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Purpose – This paper aims to critically examine whether it is timely and actionable for the European Union (EU) to adopt a global sanctions regime against corruption and how such a regime can be designed to maximise its efficiency. We argue that developing such a dedicated framework is necessary, feasible and supportive of the international fight against corruption and the efforts to enhance the recovery of corruption proceeds.

Design/methodology/approach – This paper draws on reports, legislations, legal scholarships and other open-source data on global sanctions against corruption and the recovery of corruption proceeds.

Findings – We argue in favour of a dedicated global sanctions regime against corruption, which is necessary to mitigate significant risks for the EU internal market.

Originality/value – This study is one of the first to examine recent legislative developments, such as the EU Global Human Rights Sanctions Regime and the UK Global Anti-Corruption Sanctions regulations, and the possible development of an EU-dedicated global sanctions regime against corruption with strong asset recovery components.

Keywords – money laundering, confiscation, corruption, kleptocrats, global sanctions, Magnitsky Act.

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1. Introduction

The systemic corruption of public officials has severe adverse effects on economic, political and social life; it undermines public trust, the rule of law, the protection of human rights and the functioning of democratic institutions, while negatively affecting foreign investment, economic development and the functioning of free markets (Scholl and Schermuly, 2020; Aidt, 2009; Uslaner, 2008; Akçay 2006). Motivated by the prospect of illicit financial and/or political gains, corrupt public officials abuse their authority, accept bribes and/or misappropriate public funds, thus disregarding public interest and ultimately undermining economic development and the fairness of institutions. To make things worse, corruption has been shown to be self-reinforcing, and the incentives for the commission of corruption offenses have become stronger as the phenomenon becomes more widespread (Stephenson, 2020).

Measuring corruption accurately is a daunting task, and various methodologies have been employed in this regard, such as perception surveys and experience-based surveys (Holmes, 2015; UNODC, 2015). Nevertheless, due to the inherent obscure nature of the phenomenon, estimating the amount of corruption proceeds that are generated and laundered worldwide is difficult (Kaufmann, Kraay and Mastruzzi, 2006), and several often-cited corruption statistics have been shown to be problematic or completely unfounded (Wathne and Stephenson, 2021). Whatever data and method we adopt, the amount of corruption proceeds that are traced and confiscated is disturbingly small (World Bank, 2007; Hansen, 2014), as asset recovery is hindered by multiple factors, such as the sophistication of money laundering techniques, the complexity of judicial proceedings, the lack of resources and the lack of political will in the country where these proceeds are generated (Van der Does and others, 2011; Tarullo, 2004).

To address these problems, international and regional legal instruments have been adopted, the most prominent of which are the 2003 United Nations Convention against Corruption (UNCAC) and the 1997 Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. These multilateral instruments have been a catalyst for domestic reform and improved action against corruption in several jurisdictions, including the European Union (EU) and its member states. Without underestimating the importance of these instruments, especially at the time they were adopted, their capacity to influence domestic law is limited due to the 'inclusion of a large number of non-mandatory criminalisation provisions, and otherwise vague and imprecise norms', which are difficult to change because they are part of binding multilateral treaties (Rose, 2015). Most importantly, not all state parties to these conventions are equally committed to implementing domestic reforms and anti-corruption policies, while some jurisdictions avoid signing international anti-corruption instruments altogether, especially kleptocracies and countries where corruption is endemic and pervasive.

At the EU level, despite ambitious political declarations and legislative initiatives, the current legal framework has often failed to prevent the proceeds of corruption from finding their way into the EU territory and financial system. Harmonisation initiatives in the area of asset recovery, such as Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime [1] and the Regulation 2018/1805/EU on the mutual recognition of freezing and confiscation orders [2], do not specifically target the proceeds of corruption from third countries. The recovery of such proceeds through mutual legal assistance remains fragmented, as different conditions and procedures exist at the level of member states. A powerful tool in this context is the adoption of a dedicated EU global sanctions regime against corruption, which contains robust provisions on the freezing, confiscation and repatriation of such proceeds.

2. The External Dimension of the EU's Fight against Corruption

As party to the UNCAC [3], the EU ensures that its rules, practices and policies comply with the anti-corruption objectives, which have gradually become an integral part of its own strategy in the area of freedom, justice and security. The EU's fight against corruption takes place both at the internal front and at the level of EU external action, which is the special focus of this paper (Council of the European Union 2015; European Parliament 2017).

The first question in this context is why the EU should bother at all to take action against corruption in third countries. If corruption is viewed as a purely domestic problem with no repercussions abroad, the EU seems to be an external actor with no legitimacy or interest whatsoever to intervene. However, corruption in third countries has serious repercussions for the EU, as kleptocrats and corrupt public officials from third countries have attempted too often to use the EU territory and financial system to transfer, stack and launder stolen funds. An uninhibited inflow of corruption proceeds in the EU can constitute a source of significant risks, such as the contamination of the legal economy (Masciandaro, 2000), the creation of asset bubbles (Weeks-Brown, 2018) and the corrosive effect on local public institutions, as the recent scandal of the Cypriot 'golden passports' scheme has demonstrated (Pavlidis, 2021a). Moreover, by accumulating with impunity illicit proceeds, kleptocrats and their associates have the financial means and the motive to remain in power for longer, oppressing the local population, violating human rights and even exporting security threats, as in the case of the Libyan dictator and kleptocrat Muammar Gaddafi (Pavlidis, 2021b). A less practical, but still significant, reason to take action is the reputational risk and the negative signalling effect of eventual inaction, which can reduce the EU legal order to a safe haven for corruption proceeds and encourage kleptocrats and their associates from all over the world.

The second question concerns how the EU should help address the problem effectively. Initiatives of external actors should take into consideration the legal, political and economic aspects of corruption in countries that are affected (Börzel, Stahn and Pamuk, 2010). A soft approach can aim at encouraging a process of domestic reform in third countries, which can take the form of capacity building, institutional development and coalition building, among others. A more proactive approach, which has been gaining momentum since the 1990s, targets corrupted foreign officials and their associates, as well as the proceeds of corruption (Gantz, 1997). In addition to the criminalisation of foreign corrupt practices, some jurisdictions have recently introduced global sanctions regimes against corruption (see Section 3). We argue that such a regime can also be deployed at the EU level, supported by enhanced asset recovery tools, to identify, freeze and confiscate the proceeds of corruption, misappropriation and related crimes and, ultimately, to have these assets repatriated to the country of origin.

3. The Rise of Global Sanctions against Corruption: A Model for the EU

An EU global sanctions regime against corruption can use as a model two of the most prominent examples of similar regimes against corruption that have been enacted in the United States (US) and in the United Kingdom (UK), respectively.

In the US, the Magnitsky Rule of Law Accountability Act was adopted in 2012 [4], with strong bipartisan support. The Act was named after the whistleblower, who was maltreated and died in Russian prisons after exposing a multimillion-dollar tax fraud. It targets individuals and entities, as well as their families and associates, who are involved in corruption offenses. It empowers the US Secretary of State to blacklist individuals and entities, ban them from entering US soil and freeze and prohibit US property transactions of designated persons by imposing due diligence obligations on financial institutions and businesses (Firestone and Contini, 2018). The scope of the US regime was subsequently broadened to cover abuses of human rights and corruption offenses committed worldwide, thus signalling 'a shift in U.S. policy toward a right-based approach to anti-corruption enforcement' (Booth, 2020). Other jurisdictions, such as Canada and a few EU member states (Estonia, Lithuania and Latvia), have adopted and implemented national legislation that follows the model of the US Magnitsky Act, thus furthering the aims of the UNCAC (Ruys, 2017).

For its part, the UK has taken bold steps to strengthen its sanctions arsenal, especially after the 2016 Brexit referendum. The post-Brexit autonomous sanctions regime initially targeted persons involved in the commission of serious human rights violations (Global Human Rights Sanctions Regulations 2020), but in April 2021, the government's sanctioning powers were extended to persons linked to serious corruption (Global Anti-Corruption Sanctions Regulations 2021) [5]. The UK regime empowers the UK government to impose travel bans and, more importantly, asset

freezes on individuals and entities, including those that are indirectly involved (associates, family members and entities owned or controlled by a listed person). This translates into an obligation of due diligence for British financial institutions and businesses, which need to evaluate the risk of their overseas clients and business associates and apply necessary due diligence checks. The UK regulations are accompanied by a policy note that clarifies the criteria for designations under the UK regime.

The targeted sanctions regimes of the US and the UK are a bold and intriguing tool against corruption, but they suffer from a certain conceptual confusion. It can be argued that they are of a hybrid nature and move disconcertingly in a grey area between administrative and criminal law. Indeed, targeted sanctions are designed to have a preventive function, but they also present strong punitive aspects and restrict the important rights of designated persons, such as the right to property and freedom of movement. This has implications for the way the procedural safeguards and the mechanisms of judicial review are to be designed (Van der Have, 2021). Although the imposition of targeted sanctions is not a judicial procedure, does not involve judicial authorities (prosecutors and judges) and does not trigger the presumption of innocence, the designated persons need to have the right to effective remedies and the right to a fair trial for challenging the sanction's legality. Designated persons, both under the US and the UK regime, have the right to request an administrative review of their designation and, ultimately, to challenge this designation before the courts. For its part, the European Court of Human Rights (ECtHR) recognises the importance of ensuring effective remedies and juridical review for asset-freezing measures, either requested by the United Nations Security Council or ordered in the context of criminal law proceedings. The case law of the ECtHR stresses that asset freezes must have time limits and respect the principles of legality and proportionality in addition to the rights to effective remedies and judicial review (Birkett, 2020; de Wet, 2011). These observations can also be applicable if the EU develops its own global sanctions regime against corruption, which can therefore incorporate similar principles and safeguards. However, why is the current EU sanctions regime insufficient?

4. From Ad Hoc Interventions to the EU Sanctions Act: Is It Enough?

The EU has occasionally imposed targeted sanctions for human rights violations and for the misappropriation of public funds in third countries. Such restrictive measures are adopted in the framework of the Common Foreign and Security Policy, and they include travel bans and the freezing of assets that belong to politically exposed persons (PEPs). Can this regime be revamped to target serious corruption offences in third countries?

Except for targeted counter-terrorism sanctions, the EU targets specific countries first and then establishes a list of designated individuals and entities. For example, targeted sanctions were adopted by the Council of the EU (Article 29 TEU and Article 215 TFEU) as part of the EU response to the Ukrainian crisis and the Arab Spring events in Tunisia [6], Egypt [7] and Ukraine [8] to deal with human rights violations and the misappropriation of state funds in these countries. According to the EU standardised practice on asset freezes [9], the Council of the EU a) establishes, reviews and amends the list of designated persons, entities and bodies; b) it orders the freezing of the funds and economic resources of such persons; c) it prohibits participation in any activities designed to circumvent the restrictive measures; d) it determines the duration of the freeze, which it can extend; and d) it accords exemptions from the freezing, in view of the basic needs, legal fees and extraordinary expenses of the affected persons.

The EU sanctions regime has been shown to have a positive short-term signalling effect (Boogaerts, Portela and Drieskens 2016), but it has three major shortcomings. First, the restitution of EU-held assets has been problematic, mainly due to failures of the judicial system in the third country and a lack of criminal court rulings establishing the illicit origin of the assets (Boogaerts 2020). As the EU cannot prolong asset freezes indefinitely, time and the complexity of mutual legal assistance proceedings work against asset restitution. Second, the EU sanctions regime is based on *ad hoc* interventions and thus lacks predictability. Third, following the imposition of asset freezes at the EU level, member states have to handle mutual legal assistance requests, which result not only in delays but also in inconsistent outcomes and different standards of judicial review.

The path towards a new regime was paved by an initiative of the Dutch government, a call by the European Parliament and the preparatory work of the High Representative of the EU for Foreign Affairs and Security Policy. In December 2020, the Council of the EU adopted Regulation 2020/1998 and Decision 2020/1999, which created the EU global sanctions regime for human rights violations [10]. The legal basis of the new instruments is Article 215 of the Treaty on the Functioning of the European Union. As in the case of the US regime, the tools employed by the EU are travel bans and the freezing of funds. Sanctions under the new regime may target individuals and entities irrespective of the place where the human rights violations occurred. The list of designated individuals and entities is established, reviewed and amended by the Council of the EU, which acts upon proposals from the High Representative or from EU member states.

The Regulation applies to genocide, crimes against humanity and several serious human rights violations or abuses, such as torture, slavery and enforced disappearance. Corruption of officials in third countries is not listed, but there is a reference to '(1)(d) other human rights violations or abuses […] in so far as those violations or abuses are widespread, systematic or are otherwise of serious concern

as regards the objectives of the common foreign and security policy […]'. The non-exhaustive list that follows includes trafficking of human beings and violations or abuses of various freedoms (peaceful assembly, opinion, expression and religion) but not the commission of corruption offenses in third countries. It can be argued that endemic corruption falls within this definition, provided that it is 'widespread, systematic or are otherwise of serious concern' and has a negative effect on human rights, but such an interpretation is farfetched and lacks predictability and legal certainty. The European Parliament is correct in calling for corruption to be included explicitly in the list of punishable offences under the new regime (European Parliament, 2021). In addition to extending the scope of the new regime, the European Parliament argues that it should itself be able to make proposals in the listing process and that this process should be inclusive enough to facilitate input from civil society to further increase legitimacy. The European Parliament also urges the introduction of qualified majority voting to increase the effectiveness of sanctions (European Parliament, 2021).

In sum, the new EU sanctions regime attempts an important paradigm shift, as it allows for the imposition of sanctions even 'in the absence of a major political event' and international crisis (Portela 2018), such as the Ukraine crisis and the event in Arab Spring countries. Therefore, the current practice of country-based sanctions is replaced by a new model of thematic sanctions, which can target individuals and entities, even from friendly countries and diplomatic allies. Regrettably, corruption in third countries is not included in the list of punishable offenses that can trigger the mechanism of sanctions. This is a significant omission that downgrades the role of the EU in the global fight against corruption compared with the more proactive policy approach in the US and the UK.

5. The Next Step Forward: An EU Global Magnitsky Act

Although there are manifest interlinkages between human rights abuses and the commission of corruption offenses, a separate and dedicated legal framework—an EU Global Magnitsky Act—is needed for blacklisting kleptocrats and their associates from third countries. In the absence of an EU sanctions regime against corruption, regimes at the level of the member states will remain fragmented and often inconsistent, thus allowing for forum shopping for those who aim to launder the proceeds of corruption from third countries.

One option for an EU Global Magnitsky Act is to resort solely to visa bans and forego asset freezes; this mitigates the risk of litigation by designees, as visas are issued at the issuing state's discretion and cannot be challenged before the European Court of Justice (Portela 2018), which is always a lengthy procedure (European Parliamentary Research Service 2014). Another option for the EU is to employ both visa bans and

asset freezes, which pose a greater litigation risk. Nevertheless, they are more incisive tools in the fight against corruption. Kleptocrats from third countries may find foregoing traveling to the EU easier than losing access to their ill-gotten gains. A third more advanced option is to cover the entire circle of asset recovery, from the asset freeze stage to the repatriation of the corruption proceeds to the country of origin, possibly following the example of the 2017 Swiss Asset Recovery Law [11] (Pavlidis 2017). Such an enhanced EU Global Magnitsky Act can empower the Council of the EU to issue visa bans, block the assets of foreign PEPs and, in some cases, order the restitution of these assets, thus going a step further than the sanctions regimes in the US and the UK. Under such a regime, asset restitution can be facilitated through the following three mechanisms:

a) A Legal Basis for the Spontaneous Exchange of Information and Technical Assistance

An enhanced EU Global Magnitsky Act can include provisions facilitating mutual legal assistance and, ultimately, the restitution of the frozen assets to the country of origin, that is, the third country where the corruption, misappropriation and similar offenses took place. To facilitate asset restitution, the authorities of the member states where the frozen assets (real estate, luxury items, bank deposits and other financial products) are located can transmit to the concerned third country information on the nature, value and 'paper trail' of the assets in question, which is difficult to obtain otherwise (Fadel 2011). Following the model of the aforementioned Swiss law, an EU Global Magnitsky Act can provide a legal basis to share information in confidence and provide technical assistance to the third country of origin, even in the absence of a prior official request (spontaneous exchange of information). This information will ultimately allow the authorities of the concerned third country to properly formulate a request for mutual legal assistance. This applies particularly in the case of third countries where a turbulent change in political regime has taken place, such as in the events of the Arab Spring, and the authorities lack the resources, know-how and information to track the former kleptocrats' assets abroad.

b) A Legal Basis for the Non-Conviction-Based Confiscation of Frozen Assets

Targeted sanctions, such as the asset freezes imposed by the EU in the case of Arab Spring countries, are restrictive measures of a temporary nature that have to be renewed periodically; they do not necessarily lead to the restitution of the frozen assets to the concerned country. An enhanced EU Global Magnitsky Act can make a step forward and introduce a new legal basis for the non-conviction-based confiscation of frozen assets in exceptional cases and, ultimately, for their restitution. Following the example of the 2017 Swiss Law, the Council of the EU can be empowered to order a non-conviction-based confiscation (i) if the third country undergoes a change in political regime, such as the fall of a dictatorship, and (ii) if a PEP from the country in question possesses assets that are disproportionate to his/her sources income. A legal basis for the restitution of confiscated assets to the

country of origin can also be provided. In an even more advanced model, an EU Global Magnitsky Act can introduce a reversal of the burden of proof as to the origin of the frozen assets, that is, a presumption of illicit origin that the PEP will need to rebut to avoid confiscation. This will 'eliminate the need to follow the full paper-trail linking the acquisition of the assets in question with acts of corruption and misappropriation committed in third countries in political turmoil' (Pavlidis, 2017). To be compatible with human rights standards (Articles 6 and 13 European Convention of Human Rights; Article 47 Charter of Fundamental Rights of the EU) and the relevant jurisprudence of the ECtHR [12], this reversal of the burden of proof needs to respect the right to a fair trial, the right to effective remedies and the principle of proportionality. This means allowing the affected persons to rebut the presumption without disproportionally difficult efforts, for example, by presenting to the court tax declarations, bank account statements and other documents that establish the licit origin of assets.

6. Concluding Remarks

Developing an EU global sanctions regime is necessary, feasible and supportive of the international fight against corruption and the efforts to enhance the recovery of corruption proceeds. An EU Global Magnitsky Act requires defining the designation criteria not only in a manner consistent with international anti-corruption standards but also in a manner that will give to the EU the political leeway to deal with each specific case. An EU Global Magnitsky Act can go beyond the existing US and UK initiatives by introducing mechanisms for the non-conviction-based confiscation of frozen assets and even for a reversal of the burden of proof in exceptional cases. Such a confiscation order can enhance the effectiveness of sanctions against corruption through an EU-wide uniform implementation, which is lacking in EU sanctions policies (Portela 2010). An EU Global Magnitsky Act can generate the risk of retaliation and countersanctions imposed by third countries whose nationals are affected. Nevertheless, an EU Global Magnitsky Act can add deterring firepower in front of global sanctions against corruption, aligning with the initiatives in the US and the UK and further denying kleptocrats a safe harbour for corruption proceeds.

Notes

1. Directive 2014/42/EU of the European Parliament and of the Council on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, OJ L 127, 29.4.2014, p. 39.
2. Regulation 2018/1805/EU of the European Parliament and of the Council on the mutual recognition of freezing orders and confiscation orders, OJ L 303, 28.11.2018, p. 1.
3. Council Decision 2008/801/EC on the conclusion, on behalf of the European Community, of the United Nations Convention against Corruption, OJ L 287, 29.10.2008, p. 1.
4. H.R.4405, Pub.L. 112–208, 126 Stat. 1496.
5. Statutory Instrument SI 2021/488 of 23 April 2021.
6. Council Decision 2011/72/CFSP, OJ L 28, 2.2.2011, p. 62; Council Regulation 101/2011/EU, OJ L 31, 5.2.2011, p. 1, as amended.
7. Council Regulation 270/2011/EU, OJ L 76, 22.3.2011, p. 4, as amended.
8. Council Decision 2014/119/CFSP, OJ L 66, 6.3.2014, p. 26, as amended.
9. See the 2004 EU Basic Principles on the use of restrictive measures and the 2012 Council's Guidelines on the implementation and evaluation of restrictive measures in the framework of the EU Common Foreign and Security Policy. See also the 2016 Best Practices on the effective implementation of restrictive measures.
10. Council Regulation 2020/1998/EU concerning restrictive measures against serious human rights violations and abuses, OJ L 410I 7.12.2020, p. 1; Council Decision 2020/1999/CFSP concerning restrictive measures against serious human rights violations and abuses, OJ L 410I, 7.12.2020, p. 13.
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