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EUROPE

Sanctions 'Blocking Statute' Lacks Bite

US President Donald Trump's failure last month to recertify the 2015 nuclear deal with Iran put the fate of the landmark agreement in Congress' hands. Any congressional moves to "snap back" the US' nuclear-related sanctions on Iran, which include secondary sanctions that target foreign investors in Iran, could both prompt the deal's unraveling and drive a wedge between the US and its European allies. European officials have publicly pledged to stick by the deal and suggested that they will move to protect national firms investing in Iran if the US were to reimpose sanctions suspended in 2016. But observers are questioning how effective Europe's legal tools could be against a determined Washington.

Ahead of Trump's widely-trailed decision, EU Ambassador to the US David O'Sullivan publicly referenced the EU's 1996 blocking statute, which he said offers legal protection to European companies "threatened by the extraterritorial nature of US sanctions in certain circumstances" (EC Sep.29'17). If US secondary sanctions are revived, O'Sullivan said, "the European Union will act to protect the legitimate interest of the company with all the means of our disposal." This, says Roland Stein, a partner at Berlin-based Blomstein, "hints at a potential extension of the EU blocking statute." O'Sullivan's words may have particularly resonated with Total, which has signed up to develop Phase 11 of Iran's South Pars gas field (EC Oct.20'17).

There is, however, a long and possibly complicated road ahead for Brussels should it choose to use this blocking tool. The statute originally worked by imposing countermeasures to address extra-territorial application of both US-imposed sanctions on Cuba via the 1996 Helms-Burton Act and the 1996 Iran and Libya Sanctions Act, now the Iran Sanctions Act. If the EU decides it wants to adapt its measures to take into account the US' Iran sanctions since then, the European Council will need to update its original decision, or joint action plan, on the matter and then direct the European Commission to update the regulation, according to Robert Meade, senior associate at UK-based Ashurst. "This process will require unanimous agreement from all member states," Meade says, adding that each state would subsequently have to produce corresponding law to enforce the EU regulation.

It gets more complicated still. "Once you get past the hurdle of having to update the blocking statute, which wouldn't be that easy, you're left with the enforcement and the obedience

European businesses would give to it," says Guy Soussan, partner at Steptoe & Johnson. Penalties to EU firms for breaching the statute are governed by national laws in each of the EU member states — although the statute stipulates that sanctions for any breach must be "effective, proportionate and dissuasive." Importantly, the blocking regulation also entitles persons or entities within the EU to recover any damages caused to them by the application of US sanctions specified in its annex. The regulation states that such recovery "could take the form of seizure and sale of assets" held within the EU by the entity or person causing the damage.

But as a paper published this week by Columbia University's Center for Global Energy notes, simply determining a violation of the EU blocking statute presents problems. Proving that a company abandoned business in Iran only for purposes of avoiding US sanctions would be difficult, the authors — former US State Department official Richard Nephew and chair of government relations at Wilkie Farr & Gallagher, David Mortlock — say, "given that there might be multiple reasons" for doing so, "including reputational risk, corruption, or profit margins."

As such, most commentators feel the likelihood of Europe enforcing the regulation if Congress decides to snap back nuclear-related sanctions on Iran is slim. Enforcement cases to date remain few and far between. In addition, there are very few, if any, examples of any similar national blocking legislation being invoked.

Tough Choice?

A reinforced blocking statute would put multinational corporations into a "difficult position," as they have to decide whether to either comply with it and violate the US sanctions regime, or do the opposite, Stein says. It could come down to choosing "between the lesser of two evils — a decision which is generally taken on the basis of the sanctions and penalties to be expected in the two jurisdictions."

Here, the US' track record of imposing multibillion-dollar penalties over sanctions violations stands out (EC Dec.25'15). As Ashurst's Meade notes, European lenders have tended to be more concerned about breaching US sanctions than the European blocking statute. "However, if the regulation were to be enhanced, a move which

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BLOCKING STATUTE *(continued from 1)*

would be very high-profile, lenders might not be able to take as relaxed an approach in the future given the spotlight on Iran,” he adds.

Indeed, some have suggested that its chief value “lies more in its signaling effect ... to the extent that it deters EU firms from complying with blocked US sanctions, and deters the US from adopting and enforcing secondary sanctions,” Anna Bradshaw, partner at UK law firm Peters & Peters, notes. In practice, however, “it is likely that most companies at risk of serious penalties for breaches of US sanctions will ignore the EU blocking legislation,” she says. Additionally, Nephew and Mortlock argue that the EU is likely to “shy away” from any confrontation with the US. But there are risks. Washington’s changing views on Iran, combined with the possible resurrection of the EU blocking statute, has wider implications for US-EU sanctions coordination, they note. ■

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Compass Points

- **SIGNIFICANCE:** The EU strongly backs the Iran nuclear deal, but its blocking statute aimed at protecting European firms from possible US secondary sanctions targeting investment in Iran lacks bite.
- **CONNECTION:** US-EU sanctions coordination on Russia is also a sore point, after Congress raised hackles in Brussels by introducing optional measures targeting Russian pipeline infrastructure in July sanctions legislation (p2).
- **NEXT:** Congress has all but ruled out snapping back nuclear-related sanctions for now (EC Oct.20’17). But Trump’s threat to take the US out of the Iran deal should Congress fail to agree new measures means they remain a possibility.