula in March 2014, but also because of the human rights violations committed by the former government of Ukraine under President Viktor Yanukovich, the European Union imposed numerous sanctions on Russia (and also on Ukraine) as recently as 2014, which have been continuously expanded and extended and are still in force today. In response to the most recent events that have occurred since 21 February 2022, these existing measures have now been further expanded, strengthened and supplemented.



Background

The previous sanctions comprise the following:

- Council Regulation (EU) No 208/2014 of 5 March 2014: Financial sanctions against certain persons, entities and bodies identified as being responsible for human rights violations in Ukraine or for the misappropriation of Ukrainian State funds
- Council Regulation (EU) No 269/2014 of 17 March 2014: Financial sanctions against persons responsible for actions which undermine or threaten the territorial integrity, sovereignty and independence of Ukraine
- Council Regulation (EU) No 692/2014 of 23 June 2014: Restrictions on the import into the EU of goods originating in Crimea or the city of Sevastopol; restrictions on trade and services; investment ban
- Council Regulation (EU) No 833/2014 of 31 July 2014: Trade restrictions on dual-use goods and equipment for the energy sector; restrictions on access to the EU capital markets; the arms embargo imposed at the same time is to be regulated nationally by the Member States (implemented in Germany in Sections 74 et seqq. of the Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung*, AWV)).

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

- Council Regulation (EU) No. 765/2006 of 18 May 2006:
Various restrictive measures in respect of Belarus

The new EU sanctions (as of 9 March 2022)

In response to President Vladimir Putin's recognition of the independence and sovereignty of the self-proclaimed People's Republics of Donetsk and Luhansk that was announced on 21 February 2022 the EU expanded the existing list of sanctions on 23 February 2022 and issued a new sanction regulation at the same time. The EU responded to the Russian military invasion of not only the Donetsk and Luhansk oblasts but all of Ukraine, which began on the morning of 24 February 2022, by imposing additional sanctions and restrictions on 25 February 2022 and then announced and implemented further measures against not only Russia but also against Belarus on an ongoing basis.

The following sanctions (in chronological order) are currently already in force:

- Council Implementing Regulation (EU) **2022/260** of 23 February 2022:
22 natural persons (from the highest political and military circles) and four entities or bodies were added to the sanctions list under Council Regulation (EU) No **269/2014**. The entities/bodies listed are: Internet Research Agency, Bank Rossiya, PROMSVYAZBANK, VEB.RF (aka Vnesheconombank; VEB)
- Council Implementing Regulation (EU) **2022/261** of 23 February 2022:
336 natural persons (members of the Russian State Duma) were added to the sanctions list under Council Regulation (EU) No **269/2014**.
- Council Regulation (EU) No **2022/262** of 23 February 2022:
Amendment to Council Regulation (EU) No **833/2014**: **Financial restrictions** were extended. Under the new Article 5a of Regulation (EU) No 833/2014, it shall be prohibited, inter alia, to directly or indirectly purchase, sell, provide investment services for or assistance in the issuance of, or otherwise deal with transferable securities and money-market instruments issued after 9 March 2022 by: Russia and its government, the **Central Bank of Russia**, or a legal person, entity or body acting on behalf of or at the direction

of the Central Bank of Russia. Furthermore, it shall be prohibited to directly or indirectly make or be part of any arrangement to make any new loans or credit to these entities and bodies.

- New Council Regulation (EU) **No 2022/263** of 23 February 2022 "*concerning restrictive measures in response to the recognition of non-government controlled areas of the Donetsk and Luhansk oblasts of Ukraine and the ordering of Russian armed forces into those areas*":
Under this new sanction regulation, new and further goods-related restrictions were imposed in addition to already existing measures under Council Regulation (EU) No 833/2014, which were **limited to the Donetsk and Luhansk oblasts** (so-called "specified territories"). These are in particular: Pursuant to Article 2 it shall be prohibited to import into the European Union goods originating in the specified territories and to provide, directly or indirectly, financing or financial assistance as well as insurance and reinsurance related to the import of such goods. Article 3 prohibits, inter alia, the acquisition (even partial) of real estate or ownership or control of entities in the specified territories or the establishment of companies there (investment ban). Article 4 prohibits the sale, supply, transfer or export of the goods and technology listed in Annex II to any natural or legal person, entity or body in, or for use in, the specified territories and also the provision of technical assistance or brokering services as well as financing or financial assistance. This covers goods and technologies from the fields of transport, telecommunications, energy, prospecting, exploration and production of oil, gas and mineral resources. The norm of Article 5 contains a prohibition of the provision of technical assistance or brokering, construction or engineering services directly related to infrastructure in the specified territories in the aforementioned sectors. Article 6 prohibits the provision of services directly related to tourism activities in the specified territories.
- Council Regulation (EU) No **2022/328** of 25 February 2022:
Further amendment to Council Regulation (EU) No **833/2014**: The **prohibition of the export of dual-use items** to Russia or for use in Russia under Article 2 (1) now applies **without restriction** (subject to narrow exceptions) and no longer only where such items are or may be intended for military use or for a military end-user or for certain named recipients. Article 2 (2) also now imposes a general prohibition of the provision of technical assistance, brokering services or other services and the provision of financing or financial assistance related to dual-use items. The

redrafted Article 2a imposes (again subject to narrow exceptions) the **prohibition of the export** of certain goods and technologies that might contribute to Russia's technological enhancement in the **defence and security sector** (new Annex VII); the prohibition of the provision of technical assistance, brokering services or other services and the provision of financing or financial assistance related to these goods has been similarly imposed. According to Article 2e **it shall be prohibited to provide public financing or financial assistance** for trade with, or investment, in Russia. Articles 3b and 3c prohibit the export - again subject to narrow exceptions - of certain goods and technology that can be used for **oil refining** (Annex X) or that are suited for use in **aviation or the space industry** (Annex XI); they also prohibit the provision of technical assistance, brokering services or other services and the provision of financing or financial assistance related to these goods. Pursuant to Article 5 et seq. the already existing **financial restrictions** were further extended, in particular the restrictions concerning the access of various Russian entities to the capital markets. It will also be prohibited to list and provide services on trading venues within the Union for shares in state-owned Russian companies. It also introduces new measures that significantly restrict financial inflows from Russia to the Union by prohibiting the acceptance of deposits from Russian nationals or natural persons residing in Russia in excess of certain amounts, the maintenance of accounts of Russian customers by Union central securities depositories and the sale of euro-denominated securities to Russian customers.

- Council Regulation (EU) No **2022/330** of 25 February 2022:
Amendment of the definition of persons, entities and bodies to be sanctioned pursuant to Article 3 (1) of Council Regulation (EU) No **269/2014**: In Article 1 (d) the restriction to eastern Ukraine was deleted and the list of persons, entities and bodies to be sanctioned was therefore expanded to include the persons, entities and bodies responsible for the destabilisation of Ukraine as a whole. A new addition is that sanctions may also be imposed on those natural or legal persons, entities or bodies supporting, materially or financially, or benefiting from the Government of the Russian Federation, which is responsible for the annexation of Crimea and the destabilisation of Ukraine (lit. f), leading business persons or legal persons, entities or bodies involved in economic sectors providing a substantial source of revenue to the Government of the Russian Federation (lit. g). In addition, natural or legal

persons, entities or bodies associated with the natural or legal persons, entities or bodies listed in lit. a) to g) may also be sanctioned.

- Council Implementing Regulation (EU) **2022/332** of 25 February 2022:
Another 99 natural persons were added to the sanctions list under Regulation (EU) **269/2014**, which again included numerous members of the Russian State Duma, but also various Belarusian military officers and politicians, high-ranking Russian representatives, and last but not least Interior Minister Vladimir Kolokoltsev, Foreign Minister Sergei Lavrov and President Vladimir Putin.
- Council Regulation (EU) No **2022/334** of 28 February 2022:
Further amendment to Council Regulation (EU) No **833/2014**: Pursuant to the new Article 3 d), Russian aircraft are prohibited from overflying the territory of the Union and from taking off and landing in the territory. Article 5 a) was amended to prohibit transactions related to the management of reserves as well as assets of the **Central Bank of Russia**, including transactions with any legal person, entity or body acting on behalf of or at the direction of the Central Bank of Russia.
- Council Implementing Regulation (EU) **2022/336** of 28 February 2022:
A further 26 natural persons (oligarchs) and one entity were added to the sanctions list under Council Regulation (EU) No **269/2014**. The entity listed is: Gas Industry Insurance Company SOGAZ
- Council Regulation (EU) No **2022/345** of 1 March 2022:
Further amendment to Council Regulation (EU) No **833/2014**: Pursuant to Article 2e (3), it is prohibited to invest, participate in, or otherwise contribute to projects co-financed by the Russian Direct Investment Fund. Under the new Article 5h, the following seven banks and their majority-controlled subsidiaries will be excluded from "specialised financial messaging services which are used to exchange financial data" (i.e. "**SWIFT**" in particular) as of 12 March 2022: Bank Otkritie, Novikombank, Promsvyazbank, Bank Rossiya, Sovcombank, VNESHECONOMBANK (VEB), VTB BANK. Under the new Article 5i, it is prohibited to sell, supply, transfer or **export euro denominated banknotes** to Russia or to any natural or legal person, entity or body in Russia - including the Government and the Central Bank of Russia - or for use in Russia.

Council Regulation (EU) No **2022/350** of 1 March 2022:

- Further amendment to Council Regulation (EU) No **833/2014**: Under the new Article 2f, the broadcasting licenses and permits for Russia Today (RT) and Sputnik will be suspended and the distribution of content through these channels prohibited.
- Council Implementing Regulation (EU) **2022/353** of 2 March 2022:
A further 22 natural persons (members of the Belarusian armed forces) were added to the sanctions list under Council Regulation (EU) No **269/2014**.
- Council Regulation (EU) No **2022/355** of 2 March 2022:
Extension of the restrictive measures against Belarus under Council Regulation (EU) No **765/2006**: The **prohibition of the export of dual-use items** to Belarus or for use in Belarus under Article 1e (1) now applies **without restriction** (subject to narrow exceptions) and no longer only where such items are or may be intended for military use or for a military end-user or for certain named recipients. Article 1e (2) now also imposes a general prohibition of the provision of technical assistance, brokering services or other services and the provision of financing or financial assistance related to dual-use items. The redrafted Article 1f imposes (again subject to narrow exceptions) the **prohibition of the export** of certain goods and technologies that might contribute to technological enhancement in the Belarusian **defence and security sector** (new Annex Va); the prohibition of the provision of technical assistance, brokering services or other services and the provision of financing or financial assistance related to these goods has been similarly imposed. Article 1g (1a) prohibits the provision of technical assistance and brokering services and the provision of financing or financial assistance related to goods required for the production and manufacture of **tobacco products** as listed in Annex VI. The same applies according to Article 1i (1a) with regard to the **potassium chloride products** as listed in Annex VIII. The previous regulations for existing contracts (performance of contracts concluded before 25 June 2021) were also deleted. Under the new Article 1o, an **import ban** applies to certain **timber products** as listed in Annex X. The same applies under the new Article 1p to certain cement products as listed in Annex XI, under the new Article 1q to certain **iron and steel products** as listed in Annex XII and under the new Article 1r to certain **rubber products** as listed in Annex XIII, in each case combined with the prohibition of the provision of technical assistance and brokering services and the provision of financing or

financial assistance. Finally, under the new Article 1s, it is prohibited to export various **machinery** as listed in Annex XIV, again combined with a prohibition of the provision of technical assistance and brokering services and of the provision of financing or financial assistance. The regulations for existing contracts apply in each case (performance of contracts entered into prior to 2 March 2022 by 4 June 2022) apply in each case with regard to these new prohibitions.

- Council Implementing Regulation (EU) **2022/396** of 9 March 2022:
A further 160 natural persons (oligarchs and members of the Federation Council of the Russian Federation) were added to the sanctions list under Council Regulation (EU) No **269/2014**.
- Council Regulation (EU) No **2022/394** of 9 March 2022:
Further amendment to Council Regulation (EU) No **833/2014**: Under the new Article 3f, it is **prohibited to export** certain **maritime** goods and technologies (Annex XVI): navigation and radio equipment); similarly, it is prohibited to provide technical assistance, brokering services or other services and the provision of financing or financial assistance related to these goods.
- Council Regulation (EU) No **2022/398** of 9 March 2022:
Extension of the restrictive measures against **Belarus** under Council Regulation (EU) No **765/2006**: Expansion and tightening of financial sanctions. Prohibition to provide public financing or financial assistance for trade with, or investment, in Belarus. It is prohibited to export euro denominated banknotes. Under the new Article 1zb, the persons, entities and bodies as listed in Annex XV (Belagroprombank, Bank Dabrabyt and Development Bank of the Republic of Belarus) will be excluded from "specialized financial messaging services which are used to exchange financial data" (i.e. "SWIFT" in particular) as of 20 March 2022.

Legal consequences of inclusion on the "sanctions list"

Pursuant to Article 2 (1) of Council Regulation (EU) No 269/2014, all funds and economic resources belonging to natural or legal persons, entities or bodies listed in Annex I shall be "frozen". For (German and European) economic operators, however, the "**prohibition to make funds or economic resources available**" standardised in Article 2 (2) and generally binding in all Member States is much more significant: This

states: “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 as listed in Annex I”. Since, on the one hand, “funds” are included and, on the other hand, “economic resources” as defined in Article 1 (d) are assets of any kind, whether tangible or intangible, movable or immovable, which are not funds but may be used to obtain funds, goods or services, this means that all (commercial) goods are prohibited as is the mere “indirect” provision of such goods (which would be the case, for example, if the listed person holds a majority controlling interest in the recipient of the funds or goods). Therefore, this prohibition - apart from in a few exceptional circumstances - effectively acts as a total embargo on the listed persons, bodies and entities.

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Capacity of a company to act and entrepreneurial risk management

The war in Ukraine and the unprecedented sanctions imposed by the West in the meantime have caused significant disruption to the Russian economy. In Ukraine itself, a significant portion of the business activities of companies have been brought to a standstill by the hostilities. Even communication channels have already suffered massive disruption. All this is also already having an impact on economic life outside Ukraine and Russia. Business activities of German companies may be curtailed or even significantly jeopardised by the inability to obtain supplies of intermediate products, which would lead to production downtimes in Europe and elsewhere, through to customers defaulting on payment obligations. This may ultimately threaten the continued existence of a company if it suffers huge liquidity problems as a result of defaults of payment obligations.



Company executives when travelling may also be affected by travel restrictions, such that it may become necessary to ensure the capacity to act in the event of their absence from the company by means of arrangements to cover such absence, related management instructions or the appointment of additional members to corporate bodies or the granting of powers of attorney.

A company in crisis mode

As is always the case in times that are becoming more difficult for a company, management's attention is increasingly focused on its duty to monitor the company's vital functions, especially procurement, sales and solvency, but also the functionality of the IT infrastructure (keyword: cyber attacks). This is

required of the members of the management body responsible for the respective divisions. They are required not only to think ahead, but also - as far as possible - to take precautions. For example, it may be necessary to immediately negotiate an extension of credit lines with the company's banks, if there is a risk of significant defaults of payment obligations by customers, which the company cannot offset from its own resources. In times of crisis, the principle of shared responsibility becomes increasingly relevant for members of executive bodies. The activities of other divisions must always be monitored. However, in difficult times, the duty to monitor may become a duty to intervene - for example, if it becomes clear that the path chosen by a division does not stand up to a critical evaluation. Basically, the same applies in the current times as always in situations that are critical for a company.

Ensuring the capacity to act

At first glance, this means ensuring that the company is always represented by a sufficient number of board members. Where there are multi-member management bodies, the question of whether there is sufficient number of persons authorised to represent the company usually does not arise or is not urgent - at least not if several members of the executive body are each authorised to represent the company individually. If this is not the case, consideration should be given to granting sole power of representation. If there is only one managing director, a review should be carried out to establish how the company can remain capable of acting if this person cannot be where he or she is supposed to be for the purpose of legally representing the company - for example, due to travel restrictions. Besides appointing additional board members, it may also be possible to grant powers of attorney or general powers of attorney to third parties, which are limited internally. Powers of attorney can be issued quickly and without the involvement of a notary, although notarising the power of attorney certainly significantly increases its "door-opening function". However, the issuance of a privately written power of attorney may be the only remaining option for ensuring the company's (limited) capacity to act, particularly when powers of attorney are issued by persons who reside in a crisis area.

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Debtor-in-possession management as a means of rescue

Many companies that are directly or indirectly involved in economic relationships with Russia will face serious economic problems in the coming days, weeks and months. The supply of goods to and from Russia has almost completely collapsed as a result of the events in Ukraine. For companies that have direct economic relationships with Russian companies, the expected problems are immediately apparent: either parts required for production are no longer delivered or parts that have already been produced can no longer be sold, or, even worse: have already been delivered to the Russian customer but are no longer paid for.



German companies can also be indirectly affected by the crisis, for example because they receive parts from a company that conducts business directly with Russian companies.

A crisis resulting from such a situation can threaten the continued existence of a company. It is important that the resultant risks be assessed quickly and as comprehensively as possible. German insolvency law provides companies that find themselves in a crisis "through no fault of their own" with a wide range of instruments to overcome the crisis not only unscathed but strengthened.

There are two mandatory grounds for filing for insolvency proceedings for corporations in Germany: insolvency and over-in-

debtiness. Both ultimately depend on the company's liquidity. Insolvency occurs if a company is unable to service its liabilities.

Over-indebtedness exists if the existing assets (at their liquidation values) are not sufficient to service all liabilities, unless it is extremely likely that the company will be able to continue as a going concern. This requires liquidity planning for the next twelve months. This is admittedly not an easy task because of the uncertainty regarding how the situation will develop over the medium term. However, in accordance with the principles of commercial prudence, it will be necessary to plan for the current restrictions to continue for the time being.

Sudden suspension of deliveries, such as those resulting from the sanctions now imposed, lead to liquidity losses due to defaults of payment obligations, overcapacity due to orders from Russian companies being cancelled (machinery, personnel, etc.), declining debt servicing capacity and thus a higher level of debt.

Debt relief is obtained through insolvency proceedings, i.e. liabilities are only satisfied on a pro rata basis. Loss-making contracts can be terminated, employment contracts can be terminated with shortened notice periods.

Insolvency proceedings can be conducted in the form of debtor-in-possession management. This means that the management continues to run the business, but under a legally watertight process and the supervision of a court-appointed trustee. In any event, it is an option for surviving a crisis such as the current one without completely putting at risk the company's economic existence. Some residual risks remain, but these can be managed through good preparation.

The proceedings are divided into four steps:

1. Crisis

It is clear that there is a crisis and liquidity bottlenecks are imminent. Ideally, insolvency has not yet occurred. In this phase, a restructuring concept is developed and a financial plan drawn up. In addition, the petition for insolvency proceedings is prepared.

Ideally, a period of four to six weeks remains for this phase.

2. Filing the petition for insolvency proceedings

The prepared insolvency petition is filed with the court together with the restructuring concept (including a plan). The approval process rarely takes more than 48 hours.

3. Debtor-in-possession management and opening proceedings

Ideally, the court orders debtor-in-possession management in accordance with the petition and appoints a temporary trustee, who can be co-determined by the debtor within certain limits. In the opening proceedings, the costs for wages and salaries are covered by the Federal Employment Agency (Agentur für Arbeit) for a maximum of three months, which improves liquidity. Existing liabilities may not and do not have to be serviced.

4. Opening decision and opened proceedings

After about three months, the insolvency court then opens the insolvency proceedings. All (new) liabilities entered into must again be serviced in full during the period in which the proceedings are open. The various measures (termination of superfluous costly contracts, personnel measures, etc.) can now be implemented. At the same time, the company is restructured, either through an insolvency plan or through a transferring restructuring (asset deal). After three to six months, this phase should also be completed and the restructured company can continue to exist.

It is important to start preparing for the proceedings at an early stage and not only when wages can no longer be paid and creditors threaten foreclosure. Once a company becomes insolvent, the prospects for a successful restructuring are significantly limited.

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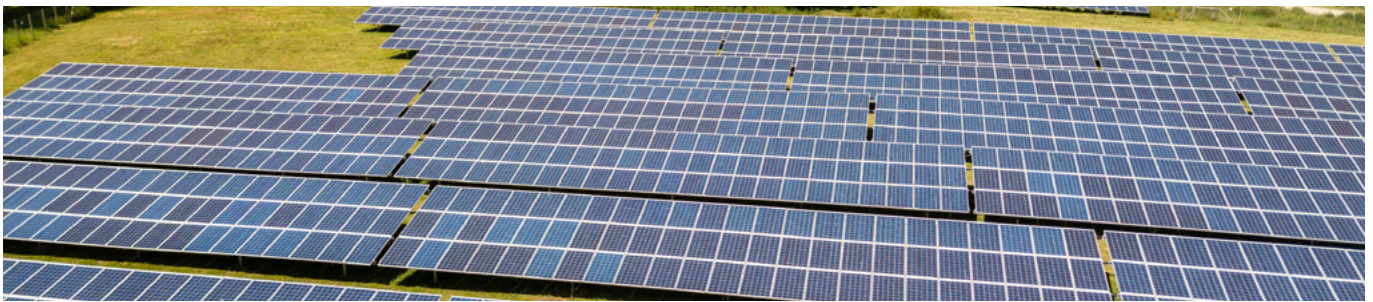


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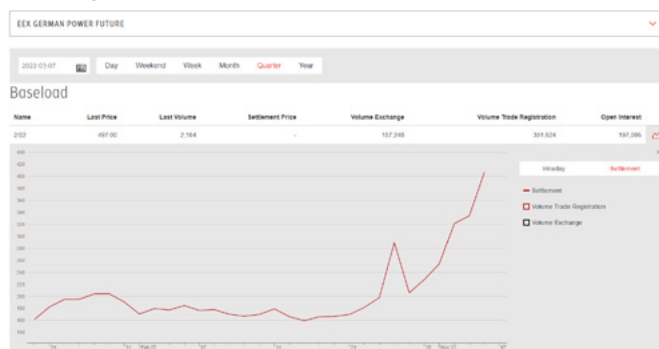
Energy procurement in the crisis

Although the EU, unlike the USA, is currently still refraining from imposing sectoral sanctions on the Russian energy industry, market prices for oil, natural gas and electricity are constantly hitting new record levels. This is due to the markets' expectation that there is a high probability that, in Europe as well, either import restrictions could be imposed by the West or alternatively export restrictions by Russia or there could be technical interruptions in the supply chain through Ukraine due to the war. Each of these possible developments is already contributing to prices on the spot and futures markets that entail a significant economic impact for the companies concerned. Since the politically envisaged possible solutions, such as the construction of LNG import terminals, the further expansion of renewable energies or a possible extension of the life-span of nuclear energy, do not provide any short-term relief in any event, companies themselves must now actively review their options for action.



Market price developments

Market price expectations have a global impact and in any event affect oil, natural gas and electricity. The latter in particular because the price-setting power stations in the EU's internal electricity market are primarily gas-fired power stations, for which the increased price of natural gas is passed through to generation costs. In addition, a large number of hard coal-fired power plants are operated with Russian hard coal, for which supply restrictions are at the very least to be expected. The following charts illustrate this unprecedented development:



Electricity prices Germany; Quarter 2/2022, Source EEX

Settlement Prices



Gas prices Germany, Front Month, Source EPEX SPOT

Diversification of procurement

In addition to the worrying price trend, it **cannot** be assumed that sufficient quantities of natural gas will be **physically available at all times**. The Federal Government's emergency plan takes effect where restrictions are required. Market mechanisms are initially envisaged here, which can be replaced by direct contractual intervention if the situation worsens. The emergency plan can be found here: [Emergency Plan for Gas for the Federal Republic of Germany](#).

However, prior to such emergency measures, the gas exporter-importer relationship may already be experiencing **unilateral supply disruptions** that continue down the **supply chain**. To minimise risk, **diversifying** procurement to **alternative upstream suppliers** for partial quantities as well as participation in the **trading market** or establishing **access to an exchange** should therefore be considered.

Contractual coverage of market price risks and output disruptions

In addition to diversifying procurement, it is necessary to hedge against the **insolvency-related default of** upstream suppliers or customers. In addition to general credit risk indicators, the points of reference should also include **market price fluctuations** in particular. This is because if an upstream supplier fails, the customer must pay the full market price to procure the replacement quantities, which is currently likely to be significantly higher than the long-term contractual procurement prices. In addition to such hedging, for example through **margining** arrangements, the bilaterally agreed **force majeure** and **hardship** clauses may become relevant, at least if there are actually restrictions on physical delivery. The following diagram illustrates the areas for action involved:



Even if the situation eases - which is **not** foreseeable at present - it is unlikely that, overall, energy prices will fall significantly. Instead, the current noticeable **risk premiums** will **continue to be applied** by the market. Sustained attention should therefore be focused on the areas for action mentioned above in order to be also optimally positioned for future crises.

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Sanctions in connection with the Ukraine crisis - notarial activity

In recent days, the situation in Ukraine has come to an explosive head. Notarial practice has also been impacted by the war in Ukraine. While business has collapsed in Kiev and the main concern is to get staff to safety, far-reaching questions also arise with regard to Russia and Russian customers, particularly in light of the fact that the European Union and the United States have imposed wide-ranging sanctions on Russia in connection with the Ukraine conflict. From the perspective of notarial practice, the focus is on the question of which measures must be complied with in order to comply with legal and professional obligations.



Legal basis of sanctions

In response to the continued attacks by Russian forces in Ukraine, the EU - in coordination with the U.S., the U.K., Canada and other partner countries - has imposed tough economic and financial sanctions on Russia in several tranches since 23 February 2022. The *Financial Intelligence Unit* ("FIU") lists on its homepage the European Union sanctions that had already entered into force in 2014, including Council Regulation (EU) No 208/2014, Council Regulation (EU) No 269/2014, Council Regulation (EU) No 692/2014 and Council Regulation (EU) No 833/2014.

The sanctions imposed on 23 February 2022, are based, inter alia, on the following EU regulations:

- **Measures in the third sanctions package of 28 February:** Council Regulation (EU) No 2022/334.

- **Measures in the second sanctions package of 25 February:** Council Regulation (EU) No 2022/330, Council Implementing Regulation (EU) No 2022/332, and Council Regulation (EU) No 2022/328.
- **Measures in the first sanctions package of 23 February:** Council Regulation (EU) No 2022/259 (amending Regulation (EU) No 269/2014), Council Implementing Regulation (EU) 2022/260, Council Implementing Regulation (EU) 2022/261, Council Regulation (EU) No 2022/262 (amending Council Regulation (EU) No 833/2014), Regulation (EU) 2022/263.

The EU sanctions legislation follows a clear structure: There have been two basic regulations since 2014, one for sectoral measures (Council Regulation (EU) No 833/2014) and one for lists of persons (Council Regulation (EU) No 269/2014). These two regulations have since been updated and supplemented by amending and implementing regulations.

The new EU lists, including the **lists of Russian banks**, can be found in the Annexes to Council Implementing Regulations (EU) 2022/332, 2022/261 and 2022/260. Council Regulations (EU) 2022/259 and 2022/330 also made substantive **changes to the legal framework for the lists**. The measures related to the **financial sector** can be found in Council Regulations (EU) No 2022/262 and 2022/328. The new **export restrictions** are set out in Council Regulation (EU) No 2022/328 and a comprehensive **trade embargo** in Council Regulation (EU) No 2022/263. Several hundred natural persons and some legal entities were also added to the **sanctions list** in Council Implementing Regulations (EU) 2022/236, (EU) 2022/260 and (EU) 2022/261.

In view of this special sanctions situation, the FIU requests that the developing legal situation be monitored carefully and that the resulting requirements be complied with, especially when submitting suspicious activity reports as defined in the Money Laundering Act (*Geldwäschegesetz*, *GWG*)

Impact on notarial practice

1. Personal prohibition of notarisation

In the context of the EU sanctions, the boundary between the “right to draw up a deed” and the notary’s obligation to fulfil his or her general duties of due diligence have gained in importance. The notary’s existing fundamental entitlement to draw up a notarial deed must take second place to the obligation to fulfil general duties of due diligence, and **notarisation is prohibited** if, for example,¹

- the notary is aware that his or her activity is to be used for the purpose of money laundering or financing terrorism; or
- the notary must cease working on the transaction following a suspicious report; or
- a party is included on the financial sanctions lists.

(Federal Chamber of Notaries, Circular No. 16/21 of 17 November 2021, page 43)

¹ In addition, there are other cases which are not directly related to the extension of the sanction lists, e.g. if a company does not comply with its obligation to disclose the identity of the beneficial owner in the context of an acquisition transaction pursuant to section 1 GrEStG on the basis of documentation of the ownership and control structure to be submitted in text form, or if a foreign company which undertakes to acquire real estate located in Germany or which acquires shares within the meaning of section 1 (3) and (3a) GrEStG does not comply with its obligation to notify its beneficial owners for entry in the transparency register. within the meaning of section 1(3) and (3a) GrEStG, fails to comply with its obligation to disclose information on its beneficial owners for entry in the transparency register.

(https://www.zoll.de/DE/FIU/Aktuelles-FIU-Meldungen/2022/fiu_sanktionen_gegen_russland.html?nn=290366, retrieved on 4.3., 17:17) (german language)

Council Regulation (EU) No. 269/2014, which remained in force and was expanded by the above-mentioned regulations, concerns “financial sanctions lists”. Pursuant to Article 2 of the underlying Council Regulation (EU) No. 269/2014, all funds and economic resources related to the listed persons are frozen. Furthermore, no funds or economic resources may be made available to or may benefit these persons, either directly or indirectly.

The regulation constitutes a **statutory prohibition within the meaning of Section 134 of the German Civil Code** (*Bürgerliches Gesetzbuch*, *BGB*), such that the participation of any person included on the sanctions list results in the invalidity of the contract. If the notary becomes aware of this, he shall refuse to perform his official duties in accordance with Section 14 (2) of the Federal Code for Notaries (*Bundesnotarordnung*, *BNotO*) or Section 4 of the German Code of Notarisation (*Beurkundungsgesetz*, *BeurkG*). It is prohibited to notarise transactions to which a listed person is a party as a formal participant, financial participant or beneficial owner. If the notary determines only after notarisation that a party to the deed was “listed” or was subsequently “listed”, he must cease execution.

If there are indications that a party is a person on an EU sanctions list, the notary must investigate such indications. The check can be made by interrogating the search engine provided on the justice portal of the Federal Government and German federal states at www.finanz-sanktionsliste.de. A hit does not mean that the person searched for is identical to the person found on the sanctions list, but merely that there is a name match or a name similarity. The date of birth, for example, can be used as a further indication. Since, for technical reasons, the comparison can only be performed together with other sanctions lists, it is also necessary to check which EU Regulation is affected and which sanction results from it. In case of doubt about the result or its consequences, the competent Chamber of Notaries or the Federal Chamber of Notaries should be contacted.

(cf. in this respect Bundesnotarkammer, Anwendungs- und Auslegungshinweise zum Geldwäschegesetz, status October 2021, p. 44; BeckOK BeurkG/Bremkamp, § 10 marginal no. 139, in each case with reference to the - comparable - Regulation (EC) No. 881/2002).

(cf. in more detail Bundesnotarkammer, Anwendungs- und Auslegungshinweise zum Geldwäschegesetz, status October 2021, p. 42 f., there on Regulation (EC) No. 881/2002)

2. Transaction-related prohibition of notarisation

In addition to the prohibition of notarisation, which is primarily linked to the person involved in the legal transaction, Article 3 (1) (a) of Council Regulation (EU) No 2022/263 provides for a further prohibition, which is linked to the type of legal transaction. Under this Regulation it is prohibited to acquire any new or extend any existing participation in the ownership of real estate located in areas of the Donetsk and Luthansk oblasts not controlled by Ukraine.

3. Notification requirements

In addition to the prohibition on notarisation, there is a duty to report within the scope of application of the Regulation on reporting duties under the German Money Laundering Act - real estate (*GwGMeldV-Immobilien*) due to the reference to risk states or sanction lists pursuant to Section 3 (3) No. 1 *GwGMeldV-Immobilien*. Section 3 *GwGMeldV-Immobilien* stipulates that circumstances where a party to or a beneficial owner of the legal transaction is included on an EU sanctions list or in a national transposition measure are reportable. A search for persons included on the EU sanctions list can be made via the website www.finanz-sanktionsliste.de. In addition, there is a reporting obligation for persons who have already been listed by the United Nations and are covered by a national transposition measure by way of a general decree of the Federal Ministry for Economic Affairs and Energy published in the Federal Gazette prior to implementation at EU level. The FIU provides information on persons to be included on its website (german language). The Federal Chamber of Notaries provides an up-to-date list of relevant countries under the heading "Combating Money Laundering" in the internal section at www.bnotk.de.

(Federal Chamber of Notaries, Circular No. 16/21 of 17 November 2021, page 51)

Outlook

The Chambers of Notaries in the federal states have already pointed out the first changes to be taken into account. In view of daily new information about possible further sanctions, notaries are required to keep themselves informed on a regular basis, to interrogate the sanctions lists on a daily basis when executing transactions and to ensure that the sanctions requirements are implemented in a compliant manner. In case of doubt about the existence of a prohibition of notarisation or a reporting obligation and the resulting consequences, notaries

and their employees are encouraged to contact the Chamber of Notaries. The Ukrainian Chamber of Notaries has contacted the Federal Chamber of Notaries with a request to also impose sanctions on Russian and Belarusian notaries (e.g. suspension of membership of the International Union of Notaries (UINL)). A decision of the presidents of the notariats that are members of the Council of the Notariats of the European Union (CNUE) regarding this is still pending.

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Protection of German investments in Russia

In response to Russia's invasion of Ukraine, the EU, the US, and the UK have imposed sanctions on more than 2,000 individuals, 155 companies, and 141 organisations. In addition, sanctions have been imposed on certain sectors of the economy, such as the oil sector, the aviation industry and ship supplies. More sanctions are being added on a daily basis, Reasonably up-to-date figures can be found [at](#).



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

Russia threatens expropriation

However, the countermeasures are more and more directed against foreign companies and their business. Russia, for example, has announced that it will remove protection for intellectual property rights and allow compulsory licenses for patents while reducing the compensation for such licenses to zero. And a [bill](#) (german language) now introduced by the Russian government would allow Russian plants and subsidiaries of foreign companies from “unfriendly states” that temporarily cease operations as a result of the sanctions to be placed under state receivership, spun off into a new company where necessary and then sold. The groups of cases where this should be possible can be changed and added to by the Russian government at any time.

That would be nothing less than expropriation. Whether this will occur remains to be seen. Expropriation measures would destroy the confidence of foreign investors in Russia as a business location. It may therefore just be a threat to keep companies in the country. When sanctions were imposed in 2014 because of the annexation of Crimea and there were rumours of expropriation, the Russian government [gave assurances](#) (german language) that it would not kill the goose that lays golden eggs. However, nationalisation and subsequent privatisation would not be a surprise. In the 1990s, today's oligarchs became rich through similar sales of state property. The Yukos case has shown how to deal with unwelcome companies, where tax claims drove the Yukos Group into insolvency and it was then acquired at a bargain basement price. It is therefore perfectly possible that the Russian government will use the opportunity to bring large parts of the economy under Russian control.

Protection afforded by the German-Russian Bilateral Investment Treaty (BIT)

However, German companies are by no means unprotected in the face of these measures.

The German-Russian Bilateral Investment Treaty of 1989 protects German capital investments in Russia.

Article 4 protects investors from expropriation and measures having similar consequences (so-called indirect expropriation). These may only be applied in cases where they are in the public interest, in compliance with the applicable procedure, upon payment of compensation and are not discriminatory. In this context, the compensation must correspond to the real value of the expropriated capital investment immediately prior to the time when the actual or threatened expropriation became known.

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

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

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

In addition to the German-Russian Bilateral Investment Treaty, Russia is still bound by the Energy Charter Treaty until 2029. The Energy Charter Treaty was provisionally applicable

until 2009, Russia then declared that it never wanted to become a party to the Treaty, thus ending this provisional applicability. However, for investments made in the energy sector up to that point, the Treaty will continue to apply for another 20 years.

Practical questions

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

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

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

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Events, publications and blog



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