Peace Research Center Prague

Policy Brief 012

October 2021 www.prcprague.cz

The human rights pitfalls of the new EU sanction regime

Nikola Kurková Klímová

Over the past two decades, the EU has increasingly relied on restrictive measures as a tool for enforcement of its foreign policy goals. The latest addition to its legal toolkit came with the adoption of the EU Global Human Rights Sanctions Regime. This new regime pursues an ambitious agenda of penalizing violations of fundamental human rights without territorial limitations. Its design, however, raises doubts about whether the EU itself does not breach such guarantees through its targeted sanctions.

Towards the EU Magnitsky Act

On 7 December 2020, the Council of the European Union introduced a comprehensive sanctions regime which allows the EU to impose restrictive measures on individuals and entities involved in serious human rights violations. The new sanctions framework had been in the making for more than two years. The initiative for its negotiations was for the first time floated by the Netherlands after the EU had found itself falling behind its Member States on the agenda of unilateral human rights enforcement.

The EU Global Human Rights Sanctions Regime follows the trend of Magnitsky-style legislation which has its origins in the United States. In 2012, the US Congress enacted the Magnitsky Act, named after the Russian lawyer Sergei Magnitsky who died in a pre-trial detention in Moscow in 2009 as a result of severe mistreatment and denial of access to medical care after exposing a $230 million tax fraud orchestrated by Russian officials. The act has enabled the US authorities to impose sanctions on human rights violators, freeze their assets and ban them from entering US territory. Since then, several other states have pursued similar legislative initiatives, such as Canada, Estonia, Latvia, Lithuania, and the United Kingdom.

The initial reactions to this proposal on the EU level were mixed. While Denmark, Sweden, France and Germany were enthusiastic proponents, some Member States were reportedly less keen on its adoption, expressing concerns about Russia's reaction. Under the slogan "better a law without a name, than a name without a law" the draft was eventually put forward without the Magnitsky stamp, winning the support of EU ministers to proceed with the proposed legal regime.

About the author

Nikola Kurková Klímová is a Ph.D. student and junior lecturer at the Faculty of Law, Charles University, and a member of the Czech Centre for Human Rights and Democracy

At PRCP, she is part of the Power Shifts and World Order research pillar and ILO working group.

The scope of the EU Global Human Rights Sanctions Regime

The legal basis for the EU Global Human Rights Sanctions Regime is twofold. First, Council Decision (CFSP) 2020/1999, proposed by the High Representative of the Union for Foreign Affairs, setting out the legal and political framework of the new regime; and second, Council Regulation (EU) 2020/1998, jointly put forward by the High Representative and the Commission, which ensures the uniform application of the sanctions across the Member States.

Under these pieces of legislation, the EU has gained powers to adopt restrictive measures against a broadly defined category of persons and entities, ranging from individuals and legal entities to state or non-state actors and bodies that are responsible for genocide, crimes against humanity and serious human rights violations or abuses, such as torture, slavery, extrajudicial, summary or arbitrary executions and killings, enforced disappearance, and arbitrary arrests or detentions. The new regime equally sanctions violations and abuses that are widespread, systematic or otherwise of serious concern for Member States. These can include trafficking in human beings, sexual and gender-based violence or violations of freedom of peaceful assembly, expression and religion or belief.

The new sanctions regime does not target only direct perpetrators and their accessories but also any other individuals and entities associated with them. Amendments of the sanction list are subject to a unanimous decision by the Council upon a proposal by a Member State or the High Representative.

The listed persons can be subject to two types of measures, namely the freezing of assets and a ban from entering into and transiting through the territory of the EU. Implementation of these measures is a direct obligation not only for Member States but to a certain degree also for all EU nationals and operators, who must refrain from making available any funds and economic resources to the listed persons in any form, subject to the risk of facing administrative or criminal penalties. Without prejudice to the above-mentioned, the effects of these sanctions are not, however, extra-territorial. This means that the measures are expected to put pressure on third countries only through the sanctioned individuals and entities while not requiring compliance by non-EU persons and operators unless they conduct their business at least partially in the area of the EU.

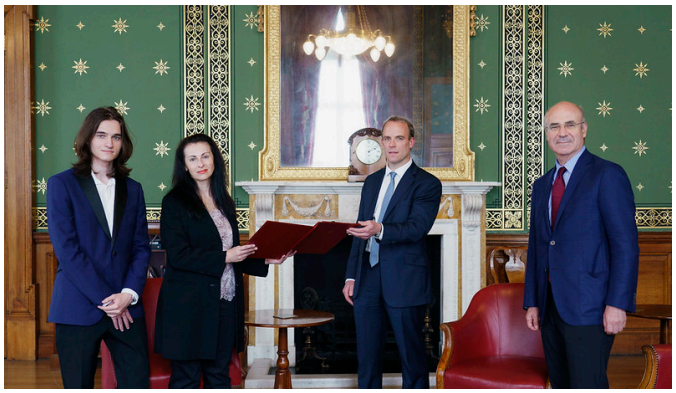
Finally, all restrictive measures are required to be designed as targeted to minimize the risk of unintended negative consequences for the civilian population. In this regard, the new regime further incorporates legal safeguards in the form of a "humanitarian" derogation that allows the temporary easing of sanctions for the purposes of facilitating or delivering humanitarian aid, including medical assistance and food supplies, transferring humanitarian workers or for evacuations.

The new and not-so-new human rights toolkit

The EU Global Human Rights Sanctions Regime is the key deliverable of the EU Action Plan on Human Rights and Democracy 2020-2024. Since its adoption, a total number of fifteen individuals and four legal entities have been placed on the sanction list, mostly in connection with the detention of the Russian opposition politician Alexey Navalny in Russia, persecution of the Uyghur ethnic group in China, repression of LGBTI persons and political opponents in Chechnya, extrajudicial killings and enforced disappearances by the Kaniyat Militia in Libya, and repressions in North Korea.

The related restrictive measures are only part of the wider EU sanctions framework, consisting of around forty different regimes which have already targeted more than two hundred individuals and entities for serious human

human rights violations. Until last year, such sanctions were predominantly geographically limited and could be imposed on a country-specific basis. In contrast, the Global Human Rights Sanctions Regime is novel in enabling the EU to react to human rights abuses worldwide in a swift manner without having to adopt new acts through the normal legislative procedure for every instance. The various sanctions regimes are complementary and do not replace each other. With the new toolkit, the multi-faceted EU sanctions framework has thus gained further legal complexity.



Nikita Magnitsky (left to right) and Natalia Magnitsky with Dominic Raab, UK foreign secretary, in the Foreign and Commonwealth Office © Pippa Fowles/No 10 Downing Street

The grey zone of international law

While the number of states using sanctions as coercive measures to enforce their foreign policy goals has been steadily growing, the legality of such actions under public international law is highly disputed. On the one hand, states are bound to comply with the sanctions authorized by the UN Security Council under Chapter VII of the UN Charter in reaction to the existence of a threat to peace, breach of the peace or act of aggression. Without such authorization, the status of purely unilateral coercive measures is less clear. Generally, states are understood to be free to conduct their political and economic relations as they choose. Their coercive actions are, however, *prima facie* legal only as long as they do not unlawfully interfere in the internal affairs of third states, although this is not always an easy line to draw.

The specific forms of pressure in international relations have significantly changed over time. Nowadays, unilateral sanctions are frequently applied in pursuit of a common good, thereby transforming the narrative of coercion into a legitimate practice. Magnitsky-style legislation is one such example. Surprisingly, its goal of the protection of human rights has been frequently found to be at odds with this objective. As the UN Human Rights Council cautioned, unilateral sanctions can disproportionately affect the most vulnerable groups of the civilian population and raise humanitarian concerns in the targeted states.

These risks demonstrably increased during the Covid-19 pandemic when the health-care systems of individual countries were combatting the devastating effects of the disease while struggling with a shortage of medical equipment and other supplies. In her report of July 2020, the UN Special Rapporteur, for instance, pointed out that the sanctions imposed on the Bolivarian Republic of Venezuela dramatically increased the costs of bank transfers, which negatively influenced the rising prices of medication, ventilators and protective kits. Combined with the impossibility of using frozen assets, it is estimated that the restrictive measures may have caused the deaths of at least 40,000 people.

Time to revisit human rights compliance

While the EU Global Human Rights Sanctions Regime has been praised for its calibrated design, the system still has noticeable loopholes in regards to human rights compliance. First of all, it remains a challenge for EU institutions to protect fully the rights and freedoms guaranteed under the EU Charter of Fundamental Rights and national laws to the targeted persons. The authors of the new regime were clearly aware of this potential pitfall

which they addressed in the second recital of the Regulation, emphasizing the recognition of the right to an effective remedy, the right to defense and the right to the protection of personal data.

In the light of the high number of past litigations involving EU-targeted restrictive measures, the legitimacy of the new regime may be easily exacerbated if the Council fails to provide sufficient reasoning for its listing decisions or to present specific evidence as legal support. It is fair to point out that the Council enjoys considerable leeway in applying the designation criteria, however, their open-ended definitions in the new regime could easily turn into a slippery slope from the requirement of legal certainty, resulting in the targeting of persons and entities whose links to the human rights violators would be highly questionable but their chance of successfully challenging such decision and being de-listed would be limited.

Furthermore, the EU Courts have made it very clear that the imposition of restrictive measures cannot be justified with reference to confidential materials that would fall outside of the scope of a court review. While the new regime remains silent on the types of sources to serve as support for listing decisions, the exclusive use of open-source evidence could be the obvious solution to this problem. The Council would have to, however, adopt a cautious approach to the verification of their credibility to avoid false positives. In this regard, it could learn lessons from recent initiatives in the area of international criminal law, such as the Berkeley Protocol on Digital Open Source Investigations, which have defined best practices for the collection, verification and analysis of these types of data.

Apart from the vague procedural safeguards for individuals, the efficacy of the broader humanitarian derogations in the new regime is also doubtful. As the UN Special Rapporteur noted, the temporary lifting of targeted sanctions under EU sanctions regimes is subject to prior authorization on a case-by-case basis which requires "meticulous work" to untangle the legal requirements. By way of example, although the EU's targeted sanctions against Syria allow for the export of disinfectants, hand sanitizers and detergents, the applicants have to make assurances to the competent authorities that the chemicals will be used solely for medical purposes, not fabricating chemical weapons for internal repressions, which can be subject to lengthy investigations. These instances show that the Council should closely cooperate with the Member States in creating a more streamlined procedure for humanitarian exemptions in the new regime.