Linklaters

Reactivation of the EU Blocking Regulation

On 8 May 2018 President Trump announced that the United States would withdraw from the Joint Comprehensive Plan of Action (the "JCPOA," commonly referred to as the "Iran Nuclear Deal") and that the previously suspended Iran-related secondary sanctions would be reinstated. In accordance with his decision, on 6 August 2018, President Trump issued the "New Iran Executive Order" which reimposes the relevant secondary sanctions[1]. EU persons and companies may thus again face significant consequences when engaging in activities that are restricted under these secondary sanctions.

In response, the European Union (EU) confirmed its full support of the Iran Nuclear Deal and took steps to preserve the interests of European persons and companies investing in Iran. Namely, the EU reactivated the so-called "EU Blocking Regulation"[2] and amended its Annex to include the reinstated U.S. secondary sanctions through the Commission Delegated Regulation (EU) 2018/1100 that was published in the Official Journal of the European Union of 7 August 2018 and entered into force the same day. Simultaneously, the European Commission released a Guidance Note regarding the updated Blocking Regulation and its Annex (the relevant documents are referenced in the Commission's press release that is available here).

The basic principles of the Blocking Regulation are that all EU persons and companies are prohibited from complying with the U.S. Iran-related sanctions listed in its Annex and are entitled to recover damages arising from the application of these sanctions from the persons or entities causing them. Further, the Blocking Regulation provides that no foreign decision, including court rulings or arbitration awards, that are based on these sanctions are recognized in the EU. These principles are discussed in more detail hereafter.

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Who does the Blocking Regulation apply to?

Pursuant to Article 11, the Blocking Regulation applies to:

i. any natural person being a resident in the EU and a national of a Member State;
ii. any entity incorporated within the EU;
iii. any national of a Member State established outside the EU and any shipping company established outside the EU and controlled by nationals of a Member State, if their vessels are registered in that Member State in accordance with its legislation;
iv. any other natural person being a resident in the EU, unless that person is in the country of which he is a national; and
v. any other natural person within the EU, including its territorial waters and air space and in any aircraft on any vessel under the jurisdiction or control of a Member State, acting in a professional capacity (hereafter together the "EU operators").

[1] A number of these secondary sanctions apply since 7 August 2018, while the remaining secondary sanctions will apply as of 5 November 2018.

[2] Council Regulation (EC) 2271/96 of 22 November 1996 protecting against the effects of extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom.

In its Guidance Note, the Commission confirms that the EU Blocking Regulation also applies to the subsidiaries of U.S. companies that are formed in accordance with the law of a Member State and have their registered office, central administration or principal place of business within the EU. Although active in the EU, the branches of U.S. companies that are present in the EU, are not bound by the EU Blocking Regulation. These branches do not have legal personality distinct from their U.S. parent and are formed in accordance with U.S. law.

Which U.S. secondary sanctions are added to the Annex?

Besides the Cuba- and Iran-related secondary sanctions that were already referenced in 1996[3], the Annex now also includes the Iran-related secondary sanctions that were either lifted or waived by the United States under the Iran Nuclear Deal and which have been or will be re-imposed as of 7 August 2018, or 5 November 2018. Concretely, these (additional) secondary sanctions can be found in:

i. the "Iran Freedom and Counter-Proliferation Act of 2012";
ii. the "National Defense Authorization Act for Fiscal Year 2012":
iii. the "Iran Threat Reduction and Syria Human Rights Act of 2012"; and
iv. the "Iran Transactions and Sanctions Regulation".

The Annex references the relevant provisions of these acts. The Commission however clarifies in its Guidance Note that these were only summarized for ease of reference and that the relevant provisions must be consulted for a complete overview.

Reporting Obligation

Article 2 of the Blocking Regulation provides that EU operators are obliged to report to the Commission within 30 days of becoming aware of any case of their "economic and/or financial interests" being affected by the secondary sanctions listed in the Annex. This information is to be supplied to the European External Action Service (EEAS), or may be submitted "through the competent authorities of the Member States".

The information supplied in this respect will only be used for the purposes for which it was provided and will not be disclosed without the express permission of the EU operator providing it. Any communication by the Commission must furthermore take into account the legitimate interest of the EU operator that his, her or its business secrets are not divulged.

No recognition and enforcement of U.S. judgments

Article 4 of the Blocking Regulation prohibits the recognition or enforcement within the EU of U.S. judgments or administrative decisions based on or resulting from the specified U.S. secondary sanctions.

This prohibition is widely drafted, such that no decision, whether administrative, judicial, arbitral or of any other nature, taken by the United States and based on the provisions listed in the Annex, or on acts which develop or implement those provisions, will be recognised in the EU. Similarly, no decision requiring, for instance seizure or enforcement of any economic penalty against an EU operator based on the aforementioned acts will be executed in the EU. This will, according to the Commission's Guidance Note, "shield EU operators from the effects of such decisions in the Union".

No compliance by EU operators

Pursuant to Article 5 of the Blocking Regulation, EU operators are prevented from complying with the U.S. secondary sanctions listed in the Annex. This blocking provision is widely drafted to cover any form of compliance, whether done "actively or by deliberate omission", and be it direct or via a subsidiary or intermediary person.

In its Guidance Note, the Commission specifies that EU operators cannot request a license from the U.S. authorities granting a derogation or exemption from the U.S. secondary sanctions listed in the Annex. This request would as such be in breach of the EU Blocking Regulation as it would necessarily imply recognising the United States extra-territorial jurisdiction and complying with the U.S. sanctions regimes.

EU operators may nevertheless request the Commission to authorize them to request a license from the U.S. authorities through the application procedure prescribed in Article 5 § 2 of the Blocking Regulation (see below under § 6). Furthermore, the simple pursuit of conversations with the U.S. authorities in order for EU operators to ascertain the exact extent of secondary sanctions, how they might impact on them, and whether not complying might entail serious damages on their interests, will not be regarded as a breach of the Blocking Regulation.

Authorisation to comply

Article 5 § 2 of the Blocking Regulation allows EU operators to seek authorisation from the European Commission to comply with the U.S. sanctions listed in the Annex to the extent that non-compliance would seriously damage their interests or those of the EU.

The precise form and content of the application for authorisation are prescribed in Article 3 of the Commission Implementing Regulation (EU) 2018/1101 of 3 August 2018. Applicants should send their application for authorisation to the Commission in writing, either by post (European Commission, Service for Foreign Policy Instruments EEAS 07/99, B-1049 Brussels, Belgium) or by email (EC-AUTHORISATIONS-BLOCKING-REG@ec.europa.eu) and indicate the precise provisions of the listed secondary sanctions. They should furthermore describe the scope of the authorisation that is being requested and the damage that would be caused by their non-compliance. Applicants should also provide sufficient evidence that non-compliance would cause them, or the EU, serious damage.

The Commission specifies in its Guidance Note that an applica-

[3] The Blocking Regulation first entered into force in 1996 to protect EU persons and companies against the extra-territorial effect of the U.S. Cuba and Iran/Libya-related secondary sanctions.

tion for authorisation can be submitted individually or by several EU operators together, provided that their interests are "sufficiently homogenous". A group submission, however, still needs to allow the Commission to assess case by case whether a serious damage would occur to the individual interests of each applicant or the EU.

The Commission is required to consider any such application and assess whether a serious damage to the protected interests would arise on the basis of the non-cumulative criteria listed in Article 4 of the Commission Implementing Regulation (EU) 2018/1101.

If the Commission finds sufficient evidence in support of the applicant's contention, it will expeditiously submit a draft of proposed measures to the Committee on Extra-territorial Legislation (the "Committee"). If not, the Commission will submit a proposal rejecting the application. The Committee, composed of representatives of every Member State and chaired by a (non-voting) representative of the Commission, then votes a formal opinion on the basis of the proposal submitted by the Commission. If the Committee passes a favourable opinion, the Commission's measures will be adopted. If a negative opinion or no opinion emerges, the proposed measures will be referred to the European Council, which in turn will consider and vote on them. If no Council decision is made within two weeks, the Commission's measures will be adopted (Article 8 of the EU Blocking Regulation).

The Commission Implementing Regulation provides that the final decision should be notified by the Commission to the applicant "without delay". The application for an authorisation does not have suspensive effect, so EU operators are obliged to comply with the Blocking Regulation until an authorisation is obtained.

Damage recovery

Article 6 states that any EU operator is entitled to recover his, her or its damages, including legal costs, caused by the application of the U.S. sanctions listed in the Annex. Recovery may be sought "from the natural or legal person or any other entity causing the damages or from any person acting on its behalf or intermediary". Recovery may be achieved by judicial proceedings in the Member State in which the party responsible for the damages holds assets, and may also take the form of seizure and sale of such assets, including any shares that are held by the responsible party in a company incorporated within the EU.

It is not clear whether this also allows EU operators to litigate in EU courts against the U.S. authorities. On this point, the Commission notes that "who exactly will be the defendant in each case will depend on the specifics of the case, on the damage caused, the person or entity actually causing it, the possible shared responsibility in causing such damage, etc." and that "deciding on this issue is a matter for the competent court". The Commission however clarifies that "the wording of Article 6 is very broad, in that it includes not only the responsible persons and entities, but also their representatives, thus allowing a broader scope of protection to EU operators".

How will breaches of the Blocking Regulation be penalized?

The amended Blocking Regulation is directly applicable in all EU Member States and is immediately enforceable (i.e. as of 7 August 2018) as law without the need for transposing legislation at a national level. The Member States' authorities are however responsible for its implementation, including for the implementation in their respective legislation and regulations of penalties for possible breaches, which need to be "effective, proportional and dissuasive". Penalties may thus vary from one Member State to another.

This note is for information purposes only and does not constitute legal advice. Companies envisaging doing business in the jurisdictions concerned should first obtain proper legal advice about the legal issues and risks under all legislations concerned, including U.S. sanctions laws.

Key contacts

Stefaan Loosveld
Partner, Brussels
Tel: +32 2 501 9251
stefaan.loosveld@linklaters.com

Liesbeth Truyens
Managing Associate, Brussels
Tel: +32 2 501 9471
liesbeth.truyens@linklaters.com