Sanctions: Foreign Policy, Economic Warfare, or Both?

By Alex Haines and Oliver Powell

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The law of sanctions and its cross-jurisdictional nature is complex, not least because its sources are both national and international; the measures it covers are both multilateral and unilateral; and the relevant case law has developed at a different pace and in different directions depending on the legal system at play. If the interaction between the four major actors in sanctions— the United Nations (U.N.), the European Union (E.U.),
the United States and the United Kingdom (U.K.) —was not complicated and convoluted enough, three 2018 political developments have made a clear grasp of this area even more difficult, by injecting another level of uncertainty:

(i) On 18 May 2018, President Trump announced the U.S.'s withdrawal from the Joint Comprehensive Plan of Action (JCPOA) or Iran nuclear deal;

(ii) On 26 June 2018, the European Union (Withdrawal) Act of 2018 received royal assent following the 23 June 2016 referendum on the U.K.'s membership of the E.U., which provides for the repeal of the European Communities Act of 1972; and

(iii) On 7 August 2018, the E.U. announced that it would reactivate Regulation (EC) 2271/96–— known as the 'blocking statute'—by updating the list of U.S. sanctions on Iran falling within its scope.

An End to the Increased Reliance by the U.S. on Multilateral Sanctions?

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Traditionally, the U.S. has adopted sanctions unilaterally. When the Office of Foreign Assets Control (OFAC) was established in 1950, multilateral sanctions at the U.N. level had yet to be imposed. The U.S. sanctions system was, therefore, set up with a focus on unilateral—as opposed to multilateral—sanctions. The last couple of decades, however, have seen an increase in multilateral sanctions imposed at the U.N. level and many of these were, perhaps unsurprisingly, instigated by the U.S. in the first place. This increased reliance by the U.S. on multilateral sanctions was hampered when President Trump announced the U.S.'s withdrawal from the JCPOA, consistent with an increased use of extra-territorial measures by U.S. authorities.

The Blocking Statute: The E.U.'s Answer to the U.S. JCPOA Withdrawal?

Generally speaking, a blocking statute shields companies in its jurisdiction against sanctions by prohibiting them from respecting the sanctions and not recognizing foreign court rulings enforcing them. In early 1996, Congress enacted a law that strengthened the U.S. embargo against Cuba. The act extended the territorial application of the initial embargo (in place since 1958) to apply to foreign companies trading with Cuba.

The E.U. first introduced the blocking statute on 22 November 1996 in response to the U.S.'s extra-territorial sanctions legislations concerning Cuba—as well as Iran and Libya—in order to protect E.U. business "against the effects of the extraterritorial application of legislation adopted by a third country."The E.U.'s argument was that the sanctions benefited U.S. foreign policy interests at the expense of the sovereignty of E.U. Member States. On 7 August 2018, the E.U. announced it would reactivate the blocking statute by updating the list of U.S. sanctions on Iran falling within its scope.

The blocking statute provides for four mechanisms: (a) nullification of foreign court rulings (Article 4); (b) obligation of non-compliance (Article 5, paragraph 1); (c) the "clawback" provision (Article 6); and (d) the obligation to inform (Article 2).

(a) Nullification of foreign court rulings

Nullification means that no decision (administrative, judicial, and arbitral) taken by any foreign body that is based on the provisions listed in the annex to the blocking statute will be recognized in the E.U. (the primary blocking measure). Nullification also means that no decision requiring enforcement of economic penalty, or seizure against an E.U. operator, will be executed in the E.U.

(b) Obligation of non-compliance

The blocking statute makes it illegal for E.U. companies or banks to comply with the relevant U.S. sanctions. Any natural or legal E.U. person that violates this prohibition can be sanctioned by the domestic authorities of the Member States that have jurisdiction over the person in question. To enforce this provision, the European Commission has to establish that the company in question is no longer conducting business with Iran because of U.S. legislation, and not due to commercial business considerations.

E.U. businesses may be authorized to pull out of Iran and comply to the extent that non-compliance would seriously damage their interest. The European Commission assesses each application on its own merit. E.U. operators alleging serious damage can apply to the European Commission through a template form.

(c) The "clawback" provision

European companies hit by new U.S. sanctions on Iran can sue the American government for compensation. The provision allows them to recover damages in E.U. courts as a result of the sanctions.

(d) Obligation to Inform

E.U. companies must notify the European Commission within 30 days whenever the renewed U.S. extraterritorial sanctions affect the financial interests of the company. The blocking statute applies in all E.U. Member States, and despite the fact that it is an E.U. regulation, the responsibility for enforcement lies with each Member State.

The Blocking Statute's Practical Impact—a Largely de Facto Effect

First, the blocking statute does not compel E.U. businesses to continue dealing with Iran. What it does is to seek to prevent them from complying with U.S. sanctions. The distinction rests on whether an E.U. entity, when it decides not to engage in certain activities, does so because of commercial business considerations, or because of the U.S. sanctions. The reality is, however, that many E.U. companies will feel that they risk falling fowl of the blocking statute if they comply with U.S. sanctions, and they risk falling foul of the U.S. regulator if they don't. Although smaller companies with little or no U.S. exposure might continue to conduct business in Iran in non-dollar currencies, multinationals with important economic interests in the U.S. may well chose to pull out of Iran.

The unescapable and brutal reality for many businesses is that the nature of the banking system, namely its international dimension, means that banks are exposed
to the U.S. financial system and U.S. dollar transaction. While the blocking statute might shield a company from fines as a result of U.S. sanction (through compensation for the costs companies incur as a result of U.S. sanctions), it cannot shield companies from the practical effects of sanctions imposed on them, for example: seizure of assets; criminal charges in the U.S.; prohibition on credit payments; and/or company officers or controlling shareholders of sanctioned firms being excluded entry from the U.S.

The aim of the blocking statute is not, therefore, purely legal. Obviously, it seeks to protect the interests of E.U. companies investing in Iran, but it also serves to demonstrate the E.U.'s commitment to the JCPOA. It can, therefore, accurately be described as a political statement.

The key question is whether E.U. businesses will rely on the blocking statute to guarantee their ability to keep doing business in the U.S. and Iran. After the blocking statute was introduced in 1996, both the U.S. and the E.U. reached a political solution in 1998 under which U.S .authorities did not actively enforce extraterritorial sanctions on E.U. companies still doing business with Cuba. The reactivated blocking statue could, therefore, be used as a bargaining chip in the case of Iran, albeit the U.S .sanctions regime imposed on Cuba is very different from the one imposed on Iran. There is, perhaps, a hope that history may repeat itself and that exemptions from U.S .secondary sanctions for E.U. companies may be forthcoming.

Brexit's Impact on the U.K.'s Sanctions System— A Largely de Jure Effect

Most sanctions currently in force in the U.K. are decided at the U.N. or E.U. level. Moreover, U.N. sanctions policy is generally implemented in the U.K. through E.U. legislation, meaning that most of the sanctions measures in force in the U.K. are governed by E.U. law. When the U.K. leaves the E.U., however, absent new legislation in the U.K., it would be in breach of its obligations to implement U.N. resolutions. The Sanctions and Anti-Money Laundering Act of 2018 (SAMLA 2018), which received royal assent on 23 May 2018, and will come into force

once the U.K. leaves the E.U., is the new mechanism sought to ensure that post-Brexit U.N. sanctions are implemented directly in the U.K. SAMLA 2018 is one of the first pieces of legislation passed directly as a result of the U.K.'s imminent departure from the E.U., and its effect is such that it creates the U.K.'s own sanctions system.

Although SAMLA 2018 represents a dramatic change in the U.K.'s ability to impose its own sanctions independently from the E.U., and it could pave the way for the U.K. to align itself more with the U.S., the U.K. is unlikely to change its sanctions policy as a whole. Moreover, it is the legal implementation of sanctions measures that will change in the U.K., but Brexit itself is unlikely to change the manner in which sanctions measures are monitored or enforced in the U.K., not least because the U.K. has been at the forefront of sanctions proposals at the E.U. level.

Endnotes

1. Regulation (EC) 2271/96: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31996R2271.
2. Commission Delegated Regulation (EU) 2018/1100 amending Regulation (EC) 2271/96: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.LI.2018.199.01.0001.01.ENG&toc=OJ:L:2018:199I:TOC.
3. https://ec.europa.eu/fpi/sites/fpi/files/fpi-2018-00035-03-00_en_0.docx.
4. http://www.legislation.gov.uk/ukpga/2018/13/contents/enacted.

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