



US Sanctions: No conflict, no Nordstream threat — An opportunity for greater EU-US cooperation

Alan Riley

Summary

The new US sanctions law – Countering America’s Adversaries through Sanctions Act 2017 – is not a legal monster threatening European interests. It stems from specific and legitimate concerns on Capitol Hill about the threat to the integrity of US democratic institutions flowing from cyber-attacks by the Russian Federation and the behaviour of the current President. The law’s most substantial legislative footprint merely codifies into law the Obama-era executive orders already agreed with the European Union. On a more positive note, the sanctions law provides opportunities for the US and the EU to cooperate to protect the West’s democratic institutions against future cyber-warfare attacks and to enhance European supply security.

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1. The US sanctions law: Between the idea and the reality

The US sanctions law, Countering America's Adversaries through Sanctions Act 2017,¹ which was signed by President Trump on 2 August 2017, has come under heavy fire from some European capitals. The German Economy Minister Brigitte Zypries called upon the European Commission to consider counter measures against the United States. She told the German media that "we consider this [the sanctions] to be a violation of international law".² Meanwhile in Brussels, Commission President Jean-Claude Juncker also expressed alarm at the US sanctions law and indicated that the EU should be prepared to "defend its economic interests against the United States".³ The German Foreign Minister Sigmar Gabriel and the Austrian Chancellor Christian Kern alleged in a joint statement in mid-June that the US in fact had a covert motive in adopting the sanctions. Far from really being about responding to Russian cyber-warfare aimed at the US presidential elections, in their view, the sanctions legislation was merely a cover to promote the commercial interests of the United States. They both damned the legislation as aimed at "selling American liquid natural gas and ending the supply of Russian natural gas to the European market".⁴

The difficulty with all this outrage is that it overlooks both the reasons for the legislation and its actual text. In fact, far from threatening European interests, the sanctions legislation supports key European concerns and can further serve to defend a range of European political and energy interests.

If one truly seeks to understand the purpose and content of the US legislation, it is helpful if one also tries to understand the motivation of Congress in proposing the legislation. Following the emergence of evidence that Russia interfered in the US Presidential election in 2016, the

¹ H.R.3364, Countering America's Adversaries through Sanctions [Act](#), 2 August 2017.

² "[Germany Urges EU Counter-measures against US over Russia Sanctions](#)", Reuters, 31 July 2017.

³ "European Commission President Juncker: New US Sanctions on Russia only after consultation of allies", European Commission statement, 2 August 2017.

⁴ "[Foreign Minister Gabriel and Austrian Federal Chancellor Kern on the imposition of Russia sanctions by the US Senate](#)", German Federal Foreign Office, 15 June 2017.

US understandably wanted to hit back at the Russian Federation.⁵ Congress wanted to take action against the disinformation, cyber-warfare and the other measures used by the Russian Federation to interfere in the US election. Secondly, there was a concern on Capitol Hill that President Trump would suddenly cancel the Obama-era executive orders on which current US sanctions against Russia are based.⁶ These sanctions are currently in force and were agreed in coordination with the European Union.

As a consequence, the major area of expansion of sanctions in the new law is aimed at cyber-warfare, particularly where it can be deployed to undermine democratic institutions. This new field of sanctions law could also be deployed to assist EU member states, which also fear that their national elections may be compromised by Russian interference.

To deal with the other major Congressional concern, namely capricious Presidential revocation of existing executive orders, the most significant legislative footprint of the new law takes the form of codifying Obama-era executive orders into statutes so that they cannot be easily revoked by President Trump.

Furthermore, despite the focus in the German media on the impact of the sanctions law on the proposed Nordstream 2 pipeline, the sanctions law has no immediate impact on that pipeline. The President's signature on August 2nd does not result in any sanctions being imposed upon Nordstream 2. This is because, unlike almost all other sanctions in the Act, the key section 232, which deals with Russian export pipelines, only grants the President the power to impose sanctions. But there is no mandatory obligation to immediately impose any sanctions at all.

It is also difficult, looking at the history of this legislation, to agree with Foreign Minister Gabriel and Chancellor Kern that there is an underlying commercial plan behind it. Congress was driven by the intention to punish Moscow for interfering in the US elections, in combination with a concern that the current President may override the existing sanctions.

Nor can one easily attribute covert commercial motivations to the US in practical terms. Even if the US had immediately imposed sanctions under the legislation on Nordstream 2, the US would not stand to gain in any way from such action. Nordstream 2, just like Nordstream 1, is likely to be a diversionary pipeline,⁷ which means that the natural gas flowing through it will

⁵ There is an avalanche of information on this subject emanating from hearings on Capitol Hill and from think tanks across Washington. A good place to start is the testimony provided by former FBI Director James Comey to the US Senate Intelligence Committee. See "Full Transcript and Video: [James Comey's Testimony on Capitol Hill](#)", New York Times, 8 June 2017.

⁶ According to the distinguished US diplomat Ambassador Daniel Fried, this was not a theoretical possibility. Immediately on assuming office, President Trump's White House staff started preparing the ground for the cancellation of sanctions. See "[Trump Officials Pressed State Department Staffers to Lift Russian Sanctions: Report](#)", The Hill, 1 June 2017.

⁷ Whilst it is possible that NS2 could provide additional natural gas into the European Union, there are several reasons why this is unlikely to happen. First, as with NS1, Gazprom appears to be planning to build a second set of parallel pipelines from the existing Russian gas fields to the Russian landfall site from where natural gas will be dispatched via Nordstream 2. Second, Russia has sustained a policy at least from the early 2000s to run down the

likely be diverted from the existing Yamal and Brotherhood Pipelines flowing, respectively, through Belarus and Poland and through Ukraine and Slovakia into Western Europe. If Nordstream 2 is not built, then gas will continue to flow through the existing pipelines, ensuring the continued flow of Russian gas into the EU. Thus, it is unlikely that any sanctions against NS2 will provide US LNG companies with new opportunities in European markets.

It is true that President Trump has called for the United States to obtain “energy dominance”, but this President’s rhetoric is not a significant influence on Congressional action.⁸ One can go even further and say that the President’s rhetoric and policy intentions are increasingly not decisive factors in the development of US foreign policy in the Trump era. One of the sources of the outrage over the legislation in some European capitals may have been a confusion between the President’s rhetoric and Congressional intent. The former in modern American politics may not necessarily have much to do with the latter, and the latter now weighs far more heavily in the development of US foreign policy.

2. The US sanctions law: A closer look

It is worth contrasting the concern and outrage expressed in Europe over the sanctions law with some of its actual text.

In two provisions, Sections 212 and 252, Congress reiterates the need for EU-US cooperation and support for the European Union. It instructs the President to “continue to uphold and seek unity with European and other key partners on sanctions implemented against the Russian Federation”. Congress also calls in Section 252 for continued support of the European Union against attempts by the Government of the Russian Federation to undermine it and emphasises the role of the EU as a partner against Russian aggression.

One of the main pillars of the law is Section 222 which merely codifies existing sanctions adopted by executive order under President Obama in statutory form and protects them, via congressional review, from being cancelled by the President. This is in essence the existing sanctions regime designed in cooperation with the EU, and brought into force in parallel with EU regulations.

supply of natural gas via Ukraine. The recent annexation and occupation of Ukrainian territory will only exacerbate the gas reduction flow policy. A third reason, which is not further discussed in this article, is the ongoing development of Turkish Stream (or TurkStream). The second string is currently being laid, which will give Gazprom the means to reduce flows further, providing additional evidence of diversionary intent of its export pipeline policy.

⁸ It is also true that Section 257 (10) states: “The United States government should prioritize the export of United States energy resources in order to create American jobs, help United States allies and partners, and strengthen United States foreign policy.” This has been interpreted in some quarters as an indication that the US plans to use sanctions to promote US energy exports, particularly LNG, whereas in fact, Section 257(10) merely re-states the export policy of the United States as it has been throughout the Obama era. This policy was created, promoted and then developed by President Obama. It does not indicate an attempt to obtain new opportunities for US business via sanctions. As explained in the main text, the most concrete allegation made on this subject regarding Nordstream 2 does not stand up to close examination.

The other major pillar of the legislation reflects US concerns over Russian interference in US elections, and the consequent need to counter and respond to Russian actions is principally contained in Section 224. This provision represents the most significant expansion of sanctions in the new legislation. It seeks to impose mandatory sanctions with respect to cyber-warfare and the undermining of democratic institutions by the Government of the Russian Federation.

Section 224 instructs the US government to enact sanctions against any person who “knowingly engages in significant activities undermining cyber security against any person, including a democratic institution, or government on behalf of the Russian Federation”.

“Significant activities undermining cyber-security” includes denial of access to degradation, disruption or destruction of the information communications technology system or network. The section also covers the exfiltration, degradation, corruption, destruction or release of information from such networks. Such actions will be subject to sanctions when they are undertaken for the purposes of conducting influence operations; causing significant misappropriation of funds, personal identification or financial information for gain, economic resources or trade secrets; significant destructive malware and denial of service attacks.

The point to recognise here is that the sanctions that are to be imposed by the United States will not only seek to protect the US, but also the democratic institutions of other states that come under attack from the Government of the Russian Federation.

In contrast to the other major provisions of the sanctions law, the most controversial energy provisions, which relate to Russian export pipelines contained in Section 232, are not mandatory. They merely give the President the power to adopt sanctions with respect to Russian energy export pipelines. There is therefore no possibility that sanctions will be immediately imposed reflecting the maximal scope of the powers contained in Section 232. Instead, the White House will consult with the State Department, the Energy Department, Congress, industry and civil society, as well as crucially its allies, and if any sanctions are to be adopted they will be drawn much more narrowly than the provision upon which they are based.

Furthermore, the President is already empowered under existing US legislation to sanction pipelines such as Nordstream 2. Consequently, the imposition of statutory language by Congress for any measures to be adopted “in coordination with the allies of the United States” means that in comparison with the position prior to the enactment of the sanctions law, the law effectively limits Presidential discretion by imposing a new coordination requirement that had not previously existed.

Similarly, Section 223 introduces a restriction on the imposition of sanctions on Russian investments in the energy sector, where such investments involve only a minority stake (up to one-third). This again demonstrates that the sanctions law is far more balanced than reported and provides a degree of legal security for investors that had not previously existed.

In short, there is a stark contrast between the pronouncements by numerous European politicians about the sanctions law and its actual text. On close examination, it is difficult to see why, even with an election in prospect, the law has been so strongly condemned. The analysis

above shows that the text focuses significantly on ensuring that the existing sanctions regime remains in place, that it principally extends sanctions in a direction (cyber-warfare) that could be of assistance to the EU member states, and in the context of Nordstream 2, only grants the President powers to act against export pipelines, on the condition that such action would be coordinated with America's allies.

3. Conclusions: The US sanctions law – less about conflict and more about cooperation

The underlying argument of this contribution is that the US sanctions law offers important opportunities for cooperation. Its main legislative focus merely codifies existing executive orders into statutes, and the main point of contention is a discretionary sanction power that if used will be crafted into an executive order in coordination with US allies. It is hard to construe a commercial intent.

The two most immediate areas for potential additional cooperation concern cyber-warfare attacks and energy security, i.e. with respect to natural gas. In the former area, one immediate opportunity arises from the obligation in Section 224 to adopt mandatory sanctions against cyber-warfare directed by the Government of the Russian Federation against democratic institutions. Germany's general elections take place on September 24th, and according to the country's federal intelligence agency BfV, more Russian-sourced cyber-attacks are expected to take place in the run up to the election.⁹

There is a compelling argument for the EU institutions, the German government and other member states to seek rapid action from Washington to introduce a new cyber-warfare sanctions regime, which would provide some deterrence before the final weeks of campaigning in the German election. The aim of such sanctions would be to raise the costs of any action against Western democracies, to deter individuals willing to participate in cyber aggression and severely punish those who do engage in such actions.

It is also likely that EU and especially German participation in jointly developing a tough set of cyber-warfare sanctions with the US to protect democratic institutions across the West would have a significant impact on Moscow. One of the principal aims of Russia's cyber-aggression is to divide the West. If the EU and the US cooperate in adopting a new cyber sanction regime, it would undermine both Moscow's means and objective. The Kremlin would be forced to reconsider its tactics.

The new sanctions law also provides a means of enhancing EU gas supply security. The member states are currently engaged in discussions to grant a mandate to the European Commission to negotiate an Intergovernmental Agreement between the EU and Russia that would govern the

⁹ ["Germany challenges Russia over alleged cyber-attacks"](#), Reuters, 4 May 2017.

construction, legal regime and operation of Nordstream 2.¹⁰ In coordination with the EU, the US could adopt an executive order that would increase the Commission's negotiating leverage with Russia.

Support for Nordstream 2 is controversial amongst the member states and the building of a consensus on the Union's approach to the pipeline is likely to be difficult. However, there are at least a couple of questions surrounding Nordstream 2 where a consensus may be obtainable.

In the first instance, Nordstream 2 envisages placing a second set of pipelines alongside Nordstream 1. This would mean putting 25% of European gas consumption and 70% of non-European imports in a narrow two-kilometre channel in the shallow Baltic sea. The danger here is that the putting so much energy resource in such a single narrow channel creates an artificial choke point similar to the situation in the Straits of Hormuz. Such a development could heighten Europe's supply vulnerability.

Secondly, there is a real concern that Nordstream 2, like Nordstream 1, will only be a diversionary pipeline and will not actually bring any new gas to the EU. Instead, it would simply switch gas from the Ukrainian (Brotherhood) pipeline network to Nordstream 2.

The adoption of a US executive order crafted around even one of these European concerns would strengthen the hand of the European Commission in its negotiations with the Russian Federation. If agreement could be reached between the EU member states and an executive order adopted, the European Commission would then be in a better position to advance the objectives of the Energy Union.

With respect to European concerns surrounding both cyber and energy security, the sanctions law provides an opportunity for additional cooperation rather than new conflict. Brussels and the member states should seize this opportunity to enhance cooperation not just with the executive branch but also with the legislative branch of the US government.

¹⁰ ["European Commission seeks a Mandate from Member States to Negotiate with Russia an Agreement on Nordstream 2"](#), Press Release IP/17/1571, European Commission, 9 June 2017.



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