

**Global Investigations Review**

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# The Guide to Sanctions

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**Editors**

Rachel Barnes, Paul Feldberg, Nicholas Turner, Anna Bradshaw,  
David Mortlock, Anahita Thoms and Rachel Alpert

Second Edition

# The Guide to Sanctions

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## Publisher's Note

*The Guide to Sanctions* is published by Global Investigations Review – the online home for everyone who specialises in investigating and resolving suspected corporate wrongdoing.

We live, it seems, in a new era for sanctions: more and more countries are using them, with greater creativity and (sometimes) selfishness.

And little wonder. They are powerful tools. They reach people who are otherwise beyond our jurisdiction; they can be imposed or changed at a stroke, without legislative scrutiny; and they are cheap! Others do all the heavy lifting once they are in place.

That heavy lifting is where this book comes in. The pullulation of sanctions has resulted in more and more day-to-day issues for business and their advisers.

Hitherto, no book has addressed this complicated picture in a structured way. The *Guide to Sanctions* corrects that by breaking down the main sanctions regimes and some of the practical problems they create in different spheres of activity.

For newcomers, it will provide an accessible introduction to the territory. For experienced practitioners, it will help them stress-test their own approach. And for those charged with running compliance programmes, it will help them do so better. Whoever you are, we are confident you will learn something new.

The guide is part of the GIR technical library, which has developed around the fabulous *Practitioner's Guide to Global Investigations* (now in its fifth edition). *The Practitioner's Guide* tracks the life cycle of any internal investigation, from discovery of a potential problem to its resolution, telling the reader what to think about at every stage. You should have both books in your library, as well as the other volumes in GIR's growing library – particularly our *Guide to Monitorships*.

We supply copies of all our guides to GIR subscribers, gratis, as part of their subscription. Non-subscribers can read an e-version at [www.globalinvestigationsreview.com](http://www.globalinvestigationsreview.com).

I would like to thank the editors of the *Guide to Sanctions* for shaping our vision (in particular Paul Feldberg, who suggested the idea), and the authors and my colleagues for the élan with which it has been brought to life.

We hope you find the book enjoyable and useful. And we welcome all suggestions on how to make it better. Please write to us at [insight@globalinvestigationsreview.com](mailto:insight@globalinvestigationsreview.com).

**David Samuels**  
Publisher, GIR  
June 2021

# Contents

<b>Foreword</b> .....	ix
<i>Sigal Mandelker</i>	
<b>Introduction</b> .....	1
<i>Rachel Barnes, Paul Feldberg and Nicholas Turner</i>	
<b>Part I: Sanctions and Export Control Regimes Around the World</b>	
<b>1 UN Sanctions</b> .....	9
<i>Guy Martin and Charles Enderby Smith</i>	
<b>2 EU Restrictive Measures</b> .....	27
<i>Genevra Forwood, Sara Nordin, Matthias Vangenechten and Fabienne Vermeeren</i>	
<b>3 EU Sanctions Enforcement</b> .....	41
<i>David Savage</i>	
<b>4 UK Sanctions</b> .....	56
<i>Paul Feldberg and Robert Dalling</i>	
<b>5 UK Sanctions Enforcement</b> .....	73
<i>Rachel Barnes, Saba Naqshbandi, Patrick Hill and Genevieve Woods</i>	
<b>6 US Sanctions</b> .....	98
<i>John D Buretta and Megan Y Lew</i>	
<b>7 US Sanctions Enforcement by OFAC and the DOJ</b> .....	114
<i>David Mortlock, Britt Mosman, Nikki Cronin and Ahmad El-Gamal</i>	
<b>8 Export Controls in the European Union</b> .....	134
<i>Anahita Thoms</i>	

## Contents

9	Export Controls in the United Kingdom.....	145
	<i>Tristan Grimmer and Ben Smith</i>	
10	Export Controls in the United States.....	151
	<i>Meredith Rathbone and Hena Schommer</i>	
11	Sanctions and Export Controls in the Asia-Pacific Region .....	166
	<i>Wendy Wysong, Ali Burney and Nicholas Turner</i>	
12	Developments in Mainland China and Hong Kong.....	179
	<i>Qing Ren, Deming Zhao and Ningxin Huo</i>	
<b>Part II: Compliance Programmes</b>		
13	Principled Guide to Sanctions Compliance Programmes .....	195
	<i>Zia Ullah and Victoria Turner</i>	
14	Sanctions Screening: Challenges and Control Considerations.....	207
	<i>Charlie Steele, Sarah Wrigley, Deborah Luskin and Jona Boscolo Cappon</i>	
<b>Part III: Sanctions in Practice</b>		
15	Navigating Conflicting Sanctions Regimes.....	221
	<i>Cherie Spinks, Bruce G Paulsen and Andrew Jacobson</i>	
16	Sanctions Issues Arising in Corporate Transactions.....	238
	<i>Barbara D Linney, Orga Cadet and Ragan Updegraff</i>	
17	Key Sanctions Issues in Civil Litigation and Arbitration .....	251
	<i>Claire A DeLelle and Nicole Erb</i>	
18	Issues Arising for Financial Institutions and Regulated Entities .....	270
	<i>Jason Hungerford, Ori Lev, Tamer Soliman, James Ford and Timothy C Lee</i>	
19	Impacts of Sanctions and Export Controls on Supply Chains .....	286
	<i>Alex J Brackett, J Patrick Rowan and Jason H Cowley</i>	
20	Practical Issues in Cyber-Related Sanctions .....	295
	<i>Brian Fleming, Timothy O'Toole, Caroline Watson, Manuel Levitt and Mary Mikhaeel</i>	
21	The Role of Forensics in Sanctions Investigations.....	308
	<i>Amy Njaa, A. Walid Osmanzoi, Nicholas Galbraith and Adetayo Osuntogun</i>	



*Contents*

Appendix 1: Comparison of Select Sanctions Regimes.....323  
Appendix 2: About the Authors.....327  
Appendix 3: Contributors' Contact Details.....355

## Foreword

I am pleased to welcome you to the Global Investigations Review guide to economic sanctions. In the following pages, you will read in detail about sanctions programmes, best practices for sanctions compliance, enforcement cases, and the unique challenges created in corporate transactions and litigation by sanctions laws. This volume will be a helpful and important resource for anyone striving to maintain compliance and understand the consequences of economic sanctions.

The compliance work conducted by the private sector is critically important to stopping the flow of funds to weapons proliferators such as North Korea and Iran, terrorist organisations like ISIS and Hezbollah, countering Russia's continued aggressive behaviour, targeting human rights violators and corrupt actors, and disrupting drug traffickers such as the Sinaloa Cartel. I strongly believe that we are much more effective in protecting our financial system when government works collaboratively with the private sector.

Accordingly, as Under Secretary of the US Department of the Treasury's Office of Terrorism and Financial Intelligence from 2017 to 2019, one of my top priorities was to provide the private sector with the tools and information necessary to maintain compliance with sanctions and AML laws and to play its role in the fight against illicit finance. The Treasury has provided increasingly detailed guidance on compliance in the form of advisories, hundreds of FAQs, press releases announcing actions that detail typologies, and the Office of Foreign Assets Control (OFAC) framework to guide companies on the design of their sanctions compliance programmes. Advisories range from detailed guidance from OFAC and our interagency partners for the maritime, energy and insurance sectors, to sanctions press releases that provide greater detail on the means that illicit actors use to try to exploit the financial system, to Financial Crimes Enforcement Network (FinCEN) advisories providing typologies relating to a wide range of illicit activity.

Whether it was for the Iran, North Korea or Venezuela programmes, or in connection with human rights abuses and corrupt actors around the globe, the US Treasury has been dedicated to educating the private sector so that they in turn can further protect themselves.

The objective is not only to disrupt illicit activity but also to provide greater confidence in the integrity of the financial system, so we can open up new opportunities and access to financial services across the globe. That guidance is particularly important today with the increased use of sanctions and other economic measures across a broader spectrum of jurisdictions and programmes.

As you read this publication, I encourage you to notice the array of guidance, authorities and other materials provided by the US Treasury and other authorities cited and discussed by the authors. This material, provided first-hand from those charged with writing and enforcing sanctions laws, gives us a critical understanding of these laws and how the private sector should respond to them. By understanding and using that guidance, private companies can help to protect US and global financial systems against nefarious actors, as well as avoid unwanted enforcement actions.

Thank you for your interest in these subjects, your dedication to understanding this important area of the law, and your efforts to protect the financial system from abuse.

**Sigal Mandelker**

Former Under Secretary of the Treasury for Terrorism and Financial Intelligence  
June 2021

# Part I

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## Sanctions and Export Control Regimes Around the World

# 2

## EU Restrictive Measures

**Genevra Forwood, Sara Nordin, Matthias Vangenechten  
and Fabienne Vermeeren<sup>1</sup>**

### **Introduction**

Over the years, the European Union (EU) has increased its use of restrictive measures – more commonly referred to as sanctions – to pursue certain foreign policy objectives laid down within the framework of the EU’s Common Foreign and Security Policy (CFSP).

EU sanctions either implement binding sanctions resolutions adopted by the United Nations (UN) Security Council or impose autonomous measures adopted by the EU.

As of April 2021, the EU had 19 sanctions regimes in place that implement UN sanctions (for example, against Iraq, Mali and Somalia), of which 10 impose additional restrictions (for example, against Iran, North Korea, and ISIL/Da’esh and Al-Qaida). In addition, the EU had 25 autonomous sanctions regimes against countries that are not subject to UN sanctions (for example, against Russia, Syria and Venezuela) and that target specific themes, including terrorism, chemical weapons and cyberattacks.<sup>2</sup>

This chapter provides a general introduction to the functioning of EU sanctions, starting with a description of the legal framework and procedural aspects. The second section deals with the application of EU sanctions. The next section provides an overview of the main sanctions regimes, and is followed by an outline of the most common types of measures taken under those sanctions regimes. The discussion then moves on to cover additional concepts relating to legal liability under EU sanctions. Finally, the chapter explores the divergence between EU sanctions and sanctions imposed by the United States (US), exemplified by the EU’s Blocking Regulation.

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1 Geneva Forwood is a partner, Sara Nordin is a counsel, Matthias Vangenechten is an associate and Fabienne Vermeeren is Regional Director Europe at White & Case LLP.

2 A consolidated overview of all EU sanctions regimes in place is available at <https://www.sanctionsmap.eu>.

Besides sanctions, the EU and individual EU Member States also impose other trade restrictions to pursue foreign policy and national security goals, particularly export controls. This chapter does not discuss these but focuses on EU sanctions.

## **Legal framework of EU sanctions**

### **Sanctions as a tool to achieve foreign policy objectives**

EU sanctions have a pivotal role in the EU's CFSP, the objectives of which are set forth in Article 21(2) of the Treaty on the European Union. Broadly, these include (1) safeguarding the EU's values, fundamental interests and security, (2) consolidating and supporting democracy, the rule of law, human rights and the principles of international law, and (3) preserving peace, preventing conflicts and strengthening international security.

The contexts in which the EU imposes sanctions can therefore be very diverse, ranging from the protection of human rights (for example, against Iran) to territorial integrity (for example, in relation to the annexation of Crimea by Russia) and non-proliferation of nuclear weapons (for example, against North Korea).

There are two main sources of EU sanctions. First, as members of the UN, EU Member States are obliged to implement the binding resolutions of the UN Security Council imposing sanctions under Chapter VII of the UN Charter. Second, the EU can adopt autonomous measures that build on UN sanctions or pursue EU interests independently of UN Security Council resolutions. These autonomous measures can be adopted when no consensus can be reached within the UN Security Council.

EU Member States can also take sanctions measures at a national level (for example, the Dutch national terrorism list and the Belgian national terrorist list) to pursue national foreign policy goals, but not to pursue the achievement of the CFSP objectives.<sup>3</sup> Autonomous national sanctions of this kind are relatively rare.

### **Procedure for imposition and renewal of sanctions**

The procedures for adopting EU sanctions are complex, reflecting the institutional and legal architecture of the EU, and the allocation of competences between the EU and the EU Member States on matters of foreign policy.

Since sanctions fall within the framework of the EU's CFSP, they require a CFSP Council Decision, which needs unanimous agreement of all EU Member States.<sup>4</sup> They can be proposed by an EU Member State or the European External Action Service led by the High Representative of the Union for Foreign Affairs and Security Policy (potentially with the support of the European Commission).<sup>5</sup>

The proposed measures and targets are further examined and negotiated by representatives of all EU Member States within the relevant Council bodies such as the Political and

---

3 Commission Opinion of 8 November 2019 on the compatibility of national asset freezes imposed by Member States with Union law (C(2019) 8007 final).

4 Treaty on the European Union, Article 31.

5 Under the European Commission led by Ursula von der Leyen (2019–2024), the responsibility for the implementation of EU sanctions has been transferred from the High Representative of the Union for Foreign Affairs and Security Policy to the Directorate General for Financial Stability, Financial Services and Capital Markets Union.

Security Committee, the competent geographical working groups of the Council, and the Foreign Relations Counsellors Working Group. As a final step, the Committee of Permanent Representatives II and the Council need to approve the sanctions. The decision enters into force upon publication in the *Official Journal of the European Union* (either on the publication date or on another date specified in the published decision).

Sanctions that fall within EU Member States' competence, such as arms embargoes and travel bans, require only a CFSP Council Decision, which is directly binding on all EU Member States. By contrast, sanctions that engage the EU's competences regarding trade and economic freedoms, such as asset freezes, trade restrictions or export bans, require additional implementing legislation at EU level in the form of a Council Regulation.

EU sanctions based on a CFSP Council Decision are in principle adopted for a limited period only, usually not longer than a year and sometimes six or even only three months. Towards the end of that period, the Council reviews the situation (including the measures and targets identified) and decides by unanimity whether to extend or amend the sanctions (or both). In reality, extensions are very common and, once put in place, EU sanctions tend to apply for a long period.

Since the adoption and review of EU sanctions require unanimity in the Council, and thus an alignment of the foreign policies of 27 EU Member States, the Commission in 2018 proposed to move to qualified majority voting<sup>6</sup> for the adoption of EU sanctions.<sup>7</sup> According to the Commission, the unanimity requirement in the Council hampers the EU's ability to 'react quickly and firmly to international developments'.<sup>8</sup> Qualified majority voting would allow a swifter and more effective response to (geopolitical) events. However, such a proposal would need unanimous approval from Member States, which makes it inherently difficult to pass. Hence, this has not yet been passed.

## **Designations and delistings**

Specific sanctions regulations set out broad criteria under which individuals and entities can be designated under that regime. EU Member States or third countries can request the Council for the designation of certain individuals or entities meeting these criteria. The responsible working party within the Council will subsequently examine the respective case and make a recommendation to the Council, which will finally make a decision whether or not to designate the respective person. In the case of a designation, the Council provides a 'statement of reasons', making clear how the criteria for listing have been met.

Delistings can be requested by the listed parties, an EU Member State or a third country that had originally proposed the listing. In addition, any listings can also be challenged before the Court of Justice of the European Union in an 'annulment action' under Article 263 of

---

6 Qualified majority voting requires 55 per cent of EU Member States representing at least 65 per cent of the total EU population to be in favour of a proposal in the Council.

7 Communication from the Commission, 'A stronger global actor: a more efficient decision-making for EU Common Foreign and Security Policy' of 12 September 2018 (COM(2018) 647 final).

8 In support of this statement, the Commission points at two specific examples: (1) the renewal of the arms embargo against Belarus in February 2017, which was about to be blocked by one EU Member State unless an exemption for a certain category of small arms was included; and (2) the adoption of targeted restrictive measures against Venezuela in response to the domestic political developments, which was initially blocked by an EU Member State in August 2017 before ultimately being adopted in November 2017.

the Treaty on the Functioning of the European Union. Many of the annulment actions to challenge listings have been successful, resulting in a line of case law on the requirements that need to be satisfied for individual listings, including the specification of designation criteria, statements of reasons and supporting evidence. Although the Council may have become more attentive to fulfil all legal requirements relating to a designation, uncertainty remains regarding the standard of proof the Council applies to list any individuals or entities.

### **Enforcement at EU Member State level**

EU sanctions are enforced in the Member States by the competent authorities under national law. The procedures and penalties for violations of EU sanctions are determined by national law. EU sanctions require that penalties be ‘effective, proportionate and dissuasive’ (see Chapter 3 of this guide).

### **EU sanctions jurisdiction**

#### **General application of EU sanctions**

EU sanctions only apply when there is EU jurisdiction (i.e., a nexus linking a certain activity to the EU). An EU nexus arises in any of the following situations:

- within EU territory (i.e., the territory of any of the EU Member States, including their airspace);
- to nationals of EU Member States (even if they are outside the EU);
- to entities incorporated or constituted under the law of an EU Member State, whether or not they are in the EU (including branches of EU companies in third countries);
- to entities in respect of any business done in whole or in part within the EU; or
- on board any aircraft or vessel under EU Member State jurisdiction.

This means that EU Member State nationals and companies or other entities incorporated in an EU Member State must comply with EU sanctions. It also means that even non-EU companies and persons may be subject to EU sanctions depending on the particular circumstances under which they perform their business activities in the EU and how they are connected to any activities restricted by these sanctions.

#### **Application of EU sanctions in the UK**

The United Kingdom (UK) ceased to be an EU Member State on 31 January 2020. Following the end of the transition period under the EU–UK Withdrawal Agreement on 31 December 2020,<sup>9</sup> the UK does not implement EU sanctions. Instead, autonomous UK sanctions regimes are now in force under the Sanctions and Anti-Money Laundering Act 2018 (see Chapter 4).

### **Overview of the EU’s main sanctions regimes**

The EU has various sanctions regimes that target third countries, as well as certain organisations and activities, regardless of their location.

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<sup>9</sup> Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (2019/C 384 I/01) [Withdrawal Agreement], Articles 126 and 127.



## **Country-specific sanctions regimes**

The most commonly known EU sanctions regimes are those that target specific third countries in view of foreign policy objectives. Currently, the EU has sanctions regimes in place against around 30 countries, including Russia, Iran and Venezuela. However, this does not mean that all activities involving those countries are prohibited. Unlike the United States, the EU does not impose comprehensive (i.e., country-wide) sanctions against third countries. Rather, the nature and extent of EU sanctions vary across the targeted countries in line with the policy objectives they intend to achieve.

For example, in response to Russia's annexation of Crimea and its role in Ukraine, the EU has developed a body of sanctions since 2014. Apart from sanctions directly targeting the Crimea region and certain people and entities held responsible for undermining Ukraine's territorial integrity, sovereignty and independence, the EU has also imposed certain sectoral sanctions against Russia with the aim to put pressure on Russia to cooperate in resolving the situation in Ukraine.<sup>10</sup> These sectoral sanctions have a limited scope. EU statements emphasise that the duration of these sanctions is aligned with the complete implementation of the Minsk agreements (i.e., the agreements between Ukraine and Russia to resolve the conflict in eastern Ukraine).<sup>11</sup>

A recent example of the use of country-specific sanctions regimes relates to the presidential elections in Belarus in August 2020, the results of which the EU does not recognise. In light of these developments, the EU decided to expand the designation criteria under its sanctions regime against Belarus. The EU can now impose an asset freeze and travel ban on parties it holds responsible for serious violations of human rights or the repression of civil society and democratic opposition, or whose activities otherwise seriously undermine democracy or the rule of law in Belarus as well as parties benefitting from or supporting the Lukashenka regime.<sup>12</sup> In March 2021, in response to the military coup staged in Myanmar, the EU also expanded the designation criteria under its framework of sanctions against Myanmar. The EU can now impose asset freeze and travel ban restrictions on parties connected to the Myanmar Armed Forces (Tatmadaw) and activities undermining democracy and the rule of law in Myanmar.<sup>13</sup> The vast majority of designated individuals are high-ranked officials of the Myanmar Armed Forces.

## **Terrorism sanctions regimes**

As part of its response to the terrorist attacks of 11 September 2001, the EU established a list of persons, groups and entities involved in terrorist acts (the EU Terrorist List).<sup>14</sup> Persons on

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10 Council Regulation (EU) No. 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, as amended.

11 European Council Conclusions on External Relations of 19 March 2015 (EUCO 11/15).

12 Council Regulation (EC) No 765/2006 of 18 May 2006 concerning restrictive measures in respect of Belarus, as amended, Article 2.

13 Council Implementing Regulation (EU) 2021/479 of 22 March 2021 amending Regulation (EU) No 401/2013 concerning restrictive measures in respect of Myanmar.

14 Council Regulation (EC) No. 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, as amended, and Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism.

this list are in principle sanctioned with an asset freeze and a prohibition to make any funds or economic resources available to such persons.<sup>15</sup>

The EU Terrorist List is not country-specific and includes persons linked to the Basque ETA and organisations such as the Continuity Irish Republican Army and Hamas-Izz al-Din al-Qassem, which is the military wing of the Palestinian Hamas Organisation.

Separate from the EU Terrorist List, the EU has also implemented the UN Security Council resolutions targeting ISIL/Da'esh and Al-Qaida.<sup>16</sup> Sanctions under this regime also include an asset freeze and a prohibition on making any funds or economic resources available to designated persons, as well as a prohibition on exporting military goods and technology to listed individuals and entities, and a travel ban. As of 20 September 2016, the EU can also apply restrictive measures autonomously to persons and entities associated with ISIL/Da'esh and Al-Qaida.

### **Chemical weapons sanctions regime**

Since October 2018, the EU has had a sanction regime in place to address the use and proliferation of chemical weapons.<sup>17</sup> This was prompted by the Novichok poisoning of Sergei Skripal, a Russian military officer working for the UK's intelligence services, and his daughter Yulia Skripal in Salisbury (UK) in March 2018, and the chemical weapons attacks in Syria.

Unusually for EU sanctions regimes, the Chemical Weapons Sanctions Regime does not target any named country. Rather, the broader objective is to support the prohibition laid down by the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction against the use of chemical weapons.

Under the Chemical Weapons Sanctions Regime, the EU can impose sanctions on persons and entities involved in the development and use of chemical weapons. The sanctions under the EU's Chemical Weapons Sanctions regime consist of EU-wide travel restrictions, where it concerns individuals, and an asset freeze against specifically listed persons.<sup>18</sup> Under the asset freeze, it is also prohibited for EU persons and entities to make funds and economic resources available to the listed persons, directly or indirectly.<sup>19</sup>

At present, the number of designations under the Chemical Weapons Sanctions Regime remains fairly limited. Designations include officials of the Russian military intelligence

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15 Council Regulation (EC) No. 2580/2001, Article 2.

16 Council Regulation (EC) No. 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with the ISIL (Da'esh) and Al-Qaida organisations, as amended; Council Regulation (EU) 2016/1686 of 20 September 2016 imposing additional restrictive measures directed against ISIL (Da'esh) and Al-Qaida and natural and legal persons, entities or bodies associated with them, as amended; and Council Decision (CFSP) 2016/1693 of 20 September 2016 concerning restrictive measures against ISIL (Da'esh) and Al-Qaida and persons, groups, undertakings and entities associated with them and repealing Common Position 2002/402/CFSP, as amended. In particular, the EU has implemented UN Security Council resolutions 1267 (1999), 1989 (2011) and 2253 (2015).

17 Council Decision (CFSP) 2018/1544 of 15 October 2018 concerning restrictive measures against the proliferation and use of chemical weapons, and Council Regulation (EU) 2018/1542 of 15 October 2018 concerning restrictive measures against the proliferation and use of chemical weapons, as amended.

18 Council Regulation (EU) 2018/1542, Article 2(1) and Council Decision (CFSP) 2018/1544, Articles 2 and 3(1).

19 Council Regulation (EU) 2018/1542, Article 2(2).

service, GRU, who have been deemed linked to the Novichok poisoning, and the Scientific Studies and Research Centre (SSRC) and related persons (i.e., the Syrian entity deemed responsible for the development and production of chemical weapons, as well as Syrian officials directly involved in the SSRC's activities).

### **Sanctions regime targeting cyberattacks**

Another recent sanctions regime, established in May 2019, targets malicious cyber activities from outside the EU that threaten the Union or its Member States.<sup>20</sup> According to media reports, these sanctions were advocated by the UK and the Netherlands after an investigation uncovered cyberattacks reportedly originating from GRU that targeted the Organisation for the Prohibition of Chemical Weapons in The Hague.

Similar to the situation under the EU's Chemical Weapons Sanctions Regime, the EU sanctions targeting malicious cyber activities are country neutral and do not mention any specific third country. These sanctions target actual and attempted cyberattacks having a (potentially) 'significant effect', in light of the scope and scale of disruption, the number of persons affected, the number Member States concerned, the extent of economic loss or economic gain to the perpetrator, the extent of any data breaches and the loss of commercially sensitive data.<sup>21</sup> In addition, cyberattacks must represent an 'external threat' to the EU and the Member States, meaning they must have originated outside the EU or used infrastructure outside the EU, or the persons instrumental to the cyberattack's operations must be established abroad.<sup>22</sup> Importantly, these sanctions also cover malicious cyber activities towards third states and international organisations.<sup>23</sup>

These sanctions also include EU-wide travel restrictions and an asset freeze. In July 2020, the EU carried out a first round of designations relating to six individuals and three entities held responsible for being involved in various cyberattacks, including the attempted cyberattack against the Organisation for the Prohibition of Chemical Weapons and the cyberattacks publicly known as 'WannaCry', 'NotPetya', and 'Operation Cloud Hopper'.<sup>24</sup>

### **Human rights sanctions regime**

Most recently, after long-standing internal discussions, the EU finally established a sanctions regime to address serious human rights violations and abuses worldwide – regardless of where they take place – by targeting individuals, entities and bodies concerned (including state and

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20 Council Decision (CFSP) 2019/797 of 17 May 2019 concerning restrictive measures against cyber-attacks threatening the Union or its Member States, and Council Regulation (EU) 2019/796 of 17 May 2019 concerning restrictive measures against cyber-attacks threatening the Union or its Member States.

21 Council Regulation (EU) 2019/796, Article 2 and Council Decision (CFSP) 2019/797, Article 3.

22 Council Regulation (EU) 2019/796, Article 1.

23 *id.*

24 Council Implementing Regulation (EU) 2020/1125 of 30 July 2020 implementing Regulation (EU) 2019/796 concerning restrictive measures against cyberattacks threatening the Union or its Member States and Council Decision (CFSP) 2020/1127 of 30 July 2020 amending Decision (CFSP) 2019/797 concerning restrictive measures against cyberattacks threatening the Union or its Member States.

non-state actors) with asset freezes and travel bans.<sup>25</sup> The EU's global human rights sanctions regime follows the introduction of similar frameworks in the United States, the United Kingdom and Canada.

The EU's regime applies to acts such as genocide, crimes against humanity and other serious human rights violations or abuses (including torture, slavery, extrajudicial killings, arbitrary arrests or detentions, but not corruption). Other human rights violations or abuses can also fall under the scope of the sanctions framework, where those violations or abuses are widespread, systematic or are otherwise of serious concern in respect of the objectives of the EU's CFSP.<sup>26</sup>

Following adoption of the EU's new global human rights sanctions regime in December 2020, the EU acted quickly to establish designations under it. In March 2021, the EU made use for the first time of the framework and adopted coordinated sanctions together with the United States in response to the poisoning and imprisonment of Russian opposition politician Aleksey Navalny. Specifically, the EU imposed an asset freeze and travel ban on four Russian government officials for their involvement in the arrest, prosecution and sentencing of Navalny.<sup>27</sup> Shortly after, the EU also designated 11 individuals and four entities in relation to deemed human rights violations in China, North Korea, Libya, Eritrea, South Sudan and Chechnya.<sup>28</sup>

## **Types of sanctions**

The EU has absolute discretion in terms of the sanctions it imposes, but applies a more targeted approach so that the sanctions have maximum effect on those whose behaviour the EU aims to influence and to reduce any adverse humanitarian effects or unintended consequences for other persons.<sup>29</sup> For this reason, measures such as asset freezes, visa bans and arms embargoes are frequently imposed.

### **Asset freeze**

The most widely used type of EU sanction is the asset freeze. The EU maintains an asset freeze on hundreds of persons and entities. In general, these are persons directly involved in activity being addressed by the sanctions (for example, Russian companies deemed to have supported the separation of Crimea and Sevastopol from Ukraine, Venezuelan politicians held responsible for undermining the democracy and rule of law in Venezuela, or Iranian officials working in support of deemed human rights violations). There are separate asset freeze

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25 Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses, and Council Decision (CFSP) 2020/1999 of 7 December 2020 concerning restrictive measures against serious human rights violations.

26 Council Regulation (EU) 2020/1998, Article 2.

27 Council Implementing Regulation (EU) 2021/371 of 2 March 2021 implementing Regulation (EU) 2020/1998 concerning restrictive measures against serious human rights violations and abuses

28 Council Implementing Regulation (EU) 2021/478 of 22 March 2021 implementing Regulation (EU) 2020/1998 concerning restrictive measures against serious human rights violations and abuses.

29 Council Basic Principles on the Use of Restrictive Measures (Sanctions) of 7 June 2004 (10198/1/04).

regulations for each sanctions programme, but the EU keeps a consolidated list of persons, groups and entities subject to any EU asset freeze.<sup>30</sup>

An EU asset freeze has two key elements. First, all funds and economic resources of an EU listed party that belong to, are owned, held or controlled by that party are required to be frozen.<sup>31</sup> Second, it is prohibited to make funds or economic resources available, directly or indirectly, to, or for the benefit of, listed parties.

'Funds' broadly covers financial assets and benefits of every kind (including cash, cheques, securities and debt instruments such as stocks and shares, bonds, dividends, letters of credit, etc.).<sup>32</sup> 'Economic resources' is a broad concept that covers essentially any asset that can be used to obtain funds, goods or services, and includes, for example, the supply of goods (regardless of any price charged) if these can in turn be used by the recipient to generate income.<sup>33</sup> 'Indirectly' making economic resources available to a listed party could involve, for example, making payments or offering goods or services to a third party affiliated with the listed party (e.g., through ownership or control).<sup>34</sup>

Under EU guidance,<sup>35</sup> 'ownership' is triggered when a party holds more than 50 per cent of proprietary rights of an entity or has a majority interest (but without ownership aggregation, i.e., the shares of different listed owners are not considered together, as would be the case, for example, under US sanctions). The test to assess whether a legal person or entity is 'controlled' by another person or entity refers to factual elements set out in EU guidance,<sup>36</sup> such as voting rights control, power to appoint company leadership, among other things, so that determination requires a case-by-case assessment. 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 in a particular case.

Even if parties are asset freeze targets, there are certain exemptions to the EU asset freeze restrictions. Commonly, EU sanctions regulations provide licensing grounds on the basis of which the competent authorities of EU Member States may authorise payments in relation

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30 For the consolidated list, please refer to [https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/sanctions\\_en](https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/sanctions_en).

31 Commission Opinion on the application of financial sanctions imposed by means of Council Regulation (EU) No. 269/2014 of 19 June 2020 (C(2020) 4117 final) clarifies that funds and economic resources of a non-listed party controlled by an EU listed party also must be frozen unless it is demonstrated that the relevant assets are in fact not controlled by the EU listed party (e.g., certain safeguards preventing the EU listed party from access).

32 See, for example, Article 1(g) of Council Regulation 269/2014 for a full definition of 'funds'.

33 For example, Article 1(d) of Council Regulation 269/2014 defines 'economic resources' as 'assets of every kind, whether tangible or intangible, movable or immovable, which are not funds but may be used to obtain funds, goods or services'. Note that Commission Opinion on the application of financial sanctions imposed by means of Council Regulation (EU) No. 269/2014 of 19 June 2020 (C(2020) 4117 final) confirms that labour and services also can be considered as economic resources to the extent that the labour and services can be used, directly or indirectly, by a listed party to obtain funds, goods or services.

34 If a listed party's ownership or control is established, then any funds or economic resources made available to relevant non-listed parties will in principle be considered made available to the listed party – unless it can be established, case by case using certain criteria, that they will not be used by or be for the benefit of the listed party. See Restrictive Measures (Sanctions) – Update of the EU Best Practices for the effective implementation of restrictive measures of 4 May 2018 (8519/18), ¶ 66.

35 Restrictive Measures (Sanctions) – Update of the EU Best Practices for the effective implementation of restrictive measures of 4 May 2018 (8519/18).

36 *id.*

to basic needs, legal fees and disbursements or service charges for routine holding or maintenance of frozen funds or economic resources, or humanitarian purposes (e.g., in relation to Syria). These exemptions are often accompanied by strict conditions, which the national competent authorities in charge of assessing the requests need to verify.

For example, under the EU asset freeze relating to the annexation of Crimea,<sup>37</sup> Member States may authorise payments to listed persons that are due under a contract or agreement that was concluded prior to the listing,<sup>38</sup> or to satisfy an arbitral award 'before' the listing or a judgment of a court in an EU Member State 'either before or after' the listing.<sup>39</sup> Further, any payments owed to listed persons (e.g., under prior contracts or pursuant to judicial, administrative or arbitral decisions) must be paid into a frozen account.<sup>40</sup>

### **Travel or visa ban**

Individuals who are subject to an asset freeze are typically also subject to a travel or visa ban. Under a travel ban, third-country nationals are banned from admission into the EU. Consequently, EU Member States need to take all the necessary measures to prevent the entry into, or transit through, their territories of listed persons, including by refusing to grant a visa. However, EU Member States are not obliged to refuse their own nationals.

In addition, exemptions to the travel or visa ban can apply on humanitarian and other grounds or to comply with obligations under international law. For example, the visa or travel ban will generally not apply to individuals when making official institutional visits to an international intergovernmental organisation or an international conference under the auspices of the UN.

### **Dual-use items restrictions and arms embargo**

EU sanctions also often restrict the supply of dual-use and military items. For example, sanctions against Russia prohibit the sale, supply, transfer or export, directly or indirectly, of dual-use goods and technology (as defined in separate EU legislation on dual-use export controls) to military end users or for military use in Russia and certain specific Russian defence companies.<sup>41</sup> In addition, any direct or indirect sale, supply, transfer or export of arms and related material of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment to Russia is prohibited.<sup>42</sup>

Typically, restrictions in relation to dual-use items and arms also cover related technical assistance, brokering services, financing and financial assistance. However, certain exceptions can be made, for example, for exports and services involving execution of an obligation

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37 Council Regulation (EU) No. 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, as amended.

38 *id.*, at Article 6.

39 *id.*, at Article 5.

40 *id.*, at Article 7.

41 Council Regulation (EU) No. 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, as amended, at Article 2.

42 Council Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, as amended, at Article 2.

arising from a contract or an agreement concluded before the date of imposition of sanctions, or ancillary contracts necessary for the execution of a contract or agreement.

The restrictions must be respected whenever there is EU jurisdiction, as discussed above, including by nationals of EU Member States and any EU person transferring or exporting the equipment from an EU Member State or using a vessel or aircraft with an EU flag.<sup>43</sup>

As discussed above, the EU may also, through a Council Decision, impose a general ban on all direct or indirect imports into or exports from a sanctioned country by EU persons of all arms and related material specified on the EU's Common Military List, which will be binding on all EU Member States. The related Council Regulation will then typically prohibit technical assistance, brokering services, financing and financial assistance related to such arms and related material.

### Sectoral trade and investment restrictions

EU sanctions frequently target specific sectors or industries in certain countries.

A well-known example of sectoral sanctions are those imposed in 2014, and that are still in effect, against Russia.<sup>44</sup> These sanctions restrict access to the EU's capital markets for certain Russian state-owned banks and companies active in the energy and defence sectors, as well as their non-EU subsidiaries and any other entity (EU or non-EU) acting on their behalf or at their direction. EU subsidiaries of listed Russian entities would only be covered if they are acting on behalf of, or as directed by, those listed entities.<sup>45</sup> More specifically, EU sanctions prohibit dealings, directly or indirectly, with certain new transferable securities and money market instruments issued by these targeted entities, and making, or being part of any arrangement to make, certain new loans or credit to these entities or to materially amend existing loans or credit. The EU also restricts the supply, directly or indirectly, of certain items and technology<sup>46</sup> (including equipment typically used for oil or gas pipelines, but also certain pumps, machinery parts and vessels with wider use) and imposes a complete prohibition if such items are ultimately destined for certain prohibited oil projects (i.e., deep water, Arctic offshore or shale), and prohibits certain 'associated' services relating to such projects (e.g., drilling).<sup>47</sup>

Another example of trade restrictions are the sanctions in relation to Crimea and Sevastopol,<sup>48</sup> which impose a general ban on imports into the EU from Crimea and

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43 There have been two recent examples of enforcement of arms embargoes against transport companies in the Netherlands, when the military equipment both originated and was destined to countries outside the EU but transited through Dutch ports and airports. One concerned a logistics company (*Rechtbank Noord-Holland*, nr. 15/994176-17, 24 April 2017) and the other an airline (*Rechtbank Noord-Holland*, nr. 15/994178-17, 24 April 2017). In both cases, the defendants were convicted of wilfully transiting goods on the EU Military List without a licence.

44 Council Regulation (EU) No. 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, as amended.

45 *id.*, at Article 5.

46 See *id.*, at Annex II for a complete overview of the items subject to restrictions.

47 *id.*, at Article 3.

48 Council Regulation (EU) No. 692/2014 of 23 June 2014 concerning restrictive measures in response to the illegal annexation of Crimea and Sevastopol, as amended.

Sevastopol.<sup>49</sup> The sanctions equally ban most investments by European persons relating to real estate located or entities incorporated in Crimea or Sevastopol.<sup>50</sup> In addition, there are restrictions in place regarding specific equipment used in four key sectors in that region (i.e., transport, telecommunications, energy, and the prospection, exploration and production of oil, gas and mineral resources), and in respect of any infrastructure in relation to these sectors.<sup>51</sup> The EU also prohibits the provision of tourism services relating to Crimea or Sevastopol.<sup>52</sup>

## **EU sanctions-related concepts**

Two other key provisions that are incorporated into all EU sanctions regimes involve an anti-circumvention clause and a diligence defence clause.

### **Anti-circumvention clause**

Generally, to complement the main prohibitions (such as asset freeze restrictions), EU sanctions also prohibit the participation, ‘knowingly and intentionally, in activities the object or effect of which is to circumvent’ the main sanctions. This non-circumvention rule can extend the scope of application of EU sanctions to conduct that formally lies outside the stated prohibitions, but that undermines the regime’s objectives. For example, an EU company that ‘knowingly and intentionally’ chooses to outsource certain activities to a non-EU subsidiary for the sole reason that the EU company itself could not perform such activities under EU sanctions would be subject to scrutiny under the non-circumvention rule.

### **Diligence defence clause**

Failure to comply with EU sanctions can expose companies and individuals to high fines and even imprisonment. However, EU sanctions expressly exclude liability if a person ‘did not know, and had no reasonable cause to suspect, that their actions would infringe’ sanctions. To be able to rely on this ‘diligence defence’, parties to contemplated transactions and activities are expected to conduct reasonable due diligence based on all readily available information to ensure no activities that could violate sanctions might take place. In particular, as part of their due diligence, European companies must carefully consider and screen the counterparties and their ultimate beneficial owners against applicable sanctions lists (such as the EU asset freeze list) to establish that they are not in any way sanctioned, and assess the goods or services involved. In addition, parties should include appropriate contractual protection in their agreements with third parties (such as appropriate representations, warranties and indemnities).

## **When sanctions regimes collide: EU Blocking Regulation**

Historically, the EU and US have broadly aligned their sanctions regimes, targeting similar third countries, and individuals and entities in third countries, in response to certain

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49 *id.*, at Article 2.

50 *id.*, at Article 2a.

51 *id.*, at Articles 2b and 2c.

52 *id.*, at Article 2d.



geopolitical events. The EU has adopted most of its autonomous sanctions in tandem with similar measures by the US (and other allied countries, such as Canada and Switzerland).

Most recently under the former Trump Administration, however, there was increasing divergence on sanctions policies between the EU and the US, particularly in respect of Iran and Russia. Most significantly, in relation to Iran, in 2018 the US withdrew from the Joint Comprehensive Plan of Action (JCPOA) (i.e., the Iran nuclear deal, under which the US and EU had agreed to roll back their nuclear-related sanctions programmes in exchange for the implementation by Iran of restrictions on its nuclear activity). Subsequently, the US reimposed certain sanctions against Iran, including sanctions targeting activities of non-US persons with no connection to the US. These 'secondary' sanctions targeting non-US persons could have a detrimental effect on European businesses that engaged in activities with Iran in compliance with EU sanctions when sanctions were partially lifted pursuant to the JCPOA in 2016.

To protect these European businesses, the EU has amended its Blocking Regulation, which was initially put in place in the 1990s in the context of the extraterritorial application of US sanctions against Cuba.<sup>53</sup> Under the revised EU Blocking Regulation, individuals and entities connected to the EU (e.g., Member State nationals who are EU residents, entities incorporated within the EU, and individuals acting in a professional capacity within the EU) are prohibited from complying, 'actively or by deliberate omission', with certain US sanctions targeting Iran. According to the Blocking Regulation, any EU person shall be entitled to recover any damages, including legal costs, in respect of harm caused as a result of compliance with US sanctions, from the person causing the loss.<sup>54</sup> In theory, EU operators can request an authorisation from the European Commission to comply with the listed extraterritorial legislation, if not doing so would cause serious harm to their interests or the interests of the EU.<sup>55</sup> However, these types of authorisations are exceptional and, according to the European Commission, 'not every nuisance or damage suffered by EU operators will entitle them to obtain an authorisation'.<sup>56</sup>

Despite guidance being provided,<sup>57</sup> there remains considerable uncertainty as to the scope and application of the Blocking Regulation. To the extent that it is invoked in litigation before the courts of Member States, then the Court of Justice of the EU may be called upon to interpret the Regulation's provisions. In March 2020, a German national court (the Hanseatic Higher Regional Court (11th Civil Chamber)) lodged a first request to the EU Court for a preliminary ruling on the interpretation of the Blocking Regulation, which is still pending with a judgment expected some time in 2021.<sup>58</sup> The case relates to a dispute between Bank Melli Iran and Telekom Deutschland following the termination by Telekom Deutschland of

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53 Council Regulation (EC) No. 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country and actions based thereon or resulting therefrom, as amended [Blocking Regulation].

54 Blocking Regulation, at Article 6.

55 Blocking Regulation, at Article 5(2).

56 See Q&A 16 of Guidance Note – Questions and Answers: adoption of update of the Blocking Statute of 7 August 2018 (C/2018/5344).

57 Guidance Note – Questions and Answers: adoption of update of the Blocking Statute of 7 August 2018 (C/2018/5344).

58 See request for a preliminary ruling of 5 March 2020, *Bank Melli Iran v. Telekom Deutschland*, Case C-124/20.

Bank Melli Iran's telephone and internet access in November 2018. In May 2021, Advocate General Hogan issued his (non-binding) opinion in this case, applying a strict interpretation of the Blocking Regulation.<sup>59</sup> Most significantly, the Advocate General considered that an EU undertaking seeking to terminate a contractual relationship with an Iranian entity subject to US sanctions must demonstrate to the satisfaction of the national court that it did not do so by reason of its desire to comply with those sanctions.<sup>60</sup> A final judgment is expected in the second half of 2021.

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<sup>59</sup> See Opinion of AG Hogan of 12 May 2021 in *Bank Melli Iran, Aktiengesellschaft nach iranischem Recht v Telekom Deutschland GmbH*, Case C-124/20, ECLI:EU:C:2021:386.

<sup>60</sup> *ibid*, para. 89.

## Appendix 2

### About the Authors

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Genevra Forwood, partner at White & Case, advises and litigates on a broad range of areas of EU law, across a variety of industrial sectors ranging from energy and manufacturing to pharmaceutical and chemicals.

One area of focus is the EU's economic sanctions against third countries. Genevra co-leads the firm's EU and UK sanctions teams, and has handled hundreds of queries on this topic, spanning advisory and transactional work through to investigations and contentious matters.

Genevra also advises on other aspects of EU regulatory compliance, including in the areas of public procurement, environmental laws and consumer protection. She assists clients with their own compliance, and has drafted a number of complaints to the European Commission in respect of failures of Member States to comply with their obligations under EU law.

Genevra has pleaded a number of high-profile cases before the EU courts, in particular in the area of antitrust and state aid rules. She frequently advises on the rules and procedures governing the grant of state aid, and has acted for both beneficiaries and complainants in proceedings before the European Commission and EU courts. She is currently involved in cutting-edge cases on the interface between EU law and international investment protection treaties.

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Sara Nordin, counsel at White & Case, is part of the EU specialist export controls and sanctions team, which regularly advises multinational institutions and corporations on a range of matters relating to relevant EU law and policy and Member State enforcement for trade restrictions towards various third countries.

Sara has worked on international trade and customs matters in both the United States and the European Union, and specialises in advising multinational companies, trade associations

and sovereign governments on related issues. From her work in Hong Kong, Sara has developed a focus on the EU's trade and investment relations (including free trade agreements) with various Asian countries.

With respect to trade and customs law, Sara has expertise relating to a range of issues concerning anti-dumping and countervailing duty, classification, origin, valuation, marking, entry procedures, preferential trade regimes and security standards. She has advised clients supplying goods and services on the EU and US markets on aspects of environmental regulations, regulatory compliance, product safety standards (including regulation of genetically modified organisms in the EU and its Member States) and intellectual property regimes (including geographical indications). Sara provides regular advice on trade, customs and institutional matters in relation to existing EU and US free trade agreements, and free trade agreements under EU negotiation.

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Matthias Vangenechten is an associate at White & Case's EU law practice in Brussels and advises clients on a broad range of EU trade law matters, with a particular focus on economic sanctions, export controls and other regulatory issues.

He provides clients with day-to-day transactional advice and regularly assists them in the development and implementation of effective compliance programmes. His experience covers a wide variety of industries, including aviation, consumer products, infrastructure, financial services, maritime and shipping, and oil and gas.

Prior to joining White & Case, Matthias worked for more than five years in the Brussels office of another international law firm, where he gained substantial experience in EU trade law. He has also worked as an international consultant for the United Nations Economic Commission for Africa in Ethiopia.

Matthias holds a master of law degree from the Catholic University of Leuven. During his master's degree programme, he was part of an international exchange programme at the National University of Singapore. Matthias also obtained an advanced master in international relations and diplomacy from Antwerp University.

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Fabienne Vermeeren, Regional Director Europe – International Trade Services, specialises in advising multinational corporations, trade associations and sovereign clients on EU trade and customs matters, including with respect to Brexit.

Fabienne frequently works on customs law issues including classification, valuation and origin matters, as well as the EU's successive generalised scheme of preferences regimes and free trade agreements. She actively monitors EU customs developments, including with respect to the Union Customs Code and related rules, procedures and guidance.

She has been involved in drafting briefing papers for Member States and the European Commission on the classification of various consumer electronic products under discussion in the EU Nomenclature Committee, and on customs valuation and origin matters.

Fabienne also works on EU export control matters and sanctions regimes and their enforcement and licence application procedures at Member State level. She is deeply involved in advising and training multinational clients to ensure compliance in these matters.

Fabienne has also worked on anti-dumping cases in the European Union, in particular on the 'Community interest' and injury aspects of numerous agrochemicals cases, and the customs aspects of anti-dumping cases in various product sectors (e.g., classification and origin issues).

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