



IRAN SANCTIONS: STEERING A COURSE THROUGH DIFFICULT WATERS

President Trump's announcement on 8 May 2018 that the US would withdraw from the Joint Comprehensive Plan of Action (JCPOA)¹ set the EU and US on divergent paths with respect to Iran. At the same time as the US indicated that the US sanctions which had been suspended in January 2016 would be re-imposed, the EU made clear that it intended to uphold the terms of the Iran deal, including the sanctions relief.

1. The JCPOA is an agreement concluded in 2015 between Iran and the P5+1. Under the JCPOA a number of US and EU sanctions on Iran were lifted provided Iran complied with certain nuclear-related requirements. On 8 May 2018 President Trump announced the US would withdraw from, and re-impose the US sanctions on Iran that were lifted under, the JCPOA.

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This divergence between the EU and the US creates a number of significant challenges for businesses, and this briefing sets out the issues which flow from the re-imposition of US sanctions, as well as recent measures by the EU to address the impact of US extra-territorial sanctions on EU businesses.

On 7 August 2018, as part of its package of measures to encourage EU businesses to continue to trade with Iran, pursuant to the terms of the JCPOA, the EU updated the EU Blocking Regulation (EC Regulation 2271/96) ('the Blocking Regulation') to reflect the latest US developments.

The Blocking Regulation, which has been in place since 1996, is designed as a counter-measure to certain foreign legislation which has extra-territorial effect. Because that legislation seeks to restrict the activities of EU entities and individuals, the EU considers the foreign legislation to be unlawful, and the declared purpose of the Blocking Regulation is to shield EU operators from the effects of that foreign legislation.

While the legal objectives of the Blocking Regulation are clear, the practical and commercial effect is less clear, and there have been mixed reactions to the Blocking Regulation. In particular, it has been said that the Blocking Regulation leaves European businesses stuck between a rock and a hard place, with businesses in breach of US sanctions if they continue to trade with Iran, but in breach of the Blocking Regulation if they stop trading with Iran in order to comply with the US sanctions.

Businesses therefore need to be aware, firstly, of the US sanctions against Iran which have been or will be re-imposed as a result of the US's withdrawal from the Joint Comprehensive Plan of Action (JCPOA), as well as the scope and requirements of the Blocking Regulation.

Iran has initiated proceedings against the US in the International Court of Justice, claiming that the US's re-imposition of sanctions previously suspended under the JCPOA, violates various provisions of the Treaty of Amity and requesting the suspension of all sanctions measures re-imposed pursuant to the President's announcement on 8 May 2018. The Treaty of Amity was concluded between the US and Iran in 1955 and includes prohibitions on unreasonable or discriminatory measures that would impair the interests of Iranian businesses.

What US sanctions are being re-imposed?

The US sanctions which are being re-imposed will impact on a wide range of businesses which trade with Iran, including those which engage in trade which relates to metals, Iran's automotive sector, petroleum, petroleum products or petrochemical products, Iran's energy, shipping and shipbuilding sectors, aviation and insurance.

In addition, the status of a number of Iranian entities will change, meaning that businesses will need to check whether they are still able to trade with their Iranian counterparties.

On 6 August 2018 US sanctions were reimposed on:

- the purchase or acquisition of US bank notes or precious metals by the Government of Iran;
- the purchase, subscription to, or facilitation of the issuance of Iranian sovereign debt;
- conducting or facilitating significant transactions related to the purchase or sale of Iranian Rials or the maintenance of significant funds or accounts outside Iran denominated in Iranian Rials;
- the sale, supply or transfer to or from Iran of graphite, raw or semi-finished metals such as aluminium and steel, coal and software for integrating industrial purposes²; and
- engaging in, conducting or facilitating a significant transaction for the sale, supply or transfer to Iran of significant goods or services used in connection with the Iranian automotive sector.

On 4 November 2018 further US sanctions will be reimposed, including those on:

- engaging in, conducting or facilitating a significant transaction for the purchase, acquisition, sale, transport or marketing of petroleum, petroleum products, petrochemical products or natural gas from Iran;
- exporting, selling or providing refined petroleum products or petrochemical products to Iran;
- investment, including participation in joint ventures, and supplying goods, services, information, technology or technical expertise or support for Iran's oil, gas or petrochemical sectors;
- assisting, providing goods or services in support of, or knowingly conducting or facilitating a significant financial transaction on behalf of any Iranian person on the US SDN list or any persons whose property is blocked³;

² Pursuant to section 1245 of the Iran Freedom and Counter-proliferation Act (IFCA)

³ Designated under the Executive Order reimposing certain sanctions with respect to Iran or Executive Order 13599

- assisting or providing goods or services in support of the National Iranian Oil Company (NIOC), Naftiran Intertrade Company (NICO), or the Central Bank of Iran;
- providing significant support to, or other goods or services in support of a person determined⁴ to be part of the energy, shipping and shipbuilding sectors of Iran or to operate a port in Iran, or to an Iranian person on the US SDN list (OFAC has indicated that routine payments (including port, docking or cargo handling fees) paid for the loading or unloading of non-sanctioned goods at Iranian Ports would not be sanctionable activity, provided no US SDN listed entities are involved and these payments do not materially exceed standard industry rates⁵);
- providing underwriting services or insurance or reinsurance with respect to or for the benefit of, any US SDN listed entity, any activity in the energy, shipping and shipbuilding sectors in Iran or for the sale, supply or transfer to or from Iran of graphite, raw or semi-finished metals and software for integrating industrial processes;

What is the impact of the Blocking Regulation?

Through implementation of the Blocking Regulation, the EU seeks to counter the effects of these US sanctions on EU residents and companies (EU Operators). It does this through a variety of methods, some of which are protective, and will therefore be welcomed by EU businesses, but others have the potential to result in penalties for EU businesses, and will therefore be less welcome.

The Blocking Regulation applies only with respect to the extra-territorial legislation which is referred to in the Annex to the Blocking Regulation. In response to the re-imposition of US sanctions mentioned above, the EU expanded the Annex to the Blocking Regulation to include the US sanctions on Iran which apply to non-US persons outside the US - commonly known as "secondary sanctions" - some of which were re-

imposed on 6 August 2018 and others will be re-imposed on 4 November 2018, as indicated above.

Member States are responsible for implementing and imposing "effective, proportionate and dissuasive" penalties for breach of the Blocking Regulation. This has resulted in some disparity. In the UK breach of the Blocking Regulation constitutes a criminal offence which may result in a fine on conviction. In Germany breach constitutes an administrative offence and may lead to fines of up to 500,000 EUR. In other Member States, such as France or Belgium, no penalty is defined yet but appropriate legislation is expected.

The 4 key aspects of the Blocking Regulation are as follows:

1. EU Operators are obliged to report to the EU Commission within 30 days

EU Operators are required to notify the EU Commission, or relevant Member State authority, within 30 days of discovery of any events arising from the legislation contained in the Annex which would affect their economic or financial interests. This obligation applies to directors and persons with management responsibilities within EU Operators.

2. Compliance with certain extra-territorial US sanctions on Iran is prohibited

EU Operators are prohibited from complying with all legislation listed in the Annex, unless resolved via discussion with, or authorised by, the European Commission. This prohibition covers active compliance and compliance by deliberate omission, as well as direct and indirect (through a subsidiary or an intermediary) compliance with this legislation. For example, requesting a licence from the US to maintain compliance with US sanctions is a prohibited act of compliance.

In exceptional cases the European Commission may authorise full or partial compliance with the measures listed in the Annex if non-compliance would seriously damage

EU Operators' interests or those of the European Union.

A specific procedure applies to obtain such an authorisation and the Implementing Regulation setting out this procedure provides guidance on the criteria that will be taken into consideration.

3. Non-EU court judgments enforcing prohibited extraterritorial legislation are nullified

The Blocking Regulation nullifies any non-EU decision, such as a court order or arbitration award, enforcing legislation, or acts and provisions adopted pursuant to such legislation, contained in the Annex.

Any decision taken by the US authorities which determines that a) an EU operator has breached US sanctions as outlined in the Annex or b) requires the seizure of assets or enforcement of any economic penalty against an EU operator for such a breach will not be recognised or enforced in the EU.

This does not prevent such a decision and fines or other penalties from being enforced in the US against any US assets held by the EU operator. Such penalties could include exclusion from the US financial system, including the ability to make or receive payments in US dollars.

4. Right to damages created

The Blocking Regulation gives EU Operators a right to claim damages, including legal costs, in respect of losses which they have suffered by the application of any legislation listed in the Annex or by actions based on or resulting from it.

In principle, such damages can be claimed from the persons or entities causing the damage or those acting on their behalf and proceedings can be brought in the courts of the relevant EU Member State and recovery can be via seizure and sale of the assets of the damage-causing entity held within the EU.

It is currently unclear how useful this measure will be in circumstances where the damage which an EU

⁴ Pursuant to section 1244(c)(2)(B) IFCA

⁵ FAQ 315, OFAC FAQs: Iran Sanctions

Operator suffers is likely to be the result of enforcement action initiated by a US regulator which does not hold assets within the EU. There are also questions surrounding the appropriate defendant in proceedings to recover damages caused by legislation listed in the Annex, as well as issues regarding quantification of losses (for example where the enforcement action results in an exclusion from a US market, rather than a financial penalty, or flows from a settlement agreement with a US regulator).

Recommendation: Steering a course through difficult waters

In Homer's Odyssey, Odysseus has to steer his ship on a course between Scylla, a six-headed sea monster with savage teeth which eats men whole, and Charybdis, another sea monster which swallows the sea and spews it out again three times a day, crating a huge whirlpool.

Odysseus consults the goddess Circe who advises Odysseus that there was no truly safe passage between Scylla and Charybdis but that, in terms of weighing up the risks, he is better to sail close to Scylla, which is likely to mean that he will only lose a few men, rather than sailing close to Charybdis, which will result in the loss of the crew, the ship, and his own life.

EU Operators may feel that the twin perils of US extraterritorial sanctions and the EU Blocking Regulation put them in much the same fraught position as Odysseus.

In light of work which we are already doing for other clients who are seeking to steer a course through these difficult waters, we recommend the following approach:

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1. Identify applicable US primary sanctions (ie those which apply because of a US nexus, such as the involvement of US entities, US nationals or US Dollar payments) to determine whether these, rather than the US extraterritorial sanctions which are the target of the EU Blocking Regulation, prohibit trade with Iran).
2. Review the US extraterritorial sanctions which will be imposed, with legal advice as necessary, to determine whether their commercial activities would actually infringe US extraterritorial sanctions.
3. Analyse carefully all of the circumstances associated with the business activities in Iran to determine whether, in the absence of US extraterritorial sanctions the party(ies) would actually start work, continue or cease business operations in Iran. Undoubtedly there are other difficulties associated with trade with Iran at this time, and EU guidance makes clear that decisions about trade with Iran should be conducted on the basis of the operator's own assessment of the economic situation. This will include all of the issues which businesses consider for every market, relating to profitability, size of investment, payment issues, etc.
4. Maintain careful records to document the reasons for any decision which is made to stop work or cease business operations in Iran on the basis of the EU operator's own assessment of the economic situation, as opposed to the US extraterritorial sanctions which are the target of the EU Blocking Regulation.

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