

# Recent Extraterritorial US Sanctions on Iran and Russia and EU Reactions

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On 13 October 2017, President Trump refused to “recertify” the international nuclear understanding with Iran (Joint Comprehensive Plan of Action, *JCPOA*).

On 31 October 2017, 41 individuals and entities associated with the Islamic Revolutionary Guard Corps (*IRGC*) have been designated under US terrorism sanctions. These new designations are part of a growing trend towards unilateral US sanctions imposed without prior consultation or coordination at an international level.

In the following, we give an overview of this trend, taking the recent US developments regarding the *JCPOA* and the US sanctions on Russia as examples. We examine the potential repercussions of these US sanctions for EU companies and potential reactions by the EU.

## Trump’s Refusal to “Recertify” the *JCPOA* and Potential Implications

In 2016 while campaigning for the Presidential election, President Trump strongly criticized the *JCPOA*. Since the beginning of the Trump Administration in January of this year an intense debate has been underway within the US government regarding the *JCPOA*’s skeptics, led by President Trump, and its supporters, including senior officials such as Secretary of State Tillerson.

In 2015 US Congress enacted the Iran Nuclear Agreement Review Act (*INARA*), as part of a political process intended to ensure Congressional review of the *JCPOA* which was then in its final negotiations. As a matter of purely domestic US law, *INARA* has ongoing significance as it requires the President to report to Congress every 90 days regarding whether Iran is in compliance with the *JCPOA* and related matters. President Trump has now refused to issue the latest of these certifications to Congress.

President Trump was persuaded by strong pressure from Tillerson and other senior officials not to terminate US participation in the *JCPOA* outright. However, he insisted that the US government should expand its unilateral sanctions on Iran, and that US Congress and Iran, the EU and other parties involved in the *JCPOA* should agree upon additional measures to address US concerns over the sunset dates in the *JCPOA*, Iran’s missile programs, and Iran’s support for Hizballah and other armed groups.

Under Trump’s new Iran policy, it is possible that some time in 2018 the Trump Administration could terminate US participation in the *JCPOA* and reimpose the suspended

US sanctions. The US sanctions that could be reimposed mainly consist of “secondary sanctions”, targeting EU and other non-US companies for penalties if they engage in certain activities involving Iran, its government or sanctioned Iranian persons.

In addition, “General License H” could be terminated. The US government issued General License H in January 2016, as provided under the JCPOA, to cut back the sanctions preventing transactions involving Iran by non-US companies owned or controlled by US persons. Though General License H is narrowly drafted, it provides some protection to EU and other non-US companies that have a US parent company or US owners and that are engaged in business with Iran.

### **Recent US Secondary Sanctions on Russia and Potential Implications**

In August 2017, President Trump reluctantly signed into law a lengthy statute referred to as “CAATSA” that imposed significant new US unilateral sanctions on Russia and North Korea, and less significant new sanctions on Iran. CAATSA includes new “secondary sanctions” authorities, under which the President has the option of penalizing non-US companies that the Trump Administration determines have engaged in certain activities relating to Russia, even if the penalized company has no ties or contact with the United States. Congress and President Obama imposed somewhat similar secondary sanctions on Iran, prior to the implementation of the JCPOA.

At present, it seems unlikely there will be extensive enforcement of these measures. However, in guidance issued on 31 October 2017, the Trump Administration has indicated that it intends to implement at least some of these sanctions, and Secretary of State Tillerson has made informal public statements that CAATSA will be fully implemented. On the positive side, this recent guidance also suggests that the Trump Administration will exercise its discretion regarding the sanctions, and will refrain from penalizing companies based in EU Member States or other countries in a manner that would damage “unity and coordination with [US] allies and partners”.

Following this guidance, it therefore remains the case that EU-based companies and financial institutions involved in covered transactions may need to decide whether to avoid those transactions, on the basis that they could theoretically trigger US secondary sanctions penalties. The covered activities include (among others) certain investments or the provision of goods or services that support the construction or repair of Russian energy export pipelines, significant transactions with entities in the Russian defense or intelligence sector, and certain transactions relating to privatization of Russian state assets.

## Risks and Difficulties for European Companies and (Potential) EU Reactions

The growing trend towards unilateral US sanctions and the decrease of foreign-policy coordination between Washington and Brussels as well as other EU capitals puts European companies in an increasingly difficult position as business transactions with certain countries that are perfectly lawful under EU law, are prohibited and severely penalised under US law. This is particularly true with regard to Iran, with which many EU companies have resumed their business relations after the implementation of sanctions relief under the JCPOA, but partly also with regard to Russia.

In reaction to Trump's decertification of the JCPOA, the Council of the European Union has stressed the importance of the agreement with Iran as "*a key pillar of the international non-proliferation architecture*" and has called upon the US to "*maintain its commitment to the JCPOA and to consider the implications for the security of the US, its partners and the region before taking further steps*". At the same time, the EU has underlined its commitment to a "*continued full and effective implementation of all parts of the JCPOA*". The Head of the EU Delegation to the US, David O'Sullivan, has stressed at an Atlantic Council conference that the EU "*will act to protect the legitimate interests of its companies with all the means at its disposal*", thus hinting at a potential extension of the EU Blocking Statute (Regulation (EC) No 2271/96).

In order to be effective, such an extension of the EU Blocking Statute, prohibiting EU persons from complying with new US secondary sanctions, would need to be accompanied by efficient enforcement measures and strong political support. However, whether such an extension would afford EU companies a higher degree of legal certainty is questionable: EU companies would in most cases still risk severe penalties under US law. This is particularly true when considering the high degree of connectivity of EU banks to the US banking system and the enforcement options of US authorities which range from the seizure of US assets to the blocking of EU companies from US market access. Nevertheless, with regard to the envisaged extension of US extraterritorial sanctions on Russia, targeting notably the building of Russian-European gas pipelines such as Nord Stream II and Turk-Stream, the prospect of an extension of the EU Blocking Statute may be a significant factor in the apparent reluctance of the Trump Administration to implement these sanctions. It might therefore also work with regard to possible new Iran sanctions. With a view to the effectiveness of a potential extension of the EU Blocking Statute also see the interview given by BLOMSTEIN partner Roland Stein to Energy Compass (attached to this document – see below).

Moreover, the EU also retains the option of challenging any US extraterritorial sanctions at the WTO level by initiating a formal legal action. In the mid-1990s, when the EU exercised this option with view to the extraterritorial US sanctions against Cuba and Iran, this served to bring about a political solution if not settlement. Under the political understanding reached between the US and EU in 1997, the US committed not to penalize EU-based companies under the extraterritorial Iran Sanctions Act. In the years leading up to the JCPOA, when these and other US extraterritorial sanctions on Iran were being

actively enforced, there were only a handful of penalties for companies based in EU Member States.

In addition, the creation of offshore dollar-clearing facilities would be conceivable which could at least weaken the threat of EU banks – and EU companies – from being cut off the US financial system.

For the time being, EU companies should make sure to include *force majeure* clauses in their contracts regarding sensitive countries and regions. Moreover, they should enter into a close dialogue with policy makers on the national as well as the EU level to ensure their understanding of the economic impacts of new potential US extraterritorial sanctions and their speedy intervention should this be necessary.

Jacobson Burton Kelley and BLOMSTEIN will closely monitor and inform about any developments. If you have questions regarding the potential impacts on your company or sector, please contact [Roland M. Stein](#) or [Glen Kelley](#).

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## EUROPE

### Sanctions 'Blocking Statute' Lacks Bite

US President Donald Trump's failure last month to recertify the 2015 nuclear deal with Iran put the fate of the landmark agreement in Congress' hands. Any congressional moves to "snap back" the US' nuclear-related sanctions on Iran, which include secondary sanctions that target foreign investors in Iran, could both prompt the deal's unraveling and drive a wedge between the US and its European allies. European officials have publicly pledged to stick by the deal and suggested that they will move to protect national firms investing in Iran if the US were to reimpose sanctions suspended in 2016. But observers are questioning how effective Europe's legal tools could be against a determined Washington.

Ahead of Trump's widely-trailed decision, EU Ambassador to the US David O'Sullivan publicly referenced the EU's 1996 blocking statute, which he said offers legal protection to European companies "threatened by the extraterritorial nature of US sanctions in certain circumstances" (EC Sep.29'17). If US secondary sanctions are revived, O'Sullivan said, "the European Union will act to protect the legitimate interest of the company with all the means of our disposal." This, says Roland Stein, a partner at Berlin-based Blomstein, "hints at a potential extension of the EU blocking statute." O'Sullivan's words may have particularly resonated with Total, which has signed up to develop Phase 11 of Iran's South Pars gas field (EC Oct.20'17).

There is, however, a long and possibly complicated road ahead for Brussels should it choose to use this blocking tool. The statute originally worked by imposing countermeasures to address extra-territorial application of both US-imposed sanctions on Cuba via the 1996 Helms-Burton Act and the 1996 Iran and Libya Sanctions Act, now the Iran Sanctions Act. If the EU decides it wants to adapt its measures to take into account the US' Iran sanctions since then, the European Council will need to update its original decision, or joint action plan, on the matter and then direct the European Commission to update the regulation, according to Robert Meade, senior associate at UK-based Ashurst. "This process will require unanimous agreement from all member states," Meade says, adding that each state would subsequently have to produce corresponding law to enforce the EU regulation.

It gets more complicated still. "Once you get past the hurdle of having to update the blocking statute, which wouldn't be that easy, you're left with the enforcement and the obedience

European businesses would give to it," says Guy Soussan, partner at Steptoe & Johnson. Penalties to EU firms for breaching the statute are governed by national laws in each of the EU member states — although the statute stipulates that sanctions for any breach must be "effective, proportionate and dissuasive." Importantly, the blocking regulation also entitles persons or entities within the EU to recover any damages caused to them by the application of US sanctions specified in its annex. The regulation states that such recovery "could take the form of seizure and sale of assets" held within the EU by the entity or person causing the damage.

But as a paper published this week by Columbia University's Center for Global Energy notes, simply determining a violation of the EU blocking statute presents problems. Proving that a company abandoned business in Iran only for purposes of avoiding US sanctions would be difficult, the authors — former US State Department official Richard Nephew and chair of government relations at Wilkie Farr & Gallagher, David Mortlock — say, "given that there might be multiple reasons" for doing so, "including reputational risk, corruption, or profit margins."

As such, most commentators feel the likelihood of Europe enforcing the regulation if Congress decides to snap back nuclear-related sanctions on Iran is slim. Enforcement cases to date remain few and far between. In addition, there are very few, if any, examples of any similar national blocking legislation being invoked.

#### Tough Choice?

A reinforced blocking statute would put multinational corporations into a "difficult position," as they have to decide whether to either comply with it and violate the US sanctions regime, or do the opposite, Stein says. It could come down to choosing "between the lesser of two evils — a decision which is generally taken on the basis of the sanctions and penalties to be expected in the two jurisdictions."

Here, the US' track record of imposing multibillion-dollar penalties over sanctions violations stands out (EC Dec.25'15). As Ashurst's Meade notes, European lenders have tended to be more concerned about breaching US sanctions than the European blocking statute. "However, if the regulation were to be enhanced, a move which

*(continued on page 2)*

## BLOCKING STATUTE *(continued from 1)*

would be very high-profile, lenders might not be able to take as relaxed an approach in the future given the spotlight on Iran,” he adds.

Indeed, some have suggested that its chief value “lies more in its signaling effect ... to the extent that it deters EU firms from complying with blocked US sanctions, and deters the US from adopting and enforcing secondary sanctions,” Anna Bradshaw, partner at UK law firm Peters & Peters, notes. In practice, however, “it is likely that most companies at risk of serious penalties for breaches of US sanctions will ignore the EU blocking legislation,” she says. Additionally, Nephew and Mortlock argue that the EU is likely to “shy away” from any confrontation with the US. But there are risks. Washington’s changing views on Iran, combined with the possible resurrection of the EU blocking statute, has wider implications for US-EU sanctions coordination, they note. ■

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## Compass Points

- **SIGNIFICANCE:** The EU strongly backs the Iran nuclear deal, but its blocking statute aimed at protecting European firms from possible US secondary sanctions targeting investment in Iran lacks bite.
- **CONNECTION:** US-EU sanctions coordination on Russia is also a sore point, after Congress raised hackles in Brussels by introducing optional measures targeting Russian pipeline infrastructure in July sanctions legislation (p2).
- **NEXT:** Congress has all but ruled out snapping back nuclear-related sanctions for now (EC Oct.20’17). But Trump’s threat to take the US out of the Iran deal should Congress fail to agree new measures means they remain a possibility.