Building Resilience Against Secondary Sanctions in an Increasingly Polarized World

The Amendment of the EU Blocking Statute

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Abstract

The spectre of foreign secondary sanctions is looming large again in the European Union after the reinstatement in 2018 of US sanctions with extraterritorial effects on Iran. However, in a context of increasing global polarization and geopolitical tensions, the challenge of secondary sanctions goes beyond US sanctions against Iran. The EU 1996 blocking statute is aimed at countering the negative effects that these sanctions have in the European Union, but there is a general consensus that it has failed to preserve the Union's interests. This article analyses the challenges that secondary sanctions pose in the European Union and the current response provided by the blocking statute. It suggests that an amended statute may play an important role within the broader European policy against secondary sanctions, although it is not by itself a sufficient mechanism. It concludes by suggesting how the statute could be amended to better achieve its objectives.

Keywords: sanctions, economic sanctions, secondary sanctions, European Union, blocking statute.

A Introduction

During the last several decades, economic sanctions have become a key instrument used by states and international organizations to promote foreign policy objectives. Among these measures extraterritorial sanctions, also known as secondary sanctions, are particularly controversial, as they impose obligations on individuals and entities that are usually outside the sanctioning state's jurisdiction. To date, the United States has led the way in this area by drawing on its unchallenged international economic leverage to impose unilateral secondary sanctions when multilateral cooperation has failed to fulfil its foreign agenda. This approach has been widely criticized for being contrary to public international law and has resulted in tensions between Washington and many of its traditional allies, including, in particular, the European Union.

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The divergent views between the United States and the European Union with respect to the strategy to be followed by western countries in their relations with Cuba and Iran resulted in the implementation by the European Union of a blocking statute in 1996.[1] Its objective was initially to counter certain US unilateral sanctions strengthening the embargo against Cuba, including measures with extraterritorial effects,[2] in order to preserve "the harmonious development of world trade", "the progressive abolition of restrictions on international trade" and the "free movement of capital between Member States and third countries" in the face of third-country sanctions with extraterritorial effects.[3] In the late 1990s, the blocking statute, together with dispute resolution proceedings filed by the European Union with the World Trade Organization (WTO), forced Washington to reach an agreement with Brussels and drop the secondary sanctions affecting European private actors.

Through the remainder of the Clinton administration and during the Bush and Obama administrations, the United States and the European Union generally coordinated the implementation of their economic sanction regimes, and the EU blocking statute, although in force, was set aside. But the spectre of secondary sanctions loomed large again in the European Union when the Trump administration decided to withdraw from the landmark 2015 Iranian nuclear deal,[4] which it did on 8 May 2018,[5] and to reinstate certain US sanctions with extraterritorial effects.[6] The European Union reacted by amending the EU blocking statute in June 2018 to include within its scope of application the new US sanctions on Iran.[7] But the decision by the United States and the consequences of its secondary sanctions have raised some concerns in Europe regarding the effectiveness of the statute. In the opinion of Mr Gerard Hogan, Advocate General of the European Court of Justice (ECJ), the existing tension between the US sanctions regime and the statute creates "geopolitical problems" and "unresolved legal issues and a variety of intensely practical problems", as a result of which European undertakings face "impossible – and quite unfair– dilemmas" when doing business with companies and individuals targeted by US sanctions.[8]

1 Council Regulation (EC) 2271/96 of 22 November 1996, protecting against the effects of the extraterritorial application of legislation adopted by a third country and actions based thereon or resulting therefrom [1996] OJ L309/1 (Blocking Statute).
2 Cuban Liberty and Democratic Solidarity (Libertad) Act, 22 USC § 6021 (1996).
3 Blocking Statute (n 1), recitals 1 and 2.
4 Joint Comprehensive Plan of Action [2015] (JCOPA).
5 Mark Landler, 'Trump Abandons Iran Nuclear Deal He Long Scorned' *The New York Times* (New York, 8 May 2018), www.nytimes.com/2018/05/08/world/middleeast/trump-iran-nuclear-deal.html [https://perma.cc/QRV8-VX3C].
6 U.S. Department of Treasury, 'U.S. Government Fully Re-Imposes Sanctions on the Iranian Regime as Part of Unprecedented U.S. Economic Pressure Campaign' (Press Release) (5 November 2018), https://home.treasury.gov/news/press-releases/sm541 [https://perma.cc/R9PG-WVT3].
7 Commission Delegated Regulation (EU) 2018/1100 of 6 June 2018, amending the Annex to Council Regulation (EC) 2271/96, protecting against the effects of extraterritorial application of legislation adopted by a third country and actions based thereon or resulting therefrom [2018] OJ L199 I/1.
8 Case C-124/20 *Bank Melli Iran* [2021] ECJ [12 May 2021], Opinion of AG Hogan, para. 5.

The European legislature is not unaware of these difficulties. Indeed, a communication from the European Commission dated 19 January 2021[9] emphasizes that "increasing the EU's resilience to the effects of the unlawful extra-territorial application of unilateral sanctions [...] by third countries" is key to reinforcing the European Union's "open strategic autonomy in the macro-economic and financial fields" and "will benefit the EU's openness, strength and resilience". It notes that although

> the Blocking Statute has provided EU response to the extra-territorial application of sanctions, [...] the proliferation of such sanctions requires a deeper debate on possible additional measures to increase deterrence and, if needed, to counteract them.[10]

In this context, both the Advocate General and the European Commission have proposed amending the EU blocking statute to enhance its effectiveness in countering the effects of secondary sanctions in Europe.[11]

This article analyses the potential amendment of the EU blocking statute as part of the European Union's toolkit to mitigate the impact of third-party secondary sanctions. The first part of the article discusses the concept of secondary sanctions and the increasingly popularity of their use among major international economies, as well as the threat their proliferation poses to the core values and interests of the European Union and its private operators. In view of these circumstances, the second part of the article presents the EU blocking statute as the current legislative response to secondary sanctions. Taking into account various institutional and stockholder perspectives, it suggests how it could be amended to optimize its effectiveness within the context of a broader European strategy against the use of sanctions with extraterritorial effects.

The purpose of this article is neither to endorse nor to criticize the use of sanctions as a means to achieve foreign policy ends; nor is it to analyse the legality of secondary sanctions under international law. Instead, the objective is to identify the challenges that the European Union faces in light of the increasing popularity of extraterritorial sanctions and to assess how the amendment of the blocking statute could foster the European Union's strategic autonomy and resilience.

B The Challenge of Secondary Sanctions: An Actual Risk for the European Union's Strategic Autonomy and Resilience

The use of targeted economic sanctions by major international actors proliferated during the late 1990s as a powerful foreign policy instrument, and such sanctions have become "integral features of many states' regulatory systems".[12] Sanctions

9 Commission, 'The European Economic and Financial System: Fostering Openness, Strength and Resilience' (Communication) COM (2021) 32 final.

10 Ibid. 1, 15 and 19.

11 Blocking Statute (n 1), recital 6; and Communication COM (2021) 32 final (n 9) 19.

12 Kern Alexander, *Economic Sanctions, Law and Public Policy* (Palgrave Macmillan 2009) 1.

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regimes sometimes include measures with extraterritorial effects, and secondary sanctions are the most contested and controversial measures within this category. Tensions and controversies have arisen when the foreign policy approaches of the European Union and the United States have diverged, leading in some cases to the imposition of unilateral secondary sanctions by Washington. In the context of increased globalization and asymmetric international relations, US unilateral extraterritorial sanctions have created major challenges for European undertakings and for the European Union's control over its foreign policy agenda. These difficulties may be exacerbated in the future as polarization continues to expand both domestically and internationally. Part one of this section focuses on the development and increasing popularity of secondary sanctions as essential foreign policy instruments since the 1980s, setting out their main features and providing some examples of their use over the years. Part two addresses the challenges that secondary sanctions pose for the European Union and its business undertakings.

I The Proliferation of Secondary Sanctions in an Increasingly Polarized World

The term 'sanction' has a wide range of meanings in the legal field. It is generally used to refer to "[a] provision that gives force to a legal imperative by either rewarding obedience or punishing disobedience".[13] More specifically, the term is used in international relations and international law to refer to measures adopted by one state or an international, supranational or regional organization to "compel [another state] to obey international law or to punish it for a breach of international law".[14] Indeed, the *Black's Law Dictionary* defines sanction in the field of international law as "[a]n economic or military coercive measure taken by one or more countries toward another to force it to comply with international law".[15]

But sanctions in international relations are no longer restricted to measures adopted by international actors against a state as a result of a breach of international law.[16] They also include

> non-forcible (i.e., non-military) foreign policy measures adopted by states or international organizations and designed [...] to influence state or non-state entities or individuals to change their behaviour or take a particular course of action,[17]

with the aim of promoting "a wide variety of policies".[18] Therefore, international sanctions are not just mechanisms to respond to unlawful behaviours by states. More broadly, today they serve to show disagreement with or disapproval of undesired – although not necessarily unlawful – practices of a target state and to

13 'Sanction', *Black's Law Dictionary* (11th edn, Thomson Reuters 2019).
14 Gordon Richard, Smyth Michael and Tom Cornell, *Sanctions Law* (Hart Publishing 2019) para. 0.3.
15 'Sanction' (n 13).
16 Richard (n 14) para. 0.4.
17 Ibid. para. 0.4.
18 John H. Jackson, William J. Davey and Alan O. Sykes, *Legal Problems of Economic Relations. Cases, Materials and Text* (7th edn, West Academic Publishing 2021) 1092.

put pressure on it to change them.[19] Undesirable policies or behaviours have traditionally included, for example, acts of warfare, violations of human rights or failures to counter terrorism or drug trafficking.[20]

Sanctions are, accordingly, part of a range of foreign policy instruments available to states and international organizations. They usually take the form of economic measures "restricting commercial or financial exchange" and may be implemented in a variety of ways, including embargoes, asset freezing, restrictions of financial transactions, restrictions on communications or travel bans, which may be targeted at states at large or at specific natural or legal persons, such as political and economic leaders.[21]

Some of the most recent examples arose in connection with the military coup in Myanmar on 1 February 2021[22] and the brutal repression of anti-coup peaceful demonstrators that followed.[23] In the wake of the crisis in the South-eastern Asian country, the European Union and the United States implemented sanctions affecting various individuals and entities.[24] For example, in June 2021 the European Union imposed sanctions targeted at ministers, deputy ministers and the attorney general of Myanmar, who were deemed "responsible for undermining democracy and the rule of law and for serious human rights violations in the country".[25] Legal entities owned by the Burmese state or controlled by its military were also targeted, on the grounds that they were "contributing directly or indirectly to the military's revenues or activities".[26] The sanctions included asset freezes, cutting off financial assistance, a travel ban within the EU territory, embargoes and export restrictions on arms and other equipment, or the prohibition of military training and military cooperation.[27]

Western countries' concerns about Alyaksandr Lukashenka's regime in Belarus provide another recent example of the use of economic sanctions. For instance, the United States has recently expanded its sanctions regime in light of the

19 Andreas F. Lowenfeld, *International Economic Law* (Oxford University Press 2002) 698.

20 Tomás Szabados, *Economic Sanctions in EU Private International Law* (Hart Publishing 2019) 7; and Jackson (n 18) 1092.

21 Szabados (n 20) 7; and Jackson (n 18) 1092.

22 Russel Goldman, 'Myanmar's Coup, Explained' *The New York Times* (New York, 1 February 2021; updated on 10 January 2022), www.nytimes.com/article/myanmar-news-protests-coup.html [https://perma.cc/8525-UQQN].

23 Richard C. Paddock, 'Days of Killings and Defiance in Myanmar, With Neither Side Relenting' *The New York Times* (New York, 14 March 2021; updated on 11 April 2021), www.nytimes.com/2021/03/14/world/asia/myanmar-protests-killings.html [https://perma.cc/FG6Q-SEZ3].

24 'EU and U.S. Sanctions Step Up Pressure on Myanmar Military Over Coup' *Reuters* (21 March 2021), www.reuters.com/article/us-myanmar-politics-idUSKBN2BE074 [https://perma.cc/9GS2-Z5WE].

25 Council of the European Union, 'Myanmar/Burma: Third Round of EU Sanctions Over the Military Coup and Subsequent Repression' (Press Release) (21 June 2021), www.consilium.europa.eu/en/press/press-releases/2021/06/21/myanmar-burma-third-round-of-eu-sanctions-over-the-military-coup-and-subsequent-repression/ [https://perma.cc/VXK9-WNNB].

26 Ibid.

27 Ibid.

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infringements of international law and human rights by the Belarus government.[28] In addition to imposing "restrictions on dealings in new issuances of Belarusian sovereign debt in the primary and secondary actions",[29] the U.S. Department of the Treasury ordered the blocking of "all property and interests in property of the designated individuals [...] that are in the United States or in the possession or control of U.S. persons" and prohibited "all dealings by U.S. persons or within the United States (including transactions transiting the United States) that involve any property or interests in property of blocked or designated persons".[30]

At this writing, the war is raging in Ukraine following Russian President Vladimir Putin's decision to invade the country in late February 2022. Prior to the attack, the United States and its European allies threatened Russia with financial, technological and military sanctions 'with massive consequences' that would be immediately deployed if President Putin decided to take military action in Ukraine.[31] Following the recognition of the independence of the eastern Ukrainian regions of Donetsk and Luhansk and the subsequent military invasion of Ukraine, the European Union and the United States, as well as many other countries – including Switzerland – have implemented an unprecedented coordinated package of sanctions as an alternative to the military intervention in the conflict. The sanctions target President Putin himself, his closest internal supporters and many Russian oligarchs, Russian Foreign Minister Sergey V. Lavrov, the Russian banking system – including the Russian Central Bank – and Russia's access to Western financial markets and critical technology, in an effort to "crack down on Russia".[32] Apart from traditional economic sanctions – such as asset freezes, travel bans, embargoes or restrictions on exports, among others – Brussels and Washington have also implemented stronger measures such as excluding some Russian banks

28 U.S. Department of the Treasury, 'Treasury Expands Sanctions Against Belarusian Regime with Partners and Allies' (Press Release) (2 December 2021), https://home.treasury.gov/news/press-releases/jy0512 [https://perma.cc/M4UD-4J48].

29 Ibid.

30 Ibid.

31 David E. Sanger and Eric Schmitt, 'U.S. Details Costs of a Russian Invasion of Ukraine' *The New York Times* (New York, 8 January 2022), www.nytimes.com/2022/01/08/us/politics/us-sanctions-russia-ukraine.html [https://perma.cc/LJY4-9R5B]; and The White House, 'Background Press Call by Senior Administration Officials on Russia Ukraine Economic Deterrence Measures' (Statement) (25 January 2022), www.whitehouse.gov/briefing-room/statements-releases/2022/01/25/background-press-call-by-senior-administration-officials-on-russia-ukraine-economic-deterrence-measures/ [https://perma.cc/45MQ-6U34].

32 'How the World Is Seeking to Put Pressure on Russia' *The New York Times* (New York, 4 March 2022), www.nytimes.com/article/russia-us-ukraine-sanctions.html [https://perma.cc/9GVK-DDSH]. *See also* The White House, 'Joint Statement on Further Restrictive Economic Measures' (Statement) (26 February 2022), www.whitehouse.gov/briefing-room/statements-releases/2022/02/26/joint-statement-on-further-restrictive-economic-measures/ [https://perma.cc/YNC8-4BMG]; U.S. Department of the Treasury, 'Treasury Sanctions Russians Bankrolling Putin and Russia-Backed Influence Actors' (Press Release) (3 March 2022), https://home.treasury.gov/news/press-releases/jy0628 [https://perma.cc/H7LX-D387]; and Mark Landler, Katrin Bennhold and Matina Stevis-Gridneff, 'How the West Marshaled a Stunning Show of Unity Against Russia' *The New York Times* (New York, 5 March 2022), www.nytimes.com/2022/03/05/world/europe/russia-ukraine-invasion-sanctions.html?referringSource=articleShare [https://perma.cc/7VGQ-6JUW].

from the SWIFT system, the essential Belgian-based messaging system for international financial transactions.[33]

These are only some very recent examples of the use of economic sanctions by the European Union and the United States. But recourse to these types of measures is by no means new in the international arena.[34] Since the beginning of the twentieth century, countries have frequently resorted to sanctions to effectively conduct their foreign policies in lieu of military action. As US President Wilson said, "[a]pply this economic, peaceful silent, deadly remedy and there will be no need for force".[35] But it was during the 1990s that economic sanctions became particularly popular.[36] Especially since the 11 September attacks, major international powers, led by the United States, incorporated targeted economic sanctions in their foreign policy toolkit as one of the most powerful instruments in this area.[37] In fact, they are nowadays a major foreign policy instrument and have become "integral features of many states' regulatory systems".[38]

However, these measures are highly controversial. Their increasingly common use has resulted in major economic and social consequences not only for targeted states, individuals or entities but also for the state's citizens and third parties.[39] In addition, their potential extraterritorial effect is a source of tensions and disputes between states. The effects of sanctions regimes implemented by different countries cannot be easily contained, and by their international nature they involve a risk of conflict between overlapping jurisdictions.[40]

State practice is usually divided in this area between the territorial and the extraterritorial approach to jurisdiction. The territorial approach aligns the scope of application of economic sanctions with the territorial jurisdiction of the sanctioning state, defined as the "[j]urisdiction over cases arising in or involving persons residing within a defined territory".[41] In this case economic sanctions must be complied with by individuals and entities that are nationals from,

33 David E. Sanger, Alan Rappeport and Matina Stevis-Gridneff, 'The U.S. and Europe will Bar Some Russian Banks from SWIFT' *The New York Times* (New York, 26 February 2022), www.nytimes.com/2022/02/26/us/politics/eu-us-swift-russia.html [https://perma.cc/MZF5-CHV7]. However, the potential long-term effects of this measure raised concerns among some western countries. *See infra* Section I.2.

34 However, as noted previously, the scope of the sanctions imposed on Russia is certainly unprecedented.

35 President Thomas Woodrow Wilson, quoted in Richard (n 14) para. 4.1.

36 Richard (n 14) paras. 4.1 and 4.3.

37 Alexander (n 12) 1.

38 Ibid.

39 Ibid.

40 Richard (n 14) para. 0.9.

41 'Territorial Jurisdiction', *Black's Law Dictionary*.

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incorporated in or who operate in the sanctioning state.[42] The extraterritorial approach relies on the effects doctrine to expand the scope of application of sanctions beyond the territorial jurisdiction of the state.[43] Although justifying the extraterritorial jurisdiction of a state, the effects doctrine is, in fact, ultimately related to the territorial jurisdiction. It extends the jurisdiction of a state beyond its borders when a conduct abroad has effects within its territory.[44]

Most unilateral sanctions implemented by the United States are subject to its territorial jurisdiction and are therefore limited to the activities of "US persons"[45] in their dealings with targeted individuals or entities.[46] Yet in some circumstances

42 As observed by Professor Mark W. Janis, William F. Starr Professor of Law at University of Connecticut Law School, "the principle of the territorial jurisdiction of states is probably the most important [among the several principles justifying a state's assertion of jurisdiction under international law.] The principle of territorial jurisdiction stems from the most essential attributes of state sovereignty: a distinct and delineated territory, a known and loyal population, and a government capable of acting independently both at home and abroad. [...] At least since [the Peace of Westphalia of 1648] [...], the principles of territorial sovereignty and the jurisdiction of states have been two of the most fundamental principles of international law." Professor Janis notes the U.S. Supreme Court recognized in 1812 the "full and absolute territorial jurisdiction [...] of every sovereign", and imposed "strict territorial limits on state jurisdiction" in the 1909 case *American Banana Co v. United Fruit Co.*, where the Court refused to extra-territorially apply the U.S. federal antitrust regulations. The Court held that "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done". However, Professor Janis indicates that nowadays the principle of territorial jurisdiction is "universally accepted, though no longer is it thought of as constituting the exclusive basis for the assertion of state jurisdictional authority. Rather, territoriality is seen as one of several foundations of jurisdiction, albeit the most fundamental". Mark W. Janis, *International Law* (7th edn, Wolters Kluwer 2016) 334-336.

43 Alexander (n 12) 79.

44 Professor Janis notes that the Permanent Court of International Justice recognized the effects doctrine of jurisdiction in the Lotus case in 1926. The main question before the Court was "whether Turkey had violated 'the principles of international law' by asserting criminal jurisdiction over a French officer who had been navigating a private French vessel when it collided with and sank a Turkish ship on the high seas". The Court held that Turkey had not violated international law by extending its jurisdiction over the French officer and "trying him for violating Turkish law while outside Turkish territory", even if he was in French territory at the time of the collision, as long as he navigated a French-flag vessel. In the United States, the effects doctrine was developed in the Supreme Court case *United States v. Aluminum Co.* in 1945, where the Court held that "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize". However, in *Morrison v. National Australian Bank Ltd. (2010)*, the Supreme Court ruled that there is a "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdictions of the United States'". Janis (n 42) 337-340.

45 'US persons' refers in the field of international economic sanctions to US nationals, legal resident aliens in the US, any individual in the US and legal entities incorporated under the laws of the US or any of its states, including foreign branches. In this respect, a foreign legal entity is considered as a foreign branch if the US entity owns at least 50% of its share capital, controls the board of directors of the foreign entity or directs the operations of the foreign entity. *See* José L. Iriarte Ángel, 'La Ley Helms-Burton proyecta su sombra sobre la jurisprudencia española y la legislación de la Unión Europea' ('The Helms-Burton Act casts Its Shadow Over the Spanish Case-Law and the European Union Legislation') (2020) 11 Bitácora Millennium DiPr footnote 2.

46 Jeffrey A. Meyer, 'Second Thoughts on Secondary Sanctions' (2009) 30 University of Pennsylvania Journal of International Law 925.

US sanctions programmes may controversially give rise to extraterritorial liability,[47] and since the 1980s this type of sanctions has become an "'ordinary' tool of American foreign policy".[48] They may be employed, for example, when foreign US-majority-owned subsidiaries are involved, when an act or omission causes a violation in the United States, when US-origin goods are re-exported to targeted states or when US dollar assets are held or managed abroad.[49]

In this respect, secondary sanctions are the most contested type of sanctions with extraterritorial effects.[50] They are

> any form of economic restriction imposed by a sanctioning or sending state (e.g., the United States) that is intended to deter a third-party country or its citizens and companies (e.g., France, the French people and French companies) from transacting with a sanctions target (e.g., a rogue regime, its high government officials, or a non-state terrorist entity).[51]

In other words, they are economic sanctions with effects on non-US persons, regardless of whether or not the foreign individual or entity involved in a transaction or the transaction itself has any connection whatsoever with the United States.[52]

Because secondary sanctions are directed at a neutral third party,[53] they "provide an effective means for states to influence the activities of foreign firms and individuals operating abroad".[54] They presuppose, by definition, that the affected third-party's country has not adopted any equivalent measures, because it has preferred either a neutral stance or a different policy vis-à-vis the targeted state.[55] Therefore, the rationale and underlying purposes of secondary sanctions are in conflict with the principle of sovereign equality among states under public international law.[56]

47 The US reliance on extraterritorial jurisdiction is a controversial issue that is also beyond international sanctions. Indeed, as observed by Professor Janis, "[t]he United States has been sometimes criticized as employing extra-territorial effects jurisdiction too extensively". Janis (n 42) 339.

48 Gary H. Perlow, 'Taking Peacetime Trade Sanctions to the Limit: The Soviet Pipeline Embargo' (1983) 15 Case Western Reserve Journal of International Law 257-258.

49 Richard (n 14) para. 4.21, and Alexander (n 12) 80.

50 Richard (n 14) para. 4.21; and Meyer (n 46) 926.

51 Meyer (n 46) 926.

52 Iriarte Ángel (n 45) footnote 3.

53 Daniel Meagher, 'Caught in the Economic Crosshairs: Secondary Sanctions, Blocking Regulations, and the American Sanctions Regime' (2020) 89 Fordham Law Review 4.

54 Meyer (n 46) 930.

55 Ibid. 926.

56 The principle of sovereign equality is recognized by Art. 2(1) of the United Nations Charter and by the U.N. General Assembly Resolution 2626 (XXV), 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations'. In the words of R. P. Anand, former Professor at Jawaharlal University, New Delhi, "[i]n the absence of any supra-national body, all States claim to be sovereign subject to no one's authority both in their internal and external affairs". R. P. Anand, 'Sovereign Equality of States in International Law' (1986) Collected Courses of the Hague Academy of International Law 23.

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Some foreign policy divergences between the European Union and the United States are a good example of this. Brussels and Washington do not always coordinate their sanctions policies. Sometimes their foreign policies clash and tensions arise from their divergent approaches to the implementation of sanctions.[57] In these cases, the United States tends to have recourse to sanctions with extraterritorial effects unilaterally, whereas the European Union usually prioritizes consensus and restricts the territorial effects of sanctions, focusing primarily on targeted states and their nationals.[58]

The declaration of martial law in Poland in 1981 in the wake of the Solidarity Movement[59] and the construction of a natural gas pipeline between the former Soviet Union and Western Europe[60] is one of the earliest and most well-known examples of a foreign policy clash between the United States and Europe involving secondary sanctions. On 13 December 1981, the Polish government declared martial law to counter political opposition led by the trade union organization Solidarity against the Polish Communist Party. The members of the North Atlantic Treaty Organization (NATO) feared that the Soviet Union might intervene in Poland to prevent the spread of the crisis to other territories, which would threaten the stability of the communist regimes and the integrity of the Warsaw Pact. While the NATO allies coordinated their foreign policy strategy – including their sanctions regimes – with regard to Poland, they differed in regard to how to manage the threat posed by the Soviet Union and their relations with it. The discrepancies between the United States and Europe arose from the lack of an apparent and open involvement of the USSR in the Polish crisis, but political and strategic interests beyond Poland also played a significant role.[61]

The United States advocated for a strong response against the Soviet Union, partially motivated by a more general desire to undermine the USSR's political, military and economic power as a global player in the context of the Cold War.[62] On 23 December 1981, President Ronald Reagan announced the imposition of economic sanctions against Poland and lambasted the Soviet Union for its involvement in the Polish crisis. He noted that the "tragic events now occurring in Poland, almost 2 years to the day after the Soviet invasion of Afghanistan, have been precipitated by public and secret pressure from the Soviet Union", adding that

57 Ellie Geranmayeh and Manuel Lafont Rapnouil, 'Meeting the Challenge of Secondary Sanctions', European Council on Foreign Relations, ECFR/289 (June 2019), https://ecfr.eu/wp-content/uploads/4_Meeting_the_challenge_of_secondary_sanctions.pdf [https://perma.cc/4XWH-284S]1.

58 Alexander (n 12) 2 and 80.

59 Bernard Gwertzman, 'Poland Restricts Civil and Union Rights; Solidarity Activities Urge General Strike' *The New York Times* (New York, 14 December 1981), www.nytimes.com/1981/12/14/world/poland-restricts-civil-union-rights-solidarity-activities-urge-general-strike.html [https://perma.cc/648T-UFAD].

60 '$14 Billion Pipeline', *The New York Times* (New York, 18 November 1980), www.nytimes.com/1980/11/19/archives/14-billion-pipeline.html [https://perma.cc/DW8M-RH5P].

61 Richard Nephew, 'Transatlantic Sanctions Policy, from the 1982 Soviet Gas Pipeline Episode to Today', Columbia University, School of International and Public Affairs, Center on Global Energy Policy (March 2019), www.energypolicy.columbia.edu/sites/default/files/pictures/REPORT.pdf [https://perma.cc/9VL6-TFXR]8-9.

62 Nephew (n 61) 9; and Perlow (n 48) 254.

"[t]he Soviet Union, through its threats and pressures, deserves a major share of blame for the developments in Poland".[63] President Reagan also addressed a letter to the USSR president, Leonid Brezhnev, reprimanding him for "the pressures and threats which your government has exerted on Poland to stifle the stirrings of freedom",[64] and warning that, if the repression continued, "the United States will have no choice but to take further concrete political and economic measures affecting our relationship".[65] In contrast, the European NATO allies prioritized a conciliatory and more tempered response, in part because of the strategic significance of the natural gas trade between Western Europe and the Soviet Union after the energy crisis of the 1970s.[66]

On 29 December 1981, the United States unilaterally imposed sanctions against the Soviet Union, claiming that it bore "a heavy and direct responsibility for the repression in Poland".[67] The controversy was centred mainly on the sanctions suspending licences for oil and gas equipment and prohibiting US companies from exporting to the Soviet Union key components for the construction of the natural gas pipeline.[68] The prohibition was extended in June 1982 to US companies' subsidiaries in Europe and to non-US-origin equipment manufactured abroad by foreign companies under US licences and technical data[69] and applied retroactively to agreements entered prior to the announcement of the sanctions.[70]

The European Economic Community viewed these measures as an unacceptable intrusion by the United States in its sovereign affairs.[71] However, while the diplomatic tension escalated during 1982 between the two sides of the Atlantic, European companies began to comply with the US sanctions regime, and Washington believed that European governments would finally give up and align with the United States. But Europe did not yield to the pressure and compelled its undertakings to fulfil their obligations under the contracts related to the construction of the pipeline, threatening them with civil and criminal penalties if

63 President Ronald Reagan's Address to the Nation About Christmas and the Situation in Poland (23 December 1981), www.reaganlibrary.gov/archives/speech/address-nation-about-christmas-and-situation-poland [https://perma.cc/TL4Z-XJR2].

64 Paul Kengor, *The Crusader: Ronald Reagan and the Fall of Communism* (HarperCollins 2006) 126, quoted in Andrzej Paczkowski and Christina Manetti, *Revolution and Counterrevolution in Poland, 1980-1989: Solidarity, Martial Law, and the End of Communism in Europe* (University of Rochester Press 2015) 127.

65 President Ronald Reagan's Address to the Nation About Christmas and the Situation in Poland (n 63).

66 Nephew (n 61) 9-10.

67 Helene Sjursen, *The United States, Western Europe, and the Polish Crisis: International Relations in the Second Cold War* (Palgrave Macmillan, 2003) 70, quoted in Paczkowski and Manetti (n 64) 127.

68 Perlow (n 48) 254.

69 Nephew (n 61) 11; and Perlow (n 48) 255 and 258.

70 Perlow (n 48) 258.

71 Associated Press, 'Europe Protests Reagan Sanctions on Pipeline Sales' *The New York Times* (New York, 13 August 1982), www.nytimes.com/1982/08/13/world/europe-protests-reagan-sanctions-on-pipeline-sales.html [https://perma.cc/UQ4X-Z63S].

they failed to do so.[72] The French government even raised the possibility of requisitioning the necessary facilities to ensure the completion of the works.[73] European companies ultimately complied with their contractual obligations and were sanctioned by Washington and prohibited from commerce with the United States.

Nonetheless, the European resistance strategy finally proved to be a success and created tensions within the Reagan administration, which, by mid-November 1982, lifted the controversial sanctions.[74] Although President Reagan linked the decision to an agreement with Western Europe "not to engage in trade arrangements which contribute to the military or strategic advantage of the U.S.S.R. or serve to preferentially aid the heavily militarized Soviet economy",[75] the French Minister of Foreign Affairs, Claude Cheysson, denied the existence of any relationship between the agreement and the lifting of the US sanctions, which European allies considered to be illegal and which were to be dropped unilaterally by the United States.[76]

After the USSR pipeline crisis, globalization "was greeted with euphoria" during the 1990s.[77] However, in a globalized economy, the tensions arising from divergent approaches to the implementation of sanctions are exacerbated and may "undermine the effectiveness of sanctions regimes, and inhibit efforts at cross-border coordination and cooperation in implementation and enforcement".[78] The foreign policy clash between Brussels and Washington in 1996 following the enactment by the U.S. Congress of the Cuban Liberty and Democratic Solidarity Act (Helms-Burton Act)[79] and the Iran-Libya Sanctions Act (D'Amanto Act)[80] is an example of the tensions arising in a context of increasing globalization.

72 Flora Lewis, 'France Defies Ban by U.S. on Supplies for Soviet Pipeline' *The New York Times* (New York, 23 July 1982), www.nytimes.com/1982/07/23/world/france-defies-ban-by-us-on-supplies-for-soviet-pipeline.html [https://perma.cc/SG4E-B8GF], and Associated Press, 'Italy Also Defies U.S. Ban on Parts for Soviet Pipeline' *The New York Times* (New York, 25 July 1982), www.nytimes.com/1982/07/25/world/italy-also-defies-us-ban-on-parts-for-soviet-pipeline.html [https://perma.cc/PE7Z-NSMA].

73 Bernard Gwertzman, 'U.S. to Penalize Those Who Aid Siberian Pipeline' *The New York Times* (New York, 26 August 1982), www.nytimes.com/1982/08/26/business/us-to-penalize-those-who-aid-siberian-pipeline.html [https://perma.cc/YJ26-Y9VR].

74 Bernard Gwertzman, 'Reagan Lifts Sanctions on Sales for Soviet Pipeline; Reports Accord with Allies' *The New York Times* (New York, 14 November 1982), www.nytimes.com/1982/11/14/world/reagan-lifts-sanctions-on-sales-for-soviet-pipeline-reports-accord-with-allies.html [https://perma.cc/4UXK-XFRW].

75 President Ronald Reagan's Radio Address to the Nation on East-West Trade Relations and the Soviet Pipeline Sanctions (13 November 1982), www.reaganlibrary.gov/archives/speech/radio-address-nation-east-west-trade-relations-and-soviet-pipeline-sanctions [https://perma.cc/X2LG-CADA].

76 Perlow (n 48) footnote 21.

77 Joseph E. Stiglitz, *Making Globalization Work* (W.W. Norton & Co., 2007), quoted in Jackson (n 18) 38.

78 *Bank Melli Iran*, Opinion of AG Hogan (n 8) para. 5.

79 Cuban Liberty and Democratic Solidarity (Libertad) Act (n 2).

80 Iran-Libya Sanctions Act, 22 USC § 61701 (1996).

The Helms-Burton Act was one more step toward the strengthening of the US embargo on trade with Cuba,[81] which had been in place since 1960 though limited to foreign assets and export control regulations.[82] In 1996, the U.S. Congress adopted measures with extraterritorial effects in Titles III and IV of the act aiming to prevent non-US citizens from trafficking in confiscated assets. In particular, Title III prohibits any person from trafficking in US nationals' properties confiscated by the Cuban government after the Cuban Revolution,[83] and Title IV excludes from the United States any foreigners involved in the seizure of such property or who traffics in it.[84] Likewise, the D'Amanto Act is aimed at "preventing the proliferation of weapons of mass destruction and acts of international terrorism"[85] by Iran and Libya. Under the act, the president of the United States shall impose sanctions on any person making some types of investments that contribute to the development of petroleum resources in Iran or Libya or that contribute to Libya's ability to acquire certain weapons or to enhance its military, paramilitary or aviation capabilities.[86]

Both acts grant authority to the president to suspend the application of some sections or to waive some of the obligations therein. Under the Helms-Burton Act, the president may suspend the application of Title III for successive 6-month periods if it is found "necessary to the national interests of the United States and will expedite a transition to democracy in Cuba".[87] The president is also authorized to waive the application of the obligations related to Iran under the D'Amanto Act with respect to nationals of countries that implement "substantial measures, including economic sanction, that will inhibit Iran's efforts to carry out activities" related to international terrorism or its weapon programmes.[88] In addition, the president is also granted waiver authority regarding the measures in Iran and Libya if "that is important to the national interest of the United States".[89]

The extraterritorial effects of the sanctions implemented by the United States under the Helms-Burton Act and the D'Amanto Act also raised significant concern among members of the international community and foreign economic undertakings.[90] The General Assembly of the United Nations adopted a resolution urging states to refrain from enacting laws or measures whose extraterritorial effects "influence the sovereignty or freedom of trade and navigation of other

81 Cuban Liberty and Democratic Solidarity (Libertad) Act (n 2), §3(2).
82 John W. Boscariol, 'An Anatomy of a Cuban Pyjama Crisis: Reconsidering Blocking Legislation in Response to Extra-territorial Trade Measures of the United States' (1999) 30 *Law and Policy in International Business* 4.
83 Cuban Liberty and Democratic Solidarity (Libertad) Act (n 2), §302.
84 Ibid. §401.
85 Iran-Libya Sanctions Act (n 80), §2(2).
86 Ibid. §5(a)-(c).
87 Ibid. §306(b).
88 Ibid. §2(3) and §4(c).
89 Ibid. §9(c).
90 Stefaan Smis and Kim Van der Borght, 'The EU-U.S. Compromise on the Helms-Burton and D'Amato Acts' (1999) 93 American Journal of International Law 227.

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States".[91] The European Union enacted the EU blocking statute and filed a settlement proceeding with the Dispute Settlement Body of the WTO alleging infringement by the United States of the General Agreement on Trade in Services (GATS) and the General Agreement on Tariffs and Trade (GATT).[92]

Ultimately, the European Union and the United States engaged in negotiations to resolve their dispute and reached a memorandum of understanding on 11 April 1997,[93] which was further developed in subsequent agreements in 1998.[94] Under the memorandum, the parties committed to acting on a coordinated basis on bilateral and multilateral levels, from both economic and political perspectives, to address the challenges targeted by the Helms-Burton Act and the D'Amanto Act.[95] With respect to the Helms-Burton Act, the United States and the European Union confirmed "their commitment to continue their efforts to promote democracy in Cuba",[96] and the United States agreed to suspend Title III of the Helms-Burton Act and that President Clinton would seek authority to waive the obligations under Title IV. As regards the D'Amanto Act, the United States pledged to continue working with the European Union to grant waivers to EU Member States and its undertakings. In exchange, the European Union agreed to suspend the WTO proceedings.

Secondary sanctions and similar measures with extraterritorial effects are not a thing of the past. Indeed, after many years of smooth relations between Brussels and Washington, President Donald Trump assumed office in 2017 in an increasingly polarized world, and the spectre of secondary sanctions loomed large again in the European Union.

The international community has indeed recently witnessed the re-emergence of these measures. In May 2018 the United States withdrew from the Iranian nuclear deal and reimposed sanctions with extraterritorial effects "as part of [an] unprecedented U.S. economic pressure campaign" on Iran.[97] This action was 'deeply regretted' by the European Union.[98] A year later, President Trump lifted the

91 General Assembly of the United Nations, 'Assembly Again Calls for End of United States-Imposed Embargo Against Cuba, by 137-3-25 Vote, Urges Repeal of Laws Such as Helms-Burton' (Press Release) (12 November 1996), www.un.org/press/en/1996/19961112.ga9164.html [https://perma.cc/KY36-X47S].

92 Request for Consultations by the European Communities, *United States – The Cuban Liberty and Democratic Solidarity Act*, WTO Doc. 96-1850 (adopted 13 May 1996).

93 'European Union-United States: Memorandum of Understanding Concerning the U.S. Helms-Burton Act and the U.S. Iran And Libya Sanctions Act' (1997) 36(3) International Legal Materials 529-530.

94 Understanding with Respect to Disciplines for the Strengthening of Investment Protection, Understanding on Conflicting Requirements and Transatlantic Partnership on Political Cooperation.

95 Smis and Van der Borght (n 90) 231.

96 'European Union-United States: Memorandum of Understanding Concerning the U.S. Helms-Burton Act and the U.S. Iran And Libya Sanctions Act' (n 93) 529.

97 U.S. Department of Treasury (n 6).

98 Council of the European Union, 'Declaration by the High Representative on Behalf of the EU Following US President Trump's Announcement on the Iran Nuclear Deal (JCPOA)' (Press Release) (9 May 2018), www.consilium.europa.eu/en/press/press-releases/2018/05/09/declaration-by-the-high-representative-on-behalf-of-the-eu-following-us-president-trump-s-announcement-on-the-iran-nuclear-deal-jcpoa/ [https://perma.cc/KXD2-4V9F].

long-standing suspensions of Titles III[99] and IV[100] of the Helms-Burton Act, which had been maintained by the Bush and Obama administrations since 1998. This decision also led to harsh criticism by the European Union[101] and countries such as Canada,[102] Japan[103] and Mexico.[104] In the United States, Representative Eliot L. Engel, chairman of the House Committee on Foreign Affairs, considered that President Trump's decision rejected "two decades of bipartisan consensus on a key piece of U.S. policy toward Cuba" and that it would "further isolate the United States from our Latin American and European allies and diminish our ability to promote democracy in Cuba and Venezuela".[105]

This, however, is not just about Iran or Cuba. The United States has also recently resorted to secondary sanctions in the context of the dispute with the European Union and Russia regarding the construction of the Nord Stream 2 pipeline. In 2017, the U.S. Congress passed the Countering America's Adversaries Through Sanctions Act (CAATSA), which authorized – but did not oblige – the US president to impose sanctions with respect to entities involved in the "development of pipelines" by Russia.[106] In this respect, for instance, the Swiss-Dutch company Allseas was forced to withdraw from the project[107] "in anticipation of the enactment of the National Defense Authorization Act".[108] More recently, in December 2021,

99 Lesley Wroughton and Matt Spetalnick, 'Trump Lifts Ban on U.S. Lawsuits against Foreign Firms in Cuba' *Reuters* (17 April 2019), www.reuters.com/article/us-usa-cuba-idUSKCN1RT1NJ [https://perma.cc/L7VR-EXEY].

100 'Spain's Melia Says CEO Banned from U.S. Over Hotels in Cuba' *Reuters* (5 February 2020), www.reuters.com/article/us-melia-cuba-usa-idUSKBN1ZZ2G0 [https://perma.cc/ALT3-BAF5].

101 Council of the European Union, 'Declaration by the High Representative on Behalf of the EU on the Full Activation of the Helms-Burton (LIBERTAD) Act by the United States' (Press Release) (2 May 2019), www.consilium.europa.eu/en/press/press-releases/2019/05/02/declaration-by-the-high-representative-on-behalf-of-the-eu-on-the-full-activation-of-the-helms-burton-libertad-act-by-the-united-states/ [https://perma.cc/LU25-FXJP].

102 Global Affairs Canada, 'Government of Canada Will Defend Interests of Canadians Doing Business in Cuba' (Press Release) (17 April 2019), www.canada.ca/en/global-affairs/news/2019/04/government-of-canada-will-defend-interests-of-canadians-doing-business-in-cuba.html [https://perma.cc/K8WF-ZSBU].

103 Ministry of Foreign Affairs of Japan, 'Full Application of Title III of the Helms-Burton Act' (Press Release) (9 May 2019), www.mofa.go.jp/press/release/press1e_000122.html [https://perma.cc/2LG4-95A3].

104 Ministry of Foreign Affairs and Ministry of Economy of Mexico, 'Position of the Mexican Government on Ending Suspension of Title III of the Helms-Burton Act' (Press Release) (8 May 2019), www.gob.mx/sre/prensa/position-of-the-mexican-government-on-ending-suspension-of-title-iii-of-the-helms-burton-act.

105 House Committee on Foreign Affairs, 'Engel on Implementation of Title III of the Helms-Burton Act' (Press Release) (17 April 2019), https://foreignaffairs.house.gov/2019/4/engel-on-implementation-of-title-iii-of-the-helms-burton-act [https://perma.cc/YGU5-GE67].

106 Countering America's Adversaries Through Sanctions Act, 22 USC § 9401 (2017) §232.

107 Martin Russell, 'The Nord Stream 2 Pipeline. Economic, Environmental and Geopolitical Issues', European Parliamentary Research Service, PE 690.705 (July 2021), www.europarl.europa.eu/RegData/etudes/BRIE/2021/690705/EPRS_BRI(2021)690705_EN.pdf [https://perma.cc/9YG5-YLMW] 5.

108 Allseas Group S.A., 'Allseas Suspends Nord Stream 2 Pipelay Activities' (Press Release) (21 December 2019), https://allseas.com/news/allseas-suspends-nord-stream-2-pipelay-activities/ [https://perma.cc/ZP65-C79Z].

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the U.S. Congress passed the Protecting Europe's Energy Security Implementation Act, which, on the basis of the CAATSA, required the US president to "impose sanctions [...] with respect to any corporate officer of an entity established for or responsible for the planning, construction, or operation of the Nord Stream 2 pipeline".[109]

Commentators note that these recent developments demonstrate that secondary sanctions "are here to stay", because the United States can no longer rely on traditional unilateral or multilateral sanctions to pursue its international agenda.[110] Instead, Washington may draw on its unchallenged international economic leverage – driven mainly by the omnipresence of American banks and the US dollar – to achieve its foreign policy objectives through secondary sanctions.[111] Ultimately, their use will depend on the foreign policy strategy of the sitting US president.

Again, however, this is not just about the United States. Foreign affairs are nowadays governed by a growing polarization, and geopolitical tensions are commonplace. At this writing, for example, Russian President Vladimir Putin has decided to invade Ukraine in an unprecedented war scenario in Europe since the end of the Second World War, and China is blocking imports from Lithuania in the context of a diplomatic dispute arising from the opening of a Taiwanese representative office in Vilnius in November 2021.[112] Because other leading economies may be tempted to follow in the footsteps of Washington and implement extraterritorial sanctions in the upcoming years, the European Union is now facing major challenges in terms of foreign policy.

II Between a Rock and a Hard Place: The Challenges Posed by Secondary Sanctions in the European Union

As discussed in the previous section, secondary sanctions are, by definition, directed at a neutral third party and presuppose that the affected third party's state has not implemented any equivalent measure. The examples that have been presented show that in some cases foreign policy discrepancies between Brussels and Washington give rise to tensions in the implementation of sanctions regimes. Given the correlation of international economic forces and the ongoing trend

109 Protecting Europe's Energy Security Implementation Act, S. 3436 (2021) §2(a). Notwithstanding the discrepancies between the European Union and the United States regarding the development of the Nord Stream 2 project, European leaders are also targeting at this moment the Nord Stream 2 project as part of the economic sanctions imposed on Russia as a result of the ongoing invasion of Ukraine ordered by Russian President Vladimir Putin. In the context of the diplomatic tensions between western countries and Russia prior to the military attack, Germany halted the certification process necessary for the operation of the pipeline. *See* Melissa Eddy, 'Germany Puts a Stop to Nord Stream 2, a Key Russian Natural Gas Pipeline' *The New York Times* (New York, 22 February 2022), www.nytimes.com/2022/02/22/business/nord-stream-pipeline-germany-russia.html [https://perma.cc/5TZB-HK8Q].

110 Meyer (n 46) 932.

111 Meagher (n 53) 5; and *see infra* Section B.II.

112 Andy Bounds, 'Lithuania Complains of Trade "Sanctions" by China after Taiwan Dispute', *Financial Times* (London, 3 December 2021), www.ft.com/content/0ebaa7c7-761d-445e-b3e4-f5d2c9b4768f [https://perma.cc/J3JU-QNT2].

towards polarization in international relations, the increasing use of secondary sanctions put European companies between a rock and a hard place, posing a major threat to the European Union's commercial and strategic interests and to Brussels' control over the Union's foreign policy.[113]

Understanding the challenge of secondary sanctions in the European Union requires taking a broader view and analysing the current economic global relationships and its consequences. Research by Professors Henry Farrell and Abraham L. Newman and the concept of "weaponized interdependence" developed by them are particularly illuminating in this respect.[114] Farrell and Newman focus on "how coercive economic power can stem from structural characteristics of the global economy", and, in particular, from the "new set of structural forces", "networks" and "hubs" that result from it.[115] They contest the widespread liberal theory that globalization has generated "reciprocal dependence" between states, which, according to some authors, would tend "to make coercive strategies less effective".[116] While Farrell and Newman acknowledge that globalization has led to "unprecedented levels of interdependence", they argue that it has in fact resulted in "asymmetric network structures" that create the potential for "weaponized interdependence", in which some states are able to leverage interdependent relations to coerce others' and "extend their influence across borders".[117] The 'chokepoint effect' is one form of weaponization consisting in excluding third parties from the privileged networks or hubs located within the territory or under the control of one state. Because these networks and hubs are 'extremely difficult to circumvent' and the consequences of losing access to them are costly, the 'privileged state' has an immense coercive power at its disposal.[118]

Unsurprisingly, the United States is one of these very few 'privileged states', indeed, the most privileged one, owing to the ubiquity of the US dollar and its powerful internal market,[119] which results in asymmetric interdependences with many other regions and countries in the world, including the European Union. Therefore, US secondary sanctions and other similar measures with extraterritorial effects are a powerful mechanism to constrain and influence the conduct of individuals and corporations from the European Union and other third countries[120] when their foreign policies diverge from Washington's objectives. In these circumstances, the United States has relied on the dependence of third-country companies on the US dollar and on their access to US markets and its banking and financial system to exercise immense foreign policy power. The mere threat of

113 Geranmayeh and Lafont Rapnouil (n 57) 2.

114 Henry Farrell and Abraham L. Newman, 'Weaponized Interdependence: How Global Economic Networks Shape State Coercion' (2019) 44(1) International Security Journal 42.

115 Ibid. 47.

116 Ibid. 48.

117 Ibid. 43, 45 and 54.

118 Ibid. 53-56.

119 Steven Erlanger, 'Europe Struggles to Defend Itself against a Weaponized Dollar' *The New York Times* (New York, 12 March 2021), www.nytimes.com/2021/03/12/world/europe/europe-us-sanctions.html [https://perma.cc/8L5U-Q5TM].

120 Communication COM (2021) 32 final (n 9) 18.

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losing access to US markets coerces foreign undertakings to comply – and even overcomply by taking more precautionary measures than necessary to strictly meet the requirements of the US sanctions –[121] with US sanctions regimes, even at the expense of undermining their own country's foreign policy agenda.[122] As noted by Professor Daniel Drezner, "the coercion of firms is usually easier than the coercion of nation-states. CEOs do not care about relative gains or political reputation; they care about profits".[123] The trend towards overcompliance resulting from extraterritoriality is exacerbated by the increasing complexity of US sanctions and the aggressive approach to their enforcement adopted by the Office of Foreign and Control Assets (OFAC), coupled with a general and deliberate uncertainty surrounding the implementation and enforcing process of US sanctions and the limited case law existing in this area.[124]

One of the earliest cases and most well-known examples of overcompliance with US secondary sanctions by foreign companies relates to Cuban-made pyjamas sold by Walmart in Canada. Indeed, the fear of infringing the Helms-Burton Act led the Canadian subsidiary of the giant US retail corporation to stop selling the pyjamas in all the stores in Canada in late February 1997, even though the move violated the Canadian blocking statute preventing Canadian undertakings from observing US sanctions against Cuba.[125] Despite the tensions, however, the pyjamas were back on Wal-Mart's shelves in Canada by mid-March.[126]

121 The concept of overcompliance has been widely used in the field of environmental law. It refers to situations where "organizations go above-and-beyond what is required by regulations". Melissa Rorie, 'An Integrated Theory of Corporate Environmental Compliance and Overcompliance' (2015) 64(2-3) Crime, Law and Social Change 66. In these circumstances, companies "set standards for themselves that are stricter than what government requires". Marco A. Haan, 'A Rent-Seeking Model of Voluntary Overcompliance' (2016) 65 Environmental and Resource Economics 297.

122 Jonathan Hackenbroich et al., 'Defending Europe's Economic Sovereignty: New Ways to Resist Economic Coercion', European Council on Foreign Relations, ECFR/345 (October 2020), https://ecfr.eu/wp-content/uploads/defending_europe_economic_sovereignty_new_ways_to_resist_economic_coercion.pdf [https://perma.cc/98HQ-YAML].

123 Daniel Drezner, *The Sanctions Paradox: Economic Statecraft and International Relations* (Cambridge University Press, 1999) 81, quoted in Nephew (n 61) 12.

124 Richard (n 14) paras. 0.15, 3, 4.8 and 4.23. In this respect, commentators have noted that "vagueness creates a chilling effect. Increasing the uncertainty about which activities are restricted and which ones are not causes individuals to overcomply with the rules. This overcompliance leads individuals to underinvest in socially (and privately) desirable activities.... In other words, for a given aversion to risking punishment [sic.], the vaguer the rule the greater the overcompliance. This is the chilling effect. Second, the more vague a rule is, the more difficult it is to engage in schemes to evade it. Vagueness elevates the importance of the spirit of the law relative to the letter of the law. Vague rules are less well defined which makes it more difficult for skilled entrepreneurs to create loopholes. In this way vagueness combats the erosion that accompanies loopholes". Michael F. Ferguson and Stephen R. Peters, 'But I Know It When I See It: An Economic Analysis of Vague Rules' (unpublished manuscript, on file with the Cardozo Law Review), quoted in Dru Stevenson, 'Towards a New Theory of Notice and Deterrence' (2005) 26 Cardozo Law Review, footnote 203.

125 David E. Sanger, 'U.S.-Canadian Split on Cuba Tangles Wal-Mart's Pajamas' *The New York Times* (New York, 6 March 1997), www.nytimes.com/1997/03/06/business/us-canadian-split-on-cuba-tangles-wal-mart-s-pajamas.html [https://perma.cc/SQW6-KWWY].

126 David E. Sanger, 'Wal-Mart Canada Is Putting Cuban Pajamas Back on Shelf' *The New York Times* (New York, 14 March 1997), www.nytimes.com/1997/03/14/business/wal-mart-canada-is-putting-cuban-pajamas-back-on-shelf.html [https://perma.cc/BYT3-9NF4].

More recently, the threat of US secondary sanctions has also thwarted EU foreign policy with respect to Iran, seriously undermining business relations between European and Iranian companies within and outside Iran and undercutting "a nuclear deal that once stood as a signal of achievement of European foreign policy".[127] For instance, the ECJ heard a case in late 2021 involving the German branch of the Iranian state-owned Bank Melli Iran (BMI) and the German company Telekom, a subsidiary of Deutsche Telekom AG, which generated half of its turnover in the United States.[128] Telekom and BMI had concluded several agreements for the provision of telecommunication services that were essential for the commercial activities of BMI in Germany. Following the withdrawal of the United States from the 2015 Iranian nuclear deal and the reinstatement of US sanctions on Iran, the U.S. Office of Foreign Control Assets included BMI in the Specially Designated Nationals and Blocked Persons List (SDN list). Shortly thereafter, Telekom decided to unilaterally terminate all the agreements entered with BMI and at least four other companies also included in the SDN list, even though it had not received any specific direct or indirect orders from US authorities.[129]

These are only two examples of the difficulties faced by European companies when US secondary sanctions impact their business relations. In this situation, EU operators usually choose to conform to the US sanctions regime, even to overcomply with it, resulting in a major foreign policy challenge for the European Union when the foreign policies on both sides of the Atlantic diverge.

The results of a recent public opinion consultation launched by the European Commission demonstrates the concerns of EU operators regarding secondary sanctions.[130] Participants in the public consultation agreed that secondary sanctions have had generally a "negative impact on the EU and its operators". They were also of the opinion that, from an economic and business perspective, extraterritorial sanctions hamper EU operators' economic activity and hinder their exports, generally leading to a loss of business opportunities and a reduction of trade and investment flows with the targeted countries.[131] More broadly, secondary

127 Geranmayeh and Lafont Rapnouil (n 57).

128 Case C-124/20 *Bank Melli Iran* [2021] ECJ [12 May 2021].

129 Ibid. paras. 16-34. BMI brought legal proceedings before the courts in Germany alleging that Telekom had terminated the agreements in order to comply with the US secondary sanctions. The case resulted in a reference for preliminary ruling on the interpretation of the EU blocking statute. *See infra* Section C.I.

130 Commission, 'Unlawful Extra-territorial Sanctions – A Stronger EU Response (Amendment of the Blocking Statute)' (Public Consultation), https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13129-Unlawful-extra-territorial-sanctions-a-stronger-EU-response-amendment-of-the-Blocking-Statute-_en [https://perma.cc/D739-QUUP]; and Commission, 'Summary of Results of the Open Public Consultation on the Review of the Blocking Statute (Council Regulation (EC) No. 2271/96)', Ares(2021)7829130 (17 December 2021), https://ec.europa.eu/info/files/2021-blocking-statute-review-summary-of-responses_en [https://perma.cc/JZH3-VMFV].

131 In the respondents' views, secondary sanctions would have an across-the-board effect in terms of sectors and industries hit by them. However, there is a general perception that banking and finance are the most affected sectors, followed by trade in goods and services, investments and tourism and transport. 'Unlawful Extra-territorial Sanctions – A Stronger EU Response (Amendment of the Blocking Statute)' (n 130) 2.

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sanctions, in the respondents' opinion, discredit the EU's foreign policy and have a negative impact on the EU's "open strategic autonomy".[132]

As noted previously, after many years of smooth foreign policy relations between Brussels and Washington, President Trump revived the challenges posed by secondary sanctions to Europe. For the moment, the U.S. Department of Treasury under the Biden administration has acknowledged that "sanctions are most effective when coordinated",[133] and has expressed "the United States' commitment to acting with its allies and partners to demonstrate a broad unity of purpose".[134] However, some are sceptical and consider that, while "[t]he new Biden administration is making nice with the European Union", in fact "the American willingness to punish its European allies and impose sanctions on them in pursuit of foreign-policy goals continues to rankle".[135] Be that as it may, commentators suggest that a point of no return has already been passed regardless of future presidential elections in the United States[136] and that, depending on their outcome – for instance, if Donald Trump decides to run again for office in 2024 and wins the election –[137] the challenges posed by secondary sanctions to the European Union may only be exacerbated in the future.

But the challenges will also depend on developments outside the United States, and, in particular, on the potential emergence of new 'asymmetric network structures' at the international level, benefiting other countries. For instance, some argue that China may rely on its predominance in technological power and on the dependence by some European manufacturers on some Chinese software and

132 'Summary of Results of the Open Public Consultation on the Review of the Blocking Statute (Council Regulation (EC) No. 2271/96)' (n 130) 2.

133 U.S. Department of the Treasury, 'U.S. Department of the Treasury Releases Sanctions Review' (Press Release) (18 October 2021), https://home.treasury.gov/news/press-releases/jy0413 [https://perma.cc/4PYS-KTUH].

134 U.S. Department of the Treasury (n 28) [https://perma.cc/KVL7-XEEN]. The sanctions recently imposed on Russia after the ongoing invasion of Ukraine are an example of a coordinated action between the United States, the European Union and their allies in the area of international sanctions. *See* U.S. Department of the Treasury, 'U.S. Treasury Announces Unprecedented & Expansive Sanctions Against Russia, Imposing Swift and Severe Economic Costs' (Press Release) (24 February 2022), https://home.treasury.gov/news/press-releases/jy0608 [https://perma.cc/SC9Z-4SVP]; and The White House, 'Joint Statement on Further Restrictive Economic Measures' (Statement) (26 February 2022) (n 32). *See also* Landler et al. (n 32).

135 Erlanger (n 119).

136 Geranmayeh and Lafont Rapnouil (n 57) 2.

137 Jeremy W. Peters, 'Trump May Run in 2024. So Might They. It's Getting Awkward' *The New York Times* (New York, 7 October 2021), www.nytimes.com/2021/10/07/us/politics/trump-2024-republicans.html [https://perma.cc/C6WD-7W4V].

technological components to advance its foreign policy agenda.[138] In fact, some examples of extraterritorial sanctions already include legislation recently adopted by China.[139] The ongoing invasion of Ukraine and the resulting western sanctions targeting Russia may also give rise to new geopolitical alliances between China and Russia that contribute to the development of new 'asymmetric network structures' in favour of China.[140] During the discussions in the United States and the European Union about the sanctions to be imposed on Russia, some feared that "blocking Russia from SWIFT would probably open the door to other workarounds, including finding alternative communications systems".[141] Such an alternative could be one of those 'asymmetric network structures', which some countries may rely on in the future to advance their foreign agenda.[142] In these circumstances, the most relevant concern is whether, sooner or later, the United States and China could use secondary sanctions against each other, "leaving Europe squeezed in the middle".[143]

138 China is usually considered the 'world's factory', representing 28% of the world's manufacturing industry, almost equivalent to the combined manufacturing capacity of the United States, Japan and Germany. Commentators consider that China's manufacturing industry has two main advantages. First, "its industrial base is unparalleled in breadth and depth, churning out everything from low-end footwear to high-end biotech". In fact, "European officials have warned of excessive dependence on China, especially for medical products". Second, the Chinese immense internal market, where Western companies want to penetrate. For example, Tesla opened in China in 2019 its first and biggest foreign factory, and the German company BASF recently invested US$10bn in China to develop a new production plant. 'China is the World's Factory, More Than Ever' *The Economist* (London, 3 June 2020), www.economist.com/finance-and-economics/2020/06/23/china-is-the-worlds-factory-more-than-ever [https://perma.cc/HAG9-9NJF].

139 'Summary of Results of the Open Public Consultation on the Review of the Blocking Statute (Council Regulation (EC) No. 2271/96)' (n 130) 2-3.

140 In fact, even before the Russian invasion of Ukraine, Beijing and Moscow began reinforcing their economic ties to improve their 'geopolitical prospects'. Keith Bradsher and Ana Swanson, 'Before Ukraine Invasion, Russia and China Cemented Economic Ties' *The New York Times* (New York, 26 February 2022; updated on 28 February 2022), www.nytimes.com/2022/02/26/business/china-russia-ukraine.html?referringSource=articleShare [https://perma.cc/7L6B-CHSW].

141 Alan Rappeport, 'Why Didn't the U.S. Cut off Russia from SWIFT? It's Complicated' *The New York Times* (New York, 24 February 2022), www.nytimes.com/2022/02/24/business/russia-swift-financial-system.html [https://perma.cc/UVG8-W7GE].

142 SWIFT is nowadays one of the 'asymmetric networks structures' benefiting western countries, in particular, the United States. As suggested by one commentator, "[t]he control of this infrastructure gives the US immense power to trade financial flows around the globe, as well as to cut entities off from using this infrastructure". Therefore, the development of alternative systems would challenge this unchallenged power. *See* Matt Henry and Mathew Carney, 'China and the US are Locked in a Superpower Tech War to "Win the 21st Century"' *ABC News* (New York, 7 July 2021), www.abc.net.au/news/2021-07-08/trump-facebook-twitter-china-us-superpower-tech-war/100273812 [https://perma.cc/3BJC-D4EB].

143 Erlanger (n 121). However, it should also be noted that, according to Professor Anu Bradford, "[i]t is increasingly difficult today to [...] rely on economic sanctions. Economic power is no longer an exclusive domain of a few relatively homogeneous players such as the United States, the EU, and Japan. Today, China and other emerging economies are growing in influence. In a world of multiple powers and heterogeneous interests, exercise of unilateral economic power is rarely possible. [...] Economic sanctions are rarely successful today because embargoed nations have an easier time finding alternative suppliers or market for their products". Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2019) xvi.

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The European institutions are well aware of these challenges. The High Representative of the Union for Foreign Affairs and Security Policy, Mr. Josep Borrell Fontelles, stated, in July 2020, that he was "deeply concerned at the growing use of sanctions, or the threat of sanctions, by the United States against European companies and interests".[144] For its part, in January 2021 the European Commission addressed a communication to other European institutions noting that the difficulties posed by secondary sanctions directly affect "the foundations of a resilient EU". According to the Commission, "[i]ncreasing the EU's resilience to the effects of the unlawful extraterritorial application of unilateral sanctions and other measures by third countries" is necessary to reinforce the European Union's "open strategic autonomy in the macro-economic and financial fields" and to "strengthen the EU's open strategic autonomy and resilience".[145] The European Commission acknowledged that, absent a strong response against secondary sanctions, the "EU's credibility as a regulatory power" and "the integrity and level playing field of the EU Single Market" are at risk.[146]

C Contributing to the Improvement of the European Union's Strategic Autonomy and Resilience Through the Amendment of the Blocking Statute

In light of the geopolitical and foreign policy challenges faced by the European Union, voices have been raised calling for an improvement of the European Union's strategy against secondary sanctions, and, in particular, for amendment of the blocking statute. The statute is one of the legislative means currently available to the European authorities to counter the extraterritorial effects of sanction regimes implemented by third countries. However, over the more than twenty-five years since its implementation, the statute has proven to be unsuccessful in meeting its objectives. This section analyses the main provisions of the blocking statute currently in force and as interpreted by the ECJ and then introduces some institutional and stakeholder perspectives on the blocking statute and its potential amendment. Finally, the last part of this section discusses several suggestions for the amendment of the statute in order to better achieve its goals and contribute to a more comprehensive strategy in the EU against the use of secondary sanctions by foreign states aimed at unduly influencing European undertakings.

I The EU Blocking Statute as Recently Interpreted by the ECJ

The EU blocking statute was enacted on 22 November 1996[147] as a reaction to the strengthening of the US embargo against Cuba by the Helms-Burton Act and the

144 European Union External Action Service, 'Statement by the High Representative/Vice-President Josep Borrell on US Sanctions', ID: 200717_22 (17 July 2020), https://eeas.europa.eu/headquarters/headquarters-homepage_en/83105/Statement%20by%20the%20High%20Representative/Vice-President%20Josep%20Borrell%20on%20US%20sanctions [https://perma.cc/5SQT-UXWK].

145 Communication COM (2021) 32 final (n 9) 2-4.

146 Ibid. 17.

147 Blocking Statute (n 1).

sanctions imposed on Iran and Libya by the D'Amanto Act.[148] It was last amended in June 2018[149] following the withdrawal of the United States from the 2015 Iranian nuclear deal[150] on 8 May 2018,[151] which led to the reapplication of certain US sanctions with extraterritorial effects.[152] In 2018 the annex to the statute listing the sanctions covered therein was amended to include the reinstated US sanctions on Iran.

The main objective of the blocking statute is to preserve "the harmonious development of world trade", "the progressive abolition of restrictions on international trade" and "the free movement of capital between Member States and third countries" in the face of third-country sanctions with extraterritorial effects contrary to international law.[153] More specifically, it is aimed at "removing, neutralizing, blocking or otherwise countering the effects" of third-country extraterritorial legislation in order to protect the 'established legal order' as well as the interests of the European Union and those of EU operators engaged in lawful international trade that are affected by such measures.[154]

While the provisions of the EU blocking statute are general in scope and may be applied to extraterritorial measures from any foreign country,[155] it only affects the foreign legislation specified in its annex. As noted previously, the statute was enacted in reaction to the Helms-Burton and the D'Amanto Acts, and its application is still nowadays limited to the imposition of secondary sanctions by the United States on Cuba and Iran.[156]

148 'Blocking statute', *European Commission*, https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/blocking-statute_en [https://perma.cc/7JR2-YFK2] (last visited 28 February 2022).

149 Commission Delegated Regulation (EU) 2018/1100 (n 7).

150 JCPOA.

151 Landler (n 5).

152 U.S. Department of Treasury (n 6).

153 Blocking Statute (n 1), recitals 1, 2 and 4.

154 Ibid. recital 6 and Art. 1. With regard to the protection of the interests of EU operators, Art. 16 of the Charter of Fundamental Rights of the European Union recognizes as a fundamental right "[t] he freedom to conduct a business in accordance with Union law and national laws and practices is recognized". The ECJ has ruled in this respect that Art. 16 includes "the freedom to exercise an economic or commercial activity, the freedom of contract and free competition", (Case C-686/18 *Adusbef and Others* [2020] ECJ, para. 82) as well as "the freedom to choose with whom to do business and the freedom to determine the price of a service". (Cases C-798/18 and C-799/18 *Federazione nazionale delle imprese elettrotecniche ed elettroniche (Anie) and Others*, [2021] ECJ, para. 57). It should be noted in this respect that the ECJ has held in various decisions that the fundamental freedom recognized in Art. 16 can be claimed by private legal entities (e.g. Case C-157/14, *Neptune Distribution* [2015] ECJ, para. 85).

155 Blocking Statute (n 1), recitals 1-5.

156 More specifically, the following US acts and regulations are covered under the EU blocking statute, according to its Annex: the National Defense Authorization Act for Fiscal Year 1993, Title XVII; the Cuban Democracy Act 1992, sections 1704 and 170; the Cuban Liberty and Democratic Solidarity Act of 1996; the Iran Sanctions Act of 1996, the Iran Freedom and Counter-Proliferation Act of 2012; the National Defense Authorization Act for Fiscal Year 2012; the Iran Threat Reduction and Syria Human Rights Act of 2012; and the Iranian Transactions and Sanctions Regulations. The Annex details which is the required compliance and possible damages to EU interests for each of the measures.

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In light of the objectives of the statute, EU individuals and undertakings are bound by certain obligations thereunder when confronted by third-country measures with extraterritorial effects.[157] Their main obligation is laid down in Article 5, which prohibits EU operators from complying directly or indirectly, by act or omission, with secondary sanctions or similar measures falling under the scope of the statute.[158] EU operators are also subject to a reporting obligation in favour of the European Commission when their economic or financial interests are affected, directly or indirectly, by any of the covered measures with extraterritorial effects.[159] However, the statute does not specify the sanctions in case of breach of the obligations thereunder, which shall instead be determined by each Member State. The only requirement is that such measures are "effective, proportional and dissuasive".[160]

The statute includes two provisions aimed at mitigating the negative effects that the main obligation under Article 5 may have on EU operators. First, the affected undertakings may be given a full or partial waiver of the obligation when failing to comply with the third-country measures "would seriously damage their interests or those of the Community".[161] The second provision contains an indemnity clause under which affected operators are entitled to recover the damages caused by the application of the foreign measures.[162] The statute

157 Art. 11 of the EU blocking statute enumerates the individuals and legal persons subject to its obligations. In particular, the statute applies "(1) any natural person being a resident in the Community and a national of a Member State, (2) any legal person incorporated within the Community, (3) any natural or legal person referred to in Article 1 (2) of Regulation (EEC) No 4055/86, (4) any other natural person being a resident in the Community, unless that person is in the country of which he is a national, and (5) any other natural person within the Community, including its territorial waters and air space and in any aircraft or on any vessel under the jurisdiction or control of a Member State, acting in a professional capacity".

158 Blocking Statute (n 1), Art. 5.

159 Ibid. Art. 2. Some EU stakeholders are of the opinion that the reporting obligation is particularly important for the purposes of the blocking statute, as it promotes transparency and allows "the European Commission and national authorities to understand the breadth of the impact [of extra-territorial sanctions], and therefore to prepare adequate political, legal and economic reactions". 'Summary of Results of the Open Public Consultation on the Review of the Blocking Statute (Council Regulation (EC) No. 2271/96)' (n 130) 4.

160 Blocking Statute (n 1), Art. 9.

161 Ibid. Art. 5. *See also* Commission Implementing Regulation (EU) 2018/1101 of 3 August 2018 laying down the criteria for the application of the second paragraph of Art. 5 of Council Regulation (EC) No 2271/96 protecting against the effects of the extraterritorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom [2018] OJ L199 I/7. The Commission Implementing Regulation (EU) 2018/1101 provides guidance for the assessment of damages resulting from compliance of third-party extraterritorial. Among other criteria, the Commission shall assess whether, by failing to comply with the measure, an operator "would face significant economic losses, which could for example threaten its viability or pose a serious risk of bankruptcy".

162 Blocking Statute (n 1), Art. 6. Under Art. 6 of the statute, "[s]uch recovery may be obtained from the natural or legal person or any other entity causing the damages or from any person acting on its behalf or intermediary. [...] Without prejudice to other means available and in accordance with applicable law, the recovery could take the form of seizure and sale of assets held by those persons, entities, persons acting on their behalf or intermediaries within the Community, including shares held in a legal person incorporated within the Community".

complements and reinforces the operators' prohibition to comply by nullifying the effects in the EU of foreign judicial or administrative decisions implementing any of the legislation covered thereunder by prohibiting their recognition of enforceability within the EU.[163]

The ECJ has been recently called upon to decide on certain issues regarding the blocking statute in the aforementioned case involving Telekom and BMI.[164] The main question before the Court concerned the scope of the prohibition under Article 5 to comply, and, in particular, whether EU operators are subject to it "even in the absence of an order directing compliance issued by the administrative or judicial authorities of the third country" that adopted the extraterritorial measures. In line with its established case law, the ECJ interpreted Article 5 considering its wording but also the context and objectives of the blocking statute and concluded on the basis thereof that the obligation is broad and applies even in the absence of a specific order from a competent authority. The Court noted that the objectives of the statute would otherwise be frustrated, as the 'mere threat' of the consequences that may result from the infringement of the third-party extraterritorial legislation is usually capable by itself of producing the effects expected by the foreign country.[165] In addition, the Court considered that this interpretation of Article 5 is not inconsistent with another of the objectives of the statute, namely the protection of the interest of EU operators, as long as their obligation may be waived when, by failing to comply with the measure, an operator "would face significant economic losses" as a result of the consequences imposed by the third country.[166]

The decision addressed two additional questions that, on their face, appear to be more case specific, but their analysis by the Court is also insightful for analysing the effectiveness and potential amendment of the blocking statute.

The first relates to the Court's analysis of two issues regarding the judicial review of actions allegedly in violation of Article 5. As noted previously, shortly after the United States reinstated sanctions on Iran, Telekom unilaterally terminated the agreements entered with BMI and four other companies that had also been recently included in the SDN list. The question before the ECJ was whether a national law allowing the termination of a contract with a counterparty included in the SDN list "without providing reasons for that termination" was consistent with Article 5 of the EU blocking statute. While the Court concluded that domestic legislation may indeed allow the termination of these types of contracts without justification, it also addressed two relevant issues regarding judicial proceedings in domestic courts in which plaintiffs invoke Article 5. First, the Court clarified that private parties may institute civil proceedings against other private parties before national courts alleging the infringement of Article 5 as a ground for requesting that the termination of an agreement be nullified. Second, the Court ruled that the burden of proof shifts in cases where the plaintiff invokes

163 Ibid. Art. 4.

164 *See supra* Section I.2; and *Bank Melli Iran* (n 128).

165 *Bank Melli Iran* (n 128) paras. 34 and 42-49; and *Bank Melli Iran*, Opinion of AG Hogan (n 8) paras. 55 and 63-64.

166 *Bank Melli Iran* (n 128) paras. 50 and 42-49; and Commission Implementing Regulation (EU) 2018/1101, Art. 4(e).

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a violation of Article 5 resulting from the termination of a commercial agreement by the defendant.[167] The burden will shift where "all the evidence available to the national court tends to indicate prima facie that, by terminating the contracts in questions", the defendant complied with any of the foreign extraterritorial measures covered by the blocking statute.[168] In these circumstances, the defendant will bear the burden of proving that complying with secondary sanctions was not the reason for terminating the commercial relationship.[169]

The Court also considered the applicable remedies in cases where an agreement has been terminated in violation of Article 5. In particular, the question was whether the blocking statute requires annulment of the termination in cases where the defendant "risks suffering substantial economic loss as a result of that annulment". The main concern in this respect was whether such a consequence excessively limited the freedom to conduct a business recognized by the Charter of Fundamental Rights of the European Union, which, as noted previously, includes "the freedom to choose with whom to do business".[170] The Court noted that the freedom to conduct a business is not absolute and may be subject to limitations in accordance with Article 52(1) of the Charter.[171] Moreover, the Court held that, compared with other fundamental rights, the freedom to conduct a business may be subject to 'a broad range of interventions', in view of 'its function in society' and having regard to "other interests protected by the EU legal order". In the specific

167 *Bank Melli Iran* (n 128) paras. 52-68. The ECJ notes in this respect that "the application of [...] [the] general rule relating to the burden of proof is liable to make it impossible or excessively difficult for the referring court to make a finding that there was an infringement of [Article 5,] [...] thereby undermining the effectiveness of that prohibition. The evidence capable of showing that conduct on the part of a person [...] is motivated by that person's intention of complying with the laws specified in the annex is not normally available to any other private individual, to the extent that, in particular, [...] such evidence may be covered by business secrecy". *Bank Melli Iran* (n 128) paras. 65-66.

168 Ibid. Para. 68.

169 This ruling by the Court regarding the burden of proof in proceedings involving Art. 5 violations mitigates to some extent one of the major concerns by European authorities with respect to the effectiveness of the EU blocking statute. In particular, the former EU High Representative for Foreign Affairs and Security Policy and Vice-President of the European Commission, Federica Mogherini, noted in 2015 that "[i]t is not usually possible to establish that the decision [of EU persons or entities not to engage in certain activities in relation to the effects of the US legislation in the EU] is a direct result of the US legislation rather than commercial considerations. It appears that it suffices for a person covered by the Blocking Statute to evade the compliance prohibition provided that one of the considerations of a person terminating its activities was commercial (or even regulatory in nature, to the extent that it does not relate to compliance with US sanctions law, e.g., compliance with regulations regarding money-laundering and terrorist financing). This means that, in practice, "commercial motivations" can always be used to evade the compliance prohibition". Tom Ruys and Cedric Ryngaert, 'Secondary Sanctions: A Weapon Out of Control? The International Legality of, and European Responses to, US Secondary Sanctions' (2020) 0 British Yearbook of International Law 88.

170 *See supra* note 157.

171 Art. 52(1) of the Charter of Fundamental Rights of the European Union states that "[a]ny limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others".

case of annulment of the termination of an agreement in violation of Article 5, the Court focused on the reasons for the annulment in connection with the objectives of the blocking statute. It held that by annulling the termination of the agreement in the specific circumstances of the case, the defendant entity was not entirely prevented from asserting its interest in the contract. Instead, the ECJ reasoned that freedom with respect to the particular contract under Article 16 was lawfully limited because the termination aimed at complying with US secondary sanctions. It was therefore contrary to the objectives of the blocking statute, aimed at protecting the "established legal order and the interests of the European Union in general" and the "free movement of capital between Member States and third countries". For these reasons, the decision held that the remedy consisting in annulling the termination of an agreement appeared proportionate and necessary to protect the objectives of the statute, recognizing at the same time that it fell on national courts to strike the necessary balance on a case-by-case basis to ensure proportionality.[172]

The decision by the ECJ clarified some of the concerns regarding the interpretation and application of the blocking statute. However, as discussed further on, the current wording of the statute – even as interpreted by the ECJ – is insufficient to effectively address the concerns by the authorities and stakeholders in Europe with regard to the negative effects of secondary sanctions.

II Institutional and Stakeholder Perspectives on the Blocking Statute and Its Potential Amendment

The reinstatement of US sanctions on Iran has raised serious concerns in Europe regarding the application and the effectiveness of the statute currently in force. In the opinion of Mr Gerard Hogan, Advocate General of the ECJ, the existing tension between the US sanctions regime and the statute creates 'geopolitical problems' and "unresolved legal issues and a variety of intensely practical problems", as a result of which European undertakings face "impossible – and quite unfair – dilemmas" when doing business with companies and individuals targeted by US sanctions. The Advocate General suggested that the statute be reviewed to address its failure to "protect the established legal order, the interests of the Community and the interests of the said natural and legal persons".[173]

The European lawmakers are not unaware of these difficulties. Indeed, the European Commission notes in its communication from 19 January 2021 that, although

> the Blocking Statute has provided EU response to the extra-territorial application of sanctions, [...] the proliferation of such sanctions requires a deeper debate on possible additional measures to increase deterrence and, if needed, to counteract them.

172 *Bank Melli Iran* (n 128) paras. 69-95.

173 *Bank Melli Iran*, Opinion of AG Hogan (n 8) para. 5. *See also* Cuban Liberty and Democratic Solidarity (Libertad) Act (n 2), recital 6.

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This 'deeper debate' is essential to the border objectives of enhancing "the EU's openness, strength and resilience".[174] The European Commission proposed in the communication three main actions to advance these objectives in the area of secondary sanctions. First, creating an expert committee on sanctions and extraterritoriality, composed of representatives of the EU Member States, to identify and address the technical challenges raised by the EU blocking statute. Second, the Commission suggested strengthening cooperation on sanctions, noting that "[t]o fulfil its potential, the Blocking Statute must be part of a more comprehensive EU policy against extra-territoriality". Third, the Commission raised the 'possible amendment' of the EU blocking statute.[175]

With respect to the latter action, in September 2021 the European Commission launched a public consultation to seek the views of relevant stakeholders in the matter.[176] The summary of results of the consultation, which has been recently published, provides an insightful overview of the concerns and positions of diverse stakeholders with respect to the statute.[177] The summary shows that respondents generally regret that the blocking statute fails to protect European undertakings from secondary sanctions by forcing them to choose "between carrying out a transaction subject to non-EU restrictions [and] risk losing access to the non-EU financial market". The general opinion is that "the vagueness of the language used", the "lack of operational framework" and the "lack of proper implementation" are the main reasons for the statute's lack of success.[178]

Indeed, most respondents considered that the prohibition under Article 5 to comply has proven to be ineffective in achieving the objectives of the statute and that it is not even the most effective mechanism for advancing them. "[T]he lack of awareness amongst companies and the judiciary, as well as the general lack of enforcement" would be the main reasons behind the failure of Article 5. Participants suggested that the effectiveness of the prohibition could be enhanced by "further clarifying the scope" of the statute and by "the exclusion of specific sectors from the prohibition".[179]

174 Communication COM (2021) 32 final (n 9) 15 and 19.

175 Ibid. 19.

176 'Unlawful Extra-territorial Sanctions – A Stronger EU Response (Amendment of the Blocking Statute)' (n 130).

177 'Summary of Results of the Open Public Consultation on the Review of the Blocking Statute (Council Regulation (EC) No. 2271/96)' (n 130). According to the summary of results, the European Commission received 86 contributions to the public consultation with 25 position papers. Participants included companies, business associations, EU citizens, non-governmental organizations, public authorities, trade unions, academic and research institutions, legal professionals, and reflexion groups from EU countries – with a significant number of participants from France and Germany – and non-EU countries – in particular, Cuba, Iran, Russia, Switzerland, the United Kingdom and the United States. Participants represented both large companies and SME from a wide range of industries and sectors, including banking, insurance, market infrastructure operation, petrochemical, energy, space, defence, and aeronautics, IT equipment, medical equipment, hospitality, transportation, construction, chemicals, and mining.

178 Ibid. 3.

179 For instance, some respondents were of the opinion that the financial sector, in particular, payments, should be excluded from the prohibition on compliance. Ibid. 6.

The prohibition on recognizing and enforcing foreign judicial or administrative decisions was viewed by the respondents as an essential provision. However, they considered that its effectiveness was also undermined because of the "inability [...] to block service from abroad", the "lack of implementation", the "need for an advisory system for EU operators facing legal proceedings abroad", and the "lack of protection of assets located abroad due to the inability of the provision to deploy its effects outside the EU".[180]

Regarding the recovery of damages, participants pointed out that the provision does not provide clear guidance for bringing court proceedings and that, in any case, they are usually 'lengthy, time-consuming and expensive' and usually involve the risk of 'undermining business relationships'.

Finally, many respondents thought that remedies for breach of the blocking statute should be harmonized and administered at the EU level[181] and that, in general, the communitarian enforcement of the statute would be more efficient, suggesting even the "creation of an EU body dedicated to the uniform application of the Blocking Statute".[182]

Participants in the public opinion consultation also suggested various measures that could be incorporated into the blocking statute to further deter the extraterritorial effects of foreign sanctions. Examples include the provision of legal support in the context of foreign legal proceedings, countermeasures consisting, for example, in limiting the access of foreign companies to the EU single market or to European certifications, the entitlement to punitive damages in addition to compensatory damages, and economic compensation in view of the costs assumed by EU operators when 'operating in a sanctioned environment'. A common understanding with respect to any of these measures is that they "should be carefully calibrated, reactive (rather than proactive), and [in] compliance with WTO law and public international law".[183]

III The Amendment of the EU Blocking Statute: Intrinsic Limitations and Some Proposals

Two questions arise when discussing the potential amendment of the EU blocking statute. Is the statute an adequate mechanism to counter the effects of extraterritorial sanctions and, if so, to what extent? If the statute is to play a role in countering secondary sanctions, how should it be amended to better achieve its goals?

With regard to the first question, the blocking statute is defined by some commentators as "a form of EU self-help in the face of internationally wrongful, or at least economically injurious, US acts". As discussed previously, when it was enacted in the 1990s, it was – together with the dispute settlement proceedings filed by the European Union with the WTO – "arguably instrumental in the US

180 Ibid. 3-4.

181 Some respondents, however, were reluctant to the harmonization of penalties, considering that they "should be adapted to a country's economic situation and the level of other penalties in force". Ibid. 4.

182 Ibid. 3-6.

183 Ibid. 5.

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rolling back its secondary sanctions". However, it seems unlikely that the EU blocking statute alone would be sufficient to deter third countries – and mainly the United States – from using secondary sanctions as a means of achieving foreign policy goals, particularly in light of the current geopolitical situation.[184]

In addition, the statute, by its very nature, will always create conflicting obligations for the private actors that, concurrently, have to comply with third-country extraterritorial measures and the blocking statute. Indeed, as the Commission has acknowledged, "[t]he basic principle of the Blocking Statute is that EU operators shall not comply with the listed extra-territorial legislation, or any decision, ruling or award based thereon".[185] Therefore, the statute alone is not an adequate mechanism to counter the effects in the European Union of third-country extraterritorial legislation in order to protect the 'established legal order' and the interests of the European Union and those of EU operators engaged in lawful international trade that are affected by such measures.[186] Indeed, as some commentators have noted, "if it is the aim of the Blocking Statute to protect EU persons from US secondary sanctions, it is somewhat incongruent to impose sanctions on these same persons".[187]

Nonetheless, the blocking statute may still play a role in the domain of the EU Common Foreign and Security Policy. This policy is defined and implemented by the European Council and the Council of the European Union[188] and put into effect mainly by the High Representative of the Union for Foreign Affairs and Security Policy,[189] assisted by the European External Action Service.[190] In particular, the High Representative, together with the Council of the European Union, is responsible under the foundational treaties of the European Union for ensuring "the unity, consistency and effectiveness" of the Union's common foreign and security policy.[191]

184 Ruys and Ryngaert (n 170) 82.

185 Guidance Note. Questions and Answers: adoption of update of the Blocking Statute [2018] OJ C277 I/4.

186 *See supra* Section B.II; and Council Regulation (EC) 2271/96, Recital 6 and Art. 1.

187 Ruys and Ryngaert (n 170) 88.

188 Under Art. 25 of the Treaty of the European Union, '[t]he Union shall conduct the common foreign and security policy by [...] adopting decisions defining [...] arrangements for the implementation of' actions and positions to be undertaken by the European Union in this area. Consolidated Version of the Treaty of the European Union [2012] OJ C326/1 (TEU), Art. 25.

189 TEU, Art. 24(1).

190 TEU, Art. 27(3). The European External Action Service is "functionally autonomous body of the Union under the authority of the High Representative" established by Council Decision on 26 July 2010. The European External Action Service "shall support the High Representative in fulfilling his/her mandates as outlined, notably, in Articles 18 and 27 TEU" in, among others, "fulfilling his/her mandate to conduct the Common Foreign and Security Policy [...] of the European Union, including the Common Security and Defense Policy [...], to contribute by his/her proposals to the development of that policy, which he/she shall carry out as mandated by the Council and to ensure the consistency of the Union's external action". *See* Council Decision of 26 July 2010 establishing the organization and functioning of the European External Action Service [2010] OJ L201/30.

191 TEU, Art. 26(2).

The statute should be part of a broader European foreign policy strategy against the use of secondary sanctions in the international arena with the objective of countering their negative impact in the European Union. In this respect, the statute should be one of the mechanisms to preserve the interests of the European Union but only as a last resort, given its burdensome effects not only on private undertakings but also on the European Union itself and its foreign relations. With respect to economic sanctions, in general, and secondary sanctions, in particular, the European Union should certainly continue to prioritize diplomacy and multilateral cooperation as required by its foundational principles – the Union shall "promote an international system based on stronger multilateral cooperation and good global governance"[192] in line with its foundational principles.[193] Indeed, diplomacy and cooperation are the optimal track along which to solve international disputes.[194] At the same time, however, the European Union should have at its disposal strong unilateral tools to preserve its objectives and values when diplomacy and cooperation fail, especially when polarization seems to increasingly shape international relations. In these undesirable situations, a strong blocking statute may be reactively instrumentalized as a lever to force third countries using secondary sanctions to reconsider their strategies, as happened during the 1990s.[195]

Therefore, only a reinforced blocking statute may contribute to the broader European strategy against the use of secondary sanctions. This leads to the second question. Three main amendments to the EU blocking statute would significantly contribute to the realization of its objectives within the framework of a broader European strategy to mitigate and counter the effects of secondary sanctions in the European Union. First, the structure and operation of the prohibition on compliance should be rethought by making it conditional on specific orders issued by European authorities. Second, the scope of application *ratione personae* of the obligations under the statute should be extended to any foreign operator doing

192 TEU, Art. 21(2)(h).

193 Pursuant to Art. 21(1) of the TEU, "[t]he Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law. The Union shall seek to develop relations and build partnerships with third countries, and inter national, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations". TEU, Art. 21(1).

194 Perlow (n 48) 257.

195 In this respect, some scholars have challenged the common understanding that the European Union tends to prioritize multilateral cooperation to achieve worldwide generally acceptable standards of conduct, while the United States would prioritize 'unilateralism in international affairs'. For instance, Professor Anu Bradford qualifies this general perception in the regulatory area, and suggests that "[l]ike any great power, the EU is willing to shape the international order to ensure that international norms reflect its regulatory preferences – often multilaterally but at times even more effectively unilaterally". In this respect, Professor Bradford maintains that "the EU's greatest global influence may not be through multilateral mechanisms and political institutions, but instead through unilateral actions, facilitated by markets and private corporations". Bradford (n 144) xv.

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business in the EU single market. Finally, the enforcement of the statute should be centralized at the European level, and the sanctions for the infringement of the obligations thereunder should be specified in the statute. These three suggested amendments are discussed separately in the following subsections.

1 *Rethinking the Prohibition on Compliance by Making It Conditional on Specific Orders by the European Authorities*

The prohibition on compliance laid down in Article 5 of the blocking statute prevents any person subject thereunder from complying directly or indirectly, by act or omission, with secondary sanctions or similar measures falling under the scope of the EU blocking statute.[196] As noted previously, the generality of the provision poses 'impossible – and quite unfair – dilemmas' for EU undertakings when doing business with companies and individuals targeted by US sanctions, which face conflicting obligations that are difficult to reconcile and the corresponding risk of penalties. This contributes to the failure of the blocking statute to "protect the established legal order, the interests of the Community and the interests of the said natural and legal persons".[197]

The structure and operation of the prohibition on compliance should be rethought in order to better protect the interests of both the European Union as an organization and those of European undertakings and to ensure that the blocking statute fits optimally within a broader European strategy against secondary sanctions. The strategy followed by Canada to counter the effects of foreign extraterritorial measures may serve as a useful guide. Under Section 5(1) of the Canadian blocking statute, the Attorney General of Canada has the authority to "require any person in Canada to give notice to him" and to "prohibit any person in Canada from complying with" any actual or likely extraterritorial measures or orders by a foreign state or tribunal

> where, in the opinion of the Attorney General of Canada, [...] [such measures affect] international trade or commerce of a kind or in a manner that has adversely affected or is likely to adversely affect significant Canadian interests in relation to international trade or commerce involving business carried on in whole or in part in Canada or that otherwise has infringed or is likely to infringe Canadian sovereignty.

The orders by the attorney general "may be directed to a particular person or to a class of persons".[198]

196 Blocking Statute (n 1), Art. 5.

197 *Bank Melli Iran*, Opinion of AG Hogan (n 8) para. 5. *See also* Blocking Statute (n 1), recital 6.

198 Foreign Extra-territorial Measures Act, R.S.C., 1985, c. F-29 (1985), §5(1) and (3). For the purposes of Section 5(1), the term 'measures' includes "measures taken or to be taken by a foreign state or foreign tribunal include laws, judgments and rulings made or to be made by the foreign state or foreign tribunal and directives, instructions, intimations of policy and other communications issued by or to be issued by the foreign state or foreign tribunal". Foreign Extra-territorial Measures Act, §5(2).

Adopting a similar stance in the European Union would allow it to strike a better balance between the diverse values and interests that the EU blocking statute – and more broadly the European strategy against secondary sanctions – tries to preserve and promote. By making the prohibition on compliance conditional on specific orders, the European authorities would have the opportunity to assess on a case-by-case basis the risks and challenges posed by a given third-country extraterritorial measure and determine which strategy is to be adopted in that particular situation. The strategy may include the enforcement of the prohibition on compliance vis-à-vis a particular undertaking or a group of them, where, in light of the circumstances, the benefits of doing so seem to outweigh the costs entailed by the prohibition. It would also facilitate working closely with the private actors affected to adopt a solution that carefully evaluates and balances the interests of all the stakeholders involved and provide them with detailed guidance and support to navigate the situation in case the prohibition on compliance is enforced.

This new approach to the implementation of the prohibition obligation would have an impact on two other provisions of the blocking statute. First, the waiver regime provided for under Article 5 would no longer be necessary as a general rule. Instead, the criteria for the administration currently laid down in the statute's implementing regulation may be used to conduct the overall assessment in order to decide whether the prohibition on compliance should be enforced in a particular situation.[199] Second, the reporting obligation in Article 2 and the Commission's power to request information from private parties affected by extraterritorial sanctions would take on special importance. Indeed, access to information regarding the consequences in the European Union of the use of secondary sanctions would be an essential precondition for the European authorities to be in a position to evaluate the potential enforcement of the prohibition on compliance in a given situation. In this respect, consideration should be given to the possibility of imposing additional due diligence and disclosing obligations on certain groups of undertakings that, by nature of their business, may be potentially more likely to be affected by foreign measures with extraterritorial effects. While this measure would impose some administration costs on the affected undertakings, it would allow the European authorities to better assess the interests at stake in a given situation in order to define an adequate strategy and have an overall beneficial effect on the undertakings potentially affected by the foreign measures and the prohibition on compliance.

2 *Extending the Scope of Application Ratione Personae of the Blocking Statute*

The scope of application *ratione personae* of the EU blocking statute is currently limited to

> (1) any natural person being a resident in the Community and a national of a Member State, (2) any legal person incorporated within the Community, (3)

199 Commission Implementing Regulation (EU) 2018/1101 provides guidance for the assessment of damages resulting from compliance of third-party extraterritorial, which may justify a waiver of the obligations laid down in the EU blocking statute. *See supra* note 164.

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> any natural or legal person referred to in Article 1(2) of Regulation (EEC) No 4055/86,[200] (4) any other natural person being a resident in the Community, unless that person is in the country of which he is a national, and (5) any other natural person within the Community, including its territorial waters and air space and in any aircraft or on any vessel under the jurisdiction or control of a Member State, acting in a professional capacity.[201]

The European Union should rely on the powerful EU single market and the significant trade relations with the United States to enhance the effectiveness of the blocking statute by extending the obligations thereunder – and, in particular, the prohibition on compliance under Article 5 amended as suggested – to any foreign operator doing business in the EU single market.

As noted previously, on several occasions the United States has relied on its domestic economic leverage to unilaterally advance its foreign policy agenda through the use of secondary sanctions. Indeed, in 2020 the United States was the second biggest economy in the world in terms of GDP-PPP – US$20 trillion – outranked only by China – US$23 trillion.[202] The United States claims to have "the largest consumer market on earth with [...] 325 million people", and the highest household spending in the world, "accounting for nearly a third of global household consumption".[203] But the US economic power is closely followed by the European Union. The EU single market, which is usually considered to be "one of the EU's greatest achievements",[204] occupies the third place in the list of the world's largest economies – US$19 trillion –[205] with 500 million citizens and 24 million companies.[206] The European Union is also one of the largest players in international trade, together with China and the United States, accounting for 15% of the world's trade in goods.[207]

200 Art. 1(2) of Council Regulation (EEC) No 4055/86 of 22 December 1986, applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries, states that its provisions "shall also apply to nationals of the Member States established outside the Community and to shipping companies established outside the Community and controlled by nationals of a Member State, if their vessels are registered in that Member State in accordance with its legislation".

201 Council Regulation (EC) 2271/96, Art. 11.

202 GDP-PPP (constant 2017 international $), *The World Bank*, https://data.worldbank.org/indicator/NY.GDP.MKTP.PP.KD?most_recent_value_desc=true [https://perma.cc/3FC8-R7HR] (last visited 8 March 2022).

203 *Select USA*, www.trade.gov/selectusa-investor (last visited 18 July 2022).

204 'Internal Market, Industry, Entrepreneurship and SMEs, Single Market and Standard', *European Commission*, https://ec.europa.eu/growth/single-market_en [https://perma.cc/BPH5-2JRZ] (last visited 8 March 2022).

205 The World Bank (n 203).

206 European Commission, Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, 'Single Market: 25 Years of the EU Single Market' (1 August 2018), https://op.europa.eu/en/publication-detail/-/publication/6ee5fa6b-95fd-11e8-8bc1-01aa75ed71a1/language-en [https://perma.cc/L5QM-B2X5], p. 1.

207 'Facts and Figures on the European Union Economy', *European Union*, https://european-union.europa.eu/principles-countries-history/key-facts-and-figures/economy_en [https://perma.cc/E3K3-ZUF7] (last visited 8 March 2022).

In addition, the European Union and the United States share strong commercial ties and together represent more than 40% of the world GDR and more than 40% of international trade. They have "the largest bilateral trade and investment relationship" in the world and are "each other's biggest source of foreign direct investment". In 2019, the EU's exports of goods to the United States amounted roughly to US$420 billion and its imports to US$253 billion. In trade of services terms, the European Union exported US$202 billion in services to the United States and imported services for a total of $217 billion. With respect to foreign direct investment, the European Union invested US$2.4 trillion in the United States and received US$2.2 trillion from the other side of the Atlantic. These trade and investment flows between the European Union and the United States are considered "an important driver of the transatlantic relationship and contributes to growth and jobs [in] both territories".[208]

Despite the asymmetries in the relationship between the European Union and the United States,[209] the powerful EU single market and the trade relations between both sides of the Atlantic shall play an important role in the analysis of the potential amendment of the EU blocking statute. Research by Professor Anu Bradford in this respect provides an excellent example of how the European Union relies on its single market and global economic power to advance its regulatory policy agenda. Bradford defines as the 'Brussels Effect' the European Union's "unilateral ability to regulate the global marketplace" beyond the borders of the single market without coercively imposing its regulations on foreign operators. To achieve this effect, the European Union only needs to regulate its own internal market, and "the size and attractiveness of its market does the rest".[210] According to Bradford, a jurisdiction's market power depends, in fact, on the value foreseen by foreign operators to be obtained from accessing that market.[211] Accordingly, "[a] foreign producer will have an incentive to comply with the importing jurisdiction's stringent standard whenever the benefits of market access outweigh the adjustment costs". Because of the size and significance of the EU consumer market, "a large number of producers depend on their ability to supply products and services to those consumers". Bradford argues that this is particularly true with respect to certain US industries, such as high-tech, electronic, pharmaceutical and organic chemical manufacturers. More specifically, Bradford notes that "87% of US pharmaceutical exports and 36% of US organic chemicals are destined for the EU". With respect to technological products, she suggests that

> the European market is important for many American corporate giants. This is the case for instance of the electronics industry, which is 'highly dependent on

208 'United States', *European Commission*, https://ec.europa.eu/trade/policy/countries-and-regions/countries/united-states/ [https://perma.cc/Q8XX-AN5Q] (last visited 8 March 2022).

209 Hackenbroich (n 122).

210 Bradford (n 144) xiv, 1 and 3.

211 'The size and attractiveness' of the EU single market is one of the main and most important contributors to the Brussels Effect, but is insufficient by itself in the context of regulatory power. Professor Bradford maintains that the Brussels Effects relies on five elements: market size, regulatory capacity, stringent standards, inelastic targets and non-divisibility. Ibid. 23.

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> the EU market and is crucial to the U.S. economy. [...] It is the U.S.'s third biggest export sector to the EU.' [...] The EU is also the most important export market for many US high-tech companies.[212]

The leverage of the EU single market in the regulatory area can and should be extrapolated to the analysis of how the European Union may improve its "resilience to the effects of the unlawful extra-territorial application of unilateral sanctions and other measures by third countries".[213] More specifically, with respect to the amendment of the EU blocking statute, the European Union should reactively rely on its economic power to counter the effects of extraterritorial sanctions imposed by foreign countries, including the United States. Article 11 should be modified to extend the scope of application *ratione personae* of the obligations under the EU blocking statute – and, in particular, the prohibition on compliance pursuant to Article 5 thereunder amended as suggested previously – to any foreign operator doing business in the EU single market.

The extension would rely on the effects doctrine of jurisdiction,[214] which has been validated by the ECJ as a legitimate basis for justifying the extraterritorial application of EU law to foreign individuals and entities in some circumstances. This is the case of EU competition rules, to which foreign entities are subject to when a conduct, "while not adopted within the EU, has anticompetitive effects liable to have an impact on the EU market".[215] In particular, the Court held that because the objective of EU competition law is to counter the anti-competitive practices of undertakings undermining the EU single market, the effects doctrine of jurisdiction

> allows the application of EU competition law to be justified under public international law when it is foreseeable that the conduct in question will have an immediate and substantial effect in the European Union.

An interpretation relying instead on "the place where the agreement, decision or concerted practice was formed" would hamper the achievement of the EU competition law's objectives. Therefore,

> the fact that an undertaking participating in an agreement is situated in a third country does not prevent the application of [EU competition law] [...] if that agreement is operative on the territory of the internal market.[216]

The ECJ's reasoning can be extended by analogy to the domain of secondary sanctions and the blocking statute. As in competition law cases, the decision by a non-EU undertaking doing business in the EU single market to comply with

212 Ibid. 27-29.
213 *See supra* Section B.II.
214 *See supra* Section B.I; and note 46.
215 Case C-413/14 *Intel v. Commission* [2017] ECJ, para. 45.
216 Ibid. 42-44 and 49.

third-country unilateral sanctions regimes when the European Union has not implemented similar sanctions is capable of having "immediate and substantial effects in the European Union" by hindering some of the foundational purposes and interests of the Union. The Maastricht Treaty recognizes as one of the cornerstone objectives of the European integration the promotion of

> economic and social progress [...] through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union [...].[217]

In the foreign policy area, asserting the EU's "identity on the international scene, in particular through the implementation of a common foreign and security policy including the progressive framing of a common defence policy [...]" is another of the Union's essential objectives.[218] The European Union shall, accordingly, "implement a common foreign and security policy covering all areas of foreign and security policy", with the objective, among others, of safeguarding "the common values, fundamental interests, independence and integrity of the Union" "to preserve peace and strengthen international security" and "to promote international cooperation".[219] Indeed, the foundational treaties envisage the European Union as a "cohesive force in international relations",[220] and the common foreign and security policy is conceived thereunder as a policy of the Union itself in light of its specific "strategic interests",[221] and not a mere coordination of the foreign policy of its Member States.[222]

Third-country sanctions with extraterritorial effects threaten these very fundamental principles and objectives of the European integration. As has been shown throughout this article, secondary sanctions seriously challenge "the integrity and level playing field of the EU Single Market"[223] and the free movement of capital within the European Union and between the Member States and third countries, as well as the interests of EU operators engaged in lawful international trade.[224] In addition, the use of secondary sanctions, more generally, thwarts the European Union's commercial and strategic interests and Brussels' control over the Union's foreign policy.[225] The significance of these risks for the core values and interests of the European Union justifies the extension of the obligations under the EU blocking statute to foreign operators doing business in the EU single market on the basis of the effects doctrine jurisdiction.

217 TEU, Art. 2.
218 Ibid.
219 Ibid. Arts. 2 and 11. *See also* ibid. Title V, Chapter 2.
220 Ibid. Art. 24(3).
221 Ibid. Art. 26(1).
222 Marise Cremona, 'The Position of CFSP/CSDP in the EU's Constitutional Architecture', in Steven Blockmans and Panos Koutrakos (eds.), *Research Handbook on the EU's Common Foreign and Security Policy* (Edward Elgar Publishing 2018) 5-6.
223 Communication COM (2021) 32 final (n 9) 17.
224 Blocking Statute (n 1), recitals 1, 2, 4 and 6, and Art. 1.
225 Geranmayeh and Lafont Rapnouil (n 57) 2. *See also supra* Section I.2 regarding the challenges posed by secondary sanctions in the European Union.

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3 *Centralizing and Tightening the Enforcement of the Blocking Statute*

> Article 9 is the only enforcement provision in the EU blocking statute. It provides that
>
> [e]ach Member State shall determine the sanctions to be imposed in the event of breach of any relevant provisions of this Regulation. Such sanctions must be effective, proportional and dissuasive.[226]

As noted previously, the "lack of proper implementation" is usually considered to be one of the main flaws of the blocking statute.[227] Enforcement is indeed essential for the effectiveness of any norm or policy in order to address non-compliance and ensure the achievement of its objectives.[228] Although sanctioning is a key element of any enforcement regime – especially considering that the mere threat of sanctions is in many cases sufficient to deter potential infringement and enhance compliance with the requirements of a norm –[229] it is not limited to sanctions.[230] Instead, "law enforcement comprises monitoring, investigating and sanctioning violations of substantive norms".[231]

National authorities have traditionally played a central role in the enforcement of EU law, generally assuming direct enforcement powers against the individuals and corporations subject to EU law obligations. For its part, EU authorities have limited themselves to the exercise of indirect enforcement functions, focused on "the supervision of the application of the law by public authorities – and foremost of the Member States – but not directly over whether citizens as such obey it".[232] This approach to the enforcement of EU law is rooted in the national sovereignty of Member States. The direct enforcement of EU competition law by the European

226 Blocking Statute (n 1), Art. 9.

227 *See supra* Section C.II.

228 Miroslava Scholten, 'EU (Shared) Law Enforcement: Who Does What and How?', in Stefano Montaldo, Francesco Costamagna and Alberto Miglio (eds.), *EU Law Enforcement. The Evolution of Sanctioning Powers* (G. Giappichelli Editore 2021) 7-8.

229 *Bank Melli Iran*, Opinion of AG Hogan (n 8) paras. 55 and 63-64; *Bank Melli Iran* (n 128) paras. 34 and 42-49; and Scholten, in Montaldo et al. (n 229) 19.

230 The term 'sanction' is used in this subsection in its broader and more common sense, that is, as "[a] provision that gives force to a legal imperative by either rewarding obedience or punishing disobedience". 'Sanction' (n 13).

231 John A. E. Vervaele, 'Shared Governance and Enforcement of European Law: From Comitology to a Multi-level Agency Structure?', in Christian Joerges and Ellen Vos (eds.), *EU Committees: Social Regulation, Law and Politics* (Hart Publishing 1999) 131, quoted in Scholten, in Montaldo et al. (n 229) 7-10.

232 Gerard C. Rowe, 'Administrative Supervision of Administrative Action in the European Union', in C. H. Hofmann and Alexander Türk (eds.), *Legal Challenges In EU Administrative Law: Towards An Integrated Administration* (Edward Elgar Publishing 2009), quoted in Scholten, in Montaldo et al. (n 229) 7-10. *See also* Scholten, in Montaldo et al. (n 229) 13. A Member State failing to adequately discharge its direct enforcement powers may be subject to the infringement procedure in Arts. 258 to 260 of the Treaty of Functioning of the European Union. Such procedure may be initiated on the initiative of the EU Commission or other Member States. *See* Luca Prete, 'Infringement Procedures and Sanctions Under Article 260 TFEU: Evolution, Limits and Future Prospects', in Montaldo et al. (n 229) 71.

Commission together with national competition authorities has traditionally been the only exception to it.

However, the sophistication of EU law enforcement mechanisms over the course of the last decade suggests an ongoing trend towards a greater direct enforcement by EU institutions – including specialized EU enforcement authorities –[233] vis-à-vis not only Member States but also private parties. This shift has resulted from the difficulties that communitarian and domestic authorities have traditionally encountered in the enforcement of EU law.[234] Indeed, nowadays EU enforcement authorities are usually entrusted with direct enforcement powers of EU law vis-à-vis private parties. While these powers may be assumed directly by the European Commission, in recent years many specific enforcement authorities have been created in the European Union and have assumed significant enforcement powers, either exclusively or in conjunction with the authorities of the Member States.[235] Some examples of these authorities include the European Anti-Fraud Office, the European Securities and Markets Authority, the European Central Bank, the European Aviation Safety Agency, and the European Public Prosecutor's Office.

The scope of authority of these agencies depends ultimately on each institution and its governing rules but can be classified into two main groups: the authorities that are entrusted with all the phases of the enforcement process – monitoring, investigation and sanctioning – and those that exercise only some of those powers and are therefore responsible for the enforcement of a given norm together with national authorities. The allocation of specific enforcement powers between a given European enforcement authority and the relevant domestic body depends ultimately on the rules governing the former authority.[236]

In line with the recent developments in the enforcement of EU law and the significance of the single market and the common foreign and security policy as core values and objectives of the European Union, the centralization and tightening of the enforcement of the EU blocking statute is essential to optimize the effectiveness of the statute. This optimization through a stringent enforcement requires, in our view, two main changes in the blocking statute.

First, the European Union authorities should assume responsibility for the direct enforcement of the statute. Article 9, as written, is based on the traditional approach to the enforcement of EU law prevalent during the 1990s, when the statute was enacted. However, considering that, as noted previously, the statute is only one of the elements within a much broader EU foreign policy toolkit, the enforcement of the statute should be centralized at the European level to optimize its effectiveness and ensure that its enforcement is consistent with the broader common, coherent and consistent foreign policy strategy. Therefore, the

233 *See* Jacopo Alberti, 'New Actors on The Stage: The Emerging Role of EU Agencies in Exercising Sanctioning Powers', in Montaldo et al. (n 229) 25.

234 Scholten, in Montaldo et al. (n 229) 10, 11 and 20.

235 Ibid. 14.

236 Ibid. 15-16.

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enforcement of the EU blocking statute should fall within the scope of the EU Common Foreign and Security Policy.

Second, the blocking statute, either directly or through an implementing regulation,[237] should specify the type and amount of the sanctions for the infringement of the obligations thereunder. The consequences for the infringement of the statute should be, as required by the ECJ case law, "effective, dissuasive, and proportionate".[238] While defining the types and amounts of potential sanctions, the European institution should have regard to the consequences that may be faced by European undertakings abroad in case of failure to comply with third-party extraterritorial measures, in order to design a sanctioning regime that effectively deters domestic undertakings from preferring a foreign sanctions regime over the European foreign policy.[239] A separate analysis should be conducted when it comes to third-party undertakings that could be potentially subject to the obligations under the statute, as suggested previously. In this latter case, the European institutions should consider leveraging the EU single market and the trade relations with foreign nations together with the potential imposition of economic penalties. These assessments should ultimately result in penalties that, as required by the ECJ, are "commensurate with the seriousness of the infringements for which they are imposed, in particular by ensuring a genuinely deterrent effect, while respecting the general principle of proportionality".[240]

As noted previously, sanctions for the infringement of the blocking statute imposed on domestic or foreign undertakings should be a last resort mechanism for the preservation of the EU's control over its foreign policy. However, in those last resort situations the suggested centralization of direct enforcement powers at the European level, the better definition of the enforcement process, and the harmonization of the potential sanctions for the infringement of the EU blocking statute would together significantly contribute to achieving two relevant outcomes. First, the proposed amendment would enhance the effectiveness of the blocking statute by reducing the EU undertakings' overall tendency to comply with extraterritorial US sanctions to the detriments of the EU foreign policy strategies. It should be recalled, as previously noted and demonstrated by the use of extraterritorial sanctions by the US, that the mere threat of sanctions is in many cases sufficient to deter potential infringement and enhance compliance with the

237 For instance, the Commission Implementing Regulation (EU) 2018/1101 provides guidance for the assessment of damages resulting from compliance of third-party extraterritorial, which may justify a waiver of the obligations laid down in the EU blocking statute. *See supra* note 164.

238 Case C-68/88 *Commission v. Greece* [1989] ECJ, para. 24.

239 This analysis is of utmost importance because, as noted in the previous sections of this article and suggested by some commentators, "[e]ven if public enforcement were to come about, EU Member State sanctions may not have a meaningful impact on EU persons' willingness to comply with the Blocking Statute, as the US sanctions which corporations face in case of non-compliance with US law are more draconian". Consequently, "[c]ommercial logic may well dictate that the risk of exposure to US sanctions outweighs the risk of exposure to European sanctions: companies may not want to risk heavy US fines or denial of access to the US market (which may well be considered an even more severe penalty)". Ruys and Ryngaert (n 170) 92 and 99.

240 Case C-679/18 *OPR-Finance* [2020] ECJ, para. 26.

requirements of a norm.[241] Second, sanctions have by their nature "an intrusive effect upon the rights and freedoms" of the liable party.[242] In this regard, specific harmonized sanctions and enforcement procedures would create legal certainty for private parties subject to the obligations laid down in the EU blocking statute, in line with the fundamental rights conferred on those individuals and undertakings in Europe.[243]

D Conclusion

The use of secondary sanctions and other measures with extraterritorial effects poses a serious threat to the European Union's core values and principles in a globalized international community characterized by asymmetrical relationships and increasingly polarization. The reinstatement of US secondary sanctions against Iran in 2018 has over the last few years demonstrated the inadequacy of the EU blocking statute to preserve the European Union's 'openness, strength and resilience' its single market and its control over the Union's foreign policy, as well as the interests of its economic undertakings, which face insurmountable conflicting obligations when Washington and Brussels do not coordinate their sanctions regimes. But as it has been shown, this is not just about sanctions unilaterally imposed by the United States. Indeed, in the near future other major international economies, such as China, may have recourse to secondary sanctions to promote their policy objectives, leaving the European Union and its operators between a rock and a hard place.

It is therefore essential for the European institutions to articulate a strong strategy to counter the negative effects in the European Union of third-party secondary sanctions within the umbrella of the EU Common Foreign and Security Policy. An amended EU blocking statute may play an important role within the broader European policy against secondary sanctions, although it is not by itself a sufficient mechanism to achieve the Union's objectives with respect to extraterritorial sanctions. Nonetheless, a powerful statute could significantly contribute to preserving the interests of the European Union but only as a tool of last resort, given its burdensome effects not only on private undertakings but also on the European Union itself and its foreign relations.

In order to optimize its utility, the structure and operation of the prohibition on compliance laid down in Article 5 of the blocking statute should be rethought by making it conditional on specific orders by European authorities. In addition, the scope of application *ratione personae* of the obligations under the statute should be extended to any foreign operator doing business in the EU single market. Finally,

241 *Bank Melli Iran*, Opinion of AG Hogan (n 8) paras. 55 and 63-64; *Bank Melli Iran* (n 128) paras. 34 and 42-49; and Scholten, in Montaldo et al. (n 229) 19.

242 Scholten, in Montaldo et al. (n 229) 19.

243 The enforcement efforts by European public authorities would be complemented by private enforcement procedures. It should be kept in mind that the ECJ has recently confirmed the possibility for parties to private law disputes before domestic courts to invoke the infringement by a counterparty of the obligations laid down in the EU blocking statute. *See above* Section C.I.

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the enforcement of the statute should be centralized at the European level, and the sanctions for the infringement of the obligations thereunder should be specified in the statute.

While the European Union should continue to prioritize diplomacy and multilateral cooperation to promote its domestic and international policy agendas, it is essential for the Union to have the necessary legal resources to stand up against the use of unilateral measures by other countries in order to protect its interest and those of the European undertakings. A blocking statute amended as suggested would certainty contribute to this objective.