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Safeguarding the Iran Nuclear Deal: A Blueprint for Europe

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Axel Hellman

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About the Author

Axel Hellman is a Policy Fellow at the European Leadership Network (ELN), where his work primarily centres on economic statecraft, U.S. foreign policy, and Russia-West relations. Prior to joining the ELN, Axel worked in management consulting in Stockholm, Sweden, and as an external adviser to Oxford Analytica and a London-based political risk start-up. He has previously held positions at the Center for a New American Security (CNAS), the Hudson Institute, and Freedom House. Axel completed a Master's Degree at St Antony's College, Oxford, and holds a B.A. in International Relations from King's College London's Department of War Studies. He has also studied at Georgetown University in Washington, DC, and MGIMO-University in Moscow. Follow Axel on Twitter @axhellman

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Safeguarding the Iran Nuclear Deal: A Blueprint for Europe

Executive Summary

The fate of the international nuclear agreement with Iran, known as the Joint Comprehensive Plan of Action (JCPOA), has been uncertain since President Trump assumed office. Despite the advice of his national security officials and the appeals of his closest allies, the President has repeatedly condemned the 2015 agreement. Faced now with the likelihood of U.S. withdrawal, Europe must decide how far to go to try to preserve the agreement in the face of renewed U.S. sanctions.

This paper outlines how U.S. sanctions might be resumed and suggests how European leaders can boost their chances of preserving the JCPOA and protecting their engagement with Iran. This includes immediate steps to influence U.S. decision making and measures to respond to U.S. sanctions.

Elements of a European strategy should include:

- A focus on transatlantic security relations rather than just Iran. The EU and its member states need to persuade the U.S. administration as well as U.S. congressional and public opinion that there is much more at stake than just a nuclear deal with Tehran.
- Firm diplomatic signaling. While their Plan A should continue to be the negotiation of a solution with Washington, European leaders must demonstrate that they have a Plan B and that if U.S.-Europe talks fail, they will protect their political and economic links with Iran despite renewed U.S. pressure. As part of this process, European policymakers should visibly lay the technical and political groundwork to challenge a snapback of U.S. sanctions.
- Continued demonstration of commitment to Iran. As long as Iran is verifiably fulfilling its commitments under the JCPOA, European leaders should work to persuade Tehran to remain in the deal. As part of this process, European policymakers should try to improve the financing conditions for European businesses in Iran and shield the most important economic contracts with Iran from the effects of sanctions.

Introduction

The uncertainty over the future of the JCPOA has increased since October last year, when the U.S. President refused to certify to Congress that remaining in the deal was in the interest of the United States. This January, Trump refrained from scuttling the agreement, but sent a blunt message to Congress and allies to “either fix the deal’s disastrous flaws, or the United States will withdraw.”¹ He called on American lawmakers to pass legislation to “ensure that Iran never even comes close to possessing a nuclear weapon” and warned allies that this was “a last chance” to address his grievances.² European diplomats are now pressed to find a solution which saves the deal while satisfying U.S. demands. The appointments of Mike Pompeo and John Bolton – both vocal critics of the JCPOA and widely seen as staunch hawks on Iran – makes it less likely that Trump will keep the United States in the deal at his next decision point by 12 May. The key question now is less whether a ‘sweet spot’ in the US-Europe negotiations can be found and more whether Europe can preserve the deal after the United States is gone.

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In response to the uncertainty generated by Trump, Iranian President Rouhani has affirmed that even if the United States were to pull out of the agreement, Iran will stay in

it “as long as [Iran’s] interests are observed.”³ That will likely be determined by the economic benefits – or lack thereof – for Iran in sticking with the JCPOA in the face of resumed U.S. nuclear sanctions. A critical question for European diplomats is therefore how to protect business activity with Iran.

This paper examines how European policymakers should respond to unilateral U.S. actions if no compromise can be negotiated. It looks at different ways in which U.S. sanctions could be re-instated and explores different options available to European policymakers for safeguarding the remnants of the JCPOA. While there is no silver bullet in response to U.S. withdrawal from the JCPOA, there are ways forward for Europe to make the best of a suboptimal situation.

Understanding the sanctions imposed on Iran

The sanctions on Iran consist of a complex web of unilateral and multilateral provisions. These have a direct effect as businesses stop banned activities. But there are also indirect effects which are magnified by the sanctions’ complexity. Businesses are often unwilling to risk their reputation by doing business in Iran or to spend the resources required to carry out sufficient due diligence. They refrain from, or scale back, their activities as a precaution.

The U.S. sanctions regime steadily built up over the decades following the 1979 Iranian Revolution. In 1996, Congress enacted the Iran and Libya Sanctions Act (ILSA) in response to Iran’s procurement of nuclear capabilities and “support of acts of international terrorism.”⁴

1 Statement by the President on the Iran Nuclear Deal, 12 January 2018, <https://www.whitehouse.gov/briefings-statements/statement-president-iran-nuclear-deal/>

2 Ibid.

3 Najmeh Bozorgmehr, “Iran pledges commitment to nuclear accord even if US withdraws,” *Financial Times*, February 6, 2018, <https://www.ft.com/content/82d19910-0b4e-11e8-839d-41ca06376bf2>.

4 Iran and Libya Sanctions Act of 1996, August 5, Public Law 104-172.

ILSA was significant as it authorised the U.S. government to impose penalties on non-U.S. persons investing in Iran – so-called “secondary sanctions.”

As the scale of the Iranian nuclear programme became apparent in the 2000s, the UN, the United States and the EU imposed further penalties. A key U.S. statute was the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (CISADA).⁵ By expanding and aggressively applying the authorities granted in ILSA it “effectively forced global financial institutions to choose between doing business with Iran and doing business with the United States.”⁶ Few needed to think twice, deepening Iran’s economic and financial isolation.

The United States further pressured Iran by targeting its Central Bank and its ability to export oil, convincing international partners – most importantly the European Union – to dramatically curtail petroleum and other imports from Iran. Shortly thereafter SWIFT, which enables the majority of international financial transfers through its messaging system, responded with a refusal to process payments with sanctioned Iranian banks. In addition to being deprived of its primary source of income, “Iran was effectively cut off from twenty-first-century finance.”⁷

Sanctions relief under the JCPOA

The JCPOA entered into force on January 16, 2016. On this date, known as “Implementation Day,” sanctions on Iran were gradually rolled

back following verification that it had taken steps to curb its nuclear program. There were significant differences in the approach to this sanctions relief.

As the agreement was implemented, the UN and the EU “terminated” their nuclear-related sanctions on Iran. The United States, meanwhile, began to “cease the application of” certain sanctions.⁸ This is a key distinction. For the United States, the underlying sanctions legislation on Iran remains in place and the United States complies with the JCPOA by suspending the application of these sanctions through executive national security waivers.

U.S. sanctions relaxation also only applies to non-U.S. persons. The long-standing U.S. unilateral trade embargo on Iran remains in place (with some notable exemptions) and prohibits nearly all U.S. transactions with Iran. As a consequence, the JCPOA mainly affects U.S. secondary sanctions.

How U.S. sanctions could be re-instated

U.S. nuclear-related sanctions on Iran could be re-imposed through a wide variety of procedures and authorities. These include:

- *Executive action.* Given that the underlying sanctions statutes remain in place, the president can simply decline to issue further waivers or can cancel existing waivers. Were this to occur, the sanctions would technically be back on the books, and would have to be applied by the U.S. authorities.⁹

5 The Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Public Law 111–195.

6 Zachary Goldman and Elizabeth Rosenberg, “American Economic Power & the New Face of Financial Warfare,” Center for a New American Security, June 2015, 5.

7 Daniel W. Drezner, *The System Worked: How the World Stopped Another Great Depression* (New York: Oxford University Press, 2014), 103–104.

8 Joint Comprehensive Plan of Action, Annex V.

9 Peter Harrell and Elizabeth Rosenberg, “The Legal Steps and Policy Challenges of Reimposing Sanctions on Iran,” Center for a New American Security, September 11, 2017, <https://www.cnas.org/publications/commentary/the-legal-steps-and-policy-challenges-of-reimposing-sanctions-on-iran>.

- *Legislation.* As the JCPOA was being finalized, the U.S. Congress enacted the Iran Nuclear Agreement Review Act (INARA) to establish congressional oversight of the agreement. Under the provisions of this law, every 90 days the president must certify that Iran is honouring its JCPOA commitments and that U.S. sanctions relief is “appropriate and proportionate” and “vital to the national security interests of the United States.”¹⁰ If he does not, Congress is entitled to consider legislation to re-impose nuclear-related sanctions on Iran. This can be done either by an expedited procedure under certain conditions that requires only 50 Senate votes or by normal procedures that would require 60 votes.¹¹ It is important to note that Congress is by no means required to consider or pass this kind of legislation and when given this opportunity after Trump’s decertification in October last year, it decided not to act.
- *Fresh sanctions.* A less direct option would be not to cancel any waivers, but instead to punish Iran with new sanctions on grounds other than nuclear-related – for example Iran’s human rights record or support for military proxy groups.¹² In theory, such sanctions could be very similar to the waived nuclear-related ones. Such a step would be very damaging for the JCPOA, and could be taken by presidential executive decision or through congressional action.
- *The formal JCPOA route to the re-imposition of UN sanctions.* Pursuant to the JCPOA and UN Security Council Resolution 2231 (which formally endorsed

the nuclear agreement), the United States could initiate a grievance procedure via the JCPOA Joint Commission based on alleged concerns over “significant non-performance of commitments” by Iran.¹³ In this case, the UN Security Council would be required to vote on a resolution to sustain the sanctions relief, in which case the United States could exercise its veto and ensure the re-introduction of UN sanctions.

Options for European policymakers

The reintroduction of U.S. sanctions, even if done unilaterally, would have a strong negative impact not only on Iranian willingness to stay in the JCPOA but also on Europe’s ability to sustain incentives for Iran to do so. Provided Iran remains compliant with the JCPOA, it is clear that Europe should oppose the re-imposition of nuclear-related sanctions.

“The economic dimension is an important factor in Europe’s relationship with Iran.”

Economic interests are not the only reason for Iran to stay in the deal. Nor are they the only reason why European policymakers are determined to preserve the JCPOA, which is now “a touchstone of transatlantic security relations, a vital component in international nuclear non-proliferation and an important instrument for Europe’s security and EU strategy towards Iran.”¹⁴ However,

10 “Iran Nuclear Agreement Review Act of 2015,” Public Law 114–17–May 22, 2015.

11 Harrell and Rosenberg, “The Legal Steps and Policy Challenges of Reimposing Sanctions on Iran.”

12 Ibid.

13 United Nations Security Resolution 2231, 20 July 2015, [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2231\(2015\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2231(2015))

14 Adam Thomson and Denitsa Raynova, “ELN JCPOA Delegation to Washington, DC 9-11 January 2018,” European Leadership Network, 22 January 2018, <https://www.europeanleadershipnetwork.org/wp-content/uploads/2018/01/180119.-ELN-JCPOA-visit-to-Washington-DC.pdf>, 1.

the economic dimension is an important factor in Europe's relationship with Iran and the JCPOA's economic benefits have been a crucial part of the case made by Iranian moderates for giving up its nuclear program. U.S. withdrawal from the JCPOA would undoubtedly have a chilling effect on European business with, and investment in, Iran, as U.S. secondary sanctions could directly target such business and investment opportunities.

European policymakers are now considering what options they have to protect the Europe-Iran economic relationship as part of an effort to preserve the JCPOA. They have four possible approaches in the event of a U.S. withdrawal:

1. Coordinate with other members of the UN Security Council to defend the deal

In response to President Trump's decision not to certify the JCPOA last October, European representatives highlighted the agreement's multilateral character and legitimacy. As Federica Mogherini, the EU foreign policy chief, emphasized in a statement following Trump's announcement, "[the JCPOA] is not a bilateral agreement, it does not belong to any single country and it is not up to any single country to terminate it. It is a multilateral agreement that was unanimously endorsed by the United Nations Security Council."¹⁵ Accordingly, the Security Council might seem a powerful arena for European diplomatic efforts to preserve the deal.

15 "Remarks by High Representative/Vice-President Federica Mogherini on the latest developments regarding the implementation of the Joint Comprehensive Plan of Action (Iran nuclear deal)," (Brussels, October 13, 2017), https://eeas.europa.eu/headquarters/headquarters-homepage/33922/remarks-high-representativevice-president-federica-mogherini-latest-developments-regarding_ru.

In reality, however, the Security Council is unlikely to be a helpful vehicle even politically and certainly not for protection from unilateral U.S. action on sanctions.

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The structure of Security Council Resolution 2231 favors sanctions re-imposition over continued relief. If determined to wreck the JCPOA, the United States could exercise its veto to ensure the snap back of sanctions. Formally, sanctions snap back would apply to all JCPOA signatories. Provided Iran was still widely considered to be compliant with the JCPOA, it is unlikely that Washington would wish to court the international isolation that pursuit of a vexatious attempt to re-impose UN sanctions would bring. But the JCPOA mechanisms and the UN route do not offer any formal way of blocking U.S. unilateral sanctions.

Use of the Security Council simply to raise the political costs to the United States and give Tehran reasons for staying in the deal would have to be weighed very carefully by European decision makers. In principle, the European members of the Security Council – most notably France and the United Kingdom but also non-permanent members Poland, Sweden, and the Netherlands – could seek coordination with Russian and Chinese counterparts to defend the JCPOA and send signals to the United States of an international commitment to preserve the accord as long as there is evidence of Iranian compliance.¹⁶

But this would be perilous. While both China

16 Ellie Geranmayeh, "Europe Must Fight to Preserve the Iran Deal," European Council on Foreign Relations, January 23, 2018.

and Russia have supported the JCPOA and benefitted from its implementation, it is difficult to foresee how they would act in the event of a U.S. withdrawal and increased tensions across the Atlantic. There is a risk that they would seek to drive a wedge between Europe and the United States – for instance by introducing resolutions condemning the U.S. withdrawal – which would put European diplomats in a difficult situation. The United States would also veto hostile resolutions and block Security Council presidential statements.

It might be more politically effective for Europeans to at least condone, if not actually vote for a UN General Assembly resolution condemning the unilateral re-imposition of U.S. nuclear-related sanctions in breach of the JCPOA and to signal the willingness to do so in advance of May 12.

“Europeans should convey to their American counterparts that U.S. sanctions which are unsupported by the wider international community are unlikely to have the desired effect.”

More generally, European diplomats should try to convey to their American counterparts that U.S. sanctions which are unsupported by the wider international community are unlikely to have the desired effect. While the threat of U.S. secondary sanctions might deter most European trade with Iran, it would be unlikely to deter the United States’ geopolitical competitors Moscow and Beijing. Indeed, an eastward shift in Iranian trade is already underway. Prior to the imposition of sanctions, the EU was Iran’s main trading partner. Now China accounts for 22.3 percent of Iran’s total trade, making it Tehran’s second largest trading partner after the United Arab

Emirates.¹⁷ Europeans should also point out that re-imposed sanctions might push other nations to seek alternatives to U.S.-dominated financial structures as a hedge. This is a problem that senior U.S. officials themselves have noted.¹⁸

2. Use precedents from U.S.-EU disputes in the 1990s

For more decisive action, European policymakers can look to their predecessors’ response to U.S. laws with extraterritorial provisions introduced in the 1990s: the Helms-Burton Act against Cuba, which enabled U.S. persons to file a suit against anyone trading in U.S. property confiscated by the Castro government; and the Iran and Libya Sanctions Act, which authorized sanctions against non-US persons investing in Iran’s or Libya’s petroleum sector. Building on this legacy, the EU could pursue two options. Both, however, are subject to serious challenges.

Measures through the WTO

One option is to initiate a dispute process at the World Trade Organization (WTO). This is what Europeans did in response to the Helms-Burton Act, on the basis that the statute was in violation of U.S. free trade commitments under the General Agreement on Tariffs and Trade (GATT).¹⁹

Yet disputes in the WTO are likely to stall

¹⁷ Data retrieved from the European Commission, http://ec.europa.eu/trade/policy/countries-and-regions/countries/iran/index_en.htm.

¹⁸ “Remarks of Secretary Lew on the Evolution of Sanctions and Lessons for the Future at the Carnegie Endowment for International Peace,” U.S. Department of the Treasury, March 30, 2016, <https://www.treasury.gov/press-center/press-releases/Pages/jl0398.aspx>.

¹⁹ World Trade Organization, “DS38: United States – The Cuban Liberty and Democratic Solidarity Act,” https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds38_e.htm.

as Article XXI of GATT allows signatories to deviate from their free trade obligations for reasons of national security.²⁰ This provision, often known as the “security exception,” has rarely been invoked and as a result is vaguely defined, since the agreement’s drafters envisioned that its abuse would be prevented by an internal understanding of shared norms by WTO members.²¹ In the event of an EU-triggered dispute process, however, it is highly likely that the Trump Administration would push back on national security grounds.

Reviving EU ‘blocking regulation’

A second option is to revive what is colloquially known as “blocking regulations”. These measures intend to prohibit EU persons from complying with U.S. secondary sanctions or acknowledging the jurisdiction of non-EU courts or authorities with respect to those sanctions.²² Notably, the blocking regulations include a clause which authorizes recovery for damages from secondary sanctions, which “could take the form of seizure and sale of assets” from the damaging party.²³ These regulations, which were introduced in 1996, only address specifically mentioned U.S. statutes, and as a result would need to be updated to include more recent laws (such as CISADA) in order to apply to the most damaging secondary measures which the United States could reapply.

Reviving blocking regulations would also be subject to technical and political challenges. A first challenge lies in the fact that, in line with EU law, it is up to member states themselves to decide what penalties to impose in the case of violations of the regulations.²⁴ This allows for uneven implementation of the regulations across the EU. It also opens the possibility of a “regulatory arbitrage” between countries with stricter and looser enforcement.²⁵ The EU’s own sanctions on Russia illustrate the risks of uneven implementation in the absence of a centralized enforcement authority.²⁶

Second, the clause stating that persons are entitled to recover damages from the party who caused those damages comes with significant challenges. Here, the inflictor of the damage would be the U.S. government, which would likely challenge any suits on the grounds of sovereign immunity.²⁷

A third challenge pertains to the regulations’ implications for the private sector. By threatening penalties against European persons and entities who comply with

20 The General Agreement on Tariffs and Trade, Article XXI, https://www.wto.org/english/docs_e/legal_e/gatt47.pdf.

21 Simon Lester, “The Drafting History of GATT Article XXI: The U.S. View of the Scope of the Security Exception,” *International Economic Law and Policy Blog*, March 11, 2018, http://worldtradelaw.typepad.com/ielpblog/2018/03/drafting-history-of-gatt-article-xxi.html?utm_source=dlvr.it&utm_medium=twitter.

22 Council Regulation (EC) No 2271/96 of 22 November 1996, Articles 4 & 5.

23 Council Regulation (EC) No 2271/96 of 22 November 1996, Article 6.

24 John Grayston and Giani Pandey, “Damned if you do, Damned if you don’t: Navigating Conflicting U.S. and Foreign Regulations on Doing Business with Cuba. The EU Perspective,” Grayston & Company, October 28, 2009.

25 Ed Crooks and Henry Foy, “US oil groups feel Russia sanctions freeze more than Europeans,” *The Financial Times*, June 19, 2017, <https://www.ft.com/content/4747bc8e-53fd-11e7-9fed-c19e2700005f>.

26 Robin Emmott, “Siemens’ Crimea predicament tests limits of EU sanctions,” *Reuters*, July 12, 2017, <https://www.reuters.com/article/us-ukraine-crisis-siemens-eu/siemens-crimea-predicament-tests-limits-of-eu-sanctions-idUSKBN19X1QE>.

27 Paulina Izwicz, “Iran deal decertification looms: what’s next?” *Institute for International and Strategic Studies*, October 12, 2017, <https://www.iiss.org/en/iiss%20voices/blogsections/iiss-voices-2017-adeb/october-1537/iran-deal-certification-d124>.

certain U.S. sanction laws, the EU would put the private sector in the cross-fire between U.S. and European authorities. In the same way that U.S. secondary sanctions are built on doing business either with America or designated entities, a blocking regulation forces companies to choose between accepting penalties in the United States or in the European Union. Given the importance of the U.S. financial system most large multinational European companies would comply with U.S. sanctions and accept European fines. To thrive in international finance, access to U.S. markets remains a prerequisite.

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Fourth, it would be difficult for European authorities to justify their penalties with proof that a given entity has acted out of compliance with U.S. secondary sanctions. Presumably, a targeted entity could claim that it has decided not to do business with Iran for a variety of other reasons such as political risk, money laundering risks or a generally dismal financial system.²⁸

Beyond these challenges lies a broader issue: both the WTO option and that of "blocking regulations" could set the EU and the United States on a path towards deeper trade conflict than may already be the case over steel

and aluminum. WTO disputes and blocking regulations risk evoking further counter-measures across the Atlantic. European policymakers are mindful that U.S. support for the WTO is already crumbling under the current Administration, and are reluctant to take steps that could further destabilize the organization. With this risk for confrontation and collateral damage, European officials are rightly hesitant to go down this route.

However, despite the drawbacks, initiating preparations for a revived blocking regulation could be a useful – indeed, a necessary – signalling tool for the EU. To Washington, the spectre of these measures could convey a message that Europe views the JCPOA as a vital achievement that it is willing to fight for. To Tehran, it would signal that Europe remains committed to the agreement's progress. The preparation of a blocking regulation could be used to boost leverage on one hand and signal goodwill on the other. Treading this line would require careful, calibrated, and coordinated diplomacy on the part of European policymakers.

The solution to the transatlantic row of the 1990s was an agreement between the EU and the United States, in part through U.S. waivers of the extraterritorial provisions in the sanctions statutes.²⁹ The key question today is how to get to that point, and a firm response from European policymakers can be part of the answer. As a result, the greatest promise of the blocking regulation is as a political tool, not as a legal one.³⁰

28 David Mortlock and Richard Nephew, "Decertification of the JCPOA and the Risk of European Union 'Blocking Regulations'," Columbia SIPA Center on Global Energy Policy, October 2017, <http://energypolicy.columbia.edu/sites/default/files/pictures/DecertificationJCPOARiskofEUBlockingRegulations1017%20.pdf>.

29 Ibid.

30 Esfandiyar Batmanghelidj, "Can Blocking Regulations Help Europe Protect Its Iran Business From Trump?" Bourse & Bazaar, February 13, 2018, <https://www.bourseandbazaar.com/articles/2018/2/9/can-blocking-regulations-help-europe-protect-its-iran-business-from-trump>.

3. Carve out U.S. exemptions for European businesses

European policymakers should undoubtedly pursue consultations with U.S. counterparts to seek exemptions to nuclear-related secondary sanctions for European companies. There are precedents for this. When the EU imposed coordinated sanctions with the United States against Russia, exemptions for certain energy projects were carved out to safeguard gas imports from Russia (on which the EU is heavily reliant).³¹ Washington accepted this to get the EU on board.

More recently, when the United States expanded sanctions on Russia through the 2017 Countering America's Adversaries Through Sanctions Act (CAATSA), European leaders responded forcefully against a provision which authorized the President to sanction certain Russian energy projects that are backed by European investors. European leaders interpreted the provision as a potential threat to European energy security and commercial interests, and reportedly considered retaliatory measures against the United States, including blocking regulations and WTO processes.³² In this case, the message hit home. In the final U.S. bill signed into law, language was added that the President would make decisions on sanctions "in coordination with allies."³³ The State Department also issued guidance

to reinforce this message.³⁴ U.S. officials also visited Europe, hosted EU delegations in Washington, and conducted extensive consultation with European counterparts to quell their concerns.³⁵ A potential transatlantic rift was thus averted.

"When it comes to Iran, European states arguably have less leverage than they do with regards to the Russia sanctions and the United States may not be as willing to accommodate European interests."

There are important differences between Russia and Iran which complicate exercising this option. To start with, in the case of Russia, there were clear differences between the U.S. legislative and executive branches over what direction U.S. policy should take, and thus more sympathy to the argument about preserving some economic links with Russia. On Iran, meanwhile, there is broad agreement in the United States over Iran's status as a pariah state. Second, crucial European states have stronger commercial interests in Russia than with Iran. Without the United States taking these commercial interests into consideration, European support for maintaining a united front on Russia would have been more difficult to sustain – an important point which the Americans understood. When it comes to Iran, European states arguably have less leverage than they do with regards to the Russia sanctions, and

31 Marcin Szczepanski, "Economic impact on the EU of sanctions over Ukraine conflict," European Parliamentary Research Service, October 2015, 3.

32 Ryan Heath, "Brussels prepares to bite back at US over Russia sanctions," *Politico*, July 24, 2017, <https://www.politico.eu/article/brussels-prepares-to-bite-back-at-us-over-russia-sanctions/>.

33 Countering America's Adversaries Through Sanctions Act of 2017, Public Law 115-44.

34 "CAATSA/CRIEEA Section 232 Public Guidance," U.S. Department of State, October 31, 2017, <https://www.state.gov/e/enr/275195.htm>.

35 "Background Briefing on Public Guidance Related to Sections 223, 225, 226, 228, 232, and 233 of the Countering America's Adversaries Through Sanctions Act of 2017 (CAATSA)," U.S. Department of State, October 31, 2017, <https://www.state.gov/r/pa/prs/ps/2017/10/275229.htm>.

the United States may not be as willing to accommodate European interests.

Nonetheless, European exemptions is an option which should be explored going forward. When the U.S. Congress passed ILSA in 1996, it included a provision that allowed the executive branch to “waive the application of [sanctions] with respect to nationals of a country if...that country has agreed to undertake substantial measures... that will inhibit Iran’s efforts [to procure weapons of mass destruction and support terrorism].”³⁶ Modified to address the current situation, this may serve as a precedent for a transatlantic quid pro quo in the event of renewed U.S. sanctions, whereby the United States would waive secondary sanctions in exchange for a commitment from the Europeans to address specific U.S. concerns. This could take the form of, inter alia, a public statement by E3/EU representatives that if Iran should deviate from the restrictions imposed on its nuclear program pursuant to the JCPOA – now or in the future – they will work with Washington to swiftly address any breaches.³⁷ It could also relate to non-nuclear aspects of Iran’s behaviour.

If these broader “blanket waivers” proved unobtainable, the focus would inevitably move to more limited national exemptions. The CEO of Total, the French oil giant, has already announced that the company intends to apply for exemption under the JCPOA’s “grandfather clause” – the provision which stipulates that sanctions will not be applied retroactively to projects that are compliant with the JCPOA – if sanctions

are snapped back.³⁸ More businesses are likely to follow suit. Exemptions should include projects currently under way, such as those through aviation manufacturer Airbus, whose agreements in Iran are significant both from a commercial and political point of view.³⁹ These limited waivers, however, would undoubtedly have a narrower effect. And while it remains in the interest of the EU to see significant projects in Iran take place, moving into this case-by-case domain could set off competition between different European companies as well as between member states.

4. Improve financing options for businesses operating in Iran

In parallel to these measures, efforts can be made to improve financing for European businesses seeking to enter the Iranian market. By no means all European companies have U.S. exposure and are therefore vulnerable to U.S. secondary sanctions. There are a number of options to explore.

One proposal already brought forward by the European Commission is to authorize the European Investment Bank (EIB), an institution set up to promote EU policy objectives, to operate in Iran.⁴⁰ This process

36 Iran and Libya Sanctions Act of 1996, August 5, Public Law 104-172.

37 Simon Gass, “Finding the Sweet Spot: Can the Iran Nuclear Deal Be Saved?” European Leadership Network, March 2018, <https://www.europeanleadershipnetwork.org/wp-content/uploads/2018/03/180309-Can-the-Iran-Nuclear-Deal-Be-Saved.pdf>, 3-4.

38 Massoud A Derhally and Jennifer Gnana, “Exclusive: Total to apply for waiver if US withdraws from Iran deal,” *The National*, March 18, 2018, <https://www.thenational.ae/business/energy/exclusive-total-to-apply-for-waiver-if-us-withdraws-from-iran-deal-1.714157>.

39 “Great Expectations, Delayed Implementation,” *Bourse & Bazaar*, January 2018, <https://www.bourseandbazaar.com/research-1/2018/1/11/special-report-on-the-economic-implementation-of-the-jcpoa>, 3.

40 “European Commitment to the JCPOA – Keynoted speech by EEAS Secretary General Helga Schmid,” European Union External Action, October 4, 2017, <https://eeas.europa.eu/headquarters/>

is well underway: through a revision of the EIB's external lending mandate last year, Iran was added as a potentially eligible country. But Iran will still need to be added to the list of eligible countries, and the EIB will thereafter have to negotiate a framework agreement with the Iranian authorities. The full technical process is therefore likely to be time-consuming. It should nonetheless be viewed as an important political signal of European commitment to Iran and should boost investor confidence.

A further option is to take steps to extend protected credit lines to Iran. Bpifrance, a French state-owned investment bank, recently revealed one such initiative: by issuing euro-denominated credit lines without exposure to U.S. financial markets, banks could circumvent the reach of U.S. sanctions.⁴¹ Similar arrangements have been concluded by credit agencies and banks across Europe, and could be adopted by many more.⁴² The depth of European capital markets adds credibility to this option.

There is inevitably a limit to what external efforts to boost European trade and investment in Iran can accomplish, given Iran's opaque economy and the hurdles

facing investors seeking to operate there.⁴³ Nevertheless, Iran is taking measures to improve its investment climate. This includes a recent push to compel the country's armed forces, many of which are subject to stringent non-nuclear sanctions, to sell off their holdings in key sectors of the Iranian economy.⁴⁴ These factors are boosted by the backing not only of President Rouhani, but also of Supreme Leader Khamenei.

“European policymakers can work actively to encourage further Iranian commitment to improve the investment climate - a commitment which would ultimately benefit all JCPOA stakeholders.”

European policymakers can work actively to encourage further Iranian commitment to improve the investment climate – a commitment which would ultimately benefit all JCPOA stakeholders. That includes pushing for full implementation of the original action plan for dealing with money laundering and terrorist financing devised by the Financial Action Task Force (FATF). The FATF has continually highlighted serious deficiencies in Iranian standards, while simultaneously suspending the implementation of penalties on Iran – most recently in February.⁴⁵

headquarters-homepage/33511/european-commitment-jcpoa-keynote-speech-eas-secretary-general-helga-schmid_en.

41 Matthieu Protard and Mathieu Rosemain, “France to finance exports to Iran, aims to sidestep U.S. sanctions,” Reuters, February 1, 2018, <https://www.reuters.com/article/us-iran-france-usa/france-to-finance-exports-to-iran-aims-to-sidestep-u-s-sanctions-idUSKBN1FL48U>.

42 Saeed Kamali Dehghan, “Europe's business heads aim to keep Iran nuclear deal despite US threat,” *The Guardian*, October 6, 2017, <https://www.theguardian.com/world/2017/oct/06/europes-business-heads-aim-to-keep-iran-nuclear-deal-despite-us-threat>.

43 Elizabeth Rosenberg and Axel Hellman, “Despite Sanctions Relief, Iran's Prospects Look Bleak,” *The National Interest*, January 18, 2016, <http://nationalinterest.org/feature/despite-sanctions-relief-irans-prospects-look-bleak-14937>.

44 Golnar Motevalli and Arsalan Shahla, “Iran Orders Armed Forces to Sell All Energy, Business Assets,” *Bloomberg*, February 6, 2018.

45 Financial Action Task Force on Money Laundering, “Outcomes FATF Plenary, 21-23 February 2018,” press release, <http://www.fatf-gafi.org/>

Conclusions

Pushing back against the United States above all requires political will. While there is undivided support for the JCPOA within the EU, there is little appetite for further confrontations with the United States. This could change if Washington is seen as taking further steps to undermine transatlantic relations and European interests, for instance by imposing tariffs on European exports to the United States or pursuing destabilizing policies in the Middle East.

The wider international context in May is going to matter a great deal for the fate of the JCPOA. So too will the way that the Europeans choose to frame their differences with Washington over the JCPOA. A choice between the JCPOA and good relations with Washington is one thing; the ability of the EU to maintain its security, its autonomy and the values it thinks should define the international order is quite another.

Analysis of the options at hand points towards the following conclusions:

First, no EU action can completely shield European businesses and investments in Iran. There is no bulletproof defence of the JCPOA's economic benefits in the event of a U.S. withdrawal. The EU and its member states can pursue measures to shield existing links, encourage further business activity and boost investors' confidence in the Iranian market, but while government can facilitate business, it cannot control it. Private sector actors will have plenty of reasons to be wary of the Iranian market. There is, however, strong European commercial interest in engaging with Iran, and European policymakers can promote policies that help turn interest into action.

Second, the lingering caution of financial

publications/fatfgeneral/documents/outcomes-plenary-february-2018.html.

institutions despite sanctions relaxation under the JCPOA is a sobering reminder of the challenge of steering the private sector through Iranian market obstacles. Regulatory uncertainty and anti-money laundering/terrorist concerns will continue to restrict investments for the foreseeable future. As the chief legal officer at HSBC noted in response to the Obama administration's push to encourage European banking activity in Iran, "Governments can lift sanctions, but the private sector is still responsible for managing its own risk and no doubt will be held accountable if it falls short."⁴⁶

Third, there are significant and inherent risks with confrontational options such as initiating processes in the WTO, reviving blocking regulations or embarrassing the United States at the UN. These retaliatory measures could easily escalate. This might not only impose significant costs on the EU and cause serious friction in the transatlantic relationship but also do damage to institutions that uphold the free movement of goods, services, and ideas.

"European policymakers should pursue an array of options in parallel."

Fourth, Europe nevertheless has realistic options in the face of U.S. withdrawal. And the EU can calibrate its response to the threat of U.S. withdrawal. European policymakers need not – indeed, should not – put all their eggs in one basket but should pursue an array of options in parallel. This includes solidifying international support for the JCPOA, demonstrating that re-imposing sanctions unilaterally will come at a cost for the United

46 Stuart Levey, "Kerry's Peculiar Message About Iran for European Banks," *The Wall Street Journal*, May 12, 2016, <https://www.wsj.com/articles/kerrys-peculiar-message-about-iran-for-european-banks-1463093348>.

States, seeking U.S. exemptions for European businesses to continue operating in Iran, and bolstering international business confidence in the Iranian market. Such practical steps, taken now, can bolster European negotiating leverage with Washington, send useful signals to Tehran and strengthen European political will to defend the JCPOA.

“There is plenty for Europeans to negotiate for with their U.S. counterparts about the terms of any U.S. withdrawal.”

Fifth, U.S. decision makers can still be influenced. U.S. decision making will be far from monolithic and it is still possible that President Trump could be influenced by congressional opinion. Congress is sensitive to European opinion over the JCPOA. There is no congressional majority for unilateral U.S. withdrawal from the JCPOA while Iran remains compliant, still less for the re-imposition of secondary nuclear-related sanctions on European allies. This leaves plenty of scope for European influence. And just as the EU can tailor its steps, so Washington's options on withdrawal are varied. U.S. policymakers can calibrate the sanctions they choose to re-instate and the executive powers of the president in matters of national security add to this flexibility. A re-introduction of sanctions does not necessarily equate to a full re-introduction of all U.S. sanctions without exemptions. This means that there is plenty for Europeans to negotiate for with their U.S. counterparts about the terms of any U.S. withdrawal.

Recommendations for European policymakers

To influence U.S. decision-making over the future of the JCPOA, European leaders should first and foremost:

Demonstrate resolve vis-à-vis Washington. Since President Trump's October 2017 de-

certification and his 12 January ultimatum that Europeans must negotiate a “supplemental agreement”, it has made sense for French, German and British negotiators to focus on seeing what can be negotiated. But with the emergence of Pompeo and Bolton the odds on keeping the United States in the JCPOA have worsened. While European leaders should continue to speak softly, they need to make it clearer that they are ready to wield big sticks. A prevailing sense among advisers to the U.S. President, actively encouraged by hawkish commentators, is that Europe is simply unable to push back against renewed U.S. sanctions – and, by extension, will agree to any U.S. demands over the JCPOA.⁴⁷ This is a dangerously simplistic reading of the financial and political power dynamics which ignores the key role of European support in the sanctions regimes against Iran and Russia (in both cases, the EU was the greater trading partner) and European frustrations with U.S. extraterritorial sanctions. More fundamentally, it ignores the importance of policy coordination between Washington and Brussels and the value of the transatlantic partnership for the United States.

“While European leaders should continue to speak softly, they need to make it clearer that they are ready to wield big sticks.”

It is the value of this partnership that European leaders should leverage in consultations with their American counterparts. The JCPOA should be framed for Congress as

47 See, for instance, Richard Goldberg, “Europe's Sanctions-Blocking Threats Are Empty,” *Foreign Policy*, February 20, 2018, <http://foreignpolicy.com/2018/02/20/europes-iran-deal-threats-are-empty-trump-iran-eu/>. Goldberg, a former Republican congressional architect of U.S. sanctions on Iran, suggests that “the EU must satisfy Trump's demands to fix the deal or be prepared to fully comply when U.S. sanctions return.”

well as the U.S. Administration as a matter of transatlantic security relations and not just Iran's denuclearization. Distrust of Iran and contempt for the nuclear deal may be widespread in the U.S. system, but even hawkish policymakers recognize the value and necessity of the transatlantic partnership. The Europeans need to make clear just how vital they consider the JCPOA to be to their interests. Credible signals that the EU is willing to take firm action through preparatory work on blocking regulations, credit lines and other means may be useful to convey that message.

"Practical European steps now can help to keep Iranian reactions measured in the run-up to and after 12 May."

Demonstrate commitment vis-à-vis Tehran.

In their dealings with Iran, European leaders should be demonstrating that Europe remains committed to the deal, and that they are working hard to ensure that the agreement remains beneficial to all signatories. Part of this effort will be to persuade Iranian counterparts that their country is better off sticking to the deal, even without U.S. participation, than they would be – indeed, than they were – without it. Practical European steps now can help to keep Iranian reactions measured in the run-up to and after 12 May. The power of symbolism should not be underestimated. High level visits to Tehran, European Council declarations, and moves in the UN General Assembly can all play a part. The EU should also consider establishing a coordinating body – outside the so-called Joint Commission which consists of all signatories to the deal – to oversee and coordinate this process of specifically European economic engagement with Iran.⁴⁸

European leaders should continue to insist that Iran will be able to enjoy the JCPOA's benefits to a greater extent if they open up their economy and deal with the striking deficiencies in their financial sector – including but not limited to their standards in anti-money laundering and terrorist financing.

Centralize decision-making. There will inevitably be a tension between these aims – responding firmly to the United States while promoting cooperative measures; signaling commitment to cooperation with Iran while playing up the value of the partnership with the United States. Simultaneously pursuing these objectives will require careful diplomacy on the part of European policymakers both externally and internally. If not managed carefully, these dual objectives risk leaving Europeans in a worst-case scenario in which they alienate both the United States and Iran. To streamline decision-making, therefore, the E3 (France, Germany, the United Kingdom) should be left in charge of the negotiations. Coordinating the EU's policy posture with all member states and drawing on the institutional knowledge of the EEAS will remain a prerequisite for strong diplomacy, but pursuing negotiations in a narrow format will enable more flexible and executive diplomacy.

European leaders should also begin contingency planning for the worst-case scenario. ***If confronted with a U.S. withdrawal and the certainty of re-introduction of sanctions,*** European policymakers should:

Maintain unity within the European Union.

At the moment there is strong support in favour of the JCPOA within the EU, but once additional issues enter the discussion (such as the actual readiness of EU member states to move towards political and economic confrontation with the United States) preserving this unity will be increasingly important – and increasingly challenging. This is particularly significant given the fact that some countries will be heavily lobbied by the United States and Middle Eastern nations

48 "Great Expectations, Delayed Implementation," Bourse & Bazaar, 17.

who are skeptical of the JCPOA, and that EU member states have varying degrees of direct commercial interests in Iran. The future of the JCPOA may well become a divisive issue in transatlantic relations; it must not become a divisive issue in internal EU politics. Strong E3 lobbying of fellow member states should therefore take place before and after 12 May.

Cooperate and coordinate EU policies with private sector actors. This highlights a broader, fundamental point in sanctions policy: while national governments can decide what is a permissible economic activity, it is ultimately up to actors in the private sector to act on those decisions. Companies and financial institutions are at the front end of sanctions policy, and must feel adequately informed and supported by government authorities. This principle is particularly important in the present case. If European governments want businesses to engage in Iran, they must take concrete steps to reduce the policy uncertainty surrounding that market. A first step is clear communication with and well-defined guidelines for businesses.

“It is reasonable for Europeans to make what they have to offer in support of U.S. concerns increasingly conditional of U.S. acceptance of European concerns.”

Make elements of any “supplemental agreement” contingent on U.S. licensing performance and an absence of U.S. secondary sanctions. U.S. officials negotiating the proposed supplemental agreement with the E3 admit that they do not know whether President Trump will honour the deal they arrive at. As uncertainties grow as to whether President Trump will extend the sanctions waiver, it is reasonable for Europeans to make what they have to offer in support of U.S. concerns increasingly conditional on U.S. acceptance of European

concerns. Europeans should not make commitments to U.S. counterparts over missiles, inspections and break-out times that put Iran’s adherence to the deal under stress if the United States cannot require Europe’s wish to see the United States meet its economic commitments under the JCPOA or refrain from secondary sanctions in the event that President Trump unilaterally re-imposes U.S. nuclear-related sanctions. President Trump and his advisers might well balk at making it easier for Europeans (and, if the Europeans are wise, Russia and China) to sustain the JCPOA without the United States through continuing economic benefits to Iran from the deal. There could, however, be congressional support for this.

It would be beneficial to coordinate the European position on sanctions exemptions at the EU level and use EU institutions to increase the pressure on the United States. Europe is strongest when speaking with one voice.