

## EU Responds to US Decision to Reimpose Secondary Sanctions Against Iran by Initiating Blocking Statute

On May 8, 2018, US President Donald Trump announced his decision to terminate US participation in the Joint Comprehensive Plan of Action (“JCPOA”)—the multilateral legal framework for addressing Iran’s nuclear program—and to reimpose US sanctions on Iran despite the concerns of EU leaders (see [our May 9 Legal Update](#)). In response, on Friday, May 18, 2018, the European Union announced that it has decided to:

- (i) extend the provisions it already has to oppose the extraterritorial effect of US sanctions targeting Iran;
- (ii) continue and strengthen the ongoing sectoral cooperation with and assistance to Iran, including the facilitation of financial assistance through the Development Cooperation or Partnership Instruments;
- (iii) launch a formal process to remove obstacles for the European Investment Bank (“EIB”) to finance activities in Iran, under the EU budget guarantee; and
- (iv) encourage member states to explore the possibility of one-off bank transfers to the Central Bank of Iran, which would allow the Iranian authorities to receive their oil-related revenues.

This political decision obtained the unanimous consent of the EU member states and will now be followed by legislative implementation. The decision has the potential to significantly impact both EU and non-EU companies, who may face potential exposure between conflicting US and EU sanctions.

### The EU response: Activation of the Blocking Statute

The legal provisions that will be amended to reflect the political decision are those of Council Regulation 2271/96, also referred to as the “Blocking Statute” (see [the Council Regulation](#)). It was initially adopted to “oppose” the extraterritorial reach of the US’s Helms-Burton Act and 1996 Iran-Libya Sanctions Act (“ILSA”). It was later amended following the signing of the Iran Freedom Support Act (“ISA”) on September 30, 2006, by President George W. Bush. ISA extended and amended the ILSA and codified certain existing sanctions against Iran. ISA prolonged ILSA until 2011 and dropped Libya from the law and its penalties. In 2010, the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (“CISADA”) revised and expanded the ISA. However, the annex to the Blocking Statute still refers to ILSA. Thus, as it stands, the EU Blocking Statute refers to US provisions on Iran that no longer exist. Consequently, before the European Commission’s (“Commission”) announcement to revive the Blocking Statute, it was essentially a dead letter as far as Iran and Libya are concerned. This annex now needs to be amended to reflect all or part of the US’s most recent sanctions targeting Iran.

In accordance with Article 1 of the Blocking Statute, the Commission can adopt a delegated regulation to add to or delete from the Blocking Statute laws, regulations or other legislative instruments of third countries having extraterritorial application and causing

adverse effects on EU interests. Thus, to implement the political decision of May 18, the Commission should now adopt such delegated regulation to add the specific US legal provisions targeting Iran to the annex of the Blocking Statute. However, the European Parliament (“Parliament”) and the European Council (“Council”) can express objections in accordance with Article 11a(5) of the Blocking Statute, which provides that:

*“A delegated act adopted pursuant to Article 1 shall enter into force only if **no objection** has been expressed either by the European Parliament or the Council within a period of two months of notification of that act to the European Parliament and to the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by four months at the initiative of the European Parliament or of the Council.”*

Pursuant to Article 290(2), for the objections to the delegated implementation to prevail, Parliament must act by a majority of its component members, and the Council, by a qualified majority.

In light of the May 18 consensus of the EU member states, it is not likely that the Council will oppose a delegated regulation adopted by the Commission. As regards to Parliament, Foreign Affairs Committee Chair David McAllister (EPP, DE) and Monitoring Rapporteur on Iran Knut Fleckenstein (S&D, DE) indicated their continued support for the JCPOA in the following statement on May 8, 2018:

*“The European Union stands united behind the Iran Nuclear Deal. We are committed to the full and effective implementation of the agreement and will make sure that the lifting of nuclear-related sanctions has a positive impact on trade and economic relations with Iran, including benefits for the Iranian people. We encourage every*

*party to remain a fully committed partner in jointly implementing the JCPOA.*

*Iran’s role in Lebanon, its ongoing support for the Assad regime in Syria, the grave internal human rights situation, the ballistic missiles programme and the repeated and totally unacceptable threats against Israel are deeply worrying. It is, however, in our common interest to tackle these issues in the relevant formats and fora outside the JCPOA.”*

Although the statement came before the Commission’s initiative to activate the Blocking Statute, it may be seen as an indication of support for the approach that was adopted 10 days later.

When this process toward the adoption of the delegated act by the Commission and the objection period for the Council and Parliament will be initiated and completed has not been specified. The Commission has only indicated that it aims to have the delegated regulation concerned in force before August 6, 2018, when the first batch of US secondary sanctions take effect.

## What does the Blocking Statute “block” or compel?

The Blocking Statute imposes two key obligations:

- to refrain from complying with the extraterritorial application of the US laws imposing sanctions covered by the Blocking Statute, i.e., currently the sanctions targeting Cuba; and
- to notify the Commission or relevant member state authority when the targeted US laws affect that person's economic and/or financial interests.

### (i) Duty not to comply

Article 5 prohibits compliance with US laws listed in the annex to the Blocking Statute—whether directly or through a subsidiary or other intermediary person, actively or by

deliberate omission, with any requirement or prohibition, including requests of foreign courts.

An exception is provided in Article 5.2:

*“Persons may be authorized, in accordance with the procedures provided in Articles 7 and 8, to comply fully or partially to the extent that non-compliance would **seriously damage their interests or those of the Community.**”*

## (ii) Duty not to enforce

In addition, Article 4 provides that no judgments of courts located outside the European Union shall be recognized or enforced to the extent that they give effect, directly or indirectly, to the third country laws listed in the annex to the Blocking Statute and prohibits actions based on or resulting from these laws. Therefore, the courts of the member states should refrain from authorizing the enforcement of judgments of courts located outside the European Union to the extent that they are inconsistent with the Blocking Statute.

## (iii) Duty to inform

Article 2 of the Blocking Statute requires any natural or legal person covered by the Blocking Statute (see below) to inform the Commission within 30 days from the date on which it obtained information that its economic and/or financial interests are affected, directly or indirectly, by the third country laws listed in the annex to the Blocking Statute or by actions based on or resulting from these laws. Article 2 clarifies that insofar as the interests of a legal person are affected, this obligation applies to the directors, managers and other persons with management responsibilities.

The formal process for informing the Commission is provided in the second and third paragraphs of Article 2, which provide that:

*“At the request of the Commission, such person shall provide all information relevant for the purposes of this*

*Regulation in accordance with the request from the Commission within 30 days from the date of the request.*

*All information shall be submitted to the Commission either **directly** or **through the competent authorities of the Member States.** Should the information be submitted directly to the Commission, the Commission will inform immediately the competent authorities of the Member States in which the person who gave the information is resident or incorporated.”*

## (iv) Possibility to recover damages

Finally, Article 6 of the Blocking Statute provides that entities who engage in international trade and/or the movement of capital and related commercial activities between the European Union and third countries shall be entitled to recover any damages, including legal costs, caused to that person by the application of the sanctions laws that are covered by the Blocking Statute or by actions based thereon or resulting therefrom. It specifies that “[s]uch recovery may be obtained from the natural or legal person or any other entity causing the damages or from any person acting on its behalf or intermediary.”

## Whom does the Blocking Statute apply to?

The Blocking Statute applies to the entities and individuals mentioned in its Article 11, namely:

- (i) Residents in the European Union and EU nationals
- (ii) Legal entities incorporated in the European Union
- (iii) EU nationals resident abroad
- (iv) Non-EU persons acting in the European Union in “a professional capacity”
- (v) Shipping companies domiciled outside the European Union and controlled by EU nationals.

Thus, with the planned addition of the US sanctions targeting Iran to the Blocking Statute, EU nationals wherever resident, non-EU nationals resident in the European Union, companies incorporated in the European Union, non-EU nationals or entities acting professionally in the European Union and some shipping companies will in principle be prevented from complying with the US sanctions targeting Iran as will be listed in the annex to the Blocking Statute except where there is sufficient evidence that non-compliance seriously damages the interests of the person or the European Union.

### Implementation and enforcement of the Blocking Statute:

For the implementation and enforcement of the Blocking Statute, the European Union relies on the EU member states. The member states are required to determine the sanctions to be imposed in the event of breach of any relevant provisions of the Blocking Statute.

The implementation of the Blocking Statute by member states has been limited in respect of the US sanctions against Cuba. Most of the member states did not implement provisions/measures to be able to impose penalties or other criminal charges. The procedure for the adoption of such provisions differs from member state to member state. In addition, even where such provisions existed, such as in the United Kingdom, the Netherlands, Austria and Germany, there was no effective enforcement except from some isolated examples of enforcement in Austria and the United Kingdom. In reality, there was also limited political will within the European Union to press enforcement.

### The practical impact for business:

The effects of the US sanctions are likely to be felt despite the enactment of the Blocking Statute. European companies are unlikely to be able to avoid the US financial system due to its global importance and because banks require access to the US dollar zone for their activities. The adoption of the amendment to

the Blocking Statute will pose severe difficulties for companies and, in particular, financial institutions also operating in the United States due to the tension between the US and EU laws. An EU company or bank would have to refrain from doing business, either directly or indirectly, with US counterparts in order to not feel the impact of US responses.

The practical limitations of the Blocking Statute were also acknowledged by Commissioner Valdis Dombrovskis, who told Parliament that “the EU blocking regulation could be of limited effectiveness, given the international nature of banking system and especially the exposure of large systemic banks to U.S. financial system and U.S. dollar transactions.” UK Foreign Secretary Boris Johnson noted in similar vein that “[w]e have to be realistic about the electrified rail, the live wire of American extraterritoriality and how (it) can serve as a deterrent to business.” Other observers, including former French MP Karine Berger have indicated that “from an economic point of view, there is no solution” to shield EU business from US sanctions, noting that “the companies that would want to protect themselves would have to cut all their ties with the US.” According to Ms. Berger, there are not many companies “that would be capable to cut ties with the US to keep that Iranian market.”

These observations further highlight the complexity that EU business finds itself in as a result of the imposition of US sanctions against Iran and the EU’s reaction of activating the Blocking Statute. As a practical matter, it will be important for companies with potentially significant exposure to evaluate their potential legal and reputational risk in connection with existing contractual commitments and to plan for contingencies in the coming weeks and months. Moreover, at a political level, the EU measure also has significant implications. It is likely that the Blocking Statute may encourage the Trump administration to continue to negotiate with the European Union on these issues. It has also been suggested by some that EU member

states may negotiate for carve-outs for sectors of industry or companies, though it is not clear how this can be done at EU member state level given the competence of the European Union over these issues. In any event, it will be important for impacted companies to monitor developments in both Brussels and Washington on these issues and to ensure that their interests are taken into account as an evolving sanctions policy landscape emerges.

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*For more information about the topics raised in this Legal Update, please contact any one of the lawyers below:*

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