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AMERICAN EXTRATERRITORIAL SANCTIONS

DID SOMEONE SAY EUROPEAN STRATEGIC AUTONOMY?



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Two years after an initial publication¹ on the recommended position that the European Union should take action against US extra-territorial sanctions affecting it, this updated and expanded version draws the consequences of major developments since, including:

- the new, albeit stifled, debates taking place in various European bodies following the 2018 publication, accompanied by several recent publications²;
- the significant buildup of American pressure on European companies –under the Trump administration –via direct sanctions on Nord Stream 2, aggravated sanctions on Iran, as well as indirect sanctions aimed at the supply of components to Chinese customers by European producers³, as anticipated in the 2018 report;
- the new situation now aggravated by the COVID-19 crisis, and stimulated by the simultaneous adoption of a strategic

1. EU and US Sanctions: Which Sovereignty?. Jacques Delors Institute, Policy Paper No.232, 23 October 2018.

2. The weaponisation of the US financial system: How can Europe respond? Jacques Delors Centre, Policy paper, 4 June 2020. *Defending Europe's Economic Sovereignty: new ways to resist economic coercion*. ECFR, 20 October, 2020.

3. See example of US sanctions blocking the exports of Dutch company ASML in 2020.

autonomy concept by various European institutions;

- the novel reflections underway in various European capitals, to which the Jacques Delors Institute (Paris), the Jacques Delors Centre (Berlin) and Europe Jacques Delors (Brussels) are contributing, hence this extended list of co-authors;
- the protective measures announced on 8 January, 2021 by the People's Republic of China against the "Unjustified Extraterritorial Application of Foreign Legislation"⁴; and
- the recent statements published by the European institutions themselves, in particular the Parliament, the Commission and the Council joint statement of 28 October 2020 regarding a legal process aimed to neutralise or deter foreign countries from using sanctions; the European Commission's Communication of 19 January 2021 on the resilience of the European economic and financial system⁵ and the Inception Impact Assessment of last 17 February to deter and counteract coercive actions by third countries.



Of the lessons to be learned from these developments and the debates that accompany them, four temptations should be avoided as they would leave to dead-ends:

The first would be to wait, thinking that the Biden administration will be more accommodating than the previous team. To do so would ignore the steadfast choice the United States has made time and time again in favour of extraterritoriality –enacted into law since 1996 but already practised before–, and irrespective of its head of state as well

4. <http://english.mofcom.gov.cn/article/policyrelease/announcement/202101/20210103029708.shtml>

5. https://ec.europa.eu/info/publications/210119-economic-financial-system-communication_en

6. Alain Pellet, foreword to the conference proceedings of the French society of International Law on extraterritorialities and international law, A.Pedone Edition, 2020.

as the decisive influence of the Congress (particularly its Senate), which has made extraterritoriality its preferred foreign policy weapon.

The second would be for a Member State of the EU or a large company to hope to do better by negotiating concessions unilaterally and discreetly. Though Washington may have granted some favours in the past on minor points, nothing of significance or permanence has ever been obtained bilaterally. Europe's strength –indeed of considerable size and importance– is in the collective.

The third would be for Europe to ignore the fact that extraterritoriality is a logical consequence of globalization. The decisions of major political and economic actors are global and increasingly have an almost automatic extraterritorial reach, even if extraterritoriality is not their primary goal. The Union itself is not exempt from this phenomenon given the potential extraterritorial implications of its past regulations (competition policy, personal data protection) or future ones (digital platform norms, climate change).

This de facto extraterritoriality is not in itself reproachable, all the less since European regulations invariably maintain an attachment or link to person or territory. The problem rather lies in the application of extraterritoriality to political sanctions, where such sanctions are decided unilaterally by a State with the objective of imposing its own political agenda⁶.

The EU's fear of inciting retaliatory measures in reaction to the defending of its own interests could ultimately lead to inaction. Though the risk of escalation cannot be ruled out, a Union that claims to be sovereign

must be able to equip itself with a full range of rules and instruments –whether defensive or counter-offensive– and adapted to each individual case. Europe itself should not exclude extraterritorial measures as long as they aim to protect the world's common interests and are in compliance with international law. Furthermore, the Union holds an obligation to protect its own citizens and companies from the coercive and damaging economic effects of extraterritoriality against which the individuals and companies are utterly powerless and defenceless.

Ultimately, the EU's objective today must be to protect itself from the effects of extraterritorial sanctions in advance by establishing deterrents while at the same time ensuring its capacity to respond with effective countermeasures if necessary.



The following are proposals intended to combat forms of extraterritoriality which are in violation of international law. They have been designed to respect both international and European law, and can be grouped into two categories.

The first relates to safeguards of a preventive nature to ensure the Union's resilience in the event of extraterritorial sanctions. Establishing such resilience relies on Europe's ability to capitalize on two of its own assets: taking better advantage of its strong internal market appeal to third-country operators, and simultaneously encouraging wider use of the euro to enable European businesses to break free from the clutches of the American dollar. To this effect, legal and financial instruments should be put in place to allow the EU and Member States to shield their companies from the effects of extraterritorial sanctions.

The measures included in this first category should be permanent in nature and form an integral part of the European Commis-

sion's common law anti-coercion toolkit. By virtue of their very existence, these measures would serve as a deterrent while also allowing for political dialogue with the sanction-issuing country so as to prompt a withdrawal of its planned or indicated actions. The goal is to avoid a chain reaction of measures and counter-measures right at the outset of potential extraterritorial sanctions by displaying a clear political will not to let it happen, as well as open the way for negotiations.

The second category concerns measures of an individual nature that demonstrate a clear intention of retaliation and have a temporary scope. These countermeasures would come into play only when attempts at deterrence have failed and extraterritorial sanctions have been applied by a third country. It would then be a matter of responding –to the same extent and without delay– to sanctions that penalize European companies or nationals on purely political grounds. Such is the case concerning the demand of the US to halt the construction of the Nord Stream 2 gas pipeline in the Baltic Sea. Following the US sanctions that accompanied Donald Trump's exit from the JCPOA agreement on Iran, this unilateral decision and its impact on German and other European economic interests is indeed among the reasons for the new-found attention to the subject in Brussels.

The premise of the proposed retaliatory measures, which are individualized and of limited duration, is that they are calibrated to reflect the timeline of third-country extraterritorial sanctions. If the said country withdraws, so does Europe: to be retractable is the very definition of these retaliatory measures. Once again, the end goal is deterrence, not punishment.

1 ■ General protection measures

■ Assessing the losses of European companies

The European Council on Foreign Relations (ECFR) has recently taken up this demand, which is increasingly voiced in political and business circles⁷.

The European Commission would arrange for an independent auditor, representing both national and European authorities/companies, to quantify the losses linked to extraterritoriality. This would cover both the direct losses incurred by companies as a result of their withdrawal from a commercial agreement already in progress, as well as encompass the potential loss of earnings in the event of an obstructed investment, such as abandoned oil field exploration in Iran. These figures would be the basis to compensate European company losses.

This exercise is compatible with business secrecy as protected under the EU Directive 2016/943, as the focus is on general figures aggregated at the EU level, and not on the specific situation of individual companies. In the event of individual compensations thereafter (see below), the company concerned would have to choose between these compensations and confidentiality.

■ Forging a financially independent Europe

- When it comes to US sanctions, the dollar has been America's main asset in getting the upper hand. Currently, the dollar (USD) predominates both as a reserve and invoicing currency, while the role of

the euro has gradually waned. This is a situation that the European Union has effectively accepted for a long time, having adopted a passive stance on the internationalization of the euro. The realignment of the euro/dollar equilibrium requires policy changes. In 2018, the Juncker Commission had made proposals echoing the sentiments mentioned herein; in its Communication of 19 January, 2021, the von der Leyen Commission also expressed interest in giving the euro an international role and sketched proposals along these lines, announcing that new proposals will be released in the short term. Other countries in the world could also have an interest to uncouple from the dollar.

- Europe itself uses the euro as an invoicing currency for less than 50% of its imports, thus leaving considerable room for improvement⁸.
- The work that needs to be done has already largely been identified: unify and deepen the separate European financial markets, which are only subject to Member State regulations and supervision by national authorities, and as a result of which remain fragmented; complete the banking union; ensure capacity for joint budgetary action in the euro area, in order to compete in size with US treasury bill issues; reinforce concentration among euro area countries in international forums hoping for a single voice at some point in the future; initiate cooperation with commodities markets to set reference prices in euros, which would apply to oil, gas, agricultural and mining products; do the same for aeronautics; take up the German proposal that aims to roll out a financial messaging system specific to Europe, which would provide services similar to those of SWIFT so as to avoid obstructions by American operators; and lastly, explore a retail payment solution common to all

⁷ [Defending Europe's Economic Sovereignty: new ways to resist economic coercion](#). ECFR, 20 October 2020.

⁸ [A Priority For the Next European Commission: Internationalising the Euro](#). *Le Figaro*, 25 July 2019 (in French)

European consumers guaranteeing confidentiality and that rivals those offered by American (Apple, Google) and Chinese companies.

These themes, which depend on a number of decision makers, vary greatly in technical –and political– difficulty. Even so, new solutions emerge where they are not always expected. Though having hesitated for too long, European banks –including the biggest among them– are now developing a common payment-clearing system for credit card payments within the Union, thus creating an alternative to the otherwise ubiquitous Visa and Mastercard. Likewise, the catastrophic impact of the COVID-19 crisis led the European Union to cross the Rubicon towards the principle of common European debt in July 2020, a momentous, unprecedented –and largely unexpected– decision. Keeping in mind that a condition for the international role of the euro is the issuing of debt by the European Commission on international financial markets.

■ Reversing the European Union's Blocking Statute (Council Regulation (EC) No 2271/96)

Originally designed to prevent the application of unlawful regulations on European territory and to protect European businesses, this blocking statute has largely proven ineffective. The European Commission itself seems to have recognized its limitations given that, in its Communication of 19 January 2021, it proposes further reflection on how to strengthen it and create a new instrument aimed to protect the European Union from 'coercive actions' by third countries.

In essence, the blocking statute puts European companies in double jeopardy. The EU prohibits companies from complying with US sanctions, which in turn puts them at risk for US penalties and exclusion from its markets.

It is thus suggested that the logic of the blocking statute be reversed by shifting the burden to the countries issuing the sanctions. By extension, this would involve prohibiting third countries from requesting any information related to sanctions from European companies. Under this new procedure, Member States would stand in for the companies targeted by extraterritorial sanctions. Such a fundamental change, the added advantage of which would be to reduce the risk of over-compliance, could be based on a number of specific legal provisions:

- using the French law known as the "Blocking Statute" No. 68-678 of 26 July 1968 as a model, to impose on all judicial or administrative authorities instructing or applying extraterritorial sanctions to solely use judicial cooperation channels for any information requested from EU companies. In the case of a direct request from the third country addressing the European company (as is currently the case for Nord Stream 2), the European company will require from its Member State to impose the above procedure. A more delicate situation will arise when the third country gets its information by indirect means: in that case, the company will require the subrogation of its Member State upon the notification of the sanction;
- Ensuring that the requesting foreign judicial authorities would have to guarantee procedural and material rights of the affected EU citizens and companies to be considered by EU authorities;
- Establishing minimum EU law standards for the protection of its companies and citizens may also derive from an interpretation of the case law of the Court of Justice of the European Union (CJEU) on UN Security Council sanctions, barring the Union from implementing foreign sanction regimes that contradict fundamental legal principles of EU law (case CJEU C-584/10P);

- tasking a service of the European Commission to centralise such requests for information in parallel so as to challenge their lawfulness and agree on a waiver;
- sanctioning any non-judicial entity requesting information from European companies that might serve as a basis for extraterritorial sanctions, regardless of the issuing country and territory concerned;
- in the event that a company is summoned before a foreign court, organizing the subrogation by the Member State and/or by the Commission's centralized service. In case of granted compensations, they will benefit the company;
- extending the scope of seizures currently covered by the Blocking Statute to include any action recognized as harmful by a Member State or third country court that is committed against a European individual or legal person by a third country –including foreign public actors. The proceeds would be channelled into the compensation fund as proposed below;
- as envisaged in the Commission Communication of 19 January 2021, forbidding any application of foreign court decisions related to sanctions on its territory.

Such provisions will have to be adapted based on the interpretation envisaged by the CJEU in reference to a question referred to it by a German court (case CJEU C-124/20). In this case, an Iranian bank argued that its German telecommunications provider was not entitled to terminate their contract in the absence of an explicit injunction from US authorities. If the Court were to require such an explicit prohibition, the Blocking Statute's theoretical strength will be reduced though it would make life easier for businesses which would be better protected.

■ A European Compensation Fund: freezing and seizing of selected assets

The creation of a fund is recommended in order to compensate penalised European companies and individuals which would request compensation. Compensation should also be mandated for EU companies and individuals-including corporate officers and employees of EU companies-that find themselves in the direct scope of extraterritorial sanctions, such as being listed on the US List of Specially Designated Nationals and Blocked persons (SDN).

This compensation should be sufficient to give enough time for the new proposed Office (see below) to challenge the sanctions.

The fund would be managed by the European Commission and sustained by the seizure of foreign assets directly linked to the sanctions. Foreign State property which is not granted immunity would be included, for example aircraft or ships belonging to a para-public company or a company of which the State is a direct or indirect shareholder. More proceeds could be sourced from a compensation to be imposed on the European subsidiaries of the third country at the origin of sanctions and additional customs duties on its products.

Though seizures are already authorized by Article 6 of the 1996 Blocking Statute, the procedure needs to be both simplified and intensified as the Commission itself considers doing according to its Communication of 19 January 2021.

■ A European Office of Foreign Assets Control (OFAC)

One of the lessons to be learned from American sanctions is their perfect coordination by the Treasury Department, which disposes of cross-cutting powers. The Commission should establish a unified service, consisting of representatives from its various Directorates-General and the European External Action Service. It could also draw inspiration from the UK Office of Financial Sanctions Implementation.

Its functions would be multiple: monitoring and information on all sanctions; coordinated responses between the Commission's services, Member States and affected companies and individuals; development of negotiation instruments using all available levers, such as the control over foreign investments and competition rules; legal assistance, especially with regard to seizures, to support affected Union companies and individuals before foreign courts; legal aid in assessing the linkage and the lawfulness of any extraterritorial regulation; management of the above-mentioned compensation fund; implementation of the new Blocking Statute; standardization of rules governing sanctions decided by the Union.

As a minimum, the proposed European Office will become the focal point for any issue involving economic sovereignty; at a later stage, it could even become the strategist and decision maker of a centralized competence.

A first step has been taken with the recent creation of a Chief Trade Enforcement Officer within the Directorate-General for Trade. Responsible for monitoring the proper implementation of trade and investment agreements by the Union's partners and preventing any type of unfair competition, whether it be dumping or prohibited subsidies, it consolidates the powers of the European Commission into a single entity,

thereby ensuring efficiency. This newcomer will have a proper place within the European OFAC. The Commission took a step in this direction in its communication of 19 January, wherein it suggested that the spill-over effect of extraterritorial sanctions on the European subsidiaries of foreign companies should be taken into account when authorizing foreign investments.

■ A European External Trade Bank

The failure of Instex to finance trade with Iran reveals how difficult it is to have a joint body financed with public funds. One of the reasons for its failure seems to be its above ground nature, which was deliberately designed to be disconnected from European commercial banks.

Some or all Member States could set up an ad hoc European Bank, an intergovernmental institution, which private banks would use for their clients. Though this Bank would have public law status in each Member State (thereby granting its immunity), it would be funded by commercial banks according to the needs of their clients.

The allocated loans would be decided and managed by the bank of the exporting customer, with the European Bank simply replacing the bank for transfers to the buyer's bank and repayment flows. In the event of non-payment by the buyer, the Bank would act as a collection agent on behalf of the creditor bank, just as in any other loan situation.

Commercial banks would have the advantage of having public protection to shield their involvement. The banks will easily justify the process to their clients.

■ ■ ■

2 ■ Countermeasures

■ Making use of existing trade power

The European Union already has at its disposal an entire arsenal of classical trade measures authorised by Article XXI of the GATT as part of the National Security Exception. Their scope is broad: restrictions on market access (withdrawal of tariff concessions for goods, services, closures, suspension of intellectual property etc.), bans on public contract competition, import quota reductions etc.

The EU's recourse to GATT Article XXI's exception legal basis is symmetric to those the United States uses in its extraterritorial regulations, including OFAC sanctions, foreign investment controls by the Committee on Foreign Investment in the United States (CFIUS), or export controls by the Export Administration Regulations (EAR). In order to do so, the European Union would have to adopt a legal act transposing it into EU law.

According to the flexible two-stage procedure proposed below, the Union should be able to deploy these tools for immediate countermeasures in response to clearly identified and targeted extraterritorial sanctions. It goes without saying that these countermeasures would have the same duration as the sanctions they are challenging, and be in accordance with the principle of proportionality set out by the WTO and international law.

As a precursor, the European Union should consider an immediate complaint before the WTO concerning the Nord Stream 2 case, with the objective of replicating its successful approach against the 1996 Helms/Burton and d'Amato/Kennedy legislations, which led to the negotiation of exceptions (waivers) with Washington.

■ Prohibiting entry into the EU of US decision makers responsible for extraterritorial sanctions that penalize European companies or individuals

This measure would target officials responsible for deciding on extraterritorial sanctions, such as members of the US Congress who have made extraterritoriality their preferred weapon. A common European list would deprive these officials of entry visas. However civil servants responsible for executing political decisions would be spared. For those who might be concerned by such an infringement of individual freedoms and fear its rejection in the event of a judicial appeal, it should be remembered that the link between direct involvement and injury is a legitimate criterion in law. The EU would simply be mirroring US practice, which is for the United States to apprehend Europeans who fail to comply with American sanctions. The Union will entirely follow the European Court of Justice's templates regarding the sanctions.

■ Prohibiting access to European Central Bank and national central banks loan issues.

As an additional requirement to the rules that European and foreign banks must follow in order to subscribe to its bond issues, the European Central Bank (ECB) could require that issue holders have financial links with all countries and financial institutions recognized by the ECB. Taking the French example of treasury securities specialists and the recent ousting of Morgan Stanley, national central banks could adopt the same system.

This means that European or American banks that have severed all ties with a country subject to EU-contested American sanctions would be deprived of EU market bond issues. By applying the law of their country, they would find themselves in a situ-

ation similar to that of European companies deprived of access to countries currently sanctioned as a consequence of US will.

■ Prohibiting participation in European and Member State calls for tender

A mechanism modelled after the above would be used in public procurement. Companies registered in jurisdictions that have imposed extraterritorial laws and sanctions on Europe would be excluded from all European public procurement opportunities for as long as the extraterritorial sanctions are in force. This represents a retaliatory measure which –provided its proportionality– would not be contrary to WTO rules (Article XXI).

To add to its legal basis, the right to apply these suspensions and temporary withdrawal procedures to companies based in countries practising extraterritoriality could be introduced as part of the European regulation on international trade recently adopted on 10 February 2021 (Regulation No. 167/2021).

■ Financial passports

The right to carry out banking activities on European territory is subject to compliance with European legislation. Upon reaffirming the illegality of extraterritorial laws and sanctions in its rulebook, the EU could thereafter ask Member States to review the licenses granted to European and foreign banks. This would provide for the temporary suspension of financial passports upon implementation of American sanctions by a bank and for the same duration.

In order for such countermeasures to become a reality, a flexible decision-making process, keeping delays to a minimum, and sticking to economic realities are critical elements. The process would consist of two stages:

- a general framework would be set by the Parliament and the Council, thereby establishing a permanent legal basis upon which the European Commission can act. This legal framework, in conformity with the Union's delegation rules, would define the principles and the framework of the situations subject to sanctions by the Commission, the proportionality of the sanctions to be applied, as well as their duration. Because this general policy would have been determined under calmer conditions, i.e., without a crisis or emergency situation, and without reference to a particular State or company case, it would become standard practice, making it easier to move on to the implementation stage;
- implementation would then be left directly to the Commission according to the tried and tested comitology procedure. In this context, the principle that only a qualified majority of States could prevent the Commission from acting would take effect.

■ ■ ■

There are, of course, a number of complex institutional questions raised by these newly formulated proposals which this paper has only treated cursorily. Further investigation of these questions is thus warranted, including how to divide competences between the Union and Member States, and which authority should be charged with employing the various tools at the EU's disposal in response to third-country sanctions. Also to be defined are the margins of appreciation that the agreed-upon authority would be entrusted with, including the modalities of their implementation by European or national authorities in the 27 Member States.

■ ■ ■

The experience of European integration has thus far shown that institutional solutions eventually emerge when the political will to achieve a well-defined objective is widely shared. To this end, the development of a comprehensive and well-articulated arsenal of measures capable of preventing or limiting the damage caused to Europeans by extraterritorial American sanctions which could encourage other powers to follow suit, is likely to be the first real operational test of this new discourse on strategic autonomy. ■

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