

## Expert Analysis

# Cos. Caught Between Iran Sanctions And EU Blocking Statute

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In response to President Donald Trump's executive order reimposing certain Iran-related sanctions, the European Union has expanded the scope of its blocking statute to cover these sanctions. On August 7, immediately following the U.S. government's reimposition of certain Iran-related sanctions, the Commission Delegated Regulation (EU) 2018/1100, amending the annex to the EU blocking statute, was published in the EU Official Journal and entered into force.

In addition to the delegated regulation, the following two texts relating to the application of the blocking statute were published in the EU Official Journal:

- Commission Implementing Regulation (EU) 2018/1101, which sets out: (i) the process for applying to the European Commission for an authorization permitting full or partial compliance with the relevant U.S. sanctions; and (ii) a non-exhaustive list of criteria that the commission will consider in assessing whether an authorization should be granted; and
- The commission's guidance note with nonbinding guidance on the application of the revised blocking statute. The nonbinding guidance covers various aspects of the blocking statute, including persons/entities within the scope of the blocking statute, its temporal application, effects of the blocking statute, recovery of damages arising from the application of U.S. Iran-related sanctions, authorizations to comply with U.S. Iran-related sanctions, etc.

## U.S. Iran-Related Sanctions Within the Scope of the Blocking Statute

As noted in our previous Law360 article, the amended annex adds within the scope of the blocking statute certain U.S. Iran-related secondary sanctions that are viewed by the European Commission as having extraterritorial application, and that previously had been lifted as part of the Iran nuclear deal.

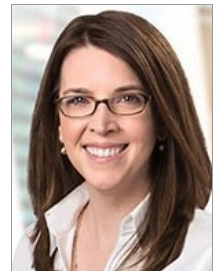
In addition, the amended annex to the blocking statute adds to its scope U.S. primary sanctions under the Iranian Transactions and Sanctions Regulations, or ITSR. It appears, therefore, that the expansion of the blocking statute includes ITSR provisions that had remained in effect even while the U.S. government was participating in the Joint Comprehensive Plan of Action.

This aspect of the expansion is particularly notable, because it prohibits EU companies from complying with the longstanding ITSR requirements "[n]ot to reexport any goods, technology or services that (a) have been exported from the USA and (b) are subject to export controls rules in the USA, if the export is made knowing or having reason to know that it is specifically intended for Iran or its Government." However, under U.S. law, knowingly engaging in such prohibited re-exports potentially can subject an EU company to U.S. civil and criminal penalties, including significant fines, a denial of export privileges and even imprisonment.

With the reimposition of certain U.S. sanctions targeting Iran, and the expansion of the blocking statute,



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many companies incorporated in the EU with Iran-related interests may find themselves facing a direct “conflict of laws” scenario.

### **Temporal Application of the Blocking Statute**

The commission's guidance note confirms that the amended blocking statute applies to EU operators from August 7, i.e., there is no retroactive application. The guidance also clarifies that the blocking statute applies to contractual obligations entered into before August 7. Therefore:

- If an EU operator currently has activities in Iran, termination of its business in the country on or after August 7 in order to comply with the relevant U.S. sanctions against Iran would require an authorization from the commission in order to avoid a breach of the blocking statute.
- If an EU operator had activities in Iran, but fully terminated its business (for example, terminated relevant contracts) before August 7 for any reason, that EU operator should not be subject to the requirements of the blocking statute.
- It is not clear how the blocking statute applies to EU operators which ceased their Iran-related activities before August 7, but still must take additional actions on or after August 7 to wind down Iran-related investments or contractual relationships. We expect that these wind-down activities may be assessed on a case-by-case basis. It is possible that they might be interpreted to fall within the scope of the blocking statute, in particular where an EU operator had taken no or only limited active steps to terminate its Iran-related activities before August 7.

### **Business Decisions of EU Operators Based on Assessment of the Economic Situation**

The commission recognizes that EU operators are free to make business decisions to start, continue or cease business operations in Iran “on the basis of their assessment of the economic situation.” Such guidance suggests that EU operators are able to cease their Iran-related activities for genuine economic reasons (for example, no access to financing, AML concerns, no access to U.S. inputs required for production, etc.).

### **Notification of Effects of U.S. Iran-Related Sanctions**

Under the blocking statute, EU operators must notify the European Commission or their member state of incorporation whenever the U.S. Iran-related sanctions directly or indirectly affect the economic or financial interests of the EU operator. The notification process is intended to allow the commission to understand more clearly the impact of Iran-related sanctions on EU operators. An EU operator is required to provide the relevant information within 30 days from the date on which it obtained such information. The commission could request additional relevant information.

The commission’s guidance note clarifies that, in case of an EU company (legal person), the notification obligation applies to “directors, managers and other persons with management responsibilities.” However, the guidance note does not elaborate further on the circumstances that would trigger the obligation to notify either the commission or the relevant member state.

Therefore, it is left for each EU operator to determine whether and when its economic or financial interests have been affected by the application of U.S. Iran-related sanctions.

### **Authorization to Comply With U.S. Iran-Related Sanctions**

The implementing regulation and the guidance note provide further details regarding how EU operators

can seek an authorization to comply with U.S. Iran-related sanctions:

- EU operators have the right to apply to the commission for an authorization to comply with U.S. Iran-related sanctions “if not doing so would actually damage their interests or those of the Union.” The damage has to be “serious.” The implementing regulation sets out a nonexhaustive list of noncumulative criteria that the commission will use to determine whether “serious damage” to the interests of EU operators or the EU itself would arise. Each of those listed criteria may find application in the specific circumstances surrounding the applicant.
- EU operators cannot use the authorization procedure to obtain the commission’s confirmation that an EU operator’s conduct does not constitute compliance with the relevant Iran-related sanctions (so-called “letters of comfort”).
- In the application for authorization, the applicant will need to specify the provisions of the relevant U.S. sanctions laws with which they would need to comply, and “what exactly the behavior is they would seek to engage in.”
- Neither the implementing regulation nor the guidance note indicates the time frame within which the commission will assess requests for authorization. The commission merely states that it will try to process applications and reply to applicants “as swiftly as possible.” We expect that the assessment period will depend on the actual number and complexity of applications received by the commission.
- The request for authorization does not suspend the application of the blocking statute. Therefore, while the commission assesses the application, the EU operator would be in breach of the blocking statute if they were to comply with the U.S. Iran-related sanctions; however, proceeding with the Iran-related activity could result in liability or secondary sanctions risk under the U.S. government’s Iran-related sanctions. As a result, it is possible that companies may find themselves caught between two conflicting legal regimes.

Overall, the implementing regulation and the commission’s guidance suggest that EU operators should view requests for authorization as a last-resort measure where an EU operator has exhausted all other options to avoid potential serious damage to its interests due to noncompliance with U.S. Iran-related sanctions (in line with the requirements of the blocking statute).

### **Requests for Licenses From U.S. Authorities**

According to the commission, an EU operator may not, absent authorization from the commission, request an individual license granting a derogation/exemption from the relevant Iran-related sanctions from the U.S. authorities, as doing so would constitute compliance with those Iran-related sanctions. Before requesting such individual license from U.S. authorities, an EU operator would need to obtain a commission authorization to comply with Iran-related sanctions in accordance with the process set out in the blocking statute.

It is not clear from the guidance whether the prohibition on requesting individual licenses covers only individual licenses under the U.S. primary Iran-related sanctions, or whether it also covers waivers of the Iran-related secondary sanctions for particular transactions or projects.

However, according to the guidance, EU operators may engage in simple conversations with the U.S. authorities regarding the new sanctions order, “to ascertain its exact extent, how it might impact on them and whether not complying with it might entail serious damage on their interests.”

## **Position of Multinational Companies**

The entry into force of the blocking statute and the reimposition of certain U.S. sanctions targeting Iran is likely to result in multinational companies incorporated in the EU (or having EU-based subsidiaries) facing a conflict of laws situation. From the EU's perspective, such companies are required to comply with the blocking statute and, in making their business decisions, are expected to disregard the reimposed U.S. Iran-related sanctions listed in Annex A.

The factual circumstances of individual EU companies are likely to differ, and require a case-by-case analysis. In deciding how to balance the U.S. Iran-related sanctions and the blocking statute, each EU company is likely to consider a number of factors, such as whether proceeding with the Iran-related activity would result in a violation of U.S. law under U.S. primary sanctions, or in sanctionable activity under U.S. secondary sanctions; a company's links to the U.S.; whether the company's intended conduct amounts to compliance with the relevant U.S. Iran-related sanctions or is a mere business decision based on economic or other considerations; the limited availability of authorizations under the blocking statute; etc.

In particular, the European Commission's guidance that the blocking statute does not apply if the decision to terminate business with Iran (or forego an opportunity) is for non-sanctions-related business reasons injects flexibility and ambiguity into the application of the blocking statute.

Multinational companies also need to consider the potential risks relating to the enforcement of the blocking statute, including the prohibition on complying with the listed U.S. Iran-related sanctions. Enforcement of the blocking statute is left to the discretion and authority of the individual member states and, in principle, there is very little evidence of the blocking statute being enforced in the past.

The difficult diplomatic and economic circumstances between the EU and the U.S. make it difficult to predict how the member states will approach enforcement. In the current political climate, it is impossible to discount the possibility that certain member states may choose to take enforcement actions against EU companies that violate the blocking statute.

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