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IRAN NUCLEAR DEAL : WHAT MIGHT HAPPEN IF THE UNITED STATES DOES NOT EXTEND THE SANCTIONS WAIVER ON MAY 12, 2018 ?

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During his speech of January 12, 2018, the United States ("US") President Donald Trump stated that he would not extend the waiver of the currently-suspended sanctions against Iran if the signatories of the Joint Comprehensive Plan of Action ("JCPOA") fail to fix "*deal's disastrous flaws*" by May 12, 2018.[1] As this deadline is fast approaching, this article analyzes possible legal consequences of a potential non-renewal of the Iran sanctions waiver.

The ultimatum made by the US President to fix the JCPOA by May 12, 2018

Pursuant to Annex II to the JCPOA, the US committed to cease on the Implementation Day of the JCPOA the application of various nuclear-related sanctions related to Iran and Iranian persons that used to apply to non-US persons (the so-called secondary sanctions). The suspension of some of such sanctions required from the US President to apply a waiver mechanism that is provided in several acts containing provisions on sanctions against Iran. This is notably the case of the Iran Sanctions Act, the Iran Threat Reduction and Syria Human Rights Act, the National Defense Authorization Act and the Iran Freedom and Counter-Proliferation Act ("**Statutory Sanctions**").

Waivers of such Statutory Sanctions must be renewed by the US President every 120 or 180 days, depending on the wording of the act. Such waivers have consistently been granted up to now by the US Presidents since the Implementation Day of the JCPOA. However, while accepting to waive the Statutory Sanctions on January 12, 2018, the US President stated that he would not grant another waiver in May 2018 if the signatories of the JCPOA fail to fix its "*disastrous flaws*". Indeed, the US President explained that no further waiver of the Iran sanctions can be granted unless the JCPOA is amended to include measures aiming at (i) ending the so-called "sunset clauses", which are the provisions that will allow Iran to resume some civil nuclear activities in 2025 and 2030, (ii) intensifying the inspections of Iran's nuclear sites and (iii) adding measures covering inspection of Iran's ballistic missile program.

However, Iran as well as the other signatories of the JCPOA seem to all have excluded so far any possibility to amend the JCPOA in the near future. Indeed, political leaders representing France, Germany, the United Kingdom, Russia and China have all confirmed their strong support to the deal in its current shape. This position is shared by the United Nations ("UN") High Representative for Disarmament Affairs who pointed out that the UN inspectors have consistently confirmed Iran's compliance with its commitments arising from the JCPOA.

In light of these diverging positions between the US and all the other signatories of the JCPOA, it seems difficult to envisage today any potential renegotiation of the agreement, or agreed additions to it before May 12, 2018, which is the date when the US President will decide on the waiver of some of the Statutory Sanctions.

Potential legal consequences of a non-extension of the waiver under the National Defense Authorization Act

Should no compromise be found between the signatories of the JCPOA, it is likely that the US decides on May 12, 2018 not to extend the waiver of the currently-suspended sanctions provided under the National Defense Authorization Act for the Fiscal Year 2012 ("**NDAA**") that needs to be renewed every 120 days pursuant to its Section 1245. This decision may have several legal consequences but its precise impact is difficult to be fully anticipated now.

The very immediate consequence of the non-renewal of this waiver appears to be the automatic reinstatement of the Statutory Sanctions arising from the NDAA. The sanctions provided under the NDAA are primarily related to the Central Bank of Iran and other Iranian financial institutions and petroleum transactions. As such, the reinstatement of these sanctions is likely to have an impact on non-US companies involved in transactions with Iranian financial institutions or those related to Iranian petrol. In addition, further sanctions could be reinstated on July 12, 2018 when the current waiver of all the other Statutory Sanctions, which needs to be renewed every 180 days, will expire.

In a more general manner, if the US decides on May 12, 2018 not to extend the waiver of sanctions provided under the NDAA, it may further choose to reinstate all the sanctions whose application was suspended as a result of the implementation of the JCPOA. Such a unilateral decision to reinstate the US sanctions, which could constitute a breach of the JCPOA, would most probably affect non-US companies as the secondary sanctions would be restored. However, it is too early to state whether the US would decide to reinstate all the previously-applicable sanctions and whether such sanctions would apply with immediate effect. Indeed, the US may decide to apply only some of the previous sanctions. It can be for example decided that only sanctions targeting US persons are to be restored. Indeed, the Office of Foreign Assets Control ("**OFAC**") could refuse to provide US persons with general licences for performing certain transactions



that would have otherwise been sanctionable, as provided under Annexes II and V of the JCPOA. The US could also limit the reinstatement of sanctions to the re-designation on the Specially Designated Nationals and Blocked Persons List (SDN List), Foreign Sanctions Evaders List (FSE List) and Non-SDN Iran Sanctions Act List (NS-ISA List) of the Iranian individuals and entities that were removed from such lists further to the implementation of the JCPOA. However, it cannot be fully excluded that the US President actually decides to introduce new sanctions in addition to the previously-applicable ones, which he could do by using his constitutional prerogative arising from the executive orders.

Any reinstatement by the US of the currently-suspended sanctions is likely to be considered by Iran or any other signatory of the JCPOA as a violation of the agreement. Indeed, the recent reports of International Atomic Energy Agency, which is the official body in charge of monitoring Iran's compliance with its obligations arising from the JCPOA, confirmed that Iran has complied with its obligations arising from the JCPOA. As such, a possible non-renewal of the waiver of any Statutory Sanctions could be treated as a unilateral violation by the US of the terms of the JCPOA.

In response to such a violation, other signatories of the agreement could declare to uphold their own commitments, or simply decide to cease to respect them, or to trigger the official multistep dispute-resolution mechanism provided under paragraphs 36 and 37 of the JCPOA, commonly known as the "snapback" provision. This mechanism would allow the dispute to be referred to a Joint Commission and the Ministers of the Foreign Affairs of the signatory countries. Should the settlement of the dispute be impossible, the application of the "snapback" provision could finally result in the reinstatement of the UN sanctions against Iran. Indeed, any signatory of the JCPOA may notify the UN Security Council of the significant non-performance of any other party to the agreement in order to trigger the vote on a resolution to continue the sanctions lifting. If such a resolution could not be adopted, the UN sanctions would be reinstated. However, the triggering of this mechanism by the US is highly unlikely as it would require a proof of "significant non-performance" of Iran's commitments arising from the JCPOA.

Guarantees for businesses already set-up in Iran in case of reinstatement of sanctions

In the very unlikely event that the UN and the European Union ("EU") sanctions were to be reinstated, strong guarantees would be granted to businesses already set-up in Iran. With regards to the UN sanctions, paragraph 37 of the JCPOA provides that in case of reinstatement of former sanctions, they would not apply with retroactive effect to contracts signed prior to the date of reinstatement of sanctions, if the activities contemplated under and execution of such contracts are consistent with the provisions of JCPOA. Likewise, the validity of transactions and contracts signed after the Implementation Day will not be affected by a potential snapback of the EU sanctions. In this regard, the EU Regulation 2015/1861 provides that in case of reintroduction of European restrictive measures against Iran, these measures will not apply with retroactive effect and the reintroduction of sanctions shall not retroactively penalize investments made before the date of snapback.[2] Therefore, the contracts that were permitted when the sanctions regime was still in place will not be targeted by the reintroduction of sanctions and the execution of these contracts will be permitted and adequately protected.[3]

The position of the US appears to be slightly less protective as it considers that the contracts signed prior to the reinstatement of sanctions would not be grandfathered. It means that transactions related to such contracts, which would be conducted after the snapback occurs, could be sanctionable to the extent they implicate activity for which sanctions have been re-imposed.[4] However, even if the US President decided to reinstate all the previously-applicable secondary sanctions against Iran, which appears to be unlikely given a potential strong reaction from the European countries, the US government would provide non-US, non-Iranian persons a 180-day period to wind down operations or business involving Iran that was consistent with the US sanctions lifting under the JCPOA and undertaken pursuant to a written contract or written agreement signed prior to snapback.[5] Such persons would also be likely to receive repayment of loans or credits or payments for goods or services that have been fully provided to Iranian counterparties before the snapback and pursuant to a written agreement. The same provisions would apply to US persons or US-owned or -controlled entities for activities that were legally undertaken pursuant to OFAC general or specific licenses which would be subsequently revoked as a result of the snapback of the sanctions.

A potential non-renewal of the waiver of the sanctions under the NDAA on May 12, 2018 is likely to bring some legal uncertainty with regards to the US sanctions against Iran and their application to the non-US persons. However, any potential change in the US rules should not have any immediate effect on the business already set up in Iran whose activity would become prohibited as a result of the reinstatement of previously-applicable secondary sanctions. Finally, it is very unlikely that the reinstatement of the US sanctions will trigger the reintroduction of the EU and the UN sanctions, should Iran not decide to cancel its own commitments. Nevertheless, if this was the case, the JCPOA and EU laws would both prohibit retroactive application of sanctions to the investment previously made.

[1] <https://www.whitehouse.gov/briefings-statements/st...>

[2] Information note on EU sanctions to be lifted under the JCPOA dated January 23, 2016.



[3] Recital 7 of EU Regulation 2015/1861.

[4] Frequently Asked Questions relating to the lifting of certain U.S. sanctions under the JCPOA on Implementation Day issued by OFAC on January 16, 2016, as amended on December 15, 2016 ("**FAQ**"), point M4.

[5] FAQ, point M5
