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The Use of Sanctions to Achieve EU Strategic Autonomy: Restrictive Measures, the Blocking Statute and the Anti-Coercion Instrument

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Sanctions are increasingly used by the European Union to pursue foreign and security policy objectives. Nowadays, these objectives include the protection of the Union's strategic autonomy too. As our empirical analysis suggests, restrictive measures – the official EU notion for sanctions – define strategic autonomy as much as they are defined by it. We understand the notion of 'sanctions' widely, not only encompassing measures adopted within the framework of the Common Foreign and Security Policy (CFSP), but also other EU acts closely connected to sanctions – including the Blocking Statute and the Anti-Coercion Instrument (ACI) – that also aim to strengthen the Union's strategic autonomy. The picture sanctions paint is one of strategic autonomy as a principle not only of processes, but also of substance. In terms of processes, it is an objective that allows for selective uses of partnership; and in terms of substance, it is also in the name of this principle that EU institutions have proceeded to a balancing between rights, interests, and values.

Keywords: Common Foreign and Security Policy (CFSP), sanctions, strategic autonomy, Blocking Statute, extra-territorial sanctions, Anti-Coercion Instrument

1 INTRODUCTION

Sanctions are normative acts that the EU may adopt to pursue its foreign policy.[1] Since the Treaties empowers the EU adopt sanctions (among other things the EU can do[2] in its international relations[3]), it stands to reason that they these measures

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1 *See* e.g., Arts 28(1) TEU and 215 TFEU; or other provisions in EU trade agreements authorizing defence mechanisms such as the suspension of an agreement in case of non-compliance by another party.

2 Other things the EU can do to conduct its foreign policy is to adopt acts defining the Union's position on a matter of geographic or thematic nature (Art. 29 TEU), to authorize civilian missions or military operations by Member States (Art. 42(1) TEU), to appoint special representatives (Art. 33 TEU), to conclude international agreements (Art. 37 TEU and or 218 TFEU), etc.

3 Significantly, it is an aspect of the autonomy of the EU legal order that what is allowed by international law (the exceptio non adimplenti contractus referred to in the first footnote) may not be permitted by EU law: 'in Commission v Luxembourg … the ECJ rejected the contention that the principle of

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are instrumental to achieving the objectives of EU external action, among which there is strategic autonomy. Strategic autonomy was defined in the November 2016 Council conclusion as the 'capacity to act autonomously when and where necessary and with partners wherever possible'.[4]

It is the key argument of this article that *sanctions define strategic autonomy as much as they are defined by it*. This is because the notion of strategic autonomy is so abstract and vague, and therefore open to many possible conceptions, that a definition can be approximated by reasoning 'bottom up', through an analysis of what the EU does *in concreto*. This is not to imply that there is one correct meaning of strategic autonomy. Rather, strategic autonomy is whatever the EU wants it to be: and this article is precisely an attempt at exploring what sanctions tells us about what the EU wants strategic autonomy to be. It is, in sum, an empirical analysis of strategic autonomy through the case study of sanctions. It is also a contribution to the growing body of literature on EU constitutional objectives: many authors have stressed that EU constitutional objectives and values are (binding) legal standards for the EU's conduct, both in its internal action[5] as well as its external one,[6] whereas we problematize this as we find a mismatch between the EU objectives on paper and the result of the empirical analysis of the objective of strategic autonomy.

For the purposes of this article, sanctions include not only restrictive measures adopted within the framework of the Common Foreign and Security Policy (CFSP),[7]

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international law according to which "a party, injured by the failure of another party to perform its obligations, [may] withhold performance of its own" (the so-called exceptio non adimpleti contractus) was recognized under EU law'; K. Lenaerts & J. A Gutiérrez-Fons, *A Constitutional Perspective,* in *Oxford Principles Of European Union Law: The European Union Legal Order: Volume I* 106 (R. Schütze & T. Tridimas eds, Oxford University Press 2018); Joined Cases 90/63 and 91/63, *Commission v. Luxembourg and Belgium* (13 Nov. 1964), ECLI:EU:C:1964:80, para. 631.

4 *Council Conclusions on Implementing the EU Global Strategy in the Area of Security and Defence*, Council of the European Union (14 Nov. 2016), https://www.consilium.europa.eu/en/press/press-releases/2016/11/14/conclusions-eu-global-strategy-security-defence/ (accessed 1 Oct. 2023). *See also* an earlier special issue on strategic autonomy in Eur. For. Affairs Rev. Vol. 27 (1). N. Helwig & V. Sinkkonen, *Strategic Autonomy and the EU as a Global Actor: The Evolution, Debate and Theory of a Contested Term*, 27(1) Eur. Foreign Aff. Rev. 19 (2022), doi: 10.54648/EERR2022009.

5 K. Lane Scheppele et al., *EU Values are Law, After all: Enforcing EU Values Through Systemic Infringement Actions by the European Commission and the Member States of the European Union*, 39 Y.B. Eur. L. 3 (2021), doi: 10.1093/yel/yeaa012.

6 E. Kassoti & R. Wessel, *The Normative Effect of Article 3(5) TEU: Observance and Development of International Law by the European Union*, in *Interacciones Entre el Derecho de la Unión Europea y el Derecho Internacional Público* 19 (P. G. Andrade ed., Tirant lo Blanch 2023); K.-P. Sommermann, *Article 3: The Objectives of the European Union*, in *The Treaty on European Union (TEU): A Commentary* 157, 160 (H.-J. Blanke & S. Mangiameli ed., Springer 2013); E. Cannizzaro, *The Value of EU International Values*, in *The Evolving Nature of EU External Relations Law*, 3 (W. Douma et al. eds, T.M.C. Asser Press 2021).

7 For an overview of EU defence, *see infra*. B. Vroege, *The EDF and the Constitutional Limits of EU Defence – Industrial Spending Power*, in this special issue.

but also the Anti-Coercion Instrument (ACI)[8] and the Blocking Statute.[9] This is because it would be artificial to separate the fight against extraterritorial sanctions (the Blocking Statute) from a treatment of CFSP sanctions, especially given that the new Blocking Statute is parallel to other initiatives, including the ACI, that aim to strengthen the EU's strategic autonomy.[10] These are all things that a diplomat could consider sanctions, even though they are not meant to be sanctions for the purposes of EU law.

The reasoning develops as follows. As a starting point, we consider the way in which sanctions are instrumental to the pursuit of the EU's 'capacity to act autonomously'. This is done in section 2, with reference to the objectives of the sanctions: the protection of the EU's security, public order, and internal market. We then identify and discuss conceptual and practical challenges with this pursuit of strategic autonomy. This is done in section 3, with reference to risks of duplication and ineffectiveness. In section 4 we invert the perspective, and consider what the adoption of sanctions tells us about strategic autonomy.

2 THE PURSUIT OF STRATEGIC AUTONOMY THROUGH SANCTIONS

Prima facie, sanctions are instrumental to reaching strategic autonomy because they are aimed at enabling the EU to 'act autonomously'. This is the case for two reasons: they protect the EU's security (and public order), and they protect the internal market. Security is an existential requirement, as recognized also in the case law of the Court, without which there can be no EU action. The internal market is one of the main strengths of the EU on the international arena: the uses of its economic and regulatory power in international politics are well documented.[11]

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[8] European Commission, *Proposal for a Regulation of the European Parliament and of the Council on the Protection of the Union and Its Member States from Economic Coercion by Third Countries*, COM (2021) 775 final (2021).

[9] *Council Regulation (EC) No. 2271/96 of 22 November 1996 Protecting Against the Effects of the Extra-Territorial Application of Legislation Adopted by a Third Country, and Actions Based Thereon or Resulting Therefrom*, OJ L 309 (29 Nov. 1996).

[10] For reasons of space, we do not consider the practice of some Member States of suspending the issuing of Visas for Russian nationals, on which *see* D. Thym, *Border Closure and Visa Ban for Russians: Geopolitics Meets EU Migration Law*, Migration & Asylum Law & Policy in Europe (11 Oct. 2022), https://eumigrationlawblog.eu/border-closure-and-visa-ban-for-russians-geopolitics-meets-eu-migration-law/ (accessed 1 Oct. 2023); European Commission, *Amended Proposal for a Regulation of the European Parliament and of the Council on the Access of Third-Country Goods and Services to the Union's Internal Market in Public Procurement and Procedures Supporting Negotiations on Access of Union Goods and Services to the Public Procurement Markets of Third Countries*, COM(2016) 34 final (2016); *Regulation (EU) No. 2022/2560 of the European Parliament and of the Council of 14 December 2022 on Foreign Subsidies Distorting the Internal Market*, OJ L 330 (23 Dec. 2022).

[11] R. Rosecrance, *The Rise of the Trading State* (Basic Books 1986); R. Rosecrance, *The EU: A New Type of International Actor*, in *Paradoxes of European Foreign Policy* 15 (J. Zielonka ed., Kluwer Law International 1998); S. Meunier & K. Nicolaïdis, *The EU as a Trade Power*, in *International Relations and the EU* 155 (C. Hill & M. Smith eds, Oxford University Press 2023).

2.1 The protection of eu security and public order

CFSP sanctions have the objective of protecting the Union's security while safeguarding international security, the security of the Member States, and that of their citizens. This is achieved by targeting the economy and the finances of hostile countries, or groups (such as terrorist organizations), or individuals (such as those associated with cyberattacks) with a view to weaken them and bring to a stop the behaviour threatening international security and/or the EU's security.

Selected examples from the recent practice of the Council illustrate this.[12] Sanctions adopted against Russia and Belarus in 2022 – following the Russian invasion of Ukraine of 24 February – mention explicitly in their preambles that '[b]y its illegal military actions, Russia is grossly violating international law and the principles of the UN Charter and undermining European and global security and stability'.[13] In those sanctions, there is no explicit link between the behaviour to be halted (the illegal military action against Ukraine) and the restrictions imposed, neither in the preambles nor in the texts of the measures. The Court has nonetheless confirmed the suitability of the previous rounds of sanctions against Russia (those adopted in 2014 in response to the escalation of the conflict in Ukraine), explaining that there is a rational link between prohibition and objective in the case of measures targeting the Russian energy sector,[14] and it would be surprising if a different conclusion were reached concerning the 2022 sanctions.

'Cybersanctions' refer to 'the growing need to protect the integrity and security of the Union, its Member States and their citizens against cyber threats and malicious cyber activities'.[15] In the context of those adopted against Russia in 2022, some sanctions – such as the censorship of some media outlets – are aimed *exclusively* at protecting the EU's security and its public order (and not at damaging the Russian economy, as the others are).[16] In this case, a scrutiny of

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12 For further analysis *see* L. Lonardo, *Common Foreign and Security Policy and the EU's External Action Objectives: An Analysis of Article 21 of the Treaty on the European Union*, 14 Eur. Const. L. Rev. 584 (2018), doi: 10.1017/S1574019618000329.

13 *See* e.g., *Council Decision (CFSP) 2022/399 of 9 March 2022 Amending Decision 2012/642/CFSP Concerning Restrictive Measures in View of the Situation in Belarus and the Involvement of Belarus in the Russian Aggression Against Ukraine*, OJ L 82, 9–13 (9 Mar. 2022).

14 Case T-715/14, *NK Rosneft and Others v. Council*, ECLI:EU:T:2018:544 (13 Sep. 2018).

15 *Council Decision (CFSP) 2019/797 of 17 May 2019 Concerning Restrictive Measures Against Cyber-Attacks Threatening the Union or Its Member States*, OJ L 129I, 13–19 (17 May 2019); *see also* Y. Miadzvetskaya & R. Wessel, *The Externalisation of the EU's Cybersecurity Regime: The Cyber Diplomacy Toolbox*, 7 Eur. Papers 413 (2022).

16 *Council Decision (CFSP) 2022/351 of 1 March 2022 Amending Decision 2014/512/CFSP Concerning Restrictive Measures in View of Russia's Actions Destabilising the Situation in Ukraine*, OJ L 65, Recital 8 (2 Mar. 2022). The protection of the EU's public order, as opposed to the public order other Member

the suitability of the sanctions was contained in the decision in *RT France v. Council*.[17]

Even the human rights sanctions' those targeting individuals responsible for violations of human rights in third countries, make the respect for EU values instrumental to international security: 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights and is committed to protect those values, which play a key role in ensuring peace and sustainable security, as cornerstones of its external action'.[18]

2.2 The protection of the internal market

2.2[a] *Anti-Coercion Instrument*[19]

The proposed ACI developed by the Directorate General for European Commission's (DG TRADE) is also a recognition that the EU seeks to strengthen its autonomy against certain activities conducted by third states. Indeed, there is an increasing tendency whereby the EU is economically coerced for its policy choices by third states.[20] As recognized by the European Commission, the 'weaponization' of economic instruments to interfere with the EU's legitimate policy choices 'continue[s] to compromise the economic and geopolitical interests of the EU and its members, and undermine the EU's open strategic autonomy'.[21] One of the recent events that triggered the EU to speed up the adoption the new ACI was China's decision to block all imports from the Baltic state[22] and, as a form of a Chinese

States, is a significant innovation in the justification; *see* S. Poli, *Prime riflessioni sulla sentenza del Tribunale RT France sulle misure restrittive contro le attività di disinformazione russe*, Quaderni Aisdue 111, 116 (Antonio Tizzano ed. 2022).

17 Case T–125/22, *RT France v. Council*, ECLI:EU:T:2022:483 (14 Nov. 2022); For an overview of the General Court case, *see* V. Szép & R. Wessel, *Balancing Restrictive Measures and Media Freedom: RT France v. Council*, 60 Com. Mkt. L. Rev. (2023) 6 p.1348-1397; L. Lonardo, *Censorship in the EU as a result of the war in Ukraine. Case T-125/22 RT France v. Council,* European Law Review (2023, forthcoming)

18 *Council Decision (CFSP) 2020/1999 of 7 December 2020 Concerning Restrictive Measures Against Serious Human Rights Violations and Abuse*, OJ L 410I, Recital 1, at 13–19 (7 Dec. 2020).

19 For an analysis of the Anti-Coercion Instrument, please *see also* N. Zamani & H. de Waele, *'Nobody Has Any Intention of Building a Wall' Some Reflections on the EU's New – Found Assertiveness in the Sphere of Trade and Investment*, European Foreign Affairs Review (2023) in this special issue.

20 J. Hackenbroich, *Defending Europe's Economic Sovereignty: New Ways to Resist Economic Coercion*, European Council on Foreign Relations (20 Oct. 2020), https://ecfr.eu/publication/defending_europe_economic_sovereignty_new_ways_to_resist_economic_coercion/ (accessed 1 Oct. 2023).

21 European Commission, *Inception Impact Assessment* (7 Jun. 2021), https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=PI_COM:Ares(2021)1326295&rid=8 (accessed 1 Oct. 2023).

22 A. Bounds, *Lithuania Complains of Trade 'Sanctions' by China after Taiwan Dispute*, Financial Times (3 Dec. 2021) https://www.ft.com/content/0ebaa7c7-761d-445e-b3e4-f5d2c9b4768f (accessed 16 Apr. 2022).

secondary sanctions, its decision to threaten (EU) multinational companies to sever their ties with Lithuania or face the potential exclusion from the Chinese market.[23]

China's decision is less about the potential to keep trade relations open but raises the question whether and under which conditions the EU and its Member States can take legitimate policy choices without any interference in their actions – a question very much related to the EU's strategic autonomy. Indeed, in 2020 Lithuania exported EUR 300m worth of goods to China which represented less than one percent of its total exports.[24] From a trade perspective, this will not have a devastating impact on Lithuania. What is more important in this context is the tendency whereby the EU and its Member States are increasingly constrained by economic and other instruments to give up their policy choices.

In light of those developments, on 8 December 2021 the Commission published the proposals on the ACI. As confirmed by the Commission, this new legal instrument is a response to the deliberate economic pressure that is being exerted against the EU and its Member States. The ultimate aim of the ACI is to 'deter countries from restricting or threatening to restrict trade or investment to bring about a change of policy in the EU [and …] to preserve the EU and the Member States' legitimate right to make policy choices and decisions and prevent serious interference in the sovereignty of the EU or its Member States'.[25] The European Commission emphasizes that deterrence is the primary objective of the instrument and countermeasures are only taken as a last resort. The EU's responses may include trade, investment of other restrictions, including imposing tariffs, restricting imports from the country in question, restrictions on services or investment, steps to limit the country's access to the EU's internal market, such as public procurement.[26]

The Commission's proposal, based on Article 207(2) TFEU, establishes a two-step procedure to allow the Union responding to economic coercion. In the first step, the Union formally identifies that an act falls within the scope of the ACI and could engage with the third country – through e.g., negotiations, mediations or other means – to de-escalate the economic coercion. If this step fails to trigger change in the behaviour of the third country, the Commission, as a last resort, would be entitled to respond adequately and to take appropriate countermeasures

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[23] J. O'Donnell & A. Sytas, *Exclusive: Lithuania Braces for China-Led Corporate Boycott*, Reuters (9 Dec. 2021), https://www.reuters.com/world/china/exclusive-lithuania-braces-china-led-corporate-boycott-2021-12-09/ (accessed 1 Oct. 2023).

[24] Bounds, *supra* n. 22.

[25] European Commission, *EU Strengthens Protection Against Economic Coercion* (8 Dec. 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6642 (accessed 1 Oct. 2023).

[26] *Ibid*.

against natural or legal persons.[27] In March 2023, the Council and the European Parliament reached a provisional political agreement on the ACI.[28]

2.2[b] *Blocking Extra-Territorial Sanctions*

Another area where the EU seeks to re-define its strategic interests is its defence against extraterritorial sanctions. Through these measures, often employed by the US, states extend their domestic laws to other jurisdictions and even non-nationals or entities working in different jurisdictions may be held liable for breaching foreign laws. Clearly, the limitations imposed by these extraterritorial sanctions are at odds with the EU's ambition to strengthen its strategic sovereignty. In 2022 the Council also recognized that extraterritorial sanctions 'threaten the integrity of the Single Market and the EU's financial systems'.[29] The Council also recalled that 'one key pillar of that policy is the EU Blocking Statute, which is the EU's unified response to the extra-territorial application of third countries' measures to EU operators'.[30] Indeed, the Commission, in its 2021 Strategic Foresight Report, identified ten areas in which the Union can strengthen its open strategic autonomy. One of the areas is a more resilient and future-proof economic and financial systems which are directly linked to sanctions. There is an increased willingness for the wider use the euro in international trade and services that could strengthen the EU's resilience against the extraterritorial application of sanctions by third countries.[31]

US extraterritorial sanctions have been a constant headache in the Union given the weight of that market. Indeed, the central position of the US dollar enables the US administration to threaten non-US actors, including European entities, to terminate their (financial, trade and other types of) activities with persons and entities under US sanctions. As the Commission also pointed it out, the use of extraterritorial sanctions has seriously affected the EU's ability 'to honour international agreements and to manage bilateral relations with sanctioned countries [and they] have compromised legitimate trade and investment of EU

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[27] *See also Council Regulation (EC) No. 2271/96, supra* n. 9; *See also* F. Hoffmeister, *Strategic Autonomy in the European Union's External Relations Law*, 60 Com. Mkt. L. Rev. 680, 683 (2023).

[28] Council of the European Union, *Trade: Political Agreement on the Anti-Coercion Instrument* (28 Mar. 2023), https://www.consilium.europa.eu/en/press/press-releases/2023/03/28/trade-political-agreement-on-the-anti-coercion-instrument/ (accessed 1 Oct. 2023).

[29] Council of the European Union, *Council Conclusions on Achieving the EU's Economic and Financial Strategic Autonomy Is an Open Economy: One Year After the Commission's Communication* 6301 (2022).

[30] *Ibid*.

[31] European Commission, *Strategic Foresight Report: The EU's Capacity and Freedom to Act*, COM (2021) 750 final (2021).

businesses with other countries'.[32] In order to preserve (or at least to try to defend) Europe's autonomy after the US decision to withdraw from the Joint Comprehensive Plan of Action (JCPOA), as well as to protect itself from the possible imposition of sanctions by China, the EU responded to re-activate.

There are three reasons why the Commission seeks to update the Blocking Statute. The political reason is that the EU as a whole tries to rebuild itself in the world, reassert its strategic sovereignty and the Blocking Statue is one of the instruments in that process. The policy reason is that the Blocking Statute was effective in the Cuban case in 1996 but has not fully delivered ever since and, therefore, the EU has lost some of its credibility. Finally, the EU seeks to end of what it perceives as unfair practice whereby it was cost free to impose extraterritorial sanctions against the EU and, therefore, 'sending states' had zero interest economically to stop that behaviour.[33]

Too often EU firms have faced the almost impossible choice between potentially excluding themselves from US (or other) markets or breaching EU law. The simple reactivation of the Blocking Statute did not solve all problems as it was originally designed in a very different geopolitical context. With the aim to strengthen the EU's strategic autonomy, the Commission decided to update and revise the EU's Blocking Statute. The new European Commission, in office since 1 December 2019, has defined itself as a geopolitical Commission to better respond to the increasing challenges that the Union has faced in the last couple of years.[34] This new geopolitical Commission, as reconfirmed in a 2021 Communication, 'aims to boost the role of the [EU] on the world stage'.[35] This new commitment entails 'a stronger policy to tackle the unlawful extra-territorial application of unilateral sanctions and other measures by third countries [which] will benefit the EU's goal of open strategic autonomy and resilience'.[36]

3 CONCEPTUAL AND PRACTICAL CHALLENGES

3.1 Risk of duplication

One of the challenges associated with the Blocking Statute and the ACI is their potential overlapping scope as both of them have the objective to defend autonomous EU and

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[32] European Commission, *The European Economic and Financial System: Fostering Openness, Strength, and Resilience*, COM (2021) 32 final (2021).

[33] A. Nedea, *EU Economic and Financial System: Fostering Openness, Strength and Resilience in COVID-19 Context* (27 Apr. 2021), https://www.youtube.com/watch?v=3pg7kLPuIGo (accessed 1 Oct. 2023).

[34] European Commission, *Speech by President-elect von der Leyen in the European Parliament Plenary on the Ocassion of the Presentation of her College of Commissioners and their Programme* (27 Nov. 2019), https://ec.europa.eu/commission/presscorner/detail/es/speech_19_6408 (accessed 1 Oct. 2023).

[35] *See also* European Commission, *supra* n. 32.

[36] *Ibid*.

Member State decisions and their capabilities to develop and maintain legitimate business relationships.[37] This potential overlap was also considered by stakeholders during the impact assessment of the ACI. Stakeholders noted that although the Blocking Statute lacks deterrence effects (one of the features of the ACI), they held that the consistency and coherence between the two instruments must be ensured.[38]

However, as was argued in the literature, a key difference is in relation to their scope of application *ratione personae*. The Blocking Statute is activated when measures target 'natural persons who are EU residents and nationals of an EU Member State, as well as to legal persons established in the EU'.[39] In contrast, the ACI is applied when measures of third countries target, directly or indirectly, the EU or its Member States. At the very same time, in practice it might be difficult to make a clear distinction. The underlying reason for this difficulty is that the scope of the ACI is broad enough to cover extraterritorial sanctions too.[40]

The Impact Assessment Report explicitly deals with this issue which provides that extraterritorial sanctions fall outside the definition of coercion if those measures do not coerce the home government. If extraterritorial sanctions do not have coercive effects, they are not covered by the ACI. The definition also excluded cases when coercion is applied in relation to private actors where the conduct which the third country government desires to obtain from private actors is purely related to these operators' activities in that third country and unrelated to the *public policy* of the EU or a Member State.[41] But a number of business associations argued that coercion against private operators sometimes equals to coercion against a government, hence the difficulty to separate between different types of coercion.

The Impact Assessment Report further recognizes that the ACI might be activated when the EU or its Member States are coerced through extra-territorial sanctions. This is the case when third states apply extraterritorial sanctions with a view to not only pressuring EU private economic operators but also to make the EU and its Member State align their policies with the coercing country's policies. It is further recognized that this is a coherence-related question because both of the instruments can be activated in relation to the same situation but they are in principle designed to address different issues.[42]

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37 T. Ruys & F. Rodriguez Silvestre, *A Brief Analysis of the Anti-Coercion Instrument and Its Relationship With Unilateral Sanctions Adopted By and Against the European Union,* (Forthcoming).

38 European Commission, *Impact Assessment Report: Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council on the Protection of the Union and Its Member States from Economic Coercion by Third Countries*, Commission Staff Working Document SWD (2021) 372 final.

39 T. Ruys & C. Ryngaert, *Secondary Sanctions: A Weapon Out of Control? The International Legality of, and European Responses to, US Secondary Sanctions*, Brit. Y.B. Int'l L. 1, 83 (2020), doi: 10.1093/bybil/braa007.

40 Ruys & Silvestre, *supra* n. 37.

41 *See* European Commission, *supra* n. 38.

42 *Ibid.*, at 28–30.

In practice, it is hard to imagine extraterritorial sanctions which are adopted by powerful states that do not target, at least tacitly, private actors and home state too. After all, the use of extraterritorial sanctions is an attempt to change the foreign and economic policies of another state through the pressure of foreign economic operators to comply with foreign laws. In addition, the ACI's focus on objective criteria focusing on the effects of measures as well as its subjective assessment in relation to the intention of coercion makes it no easier to decide how these benchmarks would actually be applied. The Commission has an almost full discretion to decide in each case whether an extraterritorial sanction falls within the scope of the ACI. Therefore, legitimate concerns continue to be voiced that the potential activation of both the Blocking Statute and the ACI has not been fully addressed by EU institutions.[43]

3.2 Risk of ineffectiveness

With the von Der Leyen European Commission, in office since 1 December 2019, there has been an increased willingness to better oversee the enforcement of EU sanctions in the twenty-seven Member States. In fact, the lack of uniform implementation of sanctions regimes prevents the EU from strengthening its strategic autonomy. The desire to reinforce the EU's position in the world through the use and proper implementation of sanctions triggered an institutional re-calibration between the European External Action Service (EEAS) and the European Commission. In particular, the sanctions unit in the Service for Foreign Policy Instruments (FPI) working under the auspices of the High Represenative (HR) was moved to the Directorate General for Financial Stability, Financial Services and Capital Markets Union (DG FISMA) under the leadership of commissioner Valdis Dombrovskis.[44] One of the reasons of this institutional re-calibration was to create better synergies between the desire to strengthen the euro as a currency and the willingness to use this as an asset when imposing sanctions. Another objective was to ensure better sanctions implementation that has represented a major challenge across EU Member States. Indeed, Ursulua von der Leyen's mission letter to commissioner Valdis Dombrovskis already in 2019 pointed out the importance 'to ensure that the sanctions imposed by the EU are properly enforced, notably throughout its financial system'.[45]

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43 Roys & Silvestre, *supra* n. 37.

44 Since then, there has been a reshuffle in the Commission's portfolios and DG FISMA is now directed by commissioner Mairead McGuinness.

45 Ursula von der Leyen, *Mission Letter to Valdis Dombrovskis Executive Vice-President-Designate for an Economy That Works for People* (1 Dec. 2019), https://ec.europa.eu/info/sites/default/files/mission-letter-valdis-dombrovskis-2019_en.pdf (accessed 1 Oct. 2023).

Undeniably, as confirmed by the 2021 Communication on the European economic and financial system (hereinafter: 'the 2021 Communication'), 'the implementation [of EU sanctions] is not as uniform across the EU as it ought to be. This creates distortions in the Single Market as EU companies, including EU subsidiaries of foreign companies, can circumvent prohibitions'.[46] Empirical studies have also found that EU restrictive measures are implemented very differently across the EU. This is due to several factors. For instance, whereas some Member States merely resort to criminal penalties for sanctions violations, others use only administrative penalties, and some others use the combination of them. Furthermore, the differences in the number of penalties may give incentive to companies to set up subsidiaries in Member States where penalties are substantially lower. Also, the application of sanctions and the imposition of penalties require cooperation of different national competent authorities, possibly including ministries of defence, economy, finance, foreign affairs or customs authorities and central banks which further raises transactions costs for collaboration.[47]

The uneven implementation of EU sanctions and their possible circumvention undermine the EU's desire to strengthen its strategic autonomy. As confirmed by the 2021 Communication, 'the EU can reinforce its open strategic autonomy […] by improving the implementation and enforcement of EU's sanctions regimes'.[48] Indeed, the (proper) application of sanctions can contribute to the EU's strategic autonomy many different ways: (1) the creation of a level playing field in the Single Market can only be guaranteed by the proper implementation of EU sanctions across all twenty-seven Member States and by making sure that all companies have the same interpretation of those EU legal acts; (2) the creation of a common understanding on the obligations that a 'common' sanctions policy imposes on Member States and their operators; (3) the effectiveness of sanctions can only be guaranteed if there are no loopholes in the national implementation and if those targeted cannot find the weak links due to the lack of uneven implementation; and finally (4) credibility is important when the EU stands against extraterritorial sanctions as they are applied against EU operators. In fact, extraterritorial sanctions are applied by the US given that it believes that somebody needs to 'put order in the chaos'.[49]

To improve the implementation of EU sanctions and thus strengthening the EU's strategic autonomy, the Commission proposed a number of ideas. For instance, it created a database, the Sanctions Information Exchange Repository,

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46 *See also supra* n. 32.

47 F. Giumelli et al., *United in Diversity? A Study on the Implementation of Sanctions in the European Union*, 10 Politics & Governance 36, 40–42 (2022).

48 *See also* European Commission, *supra* n. 32.

49 Nedea, *supra* n. 33.

which allows 'the smooth reporting and exchange of information between Member States and the Commission on the implementation and enforcement of EU sanctions'.[50] The Commission also created the Expert Group on Union restrictive measures and extra-territoriality, composed of representatives from DG FISMA, Member States and the EEAS as observer. The main objective of this group is to provide the Commission with advice and expertise, including 'in monitoring the uniform implementation and effective enforcement of Union restrictive measures'.[51] Following the war in Ukraine, the Commission also proposed to harmonize the criminal laws of the Member States on the violation or circumvention of restrictive measures which is further expected to strengthen the uniform implementation of EU sanctions.[52]

4 HOW SANCTIONS FASHION STRATEGIC AUTONOMY

Since strategic autonomy is an objective operating at a level of abstraction,[53] and since it has not been operationalized in one single manifestation (a code, a statute, a mission, an operation, an initiative, or similar things), it is suggested that an empirical analysis is necessary in order to understand the meaning that EU institutions give to it. Looking at what the EU *actually does* gives insights into what strategic autonomy is (meant to be). The analysis of sanctions (broadly understood) developed in the previous sections of this article gives rise to three sets of considerations.

First, strategic autonomy is both about 'procedure' and about 'substance'. It aims at preserving capabilities and structure as much as substantive choices and values of the EU. Sanctions protect both the EU's *capacity* to act (that is, its material independence) and the EU's *substantive power* (the internal market). The first is achieved through the protection of the EU's security and public order; the latter, through the protection of the economic element of EU integration, that is the economic might that gives 'weight' to the EU in international politics.

It was shown that, by and large, CFSP sanctions tend to have the objective of protecting the Union's security. This enables the EU to act autonomously because sanctions aim *in the first place* at preserving the EU's security, independence, and

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50 European Commission, *Q&A: Europe's Economic and Financial System*, European Commission (19 Jan. 2021), https://ec.europa.eu/commission/presscorner/detail/cs/qanda_21_109 (accessed 1 Oct. 2023).

51 European Commission, *Commission Decision (EU) of 12 April 2021 Setting Up the Commission Expert Group on Union Restrictive Measures and Extraterritoriality*, C(2021) 2385 final (12 Apr. 2021).

52 *See* European Commission, *Proposal for a Directive of the European Parliament and of the Council on the Definition of Criminal Offenses and Penalties for the Violation of Union Restrictive Measures*, COM (2022) 684 final (2022).

53 *See also* an earlier special issue on strategic autonomy in European Foreign Affairs Review, Vol. 27, Special issue.

integrity (sanctions may and in fact do pursue other objectives as well,[54] but the preservation of the Union's security is a logical precondition for all of those). The examples discussed in section 2 of this article show that this meta-rationale is present in all sanctions, regardless of the regime under which they are adopted (counterproliferation, fight against terrorism, international situation – including the 'human rights sanctions'). Taking the reasoning one step further, we submit that sanctions *must* enable the EU to act autonomously because this is a meta-objective that is indispensable for all foreign policy action. The proportionality of a sanction depends on this. Sanctions are proportionate if they are suitable to achieve their objective (this being a necessary but not sufficient condition: they also need to be necessary for the attainment of that objective), and this is an element that is for the Court to determine. It was also shown that sanctions broadly understood enable the Union's to preserve its distinctive choices and values 'internally'. The EU protects its democratic choices – namely the creation and maintenance of an internal market based on free trade with elements of a social economy – by shielding them from outside interference (extraterritorial sanctions, distortion of competition, unfair subsidies). This is done through a combination of internal and external instruments – that is, through a combination of domestic economic policy and foreign policy.[55]

Second, strategic autonomy allows for a selective use of international partnerships. This entails, above all, a 'positive' aspect: the EU must be able to choose its own allies. This proposition is no longer obvious after the Russian invasion of Ukraine of 2022, which had, among other intended effects, the coercion of Ukraine into a Russian sphere of influence. For Russia, Ukraine should not be allowed to choose its own allies. For the EU, instead, the opportunity of a community to exercise the right to self-determination, which expands to foreign policy and the choice of allies, is a precondition of the international system. It also means that reliance on an ally is tolerated by strategic autonomy (this is perhaps what the use of the qualifier 'strategic' suggests: the autonomy that EU institutions strive for is not absolute, but selective and opportunistic).[56] Sanctions are predicated on an asymmetry: the sanctioning party must be able to coerce the

[54] Such as recent measures adopted in view of the situation in Iran, where there is no explicit link with the Union's security; *See Council Decision (CFSP) 2023/727 of 31 March 2023 Amending Decision 2011/235/CFSP Concerning Restrictive Measures Directed Against Certain Persons and Entities in View of the Situation in Iran*, OJ L 94, 56–64 (3 Apr. 2023).

[55] It could conceivably be done exclusively through domestic policy; L. Gardner, *Pay Any Price. Lindon Johnson and the War for Vietnam*, 2 Indep. Rev. J. Pol. Econ. 1 (1997). 'Roosevelt's New Deal, as first conceived, tried to contain those challenges [the collapse of the world economy] by expanding the limits on reform and isolating the US economy from the shockwaves and tremors sweeping across Europe and Asia'.

[56] Perhaps, a hint to that effect is the use of the phrase 'principled pragmatism' to describe the Union's philosophy of foreign affairs in the 2016 Global Strategy.

sanctioned one by withholding something that the sanctioned party needs (or by doing something it cannot stand): finances, access to a market, material for the production of military equipment, etc. The fact that sanctions, as a rule, need a concerted effort (often, by the political West) to be more effective is not a reason not to adopt them: in a word, it does not negatively affect the EU's strategic autonomy. The selective use of international partnerships also allows for a 'negative' aspect: it is possible to restrict free trade and deviate from multilateralism. The proposed ACI, the international procurement regulation, the foreign subsidies regulation all foresee limitations to free trade.

Third, this notion of strategic autonomy gives us indications about how EU institutions strike a balance between values and objectives of EU foreign policy. There is an instrumentalization of EU values when the EU links the protection of fundamental rights to international security. This is the case in the human rights sanction regime, and in the sanctions against certain Russian media outlets in Europe. In the first case, the link of subordination is made in the preamble of the relevant CFSP Decision.[57] In the second case, freedom of speech – a cornerstone of liberal democracy – is restricted in the name of the EU's security and public order. One could go as far as to say that even truth has an instrumental value: propaganda is prohibited in so far as it is a threat to the Union's security and the prohibition is justified in that exceptional context.[58]

These actions could be interpreted as suggesting that values are pursued in EU foreign policy because (and in so far as) they contribute to security (rather than being valuable in themselves). This suggests an axiological subordination of the substantive values of Articles 2 and 3(5) TEU to the meta-rationale of security. While this subordination is not mandated by any provision of the Treaties, it is a balancing act that EU institutions must carry out in the absence of any specific instructions in the Treaties and, in fact, the absence of decisive guidance by legal scholars on how much – indeed at what cost – the EU ought to promote its values. The balancing is not as problematic as it may appear at first sight because it is anyways subject to the judicial review of the Court at proportionality stage.

There are also cases of conflicts between values. This is most evident in the case of the conflict between upholding international law and fundamental rights. One instance in which this plays out is the case of RT France, where the contrast is between stopping Russia and its war machinery, which include pro-Russian media outlets, and upholding fundamental rights and democratic values (that is, allowing free speech also to Russian sponsored media). This is discussed at length elsewhere.[59]

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[57] *Council Decision (CFSP) 2020/1999 of 7 December 2020 Concerning Restrictive Measures Against Serious Human Rights Violations and Abuse*, OJ L 410I, Recital 1, 13–19 (7 Dec. 2020).

[58] Case T-125/22, *RT France v. Council*, ECLI:EU:T:2022:483 (27 Jul. 2022).

[59] *See* Szép & Wessel, *supra* n. 17.

Another case is that of sanctions affecting the Russian civilian population. Here the objective of stopping Russia is pursued by creating discontent among the civilian population in the hope that this leads to a change in the Kremlin's policy; but their fundamental rights may suffer. In the case of the Russian visa ban, the right to asylum may be breached by blanket prohibition to enter the EU.[60]

5 CONCLUSION

The main question of this article is what conception of strategic autonomy is manifested by EU sanctions – broadly understood to encompass not only measures adopted under CFSP, but also the measures the EU might take under the ACI and the so-called Blocking Statute.

In the absence of a blueprint of strategic autonomy in the abstract, sanctions do provide some specification. The picture they paint is one of strategic autonomy as a principle not only of processes, but also of substance. In terms of processes, it is an objective that allows for selective uses of partnership; and in terms of substance, it is also in the name of this principle that EU institutions have proceeded to a balancing between rights, interests, and values.

One could even contend that the balancing done by EU institutions contrasts with the one painted by the Treaties. To a cosmopolitan view of international relations and to an aspiration to multilateralism, strategic autonomy juxtaposes a much more 'realist' vision, that is inspired by 'principled pragmatism'[61]: and an 'unprecedented resolve to restore peace in Europe'.[62]

[60] Thym, *supra* n. 10.
[61] To use the wording of the 2016 Global Strategy.
[62] To use the wording of the 2022 Strategic Compass.