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DOI

[10.4324/9781003292166](https://doi.org/10.4324/9781003292166)

[10.1080/14782804.2021.1965556](https://doi.org/10.1080/14782804.2021.1965556)

Publication date

2023

Document Version

Other version

Published in

Security in Transnational Spaces

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Citation for published version (APA):

Eckes, C. (2023). EU global human rights sanctions regime: is the genie out of the bottle? In S. D'Amato, & A. Sachoulidou (Eds.), *Security in Transnational Spaces: Legal and Political Perspectives across Europe* (pp. 59-73). Routledge. <https://doi.org/10.4324/9781003292166>, <https://doi.org/10.1080/14782804.2021.1965556>

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EU global human rights sanctions regime: is the genie out of the bottle?

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ABSTRACT

On 7 December 2020, the EU Foreign Affairs Council adopted an ‘EU Global Human Rights Sanctions Regime’ (EU HRSR). The EU HRSR is an example of a transnational response to a fundamental security-related challenge. Both its adoption and its specific institutional set-up are a continuation of the move towards stronger supranational practices in the area of sanctions. Further supranationalising the EU’s sanctioning practices, as one of its most developed and most powerful tools to respond to security threats, is likely to increase the uniformity, flexibility, and arguably also the impartiality of the sanctions. At the same time, the adoption process also demonstrated that national governments set limits to further supranationalisation. While in particular the Dutch parliament was a driving force behind the adoption of the EU HRSR, both national parliaments and the European Parliament are likely to struggle to have significant influence over the sanctioning process. Yet, much depends on the actual sanctioning practices and the legal framing of the EU HRSR’s objectives, designation criteria and evidentiary threshold may in practice raise legitimacy problems.

KEYWORDS

Human rights; sanctions; restrictive measures; supranationalisation; flexibility; listing criteria; evidentiary standard; corruption

Introduction

On 7 December 2020, the EU Foreign Affairs Council adopted an ‘EU Global Human Rights Sanctions Regime’ (EU HRSR). It is the newest tool in the EU’s extending foreign policy toolbox. The objective of the EU HRSR is to give the EU the flexibility to address serious human rights violations and abuses worldwide (Council of the European Union, 2020c and 2020b). It is horizontal in nature, i.e. it is not limited to any particular geographical region and follows the examples of *inter alia* the US, Canada and UK.

For two decades, the EU has been adopting restrictive measures (targeted sanctions) against private persons (both natural and legal) in order to pursue its foreign policy objectives. These sanctions usually consist of the freezing of assets and travel bans, aim to bring about a change in the policy or conduct of those targeted that aligns with the EU’s Common Foreign and Security Objectives (CFSP) objectives, and form part of an integrated and comprehensive policy approach. In recent years, the EU’s use of restrictive measures has increased exponentially. In 2021, more than 40 targeted EU sanctions regimes are in force.

The European Parliament first raised the idea of an EU HRSR in a resolution on the Annual Report on Human Rights in the World 2009 (European Parliament 2010). The regime in its current form was initiated by the Dutch parliament. However, the influence of the European and national parliaments

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seem quite limited since the EU HRSR has entered into force. It appears that the move towards supranationalisation contributes to disconnecting the EU's sanctioning practices, as one of its most developed and most powerful tools to respond to transnational security threats, from the control of national parliaments.

As part of a Special Issue titled 'European transnationalism between successes and shortcomings: Threats, strategies and actors under the microscope', this article identifies and evaluates the case of the EU HRSR as an example of transnational-threats-driven prioritization of security in EU politics. It falls in the first of the two categories by Cotterrell (2009, 481–482), outlined in the introduction to this Special Issue. The EU HRSR establishes a legal regime that reach across nation-state borders and often bypass third country authorities by targeting the citizens or even state officials of those countries without consulting or involving state authorities.

Transnationalism and cross-country cooperation have been defining features of the European project for many decades (see DeBardeleben and Hurrelmann 2011; Börner and Eigmüller 2015). The EU HRSR is an example of transnational cooperation (under the broad conceptualization presented in the introduction that includes cooperation by state actors) with strong supranational elements that has transnational effects, which are predominantly directed beyond the EU's borders.

The article concludes that the EU HRSR further centralizes powers in EU institutions and limits the grip of Member States on the sanctioning process. At the same time, the EU HRSR also demonstrates that Member States are not willing to fully supranationalize the sanctioning process. The article discusses the potential added value and legitimacy threats emerging from the EU HRSR. Both are closely related to the additional step of centralization that the EU HRSR takes compared to prior sanctions regimes.

Supranationalisation leads to a centralisation of power in the hands of EU actors, which are only loosely controlled by national representatives through existing accountability structures. In the context of the EU HRSR, this is best illustrated by the powers of the High Representative of Foreign Affairs and Security Policy (High Representative) and the European External Action Service (EEAS). The two terms of centralization of power in EU actors and supranationalization are hence for the present purpose used interchangeably.

Transnationalisation may on surface appear to contradict the notions of centralization and supranationalisation. However, as the introduction to the Special Issue rightly explains transnationalisation has many faces. The EU HRSR is a cross-border cooperation by EU Member States within the framework of the EU in response to a transnational security threat. It highlights the limits of supranationalization and hence confirms that the adoption of human rights sanctions will also remain characterized by intergovernmental legal cooperation in which the Member States continue to play a decisive role.

This paper is structured as follows: Section one introduces the EU HRSR. Section two argues that the EU HRSR is a notable step towards supranationalism. Section three focusses on the added value of the regime and discusses whether the EU HRSR really increases the EU's flexibility in responding to human rights violations and related security threats worldwide. Section four highlights potential pitfalls of this new instrument.

The EU HRSR in a nutshell

The EU HRSR – as all other EU sanctions regimes in force – was adopted on the basis of Article 215 TFEU. This requires a unanimous CFSP Council Decision under Article 29 TEU, which is then followed by a directly applicable EU Regulation giving effect to the CFSP decision. The CFSP Council Decisions contain an annex with the names of the targeted individuals. This annex is then copied into the EU Regulation.

The Council, acting by unanimity upon a proposal from a Member State or from the High Representative, identifies those targeted by sanctions (Council of the European Union, 2020c, Article 5(1)). In other words, every name on the list is agreed unanimously by all the Member

States. The restrictive measures imposed are asset freezes and travel bans (Council of the European Union, 2020c, Articles 2 and 3, emphasis added). The travel restrictions remain stipulated in the CFSP decision and not in the Regulation, as suggested during the adoption process (see more on this point below). This means that the implementation of travel restrictions remains under the responsibility of the Member States.

The EU HRSR focusses on serious human rights violations, introduced at three levels. Genocide and crimes against humanity are singled out at the highest level, followed by five examples of 'serious human rights violations or abuses' grouped together at the second level: torture and other cruel, inhuman or degrading treatment or punishment; slavery; extrajudicial, summary or arbitrary executions and killings; enforced disappearance of persons; and arbitrary arrests or detentions (Council of the European Union, 2020b, Article 2(1) (c), emphasis added). At the third level, five 'other human rights violations or abuses, including but not limited to the following, 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 set out in Article 21 TEU' are listed, namely trafficking in human beings, sexual and gender-based violence; violations or abuses of freedom of peaceful assembly and of association; violations or abuses of freedom of opinion and expression; and violations or abuses of freedom of religion or belief (Council of the European Union 2020b, Article 2 (1) (d), emphasis added). As an aid for interpretation, the EU HRSR wisely refers to 'customary international law and widely accepted instruments of international law', the latter of which are then listed (Council of the European Union 2020b, Article 2(2)). This includes, for example, the Rome Statute of the International Criminal Court.

The EU HRSR introduces a hierarchy of the seriousness of human rights violations, because some violations have to be widespread, systematic or otherwise of serious concern while others qualify without further conditions. It makes a choice, for example, that as such 'arbitrary arrests or detentions' are more serious violations than 'sexual and gender-based violence'.

The targets of the EU HRSR are also distinguished in three categories: first, 'natural or legal persons, entities or bodies, who are responsible for' violations or abuses; second, those 'who provide financial, technical, or material support for or are otherwise involved in' violations and abuses, 'including by planning, directing, ordering, assisting, preparing, facilitating, or encouraging such acts'; and third, those who are associated with those in the first two categories (Council of the European Union 2020b, Article 3(3), emphasis added).

In other words, at the centre are those persons, who are directly responsible for the defined human rights violations. From there, the involvement becomes step for step less direct and for this reason also more problematic in terms of legitimacy and evidence. In the last category, the EU HRSR's personal scope reaches all the way to those with the tenuous link of being 'associated' with a person, who 'encouraged such acts'.

On the one hand, extending the personal scope raises questions with regard to the duration of sanctions and the evidentiary threshold that needs to be met to demonstrate the involvement of those targeted. As in other sanctions regimes, no subjective element of knowledge or at least acceptance of the risk that the violation might occur is necessary for a person to be sanctioned. This stands in sharp distinction with conventional criminal law, even if many have pointed out the similarities between sanctions and criminal charges in terms of consequences (Eckes 2009, 2014; Van der Have 2019).

On the other hand, extending sanctions to those who 'encouraged such acts' is necessary to avoid the regime to include only those directly and physically involved rather than only extending to bigger fish (both natural and legal persons), who usually limit their personal actions to encouragement.

While directly targeting grave human rights violations, the EU HRSR should be seen as an EU response to a *transnational security threat*. The grave human rights violations targeted by the EU HRSR are first of all a security threat in the places where they occur. Yet, they are also usually interrelated with other criminal activity, such as corruption and breaches of international law. In

addition, the targeted violations are also of such a scope and gravity that they threaten international security more broadly. When such violations can be committed without fear of any response this exposes a powerlessness of the international system, which in turn solicits others to also disregard human rights, including those that are considered to form part of *ius cogens*.

Towards supranationalism

The EU HRSR is a pertinent example of how transnational cooperation in the area of sanctions moves towards greater centralization, with the EU institutions and in particular the High Representative and the EEAS taking a much more powerful role in the sanctioning procedure, as core form of supranationalisation. Its adoption process, however, also clearly demonstrates the limits of these centralizing efforts, because several of the most far-reaching proposals for centralization were abolished.

The first subsection draws attention to what is supranationalised and what is not in the EU HRSR's listing procedure. The second subsection specifically considers the failed attempt to centralise oversight in the hands of the Commission. The third subsection highlights the role of national parliaments in the adoption of the regime and in the listing procedure.

Listing procedure and first listings

In his 2018 State of the Union address, Former President Jean-Claude Juncker called upon the Member States to make use of existing EU rules to move from unanimity to qualified majority voting in certain areas of the EU's CFSP (Juncker 2018). He specifically mentioned 'human rights issues' and 'sanctions' in this context. In its resolution of 14 March 2018, the European Parliament urged 'the Council to adopt this new sanction instrument in such a way that the imposition of human rights sanctions might be adopted by qualified majority in the Council' (European Parliament 2019). However, after some discussion, Commissioner Johannes Hahn insisted already in March 2019 that all sanctions decisions would continue to require unanimity. Unanimity is what the EU HRSR requires for listing a person in the annex of the CFSP decision (Council of the European Union, 2020c, Article 5(1)). In other words, supranationalising the identification of those human rights violators and their supporters by moving to qualified majority vote in the Council was one bridge too far for the Member States.

However, the EU HRSR gives, besides the Member States, the High Representative the *right to propose designations* and, in practice, most designations are made following a proposal by the High Representative. This is one step towards centralizing the power of *proposing sanctions* in EU actors, which is a form of supranationalisation – even if the sanctioning decision continues to require unanimity.

Of the existing EU sanction regimes, the EU's more recent horizontal sanctions regimes, namely the 2016 autonomous ISIL/Da'esh and Al-Qaida regime (Council of the European Union 2016b; Council of the European Union 2016), complementing the EU measures giving effect to UN Security Council lists concerning ISIL/Da'esh and Al-Qaida (UNSCR 2253 (2015)), as well as the regimes against chemical weapons () and cyberattacks (), come the closest to the EU HRSR. They 'de-link' the sanctioning from international crises (Portela 2021).

The ISIL/Da'esh and Al-Qaida regime in particular possesses a human rights component, by listing individuals 'also' for 'being involved in serious abuses of human rights outside the EU, including abduction, rape, sexual violence, forced marriage and enslavement of persons' (Council of the European Union 2016b, Art 2(2)(f)). While the criterion itself is phrased in terms of general serious abuses of human rights and does not specifically refer to ISIL/Da'esh or Al-Qaida, a systematic reading would require such a link.

Designations under the autonomous ISIL (Da'esh) and Al-Qaeda regime may be 'based on proposals from the Member States or from the HR/VP' (Council of the European Union, 2016b, Art 5(1), emphasis added). In practice, the Council lists individuals based on proposals of the High

Representative in an EU procedure (E.g. Council of the European Union 2019a; Council of the European Union 2018b), without involvement of national authorities. Both the chemical weapons and the cyberattacks sanctions regimes are based on an identical designation procedure (Council of the European Union 2018d, Article 4(1); Council of the European Union 2019c, Article 6). Adopting sanctions under these horizontal regimes is, different from the traditional way sanctions have been imposed based on a decision of the competent national authority, no longer a composite but an EU only procedure. In other words, in the past, designations under the horizontal counterterrorist regime have been based on a relevant decision of a competent *national* authority, with the CP 931 Working Party/Council confirming (rubberstamping?) national decisions. Under the new EU only procedures by contrast, designations have been fully centralized: a working party (e.g. COMET WP) prepares, the High Representative usually proposes and the Council lists. This may help to diminish potential national bias. It also shifts the full (political) responsibility to the collective bodies/institutions of the EU.

This shift in responsibility may explain why requirement of unanimity in the Council did not prove to be an obstacle to listing individuals closely linked to the regime of wealthy powerful non-EU states, with whom some Member States entertain economic relations. Already in the second round of listing on 22 March 2021, the EU, together with the US, the UK and Canada, imposed, amongst others, sanctions on four individuals and one entity for abuses of the Uyghur in Xinjiang, China.

Together with non-disclosure of the internal discussions and the formal proposal by the High Representative, the adoption procedure in principle ensures that the political and economic implications of listing an individual are evenly affecting all Member States. Any listing decision is a decision of the EU Council as such. In principle, external parties should not be able to distinguish between friends and foes amongst the EU Member States. The listing of Chinese perpetrators seems to indicate that the Global EU HRSR may be able to transcend national political and economic interests and serve the EU's 'common foreign and security policy objectives as set out in Article 21 TEU' (Council of the European Union 2020c, Article 4(a); 5(1)).

Supranational oversight

However, the EU HRSR demonstrates also in another way that Member States push back on further centralisation of powers. The joint proposal of the Commission and the High Representative of 19 October 2020 for an EU HRSR foresaw another unprecedented supranational element. It proposed that the travel restrictions should be included in the EU Regulation and not, as is usually the case, only in the CFSP decision. Inclusion in the EU Regulation would have placed the Commission for the first time in the position to oversee on the implementation of travel restrictions under the EU HRSR (European Commission 2020).

The EU HRSR, as adopted on 7 December 2020, sets out the travel restrictions only in the CFSP decision. This means that the EU HRSR takes the same approach than other EU sanctions regimes: The travel restrictions fall under the responsibility of the Member States and the Commission does not hold oversight powers. Asset freezes, by contrast, are directly applicable and directly oblige banks within the EU to freeze all financial funds of those sanctioned. Again, this proposed centralisation of powers in the Commission did not find the necessary support in the Council. The EU HRSR remains transnational cooperation with supranational elements.

Parliamentary influence

Generally, the influence of the European Parliament over CFSP is very limited. It regularly adopts resolutions but the Council is not formally obliged to take any action or even take a position with regard to the European Parliament's views. Nonetheless, the European Parliament has at times been successful in putting issues on the agenda, including in national parliaments. The Lithuanian parliament, for example, called explicitly for a follow-

up of the European Parliament's resolution on a potential EU HRSR by Lithuanian politicians in Brussels (Seimas of the Republic of Lithuania 2017).

However, the driving force behind the EU HRSR was not so much the European Parliament but the Dutch parliament. In numerous resolutions, Dutch parliamentarians had expressed their conviction that it would be desirable to introduce sanctions for human rights violations (e.g.). Since April 2018, the Dutch minister for foreign affairs, Stef Blok, actively tried to find support for human rights sanctions in Brussels (Second Chamber of the Dutch Parliament (Tweede Kamer Der Staten-Generaal) 2018a). On 10 December 2018, the Member States agreed to develop the Dutch proposal of an EU HRSR further in the Working Party on Human Rights (COHOM). The Dutch Parliament followed the process closely and repeatedly asked questions to the minister and expressed support for his actions (e.g. Second Chamber of the Dutch Parliament (Tweede Kamer der Staten-Generaal) 2019a). It is fair to conclude that the Dutch Parliament directly exercised influence on the conception of the current EU HRSR and that parliaments when they complement and reinforce each other's points can have an influence on CFSP (see e.g. Second Chamber of the Dutch Parliament (Tweede Kamer der Staten-Generaal) 2019b).

It is also reasonable to expect, however, that it will be more difficult for parliaments to exercise influence over the transnational sanctioning process. Both the European Parliament and national parliaments have no formal say in the matter and raising public interest in the listing of individual names may prove a great challenge. It may also lead to targeted counter-sanctions imposed on individual members of parliament, as in the case of the listing of Chinese officials (European Parliament 2021).

Added value: more flexibility and greater speed?

The global reach of a horizontal regime

The creation of the EU HRSR is part of this trend and of an emerging trend towards *horizontal* sanctions regimes. The majority of the 40 plus EU sanction regimes were imposed as geographically limited regimes targeting a specific country or region, as listed on the EEAS website. Eight of them also contain sub-regimes specifically addressing human rights violations as part of the overall sanction regime that pursues other more openly political objectives. On 7 December 2020, when the EU HRSR was adopted, the EU had more than 200 natural and legal persons listed for human rights violations or abuses (EEAS 2020). However, those sanctioned under the geographically limited sub-regimes addressing human rights violations did not necessarily have to be directly linked to government authorities. In addition to the geographically limited sanction regimes, the EU has for many years 'horizontal' sanctions regimes targeting terrorist suspects (see Kaijafa-Gbandi 2021 on information exchange in the context of counter-terrorism) and since 2018 and 2019, respectively, it also has horizontal regimes against the use of chemical weapons and cyberattacks (Council of the European Union 2018d; Council of the European Union 2018c; Council of the European Union 2019c and 2019b).

The horizontal nature of the EU HRSR is what is expected to deliver greater flexibility and justice than the already existing legal structures, which in many ways already enable the EU to target human rights violators in very different contexts.

The recent case of Alexei Navalny illustrates this. After the Organisation for the Prohibition of Chemical Weapons (OPCW) confirmed early October 2020 that Mr. Navalny was poisoned with a toxic nerve agent classified as a chemical weapon, the EU quickly sanctioned five natural and one legal person identified as responsible for the poisoning under the EU's chemical weapons regime (Council of the European Union 2020a). In February 2021, the European Council agreed to blacklist additional Russian officials guilty of wrongly jailing Mr. Navalny, following his return to Russia (Rettman 2021). Navalny's example demonstrates how the different sanctions regimes can complement each other and how the EU HRSR can have an added value. In this first use of the EU

HRSR, the EU also demonstrated some restraint. It listed those who ‘run Russia’s investigative, prison, prosecution, and national guard services’ but not those whose corruption Mr. Navalny exposed and who may be expected to have been involved in the form of the second category above (e.g. ordered, directed, endorsed), because the evidence was not sufficient (Rettman 2021).

Because it is horizontal in nature, the EU HRSR and the chemical weapons regime have a global reach. In other words, no new legislative basis is necessary to address new threats that fall under their substantive reach, irrespective of where they emerge in the world. The Navalny case appears to confirm the promised speed and flexibility of the sanctioning process under horizontal regimes. This speed and flexibility should not come at the expense of human rights protection (see Sachoulidou 2021 on the proposed E-Evidence Regulation).

The double listing of those involved in jailing Mr. Navalny illustrates what could also happen with geographical regimes. Sanctions under one of the human rights sub-regimes could be imposed in addition to sanctions under the EU HRSR (see also Portela 2021, 36). Legally, this would be possible, as sanctions are formally considered to be preventive rather than punitive measures. Also, many of the consequences would be the same (travel ban; freezing of assets with the EU). At the same time, if a person is delisted or succeeds to have their listing annulled under one of these regimes, particularly if this is the case for lack of evidence, this would require a reconsideration of how it is possible that the evidentiary standard under the other regime is met.

Targeting human rights violators worldwide: global justice?

Formally, the EU HRSR has a global reach. It offers a legal framework to adopt sanctions against any particular person or group of persons for example, following any incident of grave human rights violation. It is ‘meant to end exemption even for the servants of powerful and strategically important states’ (Rettman 2020a). Not singling out any specific geographic region at the stage of adopting the legal instruments avoids antagonising any particular state or region at that stage. The EU HRSR’s formal global reach postpones all potential disagreement to the more limited scale of individual listings. This is expected to offer more flexibility and allow for a quicker EU reaction to those incidents circumscribed in the EU HRSR – quicker as compared to the current situation in which the EU might first have to adopt an entirely new geographically limited sanctions regime.

As discussed above, further supranationalisation and diplomatic secrecy around the listing procedure allow Member States to hide behind the EU decision. At the same time, the unanimity requirement in the Council is likely to amount as an obstacle to listing certain nationals. This is well known for geographically limited sanctions regimes (e.g. Cypriote veto on sanctions against Belarus). With the sanctions against Chinese nationals, the EU has shown that it is possible to target perpetrators also when they are directly connected to a politically and economically powerful state.

Potential legitimacy pitfalls of the EU HRSR

The EU HRSR is bound to be held to a higher standard than other EU sanctions regimes in the public debate. This is the case simply because if you restrict human rights in order to protect human rights, your actions are scrutinized for whether they are in line with your own noble objectives. Already during the adoption process, the EU HRSR has drawn much attention and support from human rights and anti-corruption organisations. They have expressed expectations about the effects of the regime that often relied on a combination of signaling, deterrence, and justice (Netherlands Helsinki Committee 2018). The EU’s first rounds of sanctions are likely to be closely scrutinised, including as to how they reconcile human rights justice considerations and political foreign policy motives.

Scope: corruption

Above, it was presented how the EU HRSR targets grave human rights violations. The EU regime is inspired by the US 'Global Magnitsky Act' (U.S. Government 2016), which was signed into law by the Obama Administration in December 2016 and became operative under an Executive Order by President Trump in late 2017 (Executive Office of the President of the U.S. 2017). The Global Magnitsky Act carries the name of Sergei Magnitsky, a Russian lawyer who investigated an enormous tax fraud connected to the Kremlin. Magnitsky was kept in detention without trial for over a year, was beaten by riot troopers, and denied medical care. In 2009, Magnitsky was killed in custody (Russel, 2019). Those involved in his detention and death did not face any legal consequences in Russia.

The Global Magnitsky Act has already inspired similar legislation in Canada (Canadian Government 2017). The UK has had for some time Magnitsky-inspired provisions in its general sanction legislation, targeting people connected with or benefited from the torture of political opponents (Proceeds of Crime Act 2002 U.K. Government 2002) and the Sanctions and Anti-Money Laundering Act 2018 (U.K. Government 2018)). In July 2020, the UK imposed the first sanctions under a national Global Human Rights Sanctions regime operating under the UK's Sanctions and Anti-Money Laundering Act 2018 (). The UK regime does not include corruption.

One of the core points of discussion has been whether corruption should be included as ground for sanctioning a person under the EU regime. The EU HRSR as it was adopted on 7 December 2020 does not include corruption; yet, as above explained, it casts a wide net catching people with very different and partially more remote links to the human rights violation. Corruption and human rights violations are often directly connected. This is one reason why it is justified considering the EU HRSR as a transnational response to a *transnational security problem*. Hence, it is conceivable that someone implicated in corruption also facilitates through this act of corruption serious human rights violations. Corruption remains on the wish list of many NGOs, such as Transparency International, to be included in the future (Rettman 2020a) i.e. when the EU HRSR initial duration ends on 8 December 2023 or at one of the interim review moments (Council of the European Union 2020c, Article 10).

Objective: change of behaviour?

The EU HRSR may become a successful attempt to reach beyond the existing means of confronting perpetrators of serious human rights violations with some consequences. However, despite the expressed intention of one of the driving forces behind the EU HRSR, namely the Dutch parliament, to set up a preventive system with behaviour-changing effects (Second Chamber of the Dutch Parliament (Tweede Kamer Der Staten-Generaal) 2018b) and the declared objective of EU sanctions in general (Council 5664/18), the EU HRSR's main objective does not seem to be changing behaviour. Objectives in EU sanctions regimes are always formulated in a very general manner, usually stating that such measures are necessary in view of the situation in a particular country. The text of the CFSP decision and the EU Regulation do not give clarity on whether a change in behaviour is an or even the objective of the regime. Arguably, without any clear mechanism to demonstrate a change in behaviour and without any reference to this objective, either in the formal legal text or in the communication by the EEAS and the Commission about the EU HRSR, the objective cannot be changing behaviour. It could hence be signalling that something is being done to address a serious human rights violation and imposing some legal consequences on those who have economic and financial ties with the EU or modifying, in a deterrent manner, the target's cost-benefit calculations of pursuing a certain policy or action. Whether sanctions in general do have any deterrent effect in practice is highly contested.

We should not expect sanctions under the EU HRSR to be applied neutrally or impartially. The regime is not meant to exclusively focus on the gravity of the violation or the responsibility of those sanctioned. As all sanction instruments, the EU HRSR cannot but conform to the foreign

policy objectives and interests of those applying it. It is best to acknowledge that sanctions, including human rights sanctions, are a foreign policy tool. The CFSP Decision establishing the EU HRSR sets out that in particular with regard to listing non-State actors, the Council shall consider in particular ‘the objectives of the common foreign and security policy as set out in Article 21 TEU; and [...] the gravity and/or impact of the abuses’ (Council of the European Union, 2020c, Article 1(4)). Article 21(1) TEU is dedicated to all the principles that the EU HRSR is inherently committed to serve, such as human rights, human dignity, democracy and the rule of law. However, the Council is held to consider all objectives in Article 21 TEU, including the EU’s own fundamental interests, security, and integration of all countries into the world economy. It is of course a legitimate interest of the Union that all its foreign policy measures promote or at least not undermine these constitutionally determined foreign policy objectives. However, the sanctions adopted under the EU HRSR are heralded as bringing those to justice who violate human rights. It will remain a politically delicate task to explain in this context why human rights violators from some countries are listed but others, who perhaps even more clearly have committed perhaps even more serious human rights violations, are not. Finding a compromise in this respect is inherent in European Union decision-making. It reflects one of the challenges of transnational cooperation of state actors.

Rights of human rights violators

The greatest potential pitfall of the EU HRSR is that it may itself be found or at least convincingly accused to structurally violate fundamental rights—for example, the procedural guarantees under the Charter of Fundamental Rights. The EU institutions were of course aware of this potential pitfall. This is reflected in the second recital emphasising that the ‘Regulation respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union, in particular, the right to an effective remedy, the right to defence, and the right to the protection of personal data. This Regulation should be applied in accordance with those rights’ (Council of the European Union 2020b, Recital 2).

For the EU HRSR, it remains a challenge to ensure compliance with the human rights guaranteed under EU and national law, including the rights to the defence of those sanctioned. The EU HRSR may be inspired by the US regime but the US model of *Global Magnitsky* cannot and should not be followed too closely. In the most crucial aspect of making the EU HRSR itself comply with human rights, namely offering judicial protection against allegedly wrongful listings, the *Global Magnitsky* does not meet the due process guarantees under the Charter of Fundamental Rights. The high numbers of annulments in the past, both of counterterrorist and country sanctions, have seriously undermined the legitimacy of these sanction regimes (Eckes 2014). An EU HRSR should from the beginning offer the necessary standards of protection in order to make a credible claim of contributing to the protection of human rights without itself infringing them.

Designation criteria

The link between designation criteria and judicial review was explicated by the Member States in a Declaration to the Lisbon Treaty dedicated to the adoption of sanctions, which emphasizes that ‘the due process rights’ of those sanctioned must be observed and that this hinges on ‘thorough judicial review’ of listing decisions ‘based on clear and distinct criteria’ (Declaration 25). The identification of the Council should be based on ‘personal conduct’ ‘corresponding to the designation criterion’ (Declaration 25). The Member States’ formal commitment to clear and distinct criteria is particularly relevant in the context of horizontal regimes, which are not *a priori* subject to limitations imposed by geographical location or political affiliation.

The Court of Justice has granted the Council considerable leeway, repeatedly confirming its broad discretion for defining ‘the general criteria’ adopted ‘for the purpose of applying restrictive

measures' (ECJ Case C-630/13P *Anboub*, [2015], para 43). The General Court further specifically ruled out that the legal safeguards applicable to the adoption of specific restrictive measures (individual listing) could be applied to the assessment of the legality of a general regime (listing criteria) (GC Case T-160/13, *Bank Mellat v Council* [2016], para 100).

In some of the human rights sub-regimes, the designation criteria remain very general. They refer for example to '[...] persons responsible for human rights violations [...]' (Council Decision (CFSP) 2014/119, Recital 2; Article 1(1)). However, in a systematic reading they are limited by the objective to achieve a change in policy of the rulers in the particular geographical area on which they focus. This contextual systematic limitation does not apply to horizontal regimes, such as the EU HRSR.

Generally speaking, it is fair to conclude from the case law of the CJEU that the broader the (de-) listing criteria the more discretion falls to the Council. This means that it is more difficult to successfully challenge an individual listing. This reduces the likelihood of successful legal challenges that may in turn undermine the legitimacy of the EU HRSR in the eyes of the public. Challenges against existing EU sanctions have become less successful. The question is only whether this is the case because the listing process has become more robust or whether this is the case because the listing criteria have become much broader, including persons 'associated with' someone, who 'endorses' conduct defined in the sanction regime. Including excessively broad criteria appears to constitute a slippery slope away from legal certainty as a core requirement of the rule of law. This results in a criminalisation of preparatory acts and is a parallel development of the criminalisation that we see in the context of terrorism (Kaiifa-Gbandi 2021).

Evidentiary threshold and burden of proof

Besides the issue of whether a claim can be brought to an independent court against an allegedly wrongful listing, the second most relevant issue is: what evidentiary threshold would an applicant in such a case have to meet. The latter determines whether in practice the applicant enjoys access to justice. The EU HRSR does not identify an evidentiary threshold, nor does the CJEU in its sanctions case law.

In the US, sanctions under the Global Magnitsky Act must formally meet an evidentiary threshold akin to requiring a 'reason to believe' or 'based on credible information' (Human Rights First 2019). As a matter of practice, the US government may try to exceed this level of proof in most cases. Formally, 'reason to believe' is a higher threshold than, for example, the 'reasonable grounds to suspect', as necessary in the UK to impose human rights sanctions (Global Human Rights Sanctions Regulations, Section 6). However, in practice, the US courts are very reluctant to interfere with what they consider political decisions; hence, the formal formulation should not lead to the conclusion that judicial review in the US is more robust.

In the EU, at least the level of detail *publicly* supplied to substantiate a listing under some of the human rights sub-regimes is very low. An example reads: 'In this capacity, Gabriel Amisi Kumba was therefore involved in planning, directing, or committing acts that constitute serious human rights violations in DRC' (Council of the European Union 2019d). In addition, for a listing to be upheld by the CJEU, it is sufficient that one of several reasons put forward by the Council can be substantiated (ECJ Case C-630/13, *Anboub* [2015], para 46). The CJEU carries out a case-by-case review. However, a codified standard of proof or at least an abstract standard formulated by the CJEU would establish clarity and a legally sound basis for designation. However, the CJEU even accepts rebuttable presumptions in the sense that the burden of proof is shifted because of such presumption to the listed person, who needs to produce evidence in order to overcome the presumption as untrue in this case.

The possibility to rely on presumptions for a listing decision depends on the context. In principle, the Council has to discharge its burden of prove by demonstrating 'sufficiently specific, precise and consistent' evidence showing 'a sufficient link between the person ... and the regime' (Court of Justice of the European Union, 2015, para 53; ECJ Case C-348/12P, *Council v Manufacturing Support*

and *Procurement Kala Naft* [2013]). However, the Court of Justice also held that ‘the use of presumptions is not precluded if the *contested acts have made provision for them and they serve the purpose of the legislation at issue*’ (ECJ Case C-376/10P, *Tay Za v Council* [2012], para 69). The presumption must be rebuttable and not disproportionate to the legitimate aim pursued. The formulation that a person is ‘associated with’ could be taken as the basis to presume that, for example, family members fall under the sanction regime.

However, in this generality such a presumption would not be in line with the case law of the ECJ. In the appeal case of *Tay Za*, the Court of Justice rejected the General Court’s conclusion that the son of a business figure was sanctioned for the sole reason that he belonged to the family of a person who could be regarded as being associated with the leaders of the sanctioned regime (Court of Justice of the European Union, 2012a, para 84). The ECJ considered how the presumption related to the objective of the sanctions regime and held that ‘it is not easy to establish a link, even an indirect link, between the absence of progress towards democratisation and the continuing violation of human rights in Myanmar and the conduct of the family members of those in charge of businesses’ (para 89).

However, while the presumption may not extend to family members, the ECJ has accepted presumptions in different circumstances. For example, in *Anboub*, the leading case on presumptions, the ECJ held that the fact that the applicant was a successful businessman in Syria was not sufficient to conclude that he supported the Assad regime (the relevant criterion for inclusion in the EU’s Syria sanctions). At the same time, the Court reasoned that ‘inclusion on the lists of persons subject to restrictive measures was well founded on the basis of a set of indicia relating to his situation, functions and relations in the context of the Syrian regime that were not rebutted by him’ (Court of Justice of the European Union, 2015, para 55). Similarly, in *Tomana*, the CJEU confirmed that the conclusion was legally possible that ‘those who hold senior posts, such as the individuals involved in military, police or security operations, must be regarded as being fully associated with the [sanctioned political regime], unless they have taken specific action demonstrating their rejection of the government’s practices. In those circumstances, referring to the capacity of those individuals or to the posts they occupy is sufficient, as the contested measures themselves expressly provide’ (Court of Justice of the European Union, 2016, para 84). In other words, while family ties alone are not sufficient for establishing a presumption in favour of inclusion on list of targets, holding a certain position, for example, of a political or military nature or conducting a thriving business in a country where this is only possible with the support of a political regime that is targeted by the sanctions regime may suffice to shift the burden of proof. Those suspected in this way would need to offer evidence that in their specific case the presumption is incorrect.

Reliance on open source materials

The EU HRSR does not stipulate the origin or type of the information that supports the listing decision. It does not make a formal legal commitment to open-source materials. Generally, under many sanctions regimes listings largely take place on the basis of open-source materials (House of Lords 2017, para 105). With regard to the EU HRSR, national and EU actors have expressed a commitment in the adoption process to use open-source materials. However, this is not a legal obligation. It does not exclude reliance on other sources of information (see for the related problems: Sachoulidou 2021)

This is crucial in the context of due process rights. In the past, a large number of sanctions, both counterterrorist and country sanctions, have been annulled by the EU Courts because the Council did not share the relevant information to put the Courts in the position to rule on the merits (Eckes 2009, 2014). The Courts have been very clear. The Council cannot rely on a claim that the evidence concerned comes from confidential sources in order to justify that it cannot be disclosed to the EU Courts (General Court 2006, para 155). It is not entitled to hide behind the state secrecy laws of a Member State (General Court 2008, para 73).

The exclusive reliance on open-source materials will solve this important problem. Open-source materials cannot legally qualify as confidential materials. They must be shared with the applicant in case of a legal challenge (European Court of Human Rights 2016). State secrets privilege cannot apply in cases where the information is already in the public domain (I, para 268; Abazi and Eckes 2018). The commitment to rely exclusively on open source material for listings under the EU HRSR is suitable to avoid some of the troubles of the counterterrorist and country sanctions.

However, any information, including open-source information should only be accepted as credible as its source. Only because an allegation is publicly made, this does not mean that a fair possibility to provide counter evidence was given. Much publicly available information is based on hearsay and notoriously difficult to verify or successfully contradict from the perspective of the suspected. In other words, false positives cannot be excluded only because information is public (see in a different context: Sachoulidou 2021).

Conclusions

The EU HRSR is above all a transnational response to a changing landscape of security challenges, which are themselves transnational. It recognizes the growing relevance of threats from non-State actors. Threats are no longer necessarily linked to a state and can therefore no longer be pinned down to specific geographical region. Certain threats are themselves more flexible and require a more flexible legal framework to deal with. This seems to be the convincing logic behind the EU's move towards horizontal sanctions regimes.

Examined within the framework of this Special Issue, the EU HRSR is also an example of transnationalisation of law. It vests the EU with a new mechanism of cooperation that has global reach and promises flexibility and speed. Sanctions, including restrictive measures against individuals, have long been EU competence. This was the case even before the entry into force of Lisbon Treaty, which introduced a specialized legal basis for individual sanctions. However, the sanctioning procedure has over time been supranationalised. Proposals may be made and are under certain sanctions regimes predominantly made by the High Representative. The European External Action Service, the EU diplomatic service with a mix of EU officials and officials seconded by the Member States, assists the High Representative for Foreign Affairs and Security Policy with carrying out the Union's CFSP, including with imposing sanctions, which are an essential EU foreign policy tool. It specifically assists the High Representative with the preparation of listing proposals.

Two proposed steps towards further supranationalisation were, however, rejected for the EU HRSR. Designations will continue to be agreed by unanimity in the Council. The Commission does not have the oversight of over the imposition of travel bans, as those continue to be set out in the CFSP decision rather than the EU Regulation. This indicates that at least at this point, Member States did not have the appetite to follow the Commission's plans of further supranationalisation.

The EU HRSR is subject to the same legitimacy pitfalls as the other sanction regimes. The imposition of sanctions needs to comply with the EU Charter of fundamental rights, including rights of the defence. If it does not, as was demonstrated to be the case in many of the judicial challenges under other sanction regimes, this damages the legitimacy of sanctions and of the Union as a Union of law.

Arguably, these pitfalls are even more dangerous in the context of the HRSR. The political actors, who advocated the adoption of the EU HRSR, made high moral claims. As mentioned above, the EU HRSR was cast in terms of bringing to justice and holding responsible those who commit serious human rights violations and abuses. The higher the moral principles one proclaims to follow the greater the disappointment when these moral principles are broken.

Disclosure statement

No potential conflict of interest was reported by the author(s).

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