



Between a rock and a hard place

European companies are squeezed between US sanctions and the new EU blocking statute. Matthew Oresman and Henrietta Worthington discuss

The US recently re-imposed sweeping sanctions against Iran over the objection of the EU and various European governments. In response, the EU issued a new 'blocking statute' to counter these sanctions and provide some level of relief to European companies. However, European companies are now caught in the crossfire as this patchwork has created a host of complex options and processes for those who are still involved in Iranian-related transactions, even indirectly or unintentionally. European companies are very much caught between a rock and a hard place.

US sanctions

For European companies, 'the rock' is the very real possibility of being sanctioned themselves or incurring other penalties for breaching US sanctions. The US has confirmed that it intends to make life difficult for anybody doing business in Iran.

The US completed the 'snap back' of its rigorous sanctions regime on 5 November, along with the announcement of a large number of new Specially Designated Persons and Blocked Nationals (SDN) designations. Secretary of State, Mike Pompeo, has stressed the importance of the re-imposed sanctions, stating that they are *"an important part of our efforts to push back against Iranian malign activity"* and that *"the United States is going to enforce these sanctions."*

The impact of US primary and secondary sanctions is far reaching. For example, primary sanctions can apply to any person transacting in US dollars, even from outside the US, because virtually all dollar denominated transactions pass through the US financial system in some way, even if just for a moment when they are 'cleared.' Secondary sanctions can be applied to companies even when there is no US jurisdictional contact; secondary sanctions apply to a number of specific categories of activities, including participating in Iran's energy sector and engaging in transactions with Iranian SDNs.

The Office of Foreign Assets Control (OFAC) has shown its willingness to impose significant penalties on companies violating US sanctions. In 2015, the US Treasury fined BNP Paribas almost \$9 billion for sanctions infringements in respect of Sudan, Cuba and Iran. Penalties of about \$1.3 billion have just been announced for Société Générale for the same, and there are many other examples.

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EU Blocking Statute

The EU's Blocking Statute is the 'hard place,' as it aims to counter the effect of the re-imposed US sanctions. The EU has stressed its commitment to the Iran nuclear deal, and its amended legislation is testament to its intention to keep the deal alive.

The statute takes a three-pronged approach in its attempt to protect EU businesses. Firstly, it forbids EU companies from complying with US sanctions, unless they have a specific authorisation to do so. EU operators may apply for approvals in circumstances where *"non-compliance [with US sanctions] would seriously damage their interests or those of the Community."*

The EU has tried to put some weight behind this exception by publishing, for the first time, the mechanics for making an application. This could be indicative of the EU's intention to enforce any breaches which have not been specifically authorised. However, there are also queries as to the robustness of this provision, given the difficulties in proving that any withdrawal from Iran was due to US sanctions, rather than a legitimate business decision.

Secondly, the Statute nullifies any foreign court judgements based on US Iranian sanctions, including court rulings and arbitration awards.

Finally, it allows companies to recover damages incurred because of the US sanctions from the person who caused them. Exactly who will be the defendant in each case will depend on the specifics of the case, the kind of damage caused, the person or entity causing it, possible shared responsibility, etc. The language is vague enough to allow for the possibility that claims could be brought against the US by an injured company under this provision.

To further reinforce its commitment to the Blocking Statute, the EU also published guidance to help companies navigate its terms. EU operators are also required to inform the European Commission where their interests are affected by US sanctions on Iran.

However, whether the regulations really offer significant protection in practice remains to be seen. Member states are responsible for enforcing the regulations, which will lead to inconsistencies in implementation across the bloc.

Historically, there has been a serious lack of EU member state enforcement for breaches of blocking regulations. Only Austria has ever brought charges under the Blocking Statute and the case never even advanced to a prosecution. This is in stark contrast to OFAC's eagerness to enforce US sanctions breaches.

A huge question mark remains as to whether a member state would sanction one of its prized corporate assets for complying with US laws in order to avoid high fines in the US. However, this is distinctly possible, particularly considering the current transatlantic trade tensions.

The House of Commons European Scrutiny Committee released their comments on the Blocking Statute, acknowledging that *"it puts EU and UK companies in the position of having to choose between risking enforcement measures at home (if they choose to comply with the American sanctions) or in the US (if they abide by the Blocking Statute and ignore the US legislation."* However, no guidance has been given on either side as to how companies should navigate these conflicting rules.

Other initiatives

Whilst the EU, and in particular Germany, France and the UK, have stressed their commitment to the Joint

Comprehensive Plan of Action (JCPOA), the US is holding all the cards. In July, Mike Pompeo and Steven Mnuchin formally rejected an appeal from E3 ministers requesting various exemptions to the re-imposed US sanctions.

The second wave of US sanctions – targeted at Iran’s oil, financial services and shipping industries – provided no clarity or reassurances to EU companies.

Along with the completion of the ‘snap back’ came the announcement that SWIFT (the international financial messaging system) would comply with US sanctions. Secretary of State Mike Pompeo also highlighted the strict US position on enforcement against financial transfer messaging platform providers.

Heiko Maas, the German Foreign Minister, has indicated that Europe, like China and Russia, could look to create its own euro-based SWIFT system. However, the Chancellor, Angela Merkel, has warned against undermining the transparency of SWIFT, which helps to weed out financial crime – further provoking fears that Iranian transactions will move underground.

This has forced the EU back to the drawing board to develop financial messaging that is ‘outside of US influence’. The most promising suggestion was for the EU to establish a ‘Special Purpose Vehicle’ (SPV) to process Iran-related payments, but this initiative looks to have collapsed.

In theory, this SPV would have sat outside the international banking system with the aim of protecting EU companies from the reach of US sanctions. It would work as a kind of clearing house, offsetting Iranian exports against purchases of EU goods whilst avoiding any actual banking transactions.

EU diplomat, Federica Mogherini, told the UN general assembly that the SPV would *“allow European countries to trade with Iran in accordance with EU law and could be open to other partners in the world.”*

However, the idea has hit multiple hurdles, with no EU country willing to host the SPV. European companies also appear not to be buying into the idea and are instead bowing to the fear of consequence for breaching US sanctions.

A further blow came with Austria’s confirmed refusal to host the SPV, prompting questions as to its feasibility. The EU was aiming to have the SPV up and running by the end of November, looking to Luxembourg to step up to the challenge, but this is looking increasingly unlikely.

Despite all good intentions, Europe will be heavily constrained in its ability to uphold its commitment to the Iran deal unless it is able to find a *“financially independent sovereign channel”* to move funds to, and from, Iran. With the commercial banks off the table, EU members are considering using their own central banks to handle Iranian transactions.

The gamble here is that the US wouldn’t dare to sanction an ally’s central bank. However, US pressure groups are already proposing that the US sanction individual central bankers if the banks themselves are off limits. Once again, it appears the central banks are afraid of being cut off from the all-dominant US financial market. No bank, as yet, has shown a willingness to take that risk. The European Investment Bank’s board was quick to refuse any involvement.

In yet another show of US determination to cause the collapse of the Iran deal, it has offered its assistance to American allies importing Iranian oil to find alternative sources. National security adviser, John R Bolton, confirmed

that the US “[does] not intend to allow our sanctions to be evaded by Europe or anyone else.”

Even the waivers granted by the US come tinged with their commitment to cripple the Iranian economy. The pre-JCPOA system on Iranian oil exports has been reinstated and exemptions have been granted to eight countries on the condition that they commit to reducing their purchases. They must also use escrow accounts designed to keep hard currency out of the hands of the Iranian regime.

How are companies reacting?

The Blocking Statute is of particular relevance to EU subsidiaries of US companies. It does not apply to EU branches of US companies, or US subsidiaries of EU companies, which are only subject to US law. However, the long reach of US sanctions will leave EU operators with activities in Iran vulnerable.

Probably the best marker of the EU’s success in countering the US’s aggressive Iranian standpoint is the response of European multinationals to the re-imposed US sanctions.

Almost without exception to date, businesses caught by both the EU and US regimes are choosing to step away from the Iranian market. Companies including Total, Maersk, Eni, Boeing, and Peugeot were quick to confirm that they would exit their Iran activities.

BP also announced that it would be suspending a joint venture with an Iranian partner, stating that *“BP always complies with applicable sanctions. We cannot defy the United States.”*

However, EU operators should be aware of the risks of cancelling planned activity in the absence of an authorisation, particularly if member states show the political commitment to apply the Blocking Statute strictly.

Whether such a cancellation is based on true economic considerations, or because of concerns related to US sanctions, may not be an easy analysis to demonstrate to EU regulators; obtaining authorisation therefore may offer a safer approach.

The EU has started looking to its SMEs to lead the charge on activities in Iran. Smaller companies with limited or no operations in the US have the opportunity to grow their Iranian businesses – provided the SPV, or other payment channel, can be secured.

Meanwhile, US diplomats have been working with exactly these companies to help them find new markets and business opportunities outside of Iran. US representatives from the Commerce Department have been holding seminars in the EU devoting time and resources to thwart any attempt for the SMEs to bring economic benefits to Iran.

SMEs may take the view that they are too small to be targeted by the US for sanctions breaches. However, they should be wary given all recent US rhetoric: they may not slip under the radar if the US wants to make an example of them.

What next?

US sanctions already appear to be taking their toll: Iranian oil exports are on the decline and its currency is plummeting. There is increasing pressure on the EU to come up with a workable solution, with Iran threatening to scrap what remains of the nuclear deal unless the EU can offer sufficient economic protection.

Whilst companies run the gauntlet between the conflicting regimes, the question remains as to which one they should obey. It is evident that businesses perceive the risk of falling foul of US sanctions to be a greater threat than

the protection offered by the EU – and until the EU proves otherwise, they are probably right. The good news is that the Blocking Statute allows EU companies seeking to comply with US sanctions a process to obtain authorisation and avoid being crushed by the conflicting laws. ■

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