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WHY THE EUROPEAN UNION NEEDS ANTICORRUPTION SANCTIONS

A POWERFUL TOOL IN THE FIGHT AGAINST CORRUPTION

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Coordination and supervision: Tinatin Tsertsvadze, Policy Analyst

Editor: Ros Taylor

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EXECUTIVE SUMMARY

Adopting a stand-alone regime on anticorruption sanctions would enable the EU to coordinate its foreign policy objectives with like-minded allies such as the US, UK, Canada, and Australia. Sanctions are most effective when coordinated with other states.

- **The aims of sanctions are not limited to behavioural change.**

Anticorruption sanctions would help disrupt kleptocratic networks, constrain kleptocrats' actions, and protect the integrity of Western domestic institutions. Corrupt proceedings have a corrosive impact on Western societies and pose a national security risk to democratic governance and the rule of law.

- **Anticorruption sanctions could become an essential part of a 'whole-of-government' approach to tackle global corruption and build resilience at home.**

Sanctions would expand the EU's toolkit to fight illicit activities and complement anticorruption regulations. They can help alter the economic calculus of kleptocrats and stigmatise their activities.

- **Anticorruption sanctions can alleviate some of the political sensitivity around designations.**

By detaching measures from a country's name, the EU can surgically target wrongdoers and shift the blame to individuals rather than countries.

- **The Council should adopt a solid evidentiary threshold and delisting criteria for anticorruption sanctions to address due process concerns and ensure fundamental rights are upheld.**

Improving evidence-gathering capacity, both for open-source and closed information, is essential to ensure a sound legal basis. The Council should establish a dedicated Working Party on corruption or create an *ad hoc* Working Party within the existing structures. This would streamline evidence-gathering and ensure information is subject to sufficient scrutiny.

INTRODUCTION

Sanctions are a central element of the EU Common Foreign and Security Policy (CFSP). While the EU has been at the forefront of deploying them as part of the CFSP, with over 40 sanctions regimes targeting both countries and themes (chemical weapons, cyberattacks, human rights and terrorism),¹ the EU lacks anticorruption sanctions.

Liberal democracies have grown to recognise that corruption is a threat to the stability and security of societies. Corruption and illicit finance are transnational in their nature. Corrupt proceedings have a corrosive impact on Western societies, as they undermine democratic institutions and governance

and erode human rights. The transnational nature of corruption requires a collective response reinforced by multilateral actions by the like-minded countries.

The EU has the ambition to play a leading role in the global fight against corruption. Anticorruption sanctions can provide the EU with a potent additional instrument to cut off kleptocrats from the access to Western financial system. Sanctions would allow the EU to 'walk the talk', speaking with one voice alongside like-minded partners, stigmatise illicit and corrupt activities, and complement existing anti-money laundering legislation.

¹ https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/restrictive-measures-sanctions_en

BACKGROUND

The US and several like-minded governments have implemented or are in the process of adopting legislation that enables targeted sanctions on human rights abuses and corruption. In 2016, the US adopted the Global Magnitsky Act, a dedicated thematic regime to hold human rights offenders and corrupt officials accountable. Internationally, Canada, the UK, and most recently Australia followed in the US's footsteps and passed their own Magnitsky-like legislation.

As part of the EU's response to transnational security threats, in December 2020 the EU Foreign Affairs Council adopted an EU Global Human Rights Sanctions Regime. But unlike its allies, the EU omitted corruption as a sanctionable activity. Political considerations and legal vulnerabilities have been the main factors behind Brussels' reticence to add anticorruption measures to its toolbox. The recent Pandora Papers revelations put Western anti-money laundering policies in the spotlight and highlighted the urgent need to take actions against kleptocratic and illicit money flows.

The US and UK have elevated the fight against corruption and illicit finance to the national security level.² Both Washington D.C. and London view corruption as a threat to national security and prosperity, which erodes trust in government and institutions. Anticorruption sanctions are a crucial part of the 'whole-of-government' approach to tackle

corruption. The EU has an ambition to play a leading role in this global fight.³ The European Parliament has renewed its calls to add acts of corruption to the existing global human rights sanctions regime, but it has yet to be heeded.

Anticorruption sanctions can be a potent instrument in helping to alter kleptocrats' economic calculus, dismantle their networks of illicit money, stigmatise their activities and complement existing anti-money laundering legislation. The measures can be a meaningful tool to contest impunity and allow the necessary agility when it comes to combatting illicit finance.

The transnational nature of corruption, where financial centres are inextricably linked, demands international collaboration. By adopting an anticorruption sanctions regime, the EU will join its closest allies—the US, UK, Canada, and now Australia—in an attempt to tackle the global challenges of corruption and illicit finance. The multilateralisation of sanctions will provide an opportunity to coordinate restrictive measures, share relevant information and thus amplify the impact of restrictive measures. A coordinated response will send a stronger message to kleptocrats and prompt the private sector in the EU to align with other jurisdictions in a compliance and due diligence approach.

2 <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/03/memorandum-on-establishing-the-fight-against-corruption-as-a-core-united-states-national-security-interest/>; https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/667221/6_3323_Anti-Corruption_Strategy_WEB.pdf

3 <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020DC0793&from=FR>

THE ADDED VALUE OF ANTICORRUPTION SANCTIONS

A cynic might argue that anticorruption sanctions do not bring any added value. Firstly, restrictions would not coerce kleptocrats to change their behaviour. Strategic ambiguity around the policy objectives of introduced sanctions makes it difficult to draw a direct line between political changes in the regime and behavioural changes of the targeted individuals. There is no publicly available evidence that the EU has ever delisted an individual from any of the targeted sanctions lists because that person or entity has changed their behaviour. At best, anticorruption sanctions can be viewed as a deterrent to future wrongdoing.

Secondly, existing country regimes already include designations for those who financially or economically support or benefit from close links with kleptocratic regimes. Indeed, several Syrian, Russian, and Belarusian individuals are targeted due to their beneficial relationships with the respective regimes, which enabled them to engage in widespread corruption and bribery. Most recently, the EU adopted a legal framework to sanction Lebanese officials engaged in corruption and serious financial misconduct.⁴ Finally, sceptics argue that it would make more sense to bolster anti-money laundering and counter-terrorism measures to prevent illicit money flows in the first place, rather than chasing kleptocrats after they have already exploited the weakness of the regulations.

These arguments quickly fade under closer examination. Anticorruption sanctions provide clear added value through:

Disrupting networks

Anticorruption sanctions can be effective in disrupting kleptocratic networks. Sanctions are often viewed through the lens of coercion and the pain-gain approach. Disabling and disrupting proliferation networks is arguably another indicator of their success. Applying the logic of counterterrorism and cyberwarfare sanctions, anticorruption sanctions can be effective in dismantling kleptocratic networks. The US sanctions levied against al-Qaeda and other terrorist organisations were successful in starving them of access to Western financial systems. Research on UN targeted sanctions against Zimbabwean and Ivorian elites suggests that the restrictions disrupted their professional and personal life, although stopped short of influencing their behaviour.⁵ In the same vein, anticorruption sanctions can be used to clamp down on kleptocratic figures who are engaged in serious corruption, transnational money laundering and large-scale kleptocracy.⁶ Recently, the Biden administration imposed a series of sanctions on corrupt officials from Central America, Europe, and Africa to disrupt their networks for personal enrichment.⁷

The notion of sanctions as coercion still dominates the debate. In this model, the sender state imposes significant economic costs on the target, coercing it to change behaviour and thus resulting in democratisation, peacebuilding or positive political transformation. However, the constraining and signalling effects of sanctions should not be overlooked. By restricting kleptocrats' access to the enjoyment of ill-gotten funds abroad—leading

4 <https://www.consilium.europa.eu/en/press/press-releases/2021/07/30/lebanon-eu-adopts-a-framework-for-targeted-sanctions/>

5 <https://www.cogitatiopress.com/politicsandgovernance/article/view/4745>

6 [Sanctions on Kleptocrats and Terrorists Work—Others Don't \(foreignpolicy.com\)](https://www.foreignpolicy.com/story/Sanctions_on_Kleptocrats_and_Terrorists_Work—Others_Don't)

7 <https://home.treasury.gov/news/press-releases/jy0523>

luxurious lifestyles and travelling to the West for high-quality education and health care— anticorruption sanctions could alter the economic calculus of corrupt individuals.⁸ The ultimate objective of this approach is to send a powerful signal to others and to discourage the powerful from engaging in corruption and kleptocracy.

Equally important is the stigmatising effect of anticorruption sanctions through naming and shaming. Visa bans and asset freezes might seem to have little impact, but targeted sanctions can exert significant psychological pressure in terms of stigma, shame, fear, and a loss of prestige.⁹ Public designations prompt significant reputational risk and negatively affect the targets' financial and commercial relations. It is perhaps unsurprising that there have been more anticorruption challenges in the EU and UK courts than challenges to human rights sanctions.¹⁰

Protecting the integrity of domestic institutions

Anticorruption sanctions could contribute to the protection of democracies and prevent the erosion of trust in government and public institutions. Corrupt proceedings have a corrosive impact on Western societies and pose a national security risk, undermining democratic governance and the rule of law. Fleeing high-level lawlessness in their own countries, kleptocrats prefer to stash their ill-gotten funds in Western banks protected by the rule of law and an impartial judicial system. As Charles Davidson, the executive director of the Kleptocracy Initiative at Hudson Institute argues, with their illicit funds, kleptocrats brought their own values:

'...the kleptocratic life juice of only valuing money and power has perverted our system. Kleptocratic regimes have become increasingly adept at purchasing many of the less morally vigilant members of our elites.'¹¹

Complementing anti-money laundering regulation

Anticorruption sanctions could expand the EU's toolkit for fighting illicit activities. Involvement in corruption should normally be addressed through law enforcement measures, but often the proceeds of serious corruption constitute a transnational security threat which is difficult to tackle via existing anticorruption regulations. The sheer scale of dirty money flowing through the Western financial system sometimes makes anti-money laundering laws ineffective. The recent scandal involving the Estonian branch of Danske Bank's complicity in the laundering of \$200 billion showed how Russian kleptocrats profit from the weaknesses of Western anti-money laundering regulation.¹²

There are various reasons why traditional anti-money laundering regulations do not always succeed. They include a lack of resources and capacity among the relevant law enforcement agencies; the absence of public registers for beneficial ownership, which hampers effective investigations; and poor coordination between various government departments and the banking sector.

Anticorruption sanctions, therefore, constitute an *additional* powerful tool to hold the corrupt to account. They are particularly useful in cases where law enforcement authorities in the relevant jurisdictions are unable or unwilling to cooperate.¹³

8 <https://brill.com/view/title/38215>

9 Cosgrove, "Examining Targeted Sanctions. Are Travel Bans Effective?" in Peter Wallensteen and Carina Staibano, pp. 207-228.

10 Open Society European Policy Institute closed-door brainstorming sessions with experts, 10 November 2021.

11 <https://www.csce.gov/sites/helsinkicommission.house.gov/files/Charles%20Davidson.pdf>

12 <https://www.reuters.com/article/us-danske-bank-moneylaundering-explainer-idUSKCN1N010D>

13 Interview with Dr Anton Moiseienko, a Lecturer in Law at the Australian National University, 19 November 2021.

Similar to the logic of human rights sanctions, anticorruption measures can be used as an instrument ‘to supplement the criminal law’¹⁴ and be used in conjunction with ‘other financial tools of pressure and accountability mechanisms.’¹⁵ By adopting anticorruption sanctions, the EU could establish a ‘whole-of-government’ approach to building resilience at home and overseas. In contrast to anti-money laundering regulations, which target the *proceeds* of corruption, the key added value of anticorruption sanctions would be their focus on *perpetrators*.¹⁶

Strengthening the human rights sanctions regime

There has been growing recognition that serious corruption is linked to human rights abuses, as UN Human Rights Council resolutions have acknowledged. Failure to properly enforce regulatory requirements weakens human rights protections. Corruption undermines the functioning and legitimacy of institutions and weakens the accountability structures responsible for protecting human rights. Corruption compounds the plight of those in vulnerable situations, affecting their access to public goods and services as well as justice. Synchronising human rights protection with anticorruption sanctions has the potential to create synergies that will have a mutually beneficial effect.¹⁷

14 <https://www.government.nl/documents/speeches/2018/11/20/blok-on-eu-global-human-rights-sanction-regime>

15 <https://thesentry.org/2020/07/09/4281/weve-got-tool-lets-use-uk-launches-human-rights-sanctions-program/>

16 <https://brill.com/view/title/38215>

17 <https://www.unodc.org/e4j/en/anti-corruption/module-7/key-issues/overview-of-the-corruption-human-rights-nexus.html>

FIXING VULNERABILITIES AND ENSURING A ROBUST FRAMEWORK

The adoption of anticorruption sanctions is prone to the risks of inconsistent application and perceptions of political bias. In the past, this has left the EU open to criticism for its misappropriation of sanctions and human rights sanctions regimes. In the future, the application of anticorruption sanctions arguably poses a risk of unjust sanctions enforcement. It should address due process concerns and ensure safeguards that are consistent with upholding fundamental rights. Several improvements can and should be made to guarantee that sanctions designations are effective, while minimising unintended consequences:

Definition

The definitions used in targeted sanctions regulations can have far-reaching implications for their application. EU legal experts concur that the broader the definition, the more difficult it would be to challenge designations in the EU courts. It is also vital to reference the international agreed standards and norms on corruption, in this case the UN Convention Against Corruption. The UK's Global Anti-Corruption Sanctions Regulation is silent on what constitutes 'serious corruption', beyond that it will consider the incidents where serious corruption fuels and enables national and security threats.¹⁸ It identifies misappropriation of property and bribery as sanctionable violations. The accompanying guidance clarifies that potential designations will be subject to the long-term objectives of the UK's Anti-Corruption Strategy.¹⁹

A broader scope does not necessarily mean that the EU would be forced to impose sanctions on a large scale. Any potential designations should be subject to an assessment of the scale, nature, and impact of serious corruption. For instance, an individual or an entity involved in the most harmful type of corruption—bribery and misappropriation of property—where the conduct is systemic and sophisticated should be considered for targeting.²⁰ A preamble to the legislation could prove helpful. It would clarify the main motivation and set the tone for a sparse application of sanctions only under egregious circumstances. To capitalise on a multilateral approach, the EU's definition of corruption should be consistent with other existing regulations to avoid discrepancies.

Scope of sanctions

Defining the scope of anticorruption sanctions is equally important. Is the perpetrator a current or former government official? Did an individual or an entity act on behalf of such an official? Did the perpetrator attempt to engage in corruption, or did the individual or entity assist or provide support for it?²¹ To use anticorruption sanctions more strategically, in circumstances where a range of individuals is involved, the person with higher status in the hierarchy, extensive connections and who has egregiously profited from corruption should be targeted. Indirect involvement should target an entity directly or indirectly owned or controlled and who is or has been involved.

18 <https://www.gov.uk/government/publications/global-anti-corruption-sanctions-guidance/global-anti-corruption-sanctions-guidance>

19 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/667221/6_3323_Anti-Corruption_Strategy_WEB.pdf

20 <https://www.gov.uk/government/publications/global-anti-corruption-sanctions-factors-in-designating-people-involved-in-serious-corruption/global-anti-corruption-sanctions-consideration-of-designations>

21 <https://www.humanrightsfirst.org/sites/default/files/hrf-global-magnitsky-faq.pdf>

The application of sanctions to the extended circle of corrupt officials should be assessed on a case-by-case basis. As a case in the Myanmar regime in 2012 illustrated, a sufficient link must exist between the regime and those who allegedly benefitted from it.²² The listing should be based on concrete evidence rather than the presumption of a close connection. The same logic should apply to associated entities. If there is a solid evidentiary threshold, sanctions should target associated entities which can be used to hide assets via complex and opaque financial arrangements or corporate structures.

In recent years, the Council has widened the justification of designations, shifting the focus from individual to collective responsibility. Occupying a senior position in a country's security apparatus or conducting a thriving business in a country where this is only possible with the support of a political regime has frequently proved to be enough to withstand judicial scrutiny. It departs from the previous approach, mostly used in the fight against international terrorism, which was centred around individual responsibility.²³

Minimising political sensitivity

The adoption of a thematic anticorruption sanctions regime can alleviate some concerns around politicised decision-making. By design, horizontal regimes are detached from country-specific regimes. Centred around themes—counterterrorism, cyberwarfare, human rights, or corruption—the sanctions have a global reach and possess necessary

flexibility. The latter grants political advantages in cases of high political sensitivity. By detaching measures from a country's name and geographical scope, anticorruption sanctions can surgically target wrongdoers without an act of attribution.²⁴

A horizontal anticorruption sanctions regime could also allay those tensions. In contrast to traditional sanctions, which are based on the decision of a national authority, thematic sanctions shift the responsibility of decision-making to the supranational level. The new procedures under thematic regimes envisage centralised decision-making between a Council and the High Representative. In this way, some tensions about sensitive designations could be assuaged by centralising designations at the EU level, while ensuring even geographical coverage.²⁵

Evidentiary standard

With anticorruption sanctions, there is a heightened risk of politicised decisions. To ensure that these sanctions do not lose their credibility, it is imperative to safeguard transparent listings and robust evidentiary standards.

The Council does not formally codify the standard of proof when imposing sanctions. The EU's misappropriation sanctions regimes in Tunisia, Egypt and Ukraine suffered from the absence of a consistent legal test due to insufficient evidence.²⁶ This negative experience had a wider bearing on the credibility of EU sanctions, prompting the Union to

22 Pye Phyo Tay Za v Council (2012) General Court of the European Union, C-376/10 P

23 <https://www.europeanpapers.eu/en/europeanforum/company-you-keep-court-of-justice-confirms-sanctions-against-persons-associated-with-zimbabwe-regime>

24 Clara Portela, "Horizontal sanctions regimes: targeted sanctions reconfigured?", <https://www.e-elgar.com/shop/gbp/research-handbook-on-unilateral-and-extraterritorial-sanctions-9781839107849.html>

25 <https://www.tandfonline.com/doi/full/10.1080/14782804.2021.1965556>

26 <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/the-legality-of-the-eu-sanctions-process/written/41026.html>

alter its sanctioning practice. Shaped by the case law, the Council ruled that asset freezes on any individual or entity should be introduced on a ‘sufficiently solid factual basis’, while broadening the listing criteria.²⁷

The application of the civil standard (‘balance of probabilities’ in the UK), not the criminal one (‘beyond reasonable doubt’), is considered an appropriate test. When deciding whom to target, the EU should aim at a high standard of proof equivalent to ‘reasonable grounds to suspect’.

Drawing on the discussion on anticorruption measures in Australia, a ‘watchlist’ of individuals considered for sanctioning may be compiled in cases where there is substantial evidence, but not enough to meet an evidentiary threshold. This measure can alert banks to be more vigilant when doing business with them.²⁸

Improving evidence-gathering capacity, both on open-source and closed information, is essential for ensuring robust evidentiary standards. The establishment of a Council Working Party on corruption (or an *ad hoc* Working Party within existing structures) can streamline the process of evidence gathering and ensure that information is subjected to sufficient scrutiny. Corroborating evidence from multiple, preferably independent, sources would safeguard the credibility

of information. The latter can be sourced from civil society organisations (CSOs), advocacy groups and governmental channels. While the EU has an ‘open door’ policy and regular consultations with the civil society,²⁹ a more formalised cooperation with CSOs and other organisations, as practised in the US and UK, could enhance evidence-gathering.

Judicial review

The EU is forced to strike a delicate balancing act between targeting kleptocrats and avoiding the infringement of their fundamental rights. To ensure fairness, due process—the right to be heard and appeal a verdict—is a critical safeguard. Sanctions legislation should give sanctioned individuals the opportunity to hear the case against them and have a right to reply or review the designation. Article 47 of the EU Charter on Fundamental Rights requires the Council to provide the right to an effective remedy and to a fair trial from the inception of sanctions.

Yet litigation trends show that EU courts have lowered the threshold of justification. On certain occasions, the Court ruled that the objective of maintaining international peace and security took precedence over the difficulties caused to the applicant because of sanctions.³⁰ While such tactics are effective in curbing the number of annulments, the EU should keep the burden of proof high enough to sustain legitimacy and credibility.

27 Case C-193/15 P *Tarif Akhras v Council* ECLI:EU:C:2016:219, para 56.

28 https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/MagnitskyAct/Report.

29 https://www.europarl.europa.eu/doceo/document/CRE-9-2021-07-06-ITM-013_EN.html

30 <https://dare.uva.nl/search?identifier=39057fa5-cc13-4389-a94e-fead2b9903f2>, p. 226.

NEXT STEPS

The recent revelations from the Pandora and Panama Papers investigations put Western jurisdictions in the spotlight and demonstrate the urgent need to take action against kleptocratic and illicit money flows. While ensuring a legally sound regime is important, there is urgent political momentum for the EU to act.

Now that the EU Global Human Rights Regime has been in place for over a year, the Council, together with the EU's High Representative for Foreign and Security Policy, should initiate discussions on a stand-alone anticorruption sanctions regime. This will broaden the EU's foreign policy toolbox and enable it to act in coordination with like-minded countries to counter kleptocrats. It should be accompanied by the creation of relevant thematic working parties on an

ad hoc or permanent basis to inform the discussions and contribute to future designations. The EU should apply a broader definition of corruption—serious or significant—and refer to internationally agreed norms and standards, akin to the UN Convention Against Corruption. Coordination with other jurisdictions with similar anticorruption sanctions regulations will ensure alignment.

The EU should define the scope of the regime and issue guidance on the application of the legislation. Formalising cooperation with CSOs and other organisations will enable it to improve evidence-gathering, and adopt solid evidentiary thresholds and safeguards for upholding fundamental rights.

