1. What advantages and disadvantages does EU membership have for the UK with regard to its approach to sanctions policy?

The UK’s prospective withdrawal from the EU is associated with both costs and opportunities. The main difficulty the EU is facing in its sanctions practice is that its designations are frequently challenged in European Courts, often successfully. A recent analysis points to a success rate of 65% to 35%, in favour of the claimants. An important benefit consists in the exclusion of British sanctions from the jurisdiction of the ECJ, which will increase litigation in UK courts.

A disadvantage about operating through the EU framework is that, as with all composite fora, measures often get diluted in favour of consensus. In order to avoid obstructing the operation of the single market, sanctions affecting trade or financial relations are agreed at the European level (Koutrakos 2001). The extent to which sanctions get diluted is less significant when negotiated in the EU than at UNSC level. Indeed, the EU has a record of approving measures that have been previously rejected at the UNSC, an example being Iran. Nevertheless, not having to co-ordinate sanctions packages with EU partners will allow London more flexibility in designing its own measures.

On the other hand, operating via the CFSP framework had been advantageous for the UK because it served as a vehicle for the multilateralisation of its measures. EU member states’ preference for imposing sanctions through the EU since 1991 has been documented. It has been calculated that London was able to multilateralise 78 per cent of its sanctions in the EU (as opposed to enacting unilateral sanctions or using alternative for a) (Jones 2007). Britain has benefited from the support of European partners, and the evolution in the CFSP over time has been towards enhanced discipline and enforcement. When the UK applied sanctions on Uganda in the 1970s, other then-EC members intensified trade with the country, taking advantage of the business opportunities created by the withdrawal of British firms (Jones 2007). However, when the UK imposed restrictions on Zimbabwe in 2002, the sanctions regime was quickly adopted by the entire EU, which sustained it for over a decade.

The European adoption of British sanctions has magnified the effect of the measures. As a participant in the CFSP, the UK benefited from the ‘pro-consensus bias’ that characterised this framework. The existence of a predisposition to agree to sanctions is most clearly illustrated by the persistence of a number of sanctions regimes despite certain resistance
by certain members. This is particularly remarkable since sanctions regimes are endowed with sunset clauses that foresee an expiration date. If no agreement on renewal is reached by the expiration date, sanctions collapse automatically. This situation makes it theoretically possible for every Member State to bring about the collapse of a given sanctions regime by frustrating its renewal in the annual review. However, such scenario has not materialised since the late 1980s, pointing to successful socialisation in the Council. In sum, Britain has greatly benefited from European solidarity in multilateralising its sanctions regimes.

2. Are there examples where it would be in the UK’s interest to diverge from current EU sanctions policy? Do you consider it likely that the UK would diverge in the longer term from the EU’s sanctions policy?

Is it difficult to think of any scenarios under which the UK should diverge from EU sanctions policy. Once freed from the scrutiny of European courts, British sanctions could becoming more targeted, reversing the broadening trend in European sanctions provoked by the legal challenges (Portela 2016).

It is unlikely that the UK would diverge from EU sanctions policy given that, in many cases, both follow Washington’s lead. The UK has been central in shaping EU sanctions policy, partly by encouraging European partners to follow Washington’s or its own approach. Rather, what we can expect is that EU sanctions policy will diverge from that of the UK.

British withdrawal from the EU threatens to weaken EU sanctions regimes altogether. This is particularly the case since the UK is one of the champions of this tool, responsible for initiating multiple sanctions regimes (Moret 2016; Lehmkuhl and Shagina 2015) and an active proponent of individual designations (House of Lords 2014). EU Member States have traditionally been divided on their attitudes to sanctions (Portela 2010). As reported by a Member State diplomat, “Sanctions are a very sensitive issue ... some believe they are very useful, some [view their] utility [as] doubtful” (EU Member State diplomat cited in Chelotti 2016, p. 157). Soon after the June 2016 referendum, the prospect of British withdrawal created expectations that EU sanctions practice would lose impetus. Alarmed at the declining cohesion behind the sanctions against Russia, an EU Member State diplomat lamented that the UK’s decision to leave the EU weakened the internal push for a sanctions renewal: “The UK already has one foot out of the door. That leaves Poland, the Baltic States, Sweden and, to an extent, Denmark, without a major ally on Russia” (quoted in Rettmann 2016). Many EU members lack a foreign policy tradition in sanctions imposition, and are less prepared to accept the economic and political losses associated with sanctions policies.
In the absence of strong leadership, their acquiescence, or covert resistance (Portela 2015), will easily turn into open opposition to (proposed) regimes.

3. What is your assessment of the impact that the imposition of sanctions by the UK (separate to the EU) would have, in comparison to its participation in the EU regime?

The imposition of sanctions by the UK separately from the EU will have less impact compared to joint UK-EU regimes. Worldwide, we witness a trend towards multilateralization: there is a preference for regimes imposed by a multiplicity of actors over unilateral sanctions, even if consensus comes at the price of diluting the contents and incurring into collective action problems. A UK-only regime will have less economic impact. Its legitimacy will be weaker as it will allow the target to claim that the sender is isolated. In the absence of similar sanctions by the EU, European countries will fill the economic and political void left by British withdrawal.

4. How could cooperation with the EU on sanctions policy help the UK to achieve its foreign policy goals after Brexit?
   a. Would this differ between the various types of sanctions (arms embargoes, asset freezes, travel restrictions et cetera)?
   b. Would this differ between thematic goals (such as the protection of human rights or nuclear non-proliferation)?
   c. Would the UK have a stronger interest in ongoing cooperation on sanctions imposed on some countries than on others?

The UK should continue co-operating closely with the EU after Brexit. As mentioned above, joint imposition of sanctions with the EU magnifies the impact of the measures and provides them with additional legitimacy. Getting the EU on board also prevents European countries from “filling the void” in both economic and political terms. Given that London is one of the main promoters of sanctions regimes at EU level, we can expect European sanctions activity to subside over the coming years. As the principal sanctions sender of the continent, and a key ally of the US, London has every incentive to establish a formal framework for regular co-ordination of sanctions regimes with the EU.

   a. My understanding is that travel restrictions already differ between the EU and the UK. The necessary degree of co-
operation on trade restrictions will be determined by the nature of British participation in the common market.

b. London will find it easier to promote sanctions in support of objectives well established among EU countries, such as terrorism and human rights. However, the main difficulty resides in the fact that the UK will no longer be represented in the Council’s geographical working groups, which is where sanctions regimes come about. This will make the adoption of sanctions regimes more difficult because the impulse to impose sanctions often emerges from a common analysis which will be framed without British participation.

c. Certainly, sanctions enacted against certain countries will be of more interest than others. See preceding paragraph.

5. A number of countries are currently closely aligned with the EU’s sanctions regime, including Norway and Switzerland. Do you have an insight into how such alignment is coordinated in practice? Do like-minded countries have an impact on the EU’s decision-making procedures on sanctions?

Alignment is not really “co-ordinated”. Instead, third countries are invited to align with EU sanctions. Third countries have no say in the framing of the regime; they can only align themselves with the EU or decline to do so. The EU picks and chose whom to invite - certain countries are routinely invited (such as candidate countries), some are invited occasionally; others are never invited. Invited third countries are invariably located in the vicinity of the EU. Switzerland constituted an exception in the case of Iran: it adopted the EU sanctions regime only partly, on account of its role as the protecting power of the US in Iran. The practice of association has been criticised due to the lack of involvement of EU partners in the sanctions preparation process (Hellquist 2016).

a. Would you regard current examples of coordination on sanctions as suitable for the UK after Brexit? If not, what might be a suitable mechanism?

The mechanism that should be replicated should be the model of consultation with the US, which is intensive and quasi-permanent. The model of third country alignment is unattractive as it would transform the UK in a mere recipient (or “taker”) of EU sanctions legislation.

6. What impact might complying with an independent UK sanctions regime – as opposed to an EU regime – have both
on UK businesses and on foreign businesses operating in the UK?

For businesses, the most obvious difference between an EU and a British sanctions regime is that it will be much easier to lobby for the modification of a unilateral sanctions regime, given that it is in the hands of a single government to modify or lift the regime. Still, enterprises operating in the US or the EU will have to take into account the sanctions legislation in force in these markets, and they will tend to apply the most restrictive of them all (typically the US sanctions legislation, which also has extraterritorial effects.)

7. What is the importance of EU membership to the UK’s influence over sanctions agreed at the UN? Do you expect a change in UK influence over UN sanctions decisions after Brexit?

Brexit will have a modest impact on the UK’s influence over sanctions at the UN. The constant consultation practices among European partners provided an additional layer for British influence in New York. The relative weight of France will increase given that it will be left as the only EU Member State with a permanent seat the UNSC. Predictably, it will become easier for France to disseminate its analyses among EU members.

Implementation

8. How could the current sanctions, agreed at the EU level and implemented through the European Communities Act, be transposed into UK law? Could this easily be included in the Great Repeal Bill? What would the legislative process for the imposition of UK sanctions after Brexit be? What would the challenges be?

Here, the Swiss model could be followed. Once the Council Decision has been adopted, the UK could pass its own legislation giving concrete shape to the measures in the EU text, performing modifications or additions, while the EU prepares the implementing Regulation.

9. Will the Government need to review its capacity and resources to develop policy on sanctions, and/or to monitor compliance with existing sanctions regimes after Brexit? If so, what is your assessment of staff resources needed in Whitehall, such as in the Foreign and Commonwealth Office, the Department for International Trade, and the Office of Financial Sanctions Enforcement?
Staffing does not appear to be a problem at all. Due to its focus on sanctions, the UK has traditionally been the EU member endowed with better capacity and expertise. The expected effect of Brexit is not that the UK will lose access to capacities and expertise at EU level. On the contrary, it is the EU that is rather understaffed and has to rely on a handful of member states (first and foremost the UK and the Netherlands) for seconded experts.

References

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