GIBSON DUNN

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THE EU RESPONDS TO THE U.S. WITHDRAWAL FROM THE IRAN DEAL

To Our Clients and Friends:

We recently assessed President Trump's decision to abandon the 2015 Iran nuclear deal, known as the Joint Comprehensive Plan of Action ("JCPOA"), and to re-impose lifted sanctions on Iran, including secondary sanctions that threaten to limit non-U.S. entities' access to the U.S. market if they transact with certain Iranian entities.

On May 17, 2018, Jean-Claude Juncker, President of the European Commission, stated that the European Union (EU) would "stick to the [JCPOA]" and seek to protect "European businesses, especially small and medium-sized enterprises."[1]

The next day, the European Commission announced it would prohibit compliance with the re-imposed U.S. sanctions.[2] The Commission will accomplish this by revising an existing EU blocking statute,[3] so that EU nationals and other persons within the EU, as well as companies incorporated within the EU, such as subsidiaries of U.S. companies, will be prohibited from complying with the revived U.S. sanctions.[4] This decision thrusts companies that do business in both the United States and EU into significant legal uncertainty.

The European Commission also announced a number of other measures designed to facilitate continued trade with Iran. For example, the Commission has "[l]aunched the formal process to remove obstacles for the European Investment Bank to decide under the EU budget guarantee to finance activities" in Iran.[5]

As "confidence building measures," the Commission will "continue and strengthen the ongoing sectoral cooperation with, and assistance to, Iran, including in the energy sector and with regard to small and medium-sized companies."[6] The Commission has also said it would encourage member states "to explore the possibility of allowing one-off bank transfers to the Central Bank of Iran" to allow Iranian authorities to receive oil-related revenues.[7]

Implementation Timeline

The U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") announced the re-imposed sanctions will be subject to 90- and 180-day wind-down periods that will expire on August 6 and November 4, 2018, respectively.[8] The European Commission aims to have the amended blocking statute take effect before the first expiration on August 6, 2018.[9] Once amended, the blocking statute will automatically take effect after two months, unless either the European Parliament or Council object, but it could take effect sooner if both institutions indicate approval before the objection periods ends.[10]

Legal Risks

A tangle of U.S. laws, including the Iran and Libya Sanctions Act of 1996 ("ISA")[11] and Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 ("CISADA"),[12] provide sanctions that apply extraterritorially to prohibit non-U.S. entities from transacting with various Iranian entities. Companies that engage in such transactions may face severe consequences, including large financial penalties and a complete ban from the U.S. banking system.[13] Needless to say, such a ban may pose an existential threat to non-U.S. entities with significant U.S. business.

The practical effect of the EU blocking statute, however, remains uncertain. That regulation prohibits entities and persons from complying with U.S. sanctions and foreign court requests that stem from U.S. laws specified in the blocking statute's annex.[14] The annex currently includes the following laws:

a) Cuban Liberty and Democratic Solidarity Act of 1996;

b) Iran and Libyan Sanctions Act of 1996;

c) Code of Federal Regulations, Ch. V, Part 515 (Cuban Assets Controls Regulations), subparts B, E, and G.

The blocking statute's impact remains uncertain for a variety of reasons. First, EU member states must give effect to the statute by passing domestic implementing laws. The United Kingdom passed such a law, which created a criminal offence for compliance with the stated U.S. laws. The U.K. law does not provide for a prison sentence as punishment,[15] but it does provide for a potentially unlimited fine.[16] Other member states also created criminal offences, including Ireland, the Netherlands, and Sweden. Other states, including Germany, Italy and Spain, created administrative penalties for non-compliance. Meanwhile some member states, including France, Belgium and Luxembourg, never implemented the blocking statute. It is unclear whether they would do so now, although they have a duty under EU law to implement the blocking statute.

Second, the European Commission has not yet released the amended statute: its scope remains to be seen. Finally, the extent to which member states will prosecute violations of the blocking statute remains unclear. It has largely been viewed as a political symbol, rather than an effective legal tool. No company has ever been convicted of breaching the blocking statute,[17] and only Austria has ever pressed charges.[18] Indeed, European Commission Vice President Valdis Dombrovskis recognized the blocking statute "could be of limited effectiveness" given the centrality of the U.S. banking system.[19] Considering the current political situation, which substantially differs from the situation when the EU blocking statute was first introduced in 1996, the enforcement appetite, however, might increase.

Possible Options for Affected Companies

The U.S. sanctions and impending EU blocking statute confront companies with a multi-jurisdictional Scylla and Charybdis. Entities have three basic options. First, they could attempt to comply with both U.S. and EU law while maintaining business in Iran. Some companies, such as French oil conglomerate Total, have indicated they will seek special licenses from the United States to allow their business in Iran to continue.[20] Given that the purpose of the U.S. sanctions is to isolate Iran economically, such efforts seem unlikely to succeed.

Second, companies could comply with U.S. sanctions while exiting Iranian business and thereby potentially violating the EU blocking statute. While special attention has to be paid to criminal prosecution in, *inter alia*, Ireland, and high fines in the United Kingdom,[21] most member states impose maximum fines well under $1 million.[22] The United States, meanwhile, may impose multi-billion dollar fines[23] and ban companies from the U.S. banking system. Given the profound threat of such penalties, a number of non-U.S. companies have already announced plans to end business in Iran.[24]

Third, companies could comply with the blocking statute, maintain business with Iranian entities, and violate the U.S. sanctions. But given the existential threat that a ban from the U.S. financial system would pose to many large companies, this route appears least tenable. Whether this route merits pursuit will largely depend on the support the EU commits to providing to small and medium-sized enterprises that become a target of U.S. sanctions.

Conclusion

The European Commission's announcement that it will amend the blocking statute further increases the uncertainty companies face in navigating U.S. sanctions on Iran, and may expose them to significant liability. Russia's recently proposed law to impose fines and possibly imprisonment for complying with U.S. sanctions against Russia only adds to the uncertainty.[25] The scope and practical effect of the EU blocking statute remain to be seen, but Gibson Dunn will continue to closely monitor the situation.

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1 Speech, European Commission, Press conference remarks by Jean-Claude Juncker (May 17, 2018), http://europa.eu/rapid/press-release_SPEECH-18-3851_en.htm.

2 Press Release, European Commission, European Commission acts to protect the interests of EU companies investing in Iran as part of the EU's continued commitment to the Joint Comprehensive Plan of Action (May 18, 2018), http://europa.eu/rapid/press-release_IP-18-3861_en.htm.

3 Council Regulation (EC) No. 2271/1996 (OJ L 309, 29.11.1996, p. 1-6).

4 *Id.*; *see also* Press Release, *supra* note 2.

5 Press Release, *supra* note 2.

6 *Id.*

7 *Id.*

8 U.S. Dep't of Treasury, *Frequently Asked Questions Regarding the Re-Imposition of Sanctions Pursuant to the May 8, 2018 National Security Presidential Memorandum Relating to the Joint Comprehensive Plan of Action (JCPOA)* (May 8, 2018), https://www.treasury.gov/resource-center/sanctions/Programs/Documents/jcpoa_winddown_faqs.pdf, (hereinafter "OFAC FAQ").

9 Press release, *supra* note 2.

10 *Id.*

11 Pub. L. No. 104-172 (codified as amended in scattered sections of 50 U.S.C.).

12 Pub. L. No. 111-195 (codified as amended in scattered sections of 22 and 50 U.S.C.).

13 CISADA § 102.

14 Council Regulation (EC) No. 2271/1996, art. 5.

15 Extraterritorial US Legislation (Sanctions against Cuba, Iran, Libya) (Protection of Trading Interests)

Order, S.I. 1996/3171. The U.K. law's omission of a custodial sentence makes it an outlier in U.K. financial crime laws.

16 *Id.*

17 *See, e.g.*, *In 1990s Redux, EU to Consider Blocking U.S. Sanctions Over Iran*, N.Y. Times (May 9, 2018), https://www.nytimes.com/reuters/2018/05/09/business/09reuters-iran-nuclear-eu-business.html.

18 *See Austria charges bank after Cuban accounts cancelled*, Reuters (Apr. 27, 2007), http://www.reuters.com/article/2007/04/27/austria-bawag-idUSL2711446820070427.

19 Huw Jones, *EU says block on U.S. sanctions on Iran of limited use for EU banks*, Reuters (May 17, 2018), https://www.reuters.com/article/us-iran-nuclear-eu-banks/eu-says-block-on-u-s-sanctions-on-iran-of-limited-use-for-eu-banks-idUSKCN1II17K;

20 Steven Mufson, *French oil giant Total seeks Iran sanctions waiver from Trump for $2 billion project*, Washington Post (May 16, 2018), https://www.washingtonpost.com/business/economy/french-oil-giant-total-seeks-iran-sanctions-waiver-from-trump-for-2-billion-project/2018/05/16/dfc709cc-5926-11e8-b656-a5f8c2a9295d_story.html.

21 *See* Extraterritorial US Legislation (Sanctions against Cuba, Iran, Libya) (Protection of Trading Interests)

Order, S.I. 1996/3171 (articulating no maximum penalty); Lag om EG:s förordning om skydd mot extraterritoriell lagstiftning som antas av ett tredje land (Svensk författningssamling [SFS] 1997:825) (Swed.) (same).

22 For example, the Netherlands imposes a maximum fine of one million guilders, which is about $560,000. *See* Uitvoering van verordening (EG) nr. 2271/96 van de Raad van de Europese Unie van 22 november 1996, https://www.parlementairemonitor.nl/9353000/1/j9vvij5epmj1ey0/vi3ah5gewv8e.

23 For example, it levied a $9 billion fine against BNP Paribas for violating sanctions against Iran, Cuba and Sudan. Maia De La Baume & Anca Gurzu, *Europe not backing down on Iran*, Politico (May 17, 2018), https://www.politico.com/story/2018/05/17/europe-iran-trump-595120.

24 *EU moves to block US sanctions on Iran*, Al Jazeera (May 17, 2018), https://www.aljazeera.com/news/2018/05/eu-moves-block-sanctions-iran-180517134848253.html.

25 Maya Lester, *Draft Russian Bill criminalises compliance with Western sanctions*, European Sanctions Blog (May 16, 2018), https://europeansanctions.com/2018/05/16/draft-russian-bill-criminalises-compliance-with-western-sanctions/. The proposed Russian law targets U.S. sanctions against Russia, not Iran, but if Russia chooses to maintain business with Iran, then it's possible that compliance with the re-imposed U.S. sanctions against Iran could trigger the Russian law where that compliance implicates business in Russia. *See id.*

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