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CONSENSUS FOR ACTION: TOWARDS A MORE EFFECTIVE EU SANCTIONS POLICY

Perspectives on Sanctions Series

**BY TOM KEATINGE AND EMIL DALL
NOVEMBER 2018**

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SERIES NOTE

This paper is intended to be the first in a series by Columbia University’s Center on Global Energy Policy on perspectives on sanctions policy outside the United States. All too often, sanctions are presented and analyzed from the view of either the sanctioners or their targets. However, sanctions policy—particularly in our globalized economy and political system—affects a wide range of states and interests. This series will thus explore a wide range of perspectives on the subject, developing and contrasting opinions on sanctions as a tool and the means of employment. Future projects will consider the reactions of emerging markets and peer competitors of the United States. This series will, therefore, seek to inform policy makers as to the broadest dimensions of the use of sanctions, to inform businesses as to how various different jurisdictions perceive the tool and may seek to apply it in the future, and to inform academics how practitioners and those involved in the policy-making space outside the normal set of governments (like the United States) make decisions and why.

Richard Nephew, Senior Research Scholar, Center on Global Energy Policy



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EXECUTIVE SUMMARY

Sanctions are a key tool of foreign policy but have taken on greater salience over the last 20 years as governments have reached for leverage in negotiations but foregone the use of force. During this period, the alignment of the design and implementation of sanctions by the European Union and the United States has, on the whole, been an article of faith as the transatlantic allies have pursued mutual foreign policy objectives.

Yet despite the consistency of objectives, the bureaucratic structures, technical mechanisms, and processes by which the European Union and the United States design and implement sanctions differ significantly. These differences—always present—have been amplified by the current stresses in transatlantic relations and may be further exacerbated when the United Kingdom leaves the European Union in March 2019.

The reasons behind these differences are myriad and touch upon both structural matters (such as the construction of the European Union and the manner in which its member states can enact policy) and more philosophical matters, as the focus on due process and human rights in EU sanctions policy demonstrates. But given the importance of transatlantic ties and cooperation in managing the sorts of problems that sanctions are usually developed to address, it is important for both the United States and the European Union to work through these differences.

Toward that goal, this paper provides European perspective on US sanctions activity, where there are differences in approach, in particular EU attitudes toward secondary sanctions put in place by the United States, and it explains the complications that may result from the United Kingdom's withdrawal from the European Union. The paper concludes with recommendations for how the European Union can address the challenges it faces in achieving an effective sanctions policy. In short, it recommends the following:

- The European Union should work through its structural issues to create a more decisive and effective EU sanctions policy. The implementation and enforcement of sanctions at the member state level must be improved, and a formal EU-level sanctions body is needed to independently monitor compliance with sanctions across the European Union.
- A clear mechanism for ensuring the coordination and effectiveness of EU-UK post-Brexit sanctions policy must be established. The global centrality of both the European Union's economy and the United Kingdom's financial sector combine to present a powerful sanctions force and must thus be closely coordinated to ensure maximum effectiveness.
- The European Union should directly address the matter of human rights exemptions by incorporating it as a key consideration of the EU-level sanctions body identified in the first recommendation. The European Union should establish a clear channel for human rights exemptions throughout the lifetime of sanctions regimes.



- The European Union should consider its options to address the ability of non-EU actors to abuse EU-originating supply chains and financial services, which represents a considerable sanctions implementation vulnerability.
- Finally, though US-EU misalignment on sanctions is growing, policy makers must stay seized of the necessity to maintain and improve communications and coordination to prevent current schisms from having serious long-term effects on international security.



INTRODUCTION

Sanctions are a key tool of foreign policy, and the alignment of the design and implementation of sanctions by the European Union and the United States has, on the whole, been an article of faith as the transatlantic allies have pursued mutual foreign policy objectives.

Yet despite the consistency of objectives, the bureaucratic structures, technical mechanisms, and processes by which the European Union and the United States design and implement sanctions differ significantly. These differences—always present—have been amplified by the current stresses in transatlantic relations and may be further exacerbated when the United Kingdom leaves the European Union in March 2019.

Much sanctions literature views their design and implementation from a UN or US perspective. This paper therefore seeks to provide the reader with an alternative perspective on sanctions—namely, through a European lens. It will first provide an understanding of the way in which the EU sanctions process works from a technical perspective, illustrating the factors that differentiate EU sanctions from the design and implementation process in the United States. It will then elaborate the European Union's perspective on the use of sanctions and the role of the United Nations and other multilateral policy instruments. The paper will consider how the European Union's approach to sanctions diverges from the United States' and how this might contribute to transatlantic misalignment on sanctions policy. Specifically, the paper will examine the European Union's attitude toward the imposition of secondary sanctions by the United States, an issue that has come rapidly to the fore following the withdrawal of the United States from the Iran nuclear deal (the Joint Comprehensive Plan of Action, or JCPOA). The paper will then explain how these challenges might be exacerbated by the United Kingdom's departure from the established EU sanctions framework before concluding with recommendations for how the European Union can address the challenges it faces in achieving an effective and forceful sanctions policy.

While this paper is rooted in an EU-based assessment, it is important throughout for the reader to keep in mind that although sanctions in the European Union are designed and imposed on a bloc basis, the implementation and enforcement is a matter for each individual national authority. It is outside the scope of this paper to review the activities and posture of every one of the 28 member states, but where it is important to note varied positions—notably as relates to Brexit and sanctions on Russia—these will be explored.



EUROPEAN FOREIGN POLICY AND SANCTIONS

Foreign policy is traditionally seen as a matter of national interest, but over the years the European Union has sought to develop a common foreign and security policy that enables member states to present a united front on key issues, including on sanctions. The logic is sound. Acting as a bloc, operating the world’s second-largest economy (after China and just ahead of the United States),¹ issuing the second most widely used currency, and acting as the largest global aid donor, the European Union has the potential to exert considerable foreign policy influence via economic leverage. Most recently, the influence of the European Union’s unilateral sanctions on the Iranian economy certainly contributed significantly to bringing Tehran to the negotiation table.

Prior to the implementation² of the Maastricht Treaty in November 1993, and although EU³ member states coordinated their foreign policy activities through the European Political Cooperation mechanism, there was no established or formalized EU-wide position. The Maastricht Treaty attempted to address this perceived shortcoming by creating the Common Foreign and Security Policy of the European Union to “assert its identity on the international scene”⁴ and “promote peace, security and progress in Europe and in the world.”⁵

The Maastricht Treaty detailed the following:^A

The objectives of the common foreign and security policy shall be

- to safeguard the common values, fundamental interests, and independence of the Union;
- to strengthen the security of the Union and its member states in all ways;
- to preserve peace and strengthen international security, in accordance with the principles of the United

Nations Charter as well as the principles of the Helsinki Final Act and the objectives of the Paris Charter;

- to promote international cooperation;
- to develop and consolidate democracy and the rule of law and respect for human rights and fundamental freedoms.

The Lisbon Treaty of 2009 built on the common objectives set out in the Maastricht Treaty to create a coherent structure to support the promotion and implementation of EU foreign policy objectives, including the position of the High Representative of the Union for Foreign Affairs and Security Policy (currently held by Federica Mogherini) and the European External



Action Service (EEAS—the European Union’s foreign service). These mechanisms have enabled EU members to better coordinate responses to common security threats and, in turn, also strengthened the European Union’s ability to design unilateral sanctions that go beyond UN-mandated sanctions.

The European Union’s overarching Common Foreign and Security Policy objectives include the following:⁶

- Promoting international peace and security
- Preventing conflicts
- Defending democratic principles and human rights
- Preventing the proliferation of weapons of mass destruction
- Fighting terrorism

As relates to sanctions, the European Union states that its policy is “to intervene when necessary to prevent conflict or respond to emerging or actual crises” and “in certain cases, EU intervention can take the form of restrictive measures or sanctions”⁷ that seek “to bring about a change in the policy or conduct of those targeted, with a view to promoting the objectives of the CFSP.”⁸

Practically speaking, this means that where the European Union determines sanctions should be applied, decisions are proposed and prepared by the EEAS, agreed to by the Council of the European Union (the gathering of relevant national ministers), and then introduced into EU law.⁹ This process applies not only for EU autonomous sanctions but also when the European Union implements a measure already mandated at the UN level or decides to reinforce those UN sanctions with additional restrictive measures of its own.¹⁰ Inevitably, unanimity is generally easily and swiftly achieved where the European Union is simply giving effect to a UN measure; the development of and agreement to implement EU autonomous sanctions—as explored further below—is far more challenging as decisions require consensus across all 28 member states.

The European Union’s position in the global economy and the influence of many of its member states around the world suggests that its ability to exert pressure as a “civilian power”¹¹ and encourage behavioral change via the use of sanctions is considerable. Yet the European Union’s sanctions power falls short of expectations.

Four issues combine to “defang” EU sanctions.

The Need for Consensus

First, the EU approach to sanctions is based entirely on consensus, as the decision of the council of ministers, made up of individual member states, must be unanimous. This need for consensus in the design and imposition of sanctions leads to compromises, which can shape sanctions and their ultimate design and implementation. Some member states might have stronger bilateral relations with a soon-to-be-sanctioned country, such as a greater reliance on



trade, energy, or financial services business, which can result in that member state challenging the consensus view.

For example, prior to the European Union imposing a full oil embargo against Iran in 2012, the decision allegedly met “strong reservations” from Greece, who relied heavily on Iranian oil supplies at the time, and as a result it took months for the European Union to achieve consensus.¹² Similarly, when sanctions on Russia were first considered in 2014, the United Kingdom was suspected of wanting to protect London’s financial center.¹³ While it would be rare for individual member states to veto new sanction measures completely, they may argue for certain exemptions that takes into account their individual views and circumstances. In the case of sanctions against Russia, as detailed in the text box below, individual country views did shape the eventual design of EU-wide sanctions policy.

Challenging EU Sanctions Consensus: Russia as an Example

As this section has reviewed, EU sanctions are developed on a consensus basis. This process challenges both the initial design and scope of EU-imposed sanctions as well as the ongoing effectiveness and maintenance of sanctions once issued. The case of Russian sanctions following the 2014 annexation of Crimea, incursions into Eastern Ukraine, and shooting down of a Malaysian airliner is instructive in this regard. As a whole, the European Union’s trade with Russia dwarfs that of the United States. Prior to the imposition of sanctions, the European Union’s trade in goods with Russia was ten times higher than that of the United States. In that same year, Russia imported 46 percent of all goods from the European Union.^B This has led many to conclude that the “economic costs incurred [from imposing sanctions against Russia] have been substantially larger for the EU than for the US.”^C

According to the OFAC sanctions list search tool, at the time of writing,

647 individuals, entities, and vessels are subject to sanctions pursuant to Ukraine-related executive orders. In contrast, only 193 people and entities are subject to the European Union’s restrictive measures in response to the crisis in Ukraine.^D As well as having applied sanctions to fewer people and entities, the European Union’s measures against Russia also include “grandfathering” clauses allowing ongoing projects involving sanctioned activities and designated individuals to continue if they commenced before sanctions were agreed to. The presence of long-standing projects in some EU member states and uneven implementation of sanctions across the bloc mean that the cost of implementing sanctions has not been even across all member states, inevitably resulting in a varied assessment of their value. While all EU member states experienced an overall decrease in their exports to Russia, companies “located in certain member states and operating in specific sectors” benefited and enhanced their market share.^E



Furthermore, as well as member states having widely varying exposure to the Russian economy, they also, importantly, have different levels of reliance on Russia for their energy needs. For example, eleven member states including Austria, Poland, and Bulgaria import 75–100 percent of their natural gas needs from Russia; while others including the United Kingdom, France, and Spain import just 0–25 percent.^F

Due to the critical role that Russian natural gas plays in the energy supply of many central European states, EU

sanctions against Russia specifically exclude gas projects from their scope—and European energy companies have thus been able to pursue both existing and new contracts in Russia, while US counterparts have not.

Another example is the case of certain overseas subsidiaries of designated Russian banks being allowed to continue operations in some member states, including France, Germany, and Austria, to “avoid risking the stability of the European banking system.”^G

Time Limited

Secondly, EU sanctions decisions are not open ended, and the decision must be unanimously extended on a regular basis. This requirement has proven to reduce the ability of the European Union to maintain the relevance of sanctions once issued by being less able to react immediately to the evasion and avoidance actions of the intended targets. It also reduces the ability of the European Union to add sanctions to a particular program as the initial event that created consensus and triggered sanctions fades in time.

For example, EU sanctions imposed on Russia in response to its annexation of Crimea are reviewed and renewed every 12 months, whereas those imposed in response to Russia’s activities in Eastern Ukraine are reviewed every six months. As detailed in a 2017 occasional paper from the Royal United Services Institute by the authors,¹⁴ the need for consensus-based maintenance of sanctions greatly hinders the ability of the European Union to respond to the evasion of EU sanctions by their targets. The fact that updating sanctions requires consensus (a condition often only present at the time sanctions are originally agreed) means that on each anniversary the most the European Union is likely to do is renew existing regimes. Fine-tuning or updating regimes—absent a further egregious action by the sanctioned target—is rare. Thus, those that are subject to sanctions can restructure their businesses or employ other sanctions evasion measures in the knowledge that they will remain one step ahead of sanctions implementation.

Maintenance of sanctions also includes designing exemptions to certain areas of business during the lifetime of a sanctions regime. While the United States can do this with relative ease, it is a more complicated matter for Brussels. The power to issue specific licenses for exempted activities lies with individual member states, as long as such licenses correspond with the overall sanctions framework. Therefore, any exemptions to sanctions regimes



that apply evenly across the European Union must be included in the original sanctions design. This leaves little flexibility for EU sanctions regimes to adapt over time to changing circumstances. Any effort to introduce general exemptions after the original sanctions design would require renewed consensus, and such a process runs the risk of potentially undoing the complex series of bargains that guaranteed consensus in the first place.

The lack of an EU-wide licensing regime and the resultant lack of coordination on new exemptions between member states represents a systemic weakness. It also presents significant challenges for those that apply for licenses, such as humanitarian actors. In particular, those entities operating across multiple jurisdictions face varied responses to inquiries regarding the wider geographic or operational application of any license they receive.¹⁵

Gaps in Implementation and Enforcement

Third, as the enforcement of sanctions is managed at a member state level, gaps in implementation can appear. Some member states have entire government departments dedicated to monitoring and gathering information on the enforcement of sanctions by the private sector (e.g., the United Kingdom's Office for Financial Sanctions Implementation), while others struggle both to find the resources necessary for and face domestic legal impediments to effective sanctions coordination and enforcement. The result is a sanctions regime across the European Union that lacks coordination and is far less effective than it could be, as sanctions targets can readily exploit jurisdictions with weak enforcement and situational awareness.

The combination of consensus-based sanctions decision making, lack of immediate adaptability of sanctions, and uneven implementation and enforcement across EU member states creates a “narrow” approach to sanctions in the European Union. This stands in stark contrast to the US sanctions system, which appears more flexible in terms of the initial design of sanctions, ongoing maintenance, and subsequent enforcement, especially as it relates to executive orders issued under the authority of the president. Even when sanctions are passed by Congress rather than via executive order, the president may have powers under those sanctions packages to temporarily waive implementation of certain provisions and lift or add designations. These contrasts carry important consequences for the ability of the European Union to be fully aligned with the United States when it comes to technical sanctions design and implementation.

The European Union, Sanctions, and Human Rights

The fourth element that defangs EU sanctions is the possibility of legal challenges, specifically on human rights grounds, within the European Union. For some, the nature of targeted sanctions “can pervert the due process and the rule of law that is so aspired to by the very states that use them.”¹⁶

Article 263 of the Treaty on the Functioning of the European Union (also known as the Treaty of Rome, the original founding treaty of what became the European Union) gives EU courts the right to review the legality of the actions of key EU institutions (including the council



of ministers). Proceedings against an EU institution can be instituted by “any natural legal person” against whom action is addressed and which is of “direct and individual concern.”¹⁷

Furthermore, the EU Charter of Fundamental Rights safeguards human rights and fundamental freedoms (including due process and the right to an effective remedy) within the European Union. This law also covers EU institutions and member states, and the European Union is thus legally bound to consider and respect human rights in its design and implementation of sanctions.¹⁸

Whereas there are very limited opportunities for UN-imposed sanctions to be challenged on legal grounds—the exception being via the relatively recent creation of the Office of the Ombudsperson to the ISIL (Da’esh) and Al-Qaida Sanctions Committee¹⁹—EU sanctions designations have been frequently and successfully challenged in EU courts.

For example, the case of *Kadi v. the European Council and Commission*, in which the assets of Yassin Abdullah Kadi were frozen and the European Court of Justice (ECJ) subsequently reversed the sanctions designation, has been instrumental in shaping subsequent EU sanctions designations. In the Kadi case, the ECJ determined that EU measures must be compatible with fundamental human rights. As related to targeted financial sanctions, this included the right to offer a defense and the need to provide evidence for the listing by establishing a clear connection to sanctioned activities (in this case, Kadi’s alleged association with Al-Qaida). In the Kadi case, the European Union had met neither criteria.

In a further example relating to the listing of the Tamil Tigers, the United Kingdom’s advocate general at the Court of Justice of the European Union, Eleanor Sharpston, noted the following:

*It is worth recalling that the consequences of listing are very serious. Funds and other financial assets or economic resources are frozen...For a person, entity or group that is named in the Article 2(3) list, normal economic life is suspended. It does not seem unreasonable to insist that, where such are the consequences, the procedures followed should be rigorous and should respect fundamental rights of the defence and effective judicial protection.*²⁰

Yet notwithstanding the seemingly robust nature of individual protections and the ability of EU courts to intervene and overturn sanctions listings, the European Union still receives criticism. In 2017 Mr. Idriss Jazairy, the UN Human Rights Council-appointed special rapporteur on “the negative impact of the unilateral coercive measures on the enjoyment of human rights,” reported—in a contentious statement²¹—that despite progress, more work needed to be done to ensure that EU-imposed sanctions allow for legal challenges and do not harm human rights.²²

Thus, the risk of court challenge means that the standards of evidence required to support EU sanctions are high, inevitably deterring cases of sanctions designation, particularly where secret intelligence is the basis on which sanctions are being considered.



TRANSATLANTIC CONTRASTS

In addition to, and perhaps more critical than, the technical misalignment that exists across the Atlantic are the contrasts that occur at a policy level. Despite the success of sanctions coordination between the European Union and the United States in relation to sanctions imposed on Russia and Iran, there are important differences in the way in which the European Union views the fundamental role and purpose of sanctions and thus their design and implementation. These differences have become more prevalent in recent years, as sanctions priorities in Washington have diverged from the views in Brussels as relates to Iran primarily, but also to Russia.

The European Union's adoption of an active sanctions strategy is a relatively recent phenomenon. In the 1990s the European Union was reluctant to pursue a unilateral sanctions policy, preferring to operate within the framework and according to the measures agreed to by the United Nations Security Council.²³ It has fiercely objected to attempts by the United States to impose unilateral secondary sanctions measures that did not fit with the foreign policy objectives or commercial interests of Europe, arguing that "such laws, designed to impose US requirements on economic operators of foreign countries, threaten the open international trading system."²⁴ Many member states were even critical of comprehensive sanctions packages passed by the United Nations, expressing concerns about the humanitarian consequences those sanctions carried with them.²⁵

Although the European Union has demonstrated increasing willingness to support comprehensive sanctions packages in recent years, particularly in response to North Korea, as well as operate outside the UN framework and implement unilateral sanctions, with over 50 percent of EU sanctions being enacted by the European Union alone,²⁶ earlier reluctance to do so is still revealed at times today. Sanctions are viewed as just one possible response to international crises and as a tool that must be paired with other diplomatic initiatives, including negotiations, in order to be effective in achieving the desired policy outcome.²⁷ As the EU authorities note, "It is preferable for sanctions to be adopted in the framework of the UN,"²⁸ as this framework provides both validation and avoids the need for the European Union to reach its own consensus. Where such global consensus is not possible, the European Union notes further that it "should seek the broadest possible support from the international community to exert pressure on the targeted country."²⁹

In addition, the European Union also views any sanctions measures in the context of the bloc's wider economic interests, as detailed in the text box below. For many EU member states, economic engagement and free trade are equally important vehicles for affecting change in other countries.



Considering CAATSA: Transatlantic Disunity

Introduced by the US House of Representatives in July 2017 and signed into law by US president Donald Trump just over a week later, the Countering America’s Adversaries Through Sanctions Act (CAATSA)^H underlines the extent to which transatlantic sanctions policy alignment is increasingly challenged. While the European Union has done little to maintain sanctions pressure on Russia since they were implemented on Moscow in 2014, the United States has continually acted to tighten and broaden existing sanctions.

The passing of CAATSA represents the most sweeping of these measures, laying the groundwork for the imposition of additional sanctions on Iran, North Korea, and Russia. As relates to Russia, CAATSA restricted the president’s ability to relax existing sanctions, codified and tightened existing sanctions, and paved the way for a range of additional secondary sanctions affecting both US and non-US persons.^I

In Europe, initial versions of the proposed legislation caused considerable concern with regards

to its possible impact on EU energy independence. Fearing impact on the infrastructure—such as gas pipelines—transporting energy to Europe, European Commission President Juncker noted that “if our concerns are not taken into account sufficiently, we stand ready to act appropriately within a matter of days. America first cannot mean that Europe’s interests come last.”^J

Although the final version of CAATSA was acknowledged by the European Union to have taken its concerns into consideration by committing to apply sanctions only after US allies have been consulted, the growing lack of trust in US sanction policy was clear to see.

Responding to the signing of CAATSA into law, the European Union observed that while the amendments to the law were welcome, if European interests were not taken into account in the implementation by the United States of future sanctions, the European Union “reserves the right to take adequate measures” to defend its economic interests in response to US actions that “specifically disadvantage” EU companies trading with Russia in the energy sector or “impact EU efforts to further diversify the energy sector.”^K

Both the European Union and the United States use sanctions to pressure target countries into changing certain policies or courses of conduct, but the two often have different views on what qualifies as a sufficient change in behavior to warrant a lifting of sanctions. A case in point is JCPOA, where the European Union lifted sanctions in response to Iranian compliance with the restrictions on its nuclear program. In contrast, the United States has applied sanctions against a broader array of issues for an extended period of time and has thus had some form of sanctions in place against Iran since the US Tehran embassy hostage crisis in 1979. In fact, at the same time as Washington was lifting nuclear-related secondary sanctions



as part of implementing the JCPOA, it also was pursuing several new designations against individuals and entities involved in Iran’s ballistic missile program. It is for this reason that the European Union is often perceived as using sanctions as “temporary measures responding to immediate threats, rather than as part of long-standing relations with countries.”³⁰ Therefore, while the United States might not consider sanctions as permanent by default, the long-standing nature of US sanctions against Iran means that systemic changes (or even regime changes) are needed on Iran’s part to lift those sanctions again.

When President Trump announced that the United States would be withdrawing from the JCPOA and reinstating secondary sanctions against Iran, EU allies disagreed strongly on the basis that Iran was upholding its side of the agreement and thus the promise to lift sanctions must be maintained. Immediately following President Trump’s announcement of his decision to pull the United States out of the JCPOA, EU high representative Frederica Mogherini reasserted the European Union’s commitment to the deal, claiming that “as long as Iran continues to implement its nuclear related commitments...the European Union will remain committed [to sanctions relief].” Mogherini further stated that the lifting of sanctions is an “essential part of the agreement” benefiting the collective security of the international community as a whole,³¹ underlining the European Union’s belief and objectives—laid out in the Common Foreign and Security Policy—that sanctions are tools that promote international peace and security.

For the European Union, the withdrawal of the United States from the JCPOA presents not only a threat to the future of the deal with Iran, but also a threat to the economy of the European Union as the United States reimposes sanctions, including what are commonly referred to as secondary sanctions, that will directly impact European companies.

US Secondary Sanctions and the European Union

US secondary sanctions—sanctions that seek to impose consequences on non-US persons for actions that have no US jurisdictional nexus—have become a preferred tool of US authorities as they exploit the centrality of the US dollar and the US financial system in global trade.

For the European Union, the concept of secondary sanctions contradicts the fundamental principles of the bloc, specifically the “harmonious development of world trade and...the progressive abolition of restrictions on international trade.”³² With this in mind, in 1996 the European Union introduced Council Regulation 2271/96 designed to protect “against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom,” or, as it is more commonly known, the Blocking Statute.

This regulation was introduced to respond to the threat posed to the interests of the European Union and its natural and legal persons by the enactment by third countries (EU speak for nonmember states) of laws and regulations that “purport” to regulate activities of natural and legal persons under the jurisdiction of an EU member state.

In the view of the European Union, such regulations violate international law, and thus the objective of the regulation was to remove, neutralize, block, or otherwise counter the effects of relevant foreign legislation. Put simply, any legal actions taken outside the European Union



based on such regulations should not be recognized or deemed to be enforceable within the European Union.

In principle, this regulation provides protection against and counteracts the effects of the extraterritorial application of any law that is specified in the annex to this regulation. Furthermore, it prohibits an EU person from complying with such regulations and approves the imposition of penalties by the home countries of any entity that does comply.

At the time this regulation was introduced in 1996, its target was US legislation in support of the economic embargo placed on Cuba³³ and limitations on investments in the petroleum industries in Libya and Iran.³⁴

Despite the apparent buttress provided by the European Union against the extraterritorial nature of third-country sanctions regimes (thus far entirely aimed at the secondary sanctions legislation of the United States), the Blocking Statute has never, in fact, been implemented and has remained—but for one case that was ultimately dropped³⁵—unused. Following the introduction of the regulation by the European Union in 1996, the United States and the European Union negotiated an understanding over the concerns held by the European Union in connection with the extraterritorial effects of these US sanctions laws and thus negated the need for the European Union to enforce its new regulation.³⁶

Fast-forward to May 2018 and the announcement by President Donald Trump that he was to withdraw the United States from the JCPOA, and the Blocking Statute, having lain dormant for two decades, was once again being considered by the European Union and was updated to reflect US sanctions on Iran in August 2018.³⁷

It is not within the scope of this paper to consider the politics surrounding the US withdrawal from the JCPOA, beyond recognizing that the Trump administration has consistently defined compliance with the JCPOA differently than their European counterparts, including considering wider Iranian behaviors beyond the nuclear program, which the JCPOA addressed.³⁸ The EU position has been—and at the time of writing, continues to be—that Iran is complying with its obligations under JCPOA. As the European Commission stated following an informal meeting of EU leaders in Sofia shortly after President Trump’s announcement, it would take steps to “preserve the interests of European companies investing in Iran and [demonstrate] the EU’s commitment to the Joint Comprehensive Plan of Action (JCPOA)—the Iran nuclear deal.”³⁹

Against this background, with the looming threat of secondary sanctions against EU companies that—in the view of the European Union and most observers—conflicted with the terms of the JCPOA, with which Iran was judged to be complying, the European Union began a formal process to activate the Blocking Statute and update its scope to include Iran-related US sanctions.

For the European Union, it is clear that any external attempts to influence the activities of EU natural or legal persons is unacceptable, and its legislative moves are an attempt to restrict the extent of such activity. However, as witnessed in the case of EU companies engaging with Iran in the spirit of the JCPOA, the practical realities are very different from those promoted by EU policy makers and leaders.



From the moment President Trump announced the United States' withdrawal from the JCPOA on May 8, 2018, a range of EU companies that are closely intertwined with the United States and fear being shut off from the US economy have announced their intentions to cease engagement with Iran, cancelling contracts, suspending investment, and stopping payments.⁴⁰ The reality for most corporations and financial institutions that have reengaged with the Iranian economy and financial system over the past two years is that when faced with a choice of continued investment and business operations in Iran or loss of access to the US market and financial system, the mere possibility of facing enforcement action by US authorities is rapidly leading them to comply with the wishes of the US president and thus contribute to the reversal of the economic advances Iran has made of late.

Thus, despite the existence, updating, and activation of legislation intended to protect EU natural and legal persons who continue to engage with Iran and the development of possible payment channels via a "Special Purpose Vehicle" that intends to "assist and reassure economic operators pursuing legitimate business with Iran,"⁴¹ few corporations or banks are likely to put their faith in the effectiveness of such legislation to protect them from US enforcement action.

A more likely outcome, given the seemingly intransigent and unforgiving position of President Trump, is that EU business will endeavor to persuade the European Union and its member states that article 5 of the Blocking Statute should apply. This provision allows for compliance with extraterritorial regulations, in this case of the United States, if "non-compliance would seriously damage their interests or those of the Community [the name for the European Union at the time the regulation was originally drafted]."⁴²

As this paper has highlighted, the European Union and the United States differ in their willingness to adopt robust and coordinated approaches to sanctions and their ability to adjust them responsively. These contrasts in the design and implementation of sanctions translate into contrasting philosophies around the role and purpose of sanctions between the European Union and the United States, but also within the European Union itself. The variance of views as to when and where to use sanctions has become starker in recent years, and these differences will only become more pronounced as the United Kingdom exits the European Union and in doing so seeks to establish a sanctions policy framework independent from the European Union, adding a third factor to an already misaligned transatlantic relationship.



SANCTIONS, THE EUROPEAN UNION, AND BREXIT

On May 23, 2018, the Sanctions and Money Laundering Act received Royal Assent in the United Kingdom, in preparation for the United Kingdom's exit from the European Union in March 2019. At this point all European legislation in force in the United Kingdom will be transposed into UK law instead—sanctions imposed under EU law will likewise remain in force. Currently, as a member of the European Union, most sanctions activity undertaken by the United Kingdom is given effect in UK law by the European Communities Act of 1972, which will be repealed by Brexit in March 2019. The United Kingdom has limited other domestic powers to allow for the unilateral imposition of sanctions beyond those related to domestic counterterrorism or export control. Thus, as the government laid out in the explanatory notes accompanying the issuance of the bill, this new legislation will “enable the UK to continue to implement United Nations (UN) sanctions regimes and to use sanctions to meet national security and foreign policy objectives.”⁴³

The UK has historically played a leading role in the design and implementation of sanctions policies. As one of the five permanent members (P5) of the United Nations Security Council, it has enjoyed a privileged position in proposing global sanctions activity; as a G7 member, it holds, in its own right, economic influence that can be applied to varying degrees on other states; and as a leading financial center, it can invoke disruptive financial activity that has impact beyond its national borders. These characteristics have ensured that within the European Union, the United Kingdom has played a high-profile role in promoting the use of sanctions and their subsequent design and implementation. A recent UK government presentation entitled “Framework for the UK-EU Security Partnership” noted that “over 50 percent of existing EU sanctions designations are underpinned by UK evidence.”⁴⁴

Thus, without direct UK input and influence on EU sanctions design and with the European Union losing access to the sanctions leverage represented by London's role as a leading global financial center, the post-Brexit era could see a shifting in priorities within the European Union as relates to sanctions. EU documents recently published by the Article 50⁴⁵ Taskforce—the European Commission body for the preparation and conduct of negotiations with the United Kingdom—underline the potential for misalignment in future EU/UK sanctions policies. Laying out its approach, the European Union notes that as far as sanctions are concerned, it would “consult with the UK to facilitate early information-sharing, minimise the risk of divergence, and eventually *enable UK's convergence...with EU sanctions policy*”⁴⁶ (emphasis added). Collaboration will be dependent on whether “the UK commits to align with the EU foreign policy objectives.” The message is clear; sanctions collaboration will be on the European Union's terms.

In the same document, the European Union notes the United Kingdom's desire to develop sanctions together with the European Union, involving exchanges of information on listings and their justification with intensive interaction during the adoption process.⁴⁷ The European Union observes that the impact on the European Union would be that the European Union and the United Kingdom would, as a result, be on an equal footing on sanctions policy, which



would impact the European Union's decision shaping and making, influence that is not likely to be acceptable to the remaining EU member states.

If the final Brexit agreement does not include prospects for collaborating closely on sanctions policy, the European Union will have to invest heavily to fill the sanctions capabilities previously contributed by the United Kingdom. At the same time, without the United Kingdom's outsized influence on sanctions policy in Brussels, other large European economies such as France and Germany will see their influence increased. It remains to be seen how this will change the sanctions policy of the European Union in the future.

Notwithstanding the United Kingdom's P5 status at the United Nations and intelligence-gathering capabilities, the United Kingdom's influence in the sanctions landscape is closely tied to and has benefited from the economic heft, bureaucracy, and diplomatic presence of the European Union. At the same time, the European Union is the world's largest exporter of manufactured goods and services, the biggest export market for around 80 countries, and the global leader for both inbound and outbound international investments.⁴⁸ Thus, however the future relationship between the United Kingdom and the European Union is constructed, the United Kingdom's sanctions policy will necessarily become less impactful on the global stage once the United Kingdom formally leaves the European Union. It is also the case that outside the European Union, the United Kingdom will be less integrated into many of the dialogue and intervention mechanisms led by the European Union that typically accompany the application of sanctions. To ensure the continued relevance and influence of its sanctions policies, the United Kingdom will need to build alliances on an issue-by-issue basis. Continuing to promote the use of sanctions within an economic bloc in which it no longer has a seat at the negotiating table will be challenging.

Of course, given that EU sanctions are developed and imposed on a consensus basis, it is right to note that outside the European Union, the United Kingdom will enjoy greater freedom to design sanctions independently of the views of EU members. For example, the United Kingdom could make use of "kingpin" sanctions targeting organized criminals or "Magnitsky" sanctions targeting those that abuse human rights or are corrupt. But absent close coordination with the European Union, the effectiveness of UK-applied economic restrictions, travel bans, and other forms of sanction will be diminished outside the European Union.

Coordinating the United Kingdom's sanctions activity with the European Union will present additional challenges. An uncoordinated policy that results in UK sanctions varying to any significant degree from those imposed by the European Union may lead bad actors to exploit these differences by, for example, creating fissures in international relations or gaining access to EU markets and services via the United Kingdom (or vice versa).

Thus, the greater flexibility that the United Kingdom may perceive it has following Brexit to align itself unilaterally with other states (such as the United States) on sanctions-related issues is likely to be illusory given the downside that would be attached to diverging significantly from the European Union's position on sanctions. On the one hand, if the United Kingdom's position is weaker than the European Union's, it may find itself accused of seeking opportunistic economic gains in favor of demonstrating and reinforcing that it is "part of Europe," if not part of the European Union. On the other, if the United Kingdom's position is stronger, it may



disadvantage the economic interests of UK businesses and deter inward investment.

The United Kingdom's move to establish a sanctions policy independent of the European Union therefore presents challenges for both actors and has the potential to reshape how sanctions are used as a tool of foreign policy, both in London and in Brussels, as the former seeks to develop an effective sanctions policy that cannot rely on the economic heft of the European Union and the latter can no longer rely on the intelligence provided by the United Kingdom in designing sanctions and the financial influence offered by London as a global money center.⁴⁹



CONCLUSION AND RECOMMENDATIONS

Sanctions have become widely accepted as a key tool for supporting foreign policy objectives, a tool that is most effective when used in coordination with allies and diplomatic engagement.

With its economic influence and considerable investment in “civilian power,” the European Union should be ideally placed to extract considerable value from the use of sanctions. Yet the process for designing, implementing, maintaining, and enforcing sanctions in the European Union, based on consensus and national implementation, undermines their potential, particularly when contrasted with the active unilateral use of sanctions by the United States.

In contrast to the robust use made of sanctions by the United States and despite attempts to coordinate between Washington and European capitals, the European Union is lackluster. Where sanctions are not imposed on a global basis by the United Nations, this difference in alignment, prioritization, and timing across the Atlantic can be exploited by those that are the subject of this increasingly disjointed approach. The recently reported remarks from the Austrian vice chancellor that “it is high time to put an end to these exasperating sanctions and normalize political and economic relations with Russia,”⁵⁰ while extreme, illustrate the challenges faced in developing a coordinated, consensus-based sanctions policy within the European Union. These challenges will only increase as transatlantic strains challenge coordination and alignment and populist governments—such as the one in Austria—take their seats at the negotiating table in Brussels, potentially hindering the use of sanctions against malign actors that threaten global security and international norms.

Although the European Union has only embraced the unilateral imposition of sanctions relatively recently, it has demonstrated that when acting with conviction, the bloc can encourage behavioral change. Furthermore, the European Union is clear-eyed in the belief that sanctions should—as in the case of JCPOA—be lifted when the clearly stated objectives are achieved.

Yet deficiencies created by weak and uncoordinated enforcement, disjointed licensing regimes, and challenges in maintaining the relevance of sanctions once imposed means that the potential effectiveness of EU-imposed sanctions is undercut. This effectiveness is likely to be further challenged once the region’s largest financial center, London, is removed from the Brussels sanctions armory by Brexit. The United Kingdom’s withdrawal from the European Union therefore has the potential to reshape both UK and EU sanctions policy respectively—to the likely detriment of both.

With the UN Security Council seemingly and increasingly impotent, the importance of alignment and coordination on sanctions across the Atlantic between two of the three largest global economies is critical for international security. The increasing misalignment that is developing in what have to-date been solidly aligned foreign policy objectives—albeit with technical differences—is thus alarming.

To conclude, therefore, the authors offer five recommendations by which the European



Union's sanctions policy could address the challenges it faces in achieving the influence and effectiveness it currently lacks, despite its economic heft and centrality to the global economy.

- Gaps in the European Union's sanctions architecture created by the current two-tier system (policy defined in Brussels with implementation and enforcement undertaken at the member state level) must be addressed to ensure a more decisive and effective EU sanctions policy. Notwithstanding the existence of the European Union's RELEX (the Working Party of Foreign Relations Counsellors),⁵¹ the European Union's sanctions policy is reactive and lacks any sort of clear strategic direction. The result is that internal coordination—in all but those cases triggered by the most egregious of events—is lacking, and information sharing that prepares for the imposition of sanctions and then monitors and maintains their effectiveness once imposed is absent. The implementation and enforcement of sanctions at the member state level must be improved, and a formal EU-level sanctions body—perhaps building on RELEX or mirroring the structure and purpose of the UN Panels of Experts that monitor the implementation of UN sanctions—is needed to independently monitor compliance with sanctions across the European Union.
- Connected to this, a clear mechanism for ensuring the coordination and effectiveness of EU-UK post-Brexit sanctions policy must be established. The global centrality of both the EU economy and the United Kingdom's financial sector combine to present a powerful sanctions force and must thus be closely coordinated to ensure maximum effectiveness.
- The European Union's effective use of sanctions is also significantly impacted by the overhanging concern—enforced by the ECJ—of the impact sanctions have on human rights. The inability of the European Union as a whole to issue specific licenses and exemptions to sanctions policy means that such exemptions must be considered in the initial design. Steps—such as ensuring a right for legal challenge—have been taken to address this concern, but this issue should be installed as a key consideration of the EU-wide sanctions monitoring body proposed above to make sure that human rights considerations are easily dealt with and that there is a clear channel for human rights exemptions throughout the lifetime of the sanctions regime. Whereas the flexibility of the US system allows sanctions to be issued and modified thereafter, the European Union's consensus model results in a need to consider and allow for all eventualities at inception, complicating and delaying sanctions decisions.
- While the European Union has consistently objected to the concept of secondary sanctions—as most recently seen in context of the United States' withdrawal from the Iran nuclear deal—the ability of non-EU actors to abuse EU-originating supply chains and financial services represents a considerable sanctions implementation vulnerability.

In comparison to the United States, EU sanctions typically apply to a fairly narrowly defined cadre of actors with clear links—via jurisdiction, nationality, or incorporation—to the European Union, meaning that any actor not covered by this definition is essentially free from any obligation to comply with EU sanctions.⁵² Given the centrality of the European Union's economy to global supply chains, this narrow and limited application of sanctions results in major opportunities for those seeking to use EU products or



financial services to evade sanctions. While the due diligence efforts of EU-based financial institutions and industrial companies might seek to identify and disrupt such actors based on their fear of enforcement action by US authorities, the fact that EU sanctions do not cover such activity directly is a failing that needs to be addressed.

Introducing secondary sanctions similar to those imposed by the United States may be anathema in the European Union and contradictory to the European Union's fundamental principles of the "harmonious development of world trade and...the progressive abolition of restrictions on international trade";⁵³ nevertheless, the vulnerability posed by this gap in implementation needs to be addressed by a more thoughtful application of EU sanctions.

- Finally, US-EU misalignment on sanctions is growing. While both parties should be able to design and pursue their individual sanctions strategies, it is also true that severe miscoordination and misalignment (as is currently the case on Iran) may bring unintended consequences that negate the effectiveness of the foreign policy objectives of both the United States and the European Union. Transatlantic coordination that has seemed second nature for so many years is being dangerously tested. While the current fissures in transatlantic sanctions policy are not due to a lack of communication between officials or due to any fault of the European Union, policy makers in Brussels must stay apprised of the issue to prevent current schisms from having serious long-term effects on international security.



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