
EU SANCTIONS REGIME CANNOT BE AN 'EU MAGNITSKY ACT'

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Dutch MEPs have called on their government to make every effort to call the EU global human rights sanctions regime the 'EU Magnitsky Act', after Sergei Magnitsky, a Russian activist, who exposed a tax fraud by corrupt officials, was incarcerated and died in prison in 2009.

The Dutch government should resist these calls and work towards the adoption of EU global human rights sanctions, whose name expresses the clear commitment to tackle not only human rights violations but also respect the rule of law and the rights of those sanctioned.

The Dutch government has proposed to adopt an EU global human rights sanctions regime that would allow the EU to impose visa restrictions and freeze the assets of those committing grave human rights violations around the world.

The proposal was inspired by the so-called 'Magnitsky Acts', adopted in the US, followed by Canada, and also by EU member states, such as Estonia, Latvia, Lithuania, and the UK.

First of all, the debate about the choice of name should not boil down to a political muscle show against Hungary, which opposes the reference to Magnitsky because of its political relations with the Russian government.

But more importantly, the EU should clearly distance itself from the US Global Magnitsky Act, which is the most well-known of them, including by choosing a different name.

The choice of name is not only about moral support and a symbolic statement about the fate of Sergei Magnitsky. This has clear political merit.

However, this particular choice of name has further, less desirable connotations. The name 'Magnitsky Act' was originally used by the Obama administration in 2012 for a sanctions regime limited to human rights violations in Russia.

In 2016, the US Global Magnitsky Human Rights Accountability Act introduced a different regime targeting human violations worldwide. Today, the name 'Magnitsky Act' is most prominently associated with the second law, the US Global Magnitsky Act.

The US sanctions imposed for global human rights violations should not and cannot be the model for the EU's global human rights sanctions regime.

EU requirements

Crucially, the US regime does not provide for a delisting procedure for those who have been unlawfully targeted, nor does the US judicial system offer judicial review that would meet the requirements of the EU Charter of Fundamental Rights or the European Convention on Human Rights.

The US Global Magnitsky sanctions are based on the Global Magnitsky Human Rights Accountability Act 2016 enacted by Congress and an Executive Order 2017 adopted by president Trump.

The two instruments differ greatly.

The 2016 Act vests the president with great discretion to decide whom to list. However, it provides for example for the option to terminate the sanctions if credible information exists that the sanctioned person did not engage in the activity for which sanctions were imposed, if the person had already been prosecuted appropriately, or if the person demonstrated a change in behaviour.

By contrast, the 2017 executive order, which ultimately determines the nature of the sanctions in practice, only provides vaguely that the secretary of the Treasury is authorised 'to determine that circumstances no longer warrant' the imposition of sanctions and 'give effect to that determination'.

The executive order also declares 'a national emergency' in order to deal with the 'unusual and extraordinary threat' of 'serious human rights abuse and corruption around the world'.

The declaration of emergency allows the US government to dodge the usually applicable rule of law guarantees. The executive order does not address possibilities for judicial review.

The actual possibilities of judicial review in the US would not satisfy the requirements developed by the Court of Justice of the European Union by reference to the EU Charter of Fundamental Rights or the European Convention on Human Rights.

Strong political reasons may support the adoption of an EU global human rights sanctions regime.

However, any such regime must meet the rule of law and human rights guarantees to which the EU and all member states are committed.

Honouring this commitment is also absolutely necessary in the face of grave human rights violations – a lesson learned from the EU's existing counter-terrorist sanctions regimes.

In particular in the earlier years of the counter-terrorist sanctions regimes, large numbers of annulment actions before the Court of Justice were successful because the sanctions were found to infringe the most basic rights of defence.

The EU's commitment to human rights, including the human rights of those sanctioned, requires the EU to distinguish its sanctions regime from the US Global Magnitsky sanctions, not just in substance but also in name.

The views expressed in this opinion piece are the author's, not those of EUobserver.

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