

SANCTIONS AND THE BALANCE OF COMPETENCES

- **How effective is the EU in establishing and implementing sanctions? What, if anything, should it do differently? Are there any gaps in competences that should be addressed (e.g. 'orphaned' sanctions that can't be implemented)?**

The EU (then EC) started implementing (UN) sanctions through the Community, rather than through national legislation, following considerations of effectiveness. The UN-mandated sanctions against Rhodesia were implemented by the member states of the EC through national legislation. It soon became clear that national legislation differed in scope and had been adopted at different points in time, thus creating a 'patchwork' of legislation throughout the Community which was judged detrimental to the common market. This warranted a move towards the subsequent implementation of sanctions through the Community (Koutrakos 2001). The adoption of implementing legislation through the Community guarantees uniformity in the scope of prohibitions, which in turn ensures that economic actors throughout the EU operate under identical conditions as far as trade relations with the targeted country are concerned. This situation also benefited the Community, because it allowed it to exert control over the sort and level of disruption inflicted on the common market. Once the EU moved to imposing its own autonomous sanctions, it continued the practice of joint implementation, which persists to our days except for those areas that do not affect community competences, notably the arms trade and the issue of visas (Portela 2010).

The inefficacy of the EU as a sender of sanctions were initially ascribed to the intergovernmental nature of its decision-making machinery, first the EPC, later the CFSP (de Wilde 1998). It was claimed that the need for unanimous decisions rendered the EU too slow to react to developments in a quick and effective manner. This was compounded by the two-steps procedure: it is a legal requirement that first a decision in the intergovernmental framework of the EPC/CFSP is taken, followed by a regulation adopted under the Community framework (in those areas in which Community competences are affected). This cross-pillar procedure has been criticised because measures could not be implemented immediately upon adoption, as they necessitate the adoption of a second legal act, the regulation. Buchet de Neuilly

reported time-lags of over 30 days between the adoption of the first legal act, Common Positions, and the implementing regulation in his study of the sanctions against Yugoslavia during the Kosovo crisis (Buchet de Neuilly 2003). This time-lag between the adoptions of both instruments considerably weakened the impact of the measures, especially given that they were applied in a situation of violent conflict. However, EU sanctions practice has improved and this situation appears to have been corrected by using two methods: one of them consists in the specification of the scope of the sanctions in the Common Position, leaving less room of manoeuvre to the negotiators of the Regulations and thus expediting their adoption (Poeschke 2008). A second method consists in the simultaneous drafting of both legal acts to allow for their adoption (Commission 2008). The fact that a Common Military List has been agreed to provide a 'minimum' list of items covered by EU arms embargoes has also contributed to limiting or even eliminating the time-lag in the two-steps procedure (Commission 2008).

Compliance with sanctions by member states and their operators is, generally, very good. Episodes of defection as registered in the early sanctions practice of the EU back in the 1980s (de Wilde 1998) have disappeared. This is in sharp contrast with the implementation of UN sanctions, where violations are plentiful (Brzoska and Lopez 2009).

- **What are the comparative advantages/disadvantages of working through the EU in the application and implementation of sanctions, rather than the UK working independently?**

The comparative advantages of working through the EU are obvious: Because sanctions are binding on all member states, the existence of EU sanctions magnifies the effects of British sanctions. It prevents other European countries from taking advantage from the void left by the withdrawal of British companies and agencies, and helps increasing the pressure on the target. By contrast, the pattern we find is one where China comes to fill the void left by European (or Western) withdrawal – as visible in Zimbabwe or Iran (Portela 2011).

A large portion of EU sanctions regimes are British-inspired. Here, the UK often benefits from the fact that many member states do not have a clearly defined policy on Zimbabwe or Myanmar; thus, they routinely oppose little resistance to UK proposals for sanctions. Over time, the number of sanctions regimes proposed by the UK and adopted at EU level has gradually increased. Over the past twenty years, one can hardly identify any instances of sanctions regimes imposed individually by

member states against third countries (Jones 2007), while the imposition of EU sanctions regimes has become increasingly frequent.

The disadvantage is that, within a composite decision-making context, measures often get diluted in favour of consensus. Far-reaching sanctions affecting the energy sector in Myanmar reportedly tabled by the UK were rejected by France due to TOTAL's volume of operations in the country. Conversely, energy sanctions against Nigeria in the 1990s were opposed by the Netherlands and the UK because Shell was heavily involved. (These reports may be inaccurate and I take no responsibility for them, but if they are true, they illustrate that the possibility of vetoing measures can either frustrate or promote UK policy objectives.) Still, the extent to which sanctions get diluted is considerably less significant than at UNSC level. Indeed, the EU has a good record of approving sanctions measures that have been previously rejected at the UNSC, a clear example being Iran. Even when sanctions get diluted, the UK often retains the possibility of imposing some supplementary sanctions beyond the stipulations of the EU legislation.

The UK does not seem to be on the same page with many continental Europeans when it comes to lifting measures. Several member states prefer to proceed to lifting the measures faster than the UK considers desirable. Yet, this situation hardly undermines British strategy, as the UK still enjoys ample opportunity to influence the outcome of Council decisions. The Council invariably opts for compromise solutions that foresee the gradual phasing out of sanctions. In those cases in which there is no agreement on lifting, measures are first *suspended*, rather than lifted, and phased out gradually as the target makes progress towards the stipulated conditions. Note that the presence of a sunset clause in the CFSP legal act allows every member state to frustrate the renewal of sanctions regimes by wielding its individual veto. In the absence of a new legal act, the sanctions regime would elapse. However, this has never happened: consensual options have consistently been preferred to the sudden collapse of a sanctions regime – as exemplified by the phasing out of sanctions against Uzbekistan or Myanmar. Finally, the UK still retains the ability to maintain conditionality in its bilateral cooperation programmes.

In sum, advantages predominate.

- **Would a different division of EU and Member State competence in relation to sanctions produce more effective policy and delivery? If so, how and why? What would the implications be for the UK (e.g. in terms of international trade, our power to influence within the EU)?**

The current allocation of competences does hinder the optimal management/administration of sanctions, but not because competences between the Member States and the Community are not well balanced. Due to the hybrid nature of sanctions, security policy instruments affecting Community competences, both Commission and the Council Secretariat traditionally participate in their drafting. Thus, there have been two parallel teams working on sanctions in each of these institutions all along. Following the creation of the EEAS, this situation has not been corrected: the sanctions team in the Council has been transferred to the EEAS, but a second team remains with the Commission. An integration of both teams would be desirable, although legally problematic.

Finally, the EU is endowed with very modest powers of monitoring/surveillance of the implementation of sanctions. It is the Member States that are responsible for collecting information and co-operating with the economic operators and banks implementing sanctions (Commission 2008). The sanctions unit at the Commission receives information in that regard, but has little power to detect and correct violations if these occurred. Strengthening the capacity and powers of the EU in this regard – without fundamentally altering the distribution of competences - would help optimising implementation.

In short: altering the division of competences between Member States and the EU would not make policy more effective – if anything, the contrary is true. Sanctions administered under the framework of the Cotonou agreement, which enables the EU to partially suspend development aid, are judged more effective in encouraging progress by the target than sanctions imposed under the Council-dominated CFSP, not least due to the leadership exerted by the Commission and the flexibility allowed by the use of QMV in the Council (Portela 2010). While research contrasting EU aid suspensions and CFSP sanctions is still emerging and its findings are not watertight, this suggests that centralising power at EU level may contribute to enhance the efficacy of the measures, perhaps by making the EU appear a more unified actor vis-à-vis targets.

- **How might the UK national interest be served by action on sanctions being taken at a different level (e.g. regional, national, UN, OECD, G20) either in addition or as an alternative to action at EU level?**

Of course, the UK should make proactive efforts to get additional senders on board, and the abovementioned fora are appropriate. However, one should bear in mind

that many members of these fora remain very reluctant to use sanctions, particularly for the reasons the EU tends to use them, the promotion of democracy and human rights. Note for instance the negative vote cast by Indonesia in the latest round of UN sanctions against Iran (Portela forthcoming) or the BRICS' ostensive lack of support for EU sanctions against Syria (Portela 2012).

So far, the EU remains the forum where the UK has promoted the adoption of sanctions most successfully. The adoption of sanctions at EU level does not preclude its promotion in other fora. Moreover, the EU has contributed to the promotion of sanctions regimes by sending delegations to third countries in an attempt to persuade them of adopting additional sanctions against targets such as Iran.

- Any other thoughts or suggestions on the current EU balance of competence with regard to sanctions

The most pressing challenges facing EU sanctions today are unrelated to the division of competences between MS and the EU: Do targeted sanctions really avoid humanitarian consequences? Can sanctions designed as “targeted” stay “targeted” in their implementation? And most importantly, how can the EU continue to impose sanctions while guaranteeing due process, especially in the face of continuous - and often successful - legal challenges to its blacklisting practices?

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