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Legal Update
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Updated EU Blocking Statute Targeting Reinstated US Iran Sanctions Enters into Force

Following President Trump's decision to withdraw from the Joint Comprehensive Plan of Action ("JCPOA") and to reinstate US sanctions against Iran, the European Commission ("Commission") published on June 6, 2018 a proposal for a delegated regulation, updating Council Regulation 2271/96, the so-called "Blocking Statute," to counter the extraterritorial effects of these reinstated sanctions. (See our May 24 Legal Update.)

In the absence of any objection from the European Parliament and the Council of the European Union, Commission Delegated Regulation (EU) 2018/1100 has been adopted and entered into force on August 7, 2018, i.e., at the same time the first batch of US sanctions are reinstated.[1]

The lack of clarity on the practical implementation of the Blocking Statute, and the legal uncertainty it creates for businesses facing compliance issues in both the United States and the European Union, has been strongly criticized. To address these concerns, the Commission also adopted:

(i) Commission Implementing Regulation (EU) 2018/1101 ("Authorization Regulation"), which lays down the criteria for requesting an authorization to comply with the legislative provisions that would otherwise be covered by the Blocking Statute[2] and

(ii) A guidance note on the functioning and implementation of the Blocking Statute ("Guidance Note").[3]

1. What does the entry into force of the update to the Blocking Statute entail for businesses?

The Blocking Statute implies that individuals and entities subject thereto:[4]

(i) Must inform the Commission when their economic and/or financial interests are affected by the laws, regulations and other legislative instruments listed in the Annex to the Blocking Statute, which now includes the reinstated US sanctions against Iran ("Listed Legislation").[5]

(ii) Are prohibited from complying—whether directly or through a subsidiary or other intermediary person, actively or by deliberate omission—with the Listed Legislation or with actions based thereon or resulting therefrom unless an authorization to that effect has been obtained.

The Commission has adopted an extensive interpretation of what it means to comply with the Listed Legislation and, as per the Guidance Note, considers that "requesting from the U.S. authorities an individual license granting a derogation/exemption from the listed extra-territorial legislation would amount to complying with the latter."[6] Requesting such an authorization would therefore need to be authorized by the Commission or, otherwise, would breach the Blocking Statute.

(iii) Are entitled to recover damages, including legal costs, caused by the application of the Listed Legislation and actions based thereon or resulting therefrom against the

person or entity causing the damage or any person acting on its behalf or intermediary, including by way of seizure and sale of assets.[7]

In addition, administrative, judicial, arbitral or other decisions of an authority located outside the European Union giving effect, directly or indirectly, to the Listed Legislation and actions based thereon or resulting therefrom can neither be recognized nor enforced in the European Union.

Failure to comply with the requirements of the Blocking Statute may lead to penalties, which are to be laid down by each member state. Member states are therefore responsible for the implementation and enforcement of the Blocking Statute in accordance with national procedures. However, divergences in terms of enforcement provisions are notable: while certain member states have introduced criminal penalties, others have failed to introduce any kind of legislation to enforce the Blocking Statute.

As emphasized in the Guidance Note, "the Blocking Statute applies to all EU operators, regardless of their size and the field they are active in." With the parallel entry into force of the update to the Blocking Statute and of the reinstated US sanctions against Iran, operators with cross-border activities involving the United States, the European Union and Iran will be caught between a rock and a hard place. The existing conflict of laws between the United States and the European Union will create numerous compliance risks, which should be given appropriate consideration given the potential financial and/or reputational consequences.[8]

2. How and when can authorizations to comply with the reinstated US sanctions against Iran be obtained?

Article 5 of the Blocking Statute provides that the Commission can grant a full or partial authorization to comply with the covered laws "to the extent that non-compliance would seriously damage their interests or those of the [European Union]."

In accordance with the Authorization Regulation, a request for authorization to comply fully or partially with the Listed Legislation must be submitted to the Commission's Service for Foreign Policy Instruments.[9] The Commission will assess this request on the basis of certain listed, non-cumulative and non-exhaustive criteria. Once this assessment is carried out, the Commission's decision to accept or reject the request for an authorization must be submitted to the Committee on Extra-Territorial Legislation, composed of representatives of the member states, in accordance with the examination procedure. This means that this committee will have a binding qualified majority vote and will therefore strongly influence the outcome of the authorization process.

In the Guidance Note, the Commission clarifies that "not every nuisance or damage suffered by EU operators will entitle them to obtain an authorisation." Non-compliance with the Listed Legislation should remain the rule and authorizations to comply should only be granted in exceptional circumstances.

Importantly, the Guidance Note clarifies that:

(i) The authorization procedure should not be used in order for EU Operators to seek so-called "letters of comfort" from the Commission or confirmation that their business decisions are in line with the Blocking Statute, but

(ii) An authorization request is only appropriate when the behavior that an applicant wishes to adopt is based on, or determined by, the Listed Legislation.

There is, however, no specific timeline for the authorization process to unfold. Article 7(b) of the Blocking Statute merely states that the Commission should "take fully into account the time limits which have to be complied with by the persons which are to be subject of an authorization," whereas Recital (10) of the Authorization Regulation states that "the handling of an application shall be carried out as soon as possible."

This creates important uncertainties since requests for authorization to comply with Listed Legislation do not have suspensive effect and authorizations only become effective when notified to the applicant. Meanwhile, EU Operators are obliged to apply the Blocking Statute and may be the first victims of the conflict of laws between the United States and the European Union.

3. What should businesses do to ensure compliance?

The first step is to determine to what extent the activities of the company are affected by the Blocking Statute. In that regard, individuals and entities that qualify as EU Operators should comply, as from August 7, 2018, with the Blocking Statute.

Also in that regard, the Guidance Note clarifies that, unlike EU subsidiaries of US companies that are established in accordance with the law of a member state, branches of US companies in the European Union are not subject to the Blocking Statute. Similarly, subsidiaries of EU companies in the United States are considered subject to the law under which they are incorporated and therefore in principle not subject to the Blocking Statute. However, the parent company in the European Union is an EU Operator and must abide by the requirements of the Blocking Statute.

Appropriate recusal policies should be considered to mitigate the risks resulting from conflicting US and EU laws.

Secondly, the Guidance Note clarifies that EU Operators "are free to choose whether to start working, continue, or cease business operations in Iran or Cuba, and whether to engage or not in an economic sector on the basis of their assessment of the economic situation."

This notwithstanding, to the extent the Blocking Statute also prohibits compliance "by deliberate omission" with the Listed Legislation, a decision not to continue doing business with Iran should be appropriately documented so as to support the fact that such decision is not related to the reinstated US sanctions.

Finally, if the interests of an EU Operator are affected, that EU Operator should:

(i) Notify, as soon as possible, the Commission that its interests and/or those of the European Union are affected by the Listed Legislation and

(ii) If it intends to adopt a business decision based on, or determined by, the Listed Legislation, seek an authorization from the Commission to comply with such legislation, at least partially and for the purpose of requesting an authorization from the competent US authorities.

Navigating through the conflicting laws of the European Union and the United States will however be a delicate task, which businesses should anticipate and address with the utmost care.

4. Extension of the mandate of the European Investment Bank ("EIB")

As part of its action plan to support the implementation of the JCPOA and despite the withdrawal of the United States, the European Union announced on May 18, 2018 that it would seek to remove obstacles for the EIB to finance activities in Iran under the EU budget guarantee.

To that end, the Commission published a proposal for a delegated decision on June 6, 2018. This proposal has also not been objected by the European Parliament and the Council of the European Union and, consequently, Commission Delegated Decision (EU) 2018/1102 was adopted on June 6, 2018 and entered into force on June 7, 2018.

Through this decision, the Commission added Iran to the list of eligible regions and countries for EIB financing under Union guarantee.

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

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Endnotes

[1] OJ L 199, 7.8.2018, p. 1.

[2] OJ L 199, 7.8.2018, p. 7.

[3] OJ C 277 I, 7.8.2018, p. 4.

[4] This includes (i) EU residents who are nationals of a member state, (ii) legal persons incorporated in the EU, (iii) EU nationals resident abroad, (iv) shipping companies domiciled outside the European Union and controlled by nationals of a member state if their vessels are registered in that member state, (v) any non-EU national resident in the European Union unless that person is in the country of which he is a national and (vi) non-EU persons acting in the European Union in a "professional capacity" (together, "EU Operators").

[5] Note that for legal persons, this obligation rests on the directors, managers and other persons with management responsibilities.

Such notification is to take place within 30 days from the date on which the relevant person obtained the information that his or her economic and/or financial interests, or those of the entity on behalf of which he or she is making the notification, are affected by the Listed Legislation.

[6] Note, however, that compliance does not cover "the simple pursuit of conversations with the U.S. authorities in order for EU operators to ascertain its exact extent, how it might impact on them and whether not complying with it might entail serious damage on their interests," which may be used as a basis to determine whether or not to request an authorization to comply with the Listed Legislation from the Commission.

[7] As clarified in the Guidance Note, damages are to be claimed before the competent courts of the member states in accordance with national procedural rules. This will therefore influence *inter alia* the nature of the damages that are to be claimed and the identity of the defendant from whom damages would be claimed.

[8] In that regard, and as clarified in the Guidance Note, the update to the Blocking Statute applies "regardless [of] whether [contractual obligations] were entered into prior to the above date of entry into force of the updated Blocking Statute."

[9] The Guidance Note clarifies that group submissions by several EU Operators jointly are acceptable provided their interests are sufficiently homogenous and if they permit a case-by-case assessment of whether the individual interests of each applicant or the Union would be affected by non-compliance.

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