Four Weeks after the Iran Nuclear Deal: The Art of Keeping a Cool Head amidst a Modern-Day Gold Rush

Months before the agreement on the future of Iran's nuclear programme, concluded on 14 July 2015 between the E3/EU3+3 Group (China, France, Germany, Russia, the UK and the US, with the High Representative of the European Union for Foreign Affairs and Security Policy) and Iran, is fully implemented, the prospects that it raises have already caused a flurry of business activity around the globe. We take this as an opportunity to look at the developments that have unfolded in the four weeks since the announcement of the deal and to lay out in detail the route to a significant sanctions relief.

Introduction

This newsletter supplements our Briefing Note of 15 July 2015 ("Iran Sanctions Deal – What to Expect, and When") and provides an overview on the insights gained since the announcement of the deal. It will set out in detail the timetable for the implementation of the deal and analyse which steps European companies might take now.

The Joint Comprehensive Plan of Action ("**JCPOA**") of Vienna aims to open a way forward to end a stalemate that has lasted for more than 12 years. Previous negotiations in Geneva and Lausanne had already implemented first steps towards this final accord, which are summarised in our newsletters of December 2013 ("Easing of Iran sanctions – an opportunity to (re)enter the market?) and May 2015 ("After the Iran nuclear 'deal' of Lausanne: Don't jump the gun (just yet")).

Staking a claim: The push into the Iranian market has begun in earnest

Less than a week after the announcement of the final deal, Sigmar Gabriel, the German Minister for Economic Affairs was the first senior Western politician to lead a trade delegation to Tehran and meet his Iranian counterparts in Iran since the escalation of the diplomatic crisis.

Around 80 German companies are currently doing business in Iran, exporting goods and services worth approximately EUR 2.4 billion (USD 2.7 billion). The potential volume of exports to Iran from Germany, once one of Iran's principal trading partners, is estimated to be around EUR 10 Billion (USD 11.1 billion).

Key issues

- The *Implementation Plan* in the JCPOA lays out five stages towards the eventual lifting of all sanctions related to Iran's nuclear programme.
- The first sanctions relief under the JCPOA is not going to take place until the first quarter of 2016 (at the earliest).
- As the sanctions will only gradually be suspended and/or lifted, caution is still the key.
- This applies in particular to US persons and/or companies who have close links to the US.

Even though companies expect good business with Iran in the near future and can hardly await the lifting of sanctions, things remain complicated. The devil continues to lie in the detail and companies trying to (re-)establish business ties with their Iranian counterparts will still faces serious compliance challenges.

Overview: The JCPOA

The JCPOA comprises of a concise main body of text, divided into the four sections *Nuclear*, *Sanctions*, *Implementation Plan* and *Dispute Resolution Mechanism* on the one hand and five comprehensive technical annexes on the other hand. These annexes deal with

- nuclear-related measures, i.e. measures concerning the dismantling or modification of certain parts of the Iranian nuclear programme (in other words: measures Iran has to take),
- sanctions-related commitments (in other words: commitments of the UN, the US, the EU and member states of the EU to lift sanctions and hence, an aspect that is of a more immediate relevance for companies),
- civil nuclear cooperation between the JCPOA participants,
- the establishment of a joint commission,
- the stages of the implementation of the JCPOA (also a very relevant part of the agreement for companies as it contains a timetable for the sanctions relief).

In this regard it must be emphasised that the envisaged sanctions relief concerns only nuclear-related sanctions. All sanctions imposed for other reasons, such as bans of ballistic missiles sales to Iran or penalties for human rights abuses (*e.g.* Regulation (EU) No. 359/2011) remain in force. On the other hand, no additional nuclear-related sanctions will be imposed during the period of implementation.

The EU, its member states as well as the US have committed themselves to regularly issue guidelines and make publicly accessible statements in relation to sanctions and restrictive measures to be lifted under the JCPOA in order to provide companies interested in doing business with Iran with further, more detailed guidance.

Step by step: The road to a comprehensive sanctions relief

Annex V, in conjunction with para. 34 of the main body of text, might be considered to be the most informative section of the JCPOA for companies trying to make sense of the protracted staging of the sanctions relief. Art. V contains a concise yet precise *Implementation Plan* that describes the sequence of events leading up to the eventual lifting of sanctions. It divides this process into 5 stages, each of which begins with a key event: Finalisation Day, Adoption Day, Implementation Day, Transition Day and Termination Day.

Stage 1: Finalisation Day to Adoption Day

This is the stage that we are currently at and that will last for the coming months. Finalisation Day was on 14 July 2015, *i.e.* the day the parties concluded and endorsed the JCPOA.

On the same day, the Council of the European Union adopted Council Decision (CFSP) 2015/1148, by which it extended until January 2016 the suspension of restrictive measures against, *inter alia*, the transport of Iranian crude oil and the provision of insurance services for such transports, the export of gold and other precious metals to Iran and bank transfers to Iranian persons or entities below certain thresholds, as agreed upon in the Joint Plan of Action ("**JPOA**") of Geneva.

The UN Security Council ("**UNSC**") then had to also endorse the agreement, which it did by unanimously adopting Resolution 2231 (2015) on 20 July 2015. As emphasised by, *inter alia*, the German Federal Office of Economics and Export Control (BAFA), this Resolution does not lead to any additional sanctions relief. In fact, the E3/EU3+3 Group is not obliged to take any further measures at this point. The UN Resolution is merely a first step, triggering a 90-day period during which the IAEA and Iran will develop arrangements for "transparency measures" ready for implementation on Implementation Day.

The EU has nonetheless amended Regulation (EU) No. 267/2012 by Council Regulation (EU) No. 2015/1327, introducing exemptions for the supply and/or purchase of certain goods, the rendering of certain services as well as the provision of financial assistance to Iran to the extent that these are required solely for the dismantling of those parts of the Iranian nuclear programme that will be discontinued, subject to an authorisation by the competent national authority, which is granted purely on a case-by-case basis. The amendment came into effect on 2 August 2015.

The aforementioned 90-day period also gives the US Congress the opportunity to review the agreement. Congress will not have a vote on the JCPOA until after its summer recess. Since the 60-day review period given to Congress by domestic US legislation that began on 20 July 2015 will expire on 17 September 2015, an initial vote is likely to be held in early or mid-September. If Congress were to pass a vote of disapproval, which seems likely at this point, this vote could then be vetoed by President Obama by 29 September 2015. Congress then, in turn, has another 10 days to override this veto, meaning that the congressional review period could take as long as until 9 October 2015.

Perhaps somewhat less known is the fact that there is also going to be a vote by the *Majlis*, the Iranian Parliament, on the agreement. This vote will take place after the completion of the vote by the US Congress.

Depending on the results of both votes, the entire process may yet collapse at this early stage.

Accordingly, most things are and will remain in the balance during Stage 1 of the implementation period. Any commitment with connections to Iran beyond the scope of what was already possible under the JPOA therefore continues to carry considerable risks and would require both careful consideration and expert advice.

Stage 2: Adoption Day to Implementation Day

The Adoption Day is the day the commitments under the JCPOA come into effect. If nothing changes (for instance, the aforementioned 90-day period might be shortened by mutual consent), Adoption Day will be on Sunday, 18 October 2015. Starting on Adoption Day, the participants of the JCPOA will have to make all preparations and arrangements, legal or administrative, to ensure that by the end of this stage they will be able to fulfil their JCPOA commitments.

Specifically, Iran will have to implement all measures or, as the case may be, refrain from all activities listed in para. 15 of Annex V to the JCPOA in conjunction with Annex 1. Iran's obligations will include:

- the discontinuation of the construction of the Arak heavy water reactor based on its original design and the removal and subsequent disabling of all existing calandrias (pressure vessels with inserted tubes as employed in heavy water nuclear reactors) at the site;
- the IAEA-supervised export of all excess heavy water that Iran will not be able to use at the modernised Arak research facility;
- capping the number of enrichment centrifuges at 5,060 for 10 years and the level of enrichment at 3.67 per cent for 15 years, while deconstructing and storing any excess enrichment infrastructure under IAEA supervision;
- conducting enrichment only in a manner that does not accumulate enriched uranium.

Technically, the Western participants of the JCPOA will also have to take measures during this stage. Those measures, consisting of legal acts aimed at the gradual sanctions lifting will be published on Adoption Day, but they will not take legal effect until Implementation Day. Accordingly, the obligations of the Western JCPOA participants belong to the next stage, Stage 3 and will be covered there.

Based on that, it could be said that the ball is firmly in Iran's court during Stage 2. Only upon IAEA verification of Iran's compliance with its commitments under the JCPOA will Stage 3 be reached, meaning that the IAEA and its assessment of Iran's activities will, not for the last time, play a key role.

All in all, the measures that will be taken during this stage are already a lot more concrete than those of Stage 1. How long this stage will take in total is currently unclear and cannot, even roughly, be predicted.

Companies assessing their options should be aware that while many important developments will certainly occur during this stage, the legal situation in terms of sanctions will again not change at all. In terms of compliance obligations, it is imperative to remain watchful. At least, by the end of this stage, which is expected to take four to six months in total, it should have become more apparent how serious Iran is in meeting its obligations under the agreement.

Stage 3: Implementation Day to Transition Day

The Implementation Day is the day on which a comprehensive sanctions relief will begin to be implemented. There is no fixed date for the Implementation Day. According to official projections communicated by the competent government authorities such as BAFA, Implementation Day might take place as early as in the first quarter of 2016, if everything goes according to plan.

However, this is currently only a prediction and by far not a given fact. It could turn out to be a somewhat optimistic forecast. There are a many factors that make it difficult to give a precise statement: The list of preconditions that have to be met by Iran in Stage 2 is comprehensive; the number of facilities that have to be inspected by the IAEA is large; the inspectors, under the watchful gaze of the world, will want to be very thorough in their inspections. At the same time, the IAEA will be anxious not to kill the momentum of the process. Looming in the background is the fear that at this point, a time-consuming cat-and-mouse game between Iran and the inspectors might have developed.

Provided that there is indeed an IAEA verification of Iran's compliance with the JCPOA, the E3/EU+3, in return for Iran's efforts at the previous stage, will take the following measures on Implementation Day:

- The EU will terminate the bulk of provisions of Council Regulation (EU) No. 267/2012 ("EU Iran Sanctions Regulation") and suspend provisions of Council Decision 2010/413/CFSP relating to nuclear and financial sanctions. Accordingly,
  - rendering banking, financial and insurance services to Iranian persons, entities or bodies, including the Government of Iran or any entity acting on behalf of it,
  - the import, purchase or swap or transport of oil, gas and petrochemical products from Iran,
  - the sale, supply, transfer or export of naval equipment and technology to Iran and Iranian persons,
  - the sale, supply, purchase, export, transfer or transport of gold, other precious metals and diamonds, banknotes as well as the delivery of banknotes or coinage to the Government of Iran , its bodies or the Central Bank of Iran,
  - the sale, supply, transfer or export of metals such as aluminium or steel,
  - the sale, supply, transfer or export of software and
  - services associated with the above-mentioned sectors

will again be allowed for EU-based companies under EU Law without reservation. Furthermore,

  - some of the listed persons, bodies or entities will be de-listed,
  - visa bans against this group of persons will be lifted,
  - asset freezes against those listed persons, bodies or entities will be ended and seized funds will be made available,

meaning that as of Implementation Day, a huge amount of capital can be expected to be repatriated to Iran.

- Member states of the EU will terminate and/or amend national implementing legislation (such as provisions of the German Foreign Trade Order (*Außenwirtschafts-verordnung*))) as required.
- The UNSC will terminate the UNSC Resolutions 1696 (2006), 1737 (2006), 1747 (2007), 1803 (2008), 1835 (2008), 1929 (2010) and 2224 (2015), in effect ending the UN sanctions regime against Iran. The termination is, however, subject to re-imposition if there is a "significant non-performance" by Iran of its JCPOA commitments.
- Finally, the US will, by virtue of a Presidential waiver, cease (but, unlike the EU, not immediately terminate) the application of all nuclear-related sanctions – however, with a very important limitation: At this point, the suspension of the application applies only to "non-US persons". "US persons" and US-owned or -controlled foreign entities will continue to be prohibited from conducting any of the transactions permitted under the JCPOA. The sectors affected by the suspension of US sanctions are:
  - financial, banking and insurance services
  - energy and petrochemicals
  - shipping, shipbuilding and port operation
  - trade in gold and other precious metals
  - trade in software and metals
  - the automotive industry
  - associated services.

As in the EU, some specially designated nationals (SDNs) are to be removed from the so-called SDN-lists. In an exception to the aforementioned rule that only "non-US persons" would, at first, benefit from sanctions relief, the US will immediately begin to grant licences for the re-export, sale, lease or transfer of commercial passenger aircraft and related parts by "US persons" to Iran for civil aviation purposes. The Iranian aviation industry is considered to be in urgent need of modernisation due to a poor security record. Additionally, the importation of Iranian carpets and foodstuffs into the US will be licensed as well.

For European companies, Stage 3 is the first stage which provides a genuine change in the legal situation and also a certain degree of certainty. This will be a significant chance that, in addition to the comprehensive lifting of EU and UN sanctions, US sanctions which, due to their extraterritorial effect, considerably affected the business of European companies, will no longer be enforced against them. However, there is an important caveat: Transactions that have a close link to the US, *e.g.* which involve subsidiaries of US companies, or which are financed by a US bank or which are carried out in USD continue to be the target of US enforcement measures.

The EU, its member states as well as the US have committed themselves to issue guidelines and make publicly accessible statements in relation to sanctions and restrictive measures to be lifted under the JCPOA in order to provide companies interested in doing business with Iran with further, more detailed guidance.

Stage 4: Transition Day to Termination Day

The Transition Day will either occur on a fixed date eight years from Adoption Day, *i.e.* in mid-October 2023, or upon a report by the Director General of the IAEA to the Board of Governors of the IAEA and to the UNSC that comes to the conclusion that all nuclear material in Iran is used for peaceful activities (whichever is earlier). This time frame makes the preceding stage, Stage 3, the longest in the process. It can be assumed that the time leading up to Stage 4 will be used for a careful review of the progress made by Iran.

If and when either of the two starting conditions is met,

- the EU will terminate the remaining sanctions under Council Regulation (EU) No. 267/2012 and Council Decision 2010/413/CFSP, meaning that
  - the supply of financial messaging services to Iranian bodies or entities
  - the provision of shipping services where the serviced vessels carry goods covered by the Common Military List
  - the sale of goods and technology and the provision of ballistic missiles services

will be permitted again; and

- the US will terminate all statutory sanctions and will permanently remove the remaining individuals and entities from the SDN list.

In other words, this will be the point in time when doing business in or with a close connection to Iran goes back to normal.

Stage 5: Termination Day and after

The Termination Day will be 10 years from Adoption Day, *i.e.*, as things stand, in mid-October 2025. On this day, the remaining provisions of UNSC Resolution 2231 (2015) and of EU Council Regulation (EU) No. 267/2012 as well as Council Decision 2010/413/CFSP will be terminated. In light of the scope of relief on previous stages, this will have a predominantly symbolic character: For the first time in more than a decade, the word "Iran" will not appear in international nuclear-related sanctions regimes and UNSC will no longer be seized on the issue.

Summary

The JCPOA is the product of diplomatic negotiations that attempted to strike a compromise between the differing aims and strategic considerations of the parties. It provides for a complex, meticulously staged implementation process with many interdependent milestones and long implementation periods, thereby gradually removing the distrust of the international community towards Iran and vice versa that has evolved over the past decade.

A lasting solution? The hurdles

Political uncertainty continues to be the largest obstacle for a successful implementation of the agreement.

Positive signs from the E3/EU3, China and Russia

In the weeks following the announcement of the JCPOA, there has been no indication at all that its successful implementation could beat risk in Europe or Asia. In fact, France, Germany and the United Kingdom have been actively and openly promoting the deal, even to an extent that has led some observers to conclude that they are treating the sanctions regime as though it had already been lifted, while China and Russia have been relatively quiet on the matter.

Challenges in the US

In the US, however, politicians from both parties have reiterated their steadfast intentions to topple the deal. As was stated before, there are still several weeks until the much-anticipated congressional vote on the JCPOA, but its opponents, among them AIPAC, the influential pro-Israel lobbying group, have already begun a large-scale campaign. Several presidential hopefuls have denounced the deal, an executive agreement under US Law, as "appeasement" and a "reward for [Iran's] atrocious human rights record" and declared that they would repeal any US approval of it immediately after taking office. Recently, a new threat has emerged as some conservative constitutional law experts have argued that since the deal is only an executive agreement and not a treaty, federal states could enact their own sanctions regimes through their state assemblies, pointing to past examples when this happened, notably Burma and Apartheid South Africa. The establishment of a maze of state-level sanction regimes could be regarded as a deal breaker by Iran, particular by Iranian conservatives who remain sceptical as to the intentions of the international community.

For the time being though, it is considered unlikely that the opponents of the deal will get the necessary support in Congress to override a presidential veto.

Still, the question that arises is what would happen if the US (or any other member of the E3/EU3+3, for that matter) were indeed to unilaterally withdraw from the agreement. There is no easy answer to this. It would not seem that the agreement, being a multilateral accord between seven parties, would automatically collapse because of the withdrawal of one party (unless of course, that party was Iran). There is no provision in the JCPOA that specifically states that its implementation is conditional upon the continued participation of the US.

The legal consequences must, however, be separated from the political effects such a move would implicate. The remainder of the E3/EU3+3 states have made it clear through their words and actions that they would, if need be, pursue the deal without the US. While it could still be attractive from Iran's point of view to implement the agreement separately with these states, it is conceivable that Iran might elect not to do so due to the extraterritorial effect of the US sanctions which could continue to deter many investors. At the very least, a new round of negotiations without the US would seem likely, bringing about new uncertainty.

Hence, the worst-case scenario would be a setback to the pre-2013 status.

Pressure from Iran

The obvious concern – from a Western point of view – is that Iran will not fully comply with its obligations under the JCPOA. The developments since the conclusion of the agreement have, however, shown that close scrutiny of the other party's every action will not be a one-way street in the implementation process: As early as on 24 July 2015, that is, a mere 10 days after the conclusion of the JCPOA, Iran filed a complaint with the IAEA, accusing the US of a "material breach" of the agreement. Iran referred to a statement made by White House Secretary Josh Earnest in a press conference on 17 July 2015, in which he, *inter alia*, said that the intelligence gathered through IAEA inspections could be used in a future military strike by the US or Israel against Iran. Why Iran did not use the formal dispute resolution mechanism provided by the JCPOA remains unclear. Notwithstanding the merits and the seriousness of the complaint, it shows clearly that Iran appears to be just as carefully monitoring every move by the US. A mutual "blame game" with a paralysing effect on the implementation process could be the consequence.

Furthermore, it is unclear which role will be played by groups such as the Iranian Revolutionary Guards Corps that have manifest business (and presumably also political) interests in the preservation of the *status quo*, having, through various commercial enterprises, actually benefited substantially from the country's isolation.

In any event, it is assumed that the 2017 presidential elections in Iran will be a test for the agreement. The incumbent, Hassan Rouhani, widely considered to be a moderate and an enabler of the nuclear deal, might be replaced by a more conservative candidate opposed to the agreement. Mahmoud Amadinejad, Mr. Rouhani's predecessor known for his anti-Israel rhetoric, has already expressed his intention to run for President.

Comment

Against the backdrop of the unfolding European push into the Iranian market, words that are in fact cautious and prudent may seem overly timid. Nonetheless, exciting though as the prospects of a comprehensive sanctions relief in early 2016 may be, it should have become obvious from this briefing that the road ahead is still riddled with question marks. Any investment in Iran remains an equation with many unknown variables for the mid-term future, which is why a rigid compliance regime is essential. If contracts with Iranian persons, private entities or government/state bodies are entered into at this stage, it is of paramount importance that adequate provisions are made for the case of a deadlock or collapse of the implementation process, be it through force majeure clauses or other instruments. Clarity will only be gained as the process moves forward.

Authors

Stefan Gentzsch, LL.M.
Counsel

T: +49 69 7199 1492
E: stefan.gentzsch@cliffordchance.com

Dr. Jochen Pörtge
Counsel

T: +49 211 4355 5459
E: jochen.pörtge@cliffordchance.com

Dr. Alexander Cappel
Senior Associate

T: +49 69 7199 1458
E: alexander.cappel@cliffordchance.com

Dr. Tim Müller, M.Jur.
Associate

T: +49 69 7199 1420
E: tim.mueller@cliffordchance.com