Corruption and sanctions: the wrong tool for the job?

A recent open letter to the Foreign Secretary from a group of 45 UK Parliamentarians has drawn attention to the issue of whether sanctions, specifically those popularly referred to as 'Magnitsky sanctions', should be used to target corruption. ***John Binns*** *and* ***Michael Drury*** *of BCL Solicitors examine the argument.*

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The signatories to the Parliamentarians' letter include the former anti-corruption tsar, John Penrose, former high court judge, Baroness Butler-Sloss, and the former Archbishop of Canterbury, Lord Williams of Oystermouth, and are led by Lord Alton, a former Liberal Democrat chief whip. They call attention to the fact that the so-called Magnitsky amendment to the Sanctions and Anti-Money Laundering Act 2018 (SAMLA) targets only human rights abusers, in contrast to Magnitsky laws in the US and elsewhere, which also target people identified as responsible for corruption offences.

The letter goes on to say that 'failing to harmonise our sanctions measures with those of our allies [risks] sending all the wrong signals to those involved in such crimes', and that 'given how attractive the United Kingdom is for many corrupt individuals who seek to buy property and invest money in the UK, it is crucial that our legislation harmonises with the US and Canadian Magnitsky legislation and includes corruption'.

The signatories are right that there is an issue here, though they may be wrong about the solution. The case of Sergey Magnitsky, which concerned torture and ill-treatment by public authorities arising from his investigation of public-sector corruption in Russia, has resulted in a frankly odd coupling of laws to combat both human rights abuses and corruption. It is far from obvious why, but for the legacy issue, these problems should be tackled together.

The UK has taken a pragmatic course, in the Proceeds of Crime Act (POCA) as well as SAMLA, by targeting the proceeds and perpetrators of torture and degrading treatment, in what have been popularly referred to as 'Magnitsky amendments', pushed in both cases by backbenchers. But would it really be necessary or appropriate to extend them to corruption as well?

One answer to that of course is that the proceeds of corruption are already squarely within the sights of POCA and its close cousin, the Money Laundering Regulations: where there are reasonable grounds for suspicion that funds have a corrupt origin, they can and routinely will be the subject of reports, freezing orders, Unexplained Wealth Orders, and ultimately civil or criminal proceedings. There was and is surely no need to amend POCA to target property purchases or spending by corrupt individuals in the UK. The cynical would say that this is just a further example virtue signalling. And even the most ardent anti-corruption campaigner needs to guard against further extensions of criminal and quasi-criminal jurisdictions.

Another answer is that there is also no need to use sanctions as a tool to freeze the assets of such people. Whilst there are precedents for doing so, in the form of EU regimes targeted at the misappropriation of public funds in Egypt, Tunisia and the Ukraine and the EU courts were prepared to accept them as a legitimate foreign policy measure, they gave rise to serious concerns. Among other things, in contrast to court-made freezing orders, they allowed for very little scrutiny of whether the allegations were well-founded, and the amounts frozen were not necessarily proportionate to the amounts said to have been misappropriated. Sanctions also prevent others from providing funds or resources to the sanctioned person (for entirely legitimate reasons), the virtue of which is hard to see when the aim is to preserve a frozen fund for potential confiscation.

The existence of precedents raises an interesting question about whether SAMLA empowers the UK government, post-Brexit, to impose sanctions against people accused of corruption. The list of aims for which sanctions can be imposed does not include corruption specifically. Ministers may seek to use the general power to impose sanctions to achieve foreign policy aims, on the same basis the EU courts have traditionally allowed – but under SAMLA, significantly there will be an opportunity for sanctioned persons to challenge that in UK courts.

With that in mind, the signatories to the letter may be right that an amendment to SAMLA should be considered, to put beyond doubt that people accused of corruption would be a legitimate target of post-Brexit UK sanctions. The effect of that would be to put before Parliament the question of whether this is really the right tool for the job. Bluntly, should it really be for a politician to decide whether someone is guilty of corruption, so as to merit a freeze on all of their assets (and the worse effects of that), or should this be for the courts to decide on the basis of equality of arms?

Opinions on the right answer to that question may of course vary. Campaigners against corruption, including the signatories to the letter, might point to the difficulties of investigating and adducing evidence in court, particularly where corruption has taken place in problematic jurisdictions. But for those concerned with the rights of the people affected, unpopular though they may be, this rather misses the point – unless that evidence can somehow be independently tested, a person's rights could just as easily be infringed by a false allegation as by a true one. As practitioners we have seen too many cases where inaccurate, untested and out of date information (often simply culled from the public domain) has been relied upon to take action which, when judged objectively, is simply unjustified.

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