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The Awakening of the Sleepy European Union: The Enigmatic Role of the EU Sanctioning System Against China¹

Francesca Brunelli²

Abstract

This paper aims at giving useful hints to understand the European hesitation to deliberately take a side in the debated *odi et amo*³ relationship between the Western countries (in particular the US) and the People's Republic of China, including the special administrative region of Hong Kong. It is a matter of fact that the EU has always been excellent with its dialectic showing pure resentment towards the autonomy dismantlement in Hong Kong, but it ended to be a mere "spectator". However, for the first time in 30 years, the EU seems to have acknowledged its "responsibilities" with the adoption of the Global Human Rights Sanctions Regime (GHRSR), a bell that, in metaphorical terms, seems to have woken up the Union. A Union now more willing to adopt restrictive measures in the promotion of human rights also against its economic partners.

Key words: Sanctions; passive role of the EU; China; Hong Kong; GHRSR.

Introduction

What happens if a certain country is misbehaving geopolitically or economically making weaker or non-aligned nations insecure or unstable by valuing the own currency aggressively, boosting exports, stealing intellectual property, or at least tolerating the theft? Just few centuries ago other countries would have been more eager to simply go to war, but in our mutually assured destruction age there are more than enough reasons to think twice. For this reason, it took place the idea of punishment as a set of financial strategies⁴ that work as a middle ground between war and words. In other terms, sanctions are used when "*diplomacy alone is insufficient, but military force is not the right response*" (U.S. Department of the Treasury, 2016). Furthermore, regardless of whether one likes it or not, one must accept the reality that the conflicting relation among the world powers has become a financial warfare, a "*hidden war*" borrowing the words of Juan C. Zarate (2013). The United States are second to none in using economic and financial sanctions⁵. Next to the US, also the EU has issued sanctions

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³ Please remember that it has been the US to turn China into a great power offering the best possible trade terms.

⁴ Sanctions can include travel bans, asset freezes, arms embargoes, capital restraints, foreign aid reductions, trade restrictions. They are considered as an essential foreign policy tool, one of the most advocated tools for governments to respond to foreign policy challenges.

⁵ Sometimes hiding the real aim to punish its archenemies under the light of being the beacon of the free world responsible to maintain a strong posture towards issues that concern US fundamental values and national security.

against individuals and countries gaining popularity as one of the main standard-setters in the field of business and human rights. However, someone could argue that this tendency is proudly perpetrated against some states such as Belarus, Bosnia & Herzegovina, Burundi, Guinea and Iran. Similarly, EU appears quite cautious when we are talking about superpowers, like China, against whom the more recent geographical restrictive measure dates back to the Tiananmen Square protests of 1989. Why this apparently enigmatic difference appears in treatment? It should be highlighted that only after 7 December 2020 the EU adopted a prominent sanctioning system in the field of protection of human rights trying to get over its partially “passive” tendency. This is to say that, even though over the last two decades there has been a quite impressive number of European restrictive measures, the Union has never adopted thematic regimes addressed specifically to human rights abuses worldwide. The “passive” tendency comes from having always favoured a geographically targeted strategy that brought about a diffidence in adopting measures against those countries, like China, with which an economic partnership has been consolidated. Therefore, the risk to subordinate the efficiency of sanctions to the maintenance of economic bilateral relations is quite high. We are not saying that the own⁶ EU GHRSR is the panacea, economic interests will remain the leverage of foreign policy and international relations for a while longer. However, this sanctioning regime takes a step forward enabling the EU to list individuals or entities responsible for violations and abuses of human rights, irrespective of where these violations have occurred.

The EU Global Human Rights Sanctions Regime

On 22 March 2021, the EU for the first time in more than 30 years imposed restrictive measures on four Chinese officials, including top security directors, and one entity for the large-scale arbitrary detention of Uyghurs in the province of the Xinjiang. This historical event was part of a broader package of sanctions for serious human rights violations that targeted in total eleven individuals and four entities around the world⁷. So, they are not only restrictive measures related to China, but the sanctioning regime is also addressed to the repression in the Democratic People’s Republic of Korea, extrajudicial killings and enforced disappearances in Libya, torture and repression against LGBTI persons and political opponents in Chechnya in Russia, and torture, extrajudicial, summary or arbitrary executions and killings in South Sudan and Eritrea (Council of the EU, 2021). This was the

⁶ It is a regime part of the European autonomous sanctioning measures, distinguished from sanctions deriving from the UN Security Council regime and also from the national one of individual countries.

⁷ EU Sanctions Map, available at

[https://www.sanctionsmap.eu/#/main/details/50/?search=%7B%22value%22:%22%20128296%22,%22searchType%22:%7B%22id%22:1,%22title%22:%22regimes,%20persons,%20entities%22%7D%7D&checked=.](https://www.sanctionsmap.eu/#/main/details/50/?search=%7B%22value%22:%22%20128296%22,%22searchType%22:%7B%22id%22:1,%22title%22:%22regimes,%20persons,%20entities%22%7D%7D&checked=)

result of the new EU Global Human Rights Sanctions Regime⁸, arose on 7 December 2020 following the adoption of the US Global Magnitsky Act in 2016. In fact, it is not a case that the new regime is also called “*European Magnitsky law*”⁹. Until that time, the EU has mostly adopted targeted sanctions against private natural and legal persons and geographically targeted sanctions focused on individual countries rather than on a particular type of problem (Russell, 2020). Interesting enough, many geographically targeted sanctions adopted by the EU respond to: undermining democracy or the rule of law; violent crackdown by security forces on political demonstrators, peaceful protesters, democratic opposition, and journalists; serious human rights violations. This seems to depict similar situations, not to say identical, to the repressions of the pro-democracy protests at Hong Kong. The objective of the GHRSR is properly trying to solve issues like that, avoiding turning a blind eye to human rights abuses beyond the European borders. However, for now the list of the GHRSR does not include any natural or legal person involved in Hong Kong’s democracy and autonomy dismantlement leaving to the US the “dirty work” on this regard. Under this sanctioning mechanism individuals and entities – believed to be responsible for: (a) genocide; (b) crimes against humanity; (c) a limited set of “*serious human rights violations or abuses*” (including torture, slavery, enforced disappearance of persons, arbitrary detention); and (d) other human rights violations¹⁰ – are subject to asset freeze in the EU and they are prohibited from making funds or economic resources available, either directly or indirectly, to those listed (Ruys, 2021). The new sanctioning regime also allows the High Representative (HR), in addition to the Council, to propose restrictive measure, as well as to prepare amendments to the Annex where natural and legal persons are listed. This creates a positive consequence shifting the political responsibility to the EU institutions and it may help to reduce potential national bias. However, to impose sanctions at European level is necessary a unanimity vote of ministers and state representatives at the Council. But a unanimous agreement among the Member States is often difficult to achieve. Still now the attempts of Ursula von der Leyen and her predecessor Jean-Claude Juncker to move from unanimity to qualified majority voting through the “*passarelle*” clause¹¹ to reduce the risk of deadlock have been unsuccessful (Latici, 2021).

⁸ In line with the “two-steps procedure” enshrined in article 215 TFEU and 29 TEU, the GHRSR has been adopted on the basis of two legal instruments: the Council Decision 2020/1999 and the Council Regulation 2020/1998.

⁹ Although some EU Member States already have Magnitsky-style sanctions at national level, such measures are more effective when adopted at European level.

¹⁰ Insofar as they are widespread, systematic, or of serious concern in light of the objectives of the Common Foreign and Security Policy set out in Article 21 of the TEU.

¹¹ Article 31(3) of the Treaty on European Union, under which the European Council can decide to apply qualified-majority voting of the Council to common foreign and security policy matters that do not have military or defence implications.

At the end of the day, we cannot ignore the incredible advantage brought to thematic human rights sanctions programs¹². The possibility to add new names to the list, rather than create a completely new program for each country, allows greater flexibility, rapidity, efficiency, and justice¹³. Furthermore, blaming a specific natural or legal person for violations of human rights avoids affecting bilateral relations with allies and economic partners. In any way, it is at least less damaging than the creation of a separate sanctions program targeting the state of nationality of that person.

We should admit that, prior to the application of the GHRSR, the EU condemned China's actions in Xinjiang only through words being accused by the international community to prioritize its economic ties and strategic relationships with that country. In fact, even though human rights have become the dominant theme in EU autonomous measures, for many years, dealing with US-China relations, the Union played the role of a "referee", rather than an active competitor. Even after the adoption of the GHRSR, the HR of the Union Josep Borell has immediately clarified that neither the EU nor the United Kingdom were currently intended to adopt individual restrictive measures against those involved in the abuses in Hong Kong and Xinjiang. This, plus the maintenance of the unanimity voting of the Council, suggests that at that moment the EU was not ready to face one of its trading partners and that the necessary agreement between the MSs was not yet there. In this way, the entire credibility of the EU as a global actor able to support its position and protect their values has been undermined (Meacci, 2020).

Conclusions

In this regard, the adoption and the effective implementation of the GHRSR could be seen as a transnational response to a fundamental security-related challenge (Eckes, 2021), a sort of watershed in the history of the European sanctioning regime. This instrument in the hands of the Union is an opportunity to become a swifter decision-maker and a more effective actor when addressing human rights perpetrators (Finelli, 2020). But, is it what the Union really wants?

The US has always showed a straightforward approach motivated by the logical choice to slow China's rise looking at its ambitious as a direct threat. Dreams, however, are hard to kill. The enthusiasm coming from the facility through which Xi Jinping has been able to dismantle the Hong

¹² The thematic restrictions do not cover only the field of human rights, but now we can also find measures against the proliferation and use of chemical weapons, cyber-attacks and terrorism.

¹³ Alexei Navalny is a recent and virtuous example (even if not perfect) of the use of the new European sanctioning system. In this occasion, the EU reacted to the poisoning and arbitrary jailing of Mr. Navalny sanctioning five natural and one legal person considered responsible under the EU's chemical weapon regime. Then the list has been expanded by the European ministers.

Kong's autonomy without almost any interference from the rest of the world¹⁴, plus the recent US withdrawal from Afghanistan, gave him the right amount of confidence to broaden his horizons abandoning the idea of a peaceful coexistence and reiterating its original plan to subordinate Taiwan to the mainland¹⁵. Here again, if the US promptly and publicly reacted to this Chinese increasingly aggressive foreign policy using marked tones¹⁶, we cannot say the same for the EU that seems to distractedly look at rising Chinese aggressiveness¹⁷. Sometimes the EU gives the impression to struggle to give a common answer (Archick, 2021) and it ends up "going with the flow", rather than dictating guidelines. Therefore, a wide range of actions and non-actions at state level respond to economic interests¹⁸, so that most countries do not wish to stand up for one specific side in the US-China trade war favouring the WTO as the authority to solve multilaterally the issue (Wu, 2020). The EU GHRSR gives an argument in favour of this point, it imposes only financial sanctions and travel restrictions excluding arms embargoes or sectoral/economic sanctions, such as imports/export bans. In this way, the EU may be able to transcend national, political, and economic interests serving the CFSP objectives set out in article 21 TEU. In the same way, the Regime ends to be a weapon that could be strategically used by the EU to adopt a more incisive and sharp choice of foreign policy. It could be considered to some extent as the intention to finally take a stand towards China. It is important to remember that when there is no consensus at the international level because the UN Security Council is blocked by the veto right of the five permanent members, the EU's autonomous measures play a central role in the field of protection of human rights¹⁹ and the adoption of the GHRSR seems to acknowledge this.

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¹⁴ We should remember that the EU only condemned China through words. The only superpower that adopted real sanctions has been the US with the Hong Kong Autonomy Act reacting to the further eroding Hong Kong's autonomy and the EO 13936 on "*Hong Kong Normalization*" ending the preferential treatment towards the island. The Biden's EO 14032 also gave its contribution in this regard – even though it addresses the "Threat from Security Investments that Finance Certain Companies of the People's Republic of China" – enlisting one company registered in Hong Kong.

¹⁵ Some weeks ago, dozens of Chinese planes (no less than 150) have started to violate Taiwanese airspace.

¹⁶ Even taking into consideration an armed intervention.

¹⁷ Please just consider that for now the only step has been the Glucksmann expression of interest in building a stronger EU-Taiwan partnership. Not to mention that no European nations, exception done for the small Vatican City, have formal diplomatic ties.

¹⁸ We must accept the reality that the economic and technological competition with China is something in which every state has an interest.

¹⁹ We also should remember that it is part of the European Policy itself the adoption of measures in both of the two main streams of human rights policy and action. One is to protect the fundamental human rights for EU citizens, and the other is to promote human rights worldwide. In this regard, the GHRSR targets first of all a security threat in the places where violations occur. But the Regime also deals with criminal activity and with violations that threaten international security more broadly.

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