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Extraterritoriality: a Blind Spot in the EU's Economic Security Strategy

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Extraterritoriality: a Blind Spot in the EU's Economic Security Strategy

Institut Montaigne's issue papers provide, analyze and breakdown the key challenges facing today's most critical issues.

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Summary

Introduction

The European Union (EU)'s resilience and long-term competitiveness are under threat. In the last few decades, the EU has had to adapt to unpredictable climate, new demographic trends and a digital revolution that is transforming the EU's economy and society. War has returned to the continent and it is facing concomitant challenges: an unstable neighborhood, immigration flows, sluggish economic growth and high inflation, not to mention heightened US-China rivalry.

The post-second world war order that many European countries helped to design is also under strain. Governments are taking a more active role in the market economy, which has become a key arena for global competition between states. Governments are pursuing technological de-risking and industrial policies that favor investment in critical sectors. Tariff races are replacing traditional, open, trade policies. Economic coercion has become widespread, both as a means to advance economic and political interests and constrain the power of others. For example, governments are increasingly extending the reach of their own laws beyond their borders as a way to secure their interests. **This process is known as "extraterritoriality".**

For some governments, extraterritoriality has become a way to secure political power. It has become the means by which a government can directly influence the course of another country's affairs. In some cases, it is necessary: for example, governments use national laws to sanction human rights violations or to fight corruption, even when these occur abroad. Extraterritoriality can help prevent sanctions evasion. But there is growing evidence that some governments are also using it to advance their own political and economic interests. The US is by far the most prolific user of extraterritoriality, with mixed results. China is also strengthening its legal arsenal. Even the EU has laws that apply to companies abroad. **The use of extraterritoriality has grown so exponentially that some governments, including in the EU, are worried that it will one day become a tool for political domination.**

In certain situations, extraterritoriality can pose a risk to the EU's economic security. Of course, economic security means many things to many people. It's about guaranteeing steady supply and demand and continual access to critical goods, whether food, medicine, energy or technology. It is about sound industrial policy and innovation. It is about securing long-term competitiveness and autonomy over our economic decisions. But it's also about international cooperation and resisting economic coercion. While von der Leyen's European Commission published a few papers on extraterritoriality in 2021,[1] **its long-awaited economic security strategy, which came out in June 2023, made no mention of it.**[2] More must be done to address the challenges and opportunities that extraterritoriality poses for the EU. **This reflection should be part of the EU's broader thinking on economic security.**

In this first paper on extraterritoriality, Institut Montaigne puts forward six observations on the state of the debate on extraterritoriality. It also identifies six challenges that the EU will need to bear in mind if it wants to begin a truly strategic discussion on extraterritoriality.

[1] U. von der Leyen, M. Šefčovič, "State of the Union 2022, Letter of intent", *European Commission* (14 Sept. 2022), https://state-of-the-union.ec.europa.eu/system/files/2022-09/SOTEU_2022_Letter_of_Intent_EN_0.pdf, accessed 11 Dec. 2023; Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the regions, "The European economic and financial system: fostering openness, strength and resilience", *EUR-lex* (19 Jan. 2021), https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52021DC0032, accessed 11 Dec. 2023; B. Immenkamp, "Amendment to the Blocking Statute Regulation", *European Parliament Legislative Train Schedule* (23 Nov. 2023), https://www.europarl.europa.eu/legislative-train/theme-a-stronger-europe-in-the-world/file-blocking-statute-regulation, accessed 11 Dec. 2023; European Commission, "Unlawful extra-territorial sanctions – a stronger EU response (amendment of the Blocking Statute)", *European Commission*, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13129-Unlawful-extra-territorial-sanctions-a-stronger-EU-response-amendment-of-the-Blocking-Statute-/public-consultation_en, accessed 11 Dec. 2023.

[2] European Commission, *An EU Approach to Enhance Economic Security* [Press Release] (20 June 2023), https://ec.europa.eu/commission/presscorner/detail/en/IP_23_3358, accessed 30 nov. 2023.

The six observations include:

- **Observation 1: There is no universally-agreed definition of extraterritoriality under public international law.** This makes it harder to have a discussion about extraterritoriality inside the EU and within international organizations.

- **Observation 2: There are no international instruments to resolve a dispute over extraterritoriality.** This is problematic given how contested extraterritoriality has become.

- **Observation 3: The time is right for the EU to talk about extraterritoriality, yet the European debate on this issue is virtually non-existent.** It is mostly confined to companies, relevant European Commission departments, some member-state governments and a small number of think tanks and universities.

- **Observation 4: Companies, which are the first victims of extraterritoriality, feel like the EU does not fully understand how extraterritoriality is impacting them.** The repercussions can be manifold: a loss of trade and investment opportunities; wasted resources spent on understanding, and complying with, several legal regimes; and huge penalties in case of non-compliance, including heavy fines, market exclusion, handing over sensitive information to foreign authorities and sometimes prison time for company employees and executives.

- **Observation 5: The EU's response, which has focused on defensive instruments, is largely ineffective.** Very few member states are pushing to reform these instruments. Discussions about EU extraterritoriality focus more on enhancing rather than radically departing from the EU's existing approach.

- **Observation 6: It is not clear that the EU has the legal competences or political will to act on extraterritoriality.** Any common, or offensive approach, on extraterritoriality would require joint thinking, coordina-

tion and decision-making at the EU level. It is not clear how palatable this would be: there are a growing number of governments and elected members of parliament inside the EU who want to limit the European Commission's powers and return them to the national level. Few want to delegate more powers to the EU.

Six challenges emerge against these six observations.

The first is that the EU's nascent debate on extraterritoriality is not political or strategic enough to enable a bold approach to address extraterritoriality. Not all extraterritorial norms are bad – for example, there is a need for strong rules to fight corruption, terrorism and human rights abuses. But problems occur when a government uses its own rules to regulate foreign commercial flows between two or more countries which it *alone* decides are irregular or going against its national interests. In such cases, extraterritoriality poses a direct challenge to the sovereignty of the EU and its member states. European governments can try to adopt defensive measures to block the application of third-country norms at the national level – some, like France, have – but a collective EU response, rooted in strategic and political reasoning, is more likely to deter third countries from applying extraterritorial sanctions to EU companies and persons in the first place.

The second is that the EU does not recognize extraterritoriality as a form of coercion. For the EU to respond, there must be a clear breach of international law. Fear of economic coercion, or safeguarding economic interests, do not constitute a sufficient basis to trigger an EU response to counter third-country extraterritorial norms.[3] Yet, in some cases, they have become a way to compel, sometimes put pressure on, third-country governments and

[3] According to the Council of the EU, "economic coercion is defined as a situation where a third country attempts to pressure the EU or a Member State into making a particular choice by applying or threatening to apply, measures affecting trade or investment against the EU or a member state.", *in*, Council of the EU, *Trade: Council adopts a regulation to protect the EU from third-country economic coercion* [Press Release] (23 October 2023), https://www.consilium.europa.eu/en/press/press-releases/2023/10/23/trade-council-adopts-a-regulation-to-protect-the-eu-from-third-country-economic-coercion/, accessed 11 Dec. 2023.

businesses to conform with foreign rules. In a context of growing economic rivalry, not least between the US and China, governments might be more tempted to extend the reach of their laws to constrain the way Europeans trade with foreign countries. **Today, EU member states are divided on whether the EU's response to extraterritoriality should be applicable to all forms of coercion** (this is the view of France and Italy, for example).

The third is that the EU's approach to extraterritoriality is predicated on the need to respond to US extraterritoriality and does not take into account extraterritorial measures of other countries. It is not just the US and China that are expanding their extraterritoriality. Australia, Canada, South Korea, ASEAN states – countries around the world are adopting extraterritorial norms. Companies operating abroad must learn the intricacies of different sanctions regimes. With the proliferation of rules, companies may soon have no other choice but to split their activities "regionally" as a way to cope with the demands of different legal regimes. This would entail a loss of overall profit and a reduced ability for the EU to determine the rules applying to its companies.

The fourth is that the EU needs an approach to extraterritoriality that is both offensive and defensive. This will require a shift in mindset and culture inside the EU. EU extraterritoriality differs significantly from US and Chinese approaches. The EU's DNA has been to resist any form of offensive extraterritoriality. However, this could change. Advocates of a more offensive strategy on extraterritoriality point to the EU's recent developments in trade defense instruments, like the Anti-Coercion Instrument and new foreign direct investment rules. But this view is far from unanimous. Some worry **that if the EU were to adopt an offensive strategy, like the US has, it will be accused of hypocrisy** after years of castigating the US for (ab)using extraterritoriality.

The fifth is that timing is an issue. First, opponents to a more offensive strategy worry that it would create tension in the transatlantic relationship at a time when so many European countries rely on American security guarantees, especially in light of Russia's invasion of Ukraine. Similarly, many member states do not want further friction with China. The timing of the

European Parliament election, scheduled for June 2024, is not ideal: even if the EU wanted to adopt a new strategy, it would be difficult to do so before a new European Commission is in place in the Autumn of 2024. At the same time, **the EU election, as well as the November 2024 US presidential election, should provide a window of opportunity to think critically about the EU's approach, and devise a new strategy** – even if the EU has to wait until a new Commission is in place to fully implement it.

The sixth and final challenge is that EU governments may need to delegate more powers to the EU level. Devising a strategy is only part of the challenge. The EU will need to decide *who* within the EU decides and implements the extraterritorial strategy. As the EU's response to the Covid-19 crisis, Brexit negotiations and war in Ukraine have demonstrated, the EU is more forceful when it acts together. Questions include who – between the EU Commission, member states, Parliament/other – should have the competence, experience and trust to design and enforce the strategy? And how can the EU make sure national responses to extraterritoriality are compatible? There are no clear answers to these key questions today.

An offensive approach to extraterritoriality needs to be built on a more credible legal arsenal that takes account of the needs of companies – and governments – most affected. **The time to think critically about extraterritoriality is now.**

1 Extraterritoriality – a practice with no universally-agreed definition under public international law

Defining extraterritoriality is a complex exercise. To date, legal scholars have failed to agree a common definition. Without clear parameters, governments have more license to determine how far to apply extraterritorial norms.

1. THE PRACTICE OF EXTRATERRITORIALITY IS "TOLERATED" UNDER INTERNATIONAL LAW

Today, many laws transcend national borders to regulate commerce, share data, respond to climate change, fight organized crime and condemn human rights abuses. These laws rarely mention extraterritorial application directly, but if they are "tolerated"[4] under international law, it is because they do not constitute a perceived breach of state sovereignty. Scholars of international relations interpret things differently: only the most powerful states can impose their rules on others. The weaker states have no other option but to accept them.

State sovereignty is a key principle of public international law. It is generally understood as a state's ability to decide and implement its own norms, to freely enter into agreements with other states and to regulate its own internal affairs without interference.[5] Implicitly, it also means that a state's sovereignty cannot encroach on the sovereignty of other states. It is mentioned

[4] The principle of "tolerance" in international law is based on the principle of state sovereignty. Sovereignty is "positively tolerated" when everything falling within the Sovereignty of States is tolerated by other States. It is the idea that "a State can do anything that it does not forbid itself from doing" and this tolerance is limited by "the recognition of norms by international law". See M. Guimezanes, "La tolérance en droit international public", in X. Bioy *et al.*, ed., *Tolérance et droit*, (Toulouse : Presses de l'Université Toulouse Capitole, 2013), 91-111. [translated from French] Available here : https://books.openedition.org/putc/734?lang=en#notes.

[5] R. Gauvain *et al.*, "Rétablir la souveraineté de la France et de l'Europe et protéger nos entreprises des lois et mesure à portée extraterritoriale", *Vie Publique* (26 June 2019), 11., https://medias.vie-publique.fr/data_storage_s3/rapport/pdf/194000532.pdf, accessed 11 Dec. 2023. [translated from French]

in the 1648 Treaty of Westphalia and is enshrined in the UN Charter of 1954 (Article 2) and the Treaty of the European Union (Article 4).

The very notion of a country applying its national laws abroad – either to sanction illegal behavior or condemn behavior that goes against its interests – should be interpreted as a direct breach of this principle. Yet, extraterritoriality happens. Why? Because states are afforded a degree of discretion to interpret norms of public international law – whether customary law, general principles and agreements – and to decide whether to "tolerate them", i.e. abide by them. Most extraterritorial norms are tolerated. The first example dates back to 1890 when the US adopted the Sherman Anti-Trust Act to curb anti-competitive practices of monopolies and cartels – first, in the US and later anywhere in the world.

The term "extraterritoriality" made its appearance in public international law in 1927, with the **Lotus Affair**.[6] While the ruling did not define the term per se, the Permanent Court of Justice (predecessor of the International Court of Justice) did acknowledge the practice – adding that a state can extend the reach of its laws beyond its borders, but only on condition that there is a "*genuine connection*" between it and the (foreign) act it was legislating for or against.[7]

Under customary international law, this genuine connection exists when one of the four following principles has been met:

- the **territorial principle**: known as the "*effects doctrine*", a government can extend the reach of its laws when foreign acts have a direct, substantial and likely economic effect on the regulating state.[8] This is the most commonly-used principle to justify extraterritorial norms today. For more details, see *Box 1: Effects doctrine*, below.

- the **nationality principle**: national laws can extend to nationals or residents living or traveling abroad. Under this principle, a country can adopt a measure to respond to foreign acts designed to harm or target its nationals. The United States, for example, criminalizes the killing of US nationals outside of the US.[9]

- the **protective principle**, sometimes called the security principle: national laws can apply abroad when foreign acts are deemed to threaten the vital interests of the regulating state or prevent it from fully exercising its power. Laws to tackle counterfeiting and espionage fall under this category.[10]

- the **universality principle**: a government can extend the reach of its laws to sanction those responsible for committing crimes "deemed to be of universal concern", such as piracy, slavery, war crimes and genocide – even when the interests of that government are not threatened directly. For instance, Argentina's Constitution acknowledges the principle of universal jurisdiction, which enables it to prosecute crimes against humanity, genocide and war crimes committed anywhere in the world.[11] Similarly, the United States has criminal statutes based on universal jurisdiction for piracy, slavery, genocide and torture, among other offenses.

[6] Named after the 1927 case between France and Turkey before the Permanent Court of International Justice (former ICC).

[7] As Section 407 of the Restatement (Fourth) of Foreign Relations Law explains, a state may exercise jurisdiction abroad if there is a "genuine connection" between the state and what it is trying to regulate.

[8] J. Voetelink, "The Extraterritorial Reach of US Export Control Law. The Foreign Direct Product Rule.", *Journal of Strategic Trade Control*, Vol. 1, Issue 1 (2023), 15, https://popups.uliege.be/2952-7597/index.php?id=57&file=1.

[9] United States Code, "Title 18 Section 2332, Criminal penalties", *Legal Information institute of Cornell Law School*, https://www.law.cornell.edu/uscode/text/18/2332., accessed 30 Nov. 2023.

[10] As Dutch scholar Joop Voetelink puts it: "*this principle could be prone to abuse if a state defines its security interests too broadly.*", in Voetelink, *The Extraterritorial Reach of US Export Control Law*, 21.

[11] "Constitution of the Argentine Nation", *Biblioteca Sede Central* (22 Aug. 1994), Article 118, http://www.biblioteca.jus.gov.ar/Argentina-Constitution.pdf, accessed 30 Nov. 2023.

For the time being, the European Union has not invoked this principle to justify extraterritoriality. However some EU member states, including Germany, Belgium, Spain, Finland, France, Ireland, and Sweden have invoked it in legal proceedings, and in some cases, even passed laws like those in Argentina and the US. These cases of extraterritoriality apply solely to crimes against humanity, war crimes and genocide.

All four principles have been used to justify the extraterritorial application of domestic laws. However, some countries are going to extreme lengths to justify the connection, as we will see below.

"Effects doctrine"

The "effects doctrine" is an expansion of the territorial principle, which supports the view that "competition laws can apply extraterritorially in cases where actions taken outside a country have a direct and substantial impact on competition in the domestic markets".[13] It was approved as a principle of international law in 1972 at the 55th Conference of the International Law Association in New York. It was also recognized a few years later by the *Institut de Droit International* in Oslo. Today, it is supported by the EU and most OECD countries, including the US.

[12] See United States Congress, "Torture Victim Protection Act of 1991" or "Alien's action for tort", Pub. L. 102–256, Mar. 12, 1992, 106 Stat. 73, *United States Code*, https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title28-section1350&num=0&edition=prelim, accessed 11 Dec. 2023.

[13] Japan Ministry of Economy, Trade and Industry, "Addendum-2, International economic activities and competition laws", *Ministry of economy, trade and industry* (17 April. 2023), 725, https://www.meti.go.jp/english/report/data/2017WTO/pdf/02_22.pdf, accessed 30 Nov. 2023.

Some countries have accused others of stretching the limits of the effects doctrine. In 1992, the US Justice Department announced that it would begin enforcing US antitrust and competitive laws to respond to any situation that was deemed to "restrict US exports" – even if the effect was not direct, thereby lessening the direct and substantive effect of the doctrine. Japan immediately lodged a complaint arguing that this practice was not justified under public international law (*United States v. Nippon Paper Industries Co.*, 109 F.3d 1 (1 Circ. 1997)).

2. THERE ARE MANY DEFINITIONS OF EXTRATERRITORIALITY

There is still no universally-agreed or commonly-accepted definition of extraterritoriality. Today, **it is perhaps best understood as a situation in which a state applies its powers (legislative, executive or judicial) outside of its territory to sanction irregular and illegal behavior, to protect human rights and international principles and/or to protect its political and economic interests.** Governments do so by adopting financial and economic sanctions, trade embargoes and boycotts, antitrust and competition laws, secondary sanctions and regulatory measures.

Definitions include:

Table 1: Examples of definitions of extraterritoriality

Definitions	Organizations
An ambiguous concept that challenges state sovereignty, one of the core principles of international law. It is the act of one country applying its domestic laws within another country's borders.	*Le Centre de recherches des officiers de la gendarmerie nationale* (2022)[14]
A legal concept according to which a country loses legal competence over its territory for the benefit of foreign nations or international organizations.	9th edition of the *Dictionnaire de l'Académie Française*[15]
A situation where one country seeks to influence the situation in another sovereign nation.	EU Parliament (2021)[16]
Legal, regulatory or administrative measures, as well as judicial decisions that apply beyond a sovereign state's borders. To this definition, we should add another one: extraterritoriality exists anytime a rule or decision is partially or fully enforced outside of the country from which the rule originates.	*Les juristes du Haut Comité Juridique de la Place Financière de Paris* (2022)[17]
The legal basis for extraterritoriality is problematic [...]. Extraterritoriality can only be recognized marginally and is based on reciprocity between states. Its basis is rooted in customary international law. [...] Laws with extraterritorial reach become much more problematic, and even contrary to international law, when a state uses them to target acts that take place in third countries. [...] But the power of this state allows it to behave in this way without fear of countermeasures.	*Direction de l'information légale et administrative* (DILA), *Vie-publique.fr* (French Public Information administration, under the authority of the French Prime Minister)[18]
In strictly legal terms, extraterritoriality may be defined simply as the application of domestic law to foreign conduct. It is an extension of jurisdiction. [...] considered in strictly legal terms, the underlying issue concerns **the appropriate reach of state jurisdiction**. [...] the point where extraterritoriality becomes unwarranted, it steps beyond legal questions and enters the area of economic and political discourse. That is, extraterritoriality is also a political and economic issue. [...]	Northwestern Journal of International Law & Business[19]

[14] C. Dugoin-Clément, I. Cadet, "Les lois de blocage chinoises, quels enjeux pour les entreprises européennes ?", *Les notes du CREOGN*, Vol. 73 (2022),1., https://www.gendarmerie.interieur.gouv.fr/crgn/. [Translated from French]
L'extraterritorialité du droit est un concept ambigu qui remet en cause la souveraineté des États, et par conséquent les bases du droit international, en permettant à un État d'agir unilatéralement sur le fondement d'une de ses lois internes, sur le territoire d'un autre État.

[15] "Extraterritorialité", *Dictionnaire de l'Académie Française* (9th Edition), https://www.dictionnaire-academie.fr/article/A9E3600, accessed 30 Nov. 2023.
[Translated from French]
Une fiction juridique en vertu de laquelle un État soustrait de sa compétence des portions de son territoire au bénéfice d'États étrangers ou d'institutions internationales.

[16] J. Titievskaia, I. Zamfir & C. Handeland, "WTO rules: Compatibility with human and labour rights", *European Parliamentary Research Service Briefing* (March 2021), https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/689359/EPRS_BRI(2021)689359_EN.pdf, accessed 18 Dec. 2023.

[17] Haut Comité Juridique de la Place Financière de Paris, "Rapport sur l'extraterritorialité en droit de l'Union européenne", *Banque de France* (May 2022), 7., https://www.banque-france.fr/system/files/2023-10/rapport_46_f.pdf, accessed 11 Dec. 2023.
[Translated from French]
La caractéristique de mesures législatives ou réglementaires et de décisions administratives ou juridictionnelles qui ont vocation à s'appliquer au-delà du territoire d'un État souverain, et sans un lien suffisant avec ce pays". À cette définition en est adossée une autre, plus juridique : il y a extraterritorialité "dès lors que tout ou partie du processus d'application d'une norme ou d'une décision se déroule en dehors du territoire de l'État auteur de cette norme ou de cette décision.

[18] "Qu'est-ce que l'extraterritorialité ?", *Vie Publique* (27 Aug. 2019), https://www.vie-publique.fr/fiches/269897-quest-ce-que-lextraterritorialite, accessed 11 Dec. 2023.
[Translated from French]
[...] *le fondement juridique de l'extraterritorialité de certaines normes est plus problématique dès lors qu'il n'est pas lié à la compétence personnelle de l'État.Ainsi, l'extraterritorialité ne saurait être reconnue que de façon marginale et demeure fondée sur la réciprocité entre États auxquels elle est nécessaire.Son fondement est plus probablement coutumier* [...] *Les lois ayant une portée extraterritoriale deviennent beaucoup plus problématiques, et même contraires au droit international, lorsqu'un État vise par ce moyen des agissements étrangers sur le territoire d'États tiers.* [...] *Mais la puissance de cet État lui permet un tel comportement sans redouter de contre-mesures.*

[19] A. E. Gotlieb, "Extraterritoriality: A Canadian Perspective", *Northwestern Journal of International Law & Business, Northwestern Journal of International Law & Business*, 5/3 (Fall 1983), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1147&context=njilb., accessed 11 Dec. 2023.

3. COMMON LAW AND CIVIL LAW APPROACH EXTRATERRITORIALITY DIFFERENTLY

In common law, there is a presumption against extraterritorial effect: offenses should be judged in the place where the offense took place. However, case law provides for extraterritorial effect for individual offenses, such as the US Foreign Corrupt Practices Act of 1977 or the UK Bribery Act 2010. Under civil law, extraterritoriality is interpreted more narrowly: according to the international law firm *Freshfields*, "criminal codes typically grant courts the jurisdiction in respect of some offenses that occurred overseas, [...] for example, when the offense was directed against a national of that state or when it was carried out by a national of that state".[20] These include the German and French civil codes as well as Japan's Penal Code (刑法).

4. THERE ARE DIFFERENT TYPES OF EXTRATERRITORIAL MEASURES

Extraterritorial norms can take different forms: sanctions (primary and secondary), regulations (export controls) and laws to tackle corruption, fight terrorism, gather intelligence, protect digital privacy, ensure financial stability and share data. As we will see from the table below, some of these laws have **full extraterritorial effect** (for example, some laws are designed to regulate activities that transcend national borders, such as maritime law, measures to regulate outer-space activities and environmental laws). Others regulate domestic activity, though they can include a few **extraterritorial provisions** (for example, export controls).

Some **judicial procedures** can also have extraterritorial effect. These allow a regulating state, for example, to pursue or judge a foreign person or company for failing to comply with its extraterritorial norms. The US' discovery procedure allows dissenting parties to obtain and to exchange legal infor-

[20] T. McKinnon, J. Terceño & K. Yamada, "Sanctions & Extraterritorial Effect – Why multiple restrictive measures may apply to your business dealings", *Freshfields Bruckhaus Deringer Risk and Compliance Blog* (1 Nov. 2022), 1. Extraterritoriality – a novel, yet old concept, https://riskandcompliance.freshfields.com/post/102i0ui/sanctions-extraterritorial-effect-why-multiple-restrictive-measures-may-apply, accessed 11 Dec. 2023.

mation before trial. In particular, US courts can ask non-US parties to submit information and documents, such as bank account details and commercial data. Similarly, the EU's **central counterparties (CCPs)** are financial market infrastructures that reduce systemic risk and enhance financial stability by standing between two counterparties of a derivative contract. Counterparties must not necessarily be European.

The content and reach of extraterritorial norms vary between countries. The US is today the most prolific user of extraterritoriality, but the EU, China and other countries have also adopted extraterritorial measures.

Table 2: Examples of extraterritorial measures

Export controls: regulate the supply, brokering, transit, exports and reexports of military and dual-use goods and technology.
Sanctions: there is no universally-agreed definition. A sanction is best understood as a coercive response (diplomatic or economic) to an internationally wrongful act. It can be adopted by states, but also by international organizations and can target individuals, governments and entities.
Anti-corruption laws: as the name indicates, these laws tackle corruption and sometimes tax evasion. For example, the US Foreign Corrupt Practices Act (FCPA) prohibits bribery and corruption of foreign officials. While it primarily applies to US companies and individuals, it can also have implications for foreign companies doing business in the United States or using US financial institutions (or US-based banks).
Anti-terrorism laws: these legislative measures are designed to prevent and combat terrorism. The US PATRIOT Act vastly expanded the US government's powers, even allowing it to investigate and prosecute financial crimes committed by non-US banks and their customers.
Anti-money-laundering acts: measures designed to prevent and prosecute money-laundering. Examples include the US' Foreign Account Tax Compliance Act, which requires financial institutions abroad to inform the Internal Revenue Service (IRS), the US government agency responsible for collecting taxes, of any accounts held by US persons abroad.
Data transfer laws: designed to share data across borders. The EU's General Data Protection Regulation (GDPR) gives Europeans more control over how their data is shared. While its primary focus is on data processing within the EU, it applies to any organization outside the EU that processes personal data of individuals living or working in the EU.
Due diligence laws: designed to make sure company activities respect human rights and environmental obligations. For example, the EU's Corporate Sustainability Due Diligence Directive (CSDDD) is a legislative framework that mandates companies to identify, report and mitigate any adverse impact that their operations and supply chains have on human rights and the environment. Non-EU companies operating within the EU fall under the scope of the CSDDD.

5. THERE ARE DIFFERENT AIMS BEHIND THE USE OF EXTRATERRITORIAL NORMS

There are several reasons why governments are increasingly turning to extraterritoriality to pursue and safeguard their interests:

- **To protect vital interests when treaties and international organizations fail to:** for many countries, international institutions and treaties are no longer fit-for-purpose. For the United States, China and other countries, international organizations like the WTO and international agreements such as the Wassenaar Arrangement on export controls, are no longer adequate to deal with today's challenges.[21] Against this background, many governments would rather resort to their own rules – and their own laws – to protect their vital interests, rather than rely on a multilateral system that is contested and not working effectively. Other laws exist to protect the interests of consumers, including their data, as well as to promote financial stability.

- **To safeguard, and condemn breaches of, international law:** primary and secondary sanctions can help to punish countries, individuals and entities that are accused of breaching international principles and/or undermining the national security of one or several countries. For example, there are ongoing US sanctions against Iran, North Korea, Russia and Venezuela (among others): the 1917 Trading With the Enemy Act (TWEA), the 1977 International Emergency Economic Powers Act (IEEPA) and the 2017 Countering America's Adversaries Through Sanctions Act (CAATSA). In 2012, the US adopted the Iran Threat Reduction and Syria Human Rights Act (ITRSHRA) to force Tehran to abandon its pursuit of nuclear weapons. A more controversial example is China's Hong Kong National Security Law of 2020, which gives the People's Republic of China expansive powers to crack down on acts deemed to contribute to separatism and collusion – though some legal experts and activists say this law is really designed to "hinder the independence of Hong Kong's judiciary" [22] and severely limits freedom of press.[23]

- **To strengthen the effectiveness of sanctions and embargoes:** when a country imposes a trade embargo or sanctions regime on another country, its own companies will be barred from doing any business with that country. To maximize the effects of the embargo, some countries decide to extend the reach of their sanction laws internationally thereby compelling foreign firms to abide by them too. For example, US sanctions statutes including Countering America's Adversaries Through Sanctions Act (CAATSA), the International Emergency Economic Powers Act (IEEPA) or the Helms-Burton Act targeting Iran, Russia, Cuba and others, all apply to foreign companies.[24] In so doing, the US is hoping to increase the effectiveness of its sanctions and prevent a situation wherein foreign companies can profit from the vacancy left by US companies.

- **To constrain military or 'key' technological advances that are deemed to pose a serious security risk:** by restricting market access, commercial opportunities and access to sensitive technologies to foreign companies. In February 2022, President Biden adopted new export restrictions of advanced AI chips to China.[25] In March of the same year, Japan and the Netherlands[26] announced similar measures. In August 2023, President Biden issued an Executive Order[27] to regulate US outbound investment in semiconductors and microelectronics, quantum informa-

[21] An export control regime whose 42 members exchange information on transfers of conventional weapons and dual-use goods and technologies.

[22] U.N. Special Rapporteur Margaret Satterthwaite in P. Yiu, "U.N. expert warns Hong Kong security law compromising judiciary", *Nikkei Asia* (25 April 2023), para.1, accessed 11 Dec. 2023.

[23] Amnesty International, "Hong Kong's national security law: 10 things you need to know", *Amnesty International* (17 July 2020), para. 13, https://www.amnesty.org/en/latest/news/2020/07/hong-kong-national-security-law-10-things-you-need-to-know/, accessed 11 Dec. 2023.

[24] All these statutes contain provisions to prevent non-US companies from making significant commercial transactions (doing business) or financial transactions (trading in dollars) with US-sanctioned countries.

[25] US Department of Commerce, Bureau of Industry and Security, "Implementation of Additional Export Controls", Federal Register, Vol. 87, No. 197 (13 Oct. 2022), https://www.govinfo.gov/content/pkg/FR-

tion technologies and AI sectors in "countries of concern", where this presents a risk to national US security. In August 2023, China retaliated by imposing export controls on gallium, germanium, graphite and several compounds used to make semiconductors, with implications for global supply chains. Finally, in October 2023, President Biden expanded export control measures to cover new types of semiconductor manufacturing equipment. One of the most striking elements of these new controls is the introduction of a "zero-percent de minimis rule"[28] that allows the US to assert jurisdiction over foreign-made lithography equipment, even when the equipment has no US content.[29] Interestingly, this does not appear to have stopped Semiconductor Manufacturing International Corp. ("SMIC"), China's largest foundry, from developing its own 7nm process node and has raised questions about the US's ability to slow down key technological exports to China.

- **To weaken a foreign country's industrial clout:** some governments have sometimes been accused of using extraterritoriality to get their hands on key industrial designs. The Alstom case is a perfect illustration of this: in 2014, Alstom, a French power and transport group, pleaded guilty for violating the US Foreign Corrupt Practices Act. While it recognized its wrongdoing, it criticized the judicial process. As part of the trial, it was asked to submit sensitive information abouts its activities to the US Department of Justice. The investigation ended in 2014 with General Electric's $17 billion takeover of the company's US branch.[30]

Over recent years, China has also asked companies operating in China to share information with authorities and companies in return for continued access to the Chinese market. According to the European Union Chamber of Commerce in China, "nearly a third of EU companies reported in 2020 that they had been obliged to transfer technology [to Chinese firms] in order to maintain market access in industries like medical devices, aerospace, and aviation".[31]

This explains why some extraterritoriality experts and politicians[32] see extraterritorial rules as a new "formidable legal-administrative instrument"[33] and an "arm of economic warfare".[34] **But more often than not, extraterritoriality is a way of compelling foreign companies, entities and persons to follow norms that are deemed in the interest of all.**

[26] G. C. Allen, E. Benson & M. Putnam "Japan and the Netherlands Announce Plans for New Export Controls on Semiconductor Equipment", *CSIS* (10 Apr. 2023), https://www.csis.org/analysis/japan-and-netherlands-announce-plans-new-export-controls-semiconductor-equipment, accessed 11 Dec. 2023.

[27] President Joseph R. Biden Jr., "Executive Order on Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern", *The White House* (9 Aug. 2023), https://www.whitehouse.gov/briefing-room/presidential-actions/2023/08/09/executive-order-on-addressing-u nited-states-investments-in-certain-national-security-technologies-and-products-in-countries-of-concern/, accessed 11 Dec. 2023.

[28] Revises EAR's *de minimis* provisions to add a zero percent *de minimis* rule that applies in certain circumstances for specified lithography equipment such as ASML.

[29] N. Barkin. "Watching China in Europe - November 2023", *German Marshall Fund of the United States* (7 Nov. 2023), 5. Playing Hardball, https://www.gmfus.org/news/watching-china-europe-november-2023, accessed 11 Dec. 2023.

[29] Revises EAR's de minimis provisions to add a zero percent de minimis rule that applies in certain circumstances for specified lithography equipment such as ASML.

[30] The Economist, "How the American takeover of a French national champion became intertwined in a corruption investigation", *The Economist* (17 Jan. 2019), https://www.economist.com/business/2019/01/17/how-the-american-takeover-of-a-french-national-champion-became-intertwined-in-a-corruption-investigation, accessed 11 Dec. 2023.

[31] "European Business in China Business Confidence Survey", *European Union Chamber of Commerce in China* (10 June 2020), https://www.europeanchamber.com.cn/en/publications-archive/774/European_Business_in_China_Business_Confidence_Survey_2020, accessed 11 Dec. 2023.

[32] R. Gauvain, *Rétablir la souveraineté de la France et de l'Europe.*

[33] K. Berger & P. Lellouche, "Rapport d'information de Mme Karine Berger déposé en application de l'article 145 du règlement en conclusion des travaux de la mission d'information commune sur l'extraterritorialité de la législation américaine", *French National Assembly* (5 October 2016), https://www.assemblee-nationale.fr/14/pdf/rap-info/i4082.pdf, accessed 11 Dec. 2023.

[34] R. Gauvain, *Rétablir la souveraineté de la France et de l'Europe*, 3.

6. THE USE OF EXTRATERRITORIALITY IS INCREASINGLY CONTESTED

As we have seen above, the 1927 *Lotus principle* makes clear countries can only apply a law extraterritorially when there is a clear nexus. However, some countries have adopted a very broad interpretation of the four principles – territorial, nationality, protective and universality – to justify the nexus. The origin of goods, currency, use of clearing services, stock markets, purchasing insurance and even the use of overseas servers have all been used to justify this nexus.

Some governments are going to great lengths to justify the use of extraterritorial norms. For example, **the US has greater powers to sanction companies that do not comply with their rules, than others.** In 1945, US jurisprudence broadened the definition of "nexus" to include any foreign activity – current or future – that undermined US exports (see *United States v. Alcoa*).[35] This gave the US more leeway to interpret when extraterritorial application is lawful or not. The following examples have been used to justify US extraterritoriality:

- **Trading in dollars/using the services of US or US-based banks:** any entity or person processing transactions in dollars can be targeted by US extraterritorial norms.
- **Being listed on the New York Stock Exchange (NYSE):** any company listed on the NYSE can be targeted, including subsidiaries based elsewhere in the world.
- **Using US-owned servers:** stocking data on US servers can count as a US nexus. As does the transit of data through US platforms (i.e. banking system, the stock exchange, servers).

[35] Case "United States V. Alcoa World Alumina LLC Court Docket Number: 14-CR-00007-DWA", US Deparment of Justice Criminal Division, (9 Jan. 2014), https://www.justice.gov/criminal/criminal-fraud/case/united-states-v-alcoa-world-alumina-llc-court-docket-number-14-cr-00007-dwa, accessed 18 Dec. 2023.

- **Exporting US-origin technology:** the US subjects certain foreign-made items that are produced with US technology, software, or equipment to the jurisdiction of the Export Administration Regulations (EAR) – even if they contain no US-origin content and are traded between parties outside the US. Exemptions are listed on the EAR's Commerce Control List (CCL).

The US also uses the protective principle to justify the application of certain extraterritorial norms and re-imposition of tariffs. For example, it has invoked the national security exception under Article XXI of the General Agreement on Tariffs and Trade (GATT) at the World Trade Organization (WTO) to justify unilateral steel and aluminum tariffs on European imports. In responding to critics, it has argued that the US has a sovereign right to decide what is best for its national security.[36]

Similarly, **China** has adopted a number of measures designed to apply abroad, though it has yet to deploy them all. China's measures include new export controls laws, as well as legislation on surveillance, national security and data protection. Examples include but are not limited to the 2020 List of Unreliable Entities "UEL" (不可靠实体清单), the 2020 Export Control Law "ECL" (出口管制法), the 2017 National Intelligence Law "NIL" (国家情报法) and the 2021 Data Security Law "DSL" (数据安全法). Beijing has its own sanctions regime. Like the EU, Canada and others, it has also developed defensive instruments to block extraterritorial jurisdiction of foreign law, known as the "Rules on Counteracting Unjustified Extraterritorial Applications of Foreign Legislation and Other Measures" (the "Blocking Rules" or "Rules"). It tends to be harder for companies to understand Chinese law and its more limited jurisprudence. Its wording is most often vague and it is not always clear how it is being enforced. Unlike Europe and the US, there is no separation between the political and judiciary powers.

[36] These metals were identified as "arising from either (i) excessive dependence on imports from unreliable or unsafe sources or (ii) threats to the viability of U.S. industries and resources needed to produce domestically goods" in M. Chinn, "What is the National Security Rationale for Steel, Aluminum and Automobile Protection?", *Econofact* (6 June 2018), para. 4., https://econofact.org/what-is-the-national-security-rationale-for-steel-aluminum-and-automobile-protection, accessed 11 Dec. 2023.

EU law tends to cover EU nationals, regardless of where they are based, as well as EU or EU-based entities, even if they are operating outside the EU (for example, EU ships, vessels or aircrafts or those operating under an EU license). Some EU laws also apply to non-EU entities which trade with or operate on EU territory. EU law can be used to counter evasion of EU regulations or sanctions by entities operating outside of the EU. Similarly, EU laws can also target activities that are seen to directly impact the Union's territory, individuals or interests – though they don't tend to be as expansive as US laws. They too have garnered criticism: the EU's General Data Protection Regulation (GDPR) has been criticized by China and the US on the grounds that it is overly restrictive and limits the power of "Silicon Valley giants".[37] In May 2023, Meta – one of the five most powerful digital companies in the world – was fined a record $1.3 billion (€1.2 billion) for violating EU data protection rules and ordered to stop transferring data from Europe to the US.[38]

EU law can also require third-country nationals or entities to follow EU rules when concluding a contract under European law, even when these activities take place abroad.[39] The EU has used extraterritorial norms to support corporate sustainability. The Corporate Sustainability Due Diligence Directive (CSDDD)[40] applies to EU and non-EU companies selling or trading with the EU. The private sector has raised concerns about the potential legal and financial consequences, not to mention the administrative burdens of complying with this law.[41]

[37] N. Vinocur, "Why Trump's administration is going after Europe's privacy rules", *Politico* (28 June 2020), para. 6, https://www.politico.eu/article/donald-trump-administration-gdpr/, accessed 11 Dec. 2023.

[38] A. Satariano, "Meta Fined $1.3 Billion for Violating E.U. Data Privacy Rules", *The New York Times* (22 May 2023), https://www.nytimes.com/2023/05/22/business/meta-facebook-eu-privacy-fine.html, accessed 11 Dec. 2023.

[39] L. Hornkohl, "The Extraterritorial Application of Statutes and Regulations in EU Law", *MPILux Research Paper* (2022), http://dx.doi.org/10.2139/ssrn.4036688.

[40] European Commission,"Corporate sustainability due diligence", *European Commission* (23 February 2023), https://commission.europa.eu/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en, accessed 11 Dec. 2023.

7. INTERNATIONAL LAW DOES NOT PROVIDE A CLEAR FRAMEWORK TO RESOLVE DISPUTES OVER EXTRATERRITORIALITY

As seen above, a state is afforded a degree of discretion to interpret extraterritorial norms in line with international legal practices.

Yet, when there is disagreement, it is very difficult to contest, let alone stop a third country from applying its norms extraterritorially. To date, there are still no provisions under public international law to resolve disputes. For example, American laws with extraterritorial reach are based, and evaluated, by US jurisprudence. Similarly, EU laws are based on EU jurisprudence.

Companies – which, as we will see later, are the first victims of extraterritoriality – have had to rely on different options to resolve disputes:

- Balancing test in national courts;
- Government diplomacy;
- Defensive instruments;
- Paying fines.

Balancing test in national courts

According to Oxford Public International Law Press, some national courts have used a method known as the "balancing test" to resolve disputes.[42] This test considers the legal standards and principles involved in the case and also takes into account various political factors that can affect how those standards are applied in a foreign country. Essentially, it tries to strike a ba-

[41] K. Haeusgen, "The proposal on due diligence is a threat to Europe's competitiveness", *Euractiv*, (23 Jan. 2023), para. 8, https://www.euractiv.com/section/economy-jobs/opinion/the-proposal-on-due-diligence-is-a-threat-to-europes-competitiveness/, accessed 11 Dec. 2023.

[42] P. De Sena, L. Acconciamessa, "Balancing Test", *Max Planck Encyclopedias of International Law [MPIL], Oxford Public International Law* (May 2021), https://opil.ouplaw.com/display/10.1093/law-mpeipro/e1257.013.1257/law-mpeipro-e1257, accessed 18 Dec. 2023.

lance between legal requirements and the real-world political considerations when making a judgment.

Examples include:

- *Timberlane Lumber Co v. Bank of America* 549 F.2d 597 (9th Cir.1976)[43]
- *Mannington Mills v. Congoleum Corp.* 595 F 2d 1287 (3d Cir 1979)[44]

In 2010, for example, the US Supreme Court, in *Morisson v. National Australia Bank* judged that extraterritoriality could not be 'presumed'. (*See Box 2 below*)

Morrison v. National Australia Bank

The 2010 ruling in *Morrison v. National Australia Bank* clarified that the extraterritorial application of US law should not be presumed or taken for granted. It has since evolved into a legal precedent that influences how US courts handle cases involving the extraterritorial application of US law.

[43] In *Timberlane Lumber Co. v. Bank of America, Bank of America* faced allegations of fraud, which had implications for Timberlane Lumber, a Canadian company. In particular, Timberlane accused Bank of America of conspiring to prevent it from milling lumber in Honduras and exporting it to the US. The issue under review was whether Bank of America could be sued for violating antitrust laws and whether American courts had the power to hear the case, even though the actions happened overseas. The court ultimately ruled in favor of Timberlane, establishing a precedent for the application of extraterritoriality in antitrust cases when foreign actions harm American businesses. A decade later the American Law Institute endorsed this balancing approach in section 403 of the Restatement (Third) of Foreign Relations Law.

[44] In the *Mannington Mills v. Congoleum Corp.* case, Mannington Mills (a US flooring manufacturer) accused Congoleum (another US flooring firm) of infringing its patents for flooring products. Mannington sued Congoleum in the US, alleging that Congoleum's patent-related practices abroad violated US antitrust law (Anti-Trust Sherman Act). The court ruled in favor of Mannington, as Congoleum's actions were found to harm American competitors, despite involving foreign patents.

Context

The National Australia Bank (NAB), an Australian bank, had its shares traded on the Australian Stock Exchange. Foreign investors alleged that the NAB had been involved in misleading actions that resulted in financial losses for them. The legal question under consideration was whether these foreign investors could sue NAB under US securities laws in US federal courts given that the alleged misconduct occurred in a foreign country and involved securities traded on a foreign exchange.

Main effects of the 2010 Supreme Court ruling:

- **Clarified the extraterritorial application of US law:** particularly in US securities law. It established that US laws do not automatically apply to actions that occur outside US borders. This decision provided a clear standard for determining when US law applies internationally.

- **Created a legal precedent:** The decision set a legal precedent that has influenced how US courts handle cases involving the extraterritorial application of US law. It established a more restrictive approach, emphasizing the importance of a clear legislative intent for laws that apply beyond US borders.

- **Fostered legal certainty for businesses and individuals:** the ruling brought a level of legal certainty for businesses and individuals operating internationally, as they now have a clearer understanding of when they might be subject to US legal jurisdiction.

The Supreme Court's decision sets an important precedent and could be used to challenge the US administration's expansive interpretation of its enforcement jurisdiction in US domestic courts. The "presumption against extraterritoriality" coupled with the "Charming Betsy" decision[45] (which goes back to the 1800s) provides leverage for EU defendants charged with violating US laws. EU-based firms may argue that US jurisdiction does not apply to them – and challenge US statutes in US domestic courts. They can also refer to EU and member-state laws when they think these meet similar standards as US law.[46] In practice, however, the *Morrison v. National Australia Bank* judgment has never been used. Companies are often reluctant to let the proceedings drag on and usually agree to pay the negotiated settlement before reaching the court stage.

Government diplomacy

Others turn to government diplomacy to try and resolve conflicts. With the exception of the Trump administration, the EU and the US have had a strong dialogue on US sanctions. In 1982, the US asked European companies to abandon the construction of a gas pipeline from Siberia to Western Europe, in part because it was worried that the Soviet Union might try to steal Western technologies. After intensive consultations with the then European Community (now European Union), President Reagan lifted the controls on the pipeline. Similarly, President Bill Clinton is also thought to have backtracked several times on imposing fines against EU companies for apparent breaches of the Helms-Burton Act, which sanctions activity with Cuba. This US-EU dialogue largely paid off: the US has suspended the application of certain sanctions for EU companies and today, US courts often take EU instruments and/or positions into account when judging a dispute over extraterritorial norms. The EU-US Trade and Technology Council (TTC) could also serve as a forum to resolve or mitigate ongoing extraterritorial-related disputes.

[45] In case of conflict, courts should refer to Congress' interpretation to decide when international obligations and domestic law might conflict with one another.

[46] S. Lohmann, "Extraterritorial U.S. Sanctions: Only Domestic Courts Could Effectively Curb the Enforcement of U.S. Law Abroad" *SWP* (5 Feb. 2019), https://www.swp-berlin.org/publications/products/comments/2019C05_lom.pdf, accessed 11 Dec. 2023

Defensive instruments

Some countries have adopted defensive instruments, such as blocking statutes, to protect their companies from foreign sanctions. In the case of an alleged breach of sanctions, these statutes forbid companies from following foreign court rulings and/or from sharing sensitive information with foreign authorities. As mentioned above, the EU, the UK, Canada and China have all adopted blocking statutes. The EU was the first country to adopt one, in 1996, in response to US sanctions against Cuba. After Brexit, the UK transposed the EU Statute into UK domestic law and now has its own blocking statute, called the "PTI regulation". Meanwhile, Canada has named its blocking legislation FEMA (Foreign Extraterritorial Measures Act). China passed a comparable set of rules – known as the the "Blocking Rules" or "Rules" in 2021 to block US sanctions and export controls against Chinese companies. It is unclear whether these Rules have been used yet.

Paying fines

Most of the time, however, companies agree to pay fines. This is because paying up, and handing over the required information to third-country authorities, is often a swifter and less-costly outcome than relying on government diplomacy and court action. For more details, read the next section.

2 Extraterritoriality – companies are the first victims

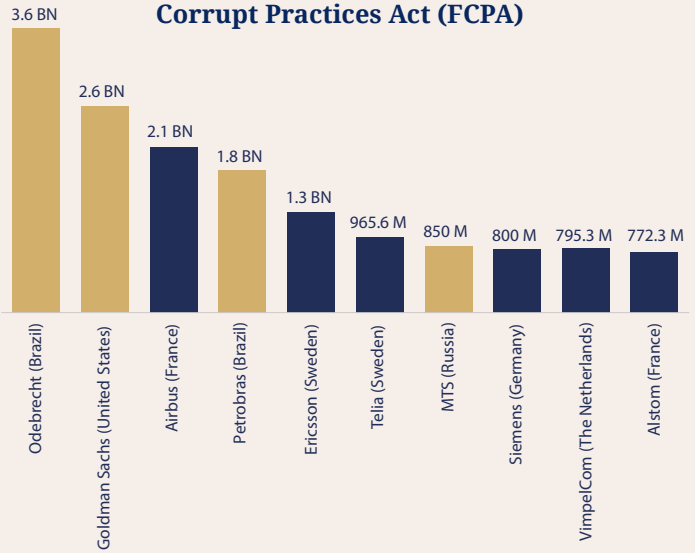
Companies, not governments, are the main victims of extraterritoriality and they lack credible tools to defend themselves.

With so many extraterritorial laws in existence, the chances of breaking the law, even inadvertently, are high. Over the past twenty years, the US alone has imposed billions of dollars' worth of fines on European, Latin American and Asian companies for failing to comply with its sanctions regime. If businesses want to comply and avoid penalties, they need to understand what their products are made of, where they are fabricated, and whom they are sold to and shared with.

For EU firms operating abroad, these risks – and costs of non-compliance – are especially high, as demonstrated in the *Gauvain Report*, commissioned by the French parliament.[47] According to the report, in the last two decades, European companies[48] have been among the main targets for US extraterritorial sanctions with some high-profile cases which include BNP Paribas, HSBC, Commerzbank, Crédit Agricole, Standard Chartered, ING, Royal Bank of Scotland, Siemens, Alstom, Télia, BAE, Total and Crédit Suisse.[49]

[47] R. Gauvain, *Rétablir la souveraineté de la France et de l'Europe*.
[48] This includes British companies.
[49] *Ibid*, 3.

Chart 1: European companies have received some of the heaviest fines for violating the US' Foreign Corrupt Practices Act (FCPA)



Extraterritorial norms can expose companies to many risks:

- **Financial and legal headaches**: Non-compliance with extraterritorial norms can result in fines, lengthy and costly legal proceedings but also exclusion from markets and financial systems. Sometimes, it even results in takeover. In the US, penalties can sometimes result in fines of up to $1 million per violation and prison sentences of up to 20 years.[50] For many companies, access to US banking and dollar clearing systems is so crucial that they often agree to plead guilty to violations – even when they

[50] Office of the Vice President for Research of Stony Brook University, "Penalties and Sanctions, Export Controls", *Stony Brook University*, (2021/2022), 2. Violations of the Export Control Reform (USC Title 50, Chapter 58, Subchapter 1), https://www.stonybrook.edu/commcms/export-controls/Export-Control-Regulations/Penalties.php, accessed 11 Dec. 2023.

do not think they are at fault. China has also adopted measures with similarly high penalties for non-compliance, as seen with its 2020 Export Control Law. In both cases, it is the duty of foreign exporters to anticipate risks and conform to the legislation.

- **Reputational damage**: US export control and sanctions breaches are widely publicized as national security risks, and may cause reputational damage for companies. Similarly, China has set up a reporting system for its 2020 List of Unreliable Entities: any company on the list may find itself excluded from the Chinese market. In February 2023, China's Ministry of Commerce (MOFCOM) announced it was placing Lockheed Martin and Raytheon, two US aerospace and defense companies on the list, as a result of their arms sales to Taiwan.

- **Industrial espionage**: there are also risks of commercial espionage and/or intellectual property theft. When a company is accused of breaching US law, for example, it is often required to hand over sensitive information about its operations to US authorities. When the European aerospace company Airbus was found guilty of violating different US anti-bribery and export controls laws in 2020, the US Department of Justice and the US Department of State asked it to turn over millions of internal business documents as part of the investigation.[51] Although there are a number of safeguards to prevent abuse by law enforcement authorities, some countries have accused the US of espionage (including industrial espionage to maintain an economic edge over foreign competitors).[52]

[51] This case started in 2016 after the company self-reported irregularities in payments made to third-party consultants. This violated both the US Foreign Corrupt Practices Act (FCPA) and the Arms Export Control Act (AECA), and its implementing regulation the International Traffic in Arms Regulations (ITAR).

[52] For example, a Stored Communications Act (SCA) order will only be granted if US law enforcement authorities can demonstrate that a particular criminal offense has been committed and that the information sought after is relevant to the ongoing criminal investigation. Service providers also have the right to challenge these SCA orders where they conflict with domestic law (H.R.4943 - CLOUD Act - 115th Congress (2017-2018).

This practice is not unique to the US. China's Cyber Security Law also requires Apple to transfer its Chinese users' data to domestic data centers, ceding control of its data to its Chinese state-owned counterparts in 2018 – though some say this was part of the process of joint ventures rather than the direct result of extraterritorial norms.[53]

- **Undermine a firm's competitiveness:** to comply with multiple legal regimes, extraterritorial norms and monitoring obligations, European companies may have no other choice but to restructure their operations and split their activities into "regional blocks". This restructuring and downsizing can affect a company's turnover – and the coherence of its activities.

- **A more fractured trading system:** increasingly, we are seeing countries coordinate their sanctions regime to maximize their impact. For example, the US, the EU and other G7 allies imposed similar sanctions on Russia after its illegal invasion of Ukraine. This concerted action has helped to weaken the Russian economy. To avoid some of the impact of Western sanctions, Moscow has significantly expanded its trade relations with China through a 'no limits' partnership. Beijing has provided Moscow with an alternative currency for its transactions and in early 2023, the Chinese yuan supplanted the dollar as Russia's most traded currency.[54] The result is a more fractured trading environment.

[53] F. Godement, V. Zhu, "Cross-Border Data Flows: The Choices for Europe", *Institut Montaigne* (April 2023), 52., https://www.institutmontaigne.org/ressources/pdfs/publications/Institut%20Montaigne_actionnote_cross-border_data_flows_the_choices_for_europe_0.pdf, accessed 11 Dec. 2023.

[54] M. Nikoladze, P. Meng & J. Yin, "How is China mitigating the effects of sanctions on Russia?", *Atlantic Council* (14 June 2023), para.2, https://www.atlanticcouncil.org/blogs/econographics/how-is-china-mitigating-the-effects-of-sanctions-on-russia/, accessed 11 Dec. 2023.

Extraterritoriality, a key instrument for US-China rivalry?

As Bates Gill recently noted, China is on a quest to achieve greater technological self-reliance, including for sensitive and critical technologies, and the US has accelerated its efforts to prevent this from happening.[55]

As seen above, the US has adopted a series of laws to limit China's development of "sensitive technologies", mainly dual-use items (i.e. items that can be used for both military and commercial purposes) such as AI and semiconductor technology. In 2020, the US realized that these export controls were not preventing Chinese firms, for example Huawei, from acquiring restricted technologies through non-US firms. As a consequence, in August 2020, the Commerce Department's Bureau of Industry and Security (BIS) amended its Export Administration Regulations (EAR), or one of the two important US export control laws, along with the International Traffic in Arms Regulations (ITAR). It introduced the "Foreign Direct Product Rule" (or FDPR) to enable regulation of a broader range of items. This subjects any foreign-produced item that uses US input (software, materials or processes) on the list to US export restriction.[56] It is a sweeping assertion of extraterritorial power: even if an item is made and shipped outside America, never once crossing US borders, and contains no US-origin components in the final product, it can still be considered a "US good." This rule creates a huge regulatory burden on foreign companies.

Similarly, China is also adopting its own laws to respond to US secondary sanctions and develop its own form of extraterritoriality, which has implications for foreign businesses located in China and could soon apply to businesses located outside of China. Examples include the 2020 Unreliable Entity List (foreign companies on this list can lose the right to import, export, invest, work and travel to China) and the 2021 "Blocking Rules" (a sanctions blocking regime to counter third-country laws deemed to affect Beijing's interests).[57]

In such a context, it is not impossible that both governments increase the use of extraterritoriality as a tool in this fight. **The US knows that it cannot prevent China from gaining technological supremacy alone and is putting pressure on the EU to follow its lead** and restrict exports of key technologies to China. The January 2023 trilateral US-Japanese-Dutch decision to restrict exports of advanced chip-manufacturing equipment, such as lithography tools made by Dutch company ASML and Japan's Nikon and Tokyo Electron to China is a recent demonstration of US pressure bearing fruit.[58] If the EU were to start im-

[55] B. Gill, K. Lee, "Can U.S. High-Tech Restrictions on China Succeed?", *Asia Society Policy Institute* (12 July 2023), https://asiasociety.org/policy-institute/can-us-high-tech-restrictions-china-succeed, accessed 11 Dec. 2023 ; B. Gill, "China's Quest for Greater Technological Self-Reliance", *Asia Society Policy Institute* (23 March 2021), https://asiasociety.org/australia/chinas-quest-greater-technological-self-reliance, accessed 11 Dec. 2023.

[56] US Department of Commerce, *Commerce Department Further Restricts Huawei Access to U.S. Technology and Adds Another 38 Affiliates to the Entity List* [Press Release] (17 Aug. 2020), https://2017-2021.commerce.gov/news/press-releases/2020/08/commerce-department-further-restricts-huawei-access-us-technology-and.html, accessed 11 Dec. 2023.

[57] Ministry of Commerce of the People's Republic of China, "Rules on Counteracting Unjustified Extraterritorial Applications of Foreign Legislation and Other Measures", *MOFCOM* (9 Jan. 2021), http://english.mofcom.gov.cn/article/policyrelease/questions/202101/20210103029708.shtml, accessed 11 Dec. 2023.

[58] G. C. Allen *et al.,* E. Benson & M. Putnam, *Japan and the Netherlands Announce Plans for New Export Controls*, para.7.

posing similar restrictions, China could also react by imposing similar restrictions or sanctions on EU companies based in, or doing business with China. **Foreign companies could easily be caught in the crossfire of two sanctions regimes.**

3 Extraterritoriality – a nascent EU debate

Extraterritoriality matters. Yet, there is virtually no EU debate about it. Several reasons explain this:

- **Not all member states are affected in the same way.** Some countries have a far greater share of companies targeted by third-country extraterritorial norms than others. This is the case for France, Germany, Italy and the Netherlands. Media coverage of extraterritoriality peaked in 2014 with the Department of Justice investigation into French company Alstom, which ended with its takeover in the US by General Electric.[59] But generally speaking, there is little debate.

- **The EU's discussion has centered on US extraterritorial measures.** There are two consequences to this. The first is that the EU feels less of a need to discuss extraterritoriality when US and the EU relations are cordial, which they have been under the Biden administration, as it believes it can resolve disputes diplomatically (and without the use of retaliatory or defensive measures). The second is that most governments, but also companies in Europe, largely ignore the threats posed by other governments' extraterritorial norms, for example China.

- The current geopolitical context means that (most) **member states are reluctant to take any measures that could be seen to weaken, or undermine, the transatlantic relationship.** A more offensive EU strategy could be interpreted this way. The EU Commission did discuss extraterritoriality in 2021 but the Covid-19 pandemic and Russia's illegal invasion of Ukraine understandably focused the EU's attention elsewhere.

- **An offensive EU strategy would require the EU to play a more important role,** which many inside the EU may refuse to countenance.

[59] The Economist, *American takeover of a French national champion.*

1. THE EU'S DEBATE ON EXTRATERRITORIALITY HAS EBBED AND FLOWED OVER THE YEARS

The EU's debate on extraterritoriality has largely centered on the application of EU competition law abroad and on how to respond to extraterritorial actions taken by other nations, most notably the United States. **There were two key moments in the EU's reflections on extraterritoriality: 1996 and 2017.**

In 1996, the US extended the Helms-Burton Act.[60] This statute called for global sanctions on the Castro regime in Cuba and prevented US and foreign companies from doing business with any countries considered 'hostile nations.' Title III was particularly controversial as it enabled the US government to sanction third-country companies directly.[61]

In response to Helms-Burton, the EU adopted the Blocking Statute, a defensive instrument designed to shield EU firms and their international trade from the extraterritorial reach of third-country legislation, in particular Helms-Burton. In theory, the Blocking Statute is supposed to cancel out any harmful effects of foreign laws on EU businesses and to forbid them from complying with foreign court rulings. It also gives them the right to claim compensation if they suffer damages as a result of third-country extraterritorial laws.

At the time, it was considered a very persuasive tool to dissuade the US from applying further sanctions on EU companies doing business in and with Cuba.[62] The US decided to exclude European companies from Title III and President Bill Clinton is believed to have backtracked several times on imposing fines against EU companies for apparent breaches of the Helms-Burton Act.

[60] Officially known as the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996.

[61] Provides Cuban exiles who are also US nationals with a private right of action before US federal courts against any person who has traded with property confiscated by the Cuban government since 1959.

[62] European Commission, *Extraterritoriality (Blocking statute).*

The suspension of Title III was maintained by successive US administrations until President Trump reinstated it in May 2019.[63] The reinstatement had an immediate effect on EU and foreign companies, with many choosing to put an end to their activities in countries under US sanctions. As we will see below, the instrument has largely failed to deter third countries from extending the reach of their norms.

The EU's interest in extraterritoriality peaked again in 2017 after President Trump withdrew the US from the Joint Comprehensive Plan of Action and restrictive measures (JCPOA). Interestingly, this also marked the beginning of the process that resulted in the adoption of the Anti-Coercion Instrument. At the time, Germany and France were worried that the Trump administration, and any future US administration for that matter, would impose further sanctions on EU companies doing, or facilitating business, with Iran. They were also worried that the Trump administration would use this as a precedent to adopt further sanctions as a way to influence and limit EU trade. In particular, Germany was worried that the US would adopt new sanctions to pressure it into abandoning Nord Stream 2, the construction of a second gas pipeline from Russia to Germany which began in 2018 (and was abandoned following Russia's invasion of Ukraine). Berlin was also worried that the Trump administration would adopt further sanctions to limit trade with, and investment in, China. France was worried about US retaliation to its "GAFA tax" law in 2019, which imposed a 3% tax on the revenues of digital services located in France whose annual turnover exceeded €25 million. This included American companies Google, Amazon and Facebook.

[63] J. B. Bellinger, III *et al.*, "Two Years of Title III: Helms-Burton Lawsuits Continue to Face Legal Obstacles", *Arnold&Porter* (10 May 2021), https://www.arnoldporter.com/en/perspectives/advisories/2021/05/two-years-of-title-iii-helmsburton-lawsuits, accessed 11 Dec. 2023; B. Bershteyn et al., "Under Helms-Burton Act, Entities With Business Ties to Cuba Now at Risk of Lawsuits", *Skadden, Arps, Slate, Meagher & Flom LLP and Affiliates* (9 May 2019), https://www.skadden.com/insights/publications/2019/05/under-helms-burton-act, accessed 11 Dec. 2023.

This concerted Franco-German push was important in getting the EU to restart discussions on extraterritoriality. The support of other member states, such as Spain, Italy and the Czech Republic, was also key. In 2018, the EU Commission set up an expert committee on extraterritoriality to explore potential amendments to the annexes of the Blocking Statute as well as other measures the EU could adopt. In 2019, it adopted the Instrument in Support of Trade Exchanges (INSTEX), a trade mechanism designed to act as an alternative to the Society for Worldwide Interbank Financial Telecommunication (SWIFT), which the US is a part of, and facilitate payments in currencies other than the dollar for priority sectors such as pharmaceuticals, food and medical equipment. Given US sanctions can target any company trading in dollars, or using the US financial system, trading with Iran in a different currency proved useful to shield EU companies from these sanctions.

In the years that followed, the European Commission published several papers and proposals on extraterritoriality:

- In September 2020, the EU Commission wrote a letter to the Council of the EU and the European Parliament where it announced that it would table measures to "counter coercive actions" by third countries no later than the end of 2021.[64]

- In January 2021, it released a communication acknowledging that the extraterritorial application of unilateral sanctions and other measures could be considered a form of economic coercion,[65] paving the way for a more strategic discussion on new, potentially more offensive measures, in line with international law obligations.

[64] Official Journal of the European Union, "Joint Declaration of the Commission, the Council and the European Parliament on an instrument to deter and counteract coercive actions by third countries", *EUR-Lex* (12 Feb. 2021), https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32021C0212(01), accessed 11 Dec. 2023.

[65] Communication from the Commission, *The European economic and financial system.*

- In February 2021, together with the Council of the EU and the European Parliament, it issued a joint declaration on the need for a new instrument to deter and counteract coercive actions by third countries.[66]

- In March 2021, it published a public consultation on the most effective "mechanism to deter and counteract coercive action by non-EU countries".[67]

- In December 2021, it began work on the Anti-Coercion Instrument, which the EU adopted in October 2023.[68] While it is not directly linked to extraterritoriality, it did signal the EU's intent to respond to economic coercion.

Several think tanks also published papers on the subject around this time. Examples include the Jacques Delors Institute,[69] the German Institute for International and Security Affairs[70] and the European Council on Foreign Relations.[71]

[66] European Commission, Council of the EU, European Parliament, "Joint Declaration of the Commission, the Council and the European Parliament on an instrument to deter and counteract coercive actions by third countries", *Eur-lex* (12 Feb. 2021), https://eur-lex.europa.eu/legal-content/EN/TXT/?toc=OJ%3AC%3A2021%3A049%3ATOC&uri=uriserv%3AOJ.C_.2021.049.01.0001.01.ENG, accessed 18 Dec. 2023.

[67] European Commission, "Trade – mechanism to deter & counteract coercive action by non-EU countries", *European Commission* (March 2021), https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12803-Trade-mechanism-to-deter-counteract-coercive-action-by-non-EU-countries/public-consultation_en, accessed 11 Dec. 2023.

[68] M. Duchâtel, "Effective Deterrence? The Coming European Anti-Coercion Instrument", *Institut Montaigne* (2 Dec. 2022), para. 3, https://www.institutmontaigne.org/en/expressions/effective-deterrence-coming-european-anti-coercion-instrument, accessed 11 Dec. 2023.

[69] M.H. Bérard *et al.*, "American Extraterritorial Sanctions Did Someone Say European Strategic Autonomy ?", *Jacques Delors Institute* (22 March 2021), https://institutdelors.eu/en/publications/american-extraterritorial-sanctions/?fullMedias=true, accessed 11 Dec. 2023.

[70] S. Lohmann, *Extraterritorial U.S. Sanctions.*

[71] J. Hackenbroich & P. Zerka, "Measured response: how to design a European instrument against economic coercion", *ECFR* (June 2021), https://ecfr.eu/wp-content/uploads/Measured-response-How-to-design-a-European-instrument-against-economic-coercion.pdf, accessed 11 Dec. 2023.

Yet, this renewed interest was short-lived. EU thinking on extraterritoriality died down once Biden came to power. The Covid-19 pandemic and Russia's illegal war in Ukraine paused any further thinking on the subject. So much so that the expert committee set up in 2018 has not met since the pandemic.

The geopolitical context further complicates the discussion on extraterritoriality: the war in Ukraine reveals once more just how important the US is for European security, and some Member States are worried that any discussion on extraterritoriality could strain relations with the US.

But the tide could change: first, the forthcoming US election could see the election of a very different administration to the one that is in place today; one that is even more willing to adopt new extraterritorial measures to compel EU companies to follow US rules, for example on export restrictions and outbound investment screening. There has been little regard paid to Chinese extraterritorial measures, even though China has been perfecting its legal arsenal. If deployed, these measures could have direct implications for EU companies, especially those with business in China. Second, as mentioned in *Box 2*, extraterritoriality could easily become an instrument in US-China rivalry. **Calls for the EU to re-engage a debate on extraterritoriality are growing. It is not impossible that the EU Commission tables new proposals to discuss extraterritorial norms in the coming months, as part of the EU's wider agenda on European economic security.**

2. THE LIMITS OF THE EU'S DEFENSIVE APPROACH

The EU's response to third-country extraterritorial norms was designed to strengthen the EU's economic sovereignty in situations where **extraterritorial sanctions breach public international law.** The Blocking Statute and Instrument in Support of Trade Exchanges (INSTEX) are the EU's main instruments, though the EU has also relied on diplomacy and dialogue to resolve disputes. Many member states have also supplemented these instruments with their own national measures and instruments.

On 22 November 1996, the EU adopted the **European Blocking Statute** to protect the EU "against the effects of the extraterritorial application of legislation adopted by a third country"[72] on the grounds that "by their extraterritorial application, such laws, regulations and legislative instruments violate international law".[73] In particular, it prohibits companies from complying with six statutes and one set of regulations listed in the annex.[74] Courts across the EU were quick to enforce the EU Blocking Regulation (for example in Spain with the Law 27/1998[75], which requires Spanish companies to "notify the European Commission within 30 days when their economic or financial interests are likely to be affected by extraterritorial measures").[76]

Together with the Canadian Blocking Statute known as the Foreign Extraterritorial Measures Act (FEMA), it served as the model for China's own blocking statute (Rules of Counteracting Unjustified Extraterritorial Application of Foreign Legislation and Other Measures (or the "Rules")).

Although the EU Blocking Statute was revised in 2018, it continues to be largely ineffective. The EU Commission simplified reporting duties for companies targeted by extraterritorial measures, but reporting is still demanding on companies' time. Very few companies have notified the EU Commission and made use of the instrument despite the heavy fines they have received for non-compliance

[72] W. Julier, S. Menegon & A. Murgier, "United States extraterritoriality: European Union sovereignty at stake", *International Bar Association*, https://www.ibanet.org/article/CF85E59E-6564-4AA3-9408-3F47C6449C9D, accessed 11 Dec. 2023.

[73] *Ibid.*

[74] S. Lohmann, *Extraterritorial U.S. Sanctions*, 3.

[75] "Ley 27/1998, de 13 de julio, sobre sanciones aplicables a las infracciones de las normas establecidas en el Reglamento (CE) número 2271/96, del Consejo, de 22 de noviembre, relativo a la protección frente a la aplicación extraterritorial de la legislación de un país tercero", *Agencia Estatal Boletín oficial del Estado* (14 Jul. 1998), https://www.boe.es/eli/es/l/1998/07/13/27/con, accessed 11 Dec. 2023.

[76] J. Seddon et al., "The Practitioner's Guide to Global Investigations, Volume II: Global Investigations around the World", *Global Investigations Review* (2021), 468, https://www.uria.com/documentos/colaboraciones/3003/documento/GIR-Spain.pdf?id=12338_en, accessed 11 Dec. 2023.

with third-country extraterritorial norms. For example, in 2020, Airbus agreed to pay over $3.9 billion in penalties for alleged non-compliance with US anti-bribery and ITAR laws.[77] Many companies are reluctant to share company data to EU authorities without knowing how it will be stored, protected and ultimately who will have access to it. They also complain about the ineffectiveness of the Blocking Statute arguing that it does not shield them from US criminal proceedings – nor does it help them deal with the judicial proceedings if disputes ever get to that stage (most companies agree to pay the fines early on rather than go through with proceedings). In the words of one executive, "the EU Blocking Statute is a charade. It puts all the onus on businesses".[78]

As we will see below, some member states have supplemented the Blocking Statute with a national blocking statute. In 2022, France revised its blocking statute of 26 July 1968. It requires companies that receive requests from foreign law enforcement authorities to hand over sensitive documents or information to share that request with the *Service de l'information stratégique et de la sécurité économique* (SISSE) of the French Ministry of the Economy, Finance and Industrial and Digital Sovereignty. This instrument has also been met with moderate success. By ignoring the US's requests, companies risk being excluded from the US market, or using the US financial system. For many companies, this is a price too high to pay.

Then there is INSTEX which was adopted in the aftermath of the US' withdrawal from the Joint Comprehensive Plan of Action and restrictive measures (JCPOA) in 2019. To prevent the deal from falling apart, and to protect EU companies from US sanctions, France, Germany and the UK, together with the EU High Representative, set up a payment mechanism to act as an alternative to SWIFT. It was supposed to "act as a clearing house between European importers and exporters [in Iran] and guarantee payment solutions without using the dollar"[79] to make sure European companies were not in breach of US sanctions. It was registered

[77] For conspiracy to violate the anti-bribery provision of the US Foreign Corrupt Practices Act (FCPA) as well as conspiracy to violate the US Arms Export Control Act (AECA) and its implementing regulations, the International Traffic in Arms Regulations (ITAR).

[78] Interview with an executive, April 2023. Interview held under the Chatham House Rule.

in France but overseen by three officials from the E3 (Germany, France, the UK).[80] Interestingly, the Chinese and Russians have set up similar clearing systems. China's Cross-Border Interbank Payment System (CIPS) has allowed cross-border and offshore financial transactions denominated in renminbi since October 2015.[81] On 9 March 2023, the 10 members of INSTEX decided to liquidate the instrument after heightened tensions with Iran.

The third response has been to turn to traditional diplomacy to try and resolve disputes. As mentioned in Part 1, with the exception of the Trump administration, the EU and the US have had a strong dialogue over US sanctions and their implications for EU companies. In 1982, the US asked European companies to abandon the construction of a gas pipeline from Siberia to Western Europe, in part because it was worried that the Soviet Union might try to steal Western technologies. After intensive consultations with the then European Community (now European Union), President Reagan lifted the controls on the pipeline.

Some EU officials are hoping that the EU-US Trade and Technology Council (TTC) could become a forum to resolve or mitigate ongoing extraterritorial-related disputes. However, dialogue and diplomacy only pay off when relations between the US and EU are cordial.

The fourth, indirect measure, is raising awareness about EU instruments or positions. This has largely paid off. Today, US courts often take EU instruments and/or positions into account when judging a dispute over extraterritorial norms – though this practice is not systematic.[82]

[79] A. Giuliani, "Beyond European extraterritoriality, for legal intelligence and compliance in the service of sovereignty", *European Issues*, Vol. 654 (2023), 3, https://server.www.robert-schuman.eu/storage/en/doc/questions-d-europe/qe-654-en.pdf, accessed 18 Dec. 2023.

[80] S. Lohmann, *Extraterritorial U.S. Sanctions*, 3.

[81] *Ibid.*

[82] The US Supreme Court has established rules that guide how US laws apply outside US territory. One rule, the "presumption against extraterritoriality" means that unless Congress says otherwise, US statutes are mainly meant for domestic use. Another rule, the "Charming Betsy presumption" from the 19th century, suggests that if there's any way to interpret a law without violating international rules, that interpretation should be chosen. These rules, when used together, could help people accused of breaking US laws abroad argue that US jurisdiction shouldn't apply to them.

Overall the EU knows its response is weak and that its instruments have largely failed to protect EU companies from extraterritorial sanctions. Relying on diplomacy only works when a foreign government is open to discussing sanctions, but even then there is no guarantee that it will end in the lifting of sanctions. As Jonathan Hackenbroich noted in his paper *Defending Europe's Economic Sovereignty: new ways to resist economic coercion*, the EU needs to do more.[83] **Yet, the debate seems stuck: any discussion on EU extraterritoriality appears to focus on enhancing, rather than radically departing from its existing strategy**, i.e. strengthening defensive instruments and investing in diplomatic efforts and multilateral dispute resolution mechanisms. This is short-sighted. **The EU would be wise to consider a more offensive approach.**

Some more offensive measures have been tabled. In 2023, the EU Commission adopted the **Corporate Sustainability Due Diligence Directive (CSDDD)** with the aim of ensuring that companies meet their environmental goals and prevent human rights abuses across the whole of their supply chains. This form of extraterritoriality is far-reaching and could change business practices. The EU has also updated **its export controls.** As the geoeconomic expert Tobias Gehrke noted, the EU can technically restrict exports of a certain technology with a given country if it deems this to be a risk to its security.[84]

3. EXTRATERRITORIALITY DOES NOT IMPACT ALL MEMBER STATES IN THE SAME WAY

The Czech Republic, France, Germany, Italy, the Netherlands and Spain have all played a role in shaping the EU's debate on extraterritoriality. This is not entirely surprising given the way extraterritoriality has impacted some of their companies. For example, in 2012 Dutch ING Group agreed to pay a settlement of $619 million after using US-based financial institutions to process transactions for Iranian and Cuban businesses and entities subject to US economic sanctions.[85] In 2015, Germany's Deutsche Bank was fined $258 million for doing business in Iran and Syria in breach of US sanctions.[86] US extraterritorial sanctions can also have knock-on effects for European companies. In 2018, the Treasury Department sanctioned Rusal, a Russian aluminum industry company, which affected aluminum prices in the Austrian Aluminium industry sector.[87]

Most of the time, companies have recognized wrongdoing but there have been some instances of companies, and EU governments, accusing the US of overreach and overreacting. European companies have faced fines totaling tens of billions of dollars for failing to comply with US corruption laws even though they were fully compliant with domestic anti-corruption laws.

France has been a strong advocate for tougher rules to counter third-country extraterritorial measures. In 2020, President Macron argued that "[today] our companies can be condemned by foreign powers: this deprives us of our full sovereignty, it limits our ability to decide for ourselves and it weakens us immensely".[88]

[83] J. Hackenbroich, Defending Europe's Economic Sovereignty: new ways to resist economic coercion", *ECFR* (20 Oct. 2020), https://ecfr.eu/publication/defending_europe_economic_sovereignty_new_ways_to_resist_economic_coercion/, accessed 11 Dec. 2023.

[84] T. Gehrke, J. Ringhof, "The Power of Control: How the EU can shape the new era of strategic export restrictions", *ECFR* (May 2023), https://ecfr.eu/wp-content/uploads/2023/05/The-Power-of-Control-How-the-EU-can-shape-the-new-era-of-strategic-export-restrictions.pdf, accessed 30 Nov. 2023.

[85] US Department of Justice, Office of Public Affairs, *ING Bank N.V. Agrees to Forfeit $619 Million for Illegal Transactions with Cuban and Iranian Entities* [Press Release] (12 June 2012), https://www.justice.gov/opa/pr/ing-bank-nv-agrees-forfeit-619-million-illegal-transactions-cuban-and-iranian-entities-0, accessed 11 Dec. 2023.

[86] AFP, "Deutsche Bank fined $258m for violating US sanctions", *The Guardian* (4 Nov. 2015), https://www.theguardian.com/business/2015/nov/04/deutsche-bank-us-sanctions-fine, accessed 11 Dec. 2023.

[87] EU Delegation to the USA, "Letter to Charles E. Schumer, Minority Leader, US Senate", *Politico* (4 Jan. 2019), https://www.politico.eu/wp-content/uploads/2019/01/document1.pdf, accessed 11 Dec. 2023.

[88] Groupe d'études géopolitiques, "The Macron Doctrine", *Le Grand Continent* (16 Nov. 2020), https://legrandcontinent.eu/fr/2020/11/16/macron/, accessed 11 Dec. 2023.

Some countries, like France, have adopted several defensive measures. In addition to its own Blocking statute (see p. 52), the French Parliament passed the *Loi Sapin II* in 2016.[89] The *Sapin II* law created the French Anti-Corruption Agency (*Agence Française Anticorruption*, AFA) and expanded the power of French authorities to prosecute acts of corruption committed by French companies outside France. Named after the French Minister of Finance Michel Sapin, it requires French companies (or subsidiaries) to maintain compliance programs, high standards and internal controls to combat corruption.

The AFA administers the law. *Sapin II* also introduced settlement agreements – the *convention judiciaire d'intérêt public* (or "CJIP") – which mirror US-style corporate settlement agreements. By adopting this law, France was hoping to demonstrate to the US that it had similar anti-corruption standards and that there was, therefore, no need to further sanction companies for non-compliance. It was largely seen as a response to US fines against Alstom and Total[90] but has gleaned limited results, with one notable exception when Airbus, in 2020, agreed to pay €2.1 billion to the French Treasury, rather than the US Treasury for bribery charges.[91] This example shows that France has managed to limit the extraterritorial reach of US anti-corruption laws and, in so doing, enhanced France's credibility in fighting corruption.

Finally, France adopted a new Cloud server (*Cloud de confiance*) to store French data in France, rather than on American servers. This Cloud server was also designed to protect EU companies from the overreach of US data laws. The results are mixed but the server has helped to reinforce European digital sovereignty.

[89] Also known as "*la loi sur la transparence, l'action contre la corruption et la modernisation de la vie économique*" ("Transparency, Anti-corruption and Modernization Law").

[90] In 2013, the US Department of Justice and the Securities and Exchange Commission fined Total $398 million. Prosecutors alleged in court documents that Total bribed an Iranian official to obtain lucrative oil and gas concessions, in violation of the FCPA.

[91] AFP, "Pourquoi Airbus a payé une amende record de 3,6 milliards d'euros", *Le Point* (1 Feb. 2020), https://www.lepoint.fr/societe/pourquoi-airbus-a-paye-une-amende-record-de-3-6-milliards-d-euros-01-02-2020-2360767_23.php, accessed 30 Nov. 2023.

4. THE EU'S DNA MAKES IT DIFFICULT TO ADOPT AN OFFENSIVE STRATEGY FOR EXTRATERRITORIALITY

By its very nature, the EU's DNA is to oppose any form of EU extraterritoriality. While there have been instances of EU extraterritoriality, they significantly differ from US and Chinese approaches. EU lawyers are always keen to point to the "genuine connection" (referenced on page 16) between the EU and the act it is legislating for or against, with due consideration for public international norms. Several reasons explain this stance.

First, the EU is founded on the respect for international law. It has strong regulatory institutions and identifies itself as a "rules-based" and "rules-respecting" organization. This commitment is mentioned in the Charter of Fundamental Rights of the European Union and is explicitly stated in the EU Treaty preamble. Furthermore, Article 21 of the Treaty on European Union (TEU) makes clear that the EU will "respect and promote international law." It attaches huge importance to the principles of sovereignty, subsidiarity and proportionality[92], in other words:

- **Sovereignty**: the EU will only legislate if it has the legal competence to do so;

- **Subsidiarity**: when it shares legal competence with member states, if should only legislate when it makes sense for it to do so (for example, if

[92] State sovereignty is understood as a government's power to make autonomous choices. Subsidiarity means a preference for the allocation and exercise of governmental functions at the lowest level of governance. Proportionality restricts authorities in the exercise of their powers by requiring them to strike a balance between the means used and the intended aim. See "Sovereignty", *Max Planck Encyclopedia of Public International Law* (April 2011), https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1472, accessed 30. Nov. 2023 ; "Subsidiarity", *Max Planck Encyclopedia of Public International Law* (Oct. 2007), https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1477, accessed 30. Nov. 2023 ; and "Proportionality", *Max Planck Encyclopedia of Public International Law* (May 2011), accessed 30 Nov. 2023, for more details.

should refrain from adopting measures that would best be taken at the level of member states)

- **Proportionality**: EU decisions must be proportional, i.e. specific. This ensures that the application of EU law is as specific as possible.

When the EU has applied its rules abroad, it has tried to do so restrictively, primarily focusing on actions committed within its territory or those that directly affect it or its citizens. The importance of the "nexus" principle is underscored by the European Court of Justice's preference for an "implementation" test, which determines when the EU can exercise jurisdiction over anticompetitive agreements or practices that affect it. This approach is evident in cases like Ahlström Osakeyhtiö and *Others v. Commission* (Woodpulp I) [1988] ECR 5193[93], where the European Court of Justice examined anticompetitive practices related to wood pulp manufacturers' practices. The case highlighted the EU's restrictive application of its rules abroad: the EU can only do so if there is a genuine connection between the act and the EU's territory or citizens. Unlike other countries, the EU regulator is obliged to consider any conduct or circumstances outside the EU that may have influenced the act it is currently considering. That said, many foreign governments have criticized the overreach of EU extraterritorial norms, in particular the GDPR.

In general, any form of extraterritoriality that goes beyond this scope is deemed contradictory to public international law. This approach sharply contrasts with the US perspective, which adopted a broader application of extraterritoriality, and China's approach, which has largely mirrored US extraterritorial norms.

Many inside the EU are worried that if the EU were to adopt an offensive strategy, it might be accused of hypocrisy. The EU has often criticized the

[93] European Court of Justice, "Judgment of the Court (Fifth Chamber) of 31 March 1993. - A. Ahlström Osakeyhtiö and others v Commission of the European Communities.", *Eur-lex* (7. July 1992), EUR-Lex - 61985J0089(01) - EN, accessed 11 Dec. 2023.

US for failing to ground its extraterritorial measures on an internationally recognized jurisdictional basis – and for not paying enough attention to other countries' measures, including the EU's, to combat corruption and anti-competitive practices. In 2009, the European Parliament requested that President Obama stop adopting "extraterritorial legislation without prior consultation".[94] The US has responded by saying that it does adhere to international norms but that international regimes are no longer fit-for-purpose to protect countries' vital interests. Today, Washington often justifies extraterritorial measures by referring to Article XXI of the WTO's GATT – known as the national security exception. There is no reason why the EU could not do the same in the future.

5. IT IS NOT CLEAR THE EU HAS THE LEGAL COMPETENCES OR POLITICAL WILL TO ACT ON EXTRATERRITORIALITY

Even if the European Union did decide to adopt a more offensive strategy, it is not clear it has the legal competence, or political support from member states, to do so. The EU does not have far-reaching enforcement capabilities like the US Treasury Department' Office of Foreign Assets Control, which administers and enforces economic and trade sanctions. Creating a new EU department or agency to address extraterritorial concerns may even necessitate treaty changes, a process that could face resistance from member states.

The EU's treaties also make clear that member states, not the EU, are responsible for protecting national and foreign policy interests. The EU has a more narrow definition of national security than the US and China. When it comes to economic issues, the EU understands national security to cover the safeguarding of certain critical goods, for example dual-use technologies (software and technology that can be used for both civilian and military applications). In contrast, China and the United States both adopt a more

[94] F. J. Millán Mon, "Report on the state of transatlantic relations in the aftermath of the US elections", *European Parliament* (2 March 2009), https://www.europarl.europa.eu/doceo/document/A-6-2009-0114_EN.html, accessed 11 Dec. 2023.

expansive definition of national security and "strategic" technologies, which allows them to adopt, and apply, wide-ranging extraterritorial measures on the grounds of vital "national security interests".

Finally, it is not clear that member states would agree to grant the EU more decision-making powers. Governments in Poland and Italy have already asked to limit to the EU's power. The German Constitutional Court (*Karlsruhe*)'s ruling that the Public Sector Purchase Program of the European Central Bank exceeded EU competences also shows the difficulties of the EU gaining more power even after EU governments have given their consent and that European Court of Justice has ruled these new powers commensurate with EU law.[95]

But this could change. On 30 March 2023, European Commission President Ursula von der Leyen said that the EU needed to reassess its security interests.[96] Her emphasis was on economic security, calling for new trade defense instruments, including a new outbound investment screening mechanism, signaling a subtle shift towards a more comprehensive approach to safeguarding all of the EU's interests.

[95] The Public Sector Purchase Programme (PSPP) of the European Central Bank, created in 2015, allows European banks to purchase bonds and debts from central governments, agencies or international organizations. The German constitutional court claimed that this exceeded the competences and mandate of the European Central Bank. In May 2020, the German Federal Court of Karlsruhe argued that the German government and the German Parliament (*Bundestag*) had not "taken sufficient steps" to challenge the ECB's implementation of the PSPP. This decision was taken by Karlsruhe even after the European Union Court of Justice itself had ruled on the case and found that "the PSPP neither exceeded the ECB's mandate nor violated the prohibition of monetary financing". This decision raised many concerns among Europeans about national courts' ability to call into question European law.

See Bundesverfassungsgericht, *ECB decisions on the Public Sector Purchase Programme exceed EU competences* [Press Release] (5 May 2020), https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2020/bvg20-032.html, accessed 30 nov. 2023, for more details.
D. Capitant, "L'arrêt de la Cour de Karlsruhe Un coup de tonnerre dans un ciel serein ?", *IFRI*, https://www.ifri.org/sites/default/files/atoms/files/ndc_155_d._capitant_arret_cour_karlsruhe_oct_2020.pdf, accessed 30 Nov. 2023.

[96] European Commission, "Speech by President von der Leyen on EU-China relations to the Mercator Institute for China Studies and the European Policy Centre", *Europa.eu* (20 March 2023), https://ec.europa.eu/commission/presscorner/detail/en/speech_23_2063, accessed 11 Dec. 2023.

Some form of EU coordination may become necessary. First, it will matter for the cohesion of the single market, which could become fragmented if every member state adopted its own set of measures. Second, it would help member states, and their companies, to resist the pressure of aligning themselves on third-country demands. Acting as a bloc of 27 is more effective than acting alone.

4 The case for an offensive strategy

The EU needs a better strategy on extraterritoriality – one that is more offensive, capable of responding to the dynamics of "great power logic" on the global stage and prioritizes measured extraterritoriality to protect its interests, while respecting the interests and powers of other international actors.

Any offensive strategy will need to be balanced: have **credible** ways to protect companies from third-country extraterritorial sanctions; be **assertive** enough to deter third countries from applying extraterritorial measures; but **not too risky** that companies take too many risks that the EU would be accountable for.

The good news is that the EU is starting to think about extraterritoriality. The EU should seize the next months to think critically about it, before a new European Commission is in place in the early autumn 2024. For this, the EU should:

1. **Revise its existing defensive tools.** When it comes to the Blocking Statute, the EU Commission must devise a **safe way to store company data** and be transparent with companies on how this data will be used. It should follow through on its proposals to strengthen the euro's international trading. This would boost the EU's competitiveness in macro-economic and financial areas (though, this will not be possible in every sector: for example, 80% of aircraft-related transactions are paid in dollars).

2. **Adopt new offensive measures.** Similarly to the US, it should consider creating a European OFAC. The EU should also be prepared to adopt more offensive measures, in the form of secondary sanctions. The EU would not necessarily need to implement these more assertive sanctions but having them in place could deter third countries. They could also help bolster the EU's negotiating position in case of dispute over extraterritorial norms. As Mathieu Duchâtel has noted for Institut Montaigne, the EU has already updated its export control regime, in particular exports of dual-use items.[97] Member states now have the authority to initiate a process to revise the collective list of dual-use items, incorporating those under their national control. This goes beyond simply mirroring multilateral agreements such as the Wassenaar Arrangement. Other measures could include the creation of a **European agency to monitor extraterritorial-related cases**, as proposed by the European Council on Foreign Relations[98], and the establishment of a **European Export Bank (EEB)**. The EU should also consider a **new European resilience fund** to help companies cover financial and legal costs. Other proposals also exist.

Table 4: Tools, measures and approaches to deal with extraterritoriality

	Diplomatic Approach	Treaty	Institutional Approach	Member States Initiatives
Existing (or past) measures	2021-EU-US Trade and Technology Concil (TTC) OECD's Multilateral Competent Authority Agreement (MCAA)	1996 EU Blocking Statute		1959 European Court of Arbitration 2019 INSTEX (now terminated)

[97] M. Duchâtel, F. Godement, "Europe's Economic Security and China: Where to Draw the Line", *Institut Montaigne* (4 Sept. 2023), para. 8, https://www.institutmontaigne.org/en/expressions/europes-economic-security-and-china-where-draw-line, accessed 11 Dec. 2023.

[98] J. Hackenbroich, *Defending Europe's Economic Sovereignty.*

	Diplomatic Approach	Treaty	Institutional Approach	Member States Initiatives
Future measures	Strenghten the WTO and the global trade system Strenghten bilateral and/ or multilateral dialogues on extraterritoriality	Conclude bilateral investment treaties with "protectives" clauses	A European Agency to motor extraterritorial-related cases A European Court of Arbitration A European Compensation Fund Internationalize the Euro A European Bank Export (EBB) A European Office of Foreign Assets Control (OFAC)	Conclude bilateral investment treaties with "protective" clauses

3. **Improve corporate engagement**: the EU Commission should launch new discussions with economic players, including companies, to listen to their proposals and concerns. Bridging the gap between legislative intent and businesses' real-world challenges is key to getting the EU's extraterritoriality strategy right.

4. **Consult member-state regulators and judges,** which are responsible for implementing EU extraterritorial measures.

Only with a stronger offensive posture can the EU position itself as a credible player capable of responding to, countering and shaping extraterritoriality.

Table 4: National measures to respond to extraterritoriality

Country	National Debate	National Defensive Instruments	Impact of Extraterritorial Sanctions
Austria		Austria passed the Austrian Federal Law on the Punishment of Offences against the Provisions of EC Regulation (EC) No 2271/96, which imposes sanctions on companies that do not respect the EU Blocking Statute.[1]	The Austrian bank Raiffeisen has been investigated by the US Office of Foreign Assets Control (OFAC) and the European Central Bank for its activities in Russia.[2] The bank announced it would cease its activities in Russia in March 2023.[3] The Austrian branch of UniCredit also had to pay fines for violating US sanctions in 2019.[4]
Belgium	The national debate has evolved since 2020. The government believes that extraterritoriality should be dealt with at the EU level.	Belgium adopted a foreign investment screening mechanism in July 2023.[6]	
Bulgaria		In 2022, the Bulgarian Supreme Administrative Court ruled that US sanctions on Bulgarian companies and individuals under the Global Magnitsky Act were illegal on the grounds that these sanctions do not have a legal basis in Bulgarian or EU law.[7] Bulgaria is developing its own version of the Magnitsky Act.	

[1] "Bundesgesetz zur Festlegung von Sanktionen bei Zuwiderhandlungen gegen die Verordnung (EG) Nr. 2271/96", *Austrian Parliament* (3 June 1997), https://www.parlament.gv.at/dokument/XX/I/703/fname_139577.pdf, accessed 14 Dec. 2023.

[2] The Kyiv Independent news desk, "Reuters: US sanctions authority examining Austrian bank's ties to Russia", *The Kyiv Invdependent* (18 Feb. 2023), https://kyivindependent.com/reuters-us-sanctions-authority-examining-austrian-banks-ties-to-russia/, accessed 14 Dec. 2023.

[3] I. Purysova, "Schrödinger's bank - How Austria's Raiffeisen Bank is (not) leaving Russia after a year of war", *Novaya Gazeta Europe* (3 May 2023), para. 1, https://novayagazeta.eu/articles/2023/05/03/schrodingers-bank-en, accessed 14 Dec. 2023.

[4] I. Timofeev, "Europe Under Fire from US Secondary Sanctions", *Russian International Affairs Council* (7 June 2019), para. 20, https://russiancouncil.ru/en/analytics-and-comments/analytics/europe-under-fire-from-us-secondary-sanctions/, accessed 14 Dec. 2023.

[5] M. Ben Achour, "Question et réponse écrite n° : 0231 - Législature : 55 - L'extraterritorialité du droit étranger", *La Chambre* (20 Jan. 2020), https://www.lachambre.be/kvvcr/showpage.cfm?section=qrva&language=fr&cfm=qrvaXml.cfm?legislat=55&dossierID=55-B011-1161-0231-2019202001684.xml, accessed 14 Dec. 2023.

[6] A. Ponthier, "Question et réponse écrite n° : 0224 - Législature : 55 - Le retrait de l'Italie de l'initiative chinoise Belt and Road", *La Chambre* (14 Aug. 2023), https://www.lachambre.be/kvvcr/showpage.cfm?section=qrva&language=fr&cfm=qrvaxml.cfm?legislat=55&dossierID=55-B116-1262-0224-2022202321159.xml, accessed 14 Dec. 2023.

Country	National Debate	National Defensive Instruments	Impact of Extraterritorial Sanctions
Croatia			
Cyprus	Cyprus has been criticized for failing to comply with US and EU sanctions against Russia.[8] The Cypriot President has said that his country would clamp down on individuals associated with Usmanov and Russian oligarchs.		In February 2023, OFAC fined Alexander Volfovich, a Cyprus-based arms broker, due to his connections with the Zimenkov network, a Russian sanctions evasion network.[9]
Czech Republic	In December 2022, the Czech parliament adopted the "Czech Magnitsky Act", a law that resembles the US Magnitsky Act.[10]		
Denmark	In December 2021, together with the Australian, Norwegian and US governments, the Danish government expressed support for the Export Controls and Human Rights Initiative.[11]		

[7] K. Nikolov, "Court ruling says US Magnitsky Act cannot be applied in Bulgaria", *Euractiv* (7 Feb. 2022), https://www.euractiv.com/section/justice-home-affairs/news/court-ruling-says-us-magnitsky-act-cannot-be-applied-in-bulgaria/, accessed 14 Dec. 2023.

[8] H. Smith, "Cyprus handed 800-page US dossier on Russia sanctions breaches", *The Guardian* (9 May 2023), https://www.theguardian.com/world/2023/may/09/cyprus-handed-800-page-us-dossier-on-russia-sanctions-breaches, accessed 14 Dec. 2023.

[9] U.S. Department of the Treasury, *Treasury Targets Global Sanctions Evasion Network Supporting Russia's Military-Industrial Complex* [Press Release] (1 Feb. 2023), https://home.treasury.gov/news/press-releases/jy1241, accessed 14 Dec. 2023.

[10] J. Logesova, J. Pumr, "The Czech "Magnitsky Act": creation of a legal basis for national sanctions", *Wolf Theiss* (19 Dec. 2022), 2. Czech Republic developing act to improve enforcement on local level, https://www.wolftheiss.com/insights/the-czech-magnitsky-act/, accessed 14 Dec. 2023.

[11] A multilateral effort intended to counter state and non-state actors' misuse of goods and technology to commit serious violations or abuses of human rights by using export controls in pursuit of national security interests. The White house, "Joint Statement on the Export Controls and Human Rights Initiative", *The White House* (10 Dec. 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/10/joint-statement-on-the-export-controls-and-human-rights-initiative/, accessed 14 Dec. 2023.

Country	National Debate	National Defensive Instruments	Impact of Extraterritorial Sanctions
Estonia	In December 2022, the Estonian Parliament supported the implementation of a UN arms embargo on Libya which included inspections on vessels off the coast of Libya suspected of carrying arms or related materials.[12]		In 2018, the US Department of Justice initiated a criminal investigation into the Danske Bank A/S, the largest branch in Estonia.[13]
Finland		In 1998, Finland adopted an Act supplementing the EU Blocking Statute, requiring companies to respect the EU Statute and to inform the EU Commission and competent Finish ministries of any foreign-imposed sanctions.[14]	
France		1968 Blocking statute (Loi de blocage) (see p.52) 2016 Loi Sapin II (see p. 56) "Cloud de confiance" (see p. 56)	Several French banks have been fined for breaching US sanction programs under the IEEPA, TWEA or Export Control Reform Act.[15]
Germany		Germany can impose fines of up to €500 000 for any breaches of the EU Blocking Statute.[16] Breaches are regulated by the German Foreign Trade and Payments Act and the EU High Representative of the Union for Foreign Affairs and Security Policy.	The German branch of the UniCredit Bank had to pay fines for illegally moving hundreds of millions of dollars through the US financial system on behalf of sanctioned entities in 2019, in violation of the IEEPA.[17]

[12] The Riigikogu, "The Riigikogu passed 19 legal acts", *Riigikogu* [Press Release] (7 Dec. 2022), https://www.riigikogu.ee/en/sitting-reviews/the-riigikogu-passed-19-legal-acts/, accessed 14 Dec. 2023.

[13] A. Walsh, R. Reznick, "The United States' Danske Bank Investigation – This is Something Different", *Orrick* (29 Oct. 2018), https://www.orrick.com/en/Insights/2018/10/The-United-States-Danske-Bank-Investigation-This-is-Something-Different, accessed 14 Dec. 2023.

[14] Finnish Parliament, "Act on Provisions Supplementing Council Regulation (EC) No 2271/96", *Finlex Data Bank*, (15 April 1998), https://finlex.fi/en/laki/kaannokset/1998/en19980265.pdf, accessed 14 Dec. 2023.

[15] Timofeev, *Europe Under Fire*, para. 20.

[16] Wilkie Compliance, "Overview of German Sanctions and Exports Controls", *Wilkie Compliance*, https://complianceconcourse.willkie.com/resources/overview-of-german-sanctions-and-export-controls/, accessed 14 Dec. 2023.

[17] Timofeev, *Europe Under Fire*, para. 20.

Country	National Debate	National Defensive Instruments	Impact of Extraterritorial Sanctions
Greece			
Hungary			In 2023, the US imposed sanctions on the Hungary-based, but Russia-controlled, International Investment Bank (IIB) for threatening to undermine European security and NATO.[18]
Ireland	Since the 1990s, debates about the extraterritorial effects of the US embargo on Cuba have taken place in the Oireachtas, the Irish Parliament. Other debates about extraterritoriality have also taken place.		
Italy	In 2018, the US withdrew from the Joint Comprehensive Plan of Action (JCPOA). In light of this decision, the Italian government reiterated its support for the EU Blocking Statute.[19] In 2021, the Italian Banking Association also expressed support for the amended EU Blocking Statute.[20]	The Italian Foreign Ministry is responsible for ensuring compliance with the EU Blocking Statute[21] and can impose administrative sanctions where necessary.[22]	The Italian branch of the UniCredit Bank had to pay fines for breaching US sanctions in 2019.[23]

[18] Ukrainian World Congress, "U.S. imposes sanctions on Hungary for evading sanctions on Russia", *Ukrainian World Congress* (12 April 2023), https://www.ukrainianworldcongress.org/u-s-imposes-sanctions-on-hungary-for-evading-sanctions-on-russia/, accessed 14 Dec. 2023.

[19] Senato Della Repubblica, "Legislatura 18 Atto di Sindacato Ispettivo n° 1-00059", *Senato Della Repubblica* (29 Nov. 2018), https://www.senato.it/japp/bgt/showdoc/frame.jsp?tipodoc=Sindisp&leg=18&id=1083638, accessed 14 Dec. 2023.

[20] T. Tafani, "Feedback from: Italian Banking Association", *European Commission* (30 Aug. 2021), https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13129-Unlawful-extra-territorial-sanctions-a-stronger-EU-response-amendment-of-the-Blocking-Statute-/ F2668873_en, accessed 14 Dec. 2023.

[21] Camera dei deputati - XVIII LEGISLATURA, "Disposizioni per l'adempimento degli obblighi derivanti dall'appartenenza dell'Italia all'Unione europea – Legge europea 2019-2020", *Camera dei deputati* (17 Nov. 2020), ARTICOLO 9 - Attuazione del regolamento (CE) n. 2271/96 - "regolamento di blocco", http://documenti.camera.it/leg18/dossier/pdf/VQ2670.pdf, accessed 14 Dec. 2023.

[22] Philippe Bonnecarrère, "Proposition de résolution au nom de la commission des affaires européennes, en application de l'article 73 quater du Règlement sur l'extraterritorialité des sanctions américaines", *Sénat Français*, (4 Oct. 2018), Le Projet de platforme comptable autonome, https://www.senat.fr/rap/r18-017/r18-017_mono.html#toc13, accessed 14 Dec. 2023.

[23] Timofeev, *Europe Under Fire*, para. 20.

Country	National Debate	National Defensive Instruments	Impact of Extraterritorial Sanctions
Latvia	Extraterritoriality is present in the national parliamentary debate but mostly in relation to Russia or hard security questions.	Latvia has an FDI screening mechanism that is part of its national security law.[24]	
Lithuania			In 2021, Lithuania opened a Taiwan Representative Office in Vilnius (instead of a "Taipei" office, in violation of the One China principle).[25] In response, China imposed coercive economic pressure on Lithuania.
Luxembourg	In 2019, Luxembourg's Parliament received a petition calling on the government to oppose the extraterritoriality of US sanctions on Cuba. This petition called for the revival of an unused EU instrument to counter the impact of third-country legislation. However, it fell short of the required votes (85 out of 4500) for a debate in the Chamber of Deputies. The 2022 European Policy Report by Luxembourg's government briefly mentions extraterritoriality in the context of the EU Commission's working groups on sanctions, specifically addressing measures against Russia.	"Loi du 27 juin 2018" regulating the transit, transfer and export controls of civil goods, defense-related products and dual-use items; relating to the brokering and technical assistance, intangible transfer of technology; on implementation of UN Security Council and EU Resolutions on commercial restrictions against specific entities.[26]	

[24] P. De Baere, "Foreign Direct Investment - Latvia", *Van Bael & Bellis* (15 Oct. 2020), 1. Scope, https://www.vbb.com/insights/FDI/Latvia, accessed 14 Dec. 2023.

[25] S. Blockmans, "Lithuania, China and EU lawfare to counter economic coercion", *CEPS*, https://www.ceps.eu/ceps-publications/lithuania-china-and-eu-lawfare-to-counter-economic-coercion/, accessed 14 Dec. 2023.

[26] Henri, Grand-Duc de Luxembourg, Duc de Nassau, "Loi du 27 juin 2018", *Journal Officiel du Grand Duché de Luxembourg* (20 July 2018), https://legilux.public.lu/eli/etat/leg/loi/2018/06/27/a603/jo, accessed 14 Dec. 2023.

Country	National Debate	National Defensive Instruments	Impact of Extraterritorial Sanctions
Malta			In August 2020, the US Treasury Department sanctioned Alwefaq Ltd, a Malta-based company, and three individuals for smuggling fuel and illicit drugs from Libya into Malta. The company was blacklisted and US assets were frozen.
Netherlands	In 2018, the Dutch government supported the revision of the EU Blocking Statute in light of the US withdrawing from the JCPOA, but it also called on close cooperation with the US.[27] The Netherlands examined the impact of the US CLOUD Act on the EU.[28] In 2023, the Dutch government was concerned about the extraterritorial scope of China's 2022 Data Security Law and identified potential conflicts between the Dutch and Chinese national security interests.[29]	In 1977, the government issued a sanctions Act which criminalizes breaches and violations of international sanctions.[30]	Different companies and banks were found in breach of US sanctions in the Netherlands in 2020, including ING Group and ASML.
Poland			
Portugal			
Romania			In 2021, the US Department of the Treasury's OFAC fined Romanian First Bank $860,000 after it violated US sanctions imposed on Iran and Syria.[31]

[27] Staatssecretaris Van Economische Zaken, "Nieuwe Commissievoorstellen en initiatieven van de lidstaten van de Europese Unie", *Tweede Kamer der Staten-Generaal* (3 June 2009), http://bit.ly/3Tv722l, accessed 14 Dec. 2023.

[28] National Cyber Security Center, "How the CLOUD-Act works in data storage in Europe", *National Cyber Security Center* (16 Aug. 2022), https://english.ncsc.nl/latest/weblog/weblog/2022/how-the-cloud-act-works-in-data-storage-in-europe, accessed 14 Dec. 2023.

[29] Tweede Kamer der Staten-Generaal, "Brief van de van de ministers van buitenlandse zaken, voor buitenlandse handel en ontwikkelingssamen-werking en van economische zaken en klimaat", Tweede Kamer (13 Jan. 2023), https://www.google.com/url?q=https://www.tweedekamer.nl/downloads/document?id%3D2023D00699&sa=D&source=docs&ust=1702568864507519&usg=AOvVaw1zC3nnnb1KZsMmUbj78MBP, accessed 14 Dec. 2023.

[30] Government of the Netherlands, "Dutch government policy on international sanctions", Government of the Netherlands, https://www.government.nl/topics/international-sanctions/policy-international-sanctions, accessed 14 Dec. 2023.

[31] R. Amin, "Trade Finance: OFAC fines another non-U.S. bank for violation of Iranian and Syrian sanctions", *S&P Global* (20 Sept. 2021), https://www.spglobal.com/marketintelligence/en/mi/research-analysis/trade-finance-ofac-fines-another-nonus-bank-for-violation.html, accessed 14 Dec. 2023.

Country	National Debate	National Defensive Instruments	Impact of Extraterritorial Sanctions
Slovakia			
Slovenia			
Spain	Parliamentary discussions on EU matters have referred to extraterritoriality.	Spain issued a national law in 1998 to enforce the EU Blocking Statute "Ley 27/1998". The government can impose sanctions for non-compliance.[32]	
Sweden		Sweden passed a law to supplement the EU Blocking Statute.[33] It introduces criminal sanctions (fines or imprisonment) against firms or persons that are found in breach of Articles 2 and 5 of the Blocking Statute. It introduces criminal sanctions (fines or imprisonment) against firms or persons that are found in breach of Articles 2 and 5 of the Blocking Statute.	

[32] Jefatura del Estado, "Ley 27/1998, de 13 de julio, sobre sanciones aplicables a las infracciones de las normas establecidas en el Reglamento (CE) número 2271/96", *Boletín oficial de estado* (14 July 1998), https://www.boe.es/eli/es/l/1998/07/13/27/con, accessed 14 Dec. 2023.

[33] Sveriges Riksdag, "Lag (1997:825) om EG:s förordning om skydd mot extraterritoriell lagstiftning som antas av ett tredje land", *Riksdagen*, https://www.riksdagen.se/sv/dokument-och-lagar/dokument/svensk-forfattningssamling/lag-1997825-om-egs-forordning-om-skydd-mot_sfs-1997-825/, accessed 14 Dec. 2023.

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- Over 60 primary and secondary sources analyzed;[99]
- Over 15 interviews with senior officials from EU institutions, member-state governments and third countries;[100]
- Over 20 interviews with senior representatives from the private sector, public sector (including national parliaments) and academia;
- 3 workshops with leading experts and companies dealing with the repercussions of extraterritorial measures.[101]

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[99] This includes official EU documents, US Government, House and Senate reports as well as academic research papers from Europe and beyond.

[100] All interviews were held under the Chatham House Rule. Those interviewed included officials from various European Commission Directorates-General (departments) and from governments of North America, Asia, Europe and Oceania.

[101] All workshops were organized between April and September 2023. These were also held under the Chatham House rule.

Institut Montaigne welcomes thoughts and ideas on how to address these issues collectively to put forward recommendations which serve the public interest.

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LVMH - Moët-Hennessy - Louis Vuitton
M.Charraire
MACSF
MAIF
Malakoff Humanis
Mazars
Média-Participations
Mediobanca
Mercer
Meridiam
Microsoft France
Mitsubishi France S.A.S
Moelis & Company
Moody's France
Morgan Stanley
Natixis
Natural Grass
Naval Group
Nestlé
OCIRP
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Oliver Wyman
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Publicis
PwC France & Maghreb
Raise
RATP
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Rivolier
Roche
Rokos Capital Management
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RTE
Safran
Sanofi
SAP France
Schneider Electric
ServiceNow
Servier
SGS
SIER Constructeur
SNCF
SNCF Réseau
Sodexo
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Vivendi
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Wavestone
Wendel
White & Case
Willis Towers Watson France
Zurich

European competitiveness is under threat. Demographic and digital trends are transforming European societies and economies. Inflation is high and politics are more fractured. The US-China tech rivalry is intensifying and companies are feeling the squeeze. European governments, like countries around the world, are under intense pressure to safeguard their interests. Many are turning to law to achieve this.

Extraterritoriality – that is, the application of national laws abroad – is not a new phenomenon, but it is gaining traction. In many ways, it is necessary: to uphold international law where multilateral organizations and treaties prove ineffective; to sanction bad behavior; and to prevent hostile actors from posing a risk to others. Extending the reach of national laws helps to stop sanctions evasion, protect consumers and ensure financial stability.

But its excessive use can also pose risks to individuals, companies and governments. Billions of dollars' worth of fines, lengthy and costly legal proceedings, diplomatic spats between governments and handover of business plans to foreign authorities. In the last few years, it has even come to be seen as a tool to secure political power and influence. Despite this realization, the European debate on extraterritoriality is virtually nonexistent. It was also entirely absent from the European Commission's June 2023 strategy on economic security.

Institut Montaigne's latest issue paper provides a framework for understanding the global debate on extraterritoriality and the EU's response to it. It stems from in-depth research and over 50 interviews with senior officials from EU institutions, member-state governments and third countries; as well as discussions with senior representatives from the private sector, public sector and academia. In 2024, a new European Parliament and European Commission will be formed. **Extraterritoriality is one of the EU's blind spots: the time to act is now.**

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