The EU Blocking Regulation: compliance programmes for US and EU companies

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In light of the US withdrawal from the Joint Comprehensive Plan of Action ('JCPOA') and the EU's subsequent amendment of the so-called 'Blocking Regulation', companies subject to US and EU jurisdiction may find themselves between a rock and a hard place when designing sanctions compliance programmes. If they implement a global policy requiring all operations to follow US sanctions requirements, their EU subsidiaries could be at risk of breaching the Blocking Regulation by arguably taking actions to comply with relevant US sanctions restrictions. Yet, if their EU subsidiaries or operations do not take into account US sanctions, they may become a target of US secondary sanctions or, if there is sufficient US nexus, direct penalties for breaching US sanctions laws.

US sanctions against Iran

The 4 November US sanctions against Iran include so-called 'secondary sanctions' designed to discourage non-US persons from doing certain business with Iran, such as purchasing oil. Secondary sanctions allow (but do not require) US authorities to impose sanctions on non-US persons that engage in targeted commercial activities involving Iran. These secondary sanctions create a particular risk for EU companies doing business with Iran under the JCPOA.

In addition, the United States maintains a trade embargo against Iran as well as extensive 'primary' sanctions, which must also be followed by non-US subsidiaries of US companies. Together, these generally prohibit any person from engaging in Iran-related transactions involving US-origin goods or through the US financial system (e.g., undertaking a funds transfer denominated in US dollars).

EU Blocking Regulation

The EU has remained committed to the JCPOA and has taken steps to persuade Iran that the JCPOA continues to be viable. In particular, the EU has amended the Blocking Regulation.[1] The Blocking Regulation, as amended, prohibits EU persons from taking actions to comply with most US sanctions against Iran.

Prior to the Iran-related amendment, enforcement of the Blocking Regulation had not been rigorous. There is a risk that this might change, given the renewed attention paid to the Regulation and opposition in the EU to the US withdrawal. In particular, EU guidance published in August 2018 (the 'EU Guidance') has clarified that article 6 of the Regulation creates a free-standing right for a private person to sue for damages caused by a company's compliance with US sanctions at issue in the Blocking Regulation. Although article 6 was not the subject of the recent amendment, its scope was previously interpreted in a much more limited way.[2] The new interpretation implies that a company can sue another company in the EU for actions taken to comply with certain US sanctions.

Compliance

The differing directives of US sanctions law and the Blocking Regulation may seem incompatible to companies subject to both. However, the Blocking Regulation does not force companies to do business in Iran, in any other jurisdiction, or with any counterparty. Per the EU Guidance, the purpose of the Blocking Regulation is 'to ensure that such business decisions remain free, i.e. are not forced upon EU operators by the listed extra-territorial legislation'. The EU Guidance expressly states that EU companies 'are free to choose whether to start working, continue, or cease business operations in Iran or Cuba'. Consequently, if a company decides to prohibit business in Iran or in any other jurisdiction for its own risk or policy reasons, the Blocking Regulation would not stand in the way of that decision. The reasons for such a prohibition might relate, for example, to Iran's inclusion on the FATF 'grey list', or the country's low Transparency International score. The risk-based rationale for declining to do business in Iran should be reflected in the company's policies, guidelines and other documentation, as appropriate. The company should also ensure that relevant employees and, if necessary, counterparties understand the company's risk-based foundation for such decisions.

Companies should also assess sanctions compliance clauses in their contracts. Among other considerations, they should carefully review whether their EU affiliates can provide blanket undertakings or representations about compliance with US sanctions, or whether appropriate carve-outs and references to internal polices should be included. When reviewing contractual relationships, the recent decision of the English High Court in *Mamancochet Mining Limited v. Aegis Managing Agency Ltd and Others* [2018] EWHC 2643 (Comm) may be instructive, as it suggests (albeit *obiter*) that the Blocking Regulation does not apply to certain contractual obligations.[3]

The reinstatement of US sanctions on Iran has created compliance headaches for companies doing business in the US and EU. Whilst the risks of conflict between US and EU laws can be mitigated, they are unlikely to be eliminated entirely. Companies should ensure that their compliance policies and sanctions clauses reflect the full scope of their risk-based decision-making without unnecessarily falling afoul of the Blocking Regulation. ■

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Links and notes

[1] Council Regulation (EC) No 2271/96, as amended.
[2] See: EU Guidance Note on Blocking Statute, 7 August 2018.
[3] See: www.debevoise.com/insights/publications/2018/10/us-sanctions-v-eu-blocking-regulation




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