

U.S. Sanctions v. EU Blocking Regulation: Conflicting Landscape Poses Challenges for Compliance

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On May 8, 2018, U.S. President Donald Trump announced the withdrawal of the United States from the Iranian nuclear deal (known as the Joint Comprehensive Plan of Action or “JCPOA”). Since then, a political standoff has emerged between the U.S. government and the other JCPOA signatories, which are seeking to keep the deal alive. The clearest example of this standoff is the European Union’s “Blocking Regulation,”¹ which prohibits EU companies from complying with U.S. sanctions against Iran. EU-based companies, caught between a rock and a hard place, must learn to navigate this difficult terrain.

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Background on U.S. Sanctions. For many years, the United States maintained a broad range of sanctions that sought to discourage non-U.S. persons from transacting with Iran. In applying these so-called “secondary sanctions,” the United States did not purport to exercise jurisdiction over non-U.S. persons. Rather, non-U.S. persons determined by the U.S. government to have engaged in certain commercial activities involving Iran—even if not involving the United States in any way—risked becoming targets of U.S. sanctions themselves.

In 2016, the United States suspended most of the secondary sanctions targeting activities involving Iran and permitted non-U.S. subsidiaries of U.S. companies, when acting independently of their U.S. parent companies, to engage in Iran-facing business activities. As a consequence, many EU-based companies began exploring commercial opportunities in Iran.

Following President Trump’s withdrawal from the JCPOA, the U.S. government announced in May that the secondary sanctions against Iran will be fully reinstated by November 4, 2018, and published additional guidance setting out the timelines and details of the reinstatement of secondary and other sanctions.² As a consequence of this shift in U.S. policy, many non-U.S. businesses have ceased, or begun to wind down, their dealings with Iran due to the renewed threat of U.S. secondary sanctions.

¹ Council Regulation (EC) No 2271/96, as amended.

² See OFAC, *Frequently Asked Questions Regarding the Re-Imposition of Sanctions Relating to the Joint Comprehensive Plan of Action* (May 8, 2018); Executive Order 13846 (Aug. 6, 2018).

EU Blocking Regulation. For EU-based companies, the situation is complicated by the expansion on August 7, 2018 of the EU Blocking Regulation to cover U.S. sanctions against Iran. The EU Blocking Regulation was introduced in 1996, and prohibited EU-based companies from taking actions, or omitting to take actions, to comply with U.S. sanctions against Cuba.³ The Blocking Regulation created a right to claim damages for losses caused by companies that comply with the U.S. sanctions regime.

Some EU Member States passed implementing legislation for the Blocking Regulation; in the United Kingdom, for example, violating it is a criminal offence. But in many jurisdictions, the Blocking Regulation was rarely considered relevant because there was little public enforcement of its provisions. As a result, some EU-based companies may not have fully considered the impact of the EU Blocking Regulation in developing their sanctions compliance policies. The amendment of the EU Blocking Regulation to encompass the U.S. sanctions regime against Iran, and the attention the issue has received, have put the regulation back into the spotlight.

Challenges for Firms Operating in the European Union. The European Union issued limited guidance on the Blocking Regulation the day it came into force.⁴ Yet there is little consensus on how the Blocking Regulation will be interpreted and enforced. EU-based companies should consider how best to navigate this uncertainty and reduce the risks they may incur under the twin spectre of the U.S. sanctions regime and EU Blocking Regulation. In particular, they may need to consider:

- **Sanctions policies** and whether they refer to compliance with U.S. sanctions laws. EU-based companies should consider whether these policies are compliant with the EU Blocking Regulation and whether there are ways to reduce risks of noncompliance.
- **Sanctions-related contractual provisions** and whether they could create risks under the EU Blocking Regulation in existing contracts or for future transactions. This issue has been complicated by the recent UK High Court decision in *Mamancochet Mining Ltd v. Aegis Managing Agency Ltd and Others* [2018] EWHC 2643 (Comm), which may limit the scope of the application of the EU Blocking Regulation to existing contracts.⁵
- **Ongoing business in Iran** and whether its continuation would expose the company to risks under U.S. sanctions or the EU Blocking Regulation, as well as potential

³ The EU Blocking Regulation also originally applied to the Iran and Libya Sanctions Act of 1996, which, in practice, was not implemented by the U.S. government.

⁴ Guidance Note 2018/C 277 I/03, “Questions and Answers: adoption of update of the Blocking Statute”.

⁵ This decision is discussed in our Client Update titled “UK High Court Rules on Sanctions Clauses in Insurance Contracts and Considers Application of the EU Blocking Regulation”.

money laundering or terrorism financing risks. For example, the Financial Action Task Force is considering whether Iran has undertaken sufficient anti-money laundering and counter-terrorism financing reform to keep it off the blacklist of problematic jurisdictions. The U.S. government also recently published an advisory on the Iranian government's use of shell companies to generate revenues for terrorist groups, ballistic missile development, human rights abuses and other malign activities.⁶ Although this guidance is directed at U.S. financial institutions, the information presented may be relevant to EU companies seeking to comply with EU anti-money laundering and counter-terrorist financing regulations.

- **Public disclosures and communications** and whether they should be revised in light of the EU Blocking Regulation.
- **Corporate governance** and adequacy of the sanctions approach for EU subsidiaries of U.S. companies.

Our sanctions practice would look forward to answering your questions regarding these complex issues in light of the specific circumstances of your business.

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⁶ See FinCEN, *Advisory on the Iranian Regime's Illicit and Malign Activities and Attempts to Exploit the Financial System* FIN-2018-A006 (Oct. 11, 2018).