WILLKIE FARR & GALLAGHER LLP

CLIENT ALERT

# The EU Blocking Statute and the Re-Imposition of U.S. Sanctions Against Iran

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On 5 November 2018, the United States completed the re-imposition of sanctions against Iran that were previously lifted pursuant to the 2015 Joint Comprehensive Plan of Action ("**JCPOA**") with Iran and the other P5+1 governments. For more details, see our client alert "A Road Map of the Re-Imposed Sanctions for Iran".

The re-imposition of Iranian sanctions threatens to have a profound effect on non-U.S. companies and financial institutions engaging in business, directly or indirectly, with Iran.

As of 5 November 2018, non-U.S. companies and individuals that engage in transactions with certain Iranian counterparties or in transactions involving certain Iran-related activity could be subjected to "secondary" sanctions. Non-U.S. companies now risk the imposition of U.S. sanctions if, for example, they:

i) facilitate a "significant" transaction with any Iranian person listed on the SDN List of Specially Designated Nationals and Blocked Persons ("**SDN List**") administered by the U.S. Department of the Treasury's Office of Foreign Assets Control ("**OFAC**"). Notably, OFAC has placed more than 700 individuals, banks, companies and blocked property back onto the SDN List;

ii) engage in a "significant" transaction related to Iran's energy, shipping, shipbuilding, or automotive sectors; or

iii) provide insurance or reinsurance services in relation to activity related to Iran for which sanctions have been imposed.

In addition, OFAC extended the general prohibition in the Iranian Transactions and Sanctions Regulations on U.S. persons exporting goods and services to Iran to any non-U.S. entity owned or controlled by a U.S. person. European subsidiaries of U.S. companies, therefore, will be subject to the same restrictions as their U.S. parents on business involving Iran.

***The Blocking Statute***

If not for the legal measures taken by the EU to counteract the effect of the re-imposed sanctions on EU persons, complying with U.S. sanctions and avoiding the imposition of secondary sanctions might have been a straightforward decision for non-U.S. companies. However, on 7 August 2018, to mitigate the impact of the full re-imposition of Iranian sanctions, and to support the continued full and effective implementation of the JCPOA, the EU's Council Regulation (EC) No 2271/96 ("**Blocking Statute**") was updated to cover the secondary sanctions now fully re-imposed in respect of Iran.

In short, while certain restrictive measures relating to Iran that are not part of the JCPOA continue to apply in the EU, for example in relation to human rights violations and support for terrorism, the Blocking Statute prohibits all EU companies from complying with the re-imposed sanctions — as well as U.S. sanctions on Iran that had remained in effect under the JCPOA — unless exceptionally authorised to do so by the European Commission.

The Guidance Note published by the European Commission sets out the criteria for which companies are caught by the Blocking Statute. Broadly, it covers entities incorporated within the EU and EU residents and nationals. It also clarifies that the Blocking Statute applies to EU-based subsidiaries of U.S. companies, but does not apply to branches of U.S. companies in the EU or U.S. subsidiaries of EU companies.

Although the Blocking Statute has direct legal effect in all EU Member States, it requires each Member State to implement domestic legislation determining the penalties to be imposed in the event of a breach. It is worth noting here that the Blocking Statute is not new, having been introduced in 1996 in response to U.S. sanctions in respect to Iran and Cuba. The Blocking Statute has, to a limited degree, therefore already been a consideration for non-U.S. companies and financial institutions for over 20 years.

However, to date, implementation and enforcement of the Blocking Statute has been limited and inconsistent. France, for example, has not enacted any implementing legislation, and only a limited number of EU Member States, including Germany, the Netherlands and Austria, have implemented a domestic penalty regime. In the UK, the Extraterritorial U.S. Legislation (Sanctions against Cuba, Iran and Libya) (Protection of Trading Interests) Order 1996 makes a breach of certain articles of the Blocking Statute a criminal offence punishable by a fine on conviction.

Moreover, to date, only one enforcement action in 2007, in respect to an Austrian bank's decision to close certain accounts held by Cuban nationals because of U.S. sanctions, has been publicised. Ultimately, however, the investigation was discontinued after the bank was granted a licence from the U.S. authorities and the accounts were reinstated.

### *Balancing Interests*

Non-U.S. companies operating in Europe may at first appear caught between a rock and a hard place: i) Restrict business in accordance with the U.S. sanctions regime, but breach the EU Blocking Statute and risk the consequences that result; or ii) comply with the EU Blocking Statute and conduct Iranian business, but risk the threat posed by U.S. sanctions, including being blocked from the U.S. market and financial system. However, the EU Blocking Statute does not require a company to continue to do business in Iran. Rather, the Guidance Note expressly provides that EU companies are free to conduct their business as they see fit.

It is therefore imperative that clients across all industries and sectors with Iranian touchpoints revisit and consider refining their policies and procedures to minimise the risk of breaching one or both of the sanctions regimes in the U.S. and/or the EU. For corporates considering winding down operations in respect of Iran, serious thought will need to be given as to how to do so in practice without breaching the Blocking Statute; for example, by the early termination of contracts relating to Iran, or the refusal under contract to perform obligations which would be in breach of the U.S. sanctions regime.

More difficult issues are raised in the insurance context, particularly if insurers or reinsurers seek to rely on exclusion clauses in respect of Iranian risks which are drafted by reference to i) the U.S. sanctions regime, or ii) relevant laws more generally (which would include the U.S.). Insurers and reinsurers should therefore consider reviewing the wording of their exclusion clauses more carefully, now that the final tranche of U.S. secondary sanctions against Iran are back in force.

Financial institutions will also need to give consideration to circumstances arising in which their customers want to use their bank accounts to process funds to or from Iran. A simple refusal to transact that business on the basis of the U.S. sanctions regime may give rise to a breach of the Blocking Statute. Institutions may also be exposed to civil damages claims from customers if customers suffer loss as a result of a financial institution's compliance with U.S. sanctions in breach of the Blocking Statute. Further, if any facility agreements incorporate references to compliance with U.S. sanctions — for example, in the representations and warranties, or the use of proceeds clauses, or in circumstances where a US bank acting as leader in a syndicated facility requires such language — consideration needs to be given as to whether such documentation is Blocking Statute-compliant.

Willkie Farr & Gallagher's market-leading Compliance, Investigations & Enforcement team regularly advises clients on a vast array of sanctions issues, most recently including how to navigate the minefield of Iranian sanctions in the context of the Blocking Statute.

If you have any questions regarding this client alert, please contact the following attorneys or the attorney with whom you regularly work.

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