EU Response to revived U.S. Sanctions against Iran

In our client alert of May 10, 2018 (available here) we detailed the U.S. sanctions against Iran which would be revived after the Trump Administration decided to withdraw from the Iran nuclear deal.

By an Executive Order, the first tranche of those revived sanctions was due to take effect yesterday August 7, 2018. The second tranche will come back into force on November 5, 2018. OFAC published a new set of FAQs (numbers 597-624) on August 6, 2018 to explain the impact of the revived sanctions.

The other signatories of the Joint Comprehensive Plan of Action deal with Iran (the "JCPOA"), were Russia, China, the European Union, France, Germany and the United Kingdom.

The European signatories have been vocal supporters of the JCPOA deal and vocal critics of the threats to re-impose U.S. sanctions.

Yesterday the EU followed through with earlier warnings and expanded the scope of its 1996 "blocking regulation". The blocking regulation had prohibited compliance with certain U.S. sanctions then in force against Cuba, Libya and Iran (EU regulation 2271/1996), but under EU Regulation 2018/1100, the list of U.S. laws now covered by the blocking regulation are:

- *National Defense Authorization Act for Fiscal Year 1993, Title XVII Cuban Democracy Act 1992, sections 1704 and 1706;*
- *Cuban Liberty and Democratic Solidarity Act of 1996*
- *Iran Sanctions Act of 1996*
- *Iran Freedom and Counter-Proliferation Act of 2012*
- *National Defense Authorization Act for Fiscal Year 2012*
- *Iran Threat Reduction and Syria Human Rights Act of 2012*
- *Iranian Transactions and Sanctions Regulations*

Subject to some narrow exceptions, it is now prohibited for those subject to EU regulations (i.e. EU nationals, EU companies, EU flagged aircraft and ships, and the EU operations of non-EU companies) to comply with the revived U.S. sanctions.

The EU, however, does not have the power to create or impose penalties outside the area of competition law, so it has been delegated to the individual member states to determine the penalty for non-compliance with this prohibition.

Implementation of the blocking statute by the member states

As the (non-exhaustive) table below sets out, the results of this delegation to the member states of the EU have been varied. Some member states, most notably France, have completely failed to implement the 1996 blocking regulation into local law.

Member State	**Implementation of EU Regulation 2271/1996**
Austria	Regulation: Administrative penalty with maximum fine of €72,600
Belgium	Not implemented
Cyprus	Section 136 of the Criminal Code, with a maximum fine of €878, or two year sentence[1]
Denmark	Regulation: criminal for companies with fines of up to 60 days' revenue
Estonia	Section 372[1] of the Penal Code with a maximum fine of €32,000
France	Not implemented
Germany	82(2) of the Foreign Trade Regulation, with a maximum criminal fine of €500,000
Ireland	Regulation: maximum criminal fine of €1,900 and maximum sentence of 12 months
Italy	Regulation: administrative penalty of between €15,000 and €92,000
Luxembourg	Not implemented
Malta	Regulation: criminal fine of between €5,000 and €116,468
Netherlands	Regulation: criminal fine with a maximum penalty of just over €450,000
Romania	Regulation: implemented into Romanian law but no available penalty
Slovakia	Regulation: administrative fine of between €400 and €125,000
Slovenia	Regulation: administrative fine of between €400 to €125,000
Spain	Regulation: administrative fine with a maximum penalty of just over €60,000
Sweden	Regulation: unlimited criminal fine, and maximum 6 months sentence
UK	Regulation: unlimited criminal fine, but no custodial sentence available

The most common responses however, have been to either create a criminal offence or an administrative offence.

Only in Sweden does the blocking statute carry with it the double threat of a potentially unlimited criminal fine for a company and a custodial sentence for an individual. The

[1] Cyprus' Sanctions Law of 2016, which introduced higher penalties for breaches of EU and UN sanctions, does not extend to the blocking regulation.

other end of the spectrum for those member states which created a criminal offence is Ireland where the maximum fine is €1,900. In the United Kingdom the potential fine for a company is unlimited but, uniquely amongst white collar criminal offences in the UK, a prison sentence is not available for this offence.

The range of penalties in force in those member states which created an administrative penalty for failure to comply with the prohibition is also set out in the table.

It should be noted that only Austria, of all the EU member states, has ever brought charges under the blocking regulation, and this did not proceed to a prosecution.[2] In that case a U.S. company purchased an Austrian bank and proceeded to shut down the bank accounts of Cuban nationals. The Austrian authorities intervened and the U.S. company was required to stop the account closures and apply to OFAC for a special licence to allow the accounts to continue.

Additionally, there are two other aspects of the blocking regulation which have received less attention than the prohibition.

The European Commission can authorize compliance with the blocked U.S. sanctions

The first is the ability of the European Commission to authorise an EU company to comply with the listed U.S. sanctions where non-compliance would jeopardise the interests of either the EU or the company. The mechanics of making such application have now, for the first time, been published through EU Regulation 2018/1101 on August 3, 2018. The ability to ask for authorization has been in place since 1996, but the mechanics for considering such applications were not in place and no examples of such authorizations being sought or granted are known

Article 4 sets out the criteria to be assessed as part of any such application:

(a) whether the protected interest is likely to be specifically at risk, based on the context, the nature and the origin of a damage to the protected interest;

(b) the existence of an ongoing administrative or judicial investigation against the applicant from, or a prior settlement agreement with, the third country which is at the origin of the listed extra-territorial legislation;

(c) the existence of a substantial connecting link with the third country which is at the origin of the listed extraterritorial legislation or the subsequent actions; for example the applicant has parent companies or subsidiaries, or participation of natural or legal

---

[2] *See*, *Austria charges bank after Cuban accounts cancelled*, Reuters (Apr. 27, 2007), http://www.reuters.com/article/2007/04/27/austria-bawag-idUSL2711446820070427

persons subject to the primary jurisdiction of the third country which is at the origin of the listed extra-territorial legislation or the subsequent actions;

(d) whether measures could be reasonably taken by the applicant to avoid or mitigate the damage;

(e) the adverse effect on the conduct of economic activity, in particular whether the applicant would face significant economic losses, which could for example threaten its viability or pose a serious risk of bankruptcy;

(f) whether the applicant's activity would be rendered excessively difficult due to a loss of essential inputs or resources, which cannot be reasonably replaced;

(g) whether the enjoyment of the individual rights of the applicant would be significantly hindered;

(h) whether there is a threat to safety, security, the protection of human life and health and the protection of the environment;

(i) whether there is a threat to the Union's ability to carry out its humanitarian, development and trade policies or the external aspects of its internal policies;

(j) the security of supply of strategic goods or services within or to the Union or a Member State and the impact of any shortage or disruption therein;

(k) the consequences for the internal market in terms of free movement of goods, persons, services and capital, as well as financial and economic stability or key Union infrastructures;

(l) the systemic implications of the damage, in particular as regards its spill over effects into other sectors;

(m) the impact on the employment market of one or several Member States and its cross-border consequences within the Union;

(n) any other relevant factor.

It is expected many companies will be considering making an application under this new procedure as it has the potential to provide a way of navigating through the complexities of complying with both the U.S. sanctions and the EU’s blocking regulation. In this

context it is worth noting that on a number of occasions OFAC has shown little sympathy to companies which have sought to comply with the blocking regulation.[3]

Right to bring claims against the U.S. government

The second additional aspect of the blocking regulation is the ability it creates, under article 6, for a company or person to recover damages. This ability has been in place since 1996 but has not been utilised before now. As it does not relate to the creation of a criminal offence, this aspect of the blocking regulation needs no implementation by the member states and has direct effect in all 28 states. Taking the example of an EU company fined by OFAC, or which loses business as a result of being forced to comply with U.S. sanctions that company is "*entitled to recover any damages, including legal costs, caused to that person by the application of the laws specified in the Annex or by actions based thereon or resulting therefrom*".

Further, the EU company would be entitled to sue the U.S. government as "*[s]uch recovery may be obtained from the natural or legal person or any other entity causing the damages or from any person acting on its behalf or intermediary*". The suit could be commenced in the courts of any EU member state where the U.S. government "*holds assets*", and "*the recovery could take the form of seizure and sale of assets held by those persons, entities, persons acting on their behalf or intermediaries within the Community, including shares held in a legal person incorporated within the Community*".

The ability to bring such a claim and enforce it would be constrained by issues of sovereign immunity in the different member states, and it remains to be seen if many companies will avail themselves of this right.

About Curtis

Curtis, Mallet-Prevost, Colt & Mosle LLP is a leading international law firm. Headquartered in New York, Curtis has 17 offices in the United States, Latin America, Europe, the Middle East and Asia. Curtis represents a wide range of clients, including multinational corporations and financial institutions, governments and state-owned companies, money managers, sovereign wealth funds, family-owned businesses, individuals and entrepreneurs.

For more information about Curtis, please visit www.curtis.com.

---

[3] *See,* notably an OFAC fine imposed in 2013 where OFAC refused to give mitigating weight to the fact that certain sanctionable transactions were from countries that had blocking laws in place.

Attorney advertising. The material contained in this Client Alert is only a general review of the subjects covered and does not constitute legal advice. No legal or business decision should be based on its contents.

Please feel free to contact any of the persons listed below if you have any questions on this important development:

Mark Handley
Partner
mhandley@curtis.com
London: +44 201 710 9821

Jacques Semmelman
Partner
jsemmelman@curtis.com
New York: +1 212 696 6067

Daniel Lenihan
Partner
dlenihan@curtis.com
New York: +1 212 696 6949

Edoardo Zucchelli
Counsel
ezucchelli@curtis.com
Milan: +39 02 7623 2001

Hyuna Yong
Associate
hyong@curtis.com
New York: +1 212 696 6123

Benjamin Woodruff
Associate
bwoodruff@curtis.com
New York: +1 212 696 6034