

OPEN STRATEGIC AUTONOMY AS EU TRADE POLICY

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KEY POINTS

- In response to the increasing breakdown of the global trading system, the EU is developing economic statecraft through a policy of Open Strategic Autonomy (OSA).
- The OSA combines EU trade defence policies with EU commitments to sustainability goals.
- OSA utilises a mosaic of EU legal bases drawn from trade and foreign policy to create a new set of trade defence instruments for the EU.
- However, the OSA is limited by EU constitutional law and international law.
- Whilst the OSA has developed in response to threats from the US and China, the UK is potentially a target for OSA action.
- The EU-UK Trade and Co-operation Agreement (TCA) does not cover foreign policy issues. The EU has more defence weapons and experience when handling trade disputes than the UK. In the next phase of enforcement of the post-Brexit deal, the UK could find itself at a disadvantage.

INTRODUCTION

This Briefing Paper sets out how the EU is developing economic statecraft. Shocks to the global trading system forced the EU to reposition its use of external relations powers and engage with new forms of economic statecraft. These were discussed in the earlier Briefing Paper 70: [Trade and Security: The EU's Unilateral Approach to Economic Statecraft « UK Trade Policy Observatory](#). As a raft of new legal measures are put in place, and the EU consolidates policy, it is a good time to consider the direction of the emerging

trade policy.

Economic statecraft has been defined as “the use of financial, regulatory, and economic tools to achieve foreign policy objectives”.¹ The EU has limited legal capacity to develop foreign policy but has greater capacity to develop economic and trade policy. The

¹ Atlantic Council, [Economic Statecraft Initiative](#).

European Commission has used EU competence in the trade arena to strengthen the economic resilience of the EU, using trade as a foreign policy tool. By responding to the challenges in this way, the EU is writing a new trade narrative, to defend its economic interests and to secure itself as a player, if not a leader, in fostering a rules-based global order.

The narrative of the instruments and policies is described in the language of warfare: trade weapons², powerful guns, regulatory arsenal³, bullet launchers⁴. The EU continues to argue for multilateralism and a rules-based international order yet the effect of many of these measures could infringe international law and weaken the already perilous international legal order. The EU insists that many of the measures will only be used as a last resort, preferring to continue with ideas of multilateralism and open investment. But some of the new measures – such as foreign investment screening mechanisms - stake a change in attitude. Other measures, such as the Carbon Border Adjustment Mechanism and the proposed Critical Raw Materials Act, may enhance the regulatory reach of the EU by creating a core of global trading rules.

THE THREAT FROM CHINA AND THE US: A STYMIED GLOBAL TRADE ORDER

The election of Trump to the US Presidency in 2017 with its “America First” and “Buy America” narratives underpinning foreign and trade policies, marked a shift in US policies. US opposition to new international agreements, the stymied WTO appellate process⁵, the fuelling of trade wars with China, Canada, Mexico, and the EU, fractured the global trade system. The Biden administration has continued to bolster the domestic economy at the expense of opening international trade.⁶

In parallel, China, a systemic rival to the EU, conducts an aggressive trade policy, through retaliatory measures and the use of state-owned enterprises and subsidies to bolster domestic production and direct

² Barbara Moens and Jakob Hanke Vela, ‘EU flexes geopolitical muscle with new trade weapon’, Politico, 27 October 2022.

³ Jay Modrall, ‘Anti-subsidy Regulation – A New Big Stick in the EU Regulatory Arsenal’, Kluwer Competition Law Blog, 6 May 2021.

⁴ EU Flexes muscle with anti-coercion bill, risks being hijacked by Lithuania, Global Times 2021.

⁵ The WTO Appellate Body has not functioned since 11 December 2019 because the US blocked the nomination of new judges. This policy can be described as an extreme de-judicialization process whereby the US is using its political strength to retake political control over its economic policies, unhindered by the rules of international law and international courts.

⁶ For e.g.: The Inflation Reduction Act 2022.

investment in foreign countries through a narrative of “Made in China 2025”.⁷

The EU, along with other large economies such as Japan and Korea, is ensnared by the polarised trade wars conducted between the US and China. It becomes the victim of collateral damage created by disruption to supply chains or through sanctions. Indirect damage may occur through spillover effects, for example US restrictions in imports from China may lead to greater Chinese exports to the EU. There may also be direct collateral damage: when the US applied pressure on Dutch company ASML, [the Dutch government decided to stop exporting microchip technology to China](#).

As a result, Ruys and Rodríguez Silvestre note that:

“Amid their ongoing trade war, the two largest economies in the world steadily drift away from the principles that inform the global trading architecture under the auspices of the World Trade Organization (WTO), leaning towards unilateralism and gradually shifting from a rules-based international order to a power-based one.”⁸

Added to this trade disruption, the EU is managing several generational challenges: the green and digital transitions, third-country migration, the effects of Brexit, climate change, cybercrime, the COVID-19 pandemic, and Russian aggression towards Ukraine where disruption to trade is weaponised. All have affected supply-chains and exposed the fragility of global inter-dependence and eroded the mantra of “free trade”.⁹

In response, the EU has adopted a policy of Open Strategic Autonomy (OSA) to embrace the new narrative of how foreign policy and trade interests can be pursued through a range of legal instruments.

The aim of this Briefing Paper is to impose a structure on what appears to be a patchwork of different policies developed as a reaction to external influences, and internal EU economic and political demands.

The OSA has developed through distinct stages.

⁷ Mario Damen, ‘[EU strategic autonomy 2013-2023](#)’ European Parliament Research Paper 2022.

⁸ Fn omitted. See Tom Ruys and Felipe Rodríguez Silvestre, “Economic Statecraft: A Closer Look Inside the European Union’s Expanding Toolbox” [2023] Georgia Journal of Int’l & Comp Law, 647-670 at 649; Frank Hoffmeister, ‘Strategic Autonomy in the European Union’s External Relations Law’ (2023) 60 CMLRev 667-700.

⁹ Marijn A. Bolhuis, Jiaqian Chen, Benjamin Kett, ‘[The Costs of Geoeconomic Fragmentation](#)’, IMF, June 2023.

POLICY (CFSP)

The legal base for an EU Common Foreign and Security Policy (CFSP) is found in **Art. 25 TEU** and **Art. 2(4) TFEU**. Sanctions are the most frequent CFSP Decisions, and the sanction packages against Russia the most wide-ranging measures taken.¹³ Article 29 TEU gives the EU general competence to adopt foreign policy positions.¹⁴ The EU Common Security and Defence Policy has a separate legal base. Article 43(2) TEU allows the Union to adopt decisions related to “joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation” as well as “the fight against terrorism” (nearly 50% of the collected CSDP decisions). Article 42(4) TEU outlines the decision-making procedure. Article 38 TEU sets out the role of the Political and Security Committee.

Constitutionally, the EU Treaties separate internal market and external commercial action from foreign and defence security matters. Today many of the measures intended as foreign security measures are based in trade competence. The OSA straddles external and internal competence, opening an approach to trade defence which may have constitutional constraints imposed by the EU legal order,¹⁵ as well as international law.¹⁶

¹³ [Overview of sanctions and related resources \(europa.eu\)](#). The escalation of the war in Ukraine by Russia has seen the range of sanctions increased to include whistleblowing where sanctions are circumvented, alongside targeting individuals and broadcasting news outlets issuing disinformation. See Richard Disney, ‘[How have the forecasts on the effect of sanctions on Russia held up a year on?](#)’ 2023 Economics Observatory.

¹⁴ Ramses A. Wessel, Elias Anttila, Helena Obenheimer, Alexandru Ursu, ‘The future of EU Foreign, Security and Defence Policy: Assessing legal options for improvement’, 8 December 2020, [The future of EU Foreign, Security and Defence Policy: Assessing legal options for improvement - Wessel - 2020 - European Law Journal - Wiley Online Library](#). Article 31(2) TEU allows the Union to adopt decisions to implement previously adopted decisions. Most of these decisions amend existing sanction regimes, for e.g., by modifying their subjects or extending their validity. Article 28 TEU allows for operational activities of the Union in foreign policy fields; Article 33 TEU provides for the appointment of Special Representatives; Article 31(1) TEU defines the decision-making procedure.

¹⁵ Editorial Comments, “Keeping Europeanism at bay? Strategic autonomy as a constitutional problem” (202) 59 CMLRev 313-326.

¹⁶ See: Tom Ruys and Felipe Rodríguez Silvestre, ‘[Economic Statecraft: A Closer Look Inside the European Union’s Expanding Toolbox](#)’ (2023) 51.3 Georgia Journal of International and Comparative Law 647-670. Malte Frank, ‘The EU’s new Foreign Subsidy Regulation on collision course with the WTO’ (2023) 60.4 CMLRev 925-958.

2013 to 2016: it focused on security and defence and was referred to as strategic autonomy.

2017 to 2019: it was a response to defend EU interests in a hostile geopolitical environment: Brexit, the Trump Presidency and China’s growing assertiveness.

From 2020: the Covid 19 pandemic shifted the focus to mitigating economic dependence on foreign supply chains.

From 2022: it broadened its scope to almost all EU policy areas, with the Russian invasion of Ukraine highlighting the need for OSA in defence and energy matters.

Initially, OSA was a slogan, a vague idea, found in EU background policy documents and European Council Conclusions. While the phrase is vague, its goals are less elusive as the EU has put in place several policy documents and proposals for trade-related security measures under the banner of OSA.

Helwig and Sinkkonen define OSA as:

“the political, institutional and material ability of the EU and its Member States to manage their interdependence with third parties, with the aim of ensuring the well-being of their citizens and implementing self-determined policy decisions.”¹⁰

Thus, the policy embraces a trade and foreign security dimension, alongside constitutional obligations from EU treaties in terms of competence, to act and to preserve the values of EU law.¹¹ Meunier and Nicolaïdis describe this transition as the shift to the “geopoliticization of EU trade policies” creating an “economic battlefield and trade warfare”.¹²

The EU is developing a de-risking policy, a new approach to industrial policy, including a green industrial policy, policies of friend-shoring, climate clubs, critical raw materials clubs, and building new transatlantic bridges through an EU-US Trade and Technology Council.

EU COMMON FOREIGN AND SECURITY

¹⁰ Niklas Helwig and Ville Sinkkonen, ‘[Strategic autonomy and the EU as a global actor: The evolution, debate and theory of a contested term](#)’ (2022) 27 EFA Rev 1-20, p.4.

¹¹ Article 3(5) and Article 21(2) TEU.

¹² Stéphanie Meunier and Kalypso Nicolaïdis, ‘[The Geopoliticization of European Trade and Investment Policy](#)’ (2019) 57 JCMS 103-113.

PRESERVING EU VALUES AND THE OSA

The Treaty of Lisbon 2009 introduced a requirement that the EU common trade policy should be consistent with the core values of the EU. This is a self-imposed commitment to principles and objectives set out in Articles 3(5) and 21 TEU.¹⁷ Through the OSA the European Commission has made a commitment to open trade which encompasses core values of sustainability and fairness,¹⁸ building upon earlier commitments to EU values in trade policy.¹⁹ Under [the Green Deal](#)²⁰ and the increased use of Trade Sustainability and Development Chapters in bilateral trade agreements there is an opportunity to externalise EU values further.

The success of economic integration has allowed the EU to leverage the externalization of internal economic and social market-related policies and regulation, creating a regulatory magnet,²¹ what Bradford describes as the “Brussels Effect”.²² As supply chains are disrupted and global trading fragmented through increasing unilateralism, the EU is under pressure to ensure it maintains the moral high ground in ensuring standards (sustainability and environmental, human and labour rights) are adhered to, and raised in order to prevent a global race to the bottom. Equally, the EU must ensure that its own standards are at the core of trading deals, otherwise production costs rise if goods must be adapted to different markets.²³

Garcia Bercero and Nicolaïdes describe the strength of the EU as a global actor as “Europe’s power surplus”:

17 Article 3(5) TEU sets an objective for the Union to uphold and promote its values and interests. These are values common to the Member States and on which the Union is founded, listed in Article 2 TEU, including respect for the rule of law, human dignity, freedom, democracy, equality, and human rights. Article 21 TEU states that EU international action shall be guided by principles that lay at its core, such as democracy, the rule of law, human rights, and the principles of international law.

18 Trade Policy Review, ‘An Open, Sustainable and Assertive Trade Policy’, COM (2021) 66 final at p.4

19 Examples included certification of blood diamonds in the Kimberley Process (Council Regulation (EC) 2368/2002 OJ 2002 L358/28; animal and ecological protection measures such [as those against illegal fishing](#), import of cat and dog fur and seal products (Council Regulation (EEC) No 3254/91).

20 A significant development is the Carbon Border Adjustment Mechanism (CBAM), based upon Article 192(1)TFEU which seeks to level the playing field between internal EU mechanisms in the Emission Trading System with imports now subject to the CBAM.

21 Erika Szyszczak, ‘[The EU Regulatory Magnet: What Are the Consequences for the UK?](#)’, UKTPO Blog 1 September 2017.

22 Anu Bradford, ‘The Brussels Effect: How the European Union Rules the World’, (Oxford, OUP, 2020).

23 Sieglinde Gstöhl, Dominic Hanf, ‘The EU’s post-Lisbon Free Trade Agreements: Commercial Interests in a Changing Constitutional Context,’ (2014) 20(6) ELJ 733-748.

“... its capacity to influence conduct beyond its jurisdiction through conditional access to the biggest market in the world – is not only due to its sheer market size and active regulatory policies but also to its own experience in managing the trade-regulation nexus internally.”²⁴

The legacy of separating the exclusive competence for the EU to act in the sphere of trade from the more limited competence to develop a foreign policy, entrenched the structural and institutional architecture of the EU²⁵ and limited the EU’s capacity to respond to the geopolitical changes taking place.²⁶ Now it is negotiating a new path for trade and security by developing a distinctive form of economic statecraft.

TRANSLATING POLICY INTO A LEGAL CONCEPT

Adapting and Strengthening the Trade Toolbox

The EU had a limited traditional toolbox to handle threats to its economic security: anti-dumping measures;²⁷ anti-subsidy [measures](#), [sanctions](#) and [safeguard measures](#).²⁸

On 6 January 2018, for the first time, the EU initiated dispute settlement procedures under the EU-Korea trade agreement to challenge the violations of a sustainable development obligation. This was followed in 2020 with a successful action initiated against Ukraine. In June 2022 the EU announced it would take a new approach to strengthening dispute settlement mechanisms in TSD Chapters in trade agreements.²⁹

24 Ignacio Garcia Bercero and Kalypso Nicolaïdis, ‘Europe’s power surplus: legal empathy and the trade/regulation nexus’ in E. Fahey and I. Mancini (eds), ‘Understanding The EU As A Good Global Actor’, (Edward Elgar, Cheltenham, 2022) 19- 36 at p. 20.

25 Fabienne Bossuyt, Jan Orbie and Lotte Drieghe, ‘EU External policy coherence in the trade-foreign policy nexus: foreign policy or strictly business?’ (2020) 23. Journal of International Relations and Development 45-66.

26 For a discussion of how the Russian war against Ukraine has forced the EU to adopt new foreign security measures see: Calle Håkansson, ‘[The Ukraine war and the emergence of the European commission as a geopolitical actor](#)’ (2023).

27 [Regulation 2017/232](#) and [Regulation 2018/825](#) modernised the EU anti-dumping regime.

28 For details of measures taken the European Commission presents an Annual Report to the European Parliament and the Council, and the 2022 Report see: [EUR-Lex - 52022DC0470 - EN - EUR-Lex \(europa.eu\)](#)

29 European Commission, Communication COM/2022/409: [The power of trade partnership: together for green and just economic growth](#). See Camille Vallier, [The EU’s proposed reforms to Trade and Sustainable Development chapters: a big change, or more of the same?](#)

The normal state-dispute mechanisms would be extended to TSD Chapters and sanctions could be used for non-compliance.

The EU appointed a Chief Trade Enforcement Officer in 2020 primarily to enforce the sustainable development commitments of EU trade agreements. DG Trade was reorganised and the CTEO has a broad remit to coordinate EU trade defence measures.

The EU toolbox has been modernised and expanded and the EU has developed over-arching policy plans in a proposal for a Critical Raw Materials Act [European Critical Raw Materials Act \(europa.eu\)](#) and The Green Deal Industrial Plan [The Green Deal Industrial Plan \(europa.eu\)](#)

Some of these measures allow the EU to unilaterally restrict access to the single market.

Others link trade defence with EU values, while others are responses to the threats to critical infrastructure. Gerhrke³⁰ provides an analytical typology to organise EU responses, dividing the measures into four policy baskets:

1. Measures to tackle economic distortions.
2. Measures to defend against economic coercion.
3. Measures linking values and sustainability.
4. Measures to protect critical infrastructure and supply resilience

The categories are fluid. **Table 1** creates an analogous and focused typology, showing where there is overlap in policies.

Objectives	Legal Base	Economic Security	Economic Distortions	Trade Measures	Ethical	Green Transition
Policy measures						
Enforcement of FTAs	FTA Trade / Sustainable Development Chapter		x	x	x	x
FDI screening Regulation 2020	Article 207 TFEU	x	x			
Anti-coercion Instrument [Regulation] 2023/2024	Article 207 TFEU	x	x			
Strategic Technologies for Europe Platform 2023	2021-27 Multiannual Financial Framework	x	x			x
Net Zero Industry Act [Regulation] [Proposal 2023]	Article 114 TFEU	x			x	x
Critical Raw Materials Act (Regulation) [Proposal 2023]	Article 114 TFEU	x		x	x	x
Trade Enforcement Regulation 2021	Article 207 TFEU	x	x	x		
International Procurement Instrument 2022	Article 207(2)	x	x			
Foreign Subsidies Regulation 2023	Article 114 and 207 TFEU	x	x			
Carbon Border Adjustment Mechanism [Regulation] 2023	Article 192 TFEU				x	x
Corporate Sustainability Directive 2023	Article 50 and 114 TFEU				x	
Forced Labour [Proposal] 2023/2024]	Article 114 and 207 TFEU				x	

30 [April2021-67-FIA-Final_Report-STRATEGIC-AUTONOMY-AND-TRANSFORMATION-OF-THE-EU.pdf \(egmontinstitute.be\)](#)

SIGNIFICANT LEGAL DEVELOPMENTS

Revision of the Trade Enforcement Regulation

In February 2021 the EU revised the Trade Enforcement Regulation (TER),³¹ in response to US trade policy and its stymying of the WTO appellate procedures. The Regulation allows the EU to respond to trade sanctions imposed by a third state by levying or increasing customs duties or using quantitative restrictions on imports. The EU may only respond in this way either after obtaining a favourable WTO Panel ruling, or when the WTO dispute settlement process does not work due to a lack of cooperation from the third state. Now that the Appellate Body cannot function, a state may thwart an adverse WTO Panel finding by appealing to the Appellate Body: an appeal into the void. A current example involves restrictions placed by Indonesia from 2014 on nickel ore exports which restrict access to raw materials necessary for stainless steel production and distort world market prices of ores. The EU requested consultations with Indonesia at the WTO in 2019 and the establishment of a WTO Panel in 2021. The Panel accepted that Indonesia's measures were inconsistent with WTO rules and were not justified by any of the available exemptions. Indonesia then proceeded to 'appeal into the void' on 8 December 2022.

While the EU states that it "... remains committed to a multilateral approach to international dispute settlement, rules-based trade" and will continue to work towards restoring an effective functioning of the WTO Appellate body,³² it opened consultations and information gathering on 7 July 2023 as to whether it would be appropriate to use the TER procedures.

Questions arise as to the legality or compatibility of the revised TER and the WTO system. In 2020 a Multi-Party Interim Appeal Arrangement (MPIAA) was drawn up using Article 25 WTO Dispute Settlement Understanding. To date, 55 WTO members have joined this interim arrangement as a means of continuing the WTO dispute settlement processes. The EU is a party, but the UK is not. Some states, such as South Africa, have voiced concerns about the plurilateral process created by the MPIAA leading to a two-tier or two speed WTO. Notable absences from the MPIAA include major litigating states such as the USA, India, Japan and Russia.

It is questionable whether the EU can impose unilateral counter measures outside of the WTO system. The European Commission argues that trade sanctions will be a last resort measure and will continue to use the

WTO system and request that the third state implement any WTO Panel findings and recommendations. Sanctions will not be imposed if an interim appeal procedure is initiated.³³

International Procurement Instrument

The EU regulates internal public procurement³⁴ but the Member States have also opened their national markets to foreign bidders. This raises issues of security as well as distortions of competition particularly if foreign bidders are subsidised. There was disagreement as to whether the EU market was too open, [making the EU vulnerable to foreign investment](#), and this led to a long gestation period (from 2012) to when [Regulation \(EU\) 2022/1031/](#) was adopted in 2022.

The EU plays the line that it wants [international procurement](#) markets to be open, and the IPI encourages reciprocity in access to international procurement markets. The Regulation applies to all areas covered by the internal EU procurement regime. IPI measures only apply to businesses, goods or services from non-EU countries that are not parties to the plurilateral WTO Agreement on Government Procurement or to bilateral or multilateral trade agreements concluded with the EU that include commitments on access to public procurement (or concession markets). This may also apply to businesses, goods or services from countries that are parties to such agreements, but only with respect to public procurement procedures for goods, services or concessions that are not covered by those agreements.

The European Commission may investigate a complaint made by an interested party (in the EU) or by a Member State, by publishing a notice in the OJ requesting information on an alleged non-EU practice or measure. It should then invite the non-EU country to submit its views, provide relevant information and start consultations to eliminate or remedy the alleged measure or practice. Any investigations and consultations must be concluded within 9 months (or 14 months in justified cases).

The European Commission must publish a Report that sets out the main findings and a proposed course of action, which may be either terminating the investigation or adopting an IPI measure, if the European Commission considers it to be in its interest. An IPI measure would limit the access of businesses, goods or services originating in non-EU countries to the

³³ Declaration on Compliance with International Law 2021 OJ 2021/C 49/03 EC. Article 3aaTER.

³⁴ [Directive 2014/23/EU on awarding concession contracts](#); [Directive 2014/24/EU on public procurement](#); [Directive 2014/25/EU on public procurement in the utilities sectors \(water, energy, transport and postal services\)](#).

³¹ [Regulation \(EU\) 2021/167](#).

³² Joint Declaration of the European Parliament, the Council, and the Commission 2021 OJ C-49/2 – Declaration Annexed to the TER.

EU public procurement or concession markets through an implementing act. Note that "its interest" considers all interests taken as a whole, including the interests of EU businesses.

Foreign Subsidies Regulation (FSR)

An EU state aid structure and policy was included in the founding Treaties. Over time, it has been modernised and expanded. The EU takes a tough stance on internal state aid, but this policy has been challenged by using state aid to ameliorate the effects of the 2008 financial crisis and more recently in the Green Deal, the responses to the COVID-19 pandemic and the Russian war against Ukraine. External challenges have been felt by the EU, particularly the rise in investments subsidized by state capital, notably China. Security issues were a concern for the EU, alongside distortion of competition. EU firms were seen to be at a disadvantage because of the strict control of the EU regime.

The FSR became operational on 12 July 2023.³⁵ The Regulation attempts to level the playing field by creating a scheme for the European Commission to regulate foreign subsidies in the same vein as the internal state aid rules regulate Member States' interventions in the market.

The FSA works by creating ex-ante mandatory notification and approval requirements for acquisitions of significant EU businesses and large EU public tenders. It also gives the European Commission extensive powers to launch ex officio investigations.

The FSR targets large transactions where the target firm has at least €500m in EU-wide turnover in the previous financial year. If this threshold is not met there is a second layer of inquiry of looking at the combined foreign financial contributions (FFC) threshold of €50 m in the previous three years. The concept of FFC is broad: it includes all contracts for goods and services between a state entity (or a public or private body whose actions are attributable to the state) and the fund and all portfolio companies. FCC also captures all investments by non-EU State-affiliated entities into the fund and support to portfolio companies, including government guarantees, direct funding, contracts concluded with public bodies and COVID-19 support.

The EU justifies the FSR ostensibly to create a level playing field between the regulation of EU Member States and non-EU states. But Xueji Su argues that the FSR, as a hybrid measure "does not mirror the internal EU state aid rules but is directed at non-EU subsidies making it more difficult for foreign firms to invest in

³⁵ [Regulation \(EU\) 2022/2560](#)

the EU.³⁶

DEFENDING AGAINST ECONOMIC COERCION

"Economic coercion refers to a situation where a third country is seeking to pressure the Union or a Member State into making a particular policy choice by applying, or threatening to apply, measures affecting trade or investment against the Union or a Member State."³⁷

Amending the EU Blocking Statute: the move to Sanctions and an Anti-Coercion Instrument

The EU introduced the Blocking Statute in 1996 in response to the US Helms-Burton Act 1996 which directed sanctions against Cuba, Iran and Libya. Additionally, any non-US company dealing with these states can be subjected to legal action. Directors may be barred from entry into the US, and sanctions may be applied to non-US companies trading with Cuba. Questioning the legality of the extra-territorial application of the Act and concerned that EU firms and individuals could be caught by the extensive extra-territorial reach of the US, the EU responded with a [Blocking Regulation](#) that prohibits EU firms from complying with the extraterritorial legislation of third countries set out in the Annex.

The Regulation allows EU firms and individuals to recover damages if any extra-territorial legislation of decision is applied to them. The Regulation states that any judicial and administrative decisions based on extra-territorial application will not be recognised or enforced in the EU.

The original Blocking Regulation fell into abeyance because the EU had used the WTO procedures to force the US to partially suspend the application of the Helms-Burton Act in 1998, but in 2018 the withdrawal of the US from the US-EU Transatlantic Partnership on Political Cooperation reignited the role of the Blocking Statute. It was [amended](#) by European Commission delegated legislation to extend to the extraterritorial sanctions the US re-imposed on Iran.

The EU recognised that the Blocking Regulation was not an effective tool against the wider activities of the US and sought comments from a broad group of stakeholders on what measures could be effective. But events in Ukraine turned the attention towards detailed sanctions packages against Russia, including Russian individuals and firms and individuals or firms

³⁶ Xueji Su, 'A Critical Analysis of the EU's Eclectic Foreign Subsidies Regulation: Can the Level Playing Field Be Achieved?', (2023) 50.1 LIEL 67-92.

³⁷ [EUR-Lex - 52021PC0775 - FN - EUR-Lex \(europa.eu\)](#)

facilitating the circumvention of Russian sanctions.³⁸

The Anti-Coercion Instrument

During the process to amend the Trade Enforcement Regulation in 2020, the European Commission, the European Parliament and the Council agreed a [Joint Declaration](#) to create a new instrument to deter and counteract coercion, by creating a rapid response mechanism to a trade security situation. The [European Commission Impact Assessment](#) argues that economic coercion falls outside of the scope of WTO disputes because the WTO does not address the separate infringement of general international law that lies in the coercive act and intention. The European Commission indicates that the ACI is directed at states where the economy is controlled by the ruling political party. In such states it argues that there is a wide range of informal coercive measures not covered by WTO rules.

Foreign Direct Investment (FDI)

The Member States retain sovereignty over foreign direct investment decisions and create their own screening tools to monitor perceived threats of foreign investment. Aggressive investment by Chinese firms, often owned or backed by the Chinese state, have highlighted the lack of an EU-level instrument to check for threats to the Single Market, especially where cross-border mergers may affect competition and trade. Ownership of critical infrastructure may also allow scope for economic coercion by the Chinese state.

In 2019 a new Regulation complemented the Member States' FDI screening mechanisms.³⁹ This creates a cooperation mechanism for Member States with the European Commission to exchange information. The European Commission can publish an Opinion when an investment is perceived to create a threat to the security or public order of more than one Member State. This is still a limited intervention since it is recognised from the experience in the US that bureaucratising foreign investment adds time and uncertainty and a disincentive which impacts upon the national economy.

On 20 June 2023 the European Commission and the High Representative published a [Joint Communication](#) on 'European Economic Security Strategy'. Regarding inbound investments affecting security and public order, heading 3.2 states:

³⁸ See https://finance.ec.europa.eu/eu-and-world/sanctions-restrictive-measures/overview-sanctions-and-related-resources_en. Also see: Francesca Finelli, 'Countering Circumvention of Restrictive Measures: The EU Response' (2023) 60 CMLRev 733-762.

³⁹ Regulation 2019/452 of the European Parliament and of the Council of 19 March 2019 Establishing a Framework for the Screening of Foreign Direct Investments into the Union, 2019 OJ L 79/1.

"The Foreign Direct Investment (FDI) Screening regulation has created a cooperation mechanism for Member States and the Commission to exchange information, raise security-related concerns and identify solutions related to specific FDIs with a view to ensuring the protection of security and public order. Since October 2020, the Commission and Member States have reviewed more than 1,000 FDI transactions. The Commission is also in the process of evaluating the current framework and will propose its revision before the end of 2023. Member States who have not yet implemented national FDI screening mechanisms should do so without further delay."

A more far-ranging complementary Foreign Subsidies Regulation was adopted in 2022⁴⁰ with the aim of creating better scrutiny of Merger and Acquisitions through a screening process of investors who may have received financial support from governments of non-EU countries.

Investment Screening

Member States retain sovereignty over foreign inward investment but not all Member States have screening mechanisms. While inward investment is normally seen as a positive aspect of developing a national economy, there is a growing global concern on the effects of increased investment by Chinese firms, many of which are state-owned. The EU is especially concerned about Chinese investment in critical infrastructure such as transport links, manufacturing, and energy. The disruption to global supply chains from the effects of the COVID-19 lock-downs and the escalation by Russia of the war and invasion of Ukraine have increased the sensitivity of ownership of critical sectors. Thus, an EU-level response was needed to pull-together the diverse national laws and policies. [Regulation 2019/452](#) provides a role for the European Commission to be involved in a transnational information sharing role and to be included at the national level, where investments are likely to affect projects or programmes of EU interest on grounds of security or public order. Earlier concerns had used the idea of competitiveness and technological development as the reason for EU intervention, alongside conventional security issues relating to defence and military areas. The final version of the Regulation modernises this approach with a new emphasis on AI, robotics, semiconductors, quantum technologies and a focus on the impact of foreign investment in critical technology.

⁴⁰ Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on Foreign Subsidies Distorting the Internal Market 2022 OJ L 330, 1-45.

The narrative of the EU approach marks a significant shift in international law where previously foreign investment was seen as a good thing: an economic benefit for the host state. International law supported the liberalisation of capital and encouraged foreign investment by providing protection for investors in the host state. The new OSA narrative recognises the disruptive effects foreign investment may have on critical and emerging sectors and incorporates ideas of the values the EU wants to project on global trade regulation.

Carbon Border Adjustment Mechanism (CBAM)

The idea of levying a carbon price on imports has been discussed in the EU for several years. A CBAM was finally included in EU trade policy in 2019 in the [European Commission Green Deal 2019](#) and in the [2021 Trade Policy Review](#), both within a climate of greater interest in sustainability provisions and TSD Chapters in trade agreements. The idea of a CBAM mirrors other ideas seen in the OSA of balancing out internal EU policies in the European Emission Trading Scheme with external policies. A CBAM can be regarded as an import restriction.⁴¹ Nevertheless, the EU used the legal base of Article 192 TFEU to justify the measure.⁴²

Corporate Sustainability and Due Diligence

Except for minerals and timber, the EU relied upon a voluntary approach by corporations to show due diligence in observing international frameworks to protect human rights standards. A new Directive on corporate sustainability and due diligence aims to "foster sustainable and responsible corporate behaviour and to anchor human rights and environmental considerations in companies' operations and corporate governance."⁴³

The core elements of the due diligence duty are

⁴¹ The CBAM could fall within GATT Article III.4, to make the CBAM equivalent to the internal ETS system. This would involve showing that goods subject to ETS and CBAM were similar, so avoiding any claims that there was arbitrary and unjustified discrimination resulting in a disguised form of protectionism. Another defence could be the use of exceptions found in GATT XX: measures necessary to protect human, animal plant life or health or measures necessary for the conservation of exhaustible natural resources. When it was functioning, the WTO Appellate Body held that sustainable development was an objective of the WTO, and all its provisions should be interpreted in the light of the principle. See also [European Parliament Report A9-0019/2021](#); Gracia S Marín Durán, "Securing Compatibility of Carbon Border Adjustments with the Multilateral Climate and Trade Regimes" (2023) 72.1. International & Comparative Law Quarterly 73 – 103.

⁴² [Regulation \(EU\) 2023/956](#)

⁴³ [Directive \(EU\) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation \(EU\) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC, and Directive 2013/34/EU, as regards corporate sustainability reporting, OJ L 322.](#)

identifying, ending, preventing, mitigating, and accounting for negative human rights and environmental impacts in a company's operations, subsidiaries, and value chains. Larger companies must implement a plan to ensure that their business strategy is compatible with limiting global warming to 1.5 °C in line with the Paris Agreement. The Directive introduces duties for Directors of the EU companies covered by the Directive inter alia: creating and overseeing the implementation of the due diligence processes and integrating due diligence into corporate strategy. In addition, when fulfilling their duty to act in the best interest of the company, directors must consider the human rights, climate change and environmental consequences of their decisions.

Forced Labour

In addition to EU policies mentioned above, the European Commission has proposed a [Regulation](#) to tackle forced labour in supply chains. All the Member States have ratified ILO Convention 29 and are obliged to take measures against forced labour. The Forced Labour Regulation would complement other EU legislation, for example, [Directive 2011/36/EU](#) on combating human trafficking, [Directive 2009/52/EC](#) on sanctions against employers of migrants in an irregular situation and [the corporate sustainability and due diligence Directive](#) (CSDDD). The added value of a Forced Labour measure would be [to specifically prohibit](#) the placing of products made using forced labour on the EU market.

The proposal is being examined by the European Parliament, with indications that the measure could go further and extend to services (transport, storage, packaging, and distribution of goods), providing remedies for victims of forced labour.

CONCLUSION

The aim of this Briefing Paper was to create an understanding of how the EU is responding to the changes in global trade policy and investment through the OSA policy.

The legacy of separating the exclusive competence for the EU to act in the sphere of trade from the more limited competence to develop a foreign policy, entrenched the structural and institutional architecture of the EU.⁴⁴ It also limited the EU's capacity to respond to geopolitical changes. The EU differs from the US where [Pentagon-style economics](#) allow for a greater role for foreign policy to determine internal economic policy and external trade-related policies. However, in a

⁴⁴ Fabienne Bossuyt, Jan Orbie and Lotte Drieghe, 'EU External policy coherence in the trade-foreign policy nexus: foreign policy or strictly business?' (2020) 23 Journal of International Relations and Development 45-66.

relatively short space of time, the EU has modernised existing measures. It has also implemented a wide range of trade defence legal instruments to match threats to trade and internal security posed by the US and China. The EU has brokered an internal political consensus on the measures and acted without the need for a Treaty amendment, manipulating the mosaic of available legal bases to develop new instruments.

In June 2023 a Joint Communication from the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy presented the Union's first Economic Security Strategy.⁴⁵ This sets out the risks facing the EU and proposes a strategy to address the risks including new measures such as the Critical Raw Materials Act, the Net-Zero Industry Act, and a proposal for a Strategic Technologies for Europe Platform.

The professed aim is to [re]build a fair and sustainable global trading order. The CBAM is a notable example where the EU has set the pace and provided leadership in marrying sustainability concerns with trade instruments.⁴⁶ It has incentivised the G7 countries to consider a "climate club",⁴⁷ which could have positive effects on encouraging states to improve climate and sustainability policies to avoid exports being affected as well as mitigating the competitive advantages some firms obtain by not having to comply with stricter environmental policies. A similar idea of a Critical Raw Materials Club is found in the proposal for a Critical Raw Minerals Act.

The FSA is a response to the industrial global subsidies race. Its reach will affect many investment funds, including those located in the UK. Firms may see the FSA as a disincentive to apply for, and use, subsidies. The FSA also affects any plans of a future Labour government in the UK to develop a more interventionist industrial policy. The UK adopted the Subsidy Control Act 2022 and lobbied for an equivalence provision in the FSR whereby subsidies from third countries, with an equivalent subsidy control mechanism to that in place at the EU level, would be presumed unlikely to be distortive. This was rejected.

In the wake of the FSA a new battle is emerging as the US, the EU and the UK are now actively developing

⁴⁵ European Commission, Joint Communication to the European Parliament, the European Council and the Council on 'European Economic Security Strategy', JOIN (2023) 20 final.

⁴⁶ E. Pander Maat, 'Leading by Example, Ideas or Coercion? The Carbon Border Adjustment Mechanism as a Case of Hybrid Climate Leadership' (2022) 7 European Papers 55.

⁴⁷ G7 Statement on Climate Club, Elmau, 28 June 2022. See Geraldo Vidigal, 'Designing Climate Clubs: The Four Models, Trade Commitments and the Non-Discrimination Dilemma', Amsterdam Law School Legal Studies Research Paper No. 2023-07, Amsterdam Centre for International Law No. 2023-03.

new kinds of green industrial subsidies that are discriminatory in nature and act as trade barriers.

The EU narrative has been played out with an audience of the US and China as the primary focus. With the exit of the UK, the task of adapting a new trade security policy is easier for the EU. The UK is also free to develop trade policies unfettered by compromises between 27 other Member States and EU constitutional constraints.

However, the EU is developing a first mover advantage and the UK may be pulled into the regulatory magnet of the EU. As [Winters and Lydgate observe](#) in relation to the need for the UK to adopt a CBAM:

"To manage adjustment costs and trade frictions, the easiest solution for the UK is to mirror the EU's approach as closely as possible in terms of sectoral coverage, emissions scope, and methods for calculating emissions. Linking EU-UK ETS schemes will absolve UK firms from EU CBAM charges and administrative requirements and is therefore also highly desirable."

The UK is relatively inexperienced in developing new trade remedies and may be fettered by government interventions.⁴⁸ The Trade Remedies Authority is a new public body and smaller and less experienced than the European Commission.

The UK is a third state with regards to the EU and shares many of the concerns of the EU in relation to trade security. However, it is also a potential target of the OSA. Extra due diligence is imposed upon UK firms trading or having a presence in the EU. The European Commission has a range of enforcement mechanisms at its disposal. It is also difficult to bring challenges before the CJEU against European Commission Decisions unless an individual/firm is directly affected by a measure. The UK government no longer has a privileged status to challenge European Commission policymaking and enforcement Decisions.

The EU and the UK are entering a new phase in post-Brexit relations with a focus on enforcing the EU-UK Trade and Cooperation Agreement (TCA) where fundamental differences emerge, or where the UK chooses to diverge from EU law. Enforcement of the TCA is multi-tiered, including consultation and arbitration procedures, Specialised Committees and Working Groups and the (Joint) Partnership Council. Potential remedies range from safeguard measures to general rebalancing, and specific measures against harmful effects of subsidies. However, as this Briefing Paper

⁴⁸ See Alan Winters, [Adam Smith's Wealth of Nations is still relevant to UK trade policymaking on international trade](#) | CITP.

shows, the European Commission has been given new roles and responsibilities for enforcing trade defence, as the EU has rapidly developed a new range of trade defence measures, bringing greater experience to the table.

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FURTHER INFORMATION

The UK Trade Policy Observatory (UKTPO), a partnership between the University of Sussex and Chatham House, is an independent expert group that:

- 1) initiates, comments on and analyses trade policy proposals for the UK; and
- 2) trains British policy makers, negotiators and other interested parties through tailored training packages.

The UKTPO is committed to engaging with a wide variety of stakeholders to ensure that the UK's international trading environment is reconstructed in a manner that benefits all in Britain and is fair to Britain, the EU and the world. The Observatory offers a wide range of expertise and services to help support government departments, international organisations and businesses to strategise and develop new trade policies in the post-Brexit era.

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