nicht zwingend zu der Annahme eines „bestimmenden Einflusses" im Sinne des § 2 Abs. 6 S. 4 LkSG, der die tatsächliche Ausübung eines weitreichenden, operativen Einflusses auf die Geschäftstätigkeit eines verbundenen Unternehmens erfordert (s. o.).

[23] Im Übrigen ist zweifelhaft, ob Art. 8a der Verordnung (EU) 833/2014 überhaupt auf Tochtergesellschaften mit Sitz in Russland anwendbar ist. Systematik und Sinn und Zweck der Vorschrift sprechen dafür, russische Tochtergesellschaften vollständig aus dem Anwendungsbereich des Art. 8a der Verordnung (EU) 833/2014 herauszunehmen.[17] Schon aus diesem Grund wäre eine Pflichtenkollision abzulehnen.

VI. Ergebnis

[24] Die Parallelität von regulatorischen Vorschriften aus dem Lieferkettensorgfaltspflichtenrecht und dem Sanktionsrecht zeigt eindrucksvoll, dass die heutige Unternehmens-Compliance ganzheitlich zu betrachten ist: Das Anstoßen unternehmerischer Veränderungen auf Grundlage der einen Vorschriften kann unbeabsichtigt erhebliche Auswirkungen auf die Einhaltung anderer Gesetze haben. Der eigene Geschäftsbereich eines nach dem LkSG verpflichteten Unternehmens lässt sich immerhin mit der sanktionsrechtlichen Bewertung harmonisieren, ohne dass grundsätzliche Wertungswidersprüche oder Pflichtenkollisionen geschaffen werden. Die aktuellen Rechtsänderungen in beiden Gebieten müssen jedoch eng begleitet werden, wie nicht zuletzt die neuen europäischen Vorschriften in Gestalt der Corporate Sustainability Due Diligence Directive[18] für das Lieferkettenrecht und die Einführung des Art. 8a in die Verordnung (EU) 833/2014 zeigen.

17 Überzeugend: Kaiser, ZASA 2024, 467 (473 f.).

18 Richtlinie (EU) 2024/1760 des Europäischen Parlaments und des Rates vom 13.6.2024 über die Sorgfaltspflichten von Unternehmen im Hinblick auf Nachhaltigkeit und zur Änderung der Richtlinie (EU) 2019/1937 und der Verordnung (EU) 2023/1859.

Frank Mattheijer*

Evaluating the proposed International Sanctions Measures Act: benefits and drawbacks

Im Sommer 2024 veröffentlichte die niederländische Regierung eine öffentliche Konsultationsfassung des neuen Gesetzes über internationale Sanktionsmaßnahmen. Der Vorschlag sowie die dazugehörige Begründung spiegeln den aktuellen Stand einer umfassenden Modernisierung des niederländischen Sanktionsrahmens wider, die erstmals im November 2022 angekündigt wurde. Der Autor skizziert in seinem Beitrag den Kontext des Vorschlags (Abschnitt II) und fasst seine wichtigsten Elemente zusammen (Abschnitt III). In Abschnitt IV kommentiert er den allgemeinen Ansatz und in Abschnitten V-VII einige Elemente des Vorschlags.

I. Introduction/summary

[1] In the Summer of 2024, the Dutch government published a public consultation version of the new International Sanctions Measures Act (Wet internationale sanctiemaatregelen, hereinafter: the proposal). The proposal as well as the accompanying Explanatory Memorandum (hereinafter: the Explanatory Memorandum) reflect the current state of a substantial modernisation of the Dutch sanctions framework first announced in November 2022. In this article I will outline the context of the proposal (II.) and summarise its main elements (III.). I will then comment on the general approach (IV.) as well as some elements of the proposal (V.–VII.).

[2] Essentially, the proposal contains some necessary improvements, including the possibility to enforce EU sanction laws through administrative law instead of exclusively through criminal law. However, I believe that the proposal ignores important practical complica-

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tions Dutch companies experience when trying to understand and comply with EU sanctions or when attempting to cut ties with sanctioned entities/countries. The proposal also pays virtually no regard to legal safeguards in the context of newly proposed administrative measures.

II. Context of the proposal

[3] The Dutch sanctions framework primarily consists of the Sanctions Act 1977 (Sanctiewet 1977). This Act is a framework law mainly allowing for the implementation of lower level decrees, which are introduced whenever new EU sanctions regulations are issued. These EU regulations are already binding and do not require implementation as such, but the aforementioned decrees are necessary to allow enforcement in the Netherlands. Currently, EU sanctions can only be enforced through criminal law.[1] The Netherlands does not generally implement national sanctions legislation supplementing EU sanctions, although it has done so in relation to terrorism.

[4] The proposal is the current result of a legislative project launched in late 2022 to modernise the Dutch sanctions framework.[2] Initially, the Dutch government envisaged a substantial revision of the existing Sanctions Act 1977. However, this was abandoned and in essence the proposal now seeks to replace the Sanctions Act 1977 with the new International Sanctions Measures Act. The public consultation that took place last summer was designed to obtain feedback from the public and private sector, allowing the proposal to be amended (if necessary) before submission of the formal version to parliament.[3] When this submission will take place is currently unclear.

III. Proposal summary

[5] A full discussion of all elements of the proposal exceeds the scope of this article. Below is a summary of its main features, some of which will be discussed in more detail in the following chapters.

[6] 1. A national reporting centre will be established which is to receive and process all reports associated with sanctions legislation. The reporting centre will also be charged with providing information on reporting obligations and will report annually on reports received.[4]

[7] 2. Reporting obligations based on EU sanctions regulations will apply to lawyers and notaries, even if this would violate legal professional privilege, unless their work pertains to actual or potential litigation. A reporting obligation for sanctioned clients may also be introduced, with a similar exception.

[8] 3. The management of real estate by a government-appointed administrator will be introduced. This instrument is to be used particularly if real estate owned by a sanctioned entity becomes difficult or impossible to maintain due to sanctions against its owner, as a result of which safety and other legal requirements are actually or potentially violated.[5]

[9] 4. The proposal aims to enable administrative supervision and enforcement of sanctions as a supplement to the current criminal enforcement regime. Rather than allowing administrative enforcement for all EU sanctions regulations, the proposal seeks to introduce a system where this is assessed for each individual sanctions regulation. Possible means of administrative enforcement will include:

a) Reparatory penalties, such as administrative injunction orders and administrative fines of a punitive nature.[6]
b) The publication of administrative penalties.
c) The appointment of an administrator of a Dutch company, in two different situations. In the first situation, an administrator can be appointed if the company is in distress because its majority shareholder is sanctioned (see further VI.). In the second situation, the administrator is appointed because the company has seriously violated or circumvented sanctions.

[10] 5. Entries will be introduced in public records, such as the trade register, warning the public that a Dutch company is associated with a sanctioned entity (see further VII.).

IV. General observations on the draft proposal

[11] As rightly pointed out in the Explanatory Memorandum, the scope and complexity of sanctions instruments has greatly increased since the introduction of the Sanctions Act 1977. It therefore makes sense to modernise the Dutch sanctions system. Most elements of the proposal should indeed help to make that system future-proof. However, the proposal does seem to focus

1 For legal entities, the maximum penalty per violation is a criminal fine of EUR 1,030,000 or 10 % of the entity's turnover, whichever is higher. For individuals, the maximum prison sentence is six years and/or a criminal fine of up to EUR 103,000 per violation. Although maximum sentences are rarely imposed in practice and many cases are resolved out-of-court, criminal enforcement of EU sanctions pertaining to Russia has significantly increased recently. So far, the highest prison sentence imposed by a criminal court is two years.
2 Parliamentary letter 4 November 2022, BZDOC-1584136316-35.
3 Further information and the relevant documents (in Dutch) can be found here: https://www.internetconsultatie.nl/sanctiemaatregelen/b1
4 See, for example, Article 8 of Council Regulation (EU) No 269/2014 on Russia, which requires EU parties to report assets frozen on the basis of the regulation to the national competent authority.
5 See p. 39 of the Explanatory Memorandum.
6 The maximum fine as proposed is EUR 103,000 per violation.

too strongly on malicious violators of sanctions legislation. I believe that, as a result, key groups and issues are being ignored. Typically, the entities and sectors targeted by EU sanctions are not themselves obliged to comply with EU sanctions. Rather, EU sanctions must be understood and complied with mainly by EU nationals and EU companies, hereafter collectively referred to as EU parties, when they deal with sanctioned entities or jurisdictions.

[12] In my experience, at least from a Dutch perspective, the main challenge in being able to understand and comply with sanctions is that the EU legislature formulates sanctions very openly. Case law and guidance which may help in understanding sanctions is relatively scarce. Although the European Commission in particular, regularly publishes guidance documents and opinions, they are non-binding. In addition, guidance by the Commission, guidance from Member States and (binding) rulings by the European Court of Justice can be inconsistent, making the interpretation of EU sanctions even more difficult. It would therefore be helpful if EU parties could address concrete questions on the interpretation and application of EU sanctions to an authority authorised to provide binding guidance. The proposal does not address this issue and is mainly aimed at targeting wilful sanction offenders more effectively.

[13] However, my experience is, that the vast majority of companies and their staff have no intention to violate sanctions. The main issue is not a lack of willingness to comply, but the fact that these companies are confronted with very open rules and an absence of guidance, especially binding guidance. This can be problematic, as is evident in the context of sanctions against Russia. Some Dutch companies still have historic ties to Russia, for example in the form of collaborations with Russian partners/shareholders predating the war in Ukraine. While most companies want to sever such ties, ironically enough this is often blocked or at least hindered by EU sanctions. For instance, a Dutch company with a sanctioned shareholder may want to buy out that shareholder or sever ties in other ways, but this is often impossible because the shareholder's funds (including their shares) must remain frozen and no funds may be made available to them.

[14] Exemptions and derogations, which may or may not involve a formal authorisation by the national competent authorities, are regulated at EU level and typically do not allow corporate transactions.[7] And as a practical matter, it often takes Dutch government entities six months to a year to share their formal views on an envisaged transaction. In my view, there should be more possibilities to deviate from the principle that funds should not be made available to sanctioned entities if this deviation would allow EU entities to permanently sever ties with them. In this context the US sanctions authority OFAC may serve as an example: it regularly issues general licences temporarily allowing transactions which would normally be prohibited. This also avoids the time-consuming process of obtaining individual waivers.

[15] In my view, since the modernisation project seeks to improve the effectiveness of sanctions legislation in the Netherlands in the long run, the above issue should be addressed in any event. This applies even if, ultimately, EU rather than national legislation is required to provide for a more effective system of guidance, exemptions and derogations.

V. Further fragmentation of supervision and enforcement of EU sanctions

[16] There are already several Dutch government bodies dealing with sanctions legislation, including in the form of supervision and/or enforcement. The proposal envisages even stronger fragmentation. Based on the proposal, as many as 25 different bodies/parties would become involved in the application/enforcement of sanctions legislation in the Netherlands, whether for the first time or more explicitly.

[17] As noted above, binding sources of interpretation in the area of sanctions are scarce and conflicting interpretations at EU or national level can already occur. If even more bodies were to deal with sanctions in the Netherlands, this would also increase the risk of inconsistent interpretations. I therefore believe that instead of proposing a more fragmented approach, the Dutch legislature should consider a national sanctions authority specialised in the supervision and enforcement of sanctions. The Explanatory Memorandum briefly covers that option but considers it unfeasible purely on practical grounds. First, the broad scope of sanctions legislation is considered to significantly impede a centralised approach. Second, it is feared that a central authority might encroach on the work of other national authorities.[8] I am not convinced that these practical objections ultimately outweigh the potential efficiency and other benefits of a central sanctioning authority. The above issues could potentially be prevented by pooling knowledge adequately and, if necessary, by implementing various departments within the authority, similiar to approach of the Netherlands Authority for Consumers and Markets (ACM). I therefore believe that the creation of a central sanctioning authority deserves reconsideration.

7 In most cases, the derogations and authorisations are mainly limited to transactions allowing natural persons to serve basic needs. These limitations are further addressed in the Commission Guidance on firewalls covered in more detail in footnote 12 below.

8 See p. 10 of the Explanatory Memorandum.

VI. Government-appointed administrator

1. Scope of intended regime

[18] Article 5.2 of the proposal proposes a ministerial power to designate one or more company administrators who "may issue instructions to a company established in the Netherlands, if, in the opinion of Our Minister whom it may concern, the application of an obligation to that company under a sanction measure would entail adverse consequences for the financial stability or continuity of the company and could thereby cause serious social, economic or employment effects for Dutch society." The Explanatory Memorandum rightly explains that there can be a need for government intervention within companies affected by sanctions against a shareholder.[9] This applies especially in cases where the sanctioned shareholder is unwilling or unable to cooperate in avoiding drastic consequences for the company by voluntarily stepping down.

[19] Based on the Explanatory Memorandum,[10] the above power appears to be reserved for cases where a sanctioned entity has ownership or control over the company, as a result of which, the company becomes subject to sanctions as well (see further VII.). This mainly concerns entities with a sanctioned shareholder holding at least 50 % of the shares. However, in my experience companies with a sanctioned minority shareholder can equally face serious issues. A sanctioned minority shareholder may still be capable of frustrating/blocking decision-making within the company, for example if a particular decision carries a qualified majority or quorum requirement. Also, the sanctioned minority shareholder may claim that it is still allowed to exercise voting rights, resulting in a legal dispute which may hinder the functioning of the company. Finally, the mere presence of a sanctioned shareholder in the structure may trigger important business partners such as banks, suppliers, and customers to refuse or stop doing business with the company. Consequently, I believe that the possibility to appoint an administrator should also be possible if the company does not meet the thresholds for ownership or control by a sanctioned entity.

2. Administrator's role and instructions versus higher order sanctions laws

[20] In IV, I advocated introducing more flexible exemptions and derogations if this would allow ties to be severed with sanctioned entities/jurisdictions. However, this would generally require new EU rather than national legislation. Even an administrator granted special powers under national law would typically be limited by the relatively inflexible exemptions and derogations currently in place. In my opinion, a major omission in the proposal is that it does not address this issue. My understanding is that the main mission of the administrator would be to try and ringfence the sanctioned majority shareholder, as a result of which the company would no longer be subject to sanctions.[11] This would need to be achieved by issuing binding instructions to the company's board. The proposal does not address the difficulty that some of those instructions could be at odds with EU sanctions. After all, both the shares of the sanctioned shareholder and the funds of the company itself must be frozen as long as they are subject to EU sanctions. This potentially limits the possibilities for restructuring the company, even if no transactions take place with the sanctioned shareholder.

[21] Additionally, just like the company the administrator can only conduct transactions normally prohibited by EU sanctions if a derogation or exemption applies. However, as indicated previously, the existing derogations and exemptions typically do not allow corporate transactions.[12] Therefore, in my opinion the final version of the proposal should address the relation between EU sanctions and instructions from the administrator. Given the vagueness of sanctions legislation, it would be undesirable if the company and its board had to make their own (risk) assessment when receiving such instructions.[13]

3. Power to appoint administrator and need for safeguards

[22] Finally, the proposal assumes that the administrator will be appointed by the competent minister, i. e. the executive power. I doubt that this would involve the same safeguards for objectivity and fairness as a court-appointed administrator. Appointing an administrator radically interferes with the company's corporate governance. Since the administrator's appointment would be published, the market perception would probably be that that the company had effectively come under government control. Consequently, I believe that the ap-

9 See p. 13 of the Explanatory Memorandum.

10 This includes a Netherlands-based company that is more than 50 % owned by a sanctioned (legal or natural) person and a Netherlands-based bank that is a wholly-owned subsidiary of a sanctioned financial institution. See p. 14 of the Explanatory Memorandum.

11 See in particular p. 16 of the Explanatory Memorandum.

12 In this context, see also the Guidance on firewalls by the European Commission, which is quoted on p. 16 of the Explanatory Memorandum: "Therefore, if a designated person is deemed to own an entity, its assets must be frozen. Restructuring of ownership (e. g. the sale of shares by a designated person) is also prohibited by virtue of the asset freeze. Such a sale can only be done if the relevant EU Regulation contains a derogation to this end and the NCA [National Competent Authority] grants an authorisation." Seehttps://finance.ec.europa.eu/document/download/6aacaf09-97e5-46c3-ad38-de760f0e8baf_en?filename=guidance-firewalls_en.pdf

13 Article 5.3(1) of the proposal does already provide that the person who carries out orders from the administrator is not liable for damage resulting from fulfilling that obligation. However, this seems to refer only to civil law liability for damage suffered by third parties and does not cover situations where complying with an instruction by the administrator would result in violating EU sanctions.

pointment of an administrator should be subject to prior judicial review, for example by the Dutch Enterprise Chamber (Ondernemingskamer).[14]

VII. Entries in public records

[23] Finally, the proposal seeks to introduce various public record entries associated with sanctions legislation. This includes the possibility to record in the publicly available Trade Register of the Dutch Chamber of Commerce that a legal entity is owned or controlled by a sanctioned entity. According to the Explanatory Memorandum, the entry would guide third parties in determining whether they may conduct business with the entity.[15] While this system may indeed serve a useful warning function, the far-reaching consequences for the legal entity concerned are still given too short shrift in the proposal. An entry in the Trade Register will in many cases amount to de facto placement on a national sanctions list. Most EU parties becoming aware of the entry will probably err on the side of caution and avoid the legal entity. I believe that in many cases this may result in the bankruptcy of the entity. Sometimes this outcome may be appropriate from a moral perspective, for example because the entity is willingly cooperating with its sanctioned shareholder. However, bona fide Dutch companies which are simply stuck with a sanctioned shareholder may equally be affected.[16] In many cases, the company concerned will not have had any say in the acquisition of that shareholding and would prefer to have no involvement with them, but simply has no means to cut ties with the shareholder.

[24] Another issue is that the proposal appears to oversimplify the concept of ownership and control. Ownership and control is mainly determined based on the Best Practices published by the Council of the European Union.[17] A shareholding of at least 50 % is the best-known and easiest indicator (for ownership). A common misconception, which is also reflected in the Explanatory Memorandum,[18] is that entities with a shareholder holding at least 50 % of the shares always become subject to the sanctions against that shareholder. In reality, however, if the indicators for ownership or control are met, this only triggers a rebuttable presumption that transactions with the legal entity are prohibited because they will indirectly benefit the shareholder.[19] The opportunity to rebut this presumption may be a lifeline for the company, for example if the shareholder has been ringfenced. The government-appointed administrator discussed at 0 could play an important role in reaching that result, but their mission to rescue the company will have little chance of success if the legal entity goes bankrupt due to being labelled a 'tainted' entity in the Trade Register.

[25] The proposal seems to erroneously assume that ownership/control can be easily and mechanically established and cannot be subject to debate in individual cases. Ownership and control are wrongly presented as a static and permanent fact, which can be determined and recorded as easily as the basic company data already included in the Trade Register. As indicated, however, ownership and control are much more nuanced, while the mere perception that a legal entity is tainted by sanctions against a shareholder may well spell the company's doom. In my opinion, this means that, if such entries are to be introduced, there should be solid safeguards and defence mechanisms in place. The legal entity should at least be allowed to contest ownership/control or have the opportunity to rebut the aforementioned presumption. Like the appointment of an administrator, the entity should also have the opportunity to have the proposed entry reviewed by an independent court rather than by the competent minister. None of these safeguards are currently included in the proposal.

VIII. Conclusion

[26] In conclusion, the proposal as it stands contains some important building blocks for the intended modernisation of the Dutch sanctions system but lacks some key elements. However, the necessary additions and improvements are still possible, and will hopefully be addressed in the proposal's final version.

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14 The Dutch Enterprise Chamber is one of the competent courts in cases involving claims of mismanagement by a company board. Cases can result in an inquiry by a court-appointed investigator and/or (preliminary) relief, for example in the form of an administrator charged with resolving the mismanagement and/or undoing certain board decisions.

15 See p. 76 of the Explanatory Memorandum.

16 This is the most likely scenario, since EU parties are not allowed to deal with the sanctioned shareholder once they become subject to sanctions.

17 Restrictive measures (Sanctions) – Update of the EU Best Practices for the effective implementation of restrictive measures, 11623/24, published by the Council of the European Union on 3 July 2024.

18 See, for example, § 3.4.1 of the Explanatory Memorandum on the continuity of enterprises indirectly covered by EU sanctions. The example is given there of a retail company that is more than 50 % owned by a sanctioned (legal or natural) person and a bank established in the Netherlands that is a wholly-owned subsidiary of a sanctioned financial institution, whose assets, according to the Explanatory Memorandum, should be frozen without question. As will be shown below, this is not straightforwardly correct.

19 See in particular Restrictive measures (Sanctions) – Update of the EU Best Practices for the effective implementation of restrictive measures, 11623/24, published by the Council of the European Union on 3 July 2024, available at https://data.consilium.europa.eu/doc/document/ST-11623-2024-INIT/en/pdf. These Best Practices read (at §§ 65, 66 and 69) as follows: "If any of these criteria are satisfied, it is considered that the legal person or entity is controlled by another person or entity, unless the contrary can be established on a case by case basis. [...] The fulfilment of the above criteria of ownership or control may be refuted on a case by case basis. [...] An economic resource will not be considered to have been for the benefit of a listed person or entity merely because it is used by a non-listed person or entity to generate profits which might be in part distributed to a listed shareholder."