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## EU to Reactivate 1996 Blocking Regulation Against US Sanctions on Iran

MAY 22, 2018

On Friday, May 18, the EU Commission launched the formal process to reactivate a 1996 trade defense law in response to the US withdrawal from the Joint Comprehensive Plan of Action (JCPOA) on Iran's nuclear program.<sup>1</sup> Once reactivated, this law (the EU Blocking Regulation) would seek to prevent European companies from complying with any sanctions the US may reintroduce against Iran.<sup>2</sup>

Coupled with ongoing [Russia sanctions issues](#), [US–China trade issues](#), and reactions that we are seeing in Russia, China and elsewhere, these are the latest in a series of trade-related developments that continue to create an ever-more-complex global legal and policy environment for companies to navigate.

Below, we discuss the May 18 announcement, including some of the procedural aspects that companies should be aware of; the broader background and scope of the EU Blocking Regulation; and some of the further, parallel developments to keep in mind—including in relation to European Investment Bank (EIB) financing and third-country involvement.

### **The European Commission's May 18 Announcement**

EU Commission President Jean-Claude Juncker first announced the reactivation of the EU Blocking Regulation on Thursday, May 17, during an informal meeting with EU leaders. A press release issued by the EU Commission (Commission) the next day stressed that the Commission is fully committed to the continued, full and effective implementation of the JCPOA, so long as Iran also respects its obligations.<sup>3</sup> The Commission's aim is to mitigate the impact on European businesses of revived and new US sanctions on Iran and to take steps to maintain the growth of trade and economic relations between the EU and Iran.<sup>4</sup> In order to achieve this, the Commission has established four fronts, by:

- a) launching the formal process to activate the EU Blocking Regulation;
- b) launching the formal process to remove obstacles for the European Investment Bank to finance activities outside the European Union, in Iran;

c) declaring its intent to continue and strengthen the ongoing sectoral cooperation with, and assistance to, Iran, including in the energy sector and with small and medium-sized enterprises; and

d) encouraging member states to explore the possibility of one-off bank transfers to the Central Bank of Iran, an approach that could help the Iranian authorities receive their oil-related revenues notwithstanding US sanctions that could target EU companies and financial institutions active in oil transactions with Iran.

Once the first two measures have been formally proposed, the European Parliament and Council will have two months to object before the measures enter into force; the measures could enter into force sooner if both bodies assert their non-objection earlier. The Commission has also emphasized that these processes “can be ended if political circumstances no longer justify the adoption of the measures” and that “the United States remain a key partner and ally.”<sup>5</sup>

The Commission's aim is for the EU Blocking Regulation to be in force before August 6, 2018, when the first US sanctions are reactivated.<sup>6</sup> It is possible that the EU may also seek to modernize the content of the EU Blocking Regulation.<sup>7</sup> It remains to be seen how this will develop, especially with respect to sanctions that might result in a loss of access to the US financial system or other dramatic consequences.<sup>8</sup> For now, several EU companies have already announced their plans to cease commercial activity in Iran unless they obtain a US waiver.<sup>9</sup> At the same time, however, at least one deal was reportedly signed between a UK company and Iran since the US withdrawal.<sup>10</sup>

### **Background and Scope of the EU Blocking Regulation**

Blocking statutes attempt to hinder the extraterritorial application of laws enacted in foreign jurisdictions. The EU Blocking Regulation was originally adopted in 1996 as a countermeasure to the US trade embargo on Cuba and sanctions against Iran and Libya. It prohibits EU companies and courts from complying with foreign sanctions laws and provides that foreign court judgments based on these laws will not have any effect in the EU.

The EU Blocking Regulation has a particularly wide reach: it applies not only to EU nationals, but also to natural persons within the EU acting in a professional capacity. This covers, for example, US nationals permanently or temporarily working in Europe for their US employer or on business trips to Europe, but not tourists.<sup>12</sup> The EU Blocking Regulation also covers any legal person incorporated within the EU as well as shipping companies established outside the EU and controlled by nationals of a member state, if their vessels are registered in that member state.<sup>13</sup>

In particular, the EU Blocking Regulation stipulates that no such person shall comply with any requirement or prohibition, including requests of foreign courts, resulting directly or indirectly from the foreign sanctions laws listed in the Annex to the EU Blocking Regulation.<sup>14</sup> However, full or partial compliance may be authorized where there is sufficient evidence that noncompliance would seriously damage the interests of the persons in question or those of the EU.

Furthermore, any person who suffers damages by the application of the foreign sanctions laws is entitled to recover these damages from the person or entity “causing” them. Such recovery can take

the form of seizure and sale of any EU-located assets of that entity, including shares held in a legal person incorporated within the EU.<sup>15</sup> In effect, this measure appears to target the “flow down” requirements that US or other non-EU entities (suppliers, customers, banks, etc.) typically rely on to implement the sanctions laws at issue. The EU Blocking Regulation also stipulates that no foreign court judgments or decisions by administrative authorities which (directly or indirectly) give effect to the sanctions laws in question will be recognized or enforceable in any manner within the EU.<sup>16</sup> Member states may determine on their own how to sanction any breach of any provision of the EU Blocking Regulation.<sup>17</sup>

### **The EU Blocking Regulation ... and Beyond**

The reactivation of the EU Blocking Regulation is only one of the planned EU measures in response to the US withdrawal from the JCPOA, as noted above. In an effort to preserve the JCPOA, the Commission will also start the legal process to allow the European Investment Bank to guarantee EU projects in Iran through the EU's common budget, covering part of the financial obligations in question in case of failure or collapse of a project. This is intended to support EU investment in Iran in cases where companies are unable to obtain financing by commercial banks due to the US sanctions.<sup>18</sup> It should be noted that EU investment in that country, mainly from Germany, France and Italy, has already reached more than 20 billion euros since 2016, in a wide variety of sectors.<sup>19</sup>

Companies in the United States, in the EU and elsewhere should monitor these developments closely and begin to examine how their current or potential future business in or with Iran may force them to confront challenging choice-of-law issues. Additional complications may arise when third countries are involved, either as part of a business alliance or in a financing role. The interaction between the JCPOA withdrawal and US Iran sanctions on the one hand, and the EU Blocking Regulation on the other, is further complicated by potential financing from the EIB or third countries such as China, US and EU sanctions against Russia, and other international trade and investment issues. The Trump Administration's willingness to pursue unilateral sanctions or trade policies further complicates this challenging landscape, especially for global companies that operate in multiple jurisdictions. This environment will require constant and careful navigation by companies before sometimes difficult decisions must be made.<sup>20</sup>

WilmerHale is uniquely positioned to advise on these matters from Washington, from Brussels and globally. Please contact us for more information on the EU Blocking Regulation or other EU, sanctions, or trade and investment issues.

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1. JCPOA, signed by the Permanent Five Members of the Security Council plus Germany and Iran in July 2015, and incorporated into United Nations Security Council Resolution 2231. See generally S.C. Res. 2231 (July 20, 2015).
  2. Council Regulation (EC) No. 2271/96 of November 22, 1996, protecting against the effects of the extraterritorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, Official Journal L 309, 29/11/1996, p. 0001–0006.

3. European Commission Press Release, May 18, 2018.
4. If reactivated, this will be the first time that the EU Blocking Regulation is applied. After the adoption of the EU Blocking Regulation and the initiation of World Trade Organization proceedings by the EU against the US in 1996, the parties began negotiations to address the EU's concerns over the extraterritorial effects of the US sanctions laws. In April 1997, an understanding was reached, with both parties agreeing on commitments that made the enforcement of the EU Blocking Regulation unnecessary. Ten years later, in April 2007, the Austrian authorities started proceedings under the EU Blocking Regulation against BAWAG, the country's fifth-largest bank, which had cancelled the accounts of around 100 Cuban clients in compliance with US sanctions, in order to facilitate its acquisition by a US private equity firm. However, that case was closed when the firm in question obtained a waiver from the US Treasury Department, allowing for the maintenance of the accounts. Reuters, "Austria charges bank after Cuban accounts cancelled," April 27, 2007.
5. Ibid. Apart from the protection of EU businesses, these measures also focus on preserving the JCPOA, as a matter of EU foreign policy.
6. European Commission Press Release, May 18, 2018.
7. Any changes to the content of the EU Blocking Regulation will have to be adopted through the lengthy "ordinary legislative procedure," which can involve prolonged negotiations with the European Parliament and Council. Note that such a process would not be required for changes to the foreign sanctions laws listed in the Annex to the Regulation that are intended to define its scope.
8. Such as the ones imposed in 2010, by the Comprehensive Iran Sanctions, Accountability, and Divestment Act, extended to more transactions in 2011 and 2012.
9. Among others, the French oil company Total has announced that it will withdraw from a project to develop Iran's South Pars natural-gas field by November 4, 2018, unless it can secure a waiver. A.P. Moller–Maersk intends to honor customer agreements entered into before May 8, 2018, but then wind them down by November 4. See Reuters, "Maersk latest company to shun Iran as EU scrambles to save nuclear deal," May 17, 2018.
10. RadioFreeEurope, "Iran Signs Oil Deal With British Group, First Since US Resumed Sanctions," May 18, 2018.
11. Regulation (EC) No 2271/96, article 11(1), (4) and (5).
12. Huber, "The Helms-Burton Blocking Statute of the European Union," *Fordham International Law Journal* 1996, Vol. 20(3), 699–716, at 703.
13. Article 11(2) and (3). See also article 1(2) of Regulation (EEC) No 4055/86.
14. These are the Helms-Burton Act, 22 U.S.C.A. §§ 6021 et seq. (1996), and the D'Amato Act ("Iran and Libya Sanctions Act of 1996"), Pub. L. No. 104–172, 110 Stat. 1541 (1995) (codified at 50 U.S.C. § 1701 (1996)).
15. Article 6. This provision does not allow recovery from a company incorporated within the EU in accordance with the laws of a member state, if the damage was caused by its US-based parent company. In such a case, the subsidiary would be regarded as a separate legal person incorporated in the EU and legally distinguished from its parent. However, shares held by

the parent company in the subsidiary could be seized if held within the EU. See Huber, *op. cit.*, at 706.

16. Article 4.
17. Article 9.
18. In the Commission's view, this measure could be useful in particular for SMEs. See European Commission Press Release, May 18, 2018.
19. Reuters, "Update 3 – EU considers Iran central bank transfers to beat U.S. sanctions," May 18, 2018.
20. While it recently withdrew a bill in its current form, the Russian Duma (the Russian parliament's lower chamber), for example, has been considering its own potential anti-sanctions bill that would create criminal penalties for companies complying with anti-Russia sanctions. While the bill was withdrawn earlier this week, it serves to underscore the growing global complexities involved. See, e.g., RFE/RL, "Russian Duma Amends One Antisanctions Bill, Postpones Vote on Another," May 17, 2018.

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