



# **THE SANCTIONS POLICY OF THE EUROPEAN UNION**

## Multilateral Ambitions Versus Power Politics

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- Barbara Kunz, Éric-André Martin and Wolfgang Richter, ‘Conventional Arms Control’, in Claire Demesmay and Barbara Kunz (eds.), “Sustaining Multilateralism in a Multipolar World: What France and Germany Can Do to Preserve the Multilateral Order?”, *Notes du Cerfa*, No. 148, Ifri, June 2019.

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# Abstract

Restrictive measures are a major instrument of the European Union's external action, which has emerged as one of the world's leading sanctions emitters. The EU has thus leveraged the size of its market and its economic and financial clout (trade relations, aid policy and bilateral agreements).

Through its significant activity in the field of sanctions, the EU has been able to reinforce its image as a normative power and a global player, contributing actively to international peace and stability. The EU's restrictive measures were adopted in a favorable international context, marked by the legitimacy that was conferred, most of the time, by United Nations resolutions, and by close coordination with the United States. This privileged period culminated with the management of the Iranian crisis and the conclusion of the 2015 Vienna Agreement. More recently, however, sanctions have tended to lose their function as an instrument contributing to shape a shared vision of the world order, and to become what they are in essence, namely an instrument of statecraft dedicated to the protection of States' national interests. This trend is illustrated on the one hand by the affirmation of a unilateral United States policy on sanctions, which tends to extend the scope of coercion to third parties, including European entities, and on the other hand, by the increasing use of sanctions by powers like China and Russia as a geo-economic tool.

This new situation regarding sanctions places an emphasis on economic security and sovereignty and confronts the EU to its vulnerability within an international order that was conceived and dominated by the United States. But it also raises the EU's incapacity to develop power politics, especially as regards economic statecraft. The forms of coercion to which the EU is and will be confronted should lead it to develop defensive tools at least, and consequently to adjust its trade policy as well as its rules regulating economic competition on its internal market. As for European companies, which are exposed to risks of prosecution by the US justice system, they have already developed compliance procedures in order to reduce their vulnerabilities.





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# Introduction

Sanctions are one form of coercion used by a State to put pressure on another, without resorting to armed force. Their practice has been extended and made more sophisticated as relations between States have diversified. Recourse to sanctions has been admitted by international custom, and progressively codified in international law. Sanctions are thus part of the measures included in Chapter VII of the United Nations Charter, especially in Article 41.<sup>1</sup>

Sanctions were a marginal instrument in the United Nations panoply until the 1990s,<sup>2</sup> a period that would become known as the “sanctions decade”.<sup>3</sup> Over this ten-year period, over 50 new sanctions regimes were adopted, including 12 by the United Nations Security Council (UNSC), the rest being adopted mainly by the United States (US) and the European Union (EU). The EU remains today one of the largest emitters of sanctions in the world, along with the US.

Since the 1990s, it has been possible to identify several “generations” of sanctions, which also reflect various states of the international order. The first involved comprehensive sanctions, marked by general and unlimited embargoes, culminating in the embargo against Iraq between 1990 and 2003. The second generation was based on targeted sanctions, or “SMART sanctions”,<sup>4</sup> which characterised the sanctions adopted at the end of the 1990s. The last generation comprises unilateral sanctions, particularly through the use of secondary sanctions by the United States. This new type breaks with the practice of concerted international sanctions in support of a shared goal, and opens the way to the instrumentalisation of interdependencies and geo-economics.<sup>5</sup>

This evolution came as a surprise to the EU when the US restored secondary sanctions against Iran in November 2018. Yet this could be

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1. Article 41 of the UN Charter states that “The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations”.

2. Sanctions were implemented against Rhodesia in 1966 and against South Africa in 1977.

3. D. Cortright and G. Lopez, *The Sanctions Decade: Assessing UN Strategies in the 1990s*, Boulder: Lynne Rienner Publishers, 2000.

4. *S* for specific, *M* for measurable, *A* for achievable, *R* for realistic, and *T* for temporally limited.

5. H. Farrell and A. Newman, “Weaponized Interdependence”, *International Security*, Vol. 44, No. 1, pp. 42-79.

extended to new actors and through the use of new instruments. Indeed, the capacity of the United States to use coercive economic measures is based not only on its financial and economic power, notably the status of the dollar as the global reserve currency, but also on the leverage the US draws from its central position in the interconnections it has established with other countries within the context of globalisation (the SWIFT network, Internet servers, interbank clearing houses, etc.).<sup>6</sup>

For the EU, restrictive measures<sup>7</sup> are thus losing their function as multilateral instruments serving a shared vision of the world, to return to what they are by nature, namely an instrument of power serving the interests of States.<sup>8</sup> This trend is likely to be amplified by Sino-American rivalry, with each party being tempted to use sanctions to assert its interests on third parties. Moreover, contagion is possible, as illustrated by Japan's recent decision to re-establish export controls on South Korea for certain dual-use goods. The EU has been able to participate fully in the second generation of sanctions by asserting itself as a normative power and vector of multilateralism, and by presenting itself as a major global player alongside the United States. It may however be asked whether the European Union has the ability to participate in the new generation of sanctions which mark the return to power politics and geo-economic strategies. There are two main reasons for this: first the economic and trading weight of the EU in the world is set to be reduced, as is its centrality in world affairs; second, American unilateralism undermines the effectiveness of multilateral sanctions that depend on the coordination with other international partners (States or international organisations). Yet while it may fail to take an active role, the EU should at least protect its interests and those of its companies by adapting its trade and competition policies to these new challenges, which will partly shape its economic security.

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6. P. E. Harrell and E. Rosenberg, "Economic Dominance, Financial Technology and the Future of US Economic Coercion", *Center for a New American Security*, April 2019.

7. While the term "sanctions" is commonly used in international law, the expression "restrictive measures" is the term used in Article 215 TFEU. The restrictive measures formally concern those adopted under the CFSP, unlike the retaliation measures that may be adopted in a context of trade policy disputes or failure to comply with the conditionality attached to implementing certain agreements, such as the Cotonou Agreement. Beyond this formal distinction, these actions can and should complement and reinforce each other within a real common foreign and security policy.

8. R. D. Blackwill and J. M. Harris, "The Lost Art of Economic Statecraft: Restoring an American Tradition", *Foreign Affairs*, 2016.

# A Major Instrument of EU's External Action

Although they are often set out as economic or trade measures, European sanctions are first and foremost a tool of foreign policy.<sup>9</sup> The procedure employed in the EU confirms this, as it imposes the adoption of a common position within the framework of the Common Foreign and Security Policy (CFSP), prior to the adoption of a regulation.<sup>10</sup>

## Forcing, Containing and Signalling

A reference study has been conducted by the Target Sanctions Consortium (TSC),<sup>11</sup> based on 56 episodes of UN sanctions between 1992 and 2012, and provides a reference framework for sanctions. The study identifies three main categories of sanctions corresponding to a triptych of “coerce, constrain and signal/stigmatise”. Consequently, sanctions can be distinguished in order to:

- force a government to change policy or behaviour on a given issue: i.e., obtain policy changes from the target;
- contain prohibited activities or restrict access to key resources such as weapons, funding and critical technologies: i.e., constrain the target to change its actions;
- signal or stigmatise designated entities with respect to observed excesses in terms of international standards: i.e., condemn the behaviour of the target.

Although the issue of sanctions' effectiveness has been the subject of numerous studies and controversies,<sup>12</sup> the authors of the TSC study conclude that sanctions are more effective for stigmatising a target (with a 43% success rate), and in constraining fields of action (42%). Not surprisingly, the success rate is much lower (13%) when the aim is to

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9. Council of the European Union, *Basic Principles on the Use of Restrictive Measures (Sanctions)*, 10198/1/04 REV 1, 2004.

10. I. Bosse-Platière, “Les mesures restrictives adoptées par l'UE”, *Annuaire français de relations internationales*, Vol. XVII, 2016.

11. T. Biersteker, S. E. Eckert, M. Tourinho and Z. Hudáková, “The Effectiveness of UN Targeted Sanctions”, Targeted Sanctions Consortium, November 2013.

12. R. A. Pape, “Why Economic Sanctions Do Not Work”, *International Security*, Vol. 22, No. 2, 1997.

change the target's policies. These figures should, however, be qualified in the light of problems which may arise in isolating and measuring the specific effects of sanctions, compared to other factors, related to the internal political or international situation of the country concerned.

As far as EU sanctions are concerned, two key motives stand out:

- protecting peace and international security, via the fight against terrorism (specific measures to combat terrorism and restrictive measures relating to Daesh and al-Qaida ); the proliferation of weapons of mass destruction (restrictive measures against the Democratic People's Republic of Korea (DPRK); restrictive measures against Iran); or even against the destabilising effects of certain conflicts (sanctions against the Russian Federation due to its involvement in the conflict in Ukraine);

- promoting standards on human rights, good governance and respect for the rule of law. Targeted measures have been taken against individuals considered as key players in the unsolved disappearances of four persons in Belarus in 1999-2000. In a different context, restrictive measures have been implemented against persons responsible for serious human rights violations in the Democratic Republic of Congo.

## A Very Rich Range of Measures

Sanction regimes were initially focused on economic and commercial measures, but they have diversified over time, both in terms of their goals and their contents. The range of measures implemented has been regularly enriched, instruments have become increasingly sophisticated, while the targeting of individuals and entities has become highly focused.

### *Four main areas of intervention<sup>13</sup>*

- **Trade restrictions:** depending on the regime in question, these restrictions applied to the sales, exports, transfers, and provision of goods and services from the EU. Import restrictions to reduce the foreign currency resources of targeted countries may be implemented on top of these export restrictions.
- **Restrictions on the movement of people:** persons targeted by travel bans may not enter the EU. Where these are necessary to enter the EU, such individuals are not granted visas.
- **Economic and financial restrictions:** the choice of measures depends on their aim and the degree of financial development of the

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13. More information about the content of these four areas is given in the Annex of this study.

country in question.

- **Specific controls:** restriction on air travel routes, access to ports, cargo inspections, and vigilance concerning the diplomatic personnel of the state in question, etc.

## ***Targeted sanctions***

The EU states that “sanctions should be targeted in a way that has maximum impact on those whose behaviour we want to influence. Targeting should reduce to the maximum extent possible any adverse humanitarian effects or unintended consequences for persons not targeted or neighbouring countries”.<sup>14</sup>

This involves drawing up lists identifying individuals and legal entities which are subject to restrictive measures. These include the list established on the basis of a resolution by the United Nations Security Council (UNSC), which is compiled by a committee for specific sanctions, or the UNSC allows Member States to draft their own lists. In this case, as with autonomous sanctions, the definition of lists rests with the EU, which requires the active participation of its Member States.

## ***Ever-more numerous sanctions regimes***

**The European Union has contributed actively to the generalisation of sanctions regimes**, in three main stages: first by ensuring the implementation of UNSC decisions, within the CFSP framework; then by developing additional measures supporting the implementation of UN sanctions; and lastly by formulating autonomous sanctions to back up its common foreign and security policy goals. The progressive development of autonomous EU sanctions, as well as the extension of their areas of intervention demonstrate the will of the EU to assert itself as a global actor and ensure the promotion of values it embodies.<sup>15</sup>

The EU is today one of the largest emitters of sanctions in the world, along with the United States. According to some recent studies, the EU has issued 36% of worldwide sanctions since 1980.<sup>16</sup> The number of countries

14. Council of the European Union, *Basic Principles on the Use of Restrictive Measures (Sanctions)*, *op. cit.*

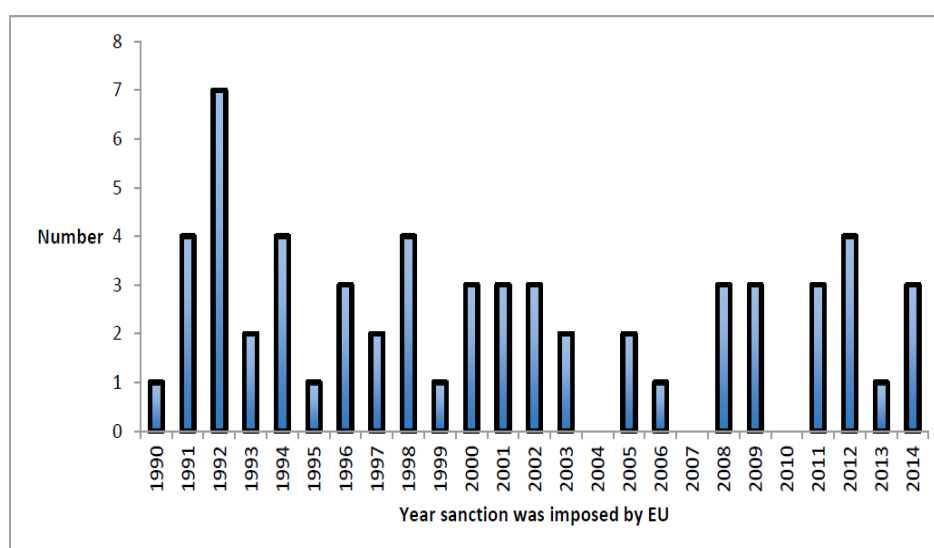
15. T. Biersteker and C. Portella, “EU Sanctions in Context: Three Types”, *Brief Issue*, No. 26, European Union Institute for Security Studies, July 2015.

16. I. Borzyskowski and C. Portella, “Sanctions Co-operation and Regional Organizations”, in: S. Aris, A. Snetkov and A. Wenger (eds.), *Inter-organisational Relations and International Security*, Abingdon: Routledge, 2018, pp. 280-294.

targeted by EU sanctions has risen from six in 1991 to 34 in May 2019. In addition, there are horizontal regimes to fight terrorism, the proliferation of chemical weapons, persons responsible for cyber attacks and potential infringements of human rights. In comparison, the US Treasury agency responsible for implementing sanctions (the Office of Foreign Assets Control – OFAC), manages 30 sanctions programmes.<sup>17</sup>

The number of autonomous sanctions regimes implemented by the EU has grown significantly and steadily, as shown in the graph below.

### Evolution of the EU's Autonomous Sanctions Regimes



Source: *Targeted Sanctions against Individuals on Grounds of Human Rights Violations: Impact, Trends and Prospects at EU Level*, Policy Department for External Relations, Study requested by the DROI Committee of the European Parliament, April 2018.

### Ever-more sophisticated instruments

A regime of horizontal sanctions is based on a list of persons and entities, set out on a cross-border basis given their involvement in prohibited activities.<sup>18</sup> This instrument was originally developed by the United Nations in the fight against terrorism, and led to the EU establishing a list of persons, groups and entities involved in terrorism.

Horizontal sanctions are now developing in new areas of criminality. This has been the case since the adoption by the Council on 15 October 2018 of a sanctions regime aimed at fighting against the proliferation and use of chemical weapons, notably following the Skripal affair, and the use of chemical weapons in Syria. Since 17 May 2019, a new sanctions regime

17. P. E. Harrell and E. Rosenberg, "Economic Dominance, Financial Technology and the Future Use of US Economic Coercion", *Center for a New American Security*, April 2019.

18. C. Portela, "The Spread of Horizontal Sanctions", *CEPS Commentaries*, March 2019.



has come into force with restrictive measures targeting cyber attacks, menacing the Union and its Member States. Measures consist of freezing assets and travel bans for persons and/or entities responsible for cyber attacks or attempted attacks, as well as their sources of support. Another project for horizontal sanctions has been put forward by the Netherlands<sup>19</sup> and was supported by EU Ministers of Foreign Affairs in December 2018,<sup>20</sup> and is presently being studied by the offices of the High Representative.<sup>21</sup> This new regime is called upon to address human rights violations, but also potentially cases of corruption, following the model of the US *Magnitsky Act*.<sup>22</sup>

By decoupling States and lists of persons responsible for wrongdoing it is possible to sanction individuals or entities, whatever their origin, without challenging governments for alleged offences. This has two potential advantages: it helps reduce the risk of tensions with the government of the State in question, and it also facilitates obtaining consensus among Member States.

The scope of the EU's restrictive measures has expanded considerably with regard to the number of countries concerned, the areas of restrictions, as well as the persons and entities listed. This raises questions about the readability of sanctions, both for companies and governments: the means dedicated to implementing them effectively, via issues of conformity concerning companies and control of implementation by Member States' governments.

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19. Stratfor, "The EU Wants to Enhance Its Sanctions Regime", available at: <https://worldview.stratfor.com>.

20. "In Accountability Drive, Dutch Seek Targeted EU Human Rights Sanctions", *Politico*, available at: [www.politico.eu](http://www.politico.eu).

21. J. Hahn, *Debates European Parliament*, 12 March 2019, available at: [www.europarl.europa.eu](http://www.europarl.europa.eu).

22. In 2012, the United States passed the *Magnitsky Act* which provides for sanctions against persons responsible for the death of Serguei Magnitsky, a Russian whistleblower who died in prison, and for other gross human rights abuses in Russia. In 2016, the scope of the act was expanded to include serious cases of human rights violations and corruption around the world.



# Constrained Implementation

Three aspects concerning the implementation of decisions reduce considerably the European Union's room for manoeuvre: (1) even if the EU has normative powers, by enacting regulations on restrictive measures, the union does not have operational competencies, which are devolved to Member States, and which may lead to differences in approach and a dilutions of effects: (2) the jurisdiction control of acts adopted by the Union's judiciary has led to significant litigation, and the annulment of several individual rulings; and (3) companies concerned (industries and banks) are faced with constraints linked to regulatory compliance, notably with American regulations, within the framework of compliance policies.

## The Role of Member States

The sharing of competencies between Member States and EU institutions follows from the hybrid nature of the CFSP, as set out in Article 24 of the Union Treaty.<sup>23</sup> This distinguishes the EU from other major sanctions emitters, beginning with the United States, where the Federal government holds normative and operational competencies, and also has the necessary means to implement decisions.

This singularity of the EU in terms of competencies and organisation is reflected in three key aspects which are essential to the implementation of measures adopted:

■ It refers to Member States to adopt legal acts or regulations in domestic law that are necessary for the proper enforcement of EU rules. This concerns the designation of competent authorities within each state and the fact of providing them with appropriate powers. This also implies determining effective sanctions that are proportionate and dissuasive in case the measures of rules relating to sanctions are violated. The existence of national criminal legislation concerning sanctions and the violation of relevant provisions are essential elements of the measures.

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23. "The common foreign and security policy is subject to specific rules and procedures. It shall be defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise. The adoption of legislative acts shall be excluded. The common foreign and security policy shall be put into effect by the High Representative of the Union for Foreign Affairs and Security Policy and by Member States, in accordance with the Treaties."

■ The transfer to Member States of the execution, supervision and control of current operations. These are central responsibilities in applying different restrictions, such as the refusal to issue visas for listed persons, the execution of controls on cargoes by customs authorities, etc. Furthermore the competent authorities in Member States have a significant margin in interpretation, as far as implementing exemption procedures set out in most regimes is concerned. Several studies have already pointed to the risks of a “mosaic” for implementing rules that are often complex across 28 national administrations with very varied traditions, means and levels of expertise.<sup>24</sup> As the secretary general of the Société générale bank has recently pointed out, splitting normative and operational competencies may significantly hinder companies, especially when problems of interpreting certain measures in a text arise.<sup>25</sup> For example, a quote about sanctions against Russia notes that:

“The OFAC replied in a week, but at our end it took a year. (...) If you transfer competencies, you should transfer implementation.”

■ The registration of individuals or legal entities on the lists annexing acts adopted by the Council, especially for autonomous sanctions by the EU, is done by using information provided by Member States. Their propositions are subsequently examined within the various formats of the Council. Council guidelines call on authors of propositions to provide motivations supporting registration on a sanctions list.<sup>26</sup> However experience has proven that the (police and intelligence) services of Member States are particularly reticent in providing such information, be it for registration on lists, or during court proceedings which may follow from entities challenging their registration on lists. This situation weakens the position of the Council with respect to EU judges in case of litigation.<sup>27</sup> Given the difficulties of this issue, waiver measures have been included within the adversarial principle of the rules of procedure of the EU’s courts.

## Control by the EU’s Courts

The legislative decisions by the Council relating to restrictive measures have led to substantial litigation. According to a recent study, litigation

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24. “EU Sanctions: A Relevant Foreign Policy Tool?”, *EU Diplomacy Papers*, No. 3, Bruges: Collège d’Europe, 2014. See also S. de Galbert, “The Challenge to Building a Balanced Transatlantic Sanctions Policy between the US and the EU”, *Center for Strategic and International Studies and Center for a New American Century*, 2016.

25. B. Margaritelli, “Compliance : des spécialistes appellent à accélérer le mouvement pour protéger les entreprises françaises”, *Journal spécial des sociétés*, No. 63, September 2019.

26. Council of the European Union, Sanctions Guidelines - update , 5664/18, 4 May 2018.

27. I. Bosse-Platière, “Les mesures restrictives adoptées par l’UE”, *op. cit.*

over restrictive measures brought before the Court of Justice of the European Union (CJEU) accounted for the third most important field of activity between 2010 and 2014, in terms of the number of cases, behind litigation on intellectual property and competition.<sup>28</sup> In all litigation dealt with in 2017 by the CJEU, restrictive measures took second place ahead of competition litigation. As of 31 December 2017, 62 cases were pending before the General Court of the European Union (EGC).<sup>29</sup> Several dozens of rulings concerning the designation of foreign persons or entities on sanctions lists have thus been annulled by the courts in recent years.<sup>30</sup>

For example, a recent study carried out for a non-governmental organisation (NGO),<sup>31</sup> identified appeals filed with the Union's courts by persons challenging their inclusion on lists adopted under three sanction regimes and implemented against persons allegedly responsible for embezzlement (in Tunisia, Egypt and Ukraine). By 31 December 2018, 35 appeals had been filed, including 10 with the EGC and four with the CJEU. In nearly half the cases (15), the EGC called for the complete or partial annulment of the measure in question; and for its part, the CJEU annulled all four offending regulations.

This abundant litigation follows from challenges by individuals or legal entities included on lists. Based on the jurisprudence of the CJEU, notably in the KADI/COMMISSION case,<sup>32</sup> plaintiffs have argued that this procedure violates rights to be defended, their right to be heard and their rights to effective legal protection. The judges have indeed annulled a very large number of decisions by the Council, based on the non-compliance of these principles.

The intervention by the courts of the EU has also made it possible to identify a number of principles which have led the Council to modify its practices of registration on lists. This has led in particular to efforts relating to: the definition of clear and distinct criteria for inclusion on lists contributing to the objectives pursued by sanctions regimes: a reasoned opinion setting out the justifications for inclusion; and the presentation of evidence in factual and detailed support for such opinions relating to individuals.

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28. Policy Department for External Relations, *Targeted Sanctions against Individuals on Grounds of Human Rights Violations: Impact, Trends and Prospects at EU Level*, op. cit.

29. Annual report of the CJEU, 2017, available at: <https://curia.europa.eu>.

30. S. de Galbert, "The Challenge to Building a Balanced Transatlantic Sanctions Policy between the US and the EU", op. cit.

31. Civil Forum for Asset Recovery (CiFAR), *Sanctioning Kleptocrats: An Assessment of EU Misappropriation Sanctions*, 2019.

32. Judgement of the Court (Grand Chamber) of 18 July 2013, in the joint cases C-584/10 P, C-593/10 P and C-595/10 P, Kadi/Commission, available at: <https://curia.europa.eu>.

In the light of this debate, it is worth noting the ambivalence of EU sanctions. They have been designed to ensure the promotion of human rights standards, good governance and respect of the rule of law, by encouraging designated entities outside the European Union to change their behaviour. They are subject to judicial control. Paradoxically, the Council often has difficulties in meeting the requirements of EU courts, which guarantee the legality of measures taken, and the strict observance of the EU's fundamental rights and principles.<sup>33</sup>

## Compliance Constraints on Companies

When it comes to implementing sanction measures, the involvement of the chain of responsibility is essential, from the issuer of standards through to the company in question (in industry or banking). Indeed, focusing only at the first level without considering intermediate echelons would amount to pursuing a purely declaratory policy. Cooperation by companies is therefore necessary in guaranteeing the effective application of regulations and decisions adopted at the level of national and Community authorities.

### *Adapting to complex and changing regulations*

An initial challenge companies face concerns access to information and expertise. They have to deal with complex and changing regulation to follow the lists of designated entities. For example, as of 3 June 2019, there were 2,285 entities subject to measures for freezing assets included on a list that could be downloaded from France's Treasury Directorate, relating to the various sanctions regimes implemented by France.<sup>34</sup> To facilitate the implementation of financial sanctions by credit and financial institutions, the EU provides a consolidated list of persons, groups and entities subject to EU financial sanctions.<sup>35</sup> It is also possible to download a file from the OFAC site of entities designated by the US Treasury, which had no less than 1,294 pages of designated names and entities (as of 23 May 2019).<sup>36</sup> In terms of flows, the US authorities added a total of 1,500 designated entities during 2018.<sup>37</sup>

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33. I. Bosse-Platière, "Les mesures restrictives adoptées par l'UE", *op. cit.*

34. This list is available at: [www.tresor.economie.gouv.fr](http://www.tresor.economie.gouv.fr).

35. The database on financial sanctions is available at: <https://webgate.ec.europa.eu>.

36. This list is available at: [www.treasury.gov](http://www.treasury.gov).

37. "Sanctions Create Business Risks and Opportunities", *The Economist*, 22 May 2019, available at: [www.economist.com](http://www.economist.com).

Concerning access to expertise, companies may turn to specialised firms to assist them in their dealings with risky markets. In terms of a company's daily business activities, it must be able to filter partners and customers in order to ensure that it is not carrying out business prohibited by sanctions. To this end, specialised consultancies offer subscriptions to database services that are regularly updated and marketed. Obviously using such services generates costs. The initial investment required to enter a market subject to restrictive measures may therefore be persuasive for small and medium-sized companies (SMEs) which may not be familiar with these constraints and would not wish to expose themselves unnecessarily to prosecution for non-compliance with regulations.

Businesses face a second challenge concerning their liability risks related to export controls and embargoes. According to a study by KPMG, numerous European companies faced penalties for three main reasons between 2010 and 2016, including: corruption, competition law, and lastly the control of exports and sanctions.<sup>38</sup> In the latter field, more than 60 European companies were subject to sanctions, imposed especially by the OFAC, for non-conformity with the extraterritorial reach of certain American laws. The US authorities thus fined European companies €3 billion overall. All it takes in these cases is for the competence of US prosecutors to be established on the basis of competency criteria, even for actions undertaken outside US territory.<sup>39</sup> These convictions have led global firms not only to incorporate the requirements of US compliance law, but also to comply with US laws in certain areas of their economic and financial activities.<sup>40</sup>

### ***The challenge for European security and sovereignty***

These convictions are a “real overflow of US judicial power”.<sup>41</sup> They have led the national authorities of several European countries, including France, to realise that compliance is henceforth an issue of economic security and sovereignty.<sup>42</sup>

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38. KPMG, “La conformité réglementaire en France”, October 2016.

39. See especially H. Juvin, “Sanctions américaines : la guerre du droit”, *Le Débat*, No. 194, March-April 2017.

40. A. Gaudement, “La *compliance* en quête de définition”, *Défis*, No. 9, 2018.

41. *Ibid.*

42. M. Leblanc-Wohrer, “*Comply or die?* Les entreprises face à l'exigence de conformité venue des États-Unis”, *Potomac Paper*, No. 34, Ifri, March 2018.

France's Law of 9 December 2016 relating to transparency, the fight against corruption and the modernisation of economic life, known as the Sapin 2 Law, enhances France's national sanctions system, especially by setting new obligations concerning company compliance. As an expert has observed, the Sapin 2 Law introduced into French law the notion of compliance for big companies,

“in the hope of leading the most active judicial authorities, especially the Americans, to give up extraterritorial competencies concerning French companies.”<sup>43</sup>

This approach has been imported from Anglo-Saxon common law, meaning that companies are not only responsible when breaking the rules imposed on them, but also for not having set up an internal organisation aimed at preventing the violation of rules. As has been noted at a conference organised by France's Economic, Social and Environmental Council,<sup>44</sup> the judicialisation of litigation related to compliance increasingly exposes individuals and legal entities to criminal prosecution by US courts, with potentially very serious consequences in both cases.

The Sapin 2 Law thus requires companies with more than 500 employees to organise themselves in order to reduce their exposure to risk. The Law sets out obligations for companies to take preventative measures to detect bribery and corruption, by setting up an internal compliance program (ICP). This type of program allows companies to meet the compliance requirements in all their fields of activity, notably with respect to their own ethical standards and all the laws of countries in which they are operating. The ICP sets up sophisticated processes applied to various hierarchical and operational levels within the company, but also in its relations to third parties. The Sapin 2 Law stipulates that such programs include at least the following points: (i) a compliance charter defining the ethical principles endorsed by the firm's executive management and applicable throughout the company; (ii) a chain of responsibility concerning compliance within the company, headed by an executive manager; (iii) the evaluation of risks according to the sectors of activity and regions in which a firm operates; (iv) measures for internal notification as well as appropriate accounting control procedures; (v) training measures for relevant staff; and (vi) regular evaluation measures accompanied by an internal sanctions regime when compliance provisions are not respected.

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43. A. Gaudement, “Qu'est-ce que la *compliance* ?”, *Commentaire*, No. 165, Spring 2019.

44. B. Margaritelli, “*Compliance* : des spécialistes appellent à accélérer le mouvement pour protéger les entreprises françaises”, *Journal spécial des sociétés*, No. 63, September 2019.



In the event of litigation, the existence of an effective ICP within a company is taken into account by US judicial authorities and contributes to reducing the responsibility for irregularities committed, as well as reducing possible fines.<sup>45</sup> It remains to be seen to what extent this legislative apparatus will reduce the vulnerability of French companies and if its field of application needs to be adapted, possibly by bringing down the threshold of 500 employees, and so extending its advantages to SMEs as well as to subsidiaries of foreign companies located in France.

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45. M. Leblanc-Wohrer, “*Comply or die?* Les entreprises face à l’exigence de conformité venue des États-Unis”, *op. cit*



# A Double-Edged Instrument

## The Contribution of Sanctions to the EU's External Actions

### *An instrument optimised within a multilateral framework*

The significant measures implemented by the EU in the field of sanctions have allowed the Union to contribute to efforts by the international community in favour of peace and international security. This is true for measures against Iran and the DPRK, aimed at countering the proliferation of weapons of mass destruction. It has also been true for recent international crises, as borne out by the restrictive measures taken against Russia (following its actions to destabilise Ukraine) and against Syria (in response to violence and flagrant, systematic and generalised violations of human rights in the country).

Through its sanctions the EU has asserted itself as a global actor, engaged in defending human rights and the rule of law: sanctions against Egypt (restrictive measures against persons identified as responsible for embezzling public funds); and sanctions against Venezuela (measures due to the continued weakening of democracy, the rule of law and human rights).

The EU's use of such restrictive measures as an instrument of its foreign policy has a threefold advantage: (1) they have an advantageous cost/effectiveness ratio, by optimising leverage gained from the capacity to restrict or shut off access to the single market, but also via economic and financial levers the Union disposes (trade, investments and aid programmes); (2) as a substitute for the EU's own weak military capacities, as sanctions allow it to intervene in the management of international crises without being confronted to capacity limits nor political risks which commitments to crisis management involve; (3) a means of officially expressing its disapproval of particular actions or behaviours (the non-respect of election results; domestic repression; the embezzlement of public funds, etc.). Sanctions allow the EU to assert its attachment to behavioural standards and to meet calls for action on behalf of public

opinion or certain interest groups, while achieving some benefits in terms of communication.

The restrictive measures of EU sanctions regimes have mainly been adopted within a favourable international context, marked by either legitimacy conferred on them by a UN resolution or through coordination with the United States. United Nations resolutions were essential for the EU to adopt sanctions against Iran and the DPRK.<sup>46</sup> In addition, coordination with the United States has been a key factor to get leverage with other States or international organisations, and to ensure the effectiveness of measures taken, as has been the case for sanctions against Russia.<sup>47</sup>

### ***Limits to the EU's capacity for external action***

That said, the leveraged effects which the EU could draw on until now are being eroded by several developments.

**Firstly, today's international context is marked by challenges to the universal nature of Western liberal values.** As the Russian president pointed out on the eve of the G 20 meeting in Osaka (June 2019), liberal values could be obsolete, because they no longer meet today's big challenges.<sup>48</sup> Since the interventions in Iraq and Libya, China and Russia have viewed Western liberalism as a vector of disguised imperialism, which moves forward by hiding behind generous discourses.<sup>49</sup> The two countries are therefore reticent about any initiatives they deem to be contrary to the fundamental principles of the United Nations Charter, such as State sovereignty or the non-interference in the internal affairs of other States. As the Russian Foreign Minister declared to the Duma, as the EU was adopting unilateral sanctions against Russia, these sanctions “never lead to anything good, they are not legitimate and have no legal basis”.<sup>50</sup> China is just as hostile to unilateral sanctions, and tends to justify its position with the arms embargo imposed on it by the United States and the EU in 1989. In this context, the EU is sometimes accused of pursuing policies with double standards and double measures, by applying

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46. C. Portela, “The EU's Use of Targeted Sanctions: Evaluating Effectiveness”, *CEPS Working Document*, No. 391, March 2014.

47. S. de Galbert, “The Challenge to Building a Balanced Transatlantic Sanctions Policy between the US and the EU”, *op. cit.*

48. “Vladimir Putin Says Liberalism Has ‘Become Obsolete’”, *Financial Times*, 28 June 2019, available at: [www.ft.com](http://www.ft.com).

49. C. Delsol, “Le crépuscule de l'universel”, *Politique étrangère*, Vol. 84, No. 1, Ifri, March 2019.

50. Mr. Lavrov, “Unilateral Sanctions Illegitimate”, *Sputnik*, 20 March 2014, available at: <https://fr.sputniknews.com>.

principles of political conditionality unequally.<sup>51</sup> This is borne out by the choices made over time to engage in critical dialogue with several States that are party to the Cotonou Agreements (Rwanda, Ethiopian, Kenya, etc.), rather than to apply sanctions (Zimbabwe).

**This explains why when sanctions are not approved by the United Nations, the EU often has difficulties in implementing them.**<sup>52</sup> In two cases, regional organisations to which target countries belong have challenged the sanctions and demanded their removal (the Association of Southeast Asian Nations (ASEAN) for Myanmar, and the Southern African Development Community (SADC) for Zimbabwe). The duration of these sanctions (10 years in the case of Zimbabwe and 21 years for Myanmar) progressively removed the EU's ability to influence the situation in these countries.

Lastly, it must be noted that when the EU stops its relations with a country, following restrictive measures, other actors tend to take its place. The risks of this increase, the longer sanctions last. In this way, China became a dominant actor in Zimbabwe's mining industry, and has also largely compensated European and American sanctions in Myanmar by becoming its largest foreign investor and leading trade partner in 2012, taking 29% of Myanmar's trade.<sup>53</sup> The same phenomenon has benefitted Russia, following the EU's sanctions against Belarus.<sup>54</sup>

## Sanctions Are an instrument of power

International sanctions are a traditional means of coercion used by one State to put pressure on another, without resorting to armed force. Since the end of the Cold War, these instruments have mainly been implemented by the United Nations, the United States and the EU, if not always within a multilateral framework, then at least through a concerted approach. **More recently, however, sanctions have tended to lose their function as a multilateral instrument underpinning a shared vision of the world, to return to what they are by nature, namely a power tool in the interests of each state.**

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51. B. Nivet, "Les sanctions internationales de l'Union européenne: *soft power*, *hard power* ou puissance symbolique ?", *Revue internationale et stratégique*, January 2015.

52. C. Portela, "The EU's Use of Targeted Sanctions: Evaluating Effectiveness", *op. cit.*

53. F. Giumelli and P. Ivan, "The Effectiveness of EU Sanctions: An Analysis of Iran, Belarus, Syria and Myanmar", *European Policy Center Issue Paper*, No. 76, November 2013.

54. *Ibid.*

Richard Haass has emphasised this in a book on sanctions:<sup>55</sup>

“Economic sanctions are a serious instrument of foreign policy and should be employed only after consideration no less rigorous than what would precede any other form of intervention, including the use military force.”

The implementation of comprehensive sanctions against Iraq is regularly evoked to illustrate the importance and lasting humanitarian consequences of a total embargo for the population of an entire country.<sup>56</sup> According to a report by the French parliament, estimates made by researchers and by UN bodies indicate that between 500,000 and 1.5 million people died directly as a result of sanctions.<sup>57</sup> Most of these were children.<sup>58</sup> The large differences in these figures are explained by taking into account the long-term effects caused by the deterioration of the country’s health and sanitary conditions, notably the contamination of water, the lack of quality food, inadequate breastfeeding and deficiencies in healthcare.<sup>59</sup>

The analysis developed by Richard Haass is also noteworthy because it underlines the ambivalent nature of sanctions. Haass is fully aware of the significant damage that sanctions can inflict on the population of the country facing an embargo, as well as the economic and political interests of the United States. He cautions American officials against the risks related to the trivialisation of sanctions and especially the recourse to secondary sanctions.<sup>60</sup>

“Secondary sanctions or boycotts are not a desirable means of bringing about multilateral support for sanctions and should be avoided. Instituting sanctions against those who do not comply with the sanctions at issue is an admission of a diplomatic failure to persuade. It is also an expensive response. The costs to US foreign policy, including the state of relations with major partners and US efforts to build an effective WTO, almost always outweigh the potential benefits of coercing friends to join sanctions in situations when the United States favors sanctions and they do not.”

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55. R. N. Haass (ed.), *Economic Sanctions and American Diplomacy*, Council of Foreign Relations, 1998.

56. A. Arnoe (ed.), *Iraq under Siege: The Deadly Impact of Sanctions and War*, Cambridge: South End Press, 2000.

57. R. Mangin, “Rapport d’information sur les sanctions internationales”, Assemblée nationale, Rapport No. 3203, 2001.

58. J. Mueller and K. Mueller, “Sanctions of Mass Destruction”, *Foreign Affairs*, vol. 78, May-June 1999.

59. A. Negre, “Surveiller ou punir. Embargos et sanctions à l’encontre de l’Irak de 1980 à 1998”, *Cahier Thucydide*, No ; 18, June 2017.

60. R. N. Haass (ed.), *Economic Sanctions and American Diplomacy*, op. cit.

In the light of such analysis, two factors illustrate the present upheavals concerning sanctions across the globe: first, the assertion of unilateral policy by the United States which together with secondary sanctions trivialises the scope of coercion of third parties while also constituting a form of geo-economic action; and secondly, the rising use of sanctions as part of power strategies by China and Russia.

### ***A geo-economic tool serving US unilateralism<sup>61</sup>***

The Trump administration's enthusiasm for economic coercion, in place of using armed force, is one of the main characteristics of US diplomacy today.<sup>62</sup> It reflects the unabashed unilateralism by this administration. The United States has reimposed secondary sanctions against Iran since 5 November 2018. This decision marks a break with the past, because it extends the scope of coercion to third parties, including European economic actors and other partners and allies of the United States. Ordinary or “primary” sanctions prohibit American citizens and companies from doing business with certain companies or individuals. By contrast, secondary sanctions prohibit Americans not only from doing business with companies and persons subject to sanctions, but also with third parties having relations with them.<sup>63</sup> For example, if a French bank has granted a loan to an Iranian company, then Americans could be prohibited from dealing with this bank, even if the loan is legal under French law. The results would be to cut off access to the US financial system for the French bank. As a lawyer in this field has noted:<sup>64</sup>

“A sanction is a legal instrument that is intended to apply to everyone. Such an instrument is misused when it is applied by the United States through secondary sanctions and when the US judicial system and the administration use it to put pressure on a particular party.”

Europeans are being led to reconsider the scope of restrictive measures, given their impact at two levels: first, economic actors (companies and banks) which by pursuing compliance (see above) find themselves having to respect American decisions to preserve their access to the American market

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61. R. D. Blackwill and J. M. Harris define geo-economics as “the use of economic instruments to promote and defend national interests in order to produce beneficial geopolitical results”, in: *War by Other Means: Geoeconomics and Statecraft*, Cambridge: Belknap/Harvard, 2016.

62. C. Stelzenmuller, “Hostile Ally: The Trump Challenge and Europe’s Inadequate Response”, Brookings Institution/Robert Bosch Transatlantic initiative, August 2019.

63 J. J. Lew and R. Nephew, “The Use and Misuse of Economic Statecraft”, *Foreign Affairs*, Vol. 97, November-December 2018.

64. Interview with a lawyer, September 2019.

and to protect themselves from prosecution by US judicial authorities; second, policymakers' decision-making autonomy is reduced in terms of defining objectives and targets, given the lack of alternative means for bypassing the dollar system and protecting their nationals.

**More worrying for the future are the risks of broader sanctions against European interests, following a deepening transatlantic rift on international issues.** This seems all the more likely as the Trump administration has shown considerable creativity in using or threatening to use sanctions in recent months:<sup>65</sup> for example, the worsening bilateral relationship with Turkey, provoked by the detention of American citizens in Turkey, led to the imposition of tariffs on Turkish steel and aluminium, by a presidential decision on 9 August 2018.<sup>66</sup> A further escalation is likely to follow with the imposition of secondary sanctions against Turkey, in response to its acquisition of Russian *S400* anti-aircraft missiles.<sup>67</sup> Lastly, the American president has raised the possibility of implementing sanctions on Chinese entities in reaction to the repression of the Uyghurs.<sup>68</sup>

Europe could also be directly affected if the United States adopts a set of enhanced sanctions against Russia. Threats of sanctions against the Nord Stream II project are known, but they could be combined with domestic US policy considerations, particularly against the backdrop of conflict between the administration and Congress.<sup>69</sup> These new measures can only aggravate transatlantic tensions by emphasising different approaches to geopolitics on the one hand, and the low importance which American authorities give to European economic actors on the other hand. The deteriorating relationship between China and the United States, in the context of technological rivalry, could also escalate sanctions. The struggle for technological supremacy is a major expression of Sino-American rivalry, and the American authorities could well have recourse to sanctions against European companies to prevent them from using Chinese components or technology.

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65. P. Harell, "Is the US Using Sanctions Too Aggressively? The Steps Washington Can Take to Guard against Overuse", *Foreign Affairs*, September 2018.

66. *Ibid.*

67. J. Taylor, "US Sanctions and Turkey's Purchase of Russian S400s Air Defense Systems", *Foreign Policy Research Institute*, available at: [www.fpri.org](http://www.fpri.org).

68. P. Harell, "Is the US Using Sanctions Too Aggressively? The Steps Washington Can Take to Guard against Overuse", *op. cit.*

69. France's *Assemblée nationale*, "Rétablir la souveraineté de la France et de l'Europe et protéger nos entreprises des lois à portée extraterritoriale", Report prepared by Raphael Gauvain, 26 June 2019.



## ***Sanctions as a power tool***

The increased reliance on geo-economic practices allows States to pursue their goals while containing the intensity of confrontation.<sup>70</sup> Indeed, leaving aside the emblematic case of the United States, numerous countries have resorted to sanctions to support their foreign policy goals. Three examples show this: the use of sanctions by China, by the Russian Federation, and finally the assertion of Japan as a geo-economic actor through the re-establishment of export controls on certain dual-use products shipped to South Korea.

### **China as a leading practitioner of geo-economics<sup>71</sup>**

The use of sanctions is a factor in China's growing international role. At the multilateral level, China has implemented international sanctions against Iran and the DPRK as part of the fight against the proliferation of weapons of mass destruction and their delivery systems.

Bilaterally, China is pursuing geo-economic goals by sanctioning regularly countries which either challenge its territorial claims or interfere in its foreign policy goals.<sup>72</sup> Compared to United States, which draws on formalised measures expressed through legal actions made public, China operates mainly through informal measures. These allow the authorities to deny any links between such measures and bilateral disagreements. Measures are selected in terms of identified weaknesses and are implemented variously. They range from: intensified customs and sanitary controls on imports from targeted countries (such as Norwegian salmon or bananas from the Philippines); to trade restrictions (cuts in rare earth exports to Japan); calls for boycotting of products or interests of the target country; direct pressure on foreign companies (South Korea's supermarket chain Lotte whose shops in China were closed for not complying with fire regulations); etc. The following table provides detail of measures taken since 2010.

The EU should pay careful attention to these developments, given the context of China asserting its foreign policy. These measures could become formalised at least partially. A proposed Export Control Law was published in 2017,<sup>73</sup> and has been submitted to public debate. The text sets out

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70. E. Fishman, "Even Smarter Sanctions: How to Fight in the Era of Economic Warfare", *Foreign Affairs*, Vol. 96, November-December 2017.

71. R. D. Blackwill, "America Must Play the Geoeconomics Game", *National Interest*, 2016, available at: <https://nationalinterest.org>.

72. P. Harrell, E. Rosenberg and E. Saravalle, "China's Use of Coercive Economic Measures", Center for a New American Century, June 2018.

73. PWC World Trade Management Services, "Who's in Control? China's Proposed Export Control Law", *Trade Intelligence Asia Pacific*, June-July 2018.

especially that China would apply retaliatory measures against any country which carries out discriminatory controls on its exports. Several foreign industry federations, especially American and Japanese, have expressed their concerns about this proposed law. In March 2019, China went further down this path by adopting a law on foreign investments. Its Article 40 authorises the Chinese authorities to apply the principle of reciprocity against jurisdictions that discriminate against Chinese investments. Lastly China is preparing to publish a blacklist or “distrusted entity list” including entities with which it is not advisable to have business relations.<sup>74</sup>

### Bilateral Sanction Regimes Adopted by China since 2010

	Calls for boycott	Import restrictions	Export restrictions	Pressure on companies from country	Cuts in tourism
Japan	X		X		
Norway		X			
Philippines		X			
Taiwan				X	X
South Korea	X	X		X	X
Australia	X				X
Mongolia		X			

Source: P. Harrell, E. Rosenberg and E. Saravalle, “China’s Use of Coercive Economic Measures”, Center for a New American Century, June 2018.

### The use of sanctions by Russia

Russia has extensive experience in geo-economics to promote its foreign policy interests, especially in its neighbourhood.<sup>75</sup> To this end, it has a wide range of levers, be they energy deliveries, infrastructure construction loans or direct investments. The use of sanctions is an integral part of this arsenal, as shown by the experience of Turkey in 2015 and Georgia in 2019.

From November 2015 to May 2017, the Russian government adopted a set of sanctions against Turkey, after a Russian military aircraft was shot down by the Turkish army on the Syrian border. Officially aimed at “ensuring national security and that of Russian citizens”, these measures

74. Interview at the Chamber of Commerce of the European Union in China, September 2019.

75. P. Aalto and T. Forsberg, “The Structuration of Russia’s Geoeconomy under Economic Sanctions”, *Asia Europe Journal*, Vol. 14, 2016, pp. 221-237.

included: the prohibition of charter flights between Russia and Turkey; the freezing of programmes by Russian tour operators planning to visit Turkish territory; the prohibition of Russian employers hiring Turkish workers as well as the reintroduction of visas for travel between the two countries; and an embargo on Turkish fruit and vegetables. Turkish airline companies also had to submit to more controls on Russian soil, “for security reasons”. In June 2019, in reaction to demonstrations in Tbilisi, which were protesting against Russia's alleged excessive influence in Georgia, President Putin signed a decree forbidding Russian airlines from flying to Georgia, in order to “protect the national security of the Russian Federation”.<sup>76</sup>

### **Japan as a geo-economic actor**

In July 2019, Japan announced that it was re-establishing export controls on certain dual-usage goods destined for South Korea, for reasons of national security. The selected goods are used in particular in the production of semiconductors, a key industry in South Korea. Observers immediately identified a link between this decision by the Japanese authorities and the restarting of bilateral litigation concerning the compensation of Korean forced labourers during World War II.<sup>77</sup> A ruling by a South Korean court had indeed opened the possibility for forced workers to claim reparations from the subsidiaries of Japanese companies in Korea, which the Japanese had refused, considering that the question of reparations was wholly settled by a bilateral agreement concluded in 1965. Apart from bilateral litigation relating to compensation following the Japanese wartime occupation, this issue is interesting for two reasons: on the one hand, it reveals a return to geo-economics as a tool of diplomacy; and on the other hand, the decision by Japan to exploit trade in bilateral litigation demonstrates a significant change, as Japan has been considered to be a traditional and unconditional champion of free trade.

## **The Need for a European Strategy**

### ***Sanctions as part of a power strategy to be constructed***

Despite the proliferation of sanctions regimes, restrictive measures are not a panacea, a universal remedy to be applied in all situations of international

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76. “Poutine interdit les vols vers la Géorgie sur fond de manifestations”, *Slate*, 22 June 2019, available at: [www.slate.fr](http://www.slate.fr).

77. M. Pollman, “What Is Driving Japan’s Trade Restrictions on South Korea?”, *The Diplomat*, 29 July 2019.

life, with the secret of their use merely being a question of dosage. In other words, it is important not to give into a “sanctions myth”.<sup>78</sup> To be effective, sanctions need to be part of an overall strategy and combine economic, diplomatic and military instruments which provide decision-makers with a range of adaptable and graduated options. They can allow cooperative strategies to be developed, as in the Joint Global Action Plan (JCPOA) with Iran, on the basis of a negotiated, controllable and reversible solution. Sanctions regimes may also participate in coercive strategies that may lead to military action, as with the Iraq war in 1990.

In the present context, which is marked by a return to power politics, the question of sanctions stresses the issue of economic security and the sovereignty of the EU. It underlines the inherent weakness of policies based on the “depoliticisation by law”.<sup>79</sup> In conducting its economic and trade policies, the EU has so far been able to avoid geopolitical interference and concentrate its efforts on developing its domestic market and its trading power. This explains why economic intelligence and geo-economics are not part of its toolkit.<sup>80</sup> This era seems to be over now due to Sino-US rivalry, which is bringing about a paradigm shift. Indeed apart from differences in their relationship to the EU, China and the United States have in common that they do not separate economics from geopolitics. Their rivalry is therefore both an economic and a security rivalry.<sup>81</sup> This duality is already having direct and destabilising consequences for the EU. On the one hand, the Union's historical ally is instrumentalising its centrality in the international economic and financial system in order to impose its decisions on the EU. On the other hand, the EU's main trading partner, which imposes certain investment and technology transfer practices on the Union, is also motivated by political and strategic goals.

## ***Retaking control of the situation***

As the French Minister for Economy and Finance, Bruno Le Maire, stressed after the United States re-established sanctions against Iran:<sup>82</sup>

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78. P. D. Feaver and E. B. Lorber, “The Sanctions Myth”, *National Interest*, 2015, available at: <https://nationalinterest.org>.

79. L. van Middelaar, *Quand l'Europe improvise*, Paris: Gallimard, 2018.

80. É.-A. Martin, “L'Union européenne va-t-elle se laisser acheter ? Principaux enjeux liés à l'adoption d'un cadre pour le filtrage des IDE dans l'Union européenne”, *Études de l'Ifri*, Ifri, March 2019.

81. On this point, see an excellent study by M. Leonard, J. Pisani-Ferry, E. Ribakova, J. Shapiro and G. Wolff, “Redefining Europe's Economic Sovereignty”, Bruegel and the European Council on Foreign Relations, *Policy Contribution Issue*, No. 9, June 2019.

82. “Bruno Le Maire veut bâtir des institutions financières européennes indépendantes des États-Unis”, available at: [www.novethic.fr](http://www.novethic.fr).

“Our priority is to build European financial institutions that are independent and sovereign and which provide financing channels for French, Italian, German, Spanish companies and those from any other country in the world, because it is for us Europeans to choose freely in full sovereignty with whom we wish to trade.”

The evolution of American policy emphasises quite brutally the great dependence of Europe on the international system created and dominated by the United States. Following the decision by the US president to pull-out of the nuclear agreement with Iran and establish secondary sanctions, the EU faces a threefold obstacle: the strength of the dollar as the international trading currency; the unavoidable nature of the international payments system, SWIFT; the dissuasive effect of extraterritorial US legal measures on European companies.

**Retaking control means the EU must regain autonomy in the implementation of sanctions.** To this end, the EU rapidly adopted a set of measures designed to reduce the effects of American decisions including:<sup>83</sup> (1) updating Council Regulation (EC) 2271/96 which establishes blocking status. This measure, which was adopted after America's first extraterritorial laws in 1996, prohibits European companies from submitting to US extraterritorial sanctions, and even provides for the possibility that they may obtain financial compensation as damages and interest for losses entailed by the execution of extraterritorial sanctions on EU territory;<sup>84</sup> (2) the enlarged mandate of the European Investment Bank (EIB) in making loans to third countries; (3) the establishment of confidence measures with Iran, including notably a budget of €50 million aimed at financing cooperative activities with Iran's private sector; (4) the creation of INSTEX (*Instrument for Supporting Trade Exchanges*), aimed at supporting legitimate European trade transactions with Iran. It has been envisaged that this will at first be limited to sectors most essential to the Iranian population, like pharmaceutical products, medical items and food products. These are goods exempted from the US sanctions regime by virtue of the Trade Sanctions Reform and Export Enhancement Act (TSRA) of 2000.<sup>85</sup>

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83. S. Lohmann, “Extraterritoriale US-Sanktionen”, *SWP Aktuell*, No. 31, May 2019.

84. Interview with Louis de Gaulle, *Défis*, No 9, 2018.

85. P. Dufourcq, “L’INSTEX : le nouvel instrument européen pour maintenir les transactions commerciales avec l’Iran”, *Dalloz Actualités*, June 2019.

## ***Finding effective counter-measures***

The above measures have proved insufficient since they were announced, if only because of the unavoidable nature of markets and the American currency, as well as significant litigation risks from the US judiciary. Through its president, the EIB has indicated that in the wake of the US decision to reimpose sanctions on the Islamic Republic, investing in Iran would threaten its global activities.<sup>86</sup> Washington has also recalled its determination to sanction companies using INSTEX to trade in anything apart from humanitarian goods. In reality, it is therefore the deterrent effect of US sanctions which has led most European countries to pull out of the Iranian market.

The goal of restoring EU autonomy can therefore only be achieved through a strategy of risk reduction, implemented over the long term. Such a strategy would imply having less recourse to the dollar by using substitution means, notably by reinforcing the international role of the euro and developing autonomous financial channels.

Several measures have been suggested to strengthen the European response and challenge the power of the United States. The following require particular attention:<sup>87</sup>

- The EU starts developing extraterritorial legislation, paralleling the American system and so counterbalancing it:<sup>88</sup> such measures would be adopted within the framework of regular legal actions and could extend the provisions of the European sanctions regime to the European subsidiaries of foreign companies, and could impose re-export controls on goods of European origin. More broadly, EU measures could extend to the fight against corruption or possibly the protection of personal data, etc.
- The EU could encourage European companies to challenge the application of extraterritorial measures in US jurisdictions, and could support such litigation:<sup>89</sup> this proposal is based on the observation that, in the very large majority of cases, incriminated European companies would not go through to court and would prefer compromise settlement by invoking a deferred prosecution agreement (DPA). The goal here would be precisely to override this procedure and to challenge

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86. Reuters, “La BEI ne veut pas prendre le risque d’investir en Iran”, Reuters, 18 July 2018, available at: <https://fr.reuters.com>.

87. For a more complete presentation of the possible options, see “Europe versus the Extraterritoriality of American Law”, *Fondation Res Publica*, No. 118, 24 September 2018.

88. “L’Europe face aux sanctions américaines, quelle souveraineté?”, Institut Jacques Delors, *Policy Paper*, No. 232, 23 October 2018.

89. S. Lohmann, “Extraterritoriale US-Sanktionen”, *op. cit.*

the applicability of provisions invoked in American jurisdictions, drawing on jurisprudence, especially the case of *Auer vs. Robbins* (1997), or the case of *Chevron USA vs. Natural Resources Defense Council* in 1984.

Although this path seems promising, negotiating with the authorities to reach an agreement entails less uncertainties and risks than proceedings in US courts, which may impose equivalent sentences in practice “a kind of death sentence for a company”.<sup>90</sup> Under such arbitration, companies take several risks into account, especially the uncertainties relating to the duration of court cases and their total cost. These factors are: firstly financial, in terms of fines imposed, on top of which precautionary measures could be decided by the prosecutor, such as withdrawing licenses; civil actions, especially liability actions which could follow sentencing; lastly, risks to companies’ reputations as these would be exposed to strong media attention. Convictions could also be accompanied by significant control measures, decided by US courts, which could be similar to guardianship of a company and so raise risks of sensitive business information being leaked. Lastly, as a lawyer pointed out in an interview, the administration retains the possibility of taking retroactive measures to annul such effects. Moreover, a settlement based on a DPA does not entail pleading guilty.

Some lawyers advocate a different approach based on a well-established doctrine which is little-known, apart from by certain magistrates and arbitration practitioners.<sup>91</sup> This approach makes it possible to determine situations in which extraterritoriality is not applicable. This could open up the possibility for companies experiencing sanctions to file reparation claims against the issuing State, on the basis of the international protection of investments, notably bilateral treaties on investments or via the International Center for Settlement of Investment Disputes (ICSID).

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90. Interview with a lawyer, September 2019.

91. Interview with a lawyer, September 2019.





## Conclusion

The years between the end of the Cold War and the start of this decade were a favoured moment for the EU in the use of restrictive measures as a tool of foreign policy, and as a means for serving the multilateral, international order. Indeed, the EU benefited from the involvement of the United Nations Security Council and convergence with the United States over goals. This favoured period was crowned at the same time as it reached its high point, with the management of the Iranian crisis and the conclusion of the Vienna agreement in 2015. However, in contrast to the federal United States, the EU has neither the competencies nor specialised agencies to ensure the implementation of its decisions and so must rely on its Member States, while also submitting to review by the Union's courts.

The recent changes in sanctions regimes have led to their reconsideration, because sanctions are fundamentally an expression of power. The use of secondary sanctions by the Americans against their European allies is a major development. It reflects a profound worsening in transatlantic relations, as well as an erosion of values on which the international liberal order was built. Even if certain recognised experts<sup>92</sup> have warned the Trump administration against the risk of over-using sanctions as a weapon, the present situation does not seem to be changing rapidly, if for no other reason than the balance of political forces in Washington.<sup>93</sup> Over the longer term, this policy has put the analyses of geo-economics formulated by Edward Luttwak (in the 1990s) back on the agenda.<sup>94</sup> It also magnifies the weaponization of interdependence.<sup>95</sup> If Washington's present sanctions policy is pursued, it will weaken the bases on which the authority and prosperity of the United States are built, by constraining States that are opposed to US sanctions to formulate avoidance strategies. Furthermore, the brutal use of this instrument, especially to force regime change, contradicts the lessons learned from the implementation of sanctions over the long term (see above).

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92. J. J. Lew and R. Nephew, "The Use and Misuse of Economic Statecraft", *op. cit.*

93. P. E. Harrell and E. Rosenberg, "Economic Dominance, Financial Technology, and the Future of US Economic Coercion", CNAS, April 2019.

94. E. N. Luttwak, *Le Rêve américain en danger*, Paris: Odile Jacob, 1995.

95. See in particular M. Leonard (ed.), "Connectivity Wars", European Council on Foreign Relations, January 2016.

In this context, the priorities of the EU should be to develop a range of defensive means, if not to neutralise then at least to contain the impact of instruments which may be used against it in the future. The use of sanctions as a weapon could indeed be combined with a wide array of tools, such as extraterritorial regulations, export controls (notably concerning “emerging and foundational technologies” which were isolated within the framework of the export control reform act in 2018),<sup>96</sup> investment screening mechanisms and anti-corruption regulation.<sup>97</sup> As things stand, the responses provided by the EU are insufficient, because they do not reflect the scope of changes taking place. Lastly, they underline the fact that much needs still to be done by the EU in asserting a certain level of autonomy and the urgency in overcoming its ambiguous relationship to power. This is a central question – if not for the existence of the European Union, then at least for its future prosperity.

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96. *Export Control Reform Act*, implemented in the framework of the *National Defense Authorisation Act for Fiscal Year 2019*.

97. É.-A. Martin, “L’Union européenne va-t-elle se laisser acheter ? Principaux enjeux liés à l’adoption d’un cadre pour le filtrage des IDE dans l’Union européenne”, *op. cit.*

# Annex: The Main Areas of Restrictions Implemented by EU Sanctions Policies

## TRADE RESTRICTIONS (EXPORTS OF GOODS AND SERVICES)

*Depending on the regime in question, these restrictions relate to sales, exports, the transfer and supply of goods and services from the EU. Import restrictions may be added to these export restrictions concerning goods, with the aim of reducing the foreign currency resources available to target countries.*

### **Weapons of war**

Goods registered on the EU Common Military List (equipment covered by Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment).

Possible related services may be added, such as brokerage, technical or financial assistance.

### **Equipment used for internal repression**

Goods on a variable parameter list (see the Syria regulation);<sup>98</sup> this prohibition may be coupled with the provision of related services (maintenance/repair).

### **Dual-use goods**

List in Annex I of regulation 428/2009 as amended.

Goods, computer programs and technologies may be added as supplementary sanctions against the Democratic People's Republic of Korea (DPRK).

Related services such as brokering as well as technical and financial assistance may be added.

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98. Exports to Syria of equipment, goods and technologies likely to be used for domestic repression are prohibited, in compliance with Annexes IA and IX of the Council Regulation (EU) n° 36/2012. The supply of technical and financial assistance as well as related services is also prohibited.

<b>Telecommunication surveillance and interception or cyber-surveillance equipment</b>	There is no reference lists but for illustration see the list defined for sanctions against Syria.
<b>Hydrocarbons (industry and production)</b>	<ul style="list-style-type: none"> <li>- import ban on crude oil and petroleum products;</li> <li>- import ban on petrochemical products;</li> <li>- prohibition of supplying certain services (linked to crude oil, petroleum products and petrochemical products);</li> <li>-under embargo of key equipment and technologies for the petrochemical industry;</li> <li>-prohibition of supplying certain services (to the petrochemical industry);</li> <li>-prohibition of certain investments (to the petrochemical industry).</li> </ul>
<b>Other goods</b>	Gold, precious metals, diamonds, luxury products (North Korea), <sup>99</sup> restrictions on trade in cultural goods (Iraq, Syria). <sup>100</sup>

RESTRICTIONS ON THE CIRCULATION OF PERSONS	
<b>Visa or travel bans</b>	Persons targeted by a travel ban will be refused entry into the EU. Where visas are necessary to enter the Union, persons facing entry restrictions will have their visa refused. <sup>101</sup>

99. It is forbidden to export, import or provide brokering services for gold, precious metals, as well as diamonds, as set out in Annex IX of Council Regulation (EU) 2017/1509, going to or coming from the government of the DPRK. Purchases from the DPRK of gold, titanium, vanadium, rare earths, copper, nickel, silver and zinc, listed in Article IV of Council Regulation (EU) are also prohibited.

100. It is forbidden to import, export, transfer or provide brokering services concerning cultural goods and other items in relation to their archaeological, historical, cultural, scientific and religious importance, including those listed in Annex XI of Council Regulation (EU) No 36/2012, which were illegally taken from Syria as of 15 March 2011.

101. Member States implement travel restrictions applicable to persons listed in an Annex to Council Decision (CFSP) 2016/1693, as well as persons designated by the United Nations Security Council in pursuant to resolutions 1267 (1999), 1333 (2000) and 2253 (2015) of the United Nations or by the United Nations Security Council Sanctions Committee on Al-Qaida, Daesh and ISIL.

ECONOMIC AND FINANCIAL RESTRICTIONS<sup>102</sup>

*The choice of measure depends on the objective pursued and the degree of development of finance in the target country.*

**Freezing assets**

The freezing of assets concerns funds and economic resources held or controlled by designated persons or entities. Access to these funds, divestment, as well as transfers are no longer possible.

The freezing of assets is the principle lever of individual sanctions and a key measure in the sanctions regime implemented in reaction to the imprisonment of funds belonging to a State (ill gotten gains).

The freezing of assets includes prohibiting EU citizens and companies from providing resources to designated entities or persons.

**Restrictions on financing in the target country: banking finance, market finance, bilateral aid, multilateral credits, etc.**

Bans on loans and transfers of funds.

**Restrictions on investments**

**Such measures aim both at establishments in the target country and by the target country in the emitting country**

These relate to sectors linked to those subject to sanctions, for example, the oil and gas sector for sanctions against Iran and Syria,<sup>103</sup> or in real estate profiting certain designated entities in Crimea and Sevastopol.

**Restrictions or controls relating to banking transactions**

Restrictions using a particular currency, access to the SWIFT interbank network, establishing relationships with corresponding banks, etc.

**Freezing of one or several banks**

May lead to the prohibition of business relationships, authorised in principle, which gives this measure great scope.

102. "Sanctions économiques : quelle leçon à la lumière des expériences passées et récentes ?", *Lettre du Trésor*, No. 150, July 2015.

103. It is forbidden to invest in the oil and gas industries in Syria or in the construction of electricity generating plants.

SPECIFIC CONTROLS	
<b>Inspection of goods coming from or during shipment to certain destinations</b>	Example: the obligation to provide prior information to competent authorities in Member States about certain cargos destined for or coming from Eritrea.
<b>Restriction on air routes</b> <b>Restrictions on access to ports</b>	<ul style="list-style-type: none"> <li>- Undertaking to inspect ships and aircraft destined for or coming from sanctioned countries, if certain conditions are met.</li> <li>- Undertaking to refuse permission to aircraft to land, take-off or fly over the territories of Member States, under certain conditions (Libya).</li> </ul>
<b>Vigilance towards the diplomatic staff of a State</b>	Member States exercise enhanced vigilance with respect to diplomatic personnel from the DPRK to prevent certain persons from contributing to nuclear or ballistic missile programmes of the DPRK or in other banned activities. <sup>104</sup>

<sup>104</sup>. “Restrictive Measures in Relation to the Non-Proliferation of the Weapons of Mass Destruction (WMD)”, EU Sanctions Map, North Korea, available at: [www.sanctionsmap.eu](http://www.sanctionsmap.eu).



