EU human rights sanctions
Towards a European Magnitsky Act

SUMMARY
Sanctions are a key part of the EU’s human rights toolbox. The EU adopts restrictive measures – mostly in the form of travel bans and asset freezes – against individuals and organisations responsible for some of the worst human rights violations.

Until now, the EU has mostly adopted sanctions targeted at individual countries. Responding to violations from countries not already covered by EU sanctions means adopting a completely new framework for each country. However, the EU is now shifting to a more thematic approach, under which sanctions focus on a particular type of problem rather than a country. For example, the EU already has sanctions on chemical weapons and cyber-attacks that can be flexibly applied to offenders from any country in the world, and it has now added thematic human rights sanctions.

The United States’ 2016 Global Magnitsky Act, named after Sergey Magnitsky, a Russian whistleblower who died in jail after exposing corruption by high-level officials, gives some idea of how future EU human rights sanctions will work. Under the act, the US government has adopted sanctions against over 100 human rights violators from a wide range of countries.

The proposal for the EU’s new sanctions regime was tabled by the Netherlands in 2018. The necessary legislation was adopted by the Council of the EU on 7 December 2020, in time for UN Human Rights Day on 10 December 2020.

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EU human rights sanctions: Current approach

Upholding ‘the universality and indivisibility of human rights and fundamental freedoms [and] respect for human dignity’ is one of the core principles of the EU’s external policy, enshrined in the Treaty on European Union. The EU’s human rights toolbox includes incentives (e.g. preferential access to EU markets under the generalised scheme of preferences), behind-the-scenes human rights dialogues with third country governments to address concerns, and support for human rights defenders. When such measures fail, the EU can also adopt sanctions against perpetrators of human rights abuses.

In general, EU sanctions fall into two categories: those that apply UN decisions (e.g. Yemen, Mali), and, in cases where there is no consensus at international level, the EU’s own autonomous measures (e.g. Myanmar, Belarus). Whereas UN sanctions are mostly concerned with security issues such as armed conflict and the proliferation of weapons of mass destruction, human rights have become the dominant theme in EU autonomous sanctions (see map, Figure 1). The most common measures are visa bans and asset freezes against human rights offenders, who are also barred from financial transactions with EU companies and individuals. These restrictions are often accompanied by embargoes on EU sales of weapons and equipment used for internal repression to the country concerned. The individuals targeted include government ministers, senior military, police and intelligence officers, prosecutors and election officials, and non-state actors such as rebel militia.

As well as imposing sanctions, the EU can also respond to attacks on human rights and democracy by suspending development aid. Under Article 96 of its Cotonou Agreement with African, Caribbean and Pacific (ACP) countries, the EU first opens consultations with the country concerned. If consultations fail to lead to a satisfactory outcome, the EU takes appropriate measures. Usually these involve the EU withholding funding for programmes and projects run in cooperation with the country’s government; on the other hand, EU funding for NGO-led projects is exempted, in order to limit the humanitarian effects. Since 2000, Article 96 has been invoked 15 times, most recently against Burundi in 2016.

The Cotonou Agreement is due to expire at the end of 2020. Whatever the provisions of the three new agreements that are to take its place (one each for Africa, the Caribbean and the Pacific; still to be finalised), EU development aid will almost certainly still be tied to respect for human rights. Some conditions are set out in the draft regulation establishing the Neighbourhood, Development and International Cooperation Instrument, which will fund EU development aid during the 2021-2027 period. This includes both carrots and sticks, with additional aid for the countries that perform best (in terms of ‘progress towards democracy, human rights, rule of law and other areas); reduced aid in the event of immediate threats to human rights and democracy; and commitment to the latter principles as a prerequisite for EU budget support, i.e. EU development aid paid directly to partner country governments.

The EU’s generalised scheme of preferences, which reduces or eliminates tariffs on developing country exports, is also conditional on human rights, and can be suspended in the event of serious and systematic abuses. The same applies to EU free trade agreements, most of which include a human rights clause. However, the EU only rarely withdraws trading privileges on account of human rights concerns. The only country currently concerned is Cambodia, criticised by the EU for its ban on the main opposition party, together with other abuses such as restrictions on labour rights and land grabbing; in August 2020, Cambodia lost duty-free access to EU markets under the ‘Everything but Arms’ scheme for some of its exports.

From geographical to thematic sanctions

In the past, EU sanctions programmes were always geographically targeted at individual countries (at present, over 30 of them). The first step towards a thematic approach was taken in 2001 with the adoption of EU and UN counter-terrorism sanctions, which have an unlimited geographical scope.
These were followed by EU sanctions penalising the use of chemical weapons sanctions in 2018 and cyber-attacks in 2019. US sanctions follow a similar trend.

Thematic sanctions have several advantages over geographical ones. Unfortunately, human rights abuses occur in many countries besides the 14 currently targeted. However, adding new countries is a cumbersome procedure requiring the creation of a complete new legal framework in each case; usually this only happens in response to a major crisis, such as an armed conflict or democratic backsliding in the country concerned. On the other hand, cases that concern individuals rather than the country as a whole (such as the death of Sergey Magnitsky) rarely lead to sanctions, however serious they are. Thematic human rights sanctions are a much more flexible option, requiring only a Council decision adding new names to the list rather than the creation of a complete new sanctions programme for each country.

Geographical sanctions carry a high geopolitical cost due to their damaging effect on bilateral relations. This may explain why the EU has mostly held back from sanctions against allies and economic partners. Critics accuse the EU of double standards: why are there human rights sanctions against Iran and Venezuela, but not Saudi Arabia and Bahrain, even though (according to US-based NGO Freedom House) political rights are even less well respected in the latter two countries?

The United States’ experience suggests that thematic sanctions offer a way out of this dilemma. The Global Magnitsky Act (see below) targets not only Kremlin functionaries and Myanmar generals, but also former Gambian president Yahya Jammeh, a Serbian arms dealer, and Belgian and Israeli businessmen implicated in corrupt mining deals. These measures do not appear to have affected Washington’s relations with most of the countries whose nationals are included on the list – for example, Saudi Arabia, which has no fewer than 17 persons facing sanctions for their role in the killing of Jamal Khashoggi.

Of course, not all countries welcome the prospect of additional EU human rights sanctions. For example, Russia is not currently targeted by EU sanctions on human rights grounds; nearly all of the EU’s restrictive measures against Moscow are to do with the latter’s violation of Ukrainian territorial integrity. In October 2019, Russia’s foreign minister Sergey Lavrov argued that the EU’s proposed human rights sanctions violated the principles of the UN Charter, while Russian Permanent Representative to the EU Vladimir Chizhov described them as ‘another short-sighted step’ damaging the already fraught relations between the two sides. Nevertheless, a global EU list of human rights violators that includes some Russian names will probably be less damaging than a separate human rights sanctions programme targeted only at Russia.

By removing geographical constraints, thematic sanctions could enable the EU to pursue human rights violations more actively and consistently. A further advantage is that such sanctions could be more easily coordinated with similar measures adopted by partners such as the US, Canada and the UK (see following sections), thus giving them an even greater impact.

**United States' Magnitsky Acts**

Sergei Magnitsky was a Russian tax expert who claimed to have uncovered massive fraud involving corrupt tax officials and criminal organisations. In 2008, Magnitsky himself was accused of tax evasion and arrested; he died in prison one year later, after being severely beaten and denied access to medical treatment. Ironically, Magnitsky and British business associate Bill Browder were the only persons ever convicted in the case; those responsible for his death and the alleged tax fraud continue to enjoy impunity.
Figure 1 – Countries that have EU/UN sanctions against them for human rights violations

Situation as of 1 November 2020; countries for which EU sanctions programmes list human rights violations as the main reason for restrictive measures.
Questions about Magnitsky were raised by a 2016 documentary directed by Russian filmmaker Andrey Nekrasov. The film argues that Magnitsky’s detention was not politically motivated, as both he and Browder were implicated in serious tax evasion. Its conclusions were rejected by Magnitsky’s family and Browder. Owing to the controversial nature of the film, its April 2016 premiere in the European Parliament was cancelled. However, the fact that Magnitsky’s case involved serious human rights abuses is not contested.

In 2012, following international outrage and tireless campaigning by Bill Browder, the United States adopted the Magnitsky Act, envisaging sanctions (asset freezes, visa bans and financial restrictions) against persons responsible for Magnitsky’s death and similar gross human rights abuses in Russia against persons who expose corruption and human rights activists. It currently targets nearly 50 Russian officials. In 2016, a Global Magnitsky Act followed, extending the scope of sanctions from Russia to the whole world. It has since been applied to over 100 individuals from around a dozen countries.

The road to dedicated EU human rights sanctions

Although some EU Member States already have Magnitsky-style sanctions at national level, such measures are more effective when adopted at European level. In April 2018, the Dutch Parliament adopted a motion requiring the government to table a proposal for an EU-level Magnitsky Act. Acting on this, in November 2018 the Netherlands floated the idea at a conference of EU, US and Canadian diplomats, and one month later (on the 70th anniversary of the UN’s Universal Declaration of Human Rights) at the Council of the EU. The Parliamentary Assembly of the Council of Europe and the European Parliament (see below) both voiced their support for EU-level human rights sanctions.

Despite informal behind-the-scenes discussions, the Dutch initiative did not start to make headway until one year later, when newly appointed EU High Representative Josep Borrell announced that EU foreign ministers had finally agreed to start preparations. In March 2020, the European Commission and High Representative’s joint EU action plan on human rights and democracy included a horizontal sanctions regime to tackle human rights abuses worldwide.

In accordance with Chapter 2 of Title V of the Treaty on European Union, and Article 215 of the Treaty on the Functioning of the European Union, any new EU sanctions require two pieces of legislation:

- a Council decision, adopted by unanimity, as part of the common foreign and security policy; and
- a Council regulation, based on a joint proposal from the European Commission and the High Representative, to be adopted by a qualified majority, covering economic and financial aspects that are Community competences and are necessary to give effect to the decision.

Following Josep Borrell’s call to have the sanctions in place by UN Human Rights Day (10 December), EU foreign ministers adopted the decision and the regulation on 7 December 2020. No names have been added to the sanctions list yet.

Challenges and controversial issues

Making human rights sanctions legally watertight

Although there is growing consensus as to the added value of thematic human rights sanctions, there are several controversies surrounding the new measures. Given that sanctions must respect the standards that they seek to uphold, targeted persons and organisations must have the right to
know the reasons for their designation, and to challenge them in court. Indeed, such challenges have become commonplace: in 2019, there were 72 cases on restrictive measures pending at the European Court of Justice, 5% of the Court’s total caseload.

When EU sanctions are frequently overturned in court, this undermines their credibility. In 2016, the Council of the EU’s Legal Service claimed that in the previous two years, the EU had gone from a situation in which legal challenges were more likely to succeed than not, to one in which only one-third of them were upheld. It attributed this improvement to more careful definition of the criteria for inclusion on sanctions lists and higher standards of factual evidence. However, more recent figures are less encouraging: according to these, as of mid-2019 the EU had lost half of the 41 cases brought against its Ukraine-related sanctions. Thematic human rights sanctions therefore need to be implemented in such a way as to make them resilient to legal challenges.

Human rights abuses and corruption

Endemic graft is often linked to serious human rights abuses, as in the case of Sergey Magnitsky, who (according to Bill Browder) was tortured and killed for his part in revealing high-level corruption. It can also be argued that, even in the absence of such abuses, corruption itself threatens human rights, given that it erodes the rule of law, and diverts government resources that could otherwise have been used to meet the basic needs of a country’s population. The link between these two issues is recognised by the US Global Magnitsky Act, which provides for sanctions against corrupt officials, whether or not they are not directly responsible for gross human rights abuses. The European Parliament (for example, in 2019) advocates a similar approach in EU sanctions.

Mechanism for identifying human rights violations

Sanctions designation is an intergovernmental process that occurs behind closed doors, with no civil society involvement. There have been many calls to change this. For example, in October 2020 several MEPs alongside Dutch and German parliamentarians argued that the EU’s new human rights sanctions should give NGOs the possibility to nominate human rights offenders. One possible mechanism would involve civil society organisations, individuals and governments submitting violations for consideration by a panel of experts, which in turn would select the most pressing cases for designation by the Council.

Qualified-majority voting versus unanimity

Like the rest of the common foreign and security policy (CFSP), EU sanctions require unanimous agreement among the Member States. This can often be difficult to achieve. For example, in September 2020 Cypriot objections delayed EU sanctions against Belarus for several weeks. To reduce the risk of deadlock, both Commission President Ursula von der Leyen and her predecessor Jean-Claude Juncker have called on the Member States to move to qualified-majority voting on sanctions.

The possibility for such a change is envisaged by Article 31(3) of the Treaty on European Union, the ‘passerelle clause’, under which the European Council (which comprises EU Heads of State or Government) can decide to apply qualified-majority voting to common foreign and security policy matters that do not have military or defence implications. So far this clause, which Jean-Claude Juncker described as a ‘lost treasure’, has never been used; EU leaders were invited to consider it at their May 2019 meeting, but it did not appear in the conclusions.

Making sanctions work

Whether or not sanctions actually change the behaviour of human rights violators is disputed. Andrey Sannikov, a former presidential candidate and political prisoner from Belarus, described himself as ‘living proof’ of the effectiveness of sanctions, arguing that they had been instrumental in persuading the country’s government to release him in 2012. On the other hand, human rights expert George Lopez, while acknowledging the sanctions can work as part of a broader package of
foreign policy measures, notes that ‘by themselves [they have] rarely forced rights violators to desist their actions’. One study of UN targeted sanctions estimates that no more than one third of measures achieve the desired outcome of changing individuals’ behaviour.

Even though human rights sanctions do not always bring tangible results, this does not mean that they are not useful. Restrictive measures may have a deterrent effect on potential human rights abusers. They are also important in signalling the EU's attachment to human rights.

**Title of the new sanctions regime**

Given the symbolic importance of Sergey Magnitsky’s case, in March 2019, the European Parliament argued that the EU’s new sanctions, like those of the US, should be named after him. However, when the Dutch government put forward its proposal in 2018, it opposed this, to avoid creating the misleading impression that sanctions were mainly targeted at Russia.

**Content of the thematic human rights sanctions**

Details of the new sanctions were not made public until their adoption on 7 December, although some had already leaked to the press a few weeks earlier. They follow the standard model for EU restrictive measures, without any of the innovations discussed in the previous section, such as qualified-majority voting or consultation of stakeholders from civil society.

**Title of proposal**: The regulation and decision, which are entitled ‘Restrictive measures against serious human rights violations and abuses’, do not include Magnitsky’s name.

**Scope**: Sanctions are envisaged for the following categories of human rights violations: genocide; crimes against humanity; torture and other cruel, inhuman or degrading treatment; slavery; extrajudicial, summary or arbitrary executions and killings; enforced disappearance of persons; and arbitrary arrests or detentions.

Furthermore, sanctions can also be applied in the event of other violations if they are widespread, systematic or otherwise of serious concern, in view of principles, such as respect for human rights, democracy and the rule of law, that underpin the EU’s common foreign and security policy. Such violations include, but are not limited to, human trafficking; sexual and gender-based violence; and violations of freedom of peaceful assembly, association, opinion and expression, religion and belief.

The proposal does not specifically mention corruption, although arguably cases like that of Sergey Magnitsky could be tackled under other headings, e.g. torture.

**Mechanism for adopting sanctions**: In line with the standard EU procedure, the names of persons and organisations to be added to the sanctions list are proposed by a Member State or the High Representative, and adopted by a unanimous decision of the Council.

**European Parliament position**: EU sanctions are adopted by Council alone, without Parliament. Even though it is not involved as co-legislator, the European Parliament has consistently backed the idea of Magnitsky-style human rights sanctions, for example in resolutions adopted in 2012, 2014, 2017 and March 2019. In the latter resolution, Parliament urged Council to reach agreement on it by the end of the parliamentary term in May 2019. Parliament was in favour of Council adopting sanctions by qualified majority rather than unanimity. Given the symbolic importance of the Magnitsky case, Parliament felt that the regime should be named after him, following the example of the US Global Magnitsky Act.