

BETWEEN A ROCK AND A HARD PLACE? THE EU EXPANDS ITS BLOCKING REGULATION FOLLOWING THE US ANNOUNCED WITHDRAWAL FROM THE IRAN NUCLEAR DEAL

Last week, the European Commission published a draft regulation which will expand the scope of Council Regulation (EC) No 2271/96 (the "**Blocking Regulation**"). This measure, which is intended to protect the Iran-related business interests of European companies, is part of the EU's response to the US decision to re-impose US nuclear-related sanctions against Iran that it had suspended as part of the Joint Comprehensive Plan of Action (JCPOA). When implemented, EU persons may find that they face competing compliance obligations and risks under US Iran-related sanctions and the Blocking Regulation when it comes to engaging in business in Iran.

US WITHDRAWAL FROM THE JCPOA

On 8 May 2018, President Trump announced his decision to withdraw the US from the JCPOA. Following a wind-down period (to allow commercial disengagement with Iran), this action will result in the re-imposition of US nuclear-related sanctions against Iran that the US had suspended or revoked under the JCPOA in January 2016. The US is set to re-impose the first phase of sanctions on 6 August 2018 (i.e. following a 90 day wind down period), with further sanctions to be re-imposed in November 2018. The re-imposition of these so-called "secondary sanctions" will heighten risk for non-US companies that engage in business with Iran after the wind-down period, even where that activity remains legal under their local legislation. The US assertion of authority to impose sanctions on non-US companies who engage in non-US business with Iran has attracted a heated response from major trading partners, including the EU. Our client briefing on the US withdrawal from the JCPOA can be accessed [here](#).

THE EU'S COMMITMENT TO THE JCPOA

Shortly after the announcement of the US's decision to withdraw from the JCPOA, the EU reaffirmed its commitment to the full and effective implementation of the JCPOA, for so long as Iran respects its obligations under the deal.

Key issues

- In response to the US decision to withdraw the US from the Iran nuclear deal, and to re-impose Iran-related sanctions, the EU has reaffirmed its commitment to the full and effective implementation of the Iran nuclear deal.
- As part of its commitment, last week, the EU published a draft regulation expanding the scope of its Blocking Regulation, as a means of protecting against and counteracting the extraterritorial effects of certain listed US sanctions set to be re-imposed that heighten the risk for non-US companies that engage with Iran.
- The EU measure potentially places EU persons in a conflict of law position where they make decisions not to engage in Iranian business as a result of US sanctions concerns.
- Much may depend on the enforcement appetite of Member States to pursue EU persons who determine not to do business with Iran as a result of US sanctions concerns, as well as how the Blocking Regulation may be interpreted.
- EU persons affected should therefore monitor developments closely in making commercial decisions with respect to Iran in the coming months.

On 18 May 2018, the European Commission announced that, pursuant to this objective, it would take measures to "*preserve the interests of European companies investing in Iran and demonstrate the EU's commitment*" to the JCPOA. The European Commission then, on 6 June 2018, published a draft regulation intended to update the Blocking Regulation and to bring within its scope, the US Iran-related sanctions that will be re-imposed. Appended to this briefing is the text of the draft regulation setting out the US Iran-related sanctions and what is prohibited by those sanctions.

WHAT IS THE BLOCKING REGULATION?

The Blocking Regulation, when enacted over 20 years ago, was designed to protect against and counteract the extraterritorial effects of certain listed US sanctions, by purportedly providing protection against their effect to EU persons. At present, its principal relevance has been in the context of US sanctions against Cuba.

Under Article 5, those subject to the Blocking Regulation (which includes all EU-incorporated companies, EU nationals and others within the EU) are prohibited from complying "*whether directly or through a subsidiary or other intermediary person, actively or by deliberate omission, with any requirement or prohibition*" of the US laws listed in the Annex. Non-compliance may give rise to civil and even criminal liability, with penalties for non-compliance determined by local law in individual EU Member States. There is an exception which provides that full or partial compliance with listed US laws may be authorised where there is sufficient evidence that noncompliance would seriously damage the interests of the relevant EU persons in question or those of the EU generally.

In addition, the Blocking Regulation prohibits the recognition within the EU of any judgment of a non-EU court, tribunal or administrative authority giving effect to the listed US sanctions, and provides for EU persons engaging in activities covered by those sanctions to claim damages caused by any person applying the listed sanctions.

WHAT NEXT?

The European Council and European Parliament have two months to object to the US Iran-related sanctions being brought within the scope of the Blocking Regulation. Subject to any objection, the amendments to the Blocking Regulation are expected to come into effect no later than 6 August 2018, the date on which the first phase of the US's Iran-related secondary sanctions are set to be re-imposed.

When the amendments take effect, the Blocking Regulation will prohibit compliance by EU persons with the re-imposed US Iran-related sanctions listed in the updated Annex. EU persons affected directly or indirectly by the listed sanctions would also have an obligation to notify the European Commission (either directly or through the competent authorities in the relevant Member States) within 30 days.

By amending the Annex to the Blocking Regulation in this way, while seeking to protect them, the EU potentially places EU persons in a conflict of laws position where they make decisions not to engage in Iranian business as a result of US sanctions concerns. Much may depend on the enforcement appetite of Member States to pursue those who determine not to do business with Iran as a result of US sanctions concerns, as well as how the Blocking

Regulation may be interpreted. The US secondary sanctions purport to apply to all non-US persons who engage in targeted activities. Accordingly, in the meantime, balancing the potentially competing risks under US sanctions concerns and the Blocking Regulation may become a necessary component of decision-making in relation to Iranian business.

EU persons affected should therefore monitor developments closely in making commercial decisions with respect to Iran in the coming months.

APPENDIX

Text of the draft regulation as it relates to US Iran-related sanctions

Note: The main provisions of the instruments contained in this Annex are summarised only for information purposes. The full overview of provisions and their exact content can be found in the relevant instruments.

'IRAN SANCTIONS ACT OF 1996'

Required compliance:

Not to knowingly:

- (i) invest in Iran at least USD 20 million during a period of 12 months that directly and significantly contributes to the enhancement of the Iranian ability to develop their petroleum resources;
- (ii) provide to Iran goods, services or other types of support any of which is worth USD 1 million or more, or of aggregate value of USD 5 million or more over a period of 12 months, that could directly and significantly facilitate the maintenance or expansion of Iran's domestic production of refined petroleum products or its ability to develop petroleum resources located in Iran;
- (iii) provide to Iran goods, services or other types of support any of which is worth USD 250 000 or more, or of aggregate value of USD 1 million or more over a period of 12 months, that could directly and significantly contribute to the maintenance or expansion of Iran's domestic production of petrochemical products;
- (iv) provide to Iran (a) refined petroleum products or (b) goods, services or other types of support which could directly and significantly contribute to the enhancement of Iran's ability to import refined petroleum products, any of which is worth USD 1 million or more, or of aggregate value of USD 5 million or more over a period of 12 months;
- (v) participate in a joint venture for the development of petroleum resources outside of Iran established on or after 1 January 2002 and in which Iran or its Government has particular interests;
- (vi) be involved in the transport of crude oil from Iran or conceal the Iranian origin of cargo consisting in crude oil and refined petroleum products;

Possible damages to EU interests:

Measures to limit imports into USA or procurement to USA, prohibition of designation as primary dealer or as repository of US Government funds, denial of access to loans from US financial institutions or transfers through such institutions, prohibition of transactions in foreign exchange subject to the jurisdiction of the USA, export restrictions by USA, prohibition of property transactions subject to the jurisdiction of the USA, or refusal of assistance by EXIM-Bank, landing and port-calling restrictions for vessels.

'IRAN FREEDOM AND COUNTER-PROLIFERATION ACT OF 2012'

Required compliance:

Not to knowingly:

- (i) provide significant support, including by facilitating significant financial transactions, or goods or services, to or on behalf of certain persons operating in the ports, energy, shipping, or shipbuilding sectors in Iran, or any Iranian person included in the list of specially designated nationals and blocked persons;
- (ii) trade with Iran in significant goods and services used in connection with the energy, shipping or shipbuilding sectors of Iran;
- (iii) purchase petroleum and petroleum products from Iran and conduct financial transactions related with them, in specific circumstances;
- (iv) conduct or facilitate transactions for the trade in natural gas to or from Iran (applies to foreign financial institutions);
- (v) trade with Iran in precious metals, graphite, raw or semi-finished metals, or software that may be used in specific sectors or involve certain persons; nor facilitate a significant financial transaction in connection with such trade;
- (vi) provide underwriting services, insurance and reinsurance related to specific activities, including but not limited to those under points (i) and (ii) above, or to specific categories of persons;

Certain exceptions apply depending on the nature of the trade or transaction and the level of due diligence applied.

Possible damages to EU interests:

Measures to limit imports into USA or procurement to USA, prohibition of designation as primary dealer or as repository of US Government funds, denial of access to loans from US financial institutions or transfers through such institutions, prohibition of transactions in foreign exchange subject to the jurisdiction of the USA, export restrictions by USA, prohibition of property transactions subject to the jurisdiction of the USA, or refusal of assistance by EXIM-Bank, prohibitions and limitations to the opening and maintenance of correspondent accounts in the USA.

'NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2012'

Required compliance:

Not to knowingly conduct or facilitate any significant financial transaction with the Central Bank of Iran or another designated Iranian financial institution (applies to foreign financial institutions).

Exceptions for food and medicine-related transactions and for petroleum-related transactions under specific circumstances.

Possible damages to EU interests:

Civil and criminal penalties; prohibitions and limitations to the opening and maintenance of correspondent accounts in the USA.

'IRAN THREAT REDUCTION AND SYRIA HUMAN RIGHTS ACT OF 2012'

Required compliance:

Not to knowingly:

- (i) provide underwriting services, insurance or reinsurance to certain Iranian persons;
- (ii) facilitate the issuance of Iranian sovereign debt, or of debt of entities controlled by the latter;
- (iii) engage in any transaction directly or indirectly with the Government of Iran or any person subject to the jurisdiction of the Government of Iran prohibited by US law (applies to foreign subsidiaries owned or controlled by US persons);
- (iv) provide specialized financial messaging services to, or enable or facilitate direct or indirect access to such messaging services for the Central Bank of Iran or a financial institution whose interests in property are blocked in connection to Iran's proliferation activities.

With regard to (i), there are exceptions for humanitarian assistance, food and medical products supply, and depending on the level of due diligence applied.

Possible damages to EU interests:

Measures to limit imports into USA or procurement to USA, prohibition of designation as primary dealer or as repository of US Government funds, denial of access to loans from US financial institutions or transfers through such institutions, prohibition of transactions in foreign exchange subject to the jurisdiction of the USA, export restrictions by USA, prohibition of property transactions subject to the jurisdiction of the USA, or refusal of assistance by EXIM-Bank, prohibitions and limitations to the opening and maintenance of correspondent accounts in the USA.

'IRANIAN TRANSACTIONS AND SANCTIONS REGULATIONS'

Required compliance:

Not to reexport any goods, technology, or services that (a) have been exported from the USA and (b) are subject to export control rules in the USA, if the export is made knowing or having reason to know that it is specifically intended for Iran or its Government.

Goods substantially transformed into a foreign-made product outside the USA, and goods incorporated into such a product and representing less than 10 % of its value are not subject to the prohibition.

Possible damages to EU interests:

Imposition of civil penalties, fines and imprisonment.

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