FROM SANCTIONS TO INVESTIGATIONS

POLICY BRIEF & RECOMMENDATIONS

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POLICY BRIEF AND RECOMMENDATIONS TO EFFECTIVELY INVESTIGATE THE ORIGINS OF SANCTIONED ASSETS

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SUMMARY

Targeted asset-freezing sanctions have increasingly been debated as a measure that could trigger the opening of law enforcement investigations and eventual asset confiscation proceedings in sanctioning jurisdictions, in cases when it is suspected that sanctioned assets are the proceeds of corruption or other crimes. While traditionally seen as a temporary foreign policy measure, sanctions are now being viewed, therefore, as a potential stepping stone towards permanent asset forfeiture through judicial proceedings.

In particular, the Russian sanctions imposed following the invasion of Ukraine have highlighted the urgent need to address the identification and confiscation of sanctioned assets and triggered innovation in sanctions policies and practices. Alongside existing investigative practice by law enforcement, several new national and international initiatives have been established with the aim of speeding up the confiscation of frozen assets. This includes the US' KleptoCapture Task Force[1] and EU's operation OSCAR.[2]

What has been particularly new is political will to proactively investigate and pursue frozen assets by sanctioning countries. This also stems from the fact that these sanctions have been imposed on individuals who are still in power and, therefore, cooperation with Russian authorities over the confiscation of these assets is unimaginable.

This briefing summarises the findings of our report *From sanctions to investigations. Legislative, policy and practical tools to investigate the origins of sanctioned assets*.[3]

The analysis of existing legislative and policy frameworks, as well as practice that would encourage the start of investigations of assets linked to sanctioned individuals across key sanctioning jurisdictions, shows that law enforcement authorities have considerable capabilities and legal pathways available to pursue sanctioned assets if the evidence shows that they might have been acquired via illicit means or are the result of illicit activities. However, corruption investigations into sanctioned assets have happened in only a handful of cases.

Building on this report and following consultation with partners, this policy brief also includes recommendations for sanctioning countries to effectively investigate the origins of sanctioned assets.

Overall, these recommendations highlight the importance of sanctioning jurisdictions proactively opening investigations. These investigations are the first step on the way from a temporary asset freeze to a permanent asset confiscation or forfeiture in a way that is compatible with current legal practice and the rule of law.

BACKGROUND BRIEF

WHAT ARE ASSET FREEZING SANCTIONS?

Asset freezing sanctions are a type of sanction that temporarily restrict access to bank accounts and other assets. Asset freezing sanctions can be applied to individuals, corporate entities and States as a whole. For the purposes of this policy brief, however, only asset freezes concerning individuals and corporate entities are considered.

In practice, the imposition of sanctions then typically means that any assets, be it financial assets, moveable or immovable property or other, cannot be made available to the individual or entity, nor can persons or entities benefit from them in the form of receiving rents, for example.[4] The assets are frozen and unusable except for specific purposes while the sanctions are in place. This process does not, however, mean that assets are permanently confiscated or change ownership.[5]

WHY ARE ASSET FREEZING SANCTIONS IMPOSED?

Asset freezing sanctions, like sanctions in general, have diverse objectives. Some key overarching objectives are:

1. 1) to change the behaviour of the target,
2. 2) to disrupt the target's malicious activities, and
3. 3) to signal disapproval by the sanctioning jurisdiction.[6]

Objectives related to this include whether sanctions are intended to force change, affect domestic policy or international reputation, or uphold international norms and order.[7]

The reasons and objectives behind the imposition of sanctions are important due to the impact that these may have on the likelihood of an investigation being started into the origins of sanctioned assets.

Particularly when anti-corruption sanctions are imposed, there is a suspicion of underlying criminal activity and these designations need to fulfil some, albeit low, evidential standard. This raises the question of whether these suspicions can be built upon and lead to investigations into the origins of these assets taking place in sanctioning jurisdictions.

HOW ARE ASSET FREEZING SANCTIONS LINKED TO INVESTIGATIONS AND ASSET RECOVERY?

The imposition and removal of sanctions are political decisions targeting the assets of a designated person or entity within a jurisdiction. They are administrative measures that are not linked to specific assets or to ongoing investigations. This is in contrast to judicial asset freezing measures that require the approval of a court and are bound by rules relating to legal processes.[8] The imposition of asset freezing sanctions are then legally distinct from asset freezing measures in corruption investigations and subsequent confiscation and recovery proceedings.[9] Assets frozen by sanctions can however become the subject of investigations and legal proceedings that question the legitimacy of their origin.

In the past, the recovery of at least some frozen assets was similarly expected after sanctions were imposed by the EU and Switzerland in the aftermath of the revolutions in Egypt (2011), Tunisia (2011), and Ukraine (2014). A core aim of these so-called misappropriation sanctions[10] was

to allow enough time for law enforcement in the countries of origin to prosecute sanctioned individuals and investigate the origin of their assets. Little however has been returned. On the one hand, this is because the post-revolutionary governments were not able to successfully prosecute the former ruling elite for their corrupt behaviour. On the other hand, and important for current discussions, however, is that the sanctioning countries also did not prioritise their own asset recovery proceedings,[11] including opening investigations into the origins of sanctioned assets in their jurisdictions.

WHY SHOULD SANCTIONING JURISDICTIONS OPEN INVESTIGATIONS INTO SANCTIONED ASSETS?

Sanctioning countries committed to the fight against corruption should seize the opportunity to investigate sanctioned assets within their jurisdictions. Otherwise, as in the case of the misappropriation sanctions, these assets may ultimately be released, after being frozen for an extended period of time, and returned to those suspected of acquiring them illicitly. By quickly freezing the assets of individuals suspected of criminal behaviour, sanctions create a unique opportunity for law enforcement in the sanctioning countries to have time to scrutinize the origin of such assets and launch investigations into their origin. In this way, sanctions can form a part of a broader governmental anti-corruption strategy.[12]

Lessons from the misappropriation sanctions imposed in 2011 and 2014 have shown that if the country where the initial act of corruption occurred cannot launch a successful investigation and convict those involved, assets frozen under sanctions may be returned to individuals suspected of having obtained them through criminal means after the sanctions have run their course and are lifted. While it is important to support countries of origin, especially by providing technical and financial resources to those without strong asset recovery offices and adequate legal frameworks, this might not always be the most effective course of action. Opening of investigations in the sanctioning jurisdiction or conducting parallel investigations in both jurisdictions may increase the chances of a successful confiscation.

Particularly in the cases of non-cooperative jurisdictions, sanctioning countries will need to take the lead in investigating potentially illicit foreign assets. This is not an easy task, as gathering sufficient evidence proving criminality relating to powerful political and business elites,[13] or potential acts of corruption occurring years or decades in the past, is extremely difficult.[14] However, a number of countries have promising legal approaches to do this, especially where crimes may have been committed in introducing those assets into the sanctioning jurisdictions.

HOW CAN SANCTIONING JURISDICTIONS OPEN INVESTIGATIONS?

Where evidence of possible corruption is identified when imposing sanctions or during administrative investigations into the assets of designated individual, or when evidence of potential evasion of sanctions is found, investigations by law enforcement can – and should – be triggered. These investigations can form the basis for legal proceedings that target the assets frozen by the sanctions or can target the broader unexplained wealth of sanctioned individuals. These proceedings and assets they target can be grouped into three different categories:[15]

1. Assets involved in sanctions violations. These are most straightforward approach for law enforcement as it focusses on

legal violations post-sanctions designation.

2. Assets linked to criminal activity such as corruption or organised crime. The criminal activity might not be related to the focus of the sanctions regime and linking sanctioned assets to prior criminal activity might be challenging.

3. Unexplained wealth more broadly. In cases where assets appear to be derived from unlawful sources, and it is difficult to establish a clear link between the assets or a person and the underlying criminality, jurisdictions have the possibility to use unexplained wealth or illicit enrichment legislation.

For asset freezing sanctions, the evidence prompting a financial investigation may depend on:

1. Evidence found during administrative asset-tracing investigations,

2. Information gathered prior to designation that served as evidence for the designation.

An important question to consider when thinking about investigations into sanctioned assets and assets linked to sanctioned persons and entities is, therefore, the reason why they were included on the sanctions list. This justification may indicate that there is evidence of criminal activity that could be used as a basis for prosecution and confiscation proceedings.

EXAMPLES OF APPROACHES IN INVESTIGATEING THE ORIGINS OF SANCTIONED ASSETS.

EXAMPLE 1: GOVERNMENT CIRCULAR INSTRUCTING LAW ENFORCEMENT AGENCIES TO WORK TOGETHER TO INVESTIGATE AND PURSUE RUSSIAN ASSETS.

A 2022 Circular issued by the French Ministry of Justice[16] instructed judicial authorities to prioritise suspicious transactions reports linked to Russian assets, to cooperate with other governmental agencies working on tracing Russian assets of possible illicit origin, and to prosecute money laundering offenses or breaches of these asset freezes where relevant. The Circular gave a green light for French law enforcement authorities to look for evidence and open investigations into potential criminal conduct of sanctioned individuals. Transparency International France filed legal complaints against persons unknown regarding the potential criminal conduct of five of sanctioned individuals for money laundering, non-justification of resources, stolen goods and complicity in these three offenses following the 2022 Russian sanctions. These legal complaints fed into investigations conducted by French law enforcement authorities and led to the opening of 17 criminal proceedings concerning Russian individuals, which are currently ongoing.[17]

EXAMPLE 2: THE SWISS FOREIGN ILLICIT ASSETS ACT

Legislation enabling authorities to freeze assets of politically exposed persons located in Switzerland in situations of political crises and failed regimes creates a direct link between these assets and anti-corruption investigations. The Swiss Foreign Illicit Assets Act (FIAA)[18] from 2015 offers a basis not only for freezing, but also for the confiscation and restitution of frozen assets to the countries of origin, where the original crime occurred. The confiscation of frozen assets can proceed as part of a procedure initiated in the country of origin via an MLA request or following independent Swiss criminal proceedings.

EXAMPLE 3: INTERAGENCY TASK FORCES HELPING TO SEIZE ASSETS BELONGING TO SANCTIONED INDIVIDUALS

In response to the Russian invasion of Ukraine, several countries established interagency task forces dedicated to seizing assets belonging to sanctioned individuals and tacking sanctions evasion. Some of these task forces, comprising experts from law enforcement, financial intelligence units, and regulatory bodies, were created to ensure not only a coordinated and efficient approach to identifying and freezing assets linked to individuals and entities facing sanctions but also their seizure and confiscation. The US Task Force KleptoCapture[19] and the UK Combating Kleptocracy Cell are examples of task forces with a mandate extending to pursuing sanctioned assets.[20]

RECOMMENDATIONS

1. Adopt new legislation, policy or issue guidance to law enforcement and judicial authorities that encourages investigations into assets that have been temporarily frozen by sanctions, when it is suspected that sanctioned assets are the proceeds of crime.

A clear commitment from the government to investigate sanctioned assets encourages law enforcement agencies to pursue cases that would otherwise be considered low priority due to the temporary nature of sanctions and the traditional onus on investigations from the country of origin. Assets of sanctioned people should be scrutinised and investigated further every time that an individual is sanctioned for reasons linked to corruption and whenever there is evidence that their assets might be the proceeds of crime.

This commitment can take a form of a legislation, policies or guidance. Policy guidance can highlight the use of particular legal pathways available in the jurisdiction that have shown to be successful in complex cross-border cases. Legislation, policy or guidance should not concern sanctions linked to a single political crisis but should relate to all sanctioned assets that are suspected to be the proceeds of crime. This should be established in accordance with the independence of the judiciary and of prosecutors.

2. Establish permanent inter-agency task forces or other forms of communication channels to enhance national collaboration between regulatory bodies, agencies implementing sanctions, tracing sanctioned assets and enforcing the law.

Commitments to investigate sanctioned assets when it is suspected that they are the proceeds of crime should be operationalised and governments should establish clear communication channels between agencies, which hold important information regarding sanctioned individuals and their assets. While the agencies involved will vary across jurisdictions, it should include agencies responsible for implementing sanctions, representatives of regulatory bodies overseeing the financial sector and professional services (e.g. real estate notaries), fiscal authorities and law enforcement.

Permanent communication channels enable proactive information sharing, flagging cases for further scrutiny and investigation. The communication channels can take the form of inter-agency working groups or task forces, such as those established by a number of countries after the Russian invasion of Ukraine and which show promise in coordinating sanctions implementation, and in the freezing and confiscation of sanctioned assets.

3. Provide all information available at the time of sanction designation to law enforcement authorities, especially if they point to an underlying crime being committed.

A lack of evidence is one of key barriers to prosecution and asset confiscation proceedings. Governments should ensure that any relevant information available to them at the time of making a designation is flagged and passed on to prosecutors. Without relevant information that would point to allegations of criminal conduct, law enforcement agencies may not see a reason to investigate a particular individual or their wealth because the thresholds to even begin an investigation may not be

met. This applies especially in cases of individuals designated for their suspected involvement in corrupt activities and other crimes.

4. Apply transparent designation criteria and openly publish as much information as possible about the reasons that led to sanctions designation.

The effectiveness of sanctions can be undermined by their inconsistent and selective application. A lack of clarity and poor communication about why sanctions were imposed in particular cases, and not others, can make designation decisions appear political and unsubstantiated. Therefore, governments should provide sufficient background information on designations within the remit of possible ongoing investigations. Moreover, if as much as possible background information on designations is published publicly, civil society and the media can aid in further evidence gathering of underlying criminal practices to assist investigations.

5. Provide infrastructure for whistleblowers, the private sector and civil society to aid in collecting and reporting evidence of involvement in corruption and other financial crime to relevant authorities.

Apart from financial institutions obliged to report any suspicious transactions and dealings that they have uncovered during due diligence checks, civil society and the wider public can also be empowered to report relevant information. Both non-governmental and private sector organizations can play a crucial role in facilitating the collection and verification of evidence relating to underlying crimes, for use by law enforcement. Authorities should create communication channels that would enable them to receive information from non-state actors and cooperate in gathering and exchanging evidence underpinning legal cases. Information sharing from non-sate actors can be encouraged, for example, by the creation of designated procedure for evidence sharing or by the creation of a sanctions whistleblower program for flagging potential cases of sanctions violation.

6. Create an enabling environment for law enforcement authorities to pursue complex cases of illicit wealth linked to sanctioned assets. This means sufficient financial, human and technical resources.

Sufficient financial, human and technical resources are key for law enforcement authorities to be able to investigate complex cases. Even though many jurisdictions have recently increased the number of staff and resources available to trace assets and fight financial crime and are equipped with a mandate to prosecute cases linked to sanctioned assets, authorities in some jurisdictions still face considerable limitations preventing them from acting effectively. In particular, agencies involved must have sufficient human resources, clearly defined responsibilities, access to central digital registries, data analytics software, and any tools and new technologies needed to tackle complex financial crime. Assessments of anti-money laundering infrastructure may provide a useful starting point for the identification of institutional and technical weaknesses when it comes to the prosecution of complex cases of financial crime, which can then often be applied to pursuing cases linked to sanctioned assets.

7. Incentivise cross-border collaboration across partner jurisdictions at all stages of investigations, including administrative asset tracing, civil and criminal investigations, and the coordination of sanctions enforcement action.

Conducting administrative, civil and criminal investigations which aim to

establish ownership structures and prove schemes of financial crime are resource intensive. Authorities in different jurisdictions can spent months conducting such investigative work in parallel without informing each other of the progress of their work and information found. This delays progress in holding corrupt individuals accountable and depriving them of their assets. They can also arrive at different conclusions about whether an entity is or is not connected to a sanctioned individual, which creates difficulties for private sector actors operating across borders, as well as financial institutions, who are responsible for accepting or rejecting dealings with these entities. Therefore, countries should consider establishing a platform or a process to further share information on sanctioned entities and individuals in the remits of civil investigations, alongside the existing Mutual Legal Assistance process in criminal investigations. At the EU level in particular, consideration should be given to the possibility of harmonising the mapping of entities owned or controlled by sanctioned individuals to speed up efforts across the member states.

8. Continue enhancing beneficial ownership transparency through beneficial ownership registration laws and address financial secrecy.

A key challenge for the law enforcement authorities to successfully trace assets that should be frozen and in understanding complex cases of illicit wealth, is to link given assets to individuals. Assets that are the proceeds of criminal activity are often owned by the individuals' family members or close associates or through layers of secretive company structures, which makes tracing the ownership of assets difficult. In order to facilitate the correct identification of all assets of sanctioned individuals, central beneficial ownership registries are key. As important are registries of real estate owners, including those of foreign origin, are information on the beneficial ownership of cars, yachts or planes. These should all be made public, searchable for easier data manipulation, and importantly, should contain at least basic data validation and verification mechanisms to ensure data accuracy. The issue and abuse of anonymous trusts by individuals to hide their assets have been apparent through a number of publicised cases of yachts and properties being owned by sanctioned Russian individuals. The beneficial ownership of trusts and funds should therefore also be made public.

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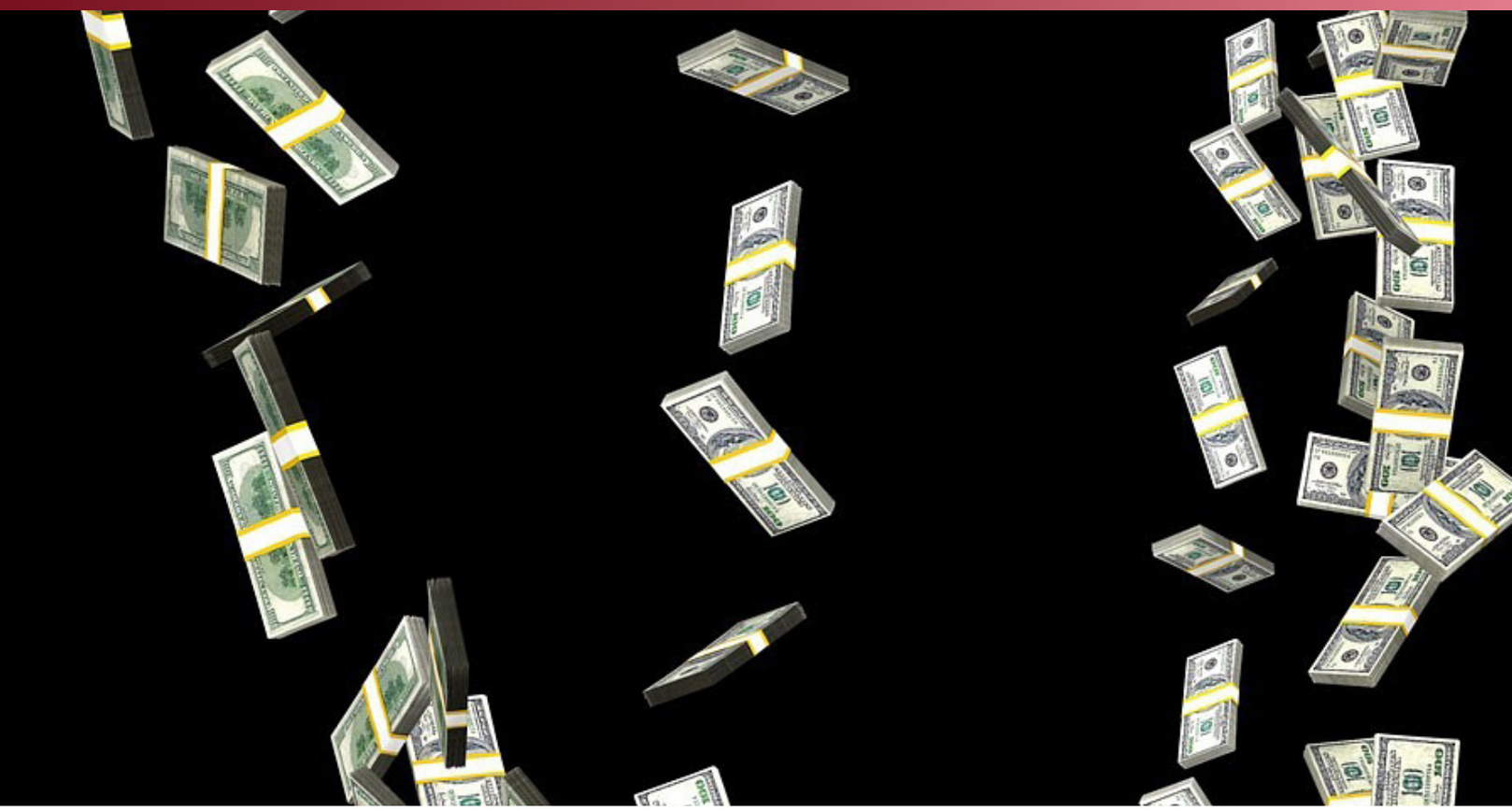

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