

BREXIT'S IMPLICATIONS FOR UK AND EUROPEAN SANCTIONS POLICY

Richard Nephew and
David Mortlock

OCTOBER 2016



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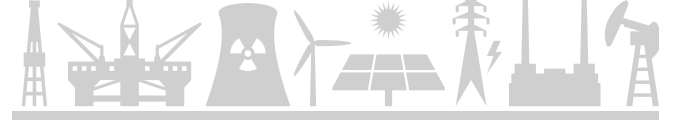


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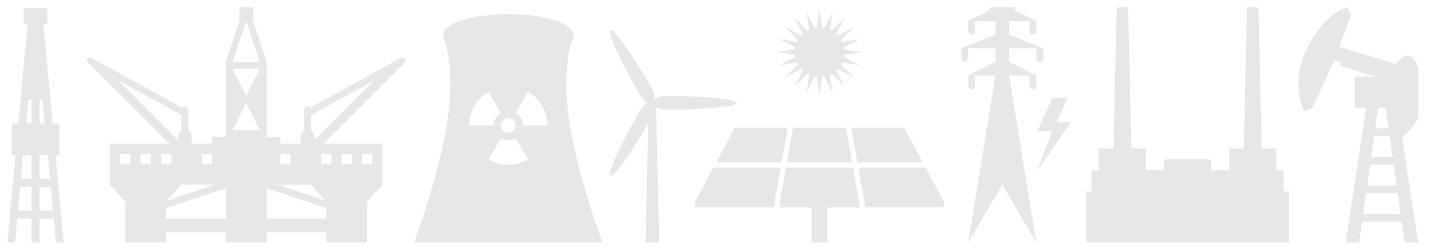
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EXECUTIVE SUMMARY

The British population's decision to withdraw the United Kingdom from the European Union was a major shock to the international order. Though most international attention on the subject has fixated on the broader political and economic implications, there is a not insignificant BREXIT effect on the manner in which the European Union and United Kingdom view and execute economic sanctions policies, at least in the long term. Just as other trade and foreign policy matters were intertwined by the United Kingdom and European Union until BREXIT, sanctions policies were joined together and they had an impact both in the selection and the execution of sanctions decisions by both the United Kingdom and the European Union. Even beyond matters of policy, the United Kingdom was (and, for the time being, is) a major contributor of information and capability to the EU sanctions machine. How the European Union will adapt to its absence on more practical terms remains to be seen.

This paper reviews the legal and political history of EU and UK sanctions policies since the Lisbon Treaty came into effect in 2009. It then reviews three cases of sanctions enforcement—against Iran, against Russia, and against terrorists—to identify common interests and themes, as well as differences, in how the United Kingdom and European Union perceived sanctions enforcement.

It offers three observations and two recommendations in conclusion:

1. First and notwithstanding some speculation to the contrary, the European Union and United Kingdom are likelier to maintain a consistent sanctions posture than they are to split, certainly in the near- to mid-term.
2. Second, there is some chance of a long-term shift in EU and UK perspectives on sanctions, depending on whether the respective self-interests of the European Union and United Kingdom also shift in the future.
3. Third, what's more likely to change in the future is not the desire of the European Union or United Kingdom to impose sanctions in response to bad behavior, but rather the tools to be used.

The authors recommend, first, that the European Union and the United Kingdom build into whatever succeeds the United Kingdom's formal involvement in the European Union the capacity for coordination of sanctions actions. Even if both the United Kingdom and European Union retain separate decision-making apparatus for sanctions enforcement, having some kind of formal role for one another in advising the creation of sanctions rules would help to preserve at least some of the benefits that existed prior to BREXIT, particularly harmonization.

Second, the authors recommend that the United States should formalize its various efforts at sanctions coordination through the creation of "like-minded" coalitions on particular issues. Like-minded collectives existed to deal with Iran and North Korea, and a scaled-up approach could involve annual gatherings of European, British, East Asian, and other interested governments to discuss a range of sanctions topics. These gatherings would not replace the need for UK–EU interaction, but they would help create a floor for this interaction while at the same time reducing some of the tensions that arise from time to time between the United States and its normal sanctions partners. Taken in combination with other mechanisms for UK–EU sanctions coordination (such as the presence of France as a permanent member of the UN Security Council alongside the United Kingdom), such a like-minded coalition would at a minimum help to smooth the transition that is inevitable as BREXIT takes place.

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INTRODUCTION

The British vote to exit the European Union on June 23 has jolted affairs both in the United Kingdom and beyond. Though “Leave” was gaining steam in polling conducted prior to the British referendum, there was widespread conviction (particularly in markets) that the public would ultimately decide to support remaining in the European Union. This conviction was wrong.

Three months after the BREXIT vote, much has already changed in the United Kingdom. Prime Minister David Cameron, who supported the referendum but opposed an exit from the European Union, resigned in deference to those in the Conservative Party who campaigned on behalf of “Leave.” Theresa May, the former Home Secretary, has become Prime Minister and reshuffled the UK cabinet, including by dividing the duties of the Foreign Secretary among three other “Leave” campaigners. The European Union and United Kingdom have begun discussions about the dimensions of the British exit, with some indications that the British will seek to maintain some kind of association with the European Union to preserve its access to European markets. EU leaders have expressed openness to such an arrangement, but underscored the degree to which access to the European Union will be contingent on British acceptance of EU rules. The United Kingdom has also not yet formally invoked Article 50 of the Lisbon Treaty, which triggers a two-year exit process, adding to the confusion surrounding British intentions and how the European Union and United Kingdom will interact whenever BREXIT becomes a reality.¹

With such fundamental matters still up in the air, it is not surprising that there is tremendous uncertainty within and outside of Europe about the future direction of UK and EU foreign policy, much less UK and EU sanctions policy. It is likely that we will not know even the legal dimensions of UK and EU sanctions policy for many months; it will take even longer to see how policymaking is affected.

Though a niche subject, the evolution of UK and EU sanctions policy is no petty matter. As EU sanctions researcher Clara Portela noted, “while the EU’s Common

Security and Defense Policy (CSDP) was launched with fanfare in 1999, and was intended to break new ground in European foreign policy by allowing the Union to carry out joint military operations, it is sanctions that have taken centre stage.”² The European Union has pursued sanctions as a means of projecting power and influencing foreign behavior in several regions and in response to a variety of provocations over the past twenty years; prior to BREXIT, sanctions were figured to remain a core element of the CSDP.

The question now is whether sanctions will remain a focus of EU (and British) foreign policy. Some have speculated, with respect to Russia, that with one of the main advocates of sanctions pressure leaving the European Union, BREXIT will usher in an era of reduced sanctions use.³ Yet this suggests a simplistic understanding of how the European Union works and the mesh of complicated interests and calculations that goes into every sanctions decision. In our experience, in fact, there are times in which the British could be more skeptical of sanctions imposition than their partners on the European continent. Such skepticism largely stemmed from a difference in view on both the efficacy of the sanctions measures in play as well as interests in the underlying problem sanctions were intended to address. But certainly there were times in which the British were undeniable drivers of sanctions decisions.

It is likely that complex calculations of national and institutional interest will continue to drive EU and UK sanctions policies even after BREXIT. What will change is the degree to which British interests will directly influence the decisions under consideration, as well as how the British choose to cooperate with EU sanctions decisions with which they may disagree. It is perhaps obvious, but still important, to underscore that though the United Kingdom was an important part of the EU economy, UK–EU economic ties are probably not sufficient to permit the United Kingdom to impose its will on a skeptical European Union absent a vote in the process, particularly if financial institutions based presently in London reconsider their position following BREXIT.⁴ On the other hand, the European

Union remains a critically important part of the United Kingdom's economy, constituting half of its total trade balance.⁵ Pure economic muscle is not necessarily a good proxy for how diplomacy works (in fact, one can argue that the United Kingdom has been exercising disproportionate political power compared to its military and economic weight since the end of World War II). Still, such practical considerations matter when tough choices have to be made.

In this paper, we examine the EU and UK legal frameworks associated with sanctions today. We also look into the sanctions policies enacted to date in both the European Union and the United Kingdom independently, as well as British views on the main current, driving sanctions topics. We conclude with observations about the short-term and long-term impact of BREXIT on EU and UK sanctions policies. Overall, we assess that though there may be little change in the near future, there is a chance that divergent national interests – in part brought about by the economic consequences of BREXIT on the British economy – will fuel differences in the years to come. We note that these differences could, in time, also create frictions with the United States and complicate – if not compromise – the Special Relationship that exists today.

REVIEW OF EUROPEAN SANCTIONS LAW AND PRACTICE

The Council of the European Union describes sanctions as “one of the EU’s tools to promote the objectives of the Common Foreign and Security Policy (CFSP): peace, democracy and the respect for the rule of law, human rights and international law.”⁶ The use of trade and financial sanctions by the European Union and, by extension, the United Kingdom has increased markedly over the last decade. Between 2010 and 2011, the number of EU sanctions decisions trebled, jumping from 22 to 69.⁷ As of July 2016, the Council has issued over 200 decisions related to sanctions imposing over 30 separate sanctions regimes.⁸ The Council initially focused on implementing terrorism, human rights and nonproliferation targeted sanctions, mandated by the UN Security Council, but eventually expanded its measures to Libya, Syria, Iran, and Russia.

How EU Sanctions Are Created and Managed

The structure of the European Union and its foreign policy making underscores the degree to which reliance on sanctions is a sustained, deliberate decision of the whole of Europe (even if some parts of the European Union express reticence from time to time). The European Council, consisting of the heads of state of each member of the European Union as well as the President of the European Council and the President of the European Commission, has ultimate authority to impose EU sanctions and operates on the basis of consensus decision-making. Article 215 of the Treaty on the Functioning of the European Union (TFEU) provides the legal basis for the Council’s authority.⁹ The TFEU gives the Council authority to interpret or reduce the European Union’s economic and financial relations with one or more third countries, where such measures are necessary to achieve the objectives of the Common Foreign and Security Policy.¹⁰ Accordingly, the Council has broad authority to impose sanctions in pursuit of the EU’s Common Foreign and Security Policy.

The vast majority of the negotiation among members, however, is actually done among the Committee of Permanent Representatives, or COREPER, made up of the head or deputy head of mission from each EU member state in Brussels. The COREPER produces the agenda for the Council meetings and prepares the

major political decisions for leaders. The COREPER also may make some procedural decisions and other decisions delegated by the Council, such as approving sanctions designations of individuals and entities under criteria established by the Council. In this process, the UK has been a valued participant, providing information to support sanctions actions as well as ideas about how they can be drafted and implemented.

EU members, like all UN member states, are obligated by Chapter VII of the Charter of the United Nations to implement all sanctions imposed by the UN Security Council.¹¹ The Council implements the UN Security Council (UNSC) measures by adopting a Common Position that establishes the framework of the sanctions regime.¹² In this, the UK and France have often been leaders, given their role as permanent members of the UNSC. It is an open question how the UK’s departure will affect this work.

In addition, the Council may impose sanctions independently, either to reinforce UN Security Council sanctions by applying stricter and additional measures, such as with sanctions for Iran, or to impose purely autonomous sanctions regimes separate from any action by the United Nations, such as sanctions for Syria and Russia.

Certain sanctions, such as arms embargoes and travel bans, are implemented directly by EU member states. Such measures only require a decision by the Council. This decision is directly binding on EU member states, which are obligated to enforce the bans on individuals and businesses, but the enforcement is itself solely within the jurisdiction of member states and in many cases supplementary national legislation is necessary to bring these sanctions into force.

Economic measures such as asset freezes and export bans, by contrast, fall under the competence of the Union and therefore require separate implementing legislation in the form of a Council regulation, which is directly binding on EU citizens and businesses. The regulation, adopted on the basis of a joint proposal from the EU High Representative for Foreign Affairs and Security Policy and the European Commission, contains the details on the precise scope of the measures decided upon by the Council and their implementation.

Nonetheless, even where Council decisions are directly binding on individuals and entities in the European Union, member states must still establish authorities to impose penalties for violations of the sanctions. Many European countries have not yet taken this step, meaning that although certain transactions with sanctioned countries or persons are illegal, there are no immediate consequences under national law for violating those prohibitions. Moreover, there are no clear guidelines for compelling member states to adopt the requisite national legislation nor to punish those whose legislation – or enforcement of it – is insufficient.

EU Sanctions Tools

Like the United States, the European Union turns regularly to familiar restrictions when developing a new sanctions program. Below are some of the most frequent tools used by the European Union.¹³

- **Asset freeze:** An asset freeze prohibits the transfer of funds and economic resources owned or controlled by targeted individuals or entities. Funds such as cash, checks, bank deposits, stocks, and shares may not be accessed, moved, or sold. An asset freeze also includes a ban on providing resources to the targeted entities and persons. In certain cases, national competent authorities can authorize exceptions from the asset freeze under specific exemptions, for instance to cover basic needs (such as foodstuffs, rent, medicines, or taxes) or reasonable legal fees.
- **Sectoral sanctions:** The European Union may place restrictions on dealing with entire industries. Sectoral sanctions regimes generally fall into one of two categories: (i) sanctions intended to prevent the targeted country from receiving goods and services that assist its perceived misconduct, and (ii) sanctions intended to pressure a targeted country indirectly through cutting off access by key industries to EU funds, services, and investment.¹⁴ For example, the European Union placed restrictions on the export of nuclear-related goods to Iran to avoid contributing to Iran's attempts to develop nuclear weaponry. By contrast, the European Union also placed restrictions on certain state-owned Russian banks obtaining funding from EU capital markets in order to place general economic pressure on the Russian government in connection to its actions in Ukraine.

- **Arms embargo:** An arms embargo normally prohibits the sale, supply, or transfer of the goods included in the EU common military list, as well as technical and financial assistance. In addition, the export of equipment used for internal repression may be prohibited, such as police equipment not covered by the EU common military list. The Council might also ban the export of dual-use goods to targeted countries, i.e. those that can be used for both civil and military purposes, as set out on the EU list of dual-use goods.¹⁵
- **Visa or travel bans:** Persons targeted by a travel ban will not be granted visa for entering the European Union and will be denied entry to the European Union at the external borders. However, EU sanctions never oblige a member state to refuse entry to its own nationals. If an EU citizen is subject to a travel ban, his home country must, subject to national legal provisions, admit that person. Member states may grant exemptions to travel bans when they host certain multilateral bodies or meetings in their territories and implementation is left to individual member states, with guidance from Europol and Interpol as appropriate.

Challenges and the EU response

European sanctions have faced a significant threat in recent years from the rulings of the European Court of Justice (ECJ), the European Court of Human Rights and numerous judicial rulings delisting designated individuals and entities from sanctions lists based on lack of evidence or due process concerns. The ECJ's two decisions in *Kadi v. Commission*, known colloquially as *Kadi I*¹⁶ and *Kadi II*¹⁷, began the acceleration of judicial delistings and also established a set of due process standards that European officials have struggled to meet.

Yassin Abdullah Kadi was listed by the UN Security Council as a supporter of al Qaeda and subjected to an asset freeze and travel ban. The European Union subsequently implemented the sanctions on Kadi, and Mr. Kadi challenged the sanctions in the European General Court. In 2008, the ECJ found that the Security Council measures could not prejudice the individual rights granted to Mr. Kadi by European treaties. The court found that the EU regulation imposing the sanctions was a violation of Mr. Kadi's right to effective judicial review and the

right to property because he had not been informed of the grounds for his inclusion in the list of individuals and entities subject to sanctions.

Following the *Kadi* decision, the European courts granted numerous delisting petitions, including from individuals designated as terrorists and terrorism financiers, as well as Iranian state agencies accused of supporting the illicit nuclear program.¹⁸

European officials took three significant steps to staunch the judicial delistings. First, the European Union sought to increase the ECJ's deference to the UN process by working with Security Council members to provide additional process for delisting petitions at the UN. In 2006, the Security Council adopted Resolution 1730 (2006)¹⁹ to establish a focal point to receive de-listing requests within the Secretariat. Sanctioned individuals were henceforth permitted to submit delisting requests either through the focal point or through their State of residence or citizenship (a principle that applies beyond just terrorism and includes all UN sanctions programs involving individual or entity designation). Following the *Kadi I* decision, however, the Security Council went a step further and adopted resolution 1904 (2009) to establish a new office of an independent Ombudsperson to review petitions for delisting from the al Qaeda sanctions list.²⁰ The Ombudsperson collects information, communicates with petitioners, and issues a report to the Sanctions Committee to recommend removal or maintenance on the sanctions list. If the Sanctions Committee denies the petition for removal, the Ombudsperson informs the petitioner of the Committee's reasons, provided they are not confidential. Since the Ombudsperson's powers were enlarged in 2011, the Security Council has never overturned one of her recommendations to delist.

The establishment of the Ombudsperson did not have a concrete impact on Mr. Kadi's petition. His appeal returned to the ECJ in 2013. In his report to the court, the Advocate General praised the Ombudsperson for providing a rigorous review of the justification for the listing and said the Ombudsperson had made it possible to raise the quality of the list considerably.²¹ He argued that EU institutions should defer to listing decisions made by the Security Council and nullify the implementing regulations only if a European court finds the sufficiency of the information to be manifestly inadequate or erroneous.²² Nonetheless, in its decision in

Kadi II, the ECJ didn't adopt such a deferential standard of review, and found that the basis for the listing of Mr. Kadi was not well founded based on the evidence produced to the court.²³ (The ECJ also did not comment on the sufficiency of the Ombudsperson process.)

Second, the EU adopted new procedures for EU courts to review information underlying the listing without disclosing it to the petitioner. The Rules of Procedure of the General Court allow the court to review classified information produced by an EU member state.²⁴ The court may decide what material is relevant for the decision and what material should be produced to the petitioner, such as a non-classified summary of the information.²⁵ If the Member State refuses to comply with the court's conditions, the court may not consider the classified information. Notably, the UK did not support the rule change, arguing that the proposed rule did not allow member states to withdraw the classified information at any time or to review draft judgments to ensure no classified information is accidentally disclosed.²⁶ Although the EU adopted the new rules on July 1, 2015, the Court is still determining how to implement the changes and has yet to review classified information under these procedures.

The European Union's third step to quell sanctions delisting was to take a more considered and conservative approach to sanctions listings. In 2013, immediately following the *Kadi II* decision, the Council adopted guidelines on implementation and evaluation of restrictive measures in the framework of the EU Common Foreign and Security Policy.²⁷ The guidelines established best practices for assessing new listings and encouraged member states to share relevant information that might support new listings. In 2015, the Council updated the best practices, once again encouraging member states to share intelligence and other information that might support new listings and buttress existing ones.²⁸ The European Union also has adopted a preference on more systemic sanctions, which are not themselves subject to the same due process considerations (for example, if the European Union were to sanction a government or industry altogether, then the European Union would only need to prove the entity was involved in that government or industry's activities).

REVIEW OF UK SANCTIONS LAW AND PRACTICE

EU sanctions have direct effect in the United Kingdom and impose obligations on UK persons. The United Kingdom may then enact statutory instruments that make it a criminal offence in the United Kingdom to breach a particular EU Regulation and establish penalties.²⁹ Typically, Parliament passes a new statutory instrument to establish each new sanctions regime, although the draft Policing and Crime Bill proposes to allow for faster implementation of UN sanctions in the United Kingdom, essentially allowing them to be implemented on a temporary basis until applicable EU measures are enacted. The relevant statute governs the nature of the restriction, the circumstances in which a license may be granted and the relevant reporting requirements.

The United Kingdom also imposes designations beyond those adopted by the European Union or United Nations, particularly for terrorism targets.

The UK sanctions regime applies to any person or entity within the United Kingdom and any person elsewhere who is a UK national or an entity incorporated or constituted under UK law.³⁰ Foreign subsidiaries of UK companies do not have to comply with the UK financial sanctions regime. Nonetheless, UK sanctions have broad extraterritorial impact. UK nationals employed by subsidiaries remain subject to the UK and EU financial sanctions regimes and could inadvertently commit a criminal offence if they take steps for the foreign subsidiary that are prohibited by the EU or UK sanctions. Moreover, transactions that originate overseas nevertheless may cause accounting entries to be made in London where the revenue is then received. If a UK company is profiting from the overseas conduct of its foreign subsidiary, which would be a breach of EU or UK sanctions if the UK company carried out the conduct, the UK parent could become liable under the UK anti-money laundering legislation, the Proceeds of Crime Act 2002 (POCA). Furthermore, if the UK parent is financing or in any other way assisting the conduct of its foreign subsidiary, it could also commit offences under the Serious Crime Act, which effectively makes it an offence to assist someone in doing something which you yourself could not do.

Asset freezes imposed by the United Kingdom, either unilaterally or pursuant to an EU listing, prohibit three sets of activities:

- Making funds or economic resources available, directly or indirectly, knowing or having reasonable cause to suspect that the funds are being made available to or for the benefit of a target (the terms “listed person” or “designated person” are commonly used to describe sanctions targets);³¹
- Dealing with funds or economic resources, which includes other assets owned, held or controlled, directly or indirectly, by a target, or a person acting on behalf of a target, knowing or having reasonable cause to suspect that the funds are owned, held, or controlled by a target;³²
- Participating, knowingly and intentionally, in activities the object or effect of which is:
 - to directly or indirectly circumvent the prohibitions on making funds available and dealing with funds; or
 - to enable or facilitate the commission of the offences listed above.³³

HM Treasury is responsible for administering and enforcing financial sanctions in the UK. This work has historically been carried out by its Financial Sanctions Unit (FSU), which was replaced in April 2016 by the Office of Financial Sanctions Implementation (OFSI). The OFSI maintains a consolidated list of sanctions targets that includes the names of individuals and entities that have been listed by the UN, the European Union and/or the United Kingdom under specific financial sanctions legislation.³⁴ The OFSI updates the consolidated list whenever the UK financial sanctions regime is updated.

Neither the OFSI nor HM Treasury brings prosecutions of sanctions breaches, although proposed changes in the draft Policing and Crime Bill would give OFSI a new power to impose civil monetary penalties in certain cases.³⁵ Prosecutions have been brought by the UK Serious Fraud Office (SFO) and HM Revenue and Customs. With respect to the financial services sector, the Financial Conduct Authority (FCA) has regulatory oversight of the systems and controls that regulated firms must have in place to reduce the risk that a breach might occur. Thus, the FCA may bring enforcement actions against firms that have committed breaches of UK financial sanctions under rules that require firms to have effective systems and

controls to counter the risk that the firm might be used for the purposes of financial crime. The Crown Prosecution Service may also prosecute for breaches of trade sanctions under the Customs and Excise Management Act 1979.³⁶ The current maximum penalty in the United Kingdom for a financial sanctions criminal offence is imprisonment for two years and an unlimited fine, although offences under the Terrorist Asset-Freezing Act of 2010 carry a term of imprisonment of seven years. Where the offence has been committed by a company and is shown to have been committed with the consent or connivance, or because of the neglect, of a director, manager, secretary or similar officer, that person is also guilty of an offence and can be imprisoned or fined.

Proposals included in the draft Policing and Crime Bill aim to broaden the enforcement options available to UK authorities including by: increasing the maximum penalty for a financial sanctions breach from two to seven years; amending existing law to allow for deferred prosecution agreements and serious crime prevention orders in financial sanctions cases; and allowing the OFSI to impose financial penalties for financial sanctions breaches in cases where it may be difficult to prove a breach to a criminal standard. At the time of writing, the bill was still being debated in the Houses of Parliament and, therefore, may be subject to further amendments.

Despite the significant increase in the application of sanctions by the European Union and the United Kingdom over the past decade, enforcement actions have not kept pace. Nevertheless, there have been a number of significant fines handed out to institutions and prison sentences handed to individuals by the UK authorities that may indicate increased enforcement activity to come.³⁷ Likewise, the proposed amendments to the law in this area discussed above could lead to an increased risk of enforcement in the future.

REVIEW OF EU AND UK POLICY POSITIONS

The preceding sections make clear that, though the European Union has increasingly adopted an activist streak in imposing economic sanctions and is the competent authority for EU states in this regard, member states retained both their own rights to impose some measures that have the same effect as sanctions and—in the case of the United Kingdom—the readiness to exercise those rights.

This speaks to a broader issue in examining the implications of BREXIT: the degree to which the United Kingdom has been a proponent of sanctions action or a follower of dictates from Brussels. Perhaps not surprising, the United Kingdom has been both, depending on the issues involved and the interests at stake. In this section, we will look at three subjects of sanctions policy since Lisbon entered fully into force in 2009: Iran, Russia, and terrorism.

Iran

The British position on Iran's nuclear program evolved over time. In 2003-2005, the United Kingdom was an advocate of and participant in direct talks with Iran intended to correct Iran's multiple failures over decades to comply with the terms of the Treaty on the Nonproliferation of Nuclear Weapons (NPT) and Iran's Safeguards Agreement with the International Atomic Energy Agency (IAEA). These talks, which the United Kingdom initiated along with France and Germany (creating the so-called EU-3 or E-3), delayed the imposition of sanctions measures against Iran by the United Nations by prompting the withholding of a finding of Iranian noncompliance with its nuclear treaty obligations. Not surprisingly, they also created tensions with the United States, which was – at the time – pressing for an immediate referral of the issue to the UN Security Council. However, when the EU-3 process with Iran came to an end in August 2005 amid mutual recriminations of bad faith in the negotiations and prompted by Iran's restart of some then-suspended nuclear activities, the United Kingdom became a strong supporter of economic sanctions against Iran. In fact, unlike any other member of the European Union, the United Kingdom

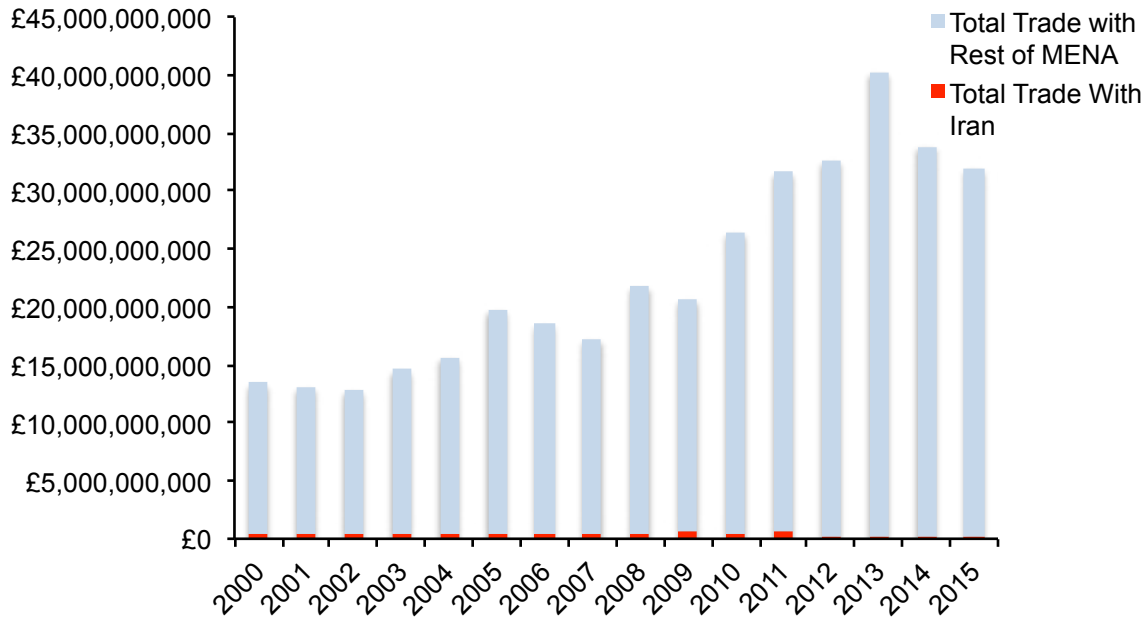
adopted its own, national sanctions measures against Iran, imposing targeted designations of Iranian banks, entities and individuals under British law in addition to designations mandated by Brussels. These designations were later invalidated due to an insufficient evidentiary basis.³⁸ But, for purposes of this assessment – focusing as it does on whether British and EU sanctions policy will shift after BREXIT – this does not undermine the point that the British government was prepared to take sanctions action against Iran. Rather, this development merely suggests that the legal and evidentiary processes governing sanctions imposition need to be improved.

There are many explanations available for the British focus on sanctions as a policy instrument. The most direct is that, having decided that the Iranian nuclear program – as it was – presented a major challenge to the security order in the Middle East, the United Kingdom sought any means of persuading Iran to back down from its chosen course of action. This explanation jives well with British rhetoric in 2005-2015 and the United Kingdom's persistent support of both the engagement and pressure tracks of the P5+1 and American approach toward Iran.

However, there are two additional factors that merit consideration, as they speak to British calculations on sanctions. The first is that, put simply, Iran was not a major trading partner prior to the sanctions regime being established and that there was little to lose economically. Figure 1 underscores the relative insignificance of trade with Iran to the UK economy both prior to and following the expansion of sanctions on Iran in the late 2000s.

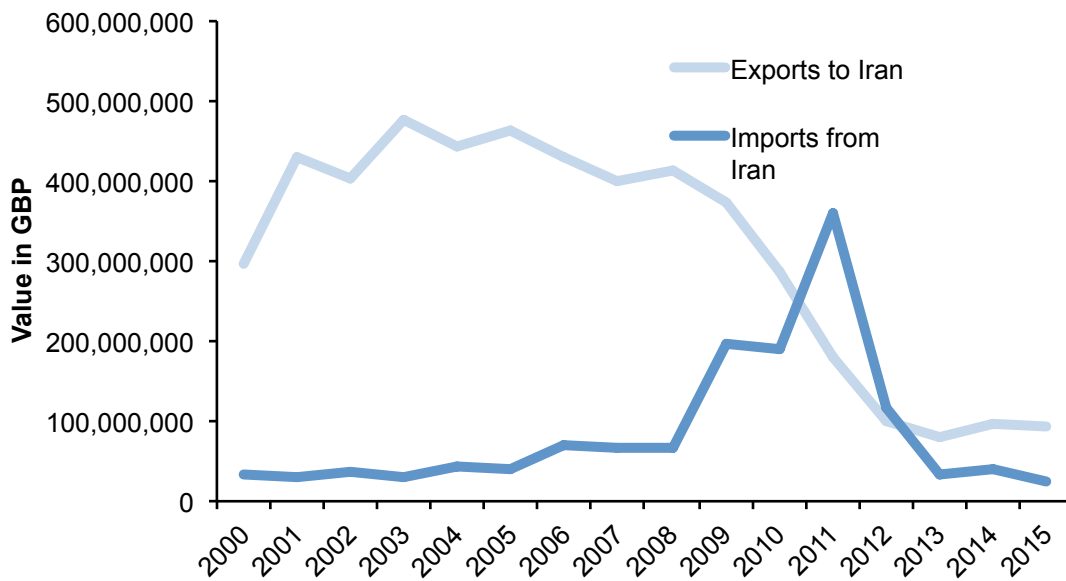
As a consequence (and as Figure 2 shows), even when UK trade with Iran dropped after 2011 (when there was a massive spike in purchases of Iranian oil during a period of significant market tightness and high prices), it simply did not have that far to go. Data from the UK's Office of National Statistics and the European Union suggest that Iran-UK trade in services was similarly de minimis during this time period.³⁹

Figure 1: UK-Iran and UK-MENA Goods Trade, 2000-2015



Source: HM's Revenue and Customs.

Figure 2: UK-Iran Goods Trade, 2000-2015



Source: HM's Revenue and Customs.

From this reading, sanctions were a relatively low-cost strategic tool for the United Kingdom and therefore easier to use from the standpoint that they would have less impact on British economic interests. But, sanctions also served another purpose: presenting a potentially viable path forward to skeptical US and regional partners. There was widespread doubt in the Bush administration that sanctions would contribute much to a change in the Iranian mind-set with respect to the nuclear program; reflections of that debate include talk about the possibility of military force instead being employed against Iran.⁴⁰ Even after President Obama took office, there were many within the US government who suspected that sanctions would not be sufficient to compel Iran to change course.

However, as was made clear during the debate over the Joint Comprehensive Plan of Action (JCPOA) reached between the P5+1 and Iran, there were others who saw the sanctions campaign, the engagement drive, and the US commitment to pursuing an honest dual-track strategy as not only good sense, but also instrumental for keeping the international community united vis-à-vis Iran. International voices pushing back against talk of military action, including UK Foreign Secretary Jack Straw in 2004⁴¹, contributed to this sense during both the Bush and Obama administrations. Straw himself pointed to the necessity of avoiding the domestic political difficulties that would have come along with military action against Iran during his tenure as Foreign Secretary.⁴² Others argued that the resolution of the Iranian nuclear issue was best achieved via dialogue⁴³ and even that precipitous military action could push Iran to end its hedging strategy and embark on a more assertive nuclear weapons program.⁴⁴ Either way, these international advocates also then bore the responsibility of helping to create the sanctions atmosphere that could compel Iranian nuclear concessions and successful negotiations.⁴⁵ In fact, the P5+1 offer to Iran in 2006 and adoption of the first UN Security Council resolutions imposing sanctions on Iran were directly linked, with the foreign ministers of the P5+1 and Javier Solana agreeing in advance that Iran's failure to accept a diplomatic path necessitated moving down the sanctions path. Even after the Joint Plan of Action was adopted in November 2013 – setting the stage for talks on a comprehensive agreement – British Foreign Secretary William Hague suggested that the British role in this endeavor was as much about “[bridging] the narrow

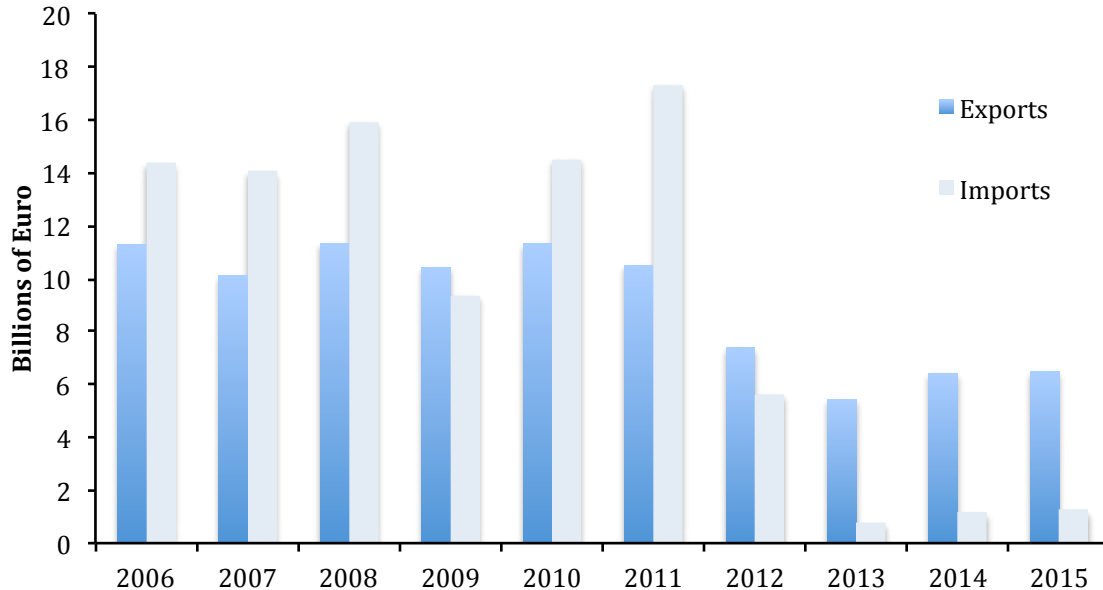
gaps between the parties” as it was about the United Kingdom's own concerns with Iran's nuclear program.⁴⁶ In other words, the United Kingdom was concerned about Iran's nuclear program, but just as concerned about managing the overall evolution of the Iran issue and avoiding a “grave error” in not exploring the diplomatic route.⁴⁷

British sanctions policies on Iran flowed from this confluence of national interests and opportunities. EU membership may have increased the political cost of unilateral action (as there was no legal impact on UK policy), but they did not dictate whether the United Kingdom was concerned about Iran or what its responsibilities might be in addressing the problems created by Iran's acquisition of nuclear weapons.

Much the same can be said for other EU members. EU member states beyond the United Kingdom were concerned with ongoing nuclear developments in Iran starting in 2002, as is demonstrated by the direct involvement of Germany and France in the EU-3 negotiating endeavor and subsequent P5+1 approaches. But they were not the only states to have concerns about Iran's nuclear program. Countries throughout the European Union—but especially northern states like Denmark and the Netherlands—were advocates within the European Union for a tough sanctions approach throughout the 2006–2013 period. The Dutch, for example, underscored their position in 2011 when they said that EU sanctions under consideration at the time “should hit the Iranian government in the heart.”⁴⁸ Other countries within the European Union had different positions, some of which is partially attributable to their own national economic interests with Iran.⁴⁹ Ultimately a combination of factors – anxiety with the Iranian nuclear program, outrage over human rights abuses, and concern over Iranian rhetoric toward Israel – convinced EU member states to back sanctions time and again from 2006 to 2013.⁵⁰

EU members did have economic exposure in Iran in 2006-2011 (when the toughest measures were imposed but before they took real effect) and this exposure was consistent (when one calibrates the 2011 import value against the overall high price of oil).

Figure 3: EU-Iran Trade, 2006-2015



Source: Eurostat database

According to data available from Eurostat, the entire European Union's exports to Iran in 2011 were only 10.5 billion euro, roughly the same as EU exports to Tunisia and Serbia. The EU's imports from Iran in 2011 were a little more, around 17 billion euro, and on par with Mexico and Thailand. But, still, trade with Iran did not represent by 2011 a major, systemic economic interest for the European Union (and, indeed, total trade with Iran in 2011 was only a modest fraction of the total trade with Russia when sanctions were imposed first in 2014, as we will discuss next).

It is impossible to judge with any certainty whether the European Union would have pursued this course of action had not one of the EU-27 (later 28) been the United Kingdom. But something beyond the economics determined EU sanctions policy toward Iran during this period, and it is less likely that one country's diplomats—even those as persuasive as those in the UK Foreign Office—were solely responsible for the shift, than a broader decision on the part of several governments that, though they had economic exposure, was the right course of action to take.

Russia

As with Iran, British thinking on Russia sanctions has been consistent since March 2014, when the crisis in Ukraine erupted over Russia's moves to seize Crimea. Then Prime Minister David Cameron declared support for Ukraine, saying "Britain's own future depends on a world where countries obey the rules. In Europe, we have spent the last 70 years working to keep the peace – and we know from history that turning a blind eye when nations are trampled over stores up greater problems for the longer term."⁵¹ Despite early charges of hypocrisy for his close ties to many wealthy Russians in London,⁵² Cameron was one of the strongest voices in Europe for sanctions since the beginning of the crisis and became more consistent in this regard toward the end of his premiership.

Since that time, the European Union—with the United Kingdom joining in consensus—has imposed several rounds of sanctions against Russia in response to both the annexation of Crimea as well as the Russian-sponsored insurgency in Eastern Ukraine. As of this writing, there is no indication that British thinking has shifted in this regard.

On August 1, Prime Minister Theresa May reiterated her commitment to maintaining the sanctions imposed against Russia until the provisions of the Minsk II agreement reached by Russia, Ukraine, France, and Germany in February 2015 (which is intended to chart a path toward resolution of the crisis, at least insofar as Eastern Ukraine is concerned) are fully satisfied.⁵³

This perspective has persisted notwithstanding the direct economic impact that sanctions on Russia might have on the United Kingdom. Cameron acknowledged this himself in 2014, when he said that he was prepared to impose costs on the United Kingdom, if necessary, to support Ukraine through the imposition of sanctions against Russia as well as to accept costs to other members of the EU.⁵⁴ Press reporting subsequent to the escalation of sanctions on Russia has substantiated widespread concern within Europe that sanctions are having a deleterious effect on European economies, including in the United Kingdom.⁵⁵ But, as with Iran, it is likely that this problem has been overstated with respect to the United Kingdom. The think tank “Open Europe” published a report in March 2014 that underscored the relatively minimal import of Russia to the British economy, noting for example that though Russian involvement in the City of London as a financial capital was substantial – as of 2011 at £27 billion – Russian investments comprised less than 0.5% of the total from the European Union.⁵⁶

Data from the UK Office of National Statistics is not yet available for after 2013. However, the 2015 “Pink Book,” which presents the UK Balance of Payments, does contain data from 2011 to 2013 and indicates that the Russian position in London had actually increased by 2013 to nearly £34 billion. This represents a larger percentage than in 2011 – a little more than 0.8 percent – though still only a fraction of the total from the EU. Despite this, the United Kingdom proceeded with the imposition of sanctions targeting the Russian financial sector and Russian oligarchs, both potentially lucrative business opportunities for the British financial sector. Moreover, the United Kingdom government has been described as a leading force in the imposition of sanctions against Russia within the European Union (with a House of Commons report from April 2016 speculating, as did former Defense Minister Fallon, that sanctions against Russia would have been weaker absent UK insistence).⁵⁷

This suggests that British motivations extended beyond their direct, immediate economic interests, consistent with the language employed by PM Cameron at the time, and in turn can help us think through how the UK perception of national interest may evolve after BREXIT.

Much the same can be said for certain other members of the European Union, especially when other countries – particularly those dependent on Russia for their natural gas and crude oil supplies – have not only joined in the effort but also been its most consistent advocates. Germany is an important case in point: German trade with Russia as of 2015 – even after sanctions imposition – was estimated to be approximately 50 billion euros, even more than the financial exposure for the City of London that some spectators have suggested would otherwise dampen British enthusiasm for sanctions when the United Kingdom departs the European Union.⁵⁸

In contrast to the United Kingdom and Germany, economic interests have dampened enthusiasm for Russian sanctions in other parts of the European Union. In 2014, *Deutsche Welle* – a leading German newspaper – reported that “the country sources 36 percent of its natural gas imports and 39 percent of its oil imports from Russian energy suppliers.”⁵⁹ This is probably the reason why more aggressive sanctions imposition against Russian energy exports has yet to be adopted by the European Union. Similarly, a number of smaller, eastern member states – especially those hit hardest by Russia’s retaliatory prohibitions on food imports, such as Hungary, Greece, and Cyprus – have even suggested the existing sanctions should be relaxed.⁶⁰ But notwithstanding the degree to which European economic interests have tempered enthusiasm for more sweeping measures against Russia, the sanctions that have been imposed have created substantial pressure on the Russian economy in the context of falling oil prices (as Nephew has written upon elsewhere).⁶¹

Moreover, the sanctions imposed have persisted despite pressures from within the European Union on economic grounds to reconsider them. This speaks to a larger set of concerns on the part of EU members, whether they are security in nature (especially for those in the east)⁶² or more philosophical about interference by foreign powers in the domestic affairs of European countries even outside of the European Union.⁶³ These concerns would have existed

whether the United Kingdom were part of the European Union or not, just as the United Kingdom might have decided to oppose Russian involvement in Ukraine even absent the pressures of NATO on the basis of the unique British historical perspective on European states that encroach upon the territorial integrity of others.⁶⁴

But, it is possible that were it not for UK participation in the European Union and internal pressure from the United Kingdom on EU decision-making, the choice of sanctions imposed against Russian actors would have been different in each body. To this point, it is worth considering the various distinctions that can be made in sanctions cases among targets, with no better example than the case of counterterrorism sanctions.

Terrorism

The British government's stance against terrorism is well established and predates 9/11. The British Home Office maintains a list of "proscribed" terrorist organizations under the Terrorism Act of 2000, which also establishes a range of criminal offenses and penalties for participating in and conducting business with or on the behalf of such terror groups. As of 2016, the United Kingdom had so designated seventy international terrorist groups (and their associated subgroups).⁶⁵ British law also holds open the possibility of asset freezes for designated individuals and entities.

It is highly unlikely that this stance will change following BREXIT. The British public have themselves been victims of a variety of terrorist groups over the past decades. In fact, BREXIT itself was sold on the basis of not only lost economic opportunity to immigrants to the United Kingdom but also the potential security risks of EU-permitted migration, a position that former MI-6 director Richard Dearlove took during the debate⁶⁶ (though also a position that was contested⁶⁷). Regardless of the veracity of the position, the idea that BREXIT would enhance UK security vis-à-vis terrorism strongly indicates that there will be continuing support for a sanctions-based response to international terrorism. So too does polling data. An aggregation of polling responses from 2010 underscores the degree to which Britons expected terrorism to remain a national threat and one meriting a government response.⁶⁸ A 2015 YouGov poll confirmed terrorism as a primary

international security concern for the United Kingdom, with 77% of those surveyed ranking it as the most serious (even if, on an individual level, it ranked far less important in the day-to-day concerns of UK citizens).⁶⁹

Things are not much different at the EU level. Even before terror attacks in Paris, Brussels, Nice, Munich, and elsewhere in Europe, EU populations were concerned about the threat of terrorism and their governments were responding (though it has shifted over time and as conditions change). In 2002, six in ten Europeans surveyed believed the United States was rightly concerned with the threat of terrorism (perhaps not surprising, coming so soon after 9/11).⁷⁰ By 2011, however, the threat of terrorism was perceived to be lower than by 2015.⁷¹ Not surprisingly, by 2016, "roughly seven-in-ten or more in every country surveyed say that ISIS is a major threat, with the greatest concern coming from the Spanish (93%) and French (91%)."⁷² During this period, there has been no appreciable concern with the use of sanctions as a tool to combat terrorism, in principle. Rather, concerns have emerged in both the European Union and in the United Kingdom about the manner in which designations are undertaken (as described above in our examination of the Kadi case), and more importantly how one defines a terrorist.

That this is a difficult issue is not itself a surprise: many different countries define terrorism in relation to the target of terrorism – whether the target is an ally or a core interest – rather than in the methods used, oftentimes mindful of the larger implication of the determination of terrorism. With respect to European consideration of sanctions, this has been most pronounced with respect to the designation of Hezbollah. The United States has considered Hezbollah to be a terrorist organization since the 1980s. However, in Europe, there has been significant debate over the nature of Hezbollah and, even today, resistance to such a blanket designation. As a consequence of this, the European Union designated only Hezbollah's "military wing" in July 2013, despite the fact that Hezbollah representatives have themselves disagreed with the very concept that there are distinct "wings" to the organization. As Matthew Levitt, a well-established expert on Hezbollah (among other things) noted in 2013:

“In October 2012, Hezbollah Deputy Secretary General Naim Qassem was crystal clear on the subject: ‘We don’t have a military wing and a political one; we don’t have Hezbollah on one hand and the resistance party on the other...Every element of Hezbollah, from commanders to members as well as our various capabilities, are in the service of the resistance, and we have nothing but the resistance as a priority.’”⁷³

But for many in Europe there was a distinct difference in their minds between the political party and the militants who plot terrorism. This distinction, which struck some in the United States and Israel as counterproductive and ill-advised, was necessary in order to address the concerns of European officials with respect to their ability to work with the government of Lebanon, which opposed the EU designation.⁷⁴ The United Kingdom itself began this separation, having sanctioned various elements of the Hezbollah security apparatus starting in 2001 and then the full military “wing” in 2008. When the United Kingdom proposed EU sanctions on Hezbollah, it kept with this practice.⁷⁵ But, the United Kingdom did not have an easy time of it. The United States had previously encouraged EU sanctions on Hezbollah in 2005, but failed to motivate reluctant EU governments notwithstanding the support of others.⁷⁶ An attack in Bulgaria was sufficient to move EU governments to act in 2013.

Many other examples can be noted to highlight the distinctions that governments make (e.g., with the Uighurs in Western China) when it comes to terrorism designation. For the purposes of this assessment, it is sufficient to note that United Kingdom withdrawal from the European Union could cut in many different ways insofar as US and other sanctions priorities are concerned. Where the United Kingdom is opposed to an action, their exit from the European Union could make EU-wide sanctions easier; where supportive, a positive voice could be lost even as the United Kingdom achieves greater freedom of national action. Ultimately, the specifics of each case will matter significantly. And not only with regard to terrorism, a similar pattern could emerge with respect to human rights sanctions, anticorruption and counter-organized crime measures, and other highly targeted sanctions initiatives that could emerge.

VIEWS AND OBSERVATIONS

The preceding sections collectively point to three key observations concerning European and British sanctions policy after BREXIT.

First and notwithstanding some speculation to the contrary, the European Union and United Kingdom are likelier to maintain a consistent sanctions posture than they are to split, certainly in the near-to mid-term. As the three cases demonstrate, European and British sentiments on key foreign policy matters in which sanctions are employed are largely the same and not likely to change simply because the United Kingdom is no longer in the EU Council. To suggest otherwise is to argue that the only consideration that kept the European Union focused on Iran's nuclear program or terrorism was British insistence, or that the British only went along with sanctions against Russia because of EU pressure. Certainly it is logical to argue that the pressures of EU membership influenced EU and British policy decisions on these matters, but independent reasons exist for European and British policy positions in all three instances, none of which will change as a result of the eventual British withdrawal from the European Union.

Moreover, BREXIT's timetable is uncertain and—with Article 50 not having even been triggered at the time of this writing—it is plausible that some time will still pass before BREXIT becomes inevitable and scheduled. Until that time, the European Union and United Kingdom will continue to have direct, legal involvement in one another's foreign and economic policies, as defined in the Lisbon Treaty. If Article 50 is triggered in the first half of 2017, as PM May suggested on October 3, then the current situation will largely persist through 2019 at a minimum. British Foreign Secretary Boris Johnson has said that the United Kingdom will continue to work with the European Union on Russia sanctions, for example, during this period.

Additionally, BREXIT will not spell the end of EU–UK relations, perhaps even on fundamental economic issues. Both the European Union and the United Kingdom will maintain a close political relationship and aligned political interests. The United Kingdom's global influence is likely to diminish. In the immediate term, it faces a difficult negotiation with Europe and a domestic debate over the nature of BREXIT. The United Kingdom also could

be occupied by further political and economic damage from the BREXIT decision and the process to come. The United Kingdom's voice both inside and outside of Europe on political decisions is likely to weaken. Nonetheless, the United Kingdom is likely to remain a close political partner with the European Union. Their interests will remain united by geography, politics, and sentimentality. The European Union and United Kingdom are likely to continue to work together and consult closely on their responses to international crises, whatever the shape of BREXIT.

Moreover, the European Union and United Kingdom are likely to maintain common economic and trade interests. The manner in which BREXIT takes place and the relationship that results will be critical to any analysis of the resulting sanctions policy. For example, Norway and Switzerland are not part of the European Union. However, both implement EU sanctions, in some cases in a manner that is word-for-word what is in EU regulation. This is both because of shared values and interests, but also because there is economic value in having harmonized trade and financial policies, including on sanctions. The United Kingdom may face similar pressures and choices if it remains part of the single market or maintains some other form of trade relationship with the European Union.

Second, there is some chance of a long-term shift in EU and UK perspectives on sanctions, and the two entities will more likely prioritize their respective economic self-interests. It is entirely plausible that, even if the United Kingdom and the European Union maintain some formal relationship after BREXIT, the United Kingdom and the European Union will look more to their economic self-interests when making decisions on the scope and nature of sanctions decisions. Assuming the United Kingdom is able to maintain the role of the City of London as a financial powerhouse, it is plausible that the United Kingdom will find a substantial portion of its economic activity is reliant on providing banking services, including to unsavory individuals and entities. This, after all, is the aforementioned criticism that was laid at the feet of the British government with regard to Russia sanctions in 2014–2015. Without the balancing force of political pressures from Brussels, it is possible that a future British government will find its perception

of interests more aligned with avoiding sanctions policies that could punish those individuals and entities (and, more important, the financial sectors to which they belong abroad). This is not to say that such a shift is inevitable: as one reviewer pointed out, long prior to the creation of the European Union, the United Kingdom was at the forefront of UN sanctions endeavors and – in fact – it may find that sanctions provide it an otherwise outsized foreign policy capacity in the absence of EU membership. But, BREXIT at a minimum puts a different UK foreign policy approach on the table at a time when the European Union has gained a more significant role in international pressure campaigns.

Likewise, the consensus-building requirements of the European Union have led to a curious balancing posture when it comes to sanctions: distributed pain, even if it is of a different character, when sanctions decisions are taken. Sanctions regimes adopted by the European Union tend to either focus on individuals or entities where the impacts are more discrete—such as with the designation of particular terrorists—or they involve sectors in which multiple states might have interests. Take, for example, sanctions on Iran. For a while, they focused on particular actors, the sanctions cost of which was slight. In time, whole industries were targeted but rarely one at a time. Instead, as in 2010, the shipping industry was sanctioned at the same time as the financial and energy sectors of Iran. The result was that every member of the European Union absorbed some cost, even if the vector and level were different. Similarly, the European sanctions on Russia balanced restrictions on finance, trade, and energy, spreading the burden across the various member states.

One could see a similar scenario developing in the future within the European Union, but now without the main financial powerhouse of the City of London as a balancer. While the United Kingdom is not the sole center of financial activity for the European Union, with the absence of the United Kingdom from the European Union and the limited ability of the remaining members to impose impactful financial sanctions, the European Union will find it more difficult to create balance among members in order to reduce the burden of sanctions among those states remaining. Without the United Kingdom's financial sector in the scope, to create an equal level of pressure, EU member states might have to intensify their other sanctions tools in sectors of greater significance to more EU members, such as embargoes on technology, defense items, and energy services. This, in turn, may make it harder for outside actors—like the

United States—to convince the European Union to adopt sanctions or obtain anything beyond toothless action.

A related issue will be the lost competency that the British government brought to EU deliberations. EU member states are well practiced at sanctions design and implementation, and there are many governments in the EU that can play an enhanced role in this work going forward (such as France, Germany and the Netherlands). It may also be that the EU bureaucracy in Brussels, which has led the charge in the past decade on sanctions despite being chronically undermanned for years, will take on a greater role. But, there is no mistaking the amount of time, effort, and energy that the UK applied in the sanctions field for the EU. In the design of sanctions, their defense, and their implementation, the UK brought knowledge and ideas that helped to create the system as it stands. That will be lost or – at a minimum – it will be different in its execution in the future.

Third, what's more likely to change, therefore, is not the desire of the European Union or United Kingdom to impose sanctions in response to bad behavior, but rather the tools to be used and their severity. Without a need to create balance in sanctions measures, one could easily imagine the United Kingdom adopting sanctions on a future adversary that include industries of little value while maintaining ties in industries of significance. The European Union may have the same impulse, especially since it will have to manage consensus politics in a way that the United Kingdom will not.

As a result, the European Union and the United Kingdom, even when politically inclined to act, are less likely to adopt balanced, corresponding measures. This also means that EU and UK measures, which may no longer be identical, are less likely to correspond with the United States' sanctions. What the United Kingdom ultimately brought to the EU table was a combination of political power, influence, and economic stake. The United Kingdom was in a position to help create EU policy because it had skin in the game and a seat at the table; the European Union, in turn, was able to shape UK policy for the same reasons. After BREXIT, while the United Kingdom and the European Union will remain critical economic actors, the impact of their respective actions will be less than when the United Kingdom was party to the European Union, and this will complicate both the task of creating sanctions regimes and making them valuable.

From a policymaking perspective, this leads to two recommendations.

The first is for the European Union and the United Kingdom to build into whatever succeeds the UK's formal involvement in the EU the capacity for coordination of sanctions actions. Even if both the United Kingdom and European Union retain separate decision-making apparatus for sanctions enforcement, establishing a body to coordinate the creation of sanctions rules and propose them to the separate political leaders would help to preserve at least some of the benefits that existed prior to BREXIT, particularly balance and harmonization.

Second, the United States should formalize its various efforts at sanctions coordination through the creation of "likeminded" coalitions on particular issues. Likeminded collectives existed to deal with Iran, Russia, and North Korea, and a scaled up approach could involve annual gatherings of European, British, East Asian, and other interested governments to discuss a range of sanctions topics. U.S., UK, and EU coordination through these groups is common. But, now, it may be increasingly essential to ensure the United Kingdom and European Union remain on the same page as the United States. These gatherings would not replace the need for EU-UK interaction, but they would help create a floor for this interaction while at the same time reducing some of the tensions that arise from time to time between the United States and its normal sanctions partners. Taken in combination with other mechanisms for EU-UK sanctions coordination (such as the presence of France as a permanent member of the UN Security Council alongside the United Kingdom), such a likeminded coalition would at a minimum help to smooth the transition as BREXIT takes place.

NOTES

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- 15 See Annex 1 of Council Regulation No. 428/2009 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:134:0001:0269:en:PDF>.
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- 22 *Id.* at pp 89-90.
- 23 Judgment of the Court, Joined Cases C-584/10 P, C-593/10 P, and C-595/10 P, *Commission v. Kadi* (Jul. 18, 2013), <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d527641e08e5394cf3903fab1210b629c9.e34KaxiLc3eQc40LaxqMbN4Pa3iTe0?text=&docid=139745&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=536710> at PP 151-165.
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