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Secondary sanctions and multilateralism – the way ahead

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The sensitive issue of American ‘secondary sanctions’ imposed on its allies generated serious tensions in the transatlantic relationship when the US left the JCPOA with Iran. Some hoped these would ease with the Biden administration, but the current row about the Nord Stream 2 pipeline demonstrates that the extraterritoriality of sanctions is a well-entrenched US bipartisan policy.

The EU has made numerous efforts to react by developing countermeasures, but these have not convinced European companies to challenge the sanctions. The perspective of enhancing the role of the Euro to reduce the dominance of the Dollar in world transactions is also still considered a long shot. New countermeasures have been suggested, notably by the Jacques Delors Institute and the European Commission has announced ‘additional policy options’ to that effect.

But the issue should also be addressed in the context of a revival of multilateralism, which the Biden administration seems to favour. The renewed transatlantic dialogue and the G7 framework could be used to address this sensitive issue, in a context in which China’s power aims at challenging the US unipolarity - and the EU aims at developing its ‘strategic autonomy’.

The decision in 2018 by the Trump administration to withdraw from the JCPOA process, aimed at preventing Iran to develop nuclear weapons, gave a new dimension to an old transatlantic dispute, first related to the American embargo against Cuba: can the US force its allies to implement sanctions decided unilaterally in Washington, when there is no agreement on the reasons why they are imposed? The answer was very clear, for Cuba as well as for Iran: despite all EU efforts, European companies with a global reach could only abide by the sanctions. I wrote a ‘Policy brief’ for the Egmont Institute in February 2019 to attract the attention to this issue (1). My conclusion was that ‘*If the American administration does not hesitate to conduct a foreign policy which we consider contrary to our interests – if Iran today, why not China tomorrow? – it might be important that we claim back the sovereignty we were willing to share with the US during the cold war.*’

In today’s context, after the end of the Trump era, one might have thought this problem would disappear from the radar; unfortunately it is still there, and remains one of the most difficult in the transatlantic agenda. Indeed, even if, hopefully, the Biden administration manages to find an agreement with the other members of the ‘5+1’ to re-engage in the JCPOA, the issue of extraterritorial sanctions as such continues to need close scrutiny. This was not a Trump extravaganza: it is a bipartisan policy which was passed as law in 1996 and seems to continue to be a choice foreign policy tool by the US Congress.

This was unfortunately confirmed recently, with European companies continuing to face US sanctions for their participation in the construction of the Nord Stream 2 pipeline between Russia and Germany. One might have thought that, with the new honeymoon transatlantic relations have enjoyed in the last months, the US administration would moderate the ardour of the Senate on the issue. On the contrary, the new administration itself continues to use the threat of secondary sanctions as a way to press the German government to abide by the US approach.

This also happens at a time when the European Union is trying to reinforce its 'strategic autonomy', partly as a result of the profound distrust of the United States policies developed during the Trump administration. From an EU point of view, the transatlantic relationship should definitely be revived, based on our shared democratic values, but no longer with Europe being dependent on decisions made in Washington without its agreement. Europe is not prepared to deal with China as the Atlantic Alliance dealt with the Soviet Union during the cold war. We aim at reorganising international relations based on multilateralism; unilateral sanctions with 'secondary' effects, are obviously not compatible with this.

The Iran case was already a step too far, the American administration not hesitating to conduct a foreign policy which we considered contrary to our interests. Interfering with the Nord Stream 2 project with secondary sanctions goes even further, since this pipeline does not create any direct threat to American security. The geopolitical implications of its construction should only be addressed from the global and energy security perspective - and for that purpose dealt with through the multilateral system and not unilaterally.

BACKGROUND: THE BLOCKING STATUTE AND INSTEX

The issue of extraterritorial sanctions became a topic of dispute between the US and the EU in 1996, with the 'Cuban Liberty and Democratic Solidarity Act', better known as the 'Helms–Burton Act', which extended the territorial application of the US embargo to foreign companies trading with Cuba.

At the time, the EU was trying to improve its relations with the island, and agreed on legislation which would circumvent the US sanctions, the so-called 'blocking statute'. In theory, the statute allows EU operators to recover damages arising from the extraterritorial sanctions 'from the persons causing them' and nullifies the effect in the EU of any foreign court ruling based on them. Moreover it forbids EU persons from complying with those sanctions, unless exceptionally authorised to do so by the Commission. But, the whole issue being based on a power relationship, no EU company ever dared to continue trading with countries under American sanctions based on this system. Even if they were prevented, in principle, from complying with US sanctions, they chose instead not to run the risk of US penalties and exclusion from its markets.

After the US withdrawal of the JCPOA, and the blocking statute not being of any use, another instrument was put in place in 2019, which was supposed at least to allow European firms to trade with Iran avoiding the use of the dollar: INSTEX - short for 'Instrument in Support of Trade Exchanges' - was aimed at facilitating 'legitimate' trade between European economic operators and Iran. It was conceived in a prudent way, more as a symbolic gesture to show Iran that the Europeans were prepared to play their part to save the JCPOA. But it remained of very marginal use, and obviously did not solve the broader problem of re-establishing European sovereignty over its trade policy.

A STRONGER INTERNATIONAL ROLE FOR THE EURO?

Partly because of this political weakness, the European Commission started to address directly the main reason why the US is able to control most international transactions: the mere fact that the majority of transactions, even when they only involve European companies, use the US Dollar. It seems that, despite efforts made to enhance it, the role of the Euro on the international markets has in fact been reduced in the last years. Europe itself uses the Euro as an invoicing currency for less than 50% of its imports.

In December 2018, the Commission issued a communication entitled *‘Towards a stronger international role of the Euro’*, opening a discussion on how to overcome the (numerous) technical obstacles in having the Euro used more broadly in financial transactions (2). On 19 January 2021, the strengthening of the international role of the Euro was presented by the Commission as one of the three pillars of a *‘strategy to prepare the EU’s economic and financial system better for the future’* (the two other pillars being the development of more resilient financial market infrastructures and an improved implementation of EU sanctions’ regimes) (3)

The recipes are well known: completing the Banking Union and the Capital Markets union; ensuring the capacity for joint budgetary action in the Euro area; a single European seat on the IMF board; cooperation with commodities markets to set reference prices in euros, etc. One substantive progress has been achieved due to the Covid pandemic: for the first time, Member States accepted that the Commission would borrow money on the financial markets to finance the ‘Recovery and Resilience Fund’ decided in July 2020.

But, even if these efforts are necessary to reinforce the EU position in the new global world, they do not give an answer in the short term to the problem of the US extraterritorial sanctions. At the current pace of progress, it will take a long time for them to make a difference: some Member States have been clear that they see ‘New Generation EU’ as a ‘one-off’ measure;

the Banking Union and Capital Markets Union are far from complete; and the suggestion of creating a single Euro area chair in the IMF remains, unfortunately, wishful thinking.

NEW PROPOSALS BY THE JACQUES DELORS INSTITUTE

Pascal Lamy, former chief of staff of Jacques Delors and director of WTO, launched in 2018 a reflexion on the issue of secondary sanctions in the framework of the Jacques Delors Institute (4) A new workshop under his lead published in March this year a new and rather far-reaching ‘Policy Brief’ titled *‘American extraterritorial sanctions: did someone say European strategic Autonomy?’* (5)

Anticipating that the new US administration will not be softer on this issue, the Policy Brief suggests a variety of moves by the European Union to counter current and future secondary sanctions: *“Europe needs a combination of general protection measures, like the reversal of the blocking statute and of case by case countermeasures, such as EU entry prohibitions or financial passport removal,”* said Pascal Lamy, when he presented the paper.

The ‘general protection’ measures, of a preventive nature, would include measures aiming at the reinforcement of the role of the Euro (cfr above) but also a ‘reversal’ of the blocking statute: the idea would be to shift the burden of proof to the country which has issued the sanctions; it would not be allowed to request any information related to sanctions from European companies and EU Member States would be *‘standing in for their companies’* targeted by the extraterritorial sanctions. Other measures include a ‘European Compensation Fund’, freezing and seizing selected assets; a European equivalent of the (efficient) American ‘Office of Foreign Assets Control’ (OFAC) and the creation of a ‘European External Trade Bank’, with public law status but funded by commercial banks.

The second category of measures suggested by the Jacques Delors Institute would be retaliatory ‘countermeasures’: one of the strongest would be to prevent American officials *‘who have made extraterritoriality their preferred weapon’* from entering the European

territory. Others would be to exclude companies registered in the country which issued sanctions from the EU's public procurement market; prohibiting access to European Central Bank and national central banks loan issues and suspending 'financial passports', meaning licenses given by EU Member States to foreign (or European) banks, upon implementation of American sanctions by a bank. As a precursor, they suggest that the European Union immediately introduce a complaint before the WTO concerning the Nord Stream 2 case.

ADDRESSING THE ISSUE THROUGH A REVIVED MULTILATERALISM

In its January 19, communication mentioned above, the European Commission announces *'additional policy options to further deter and counteract the unlawful extra-territorial application of unilateral sanctions by third countries to EU operators, including a possible amendment of Regulation (EC) No 2271/96'*.

It will be interesting to see how much will be retained of the suggestions by the Jacques Delors Institute, which are the result of contributions by various high level experts, but, from a political point of view, are rather provocative - and indeed directly challenge the new EU ambition to assert its 'strategic autonomy'.

Another question is to assess whether the suggested 'countermeasures', even if they are put fully into place, will be enough to convince European companies to challenge the American sanctions. The real weight of the US sanctions policy comes indeed from the superpower status of the United States, which is sufficient as such to discourage our global firms to challenge it. In a way, it is the law of the jungle, *'la loi du plus fort'* which allows the extraterritoriality of American sanctions.

But what would happen if China becomes an economic (and military) power of a size similar to that of the United States? What if China starts to impose a sanctions policy to the rest of the world? The jungle will then become a very dangerous battlefield.

Would it not be in the interest of the United States, in today's world, to think twice about the secondary sanctions affecting its allies and to balance this aggressive approach of international relations with the benefits that could come from a real, genuine, acceptance of the rules of the game of multilateralism, at the regional - or even, when possible, at the world level?

This question deserves to be part of the new revived transatlantic dialogue we are trying to develop: the determination of the EU to reinforce its capacity to react, based on its 'strategic autonomy' agenda, and the countermeasures as suggested by the Delors institute should convince our US counterparts that this debate cannot be avoided.

A suggestion in this sense is made (in careful terms) in the joint communication of the Commission and the High Representative of December 2, 2020 *'a new EU-US agenda for global change'*(6): *'... we will seek to enhance coordination on the use of sanctions including in the pursuit of shared objectives, while avoiding unintended consequences for European and US economic interests and the unilateral use of extraterritorial sanctions'*.

The relief felt throughout the world following the first initiatives taken by president Biden upon his arrival at the White House is a clear indicator of the aspiration from the rest of the world (including Russia and China) to give a new chance to multilateralism: the return of the United States to the Paris climate agreement and to the JCPOA; the revival of the World Trade Organization, sabotaged for four years; the return of the US to the World Health Organization, accused by Trump of only defending China, and even recently the US administration opening to a global corporate tax to be negotiated in OECD, all these decisions demonstrate that, even for the United States, there is, in reality, no valid alternative to multilateralism.

But the rules of the game have to be respected; the extraterritorial reach the US is giving to unilaterally-decided sanctions is not compatible with multilateralism, whether at the regional level or at the global level.

The current moves in Washington relating to Nord Stream 2 do not give very positive signals, even if the prominence given to this quarrel since the first months of the Biden presidency comes from the US Senate, where the most Trumpian Republicans used it to blackmail him over the confirmation of some members of its team; Senator Cruz even threatens to insert amendments related to Nord Stream 2 into the 2022 defense spending bill.

But this should not deter the EU and its Member States, together with likeminded countries in the framework of the G7, to engage directly with the new US administration about the broader issue of the compatibility of secondary sections with our common aspiration to address the challenges of today's world through a revival of multilateralism – not unilateralism.

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He presided the Committee of Permanent Representatives (COREPER) during the Belgian Presidency in 2010 and ended his diplomatic career as special envoy for the European External Action Service in 2011-12.

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Endnotes

¹ ‘American sanctions and European sovereignty’, European policy brief # 54, February 2019

² ‘Towards a stronger international role of the Euro’, Brussels, 5/12/2018, COM 2018, 796, final

³ ‘The European economic and financial system: fostering openness, strength and resilience’, Communication from the Commission, 19 January 2021; Com (2021) 32.

⁴ The results have been published under the title: ‘EU and US sanctions, which sovereignty?’, Policy paper # 232, Notre Europe, 23/10/2018.

⁵ ‘Europe in the World’, policy brief, March 2021

⁶ Brussels, 2.12.2020 - JOIN(2020) 22 final