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Ole van Vredendaal, *Analysing the role of the EU as a legislator of international trade and assessing the nature and effectivity of EU sanctions in relation to the EU's exclusive trade competences* (June 2020)



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Analysing the Role of the European Union as a Legislator of International Trade and Assessing the
Nature and Effectivity of European Union Sanctions in Relation to the EU's Exclusive Trade
Competences

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1. Introduction

The European Union has grown to become one of the world's foremost trading blocs. Whereas, by the dawn of the 21st century, the European Union's net gross national income (GNI) equalled approximately 22 percent of the global net GNI, by the late 2000s, prior to the 2008 Great Recession, the EU's net GNI equalled approximately 26 percent of the global estimate (World Bank, 2020). By the mid-2010s, moreover, the majority of the world's 500 largest multinational corporations by revenue had established their headquarters in the European Union (McCormick, 2017, p. 153). As such, it should not come as a surprise that the European Union currently ranks as the world's largest economy; as of the late 2010s, it boasted a record high gross domestic product (GDP) per capita of approximately US\$28,270 (European Commission, 2019).

Trade relations have, historically, proven integral to furthering the goal of European integration. Nowadays, trade remains one of the crucial areas within the greater policy framework of the European Union. While the EU, as an institution, has the sole power to regulate commercial activities between itself, as a trading bloc, and non-EU countries thanks to the Union's exclusive competence in this field, the EU cannot act unilaterally concerning a variety of matters that are intimately related to trade policy, such as economic sanctions, trade embargos, and other restrictions of commercial activities. Moreover, the European Union and its individual member states are subject to influences from other countries and trade blocs outside of the EU, even if their respective restrictive measures are aimed against a common foe.

In light of the above, the research question that lies at the foundation of this paper is: "How do sanctions and their effectiveness relate to the framework of European Union competences and how has the European Union, as an institution, sought to maintain control over non-European restrictive measures by which it has been impacted in recent years?" In moving towards providing an answer to this question, this paper analyses the nature of European Union trade policy using a combination of academic literature and empirical materials, including expert papers and media reports. Additionally, this paper will perform a case study centred around the recent sanctions imposed against Iran in response to that country's violation of international nuclear development regulations. This paper also

seeks to render a conclusion regarding the practical value of having different policy areas fall within different categories of European Union competences, a topic which has emerged in various areas of contemporary political and academic debates alike.¹

This paper comprises five main sections. Firstly, the history of European integration and the role that trade has played in facilitating integration is outlined. Secondly, the concept of EU competences is introduced and the nature of the EU's competence with regards to trade is examined. Thirdly, the case study focusing on the restrictive measures imposed against Iran is introduced and the nature of numerous relevant EU sanctions and embargos is analysed. Fourthly, the effectivity of these measures is studied. Fifthly, and finally, the impact of sanctions imposed by the United States against Iran on EU private sector actors and the European Union's attempts to diminish this impact is examined. This paper concludes by reiterating and answering its research question and by presenting an overview of its main findings.

2. Introduction to the History of European Integration

Various organisations have preceded the European Union as it exists in its current form. European integration only commenced following the end of World War Two. Founded in 1949, the Council of Europe, a loosely organised intergovernmental organisation consisting only of ten Western European nations, was the first tentative attempt at achieving greater inter-state cooperation in continental Europe (McCormick, 2017, pp. 51-52). In 1952, the Federal Republic of Germany (West Germany), France, the Netherlands, Belgium, Luxembourg and Italy established the European Coal and Steel Community, or ECSC. The ECSC served to regulate industrial production – and the production of coal and steel in Europe, especially – among its six founding states (Reynolds, 1952, p. 282).

In 1958, the Treaty of Rome came into effect. Consequently, the European Economic Community (EEC) succeeded the ECSC. The EEC consisted of the same members states as its

¹ See for example, Garben, S., Confronting the competence conundrum: democratising the European Union through an expansion of its legislative powers. *Oxford Journal of Legal Studies*, 35(1), 55–89. <https://doi.org/10.1093/ojls/gqu021>

predecessor (Craig & De Búrca, 2015, p. 4). Moreover, the EEC adopted a similar organisational structure. It consisted of an executive body known as the Commission, a decision-making body known as the Council of Ministers, a quasi-legislative body known as the Parliamentary Assembly (the present-day European Parliament) and a Court of Justice (McCormick, 2017, pp. 54-55). The contemporary European Union has retained this structure.

By the 1980s, the EEC had been renamed the European Community (McCormick, 2017, p. 58). By the late 2000s, usage of the term “European Union” had already been widespread. However, the term did not obtain legal status until the signing of the Lisbon Treaty in 2009, which officially disbanded the European Community in favour of establishing the European Union.

Trade as the Foundation of European Integration

International trade lies at the foundation of the modern-day European Union. Indeed, the desire to foster a fiscal climate conducive to trade and economic development was a priority for each of the EU’s predecessor organisations. For example, while efforts to establish the ECSC were, in part, driven by political considerations – the French government was motivated to work together with its neighbours in the hopes of deterring future Franco-German conflicts (Reynolds, 1952, pp. 282-283) – economic and trade-related concerns also played an important role in the creation of the ECSC. Indeed, the ECSC was, *inter alia*, established with the intention to increase European industrial productivity and to encourage intra-European exports through the creation of a single market (Reynolds, 1952, p. 283). The ECSC’s High Authority, a (quasi-)supranational body and the spiritual predecessor of the contemporary European Commission, could enact legislation impacting trade and industry in the ECSC member states (Reynolds, 1952, pp. 285).

If the desire to establish a single market was just one of the motivations for establishing the European Coal and Steel Community, the single market was integral to the European Economic Community. Indeed, the Treaty of Rome, upon which the contemporary European Union was constructed, and which continues to serve as a cornerstone of its foundation, facilitated the removal of trade barriers, such as tariffs and quotas (Craig & De Búrca, 2017, p. 4). In addition, the Treaty of

Rome introduced the “Four Freedoms” which EU citizens continue to enjoy to this day and which allow them to freely engage in commercial activities: the freedom to move goods, workers, capital across European borders, and to provide services in an unrestrained manner (Craig & De Búrca, 2017, p. 5).

Trade and economic considerations continued to play an important role in the process of European integration as the EEC evolved into a series of new organisations, culminating in the present-day European Union. During the 1960s and 1970s, European Community members sought to establish a European economic and monetary union (EMU), control exchange rates between various European countries to facilitate easy trade and explored the options for introducing a single European currency (McCormick, 2017, pp. 58-63). Meanwhile, the single market was expanded during the 1990s and 2000s as further barriers to free trade were struck down, for example, through formation of the Schengen Area, and by increasingly harmonising trade-related government policy throughout the European Union (McCormick, 2017, pp. 146-148).

3. The History and Nature of Exclusive Competences

Historically, the European Union, as a supranational institution, has only enjoyed competence – i.e. authority to legislate in specific policy areas – insofar as the various European treaties have bestowed such competences upon the EU, in what is known as the principle of conferral (McCormick, 2017, p. 122). It was not until the introduction of the Lisbon Treaty, however, that clear distinctions between different competences were made (Craig & De Búrca, 2017, p. 73). The Lisbon Treaty distinguishes between three types of competences: exclusive competence; shared competence; and, competence with regards to supporting, coordinating or supplementary action. Whereas, in the case of the latter two types of competences, both the European Union, as well as individual member states are – in varying degrees of extensiveness – authorised to legislate in relation to specific policy fields, only the European Union, not the member states, is allowed to adopt legislation regarding policy fields which fall under its exclusive competence (Craig & De Búrca, 2017, pp. 78, 83, 86). The only policy areas over which the European Union enjoys exclusive competence are: [economic] competition,

customs, fisheries conservation, monetary policy for Eurozone member states, and trade (McCormick, 2017, p. 124).

Trade Policy as an Area of Exclusive Competence of the European Union

Trade is one of the policy areas over which the European Union, as an institution, enjoys exclusive competence. However, in spite of appearances, the extent to which the EU can act as the sole legislator of trade within its boundaries is relatively limited. Pursuant to Article 3 of the Treaty of the Functioning of the European Union (hereafter to be referred to as “TFEU”), the European Union has the sole power to formulate the “common commercial policy”.² Furthermore, Article 3 TFEU confers upon the European Union the power to negotiate international (trade) agreements with countries and trading blocs outside of the EU.³ Nevertheless, for drafted trade agreements to be *adopted*, a qualified majority vote is required in the Council of Ministers. This means that any agreement subject to a Council vote requires the support of 55 percent of the Council – this is equal to the representatives of 16 member states, given the current size of the EU – which, together, must represent at least 65 percent of the Union’s total population (Leblond & Viju-Miljusevic, 2019, p. 1839; McCormick, 2017, p. 87). Pursuant to Article 207(1) TFEU, the European Union also enjoys exclusive competences with regards to external trade. As such, the EU may involve itself with issues concerning intellectual property rights, foreign investments, and the provision of services, *inter alia* (Leblond & Viju-Miljusevic, 2019, p. 1839).

Current State of the EU’s Common Commercial Policy. The scope of the European Union’s Common Commercial Policy, over which it enjoys exclusive competence pursuant to the Treaty on the Functioning of the European Union, has considerably expanded in recent years. Indeed, the extent to which trade-related matters can nowadays be claimed to fall under the Common Commercial Policy has aroused fear among numerous member states, spurring some to stipulate that

² See *Treaty on the Functioning of the European Union* (2016) *Official Journal* C202, 7 June, Art. 3 §1(e), “The Union shall have exclusive competence in the following areas: (...) common commercial policy.”

³ See *Treaty on the Functioning of the European Union* (2016) *Official Journal* C202, 7 June, Art. 3 §2, “The Union shall also have exclusive competence for the conclusion of an international agreement (...)”

control over sensitive policy areas that are intimately connected to trade, such as countries' national budgets, should not be transferred to the EU (Weiss, 2013, pp. 29-30).

Under the current Common Commercial Policy, the European Union can impose tariffs on goods and services imported into the Union. Furthermore, the EU has the power to regulate intellectual property rights – for example, regarding the commercialisation of European intellectual property (Van den Berghe, 2009, p. 278) – and foreign investments – for instance, by regulating capital movements coming into the EU, by resolving disputes between non-EU investors and European beneficiaries and by seizing foreign investors' European assets (Dimopoulos, 2011, p. 75). Moreover, the EU can formulate Union-wide export policy and implement measures intended to promote competition in trade (Janku, 2017, pp. 11-12).

EU Competences in Relation to Economic Sanctions and Trade Embargos

As previously demonstrated, the European Union enjoys exclusive competence in the field of trade. More specifically, the EU can exercise a great degree of influence in relation to international trade thanks to its exclusive competence with regards to the common commercial policy. Nevertheless, the European Union does not have exclusive competence regarding a wide range of policy areas which are intimately connected to trade, *while not directly falling within the scope of trade policy, per se*. For instance, the EU does not have exclusive competence over economic sanctions or trade embargos. Sanctions and embargos constitute an element of the EU's Common Foreign and Security Policy (CFSP). As such, financial and trade-related restrictions fall under two policy areas – external relations and justice – over which the European Union merely enjoys shared competence (McCormick, 2017, p. 124) and regarding which both the EU, as well as individual member states, are authorised to implement binding legislation.

Formulation of EU Sanctions. As sanctions do not fall under the EU's exclusive competences, their creation depends on the interplay between the institutional workings of the EU and the actions of EU member states. Pursuant to the Treaty of the European Union, sanctions may be used to achieve the goals specified as part of the Common Foreign and Security Policy. Both individual

member states, as well as the European Union's High Representative of the Union for Foreign Affairs and Security Policy, may suggest sanctions (Giumelli, 2013, pp. 10-11). Apropos of the former category of actors, then, the EU is indeed very much dependent upon the assertiveness and ingenuity of its members if it seeks to implement restrictions. Moreover, even if the EU, through its High Representative, proposes sanctions, it is still subject to the preferences of its member states. EU member states negotiate the precise nature of each restriction *together* and sanctions cannot be imposed unless the Council unanimously votes in favour of the proposed restrictions, since sanctions are related to European foreign policy (European Union, 2020; Giumelli, 2013, p. 11).

Symbolic Value of EU Sanctions. Moving beyond the EU's competences, sanctions and other restrictions imposed by the European Union carry a great symbolic value. The fact that the European Union has repeatedly imposed sanctions against the backdrop of international (diplomatic) conflicts serves to underline the important role as a respected global actor, which the EU has carved out for itself. Indeed, by imposing restrictions on countries without the involvement of the United Nations or of any other international body, the European Union has consolidated its place as an international actor with the (moral) authority to assess, independent of others, the need to address a wide range of developments unfolding across the world (Orakhelashvili, 2015, pp. 7-8).

4. Case Study: Sanctions Imposed by the European Union Against the Islamic Republic of Iran

Both the European Union, as a bloc, and powerful individual EU member states, such as Germany and France, have maintained positive relations with Iran for several decades (Tarock, 1999, pp. 41-42; Jenkins, 2016, pp. 727-729; French Ministry of European and Foreign Affairs, n.d.;). Despite the diplomatic ties that exist between the EU and Iran, the latter has experienced numerous far-reaching constitutional changes during the latter part of the 20th century which have seriously impacted its relationship with other nations. In 1979, the Iranian Revolution saw the end of the reign of the Shahs of Iran, the emperors who had ruled over the country for millennia. A new form of authoritarian government, based on the principles of the Islamic religion, was installed and remains in place to this day.

Background: The Road to Sanctions

From the early 2000s onwards, the international community became increasingly concerned over the status of Iran's nuclear programme, which it had initiated during the 1950s. Iran had signed the Treaty on the Non-Proliferation of Nuclear Weapons in 1970, subjecting any nuclear activity taking place in the country to oversight from the United Nations' International Atomic Energy Agency (IAEA). However, Iran has repeatedly disregarded the obligations which followed from its signing of this treaty. In 2003, the IAEA concluded that Iran had failed to disclose the details surrounding the import and processing of nuclear materials (International Atomic Energy Agency, 2003, pp. 1-2). Consequently, the international community at large began to question the peaceful nature of Iranian nuclear activities. These concerns only faded when, in 2015, Iran, the five permanent members of the United Nations Security Council and the European Union agreed on a Joint Comprehensive Plan of Action – commonly referred to as the Iran Nuclear Deal – which served to regulate Iran's nuclear activities.

Nature of UN and EU Sanctions Imposed Against Iran

Both the United Nations and the European Union imposed various sanctions against Iran during the period when international consternation over Iran's nuclear programme was widespread. Given the long history of the international diplomatic quarrel over Iran's nuclear development programme, not all sanctions can be considered within the context of this paper. As such, this subsection limits its scope to a reduced number of noteworthy restrictions against Iran. For example, United Nations Security Council Resolution 1747, passed in 2007, imposed an arms embargo against Iran and froze the Iranian's governments overseas financial assets,⁴ while United Nations Security Council Resolution 1929, passed in 2010, further restricted the activities of Iranian financial institutions.⁵ The European Union has adopted UN sanctions for implementation by its member states

⁴ See SC Resolution 1747 (2007), UNSC, 62nd Year (24 March 2007) §5, "*Iran shall not supply, sell or transfer directly or indirectly from its territory or by its nationals or using its flag vessels or aircraft any arms (...)*."

⁵ See SC Resolution 1929 (2010), UNSC, 65th Year (9 June 2010) §22, "*(...) States shall require their nationals, persons subject to their jurisdiction and firms incorporated in their territory or subject to their jurisdiction to exercise vigilance when doing business with entities incorporated in Iran or subject to Iran's jurisdiction (...)*."

by adopting EU legislation (Orakhelashvili, 2015, pp. 4-5).⁶ However, the European Union has also imposed restrictions which were not based on UN sanctions. For instance, in early 2012, the European Union imposed an oil embargo against Iran. Later that year, the EU unilaterally disconnected Iranian banks from SWIFT, the international digital financial transaction service. The EU lifted the majority of its sanctions against Iran when the Joint Comprehensive Plan of Action came into effect in 2016, after having been agreed to in 2015.

Breaches and Violations of EU Sanctions against Iran

While numerous private sector actors that fall within the jurisdiction of the European Union have repeatedly treated the sanctions imposed against Iran in a questionable manner, there exists limited evidence that points towards clear, intentional violations of either UN or EU restrictions. During the early 2010s, Royal Dutch Shell, the Anglo-Dutch oil company which is headquartered in the Netherlands but registered in the United Kingdom as a public limited company (PLC) during the time that Britain was still a member of the European Union, conducted business with the state-owned Iranian oil company NIOC for the amount of at least US\$1,500,000,000 (Booth, 2010). One may question the morality of being engaged in trade with a foreign country to which one's own government is seriously opposed. However, as the European oil embargo against Iran had not yet come into effect during the time that Shell traded with NIOC, one cannot reasonably accuse the company of violating any sanctions. Similarly, the extraction and transportation of Iranian crude oil by STASCO – one of Shell's subsidiaries – and British Petroleum's refusal to abandon a joint venture with the Iranian government during the early 2010s (Calabresi, 2010; Borger, 2013) prior to the EU's oil embargo taking effect cannot be regarded as attempts to breach international sanctions. In addition, while the morality of five EU member states' (Belgium, Denmark, Finland, the Netherlands, and Sweden) stated intention to continue trading with Iran regardless of various international sanctions still in place during

⁶ See, for example, Council Regulation (EC) No 423/2007 of 19 April 2007 concerning restrictive measures against Iran [2007] OJ L 103 Art. 2(a), "*It shall be prohibited (...) to sell, supply, transfer or export, directly or indirectly, the following goods and technology, whether or not originating in the Community, to any natural or legal person, entity or body in, or for use in, Iran, (...) all goods and technology contained in the Nuclear Suppliers Group and Missile Technology Control Regime lists (...).*"

the late 2010s (Brzozowski, 2019), is subject to debate, again, this does not unequivocally point towards a violation of EU sanctions.

Effectivity of EU Sanctions Against Iran

Even if the European Union is forced to share the responsibility of devising sanctions together with its member states, this is not to say the lack of exclusive competence in this regard makes sanctions unsuccessful, nor does it automatically point towards a lack of legislative harmony. On the contrary, the sanctions and restrictions imposed by the European Union against Iran are, in fact, widely considered as having been successful. Not only were the EU's sanctions successful in achieving its intended results prior to reaching the two-year threshold at which the impact of economic sanctions diminishes considerably – indeed, the EU oil embargo imposed in 2012 served to damage the Iranian economy (Dizaji & Van Bergeijk, 2012, pp. 5, 21), European sanctions have shown to outperform UN sanctions, as the latter is apparently more widely accepted by (part of) the international community (Vines, 2012, p. 875). One might attribute this to the fact that the sanctions flow from consensus between 28 sovereign states, potentially signalling the universality of the restrictions. In addition, violations of the EU's sanctions by European Union member states were rare, as demonstrated.

5. The Impact of US Sanctions on the European Private Sector

As we have seen, the European Union cannot impose economic and trade-related restrictions on non-European parties without concerting with its member states. However, the European Union has undertaken active steps to devise a unitary approach designed to address the impact of sanctions imposed against Iran *by non-European actors*. Even if the EU's international partners seek to punish a common enemy, this may entail negative consequences for European private sector actors and their international trading activities.

The UN has encouraged more constructive behaviour on the part of Iran vis-à-vis its attempts at nuclear development by imposing a range of different sanctions throughout the previous two decades. These actions have been complemented by unilaterally imposed restrictions on the part of the

European Union. Similarly, the United States has also complemented the restrictive UN measures by imposing sanctions of its own. For example, during the early 2000s, the United States federal government fined both US and non-US companies that invested in excess of US\$20,000,000 in the Iranian oil sector (Torbat, 2005, p. 411). By the 2010s, these sanctions had been expanded in such a way as to seriously restrict all financial transactional activities, in the form of investments or otherwise, between American financiers and Iranian citizens (Kozhanov, 2011, p. 145).

While Iran was the intended target of the American sanctions, US restrictions have inadvertently negatively impacted American foreign partners. When the US unilaterally withdrew from the Iran Nuclear Deal in 2018, it reinstated its previous sanctions against Iran. As a result, the US could penalise companies, whether they be within or outside of US jurisdiction, that were found to engage in commercial activities with Iran. Under US law, sanctions which are imposed by the American government may affect non-US organisations if they also do business in the United States (McVey, 2019). In addition, sanctions can impact non-US entities which are owned or controlled by anyone physically located within the United States, regardless of their nationality or US residency status, as well as foreign organisations, or any subsidiaries thereof, registered in the US (McVey, 2019; McNabb et al., 2020, p. 3).

The threat of US sanctions dissuaded numerous European companies from continuing their business dealings with Iran. For example, the French oil company Total – which owns numerous subsidiaries in the United States – reneged on its deal to develop an Iranian gas field out of fear over US penalties (“French energy giant Total officially pulls out of Iran”, 2018). Other large European companies, including Deutsche Bahn and Deutsche Telekom, suspended their dealings with Iran, as well in response to the US reinstating its sanctions (“US forms action group”, 2018).

EU Attempts at Diminishing the Impact of US Sanctions Against Iran

In response to the influence of the US government vis-à-vis European companies, the EU has attempted to circumvent US sanctions. In early 2019, the European Union co-founded the Instrument for Supporting Trade Exchanges, or INSTEX. A so-called special purpose vehicle (SPV) of the

European Union, INSTEX facilitates European trade with Iran without relying on US currency, which can be subject to US sanctions. INSTEX is registered in Paris and, upon its creation, its main shareholders included the governments of France, Germany and the United Kingdom.

Whereas sanctions previously imposed by the European Union against Iran were the product of inter-state cooperation, against the backdrop of which the European Union could not unilaterally act as an institution, the Instrument for Supporting Trade Exchanges is very much the product of the EU as a unified organisation, rather than a forum that facilitates the joint action of its member states. Indeed, upon announcing the establishment of INSTEX, the European Union's High Representative of the Union for Foreign Affairs and Security Policy, who oversaw its development, stated that the Instrument was intended to "accompany the work of the Member States" (Mogherini, 2019). This statement clearly implies that INSTEX emerged thanks to the efforts of the European Union as an institution. INSTEX allows for continued trade between Europe and Iran to take place by, for example, substituting Iranian payments to wholly European organisations which do not operate in the United States, which act as trading intermediaries, for direct Iranian payments for goods and services delivered by US-affiliated companies (Werner, Kampouridi & Ryzgelyte, 2019, p. 64). In addition, the European Union may circumvent US sanctions through its EU Blocking Regulation, which prevents certain elements of sanction-related US legislation from taking effect within the EU's jurisdiction (Werner et al., 2019, pp. 64-65).

Conclusion

This paper sought to analyse the nature of European Union trade policy. It did so by considering the exclusive competences of the European Union and by performing a case study centred around the European Union's sanctions against Iran. The question that formed the basis of this paper was: "How do sanctions and their effectiveness relate to the framework of European Union competences and how has the European Union, as an institution, sought to maintain control over non-European restrictive measures by which it has been impacted in recent years?"

As demonstrated, the European Union's exclusive competence with regards to trade does not extend to the realm of economic sanctions, trade embargos or other commercial restrictions. Indeed, when sanctions are imposed by the European Union, this is very much thanks to the joint effort of all EU member states. This does not mean, however, that sanctions are unstable or ineffective merely because they have not been devised by the European Union in its capacity as a unilateral institutional actor. On the contrary, when considering the EU's sanctions imposed against Iran, one is struck by their effectiveness, their widespread support from members of the international community, as well as the (near) absence of any sanction violations. Herein lies a potential lesson for the future of the European Union. Whereas, during the early phases of European integration, policy or legislation – however limited their scope might initially have been – was more or less imposed on the members of the European Union's predecessor organisations (e.g. by the ECSC's High Authority), this is not the only way in which to achieve policy-related harmony between states. Indeed, by looking at the success of the EU's recent sanctions, one is reminded of the potential for undertaking unified, Europe-wide action in areas that do not fall under the exclusive competences of the European Union. Such action may, nevertheless, be complemented by actions taken by the EU as a unilateral institutional actor, as has been the case regarding the EU's efforts to circumvent US sanctions during the late 2010s. This clearly demonstrates the value that distinctions between the EU's different competences have in facilitating the continued successful intervention of cooperating European Union member states in relation to a variety of pressing international developments.

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