

A photograph of an iceberg floating in dark water. The visible tip of the iceberg is small and jagged, while the submerged portion is much larger and more complex in shape, illustrating the concept of hidden assets or illicit activities. A red rectangular box is overlaid on the submerged part of the iceberg, containing the title and subtitle text.

SANCTIONING KLEPTOCRATS

AN ASSESSMENT OF EU
MISAPPROPRIATION SANCTIONS

Cover image created by Uwe Kils (iceberg) and User:Wiska Bodo (sky) under a GNU Free Documentation License

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Sanctioning kleptocrats.
An assessment of EU misappropriation sanctions

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CONTENTS

ACRONYMS	iv
EXECUTIVE SUMMARY	v
1. INTRODUCTION	1
2. ASSET FREEZES AS CFSP SANCTIONS	3
3. THE USE AND EFFICACY OF ASSET FREEZES	5
4. THE SELECTIVE APPLICATION OF FREEZES	7
The View from Brussels	7
The Specificities of the Misappropriation Regime	9
Conclusion	10
5. THE EU AND THE SWISS LEGAL FRAMEWORKS	12
The EU Framework	12
The Swiss Framework	16
Comparing the EU and the Swiss Frameworks	19
6. EVALUATING THE EFFECTIVENESS OF FREEZES	21
Tunisia, Egypt, Ukraine	21
7. EFFECTIVE ANTI-CORRUPTION INSTRUMENTS?	27
Available Alternatives	28
NOTES	30
REFERENCES	32
ANNEXES	36

ACRONYMS

CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
EC	European Community
EEAS	European External Action Service
ENP	European Neighbourhood Policy
EU	European Union
FIAA	Foreign Illicit Assets Act
HR	High Representative of the Union for Foreign Affairs and Security Policy
MEP	Member of the European Parliament
QMV	Qualified Majority Voting
TEU	Treaty on European Union
TFEU	Treaty on the functioning of the European Union
UNSC	United Nations Security Council

EXECUTIVE SUMMARY

Sanctions as a political tool

In 2011 revolutions ousted the presidents of Tunisia and Egypt, and in 2014 similar large protests led to the overthrow of the leadership of Ukraine. These uprisings removed from power leaders and their close associates who had long been suspected of stealing vast amounts of public wealth from their countries and hiding this wealth overseas.

Responding to these revolutions, the European Union (EU) put in place freezes on the European bank accounts and property of the former rulers, as well as on their families and entourages, preventing these assets from being transferred and hidden again. To accomplish this aim, the EU employed the same type of legislative acts it uses for foreign policy sanctions, which are adopted under its Common Foreign and Security Policy (CFSP) and are primarily designed to advance political objectives.

These sanctions were agreed for two main reasons:

- To prevent the flight of suspected stolen public assets by former regime elites, through freezing the assets, thereby making it possible to recover the assets at a later stage;
- To stabilise the post-revolutionary leaderships and new governments in Cairo, Tunis and Kiev.

A story of limited success

While there is evidence to suggest that the sanctions were successful in building bridges with the new governments in the three countries, particularly after initial, lukewarm support for regime change in Egypt and Tunisia, progress in the recovery of the allegedly stolen wealth has been limited.

These three cases are moreover the first and only examples

of EU level sanctions imposed to address the suspected theft of public funds - in EU terminology the “misappropriation of state assets”.

The difficulties experienced in the three cases and the limited use of CFSP sanctions to fight the misappropriation of state assets are, to an extent, linked. The principal obstacle with the Tunisia, Egypt and Ukraine cases was legal challenges to the sanctions in front of European courts, which often ruled in favour of annulling listings due to insufficient substantiation.

While judicial defeat is common to all EU sanctions regimes, in the case of misappropriation sanctions this problem was exacerbated by the Council’s over-reliance on evidence supplied by Egypt, Tunisia and Ukraine, which suffered from weak investigative capacity and political interference in the judicial system.

The Council’s reliance on evidence from other countries has made the EU hesitant to extend its use of sanctions for misappropriation. In addition to this is the problem of the link between the sanctions and any recovery of stolen assets. The CFSP sanctions framework is not empowered to deal with the restitution of funds, leaving this to the Member States where the assets are located. This means that the sanctions often exist independently of any domestic criminal investigation.

By way of comparison, the Swiss Foreign Illicit Assets Act, enacted in the wake of the revolutionary regime changes and tailored to the objective of asset recovery, specifies criteria for the freezing of assets, and provides a legal basis for their confiscation and restitution, covering all stages of the asset recovery process.

EXECUTIVE SUMMARY

Available alternatives

Several alternatives exist that could be taken up by policy makers to address the limitations of EU-wide sanctions to address grand corruption.

Asset freezes could be made to work more effectively towards asset recovery by, for example, transferring the basis for asset freezes to a different legislative framework that involves judicial co-operation, or by creating new legislation addressing all aspects of the asset recovery process. While discussions are underway to introduce reforms in EU sanctions policy, these need to build on the lessons of existing misappropriation sanctions regimes.



INTRODUCTION

Media reports tend to portray sanctions as a tool of foreign and security policy, often overlooking the existence of sanctions imposed to address the misappropriation of state assets. Reporting on the current EU sanctions regime in response to the crisis in Ukraine highlights the sanctions against Russian targets for their support of destabilisation in Eastern Ukraine, as well as the embargo on Crimea following its annexation. However, the existence of a sanctions regime freezing the assets misappropriated by members of the political elite ousted in the spring of 2014 receives by comparison little attention.

Indeed, while the EU has been imposing sanctions for decades under its Common Foreign and Security Policy (CFSP), the use of sanctions to address misappropriation of state assets represents a novel application of this tool. It emerged in response to the Arab uprisings of early 2011, and it was employed again in the aftermath of regime change in Ukraine. However, since the Maidan crisis in Ukraine, the EU has not applied assets freezes for this purpose again. These cases remain unique in the context of CFSP sanctions policy, as they constitute the only instances in which sanctions have been applied to leaders after their ousting. Further, they are the only assets freezes unaccompanied by visa bans.¹

After a life span of roughly four to seven years, the application of asset freezes under the CFSP to address misappropriation does not boast a satisfactory record. These measures have run into trouble. Firstly, following the initial freezing, the lack of criminal convictions of the individuals by their country's judicial systems has not allowed the sanctions to move into the phase of asset recovery. Secondly, some of the targets have successfully challenged their designation in front of EU courts, which have annulled their listing due to insufficient evidence for the imposition of sanctions. The EU's inability to maintain

the freezing of assets swiftly effected after the ousting of the governments of Tunisia, Egypt and Ukraine has been mournfully described as a "short-term success but a long-term failure".²

In light of this sub-optimal state of affairs, the present contribution aims to investigate the following questions with regard to misappropriation sanctions:

- What are the reasons behind the imposition of misappropriation sanctions and why have they been applied only in three cases?
- Have CFSP sanctions proved effective in combatting the misappropriation of state assets?
- Which obstacles constrain the effectiveness of these sanctions as a tool for asset recovery?
- How does the use of misappropriation sanctions compare to alternative tools for asset recovery?

Ultimately, the objective of the study is to generate knowledge that can inform the actions of civil society organisations and policy experts active in the field. Existing research cannot be relied upon for this purpose: Scholarship has produced some studies on the impact of blacklists on individuals. However, such research has focused on the measures' impacts on the behaviour of designees³ or on the political dynamics in the country affected⁴ rather than on their ability to facilitate asset recovery. Thus, a misappropriation angle is missing. The proposed study aims to address this gap, focusing on the EU's experience. The investigation relies on desk review of both academic and grey literature, selected jurisprudence and EU official documents as well as anonymous interviews with representatives from various EU Member States and EU institutions in Brussels conducted between spring 2017 and autumn 2018.



INTRODUCTION

The study proceeds as follows. First, it outlines the EU's use of assets freezes to address misappropriation of state funds, identifying their aims and evaluating their efficacy. Secondly, based on the information available, it attempts an explanation of the selectivity with which this tool has been employed so far: it entails only three cases, all of which occurred in the period from 2011 to 2014. The following section delves into the characteristics of existing EU legislation, performing an analysis of the CFSP instrument and comparing it to the Swiss legislative model addressing the same issue. This is followed by an exploration of the three instances of application of asset freezes: Tunisia, Egypt and Ukraine. To conclude, a final section presents the overall findings.



ASSET FREEZES AS CFSP SANCTIONS

Before analysing the EU's employment of asset freezing sanctions to address the misappropriation of state funds, this section will outline the decision-making environment in which such decisions are framed, and contextualise it within EU external governance. The assets freezes were agreed under the foreign policy coordination framework of the EU, the CFSP. In this intergovernmental forum, each Member State has one vote and decisions are adopted by unanimity, meaning that each Member State formally has a veto. CFSP sanctions are adopted in pursuance of the objectives of the EU's external action as stipulated in Art 21(2) of the Treaty on European Union (TEU), which include, among others, to consolidate and support democracy, the rule of law, human rights and international law, as well as to foster the sustainable economic, social and environmental development of developing countries.⁵

The trigger for the adoption of sanctions comes from the geographical working group dealing with the country concerned. A Member State must present the proposal, although it may also be tabled by the High Representative of the Union for Foreign Affairs and Security Policy (HR). Ultimately, though, all Member States must agree to it, given the requirement for unanimity. A request by a third country is only discussed if a Member State or the HR asks for its inclusion in the agenda. Nothing precludes any of the Member States from proposing an asset freeze in a third country in the absence of an explicit request. Indeed, in CFSP practice, the proposal of sanctions regimes at the request of a third country represents the exception rather than the norm.

The decision-making procedure consists of two steps.⁶ A Council Decision is first adopted under Title V of the TEU. This act represents the political decision to wield sanctions. Because of their bearing on the single market, decisions on sanctions require the subsequent adoption of another

type of EU legal act - a Regulation - to give effect to the bans reflected in the CFSP act. Accordingly, Regulations, which are agreed under qualified majority voting (QMV), invariably follow the initial CFSP measure.⁷ The current legal basis is Article 215 of the Treaty on the Functioning of the European Union (TFEU), which provides for the adoption of sanctions against third countries as well as individuals, groups and non-state entities.

Article 215 (3), TFEU

1. Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof.
2. Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities.

Once sanctions are enacted, they are subjected to periodic renewal, normally every twelve months. Renewals take the form of Council Decisions and must again be agreed upon by unanimity. Under the current treaty, the Court of the Justice of European Union (CJEU) has limited powers in the CFSP. However, sanctions imposed against individuals are subject to the jurisdiction



ASSET FREEZES AS CFSP SANCTIONS

of the Court, which established in its 2008 ruling on Kadi⁸ that it is competent to review the conformity of CFSP designations with fundamental rights.⁹ As a result, sanction regulations must provide adequate safeguards to protect the fundamental rights of those affected by the measures.

As a general foreign policy framework lacking any specific anti-corruption dimension, CFSP acts do not contain any elements permitting a follow-up to the initial freeze. There are no provisions for efforts leading to the confiscation and return of assets at EU level, which means that any action for asset recovery must take place at the level of the individual Member States concerned.



THE USE AND EFFICACY OF ASSET FREEZES

Sanctions are generally believed to be geared towards achieving a change of behaviour in the target.¹⁰ However, scholarship has long recognised that sanctions success should not be measured just in terms of their contribution to the achievement of a change of behaviour in the targeted leadership. Sanctions fulfil a number of functions beyond forcing compliance. Several authors have pointed to a myriad of roles played by sanctions other than coercion.¹¹ They can limit the military or economic capacity of the target, thereby preventing them from pursuing policies opposed by the sanctioning authority. Sanctions may also deter third countries from following a similar course.¹² They can be used to protect activists and political opponents exposed to state repression, or to divert the attention of the local public from domestic problems, focusing discontent on a battle against an “external enemy”.¹³ Imposing sanctions can also improve the image and electoral prospects of the leaders who advocate them. Importantly, they can be employed to position international actors strategically in the context of an international dispute.¹⁴ In the case of the EU, it has been suggested that wielding sanctions helps strengthen its international presence.¹⁵ The differentiated evaluation of multiple goals has gradually established itself in sanctions research.¹⁶ The success or failure of sanctions can only be evaluated against their goals. In order to assess the efficacy of the measures, their objectives must first be ascertained.

Misappropriation sanctions regimes differ fundamentally from the rest of CFSP sanctions. They are accordingly treated as special cases by EU authorities. From the perspective of EU Member States, standard CFSP sanctions are meant to compel the target to change course, and deter specific forms of behaviour. By contrast, misappropriation regimes were not conceived as means of pressure to bring about a specific outcome from the targeted individuals or national authorities.¹⁷ Instead, the freezes were imposed

with a two-fold intention in mind, one of them is rather technical in nature, while the other is political.

Firstly, the freezing of assets constitutes a pre-requisite for the later recovery of assets. The objective was to prevent the flight of capital by members of the ousted leadership and their associates. The freezes are meant to prevent the flight of misappropriated funds until these can be recovered. Illustratively, the measure is referred to as “preventive blocking” (French: “blocage preventif”) under Swiss legislation.

Since deposed leaders left office abruptly and swiftly, they retained access to public funds they could easily transfer, in addition to access to funds misappropriated at an earlier stage. The urgency of the situation made it imperative to freeze the assets immediately, in order to afford some time for the authorities from the affected countries to issue international mutual legal assistance requests. Thus, the freezes were temporary in character, and were put in place in a quickly evolving context, on the assumption that they would be replaced by a formal request of mutual legal assistance (MLA) shortly after. As explained by then-HR Catherine Ashton, “the frozen assets cannot just be released; first ownership must rightfully be transferred to the new state structures”.¹⁸ The EU intends “to be ready to lift them quickly when we are in the position to be able to make sure that the assets are returned to the people”.¹⁹ This formulation reveals that the recovery of assets and their restoration to the coffers of the originating countries²⁰ constitutes the ultimate objective of the measure. Equally, this shows that misappropriation sanctions do not pursue the goal of coercing any government or individual to change behaviour, which contrasts sharply with the popular belief that sanctions are invariably about those goals. Any coercive intention would be ineffective anyway



THE USE AND EFFICACY OF ASSET FREEZES

given that the targeted individuals are no longer in office. Having fled the country, former leaders and most of their entourage have disappeared from the political landscape.

The freezing of assets constitutes only the first step in the recovery process, and it is also the only one that can be dealt with at the EU level under the current legal framework. The subsequent stages, i.e. identification of assets and return to the originating state with the help of a MLA are to be handled at the level of Member States.

A separate - if closely related - rationale of misappropriation sanctions is to support the new leaderships that replaced the rulers ousted during the Arab Spring. The motivation is clearly political: the asset freezes were applied as a signal of support to the post-revolutionary leaderships of Tunisia and Egypt.²¹ This goal was of key importance to the EU given that the initial European response to the protests had not been one of unequivocal backing. Prior to the overthrow of the doomed regimes, most European government had been cautious about aligning themselves with the upheavals. France infamously offered help to the Tunisian government to repress the revolts.²² From this point of vantage, the freezing of the assets of ousted leaders was designed to make up for the initial absence of support and to build bridges with a new political elite, with which Europeans had no previous links. Such conciliatory gestures were all the more pertinent given that European hesitation about backing the popular protests was at odds with the EU's declared objective of promoting democracy in its neighbourhood. The situation repeated itself three years later with the Maidan protests in Ukraine, where the freezing of assets by the EU followed a sudden change of government. Due to the parallelism between the Arab Spring and the Maidan protest, characterised by a pattern of popular unrest leading to the unexpected ousting of the leadership, the EU replicated the approach witnessed in the

aftermath of the Arab revolts. This reading was confirmed by the CJEU, which declared in relation to the Egyptian freeze that the freezes were "part of a policy of supporting the new Egyptian authorities".²³

The message of support conveyed by the freezes is not merely a symbolic gesture of solidarity with post-revolutionary forces that seized power. Restoring the assets frozen to the state coffers contributes to the stabilisation of post-revolutionary situations and of new governments. Recovered funds can be used to aid the economic development of the often impoverished requesting states.²⁴ With limited finances, new leaderships find it difficult to build legitimacy and to implement reforms. The Council of the EU framed the adoption of freezes as part of a policy of democracy promotion. The original text of the CFSP Decision on Tunisia announced the freezing of assets "against persons responsible for misappropriation of Tunisian state funds and who are thus depriving the Tunisian people of the benefits of the sustainable development of their economy and society and undermining the development of democracy in the country" (author's emphasis).²⁵ Similar wording was inserted in the CFSP Decision adopting identical measures with regard to Egypt barely two months later.²⁶

In consequence, any evaluation of whether sanctions have been successful ought to be conducted with reference to these two sets of objectives: enabling asset recovery and conveying support to post-revolutionary governments.²⁷



THE SELECTIVE APPLICATION OF FREEZES

After adopting a practice of freezing assets to aid their recovery, the EU has made sparse use of this tool, deploying it in some but not all occasions where it could have been relevant. How can this be explained?

As described above, the freezes were originally agreed as temporary measures, in the expectation that they would be replaced by mutual legal assistance requests shortly after. However, several years on, few designees have been indicted in their countries of origin. In some cases, no charges have yet been made. The slow pace at which these cases are proceeding can be explained by several reasons. Firstly, the ownership of funds by members of the former leadership is often difficult to establish, as it might be hidden under several layers of front companies. Thus, investigations are often of a complex and protracted nature. As explained by Bill Browder, chief executive of Hermitage Capital and anti-corruption activist, money launderers “create a situation where the money has moved through so many different companies and so many different countries, in so many different accounts that it would be almost impossible to recreate the trail”.²⁸ Misappropriated assets were reportedly transferred to companies in Ukraine via bank accounts in Latvia and later passed through dozens of offshore shell companies in Cyprus, Belize, British Virgin Islands and the UK, for example.²⁹

Secondly, the judicial system in post-revolutionary settings is seldom free of political interference. As posited by asset recovery expert Gretta Fenner, “independence of the prosecutor general office is...often not given in countries that still struggle in democratic transition. Prosecution services all around the world, in countries with young democracy or no democracy for a long time, have actively been used as a tool of political power”.³⁰ To take Ukraine as an example: the director of the Ukrainian Anti-corruption Bureau has complained about political interference claiming

that “resistance is very strong from the elites who are in power now and the more we investigate, the more we face this resistance”, alluding also to the obstructive role of parliament: “Parliament is taking steps to side-line the management of the Anti-Corruption Agency and take control”.³¹ The problem is particularly acute in the case of the Ukrainian judiciary.³² The Ukrainian judiciary performs very poorly according to indicators of judicial independence produced by the World Economic Forum, which ranks Ukraine 129 out of 137 countries in judicial independence for the year 2017.

THE VIEW FROM BRUSSELS

This state of affairs is unsatisfactory from the viewpoint of Brussels.³³ While EU capitals have different views on the usefulness of assets freezes to address misappropriation, negative assessments prevail. The main problem that the Council of the EU has encountered is the scrutiny of its own judiciary.

Following the 2008 landmark ruling on Kadi,³⁴ a citizen who successfully contested his inclusion in the EU’s terrorism list, blacklisted individuals frequently challenge their designations in front of EU courts.³⁵ For years, the Council lost a large percentage of the cases brought to Court, which obliged it to drop the designations. The requirements of the CJEU to uphold the legality of blacklists have led the Council to seek better substantiation to underpin its designations (see below), improving their solidity. However, it has also compelled the Council to broaden the designation criteria as defined in EU legislation in an attempt to fend off court challenges. In the event, these efforts have borne fruit, managing to reverse the trend. Michael Bishop, an official from the legal service at the Council Secretariat



THE SELECTIVE APPLICATION OF FREEZES

reported: “In 2012, 2013 and 2014 the Council was still losing twice as many cases as it won... In 2015 that trend was reversed; the Council won more than twice as many cases as it lost. The same applies for 2016”.³⁶ Improvement to the statement of reasons has indeed allowed the Council to uphold designations. This is visible in the few cases of litigation initiated by Tunisian targets: the General Court has rejected requests to annul the listings of Mehdi Ben Ali, Fahed Al Matri’s, Sirine Ben Ali and Mohamed Mabrouk.³⁷

Despite a positive trend, litigation remains a concern for the Council. Unfavourable rulings are seen as impinging upon the Council’s credibility and prestige.³⁸ In order to satisfy CJEU requirements, the Council requests updated supporting information from the prosecutor offices of the requesting states every time that a court case is decided as well as prior yearly revision of measures, in an effort to strengthen the evidentiary basis of the listings. This constitutes an exercise especially resented by Member States which have not located any misappropriated assets in their jurisdictions. Since the EU does not conduct independent investigations, the Council depends on the information submitted by foreign prosecutor offices. As former UK cabinet member David Lidington confirmed, “the information the EU relies upon to conduct its review can only be provided by an authority in the targeted state”.³⁹ Deadlines have been met sometimes very narrowly by the judiciaries of the requesting states. In one instance reported to the UK House of Lords, a final piece of supporting information was only received from the Ukrainian authorities the day before the renewal of the measures.⁴⁰ This led the chair of the Select Committee on the European Union in the UK House of Lords to complain about the resulting lack of parliamentary scrutiny, claiming that the European External Action Service (EEAS) “should have impressed upon the Ukrainian authorities the importance of providing the information in sufficient time for prior scrutiny by national parliaments,

rather than a few days before adoption by the Council”.⁴¹

However, the Council is unable to speed up the pace of investigation and indictment as this process remains in the hands of the judiciaries of the requesting countries. EU Member States are reticent about influencing foreign judicial systems, which are expected to operate independently from political pressure. In the words of David Lidington, “although EU Member States are committed to supporting the asset recovery process in Ukraine, Egypt and Tunisia, there are limits to the influence we can bring to bear on their national judicial proceedings”.⁴² In sum, the Council is responsible for upholding often fragile designations in front of its own judiciary for an indefinite period, while it is not in its power to bring the investigation process to a successful conclusion. This situation has generated uneasiness and a certain degree of pessimism.⁴³ In the words of one interviewee, “these sanctions regimes are unsustainable in the long term”.⁴⁴ The fragile nature of these sanctions regimes can be read off the decremental dynamics of the blacklists: The list is only altered due to the dropping of existing designations, but never as a result of the insertion of new entries.

Indeed, in the absence of convictions in the requesting country, the de-listing of designees has occurred under either of the following scenarios:

- i. successful court challenges by the designee;
- ii. a decision by the Council to drop the entry based on the realisation that the evidentiary basis of the listing was unlikely to withstand judicial scrutiny;
- iii. a decision by the requesting country to drop charges, often having reached a settlement with the listed individual, which compels the EU to de-list the individual.



THE SELECTIVE APPLICATION OF FREEZES

In view of the outlined difficulties, prospects of recourse to asset freezes along the lines of the Tunisia, Egypt and Ukraine regimes seem dim.⁴⁵ Nevertheless, the establishment of new misappropriation sanctions cannot be excluded. Member States are satisfied with the political performance of the sanctions regimes as a link of solidarity and support to the leaderships in the requesting states,⁴⁶ as demonstrated by the continuation of the freezes. Moreover, since 2014, we have not witnessed any revolutionary movement that has culminated in the replacement of the leadership in any country. Neither has there been any (known) instance of a third country requesting the EU to freeze assets presumed to have been misappropriated by members of a leadership previously in power. Therefore, there is no firm evidence that current discontent with the state of affairs will prevent the Council from resorting to CFSP asset freezes in future.

THE SPECIFICITIES OF THE MISAPPROPRIATION REGIME

An analysis of the misappropriation sanctions regimes shows that the absence of a coercive objective is not the only feature that sets them apart from other sanctions regimes. A number of differences that have hardly been captured by observers point to misappropriation regimes as measures “for the benefit of a third party”, in the absence of an established technical term. Here, the EU limits its role to back a judicial process in a third country. Catherine Ashton presented the freezes as a policy of assistance, rather than of anti-corruption: “ownership must rightfully be transferred to the new state structures. This is a complex process. (...) [w]e are ready to assist those states concerned” (author’s emphasis).⁴⁷

The regime is characterised by the following traits:

1. The listings emanate from the third country, rather than from EU Member States.
2. The aim of the EU is not to fight corruption per se. In the words of David Lidington, they were imposed “to prevent misappropriated state funds from undermining the stability and development of the state in question”.⁴⁸ There is a difference in nuance that points to political stability in the affected state rather than to notions such as the fight against impunity that characterise the anti-corruption discourse.
3. Even though the Council conducts its own review of listings prior to their periodical renewal, it relies on information that can only be provided by third state parties. The Council is not required to show that allegations against the individual are well-founded, but rather that the listing criteria are met.⁴⁹ The corollary is that individuals are de-listed as soon as third state authorities have reached a settlement with them. As confirmed by UK Minister for Europe Alan Duncan, “those designated under the EU’s misappropriation sanctions for Tunisia, Ukraine and Egypt can be de-listed when the Council is satisfied that legal cases and judicial procedures in these countries have been concluded or discontinued”.⁵⁰

The practice of freezing assets to address misappropriation has been criticised by legal practitioners. Maya Lester, a barrister experienced in acting for blacklisted individuals, complained about the potential for political misuse associated with the reliance on designations requested by third parties as they circumvent established processes for countries providing each other with MLA requests: “The EU lists people said to be connected with former regimes (the Yanukovych, Ben Ali & Mubarak regimes) on the basis that people are



THE SELECTIVE APPLICATION OF FREEZES

under ‘judicial investigation’ in those countries for having misappropriated State funds. (...) The European Court has upheld the lawfulness of those regimes, and rejected submissions that there should be adequate safeguards to ensure that there is evidence, a prima facie case, and a fair trial in those countries”.⁵¹

The risk that requesting leaderships may be tempted to neutralise innocent political opponents by suggesting their inclusion in EU blacklists is mitigated by the review of the designations that precedes the yearly renewal of the measures. This exercise involves an assessment by the EEAS and the Council of the progress made in each of the outstanding proceedings against the blacklisted individuals to ensure that they remain justified.⁵² The practice of regular review of designations has been praised by the UN Special Rapporteur Idriss Jazairy.⁵³ Nevertheless, some level of risk remains.

CONCLUSION

In conclusion, various factors underline the exceptionality of the misappropriation regimes. The freezes were originally adopted as a response to a crisis of the magnitude of the Arab Spring. Because of the atypical nature of the crisis, the EU lacked a ‘blueprint’ for addressing successful revolutionary revolts. The imposition of an asset freeze was instrumental in establishing amicable links to the post-revolutionary elites, by meeting one of their first requests to the EU. Thus, it helped European governments position themselves in favour of the new governments. The Council resorted to the CFSP not only because it is an instrument often used to freeze assets, but also because the situation at hand was seen as a foreign policy matter requiring a foreign policy response. The Maidan crisis replicated this pattern, giving rise to an identical reaction.

Over time, the adoption of this policy came to be regarded as disappointing, although some variation exists among Member States in the level of satisfaction with this set of measures. The main source of unease are the abundant court challenges. Given that designations do not come from Member States, but from the requesting country concerned, the Council has had to rely on a third party for the substantiation of listings. This puts the EU in the uncomfortable position of depending on an external party for information to uphold its listings, almost inverting the notion of “petitioning state”. That the process of indictment and conviction remains the hands of judicial systems which are not free from political interference further complicates the matter. The EU lacks the legitimacy to exert influence on a foreign judiciary, as well as the means to protect it from domestic interference.

Even though the CFSP includes the rule of law among its objectives, the EU did not regard the freezing of assets in Tunisia, Egypt and Ukraine as a measure to fight corruption in the first place. A foreign policy rationale prevailed over anti-corruption considerations. This is in consonance with EU sanctions tradition: While sanctions have often been applied in response to democratic backsliding in third countries,⁵⁴ there is no single case of sanctions imposed to address corruption other than the three misappropriation regimes in question here.⁵⁵ Notably, none of these sanctions pits the EU against a foreign government. Because they concern deposed leaders, they do not carry a political cost to the EU. Rather, they afford the EU with the gratitude of the post-revolutionary governments, which perceive it as a powerful gesture of support. This is despite the fact that misappropriation blacklists have also represented a source of tension. In spite of the EU asset freeze, the UK Treasury failed to ensure property linked to individuals



THE SELECTIVE APPLICATION OF FREEZES

convicted of embezzling funds from Egypt was adequately frozen, leading to accusations that ministers were “more interested in preserving the City of London’s cosy relationship with the Arab financial sector than in securing justice”.⁵⁶ Tunisia and Ukraine further discreetly complain that some EU Member States are unprepared to share information necessary for the domestic investigations.⁵⁷

This primarily foreign policy rationale of the misappropriation sanctions regimes represents a reason for its perpetuation despite the meagre progress achieved so far: Member States see the value of keeping them in place because of the appreciation shown by the requesting governments, where societal demand for asset recovery is very pronounced.⁵⁷ Particular importance is attached to bilateral relations with the requesting countries, which are all partners included in the European Neighbourhood Policy (ENP), with which the EU seeks close relations on account of their location in its unstable surroundings.⁵⁸



THE EU AND SWISS LEGAL FRAMEWORKS

THE EU FRAMEWORK

Legal Instruments Implementing Asset Freezes

As mentioned at the outset, sanctions are agreed by a unanimous decision of the EU Council.⁶⁰ However, to the extent that such decisions require measures that affect the Union's "economic and financial relations with one or more third countries", they must further be implemented by a regulation detailing the exact scope of those measures.⁶¹ Sanctions falling within this provision include "restrictive measures against natural or legal persons and groups", in particular asset freezes.⁶² Because of this dual structure, EU sanctions-based asset freeze measures, such as those related to misappropriation of public funds in third countries, always rest on two separate legal instruments: a Council Decision and a Council Regulation implementing that Decision. The regulations are directly applicable in all EU Member States, meaning that they create legal obligations directly to EU citizens and entities established in the EU, without any need for additional national implementing measures. For instance, any EU financial institution is obligated to implement an asset freeze measure immediately upon a regulation entering into force via publication in the Official Journal of the European Union.

Each of the misappropriation sanctions regimes of the EU have been established through a different set of legal instruments. Chronologically, the first of these were sanctions related to Tunisia, adopted through Council Decision 2011/72/CFSP on 31 January 2011, followed closely by those related to Egypt, adopted through Council Decision 2011/172/CFSP on 21 March 2011. Finally, sanctions related to misappropriation in Ukraine were established through Council Decision 2014/199/CFSP on 5 March 2014.⁶³

Each decision was accompanied by a regulation implementing its economic and financial aspects: respectively, Council Regulation (EU) No 101/2011, Council Regulation (EU) No 270/2011, and Council Regulation No (EU) 208/2014. All six legal instruments have been amended several times since their adoption, primarily in order to modify their annexes which contain the lists of persons targeted by the asset freezes, their identification details, and statements of reasons for each person targeted, as well as in certain cases to amend "listing criteria", i.e. the definition of who can be subjected to the asset freezing measure. Very often such modifications were a reaction to judgements from the European Court of Justice, annulling specific measures due to procedural or other defects, as discussed below.

The substantive provisions of each regulation are almost identical. For instance, the current regulation related to Ukraine contains the following provisions: Article 1 provides for the definitions used in the Regulation; Article 2 provides for the freezing of assets, and the prohibition on making assets available, to parties listed in an annex; Article 3 describes the criteria under which persons may be added to the annex as well as the information that must be provided for each entry on it; Articles 4 to 7 provide for various grounds on the basis of which national competent authorities may authorise exceptions to the freezing measures as well as other exemptions (such as for funds needed to basic living expenses, to pay for pre-existing debts, legal fees, etc.); Articles 8 and 12 provide for reporting to authorities of assets frozen as well as exchanging such information among the Member States and the European Commission; Article 9 establishes a prohibition on measures intended to circumvent the asset freeze⁶⁴; Articles 10 and 11 provide for limits of liability and protection from claims of EU operators⁶⁵; Articles 13 and



THE EU AND SWISS LEGAL FRAMEWORKS

16 require Member States to designate national frozen funds to the originating governments. In their absence, the title to any frozen assets would have to be transferred to the requesting state via a bilateral MLA request, which relies on domestic judicial proceeding in the originating country and bilateral co-operation between judicial authorities. In 2012, the EU adopted new legislation aimed at facilitating the release and return to the Egyptian and Tunisian authorities of funds frozen under EU sanctions by authorising EU Member States to release frozen assets on the basis of judicial decisions recognised in other EU members.⁶⁶ Despite this improvement, recovering and repatriating assets remains a competence of Member States and must occur via a MLA procedure. Thus, the asset freeze enacted by the EU remains unconnected from subsequent endeavours to recover and repatriate assets, which must be effected at the level of Member States.⁶⁷

Case law and analysis

EU sanctions measures implementing asset freezes in response to misappropriation of state funds in third countries have been extensively tested in the CJEU, as have other forms of EU targeted sanctions. By December 2018, the General Court (its court of first instance) and the Court of Justice (the appellate body) had issued a total of 35 judgments related to the asset freeze regimes on Egypt, Tunisia, and Ukraine. The primary focus of those cases has been claims by those targeted that the asset freeze violated their substantive or procedural fundamental rights, such as the right to property, the right to a fair trial, including rights of the defence, and failure to state reasons, and that the Council had made manifest errors of judgment and misused its powers in ordering the freezes.⁶⁸ Out of 31 General Court judgements, the appeal by the designees has been entirely dismissed in twelve cases, with six appeals being successful and a further nine leading to partial annulment of the

measures. Four appeals have been lodged to the Court of Justice by designees, all of them unsuccessful until Mykola Azarov, a former Prime Minister of Ukraine, won his appeal in December 2018. In most cases where the Council lost, it re-imposed the sanctions under improved evidence or a procedure.

This case law, and that related to other EU sanctions, delineates the limits of the EU's competence in adopting and maintaining asset freezes in the CFSP context as well as procedural requirements in doing so. Prior to the Arab Spring, the EU had never adopted CFSP sanctions in response to misappropriation of state funds. Until then, they were targeted at more traditional security and foreign policy threats⁶⁹: human rights breaches and democratic backsliding⁷⁰, armed conflict⁷¹, proliferation of weapons of mass destruction⁷² and terrorism.⁷³ One of the questions underlying the early case law was, therefore, whether the imposition of misappropriation sanctions was appropriate under the CFSP at all, or whether other mechanism should have been used.

However, the General Court explicitly rejected any such claims, noting on the case of Egypt that the Council adopted the measures to “support the peaceful and orderly transition to a civilian and democratic government in Egypt based on the rule of law, with full respect for human rights and fundamental freedoms” as part of part of a “policy of supporting the new Egyptian authorities, intended to promote both the economic and political stability in Egypt”. As such, the Court ruled, the measures were “fully based on the CFSP and satisfied” the objectives of EU external action.⁷⁴

Importantly, the Court has affirmed that the act of using the CFSP asset freeze mechanism in relation to third state misappropriation situations is not, in itself, a



THE EU AND SWISS LEGAL FRAMEWORKS

disproportionate violation of the right to property of those targeted. The Court recalled that under the EU Charter of Fundamental Rights, such rights may be limited under certain conditions – specifically, limitations are justified to the extent that they are provided for by law, pursue an important general interest of the EU, and are proportional to the general interest being pursued.⁷⁵ In the context of misappropriation sanctions, the Court has been satisfied that all three can, in principle, be met.

As for the general interest being pursued, the Court noted that the sanctions in the case of Egypt, by way of example, were “part of a policy of supporting the new Egyptian authorities, intended to promote both the economic and political stability of Egypt and, in particular, to assist the authorities of that country in their fight against the misappropriation of State funds” which, in turn, was compatible with EU external policy objectives laid down in the Treaty, including the aim to “consolidate and support democracy, the rule of law, human rights and the principles of international law”.⁷⁶

As for the proportionality of the asset freeze in relation to that objective, the Court has emphasised that “respect for the rule of law is one of the primary values on which the European Union is founded”⁷⁷ and therefore a weighty objective. At the same time, the Court highlighted that not all acts of misappropriation of public funds in third countries would be serious enough to be capable of undermining the rule of law to the extent that a CFSP asset freeze, and the resulting infringement of the right to property, would be a justified and proportionate measure. For an (alleged) act to qualify, the Court reasoned, it would have to be serious enough “having regard to the amount or the type of funds or assets misappropriated or to the context in which the offence took place” so that it could “undermine the legal and institutional foundations of [the country in question]

and in particular the principles of legality, prohibition of arbitrary exercise of power by the executive, effective judicial review and equality before the law and, ultimately, to undermine respect for the rule of law in that country”.⁷⁸ But within such a context, the General Court ruled, the asset freeze measure would be proportional.⁷⁹ On appeal, the Court of Justice further confirmed that an asset freeze could be justified also against a person subject to merely a pre-trial investigation for such acts, since “the effectiveness of a decision to freeze funds would be undermined if the adoption of restrictive measures were made subject to the criminal convictions of persons suspected of having misappropriated funds, since those persons would have enough time pending their conviction to transfer their assets”.⁸⁰

As for being “provided for by law”, the Court has noted the activities of which the targeted person is accused must strictly fall within the stated objective of the measure, i.e. constitute “misappropriation”. To establish the scope of the term misappropriation, undefined in all of the regulations, the Court has relied on an EU Directive related to financial crime, which defines it as “the action of a public official who is directly or indirectly entrusted with the management of funds or assets to commit or disburse funds or appropriate or use assets contrary to the purpose for which they were intended in any way which damages the Union’s financial interests”.⁸¹ In this vein, the Court noted that a person accused of having engaged in cross-border money-laundering operations from Tunisia could not legally be subjected to an asset freeze on this basis, since, while unlawful in Tunisia, it did not constitute “misappropriation”.⁸² If, however, the alleged activity indeed does squarely fall within that definition, the Court has accepted that also this “provided by law” requirement is satisfied in EU’s



THE EU AND SWISS LEGAL FRAMEWORKS

misappropriation sanctions⁸³ and that, therefore, they do not in themselves constitute an illegal violation of the right to property.

In other words, the EU Courts have confirmed that freezing assets to counter misappropriation of third State funds is within the acceptable remit of the asset freeze tool in the CFSP toolkit. However, the Court has also emphasised that any such measure must not only satisfy the proportionality described test above, but also a set of other, mostly procedural requirements.

According to established case law from the EU Courts, a decision to impose an asset freeze on any individual or entity must be based on a “solid factual basis”, as evidenced by information in the Council’s file.⁸⁴ In a series of cases ruled on by the Court in late 2015 and early 2016, former Ukrainian officials subject to an asset freeze claimed that no such basis existed for the measures to which they had been subjected.⁸⁵ When prompted, the Council was only able to produce, as evidence of the factual basis of the measures, a letter from the Public Prosecutor’s Office of Ukraine to the EU’s foreign policy chief, listing the individuals in question and stating that “Ukrainian law enforcement authorities have initiated a number of criminal proceedings to investigate criminal acts committed” by the senior officials listed, and that “that the inquiry in question made it possible to establish misappropriation of sizeable amounts of State funds and the subsequent illegal transfer of those funds outside Ukraine”, without adding further detail.⁸⁶ The Court noted that the letter was so vague that the Council had not been able to show evidence indicating that it had “any information regarding the acts or conduct specifically imputed to the [persons in question],” even when taking into account the commonly known post-revolutionary context of Ukraine.⁸⁷

To shield the Ukrainian freezes from successful challenges, the Council has taken a number of steps to build up the underlying evidence, broaden the criteria for listing the targeted persons, and elaborate on individual statements of reasons.⁸⁸ In September 2016, the General Court issued its judgement on the case brought against the Council by Viktor Yanukovych, the former president of Ukraine.⁸⁹ As with so many earlier cases, the Court noted that the vague letter from Ukrainian prosecutors was not specific enough to justify an EU asset freeze, and went on to annul the original asset freeze against Mr Yanukovych.⁹⁰

However, the Court then pointed out that the Council had, since the initial freeze, modified the underlying legal instruments by adopting a modified statement of reasons for the listing of Mr Yanukovych in 2015 and had provided, as evidence underlying that new decision, a new letter from the Ukrainian Prosecutors, received in October 2014. In this letter, the Court pointed out, the authorities had described in detail “three pre-trial investigations within the framework of criminal proceedings initiated with respect to the applicant in relation to acts classifiable as misappropriation of public funds [concerning] (i) misappropriation of assets while acting in concert with others as part of the illegal funding of construction of a telecommunications network; (ii) misappropriation of buildings, facilities and land, together with other public properties and the legalisation of ill-gotten gains, and (iii) misappropriation of a plot of land”.⁹¹ The Court was satisfied that this provided a sufficiently solid basis for the adoption of the measure and its statement of reasons, i.e. that Mr Yanukovych was “was the subject of criminal proceedings for misappropriation of public funds or assets” in Ukraine.

Mr Yanukovych’s appeal was later rejected by the Court



THE EU AND SWISS LEGAL FRAMEWORKS

of Justice, which confirmed that “the detailed nature of the charges brought against the appellant, as set out in [the 2015 letter]” established an appropriate factual basis for the asset freeze⁹², in the absence of contradicting exculpatory evidence produced by Mr Yanukovych. In later case law the Court has required, in cases where such contrary evidence plausibly challenges the reliability of the Council’s position, that the Council investigates further to determine the continued justification of the measure.⁹³

In sum, the EU may choose to adopt misappropriation related asset freezes against individuals in third countries if:

- i. the activities can be categorised as “misappropriation”, referring to “a public official who is directly or indirectly entrusted with the management of funds or assets” using, disbursing, or appropriating those funds contrary to the purpose to which they were intended;
- ii. the activities are serious enough to be capable of undermining the rule of law in that third country; and
- iii. the measures are based on solid factual basis, indicating, for each targeted person, at least the existence of an investigation into activities satisfying (i) and (ii).

On the whole, the evolution of the misappropriation sanctions case law closely resembles that of traditional sanctions practice.⁹⁴ In other words, the Courts initially acknowledged that the Council had not overstepped its CFSP discretion or fundamental rights boundaries by ordering asset freezes on individuals, but still annulled a series of listings in the absence of any reliable evidence to support the stated reasons. Then, after designees were listed with stronger evidence, the Court deferred to the Council on their adequacy, as long as they were not manifestly insufficient. Similar treatment was applied also to the listing criteria.

In its December 2018 ruling on Mykola Azarov’s appeal, the Court held that the Council is required to verify that decisions by foreign authorities which serve as a basis for EU measures respect the rights of defence and the right to effective judicial protection.⁹⁵ In other words, the Court now demands the Council not only obtain from the originating state adequate documentation indicating the existence of domestic proceedings against designees for misappropriation, but that the Council must also establish that those domestic proceedings respect fundamental rights. This most recent jurisprudence on Azarov suggests the emergence of a further complication in upholding the listings as it requires the Council to tighten the scrutiny of third-country requests before adopting its own freezes.

THE SWISS FRAMEWORK

As the host of a vast amount of foreign assets and the recipient of a large number of MLA requests, Switzerland is a leader in the international asset-recovery agenda. Its legal framework enabling the freezing of assets has been the object of revision in recent years, and has become increasingly sophisticated.⁹⁶

Constitutional Basis

In Switzerland, the constitutional basis for asset freezes related to the potential misappropriation of State funds by officials in third countries is established by Article 54(1) of the Federal Constitution.⁹⁷ Freezing ordinances, which resemble EU freezing regulations, are today issued on the basis of the Constitution and a subordinate regulation, the Federal Act on the Freezing and the Restitution of Illicit Assets held by Foreign Politically Exposed Persons (Foreign Illicit Assets Act, FIAA),



THE EU AND SWISS LEGAL FRAMEWORKS

adopted in 2016. In contrast to the EU, where misappropriation related assets freezes are adopted under the CFSP, like any other sanctions against third states, the Swiss legal basis is separate from powers of the Federal Council to adopt sanctions related to international peace and security, which are contained in the Federal Act on the Implementation of International Sanctions.⁹⁸

Legal Instruments Implementing Asset Freezes

The Foreign Illicit Assets Act, divided into nine sections, contains most of the substantial provisions applicable to asset freeze regimes adopted through individual ordinances.

Section 1 describes the purpose of the act and definitions used in it. Section 2 then lays down three separate bases for an asset freeze, permitting this:

- i. in order to support future cooperation within the framework of mutual legal assistance proceedings with the country of origin, when (a) there is a change or imminent change of power in the country, (b) the level of corruption in the country is notoriously high, (c) assets appear likely to have been acquired criminally, and (d) Switzerland's interests require freezing actions;
- ii. where assets have already been made subject to a provisional seizure order within the framework of international legal assistance proceedings, but (a) the third country is unable to satisfy the requirements for mutual legal assistance due to a structural failure of its judicial system and (b) Switzerland's interests require freezing action; and
- iii. where a request for MLA has been received from a third country, but (a) that country is unable to meet basic procedural requirements for such co-operation laid down in Swiss law and (b) Switzerland's interests require freezing action.

In each three alternative scenarios a set of cumulative criteria have to be met to establish a legal basis for the asset freeze. The criteria reflect the fact that the process is not designed to be a substitute or alternative to MLA proceedings, but rather to complement that primary tool in cases where weaknesses in the originating state's domestic system prevent it from complying with the formal requirements of an MLA.

Section 2 also provides the procedure of adopting the lists of persons targeted by the freezes, the duration of measures, the obligation on persons and entities subject to Swiss jurisdiction to report of assets frozen, administration of such assets, the basis of which national competent authorities may authorise exceptions to the freezing measures, and "amicable settlement" for the restitution of assets. Section 3 provides for measures Swiss authorities may take in order to facilitate the restitution of the funds to the originating State, including through technical assistance and information sharing.

Section 4 provides for the conditions of confiscating assets that have been frozen, including when assets may be presumed to have been of illicit origin, and for protection of the rights of third parties. Section 5 lays down the procedure for the restitution of the assets frozen and confiscated to the originating State. Section 6 provides for the procedural rights of those that have been targeted by freezing measures.

Sections 7 covers aspects related to information exchange within the Swiss Government, data processing, and reporting to Parliament. Section 8 lays down penalties for violations of the Act, including the asset freeze and reporting obligations, as well as certain jurisdictional and procedural aspects related to resulting judicial proceedings. Finally, Section 9 contains provisions



THE EU AND SWISS LEGAL FRAMEWORKS

related to the entry into force, transitional periods, and other similar aspects of the law itself.

The targets of asset freezes are established through ordinances, adopted in relation to specific third countries in situations that satisfy one of the three criteria listed in the Foreign Illicit Assets Act. At the time of writing, Switzerland maintains two ordinances based on the Foreign Illicit Assets Act: the Ordinance blocking assets in the context of Tunisia (Ordinance 196.127.58) and the Ordinance blocking assets in the context of Ukraine (Ordinance 196.127.67). A former ordinance adopted in relation to the situation in Egypt (Ordinance 946.231.132.1) has been revoked.⁹⁹ The ordinances are annexed with lists of persons targeted by the asset freeze.

Case Law Analysis

In Switzerland, the Federal Administrative Court has been invited to rule on the three misappropriation ordinances on a handful of occasions. Unsurprisingly, the cases brought by persons targeted by asset freezes have rested on similar arguments as in the EU case law – in particular, the infringement of the right to property and violation of the principle of proportionality.¹⁰⁰ The Court in Switzerland has accepted that the freezing of assets does indeed infringe the right to property, but noted, much like its EU counterpart, that such rights may be restricted under certain conditions: (i) the restriction must be based on law; (ii) it must be justified by public interest or the protection of rights of others; (iii) and it must be proportional, in other words, limited to what is necessary and adequate to obtain the justified interest pursued.¹⁰¹

The Court has also arrived at similar conclusions as the one in the EU. The interest being pursued by the measures was a legitimate interest protected by the Constitution, the Court

determined, in particular protecting the financial system and reputation of Switzerland as well as furthering sustainable development and the fight against impunity, in particular where the targeted person is unquestionably closely associated with the regime of the third country.¹⁰² Further, the Court ruled that it is also necessary for that aim to adopt an all-encompassing asset freeze (rather than for example identifying specific assets that have been misappropriated), since assets could otherwise be moved beyond Switzerland's reach before the third country authorities had time to conclude their investigations.¹⁰² Consequently, a measure such as the asset freeze in the context of Egypt on persons closely associated with the regime satisfied the constitutional principle of proportionality.¹⁰⁴

The Court has further ruled that a measure against any individual has to strictly satisfy the four cumulative conditions laid down in Article 3(1)(2) of the FIAA, i.e. that (a) the Government or its members have, or are about to, lose power, (b) there is a high level of corruption in the country, (c) that it appears likely that the assets have been acquired through corruption, criminal mismanagement, or other felonies, and (d) that the safeguarding of Swiss interests require the freeze.¹⁰⁵

Of these, points (a), (b) and (d) are concerned with the gravity of the overall circumstances in the third country and their impact on Switzerland. In a case relating to the context of Ukraine, the Court reaffirmed its position that Switzerland's interests are inherently jeopardised should it permit assets misappropriated from third countries to flow through its financial system. It also accepted on the basis of publicly available information, such as NGO reports, that corruption in Ukraine was widely spread, and that the President had lost power – accepting, therefore, that points (a), (b) and (d) were satisfied and



THE EU AND SWISS LEGAL FRAMEWORKS

implicitly accepting that the situation in Ukraine, in general, was such that the imposition of asset freezes on the basis of Foreign Illicit Assets Act could be justified.¹⁰⁶

However, it would additionally have to be established, the Court stated, the assets frozen were likely to have been obtained through misappropriation or similar illicit means. Noting that the law was silent on the level of probability that should be associated with this criterion, the Court accepted that the threshold should initially be low, in order to protect the effectiveness of the measures. Given that the information provided to the Court by the administration, including a letter from the Ukrainian authorities, indicated that the relevant person appeared to have been engaged in systematic illegal enrichment, the Court ruled that there was a high probability that a given asset had, indeed, been illegally obtained – without actually tracing any specific illegal activity to the specific asset.¹⁰⁷ In other words, starting from a very different place, the Court reached a similar requirement as the EU Court: for an asset freeze against an individual person be justified, there has to be reliable information suggesting that the target has been personally involved in misappropriation or benefited from it.

Article 1 of the Foreign Illicit Assets Act adds one final criterion for an individual asset freeze to be justified, i.e. that the targeted person must be a “foreign politically exposed person” (PEP),¹⁰⁸ which includes high level politicians and officials from different branches of Government, as well as their close associates.¹⁰⁹ While EU misappropriation regulations do not explicitly contain any such requirement, it should be noted that under the definition adopted by the EU Court, only “a public official who is directly or indirectly entrusted with the management of funds or assets” can in fact engage in “misappropriation”. Given that the listing criteria under these regulations

typically include also “natural or legal persons, entities or bodies associated” with persons suspected of misappropriation,¹¹⁰ it appears that the scope of the Swiss and EU measures are very similar.

COMPARING THE EU AND THE SWISS FRAMEWORKS

There are important differences that set the two legislative frameworks apart. Firstly, the EU relies on a general type of act designed to address foreign policy issues, while the FIAA is a purpose-made law to deal with misappropriation. Secondly, the Swiss FIAA explicitly lays down cumulative criteria that have to be met before asset freezes may be adopted. By contrast, the adoption EU sanctions measures is restricted only by the more general requirements developed in case law, i.e. that the measures seek to advance an important general interest of the EU, are proportional, and satisfy certain basic procedural requirements. Thirdly, and most importantly, Swiss legislation explicitly provides a legal basis not only for freezing, but also for confiscation and restitution, thereby offering a more mature basis for the recovery process as a whole. It addresses the various stages necessary in the recovery of assets to the requesting state.¹¹¹ Within the EU misappropriation sanctions framework, by contrast, regulations speak exclusively to the freezing of assets identified as being owned, held, or controlled by targeted individuals. The exceptions and authorisations related to the release of frozen funds do not provide a basis for confiscation and restitution of assets to the authorities in the third state. This is bound to cause difficulties in the later stages of the recovery process.

The Swiss and EU legislative frameworks also display



THE EU AND SWISS LEGAL FRAMEWORKS

some similarities. In terms of enabling the freeze of assets belonging to persons suspected of misappropriation or their close associates, the legal frameworks of the EU and Switzerland appear, on the regulatory level, to be largely comparable. Both enable the authorities to impose freezing measures after determining that there is reason to believe that corrupt officials are likely to have engaged in mismanagement of state funds, assuming the circumstances are grave enough to warrant such a robust response. Finally, while the measures in both jurisdictions have rested on documentation provided by prosecutors or other authorities in the third state, neither jurisdiction explicitly provides the sources from which the evidence or information underlying the measures must originate. The EU Council must rely on information originating from the requesting state. The Swiss Federal Council, on the other hand, could presumably rely on the law enforcement and other agencies in the executive branch.



EVALUATING THE EFFECTIVENESS OF FREEZES

Having reviewed the overall political and legal framework of EU asset freezes, we now turn to analyse the use of misappropriation sanctions in Tunisia, Egypt and Ukraine to ascertaining their effectiveness. In addition to evaluating the cases with reference to the aims stipulated in relevant EU documents, the present section pays attention to the following set of questions:

- Why were individuals listed and removed from the blacklists?
- Have the asset freezes ultimately facilitated/paved the way for asset recovery?
- What obstacles are preventing asset recovery?

TUNISIA, EGYPT, UKRAINE

Tunisia

Of all three misappropriation regimes, the one imposed against Tunisian targets features the simplest designation criteria, which have remained unaltered since the act was adopted. They read: "All funds and economic resources belonging to, owned, held or controlled by persons responsible for misappropriation of Tunisian State funds, and natural or legal persons or entities associated with them, as listed in the Annex, shall be frozen."¹¹²

Chronologically the first EU sanctions regime addressing misappropriation, the Tunisian case features the longest blacklist, including 48 individuals. The list is characterised by the family connections existing among the designees. This is reflected in the repetition of surnames: The current list features only thirteen family names, scattered among 47 entries. The Tunisian list is the blacklist that has faced the least alteration: Only one entry has been removed since the asset freeze was first enacted.

With a limited number of physical assets recovered as early as by 2013, the Tunisian case has recorded the fastest progress so far. \$80m, two airplanes and two boats were identified and then frozen or seized in Switzerland, France, Belgium and Italy. One of the planes, seized in France and owned by Ben Ali's son in law, was returned to Tunis in July 2011. The other plane in Switzerland and the two yachts in Italy and Spain were also subsequently recovered. While the value of these assets represent only a small portion of what is estimated to have been stolen from Tunisia, their recovery illustrates that property located in foreign jurisdictions can be returned even before the finalization of the legal cases.¹¹³

In April 2013, an even more visible success demonstrated that the consistent and patient efforts of the Tunisian authorities and others were paying off. Tunisia recovered \$28.8m hidden in a Lebanese bank account controlled by the Ben Ali's wife. Further, Switzerland had blocked CHF60 million in the wake of the Arab Spring¹¹⁴ and on the basis of a MLA filed by Tunis, Switzerland repatriated assets to Tunisia in two chunks: in May 2016, CHF 250,000 were transferred, and €3.5m followed one year on.¹¹⁵

Table 1: Summary of CFSP designations for the misappropriation of state assets in Tunisia

Total number of designees	48
Individuals targeted in 1 st round	2
Individuals targeted in a 2 nd round	46
Individuals listed as of Dec. 2018	47



EVALUATING THE EFFECTIVENESS OF FREEZES

As evident from the table above, the Tunisian misappropriation regime displays a pattern of stability. Patterns of litigation are low: Only 15% of Tunisian targets contested their designations in court.¹¹⁶

Egypt

Compared to the Tunisian sanctions regime, the text of the freeze imposed against Egyptian targets features two significant additions. The designation criteria, which have remained unaltered since the act was adopted, read as follows: “All funds and economic resources belonging to, owned, held or controlled by persons having been identified as responsible for misappropriation of Egyptian State funds, and natural or legal persons, entities or bodies associated with them, as listed in the Annex, shall be frozen”¹¹⁷ (author’s emphasis). The formulation broadens the circle of potential designees to individuals “identified as responsible”, and explicitly extends the coverage to entities and bodies associated with blacklisted individuals.

The Egyptian blacklist is the shortest in our sample, featuring only 19 entries initially, and 9 at the time of publication. Similar to the Tunisian list, it displays a pattern of continuity along subsequent renewals. Around 55% of Egyptian targets challenged their designations in court.¹¹⁸ The table below helps the visualisation of the designations under the CFSP misappropriation sanctions regime.

Table 2: Summary of CFSP designations for the misappropriation of state assets in Egypt

Total number of designees	19
Individuals targeted in 1 st round	19
Individuals targeted in a 2 nd round	0
Individuals listed as of Dec. 2018	9

In 2012, Spain froze a number of assets belonging to businessman Hussein Salem, a dual citizen of Egypt and Spain. This included € 28m in cash and financial investments, and seized a number of luxury properties across the country, including two houses in a Madrid suburb with a combined value of around € 7m, seven properties in southern Spain worth around € 3m, and five luxury cars.¹¹⁹

The UK also froze Egyptian assets whose value is estimated to be more than £90m.¹²⁰ However, its action was tarnished by revelations that the assets of some regime figures convicted of embezzling money from Egypt remained untouched by British authorities. Assets linked to Mubarak’s inner circle that had not been frozen 18 months after the adoption of EU sanctions included luxury houses and companies registered in central London. One close associate of Mubarak was even able to set up a UK-based business despite his inclusion in a British Treasury sanctions list of Egyptians linked to misappropriated assets and subject to an asset-freeze. Such revelations led Egyptian authorities to pursue a lawsuit against the UK Treasury for a slow progress in asset recovery efforts.¹²¹

Most funds misappropriated by the Mubarak clan were located in Swiss banks¹²² and Switzerland froze about CHF 700m in the wake of his overthrow.¹²³ In December 2016, Switzerland dropped the listing of six designees from Mubarak’s entourage and unfroze their assets, totalling about CHF 180m, which were restored to the designees. The dropping of designations and the unfreezing ensued due to a lack of co-operation between prosecutors in Egypt and Switzerland.¹²⁴ The breakdown of co-operation was precipitated after the Swiss Attorney-General insisted that Egyptian courts had to prove the funds stashed in Swiss banks had been



EVALUATING THE EFFECTIVENESS OF FREEZES

obtained illegally in order to move forward with its restitution. In August 2017, Swiss authorities ceased mutual legal efforts over the charges for lack of results.¹²⁵

This was also linked to the effect of Egypt's reconciliation law of 2015, which offered listed individuals immunity in exchange for restoring funds to the state. According to the Federal Department of Foreign Affairs of Switzerland: "In Egypt, several acquittals and reconciliation agreements contributed to the decision of the Egyptian judiciary to drop criminal proceedings in the most prominent cases with possible links to assets frozen in Switzerland. For this reason and in the absence of tangible results at the end of August 2017, the Swiss judicial authorities closed the mutual legal assistance procedures on cases with potential links to assets frozen in Switzerland. Therefore, the freeze on the Egyptian assets on the basis of the FIAA has no further purpose as defined by law and jurisprudence".¹²⁶ The freeze was lifted in December 2017.

In 2016, Egypt officially concluded a reconciliation deal with Hussein Salem to drop charges against him in exchange for the giving up EGP 5.3bn, which accounts for 75% of his wealth.¹²⁷ Egypt subsequently called on Switzerland, Spain and Hong Kong to unfreeze his assets.¹²⁸ However, it appears that the assets were unfrozen and made accessible to Salem instead of repatriated.¹²⁹ In late 2017, following a reconciliation agreement struck between Egyptian authorities and politician and businessman Ahmed Ezz, Switzerland released his assets in Swiss banks, CHF 32m, which were transferred to the Egyptian state. This constituted the first repatriation of misappropriated assets to the Egyptian state by Switzerland ever. After the settlement with Ezz and the de-listing of six individuals, CHF 400m remain frozen, belonging to Mubarak's sons Alaa and Gamal, as well as to four other individuals from his entourage.¹³⁰

Ukraine

The designation criteria applicable to the Ukrainian blacklist are both broader and more detailed than its Arab Spring predecessors. It is also the only misappropriation regime that has experienced a revision of designation criteria.

The original formulation in the legal act of spring 2014 mirrored the language of the Egyptian freeze, but included a reference to human rights that was absent from previous misappropriation regimes:

"All funds and economic resources belonging to, owned, held or controlled by persons having been identified as responsible for the misappropriation of Ukrainian State funds and persons responsible for human rights violations in Ukraine, and natural or legal persons, entities or bodies associated with them, as listed in the Annex, shall be frozen."¹³¹

This makes the Ukrainian blacklist, uniquely, a human rights sanctions regime concurrently to a misappropriation sanctions regime. This criterion also de-localised the regime, reflecting the intervention in the country by foreign actors. While the embezzlement of state funds can be presumed to have been perpetrated by Ukrainian officials, the perpetration of "human rights violations in Ukraine" admits foreign agency.

With the renewal of the asset freeze that ensued one year after its first adoption, the Council inserted a definition of persons identified as responsible for the misappropriation of Ukrainian state funds, which "include persons subject to investigation by the Ukrainian authorities:



EVALUATING THE EFFECTIVENESS OF FREEZES

- (a) for the misappropriation of Ukrainian public funds or assets, or being an accomplice thereto; or
- (b) for the abuse of office as a public office-holder in order to procure an unjustified advantage for him- or herself or for a third party, and thereby causing a loss to Ukrainian public funds or assets, or being an accomplice thereto.”¹³²

Despite the fact that the Ukrainian blacklist is chronologically the last one adopted, it displays unusual complexity. Sanctions were adopted in two rounds (March and April 2014), separated by merely five weeks. According to expert Gretta Fenner, “European jurisdictions acted as fast as they ever have”,¹³³ presumably thanks to the fact that they closely followed the Arab Spring blueprint.

Individuals were blacklisted at the request of the Office of the Prosecutor General of Ukraine. All designees filed cases in front of the CJEU. Some of them won their cases and got their designations annulled. Sometimes the EU removed entries from the blacklists while the cases were still being considered in the Court, delisting individuals listed on tenuous grounds before the Court issued its ruling, as in the case of Andriy Portnov. In other cases, such as Serhii Kliuiev, Ukraine dropped the case and the EU automatically removed the listing. Finally, the Court has also upheld some designations. In the recent ruling on Andrii Kliuiev, the Court annulled the original designation but upheld the legality of its renewal, which reflects an evolution in which the EU has gradually improved the evidentiary basis for the designations.¹³⁴

The asset freezes have not yet been successful in facilitating asset recovery. However, they have only been in place for about five years, which is still a relatively short time.

Table 3: Summary of CFSP designations for the misappropriation of state assets in Ukraine

Total number of designees	22
Individuals targeted in 1 st round	18
Individuals targeted in a 2 nd round	4
Court challenges	16
Individuals listed as of Dec. 2018	15

The European Commission collects information on the amounts frozen,¹³⁵ but it is not authorised to disclose them. Ukrainian authorities reported freezes totalling \$107.2m, €15.9m and CHF135m in Austria, the UK, Latvia, Cyprus, Italy, Liechtenstein, Switzerland and the Netherlands.¹³⁶ As pointed out by Michael Howard, not a single Ukrainian politician or businessman implicated in the Yanukovych era has so far been brought to justice.¹³⁷ To date, only middle-level public officials have been convicted.¹³⁸

Funds belonging to several individuals closely associated with former president Viktor Yanukovich were identified in Latvian banks and frozen. They included Sergiy Kurchenko, one of the first individuals to be named on EU and US blacklists, Serhii Arbuzov, who had \$49m frozen in Latvian accounts, and businessmen and politician Yuri Ivanyushenko, who had \$32m plus CHF72m. However, neither Kurchenko, Arbuzov nor Ivanyushenko were under investigation in Ukraine over the ownership of funds held in Latvian banks and a series of court decisions led to their unfreezing and seizure by the Latvian state.¹³⁹ Ivanyushenko, who was investigated in Ukraine over a different embezzlement case, was removed from the EU blacklist after the case against him was discontinued in 2017.¹⁴⁰



EVALUATING THE EFFECTIVENESS OF FREEZES

The obstacles preventing asset recovery in Ukraine are manifold. Firstly, the funds and their ownership are difficult to trace, and the Prosecutor General's Office has little experience with financial investigations. However, the most significant problem is reportedly the persistence of political interference in the Office's work, as well as the disincentives this creates for officials. This makes officials often reluctant to move cases forward for fear of retribution.¹⁴¹ In the words of Greta Fenner, Office members investigate "people who are still very powerful and have resources at their disposal to destroy you if they want to...If you are successful in your work, you expose yourself to risks".¹⁴² In addition, on the basis of her experience as an advisor to the Ukrainian Office of the Prosecutor General, the same expert points to an initial lack of understanding of the centrality of domestic prosecutions to the success of asset recovery.¹⁴³

Nevertheless, the blacklists are considered political useful beyond their performance in paving the way for asset recovery. EU members consider the misappropriation sanctions part of a broader package imposed in response to Russian interference in Ukraine. Although formally separate and associated to different objectives, they are linked to the full embargo imposed on Crimea following its annexation by Russia and the sanctions addressing destabilisation of Eastern Ukraine. From this point of view, the freezes form part of a broader response to Russian interference with Ukrainian sovereignty, in which the EU presents a united front resolutely opposed to such actions. The political significance of the measures is of paramount importance to Member States, which remain willing to uphold the freezes as a gesture of solidarity with Ukraine.

Similarly to the EU list, there were two consecutive rounds of listings also in the case of Swiss FIAA freezes; however,

the first round preceded the first round of CFSP sanctions, and the second round followed barely three weeks on. The faster pace of adoption of freezes in Switzerland can be explained because, as the EU is a composite actor, it generally takes time for the Council to decide on legislation. In addition, the requirement to translate legislation into all EU official languages further slows down its release.¹⁴⁴ Similarities in the selection of designees are observable however, even though the number of entries is higher in the Swiss list: The 20 initial entries of the Swiss list became 29 in the second round, while the EU listed 18 in the first round and added four more entries in the second.

Table 4: Evolution of designations under the FIAA freezes for the misappropriation of state assets in Ukraine

Total number of designees	29
Individuals targeted in 1 st round	20
Individuals targeted in a 2 nd round	9
Individuals listed as of Dec. 2018	15

Comparing the three misappropriation regimes

Overall, there have been 35 court cases in the EU courts, out of which 4 are appeal judgements.¹⁴⁵ Interestingly, litigation activity has increased over time, and presents vastly different patterns across countries. The number of court cases is not proportional to the number of designees however: 32% of the total correspond to Tunisia, which is by far the longest list and more than doubles the number of designees of the second longest list, Ukraine. 10% of court cases concern Egypt, while Ukraine accounts for 58% of all court cases. Three out of the four appeals concern Ukraine, while the fourth refers to Egypt.



EVALUATING THE EFFECTIVENESS OF FREEZES

The outcomes of litigation vary from country to country. Overall, almost half of the General Court cases (48%) ended in dismissals (i.e. rulings in favour of the Council), while 29% were partial annulments and 23% resulted in annulments. Regarding Tunisia, 60% of cases were dismissed, two were annulled and two were partially annulled. By contrast, all Egyptian cases were dismissed. In Ukraine, the results of litigation are almost evenly distributed among the three categories: 33% dismissals, 39% partial annulments and 28% annulments. Including Court of Justice rulings in the calculation would only alter the results for Ukraine, since the only successful appeal (C-530/17) concerns one Ukrainian target: dismissals would make up 28% of the total, while annulments would represent 33%, inverting the positions of these categories before appeal. This makes Ukraine the only targeted country where designees have proved more successful in litigation than the Council. The figures for Ukraine depart from the overall Council-friendly trend observable since 2015, when the Council reportedly started to win twice as many cases than it lost,¹⁴⁶ and deviates from the more favourable pattern witnessed in the Arab Spring cases. They also contradict the expectation that EU freezes should have, over time, become more resistant to legal challenges.



EFFECTIVE ANTI-CORRUPTION INSTRUMENTS?

The employment of CFSP assets freezes to advance asset recovery has proved unsatisfactory at the EU level and is unlikely to be repeated in the near future. Reluctance to activate this tool is not due to questions over the suitability of the CFSP to address misappropriation, which is less controversial. On the contrary, the CJEU has acknowledged these measures as part of a policy of supporting new authorities, intended to promote economic and political stability in the requesting country and to assist the authorities of that country in their fight against the misappropriation of state funds. This fits the EU external policy of consolidating democracy and the rule of law. The Court has merely set limits on the sort of misappropriation of public funds in third countries that is relevant to an EU freezing. The Court reasoned that a CFSP measure would only be appropriate if misappropriation jeopardises the legal and institutional foundations of the country in question, threatening the rule of law.

Instead, the key difficulty emanates from the vulnerability of designations to court challenges, in particular after the CJEU established that it was not admissible to freeze assets of individuals who were merely under investigation in the requesting state. What is unique to the misappropriation sanctions is that the listings do not originate from EU Member States, but from requesting states that do not always substantiate the requests with sufficient evidence. Therefore, the Council finds itself upholding designations of individuals not yet convicted in their home countries, sometimes lacking sufficient information to justify the freeze. This leaves the Council with few resources to fend off annulments by the Court of Justice, which carry a loss of prestige for the institution. This situation contrasts sharply with sanctions under regular CFSP regimes, where designations are proposed by Member States, and the Council engages in listing and de-listing of entries disconnected from external processes. Because the Council

employs CFSP legislation designed to address foreign policy issues which maximises Council's flexibility, no criteria exist stipulating the conditions under which sanctions can be employed. This leaves the door open for inconsistencies in the application of asset freezes to address grand corruption cases, even when these accompany significant international crises.

This said, the freezes have fulfilled other political objectives. As indicated at the outset, the evaluation of the effectiveness of misappropriation sanctions ought to be conducted with reference to a twofold objective: enabling asset recovery and conveying support to post-revolutionary governments. While the freezes have been barely successful in attaining the goal of asset recovery, given that very few designees have been indicted, the measures have been successful in helping EU Member States forge links with the post-revolutionary leaderships. The new elites report considerable appreciation for the EU's willingness to keep the assets frozen, which they continue to regard as a gesture of solidarity and support, particularly in Kiev.¹⁴⁷ Upholding the Ukrainian asset freeze is of special significance to the EU given that the Kiev uprising was largely about approximation to the EU. Unlike the Arab uprisings, which resulted from purely internal processes, the Maidan protest erupted in response to the government's refusal to sign an Association Agreement with the EU.¹⁴⁸ This EU-related origin involved Brussels in a confrontational course with Russia, which is still ongoing. Thus, the initial political imperative that gave rise to the listings remains alive.



EFFECTIVE ANTI-CORRUPTION INSTRUMENTS?

AVAILABLE ALTERNATIVES

Modifying the legislative framework

In the face of the unsatisfactory state of affairs, how could existing mechanisms be optimised, or replaced with less problematic options? Several alternatives could be contemplated. One of them consists in replicating the Swiss legislative framework in force since 2016. The comparative strength of the Swiss law is that it addresses also confiscation and restitution, whereas the EU regulations do not. In addition, even if the Council of Ministers chose to collect evidence to back up the listings independently from requesting states, it would be poorly equipped for obtaining it as it relies merely on the capabilities of its Member States. The character of CSFP acts as foreign policy measures precludes their use in addressing situations of misappropriation which are disconnected from international crises, notably revolutionary regime change. Instead, legislation enabling the adoption of EU-wide asset freezes addressing misappropriation could be moved to the framework of Justice and Home Affairs, an EU policy domain with a growing external dimension.¹⁴⁹

Another way in which this could be accomplished is by creating a horizontal sanctions list, defined as sanctions legislation devoted to address breaches in a particular field across constituencies, rather than breaches linked to a specific country.¹⁵⁰ This would not differ substantially from the current approach, given that the operative paragraphs of the three existing regimes are almost identical. This would fit the current trend towards theme-based sanctions lists that follow the model of anti-terrorism lists: Horizontal sanctions regimes to address cybercrime and the use of chemical weapons have already been established.¹⁵¹ Legislation allowing to list perpetrators of grave human

rights breaches has been tabled by the Netherlands under the name of “EU global human rights sanctions regime” and is currently under discussion.¹⁵² In an open letter, ninety non-governmental organisations have recently expressed support for the initiative, claiming that Global Magnitsky-type legislation “will provide the EU with the ability to shine a spotlight on and compel changes of behaviour in some of the world’s worst human rights violators”, and that it “has the potential to deter would-be kleptocrats”.¹⁵²

However, the initial Dutch proposal centres on human rights and lacks an explicit anti-corruption component,¹⁵⁴ in contrast to the U.S. and Canadian iterations of the Global Magnitsky list. Thus, it remains to be seen whether the EU global human rights sanctions regime could be used for the purpose of fighting grand corruption. It is not believed that sufficient consensus exists among Member States to adopt the anti-corruption element that is integral to the North American lists. This is despite the recognition of a link between grand corruption and the foreign policy challenges faced by the EU. Former Prime Minister of Belgium and current MEP Guy Verhofstadt encourages the EU to “go after the billionaire cronies of the Kremlin who really set policy in Moscow while laundering money in the West”, claiming that the “finances and opulent lifestyles of Kremlin-lined tycoons should be fiercely scrutinised in line with EU anti-money laundering legislation”.¹⁵⁵ In the absence of an anti-corruption dimension in the EU version under discussion, the creation of separate legislation dedicated to listing individuals involved in grand corruption could be envisaged. The European Parliament has expressed support for anti-corruption movements in third countries in various resolutions.¹⁵⁶



EFFECTIVE ANTI-CORRUPTION INSTRUMENTS?

Introducing partial reforms to the current system

The current system could also be made more efficient by inserting conditional deadlines for the renewal of measures, again following the Swiss model. The current CFSP sanctions system foresees the yearly renewal of measures; however, there is no explicit conditional aspect to it. By contrast, Swiss legislation stipulates that the extension of the original listings “is expected to yield tangible progress in pending proceedings”, and that Bern will “decide whether the freezes on these assets will be prolonged on the basis of the progress made in the respective legal proceedings”.¹⁵⁷ The adoption of such conditionality component would provide an unequivocal incentive for requesting states to make progress with their investigations lest the frozen funds be released.

Another option consists in imposing an EU-wide CFSP assets freeze initially, and replacing it at a later stage with national assets freezes in those countries where assets have been identified. An EU-wide freeze becomes redundant once it becomes known in which constituencies the funds are located. If assets are identified in say, four EU Member States, the freeze could be upheld in the concerned countries via national measures. This would allow for the EU freeze to be revoked. Removing the CFSP freeze would eliminate the risk of challenges in the CJEU; instead, national courts would be competent. It would also release those Member States where no misappropriated assets exist from the responsibility of ensuring the substantiation for listings, thereby mitigating their reluctance to effect assets freezes in future.

However, it must be emphasised that these alternatives present serious limitations: Partial reforms – such as the introduction of deadlines for renewal – fail to fully resolve the identified problems, while more dramatic reforms –

such as replacing EU with national measures after an initial period, or moving the assets from the CFSP to the realm of Justice and Home Affairs – fundamentally alter the character and finalité of the measures.

Finally, the current system consists of a freeze at EU level, and does not entail any mechanism for asset recovery, which must take place at national level via MLAs. This system resembles the US system, which foresees the freezing of assets under the International Emergency Economic Power Act but has no provisions for confiscation.¹⁵⁸ A new EU legislative framework could establish a link between both levels.

NOTES

1. Bogaerts et al. 2016
2. Boogaerts 2018
3. Cosgrove 2005; Wallensteen and Grusell 2012; Portela 2018a
4. Portela 2010
5. TEU, art 21(2)
6. Portela 2010
7. For a background to this mechanism, see Gestri 2016
8. Court of Justice of the EU 2008
9. Happold 2016; Portela 2009
10. Nephew 2018
11. Barber 1979
12. Barber 1979
13. Stepien et al. 2016
14. Taylor 2009; Hellquist 2016
15. Blavoukos and Bourantonis 2014
16. Biersteker et al. 2016; Moret et al. 2016; Giumelli 2018
17. Boogaerts 2018
18. Ashton 2012
19. Ashton 2012
20. The terms originating and requesting countries are employed indistinctively throughout the text, indicating the state that issues the request for freezing and/or MLA.
21. Boogaerts 2018
22. Chrisafis 2011
23. Case C-220/14 P, *Ezz and others v Council*, 15 March 2015, para 43—48
24. The Economist 2014, Kettis and Hakala 2013
25. Council 2011a
26. Council 2011b
27. Interview with EU Member States representatives (2) and (4), Brussels, September 2018 and October 2018
28. Quoted in Aljazeera 2018
29. Aljazeera 2018
30. Fenner 2016, p.19
31. Quoted in Aljazeera 2018
32. Lough and Dubrovskiy 2018, Bullough 2014
33. The present section is largely based on interviews with anonymous officials and experts conducted between spring 2017 and autumn 2018. See Annex 1.
34. Court of Justice of the EU 2008
35. Happold 2016; Portela 2009, 2018a
36. Bishop quoted in House of Lords 2017
37. Boogaerts 2018
38. Interview with EU Member State representative (1), Brussels, March 2017
39. Lidington 2015a, p.2
40. Lidington 2015b, p.2
41. Boswell 2015, p.1
42. Lidington 2015a, p.2
43. Boogaerts 2018
44. Interview with EU Member State representative (3), Brussels, October 2018
45. Interview with EU Member State representative (1), Brussels, March 2017; Interview with EU Member State representatives (3) and (4), Brussels, October 2018
46. Interview with EU Member State representative (2), Brussels, September 2018
47. Ashton 2012
48. Lidington 2015a, p.1
49. Timmermans and Mogherini 2017
50. Duncan 2017, p.2
51. Lester 2016, p. 6
52. Duncan 2017, pp.1-2
53. European Parliament 2017c
54. Bartels 2014
55. Boogaerts et al. 2016
56. Shenker 2012
57. Boogaerts 2018
58. Bullough 2014, Anticorruption Action Centre 2017
59. Portela 2017
60. TEU, Art. 24.
61. TFEU, Art. 215(1).
62. TFEU, Art. 215(2).
63. Council 2011a, 2011b and 2014
64. This is one of the two provisions not included in the regulations relating to Egypt or Tunisia.
65. The “no claims” article is the other of the two provision not included in the regulations relating to Egypt or Tunisia.
66. Council 2012
67. Kettis and Hakala 2013
68. In chronological order based on the publication of the judgement, these are Cases T-188/11, T-200/11, T-290/14, T-486/14, T-246/15, T-434/14, T-258/17, T-187/11, T-133/12, T-331/14, T-332/14, T-341/14, T-340/14, T-348/14, T-346/14, T-731/15, T-256/11, C-220/14, T-200/14, T-224/14, T-516/13, T-545/13, T-221/15, T-215/15, T-149/15, T-175/15, C-598/16, C-599/16, T-245/15, T-242/16, T-190/16, T-288/15, T-216/17, T-358/17 and C-530/17. See Annex 2.
69. Portela 2012
70. E.g. Myanmar
71. E.g. Syria
72. E.g. Iran
73. E.g. the EU autonomous terrorism listings under Common Position 2001/931/CFSP
74. Case T-256/11, *Ezz and others v Council*, 27 February 2014, para 44
75. Case T-256/11, *Ezz and others v Council*, 27 February 2014, para 196
76. Case C-220/14 P, *Ezz and others v Council*, 15 March 2015, para 43—48
77. Case T-348/14, *Yanukovych v Council*, 15 September 2016, para 98
78. Case T-340/14, *Klyuyev v Council*, 15 September 2016, para 91
79. *Ibid*
80. Case C-599/16 P, *Yanukovych v Council*, para 60
81. Case T-246/15, *Ivanyushchenko, v Council*, 19 October 2017, para 92, and Article 4(3) of Directive (EU) 2017/1371 of the European Parliament and of the Council on the fight against fraud to the Union’s financial interests by means of criminal law
82. Case T-187/11, *Trabelsi and others v Council*, 28 May 2013, para 93. See also Case T-246/15, *Ivanyushchenko v Council*, 8 November 2017, para 152—155

NOTES

83. Case T-256/11, 27 February 2014, para 202 and 206.
84. See, for instance, Case C-280/12, Council v Fulmen and Mahmoudian, 28 November 2013, para 64
85. Cases T-290/14, T-331/14, T-332/14, T-340/14, T-341/14, T-346/14, T-348/14, T-486/14, and T-741/14, all decided on nearly identical language on this issue
86. E.g. Case T-290, Portnov v Council, 16 October 2015, para 41
87. E.g. *ibid.*, para 48
88. Council Decisions 2014/216/CFSP of 14 April 2014, 2015/143 of 29 January 2015, 2015/364 of 5 March 2015, 2015/1781 of 5 October 2015, 2016/318 of 4 March 2016, and 2018/333 of 5 March 2018
89. Case T-346/14, Yanukovych v Council, 15 September 2016
90. *Ibid.*, para 44—53
91. *Ibid.*, para 138
92. Case C-598/16, Yanukovych v Council, 10 October 2017, para 74
93. Case T-731/15, Klyuyev v Council, 21 February 2018, para 255—256
94. Pursiainen 2017
95. C-530/17 P of 19 December 2018 reverses General Court's judgment T-247/17 of 13 December 2018
96. Lohaus forthcoming
97. This is the basis on which the current Foreign Illicit Assets Act, FIAA, was issued. Prior to that, ordinances were issued directly on the basis of Article 184(3) of the Constitution, which permit that Federal Council to issue temporary ordinances "safeguarding the interests of the country so require".
98. Which provides, in particular, that Switzerland may adopt sanctions in order to align with the UN Security Council, the OSCE, or "Switzerland's most significant trading partners" like the EU.
99. Federal Department of Foreign Affairs of Switzerland 2018
100. See, for instance, Case B-4797/2012, X v DDIP, 5 December 2013, para 2
101. *Ibid.*, para 3.
102. *Ibid.*, para 5.1—5.3. The judgment does not identify the person in question.
103. *Ibid.*, para 7.2. —7.3.3.
104. *Ibid.*, para 7.7.
105. Case B-2682, A. Ltd v. FDFA, 7 April 2017, para 3.2.
106. *Ibid.*, para 3.2.1.
107. *Ibid.*, para 3.2.2.
108. Servettaz 2014
109. See also *ibid.*, para 3.2.1.
110. See, for instance, Article 1 of Council Decision 2014/119/CFSP, as amended.
111. Lohaus forthcoming
112. Council 2011a, art. 1
113. Brun 2014
114. Keller 2015
115. Reuters 2017
116. Boogaerts 2018
117. Council 2011b, art. 1. Author's italics.
118. Boogaerts 2018
119. Govan 2012
120. Tovrov 2012, Dale 2013
121. Shenker 2012
122. Daily News Egypt 2018
123. Häuptli 2018, Swissinfo 2018
124. Egypt Independent 2017
125. Daily News Egypt 2018
126. Federal Department of Foreign Affairs 2018
127. Daily News Egypt 2018
128. Staff 2016
129. Public Eye 2017
130. Häuptli 2018
131. Council 2014, art. 1
132. Council 2015, art. 1. See also Annex 2.
133. Fenner 2016, p.19
134. Radio Free Europe 2018
135. Council 2011a, 2011b, 2014
136. State Financial Monitoring Service of Ukraine 2018
137. Howard 2018
138. Anti-corruption Action Centre 2017
139. LSM 2016
140. LSM 2017
141. The Economist 2014
142. Fenner 2016, p.19
143. Fenner 2016, p.20
144. Boogaerts 2018
145. See footnote 67.
146. Bishop quoted in House of Lords 2017
147. Interview with EU Member State representatives (2) and (4), Brussels, September 2018 and October 2018
148. Webber 2019
149. Rees 2013
150. Portela 2018b
151. Portela 2018b
152. Bayer 2018; Jozwiak 2018
153. Human Rights First et al. 2018; Transparency International 2018
154. Blok 2018
155. Verhofstadt 2018
156. European Parliament 2017a and 2017b
157. Conseil Federal 2016
158. Levey 2011

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ANNEXES

ANNEX 1: LIST OF INTERVIEWS

Interview with Member State representative (1), Brussels, March 2017

Interview with Member State representative (2), Brussels, September 2018

Interview with Member State representative (3), Brussels, October 2018

Interview with Member State representative (4), Brussels, October 2018

Interview with expert, Brussels, October 2018

E-mail communication with expert, remote, October 2018

Interview with Member State representative (5), European capital, November 2018

Interview with EU officials, Brussels, November 2018

All interviewees are guaranteed full anonymity.

ANNEXES

ANNEX 2: LIST OF JUDGEMENTS IN MISAPPROPRIATION CASES PUBLISHED AS OF DECEMBER 2018

Code	Title	Date	Country	Outcome	Claimant
T-188/11	Chiboub v Council	28-May-13	Tunisia	Annulment	Chiboub, M.
T-200/11	Al Matri v Council	28-May-13	Tunisia	Annulment	F. Al Matri
T-187/11	Trabelsi & others v Council	28-May-13	Tunisia	Annulment (partial)	Trabelsi, M. (and four family members)
T-256/11	Ezz and others v Council	27-Feb-14	Egypt	Dismissed	Ezz, A., Ahmed. A., Yassin, K, Al Naggar, S.
T-133/12	Ben Ali v Council	02-Apr-14	Tunisia	Annulment (partial)	Ben Ali, M.
C-220/14 P	Ezz and others v Council	05-Mar-15	Egypt	Dismissed	Ezz, A., Ahmed. A., Yassin, K, Al Naggar, S.
T-290/14	Portnov v Council	26-Oct-15	Ukraine	Annulment	Portnov, A.
T-331/14	Azarov v Council	28-Jan-16	Ukraine	Annulment (partial)	Azarov, M.
T-332/14	Azarov v Council	28-Jan-16	Ukraine	Annulment (partial)	Azarov, O.
T-341/14	Klyuyev v Council	28-Jan-16	Ukraine	Annulment (partial)	Klyuyev, S.
T-486/14	Stavytskyi v Council	28-Jan-16	Ukraine	Annulment	Stavytskyi, E.
T-200/14	Ben Ali v Council	14-Apr-16	Tunisia	Dismissed	Ben Ali, M.
T-224/14	CW v Council	30-Jun-16	Ukraine	Dismissed	CW
T-516/13	CW v Council	30-Jun-16	Tunisia	Dismissed	CW
T-545/13	Al Matri v Council	30-Jun-16	Tunisia	Dismissed	F. Al Matri
T-340/14	Klyuyev v Council	15-Sep-16	Ukraine	Annulment (partial)	Klyuyev, A.
T-348/14	Yanukovych v Council	15-Sep-16	Ukraine	Annulment (partial)	Yanukovych, O.
T-346/14	Yanukovych v Council	15-Sep-16	Ukraine	Annulment (partial)	Yanukovych, V.
T-221/15	Arbuzov v Council	07-Jul-17	Ukraine	Dismissed	Arbuzov, S.
T-215/15	Azarov v Council	07-Jul-17	Ukraine	Dismissed	Azarov, M.
T-149/15	Ben Ali v Council	05-Oct-17	Tunisia	Dismissed	Ben Ali, S.
T-175/15	Mabrouk v Council	05-Oct-17	Tunisia	Dismissed	Mabrouk, M.
C-598/16 P	Yanukovych v Council	10-Oct-17	Ukraine	Dismissed	Yanukovych, V.
C-599/16 P	Yanukovych v Council	19-Oct-17	Ukraine	Dismissed	Yanukovych, O.
T-246/15	Ivanyushchenko v Council	08-Nov-17	Ukraine	Annulment	Ivanyushchenko, Y.
T-245/15	Klymenko v Council	08-Nov-17	Ukraine	Dismissed	Klymenko, O.
T-434/14	Arbuzov v Council	28-Jan-18	Ukraine	Annulment	Arbuzov, S.
T-731/15	Klyuyev v Council	21-Feb-18	Ukraine	Annulment (partial)	Klyuyev, S.
T-242/16	Stavytskyi v Council	22-Mar-18	Ukraine	Dismissed	Stavytskyi, E.
T-190/16	Azarov v Council	26-Apr-18	Ukraine	Dismissed	Azarov, M.
T-258/17	Arbuzov v Council	06-Jun-18	Ukraine	Annulment	Arbuzov, M.
T-288/15	Ezz and others v Council	27-Sep-18	Egypt	Dismissed	Ezz, A., Ahmed. A., Yassin, K, Al Naggar, S.
T-216/17	Mabrouk v Council	15-Nov-18	Tunisia	Dismissed	Mabrouk, M
T-358/17	Mubarak v Council	12-Dec-18	Egypt	Dismissed	Mubarak, H.
C-530/17 P	Azarov v Council	19-Dec-18	Ukraine	Annulment	Azarov, M.

Source: <http://curia.europa.eu/juris/recherche.jsf?language=en>

ANNEXES

ANNEX 3: EVOLUTION OF DESIGNATION CRITERIA

State	Tunisia	Egypt	Ukraine
Original act	All funds and economic resources belonging to, owned, held or controlled by persons responsible for misappropriation of Tunisian State funds, and natural or legal persons or entities associated with them, as listed in the Annex, shall be frozen (Council Decision 2011/72/CFSP of 31 January 2011)	All funds and economic resources belonging to, owned, held or controlled by persons having been identified as responsible for misappropriation of Egyptian State funds, and natural or legal persons, entities or bodies associated with them, as listed in the Annex, shall be frozen. (Council Decision 2011/172/CFSP of 21 March 2011)	All funds and economic resources belonging to, owned, held or controlled by persons having been identified as responsible for the misappropriation of Ukrainian State funds and persons responsible for human rights violations in Ukraine, and natural or legal persons, entities or bodies associated with them, as listed in the Annex, shall be frozen. (Council Decision 2014/119/CFSP of 5 March 2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine)
Revised act			<p>All funds and economic resources belonging to, owned, held or controlled by persons having been identified as responsible for the misappropriation of Ukrainian State funds and persons responsible for human rights violations in Ukraine, and natural or legal persons, entities or bodies associated with them, as listed in the Annex, shall be frozen.</p> <p>For the purpose of this Decision, persons identified as responsible for the misappropriation of Ukrainian State funds include persons subject to investigation by the Ukrainian authorities:</p> <p>(a) for the misappropriation of Ukrainian public funds or assets, or being an accomplice thereto; or</p> <p>(b) for the abuse of office as a public office-holder in order to procure an unjustified advantage for him- or herself or for a third party, and thereby causing a loss to Ukrainian public funds or assets, or being an accomplice thereto.</p> <p>(Council Decision (CFSP) 2015/143 of 29 January 2015)</p>

Source: <http://curia.europa.eu/juris/recherche.jsf?language=en>



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