Sanctions Against Libya

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This client alert considers the impact of measures taken by the US, the UN and the EU in recent days in response to the situation in Libya.

THE US

In February 25, 2011, President Obama issued Executive Order 13566, setting out a unilateral package of trade sanctions against Libya. These measures took effect immediately.

The sanctions include:

— Blocking all assets of the Government of Libya, its agencies, instrumentalities, and controlled entities, and the Central Bank of Libya, barring dealings by US persons with such entities.

— Placing the Qadhafi family on the Treasury Department Office of Foreign Assets Control (OFAC) Specially Designated Nationals and Blocked Persons (SDN) List, blocking their far-ranging assets.

— Directing the Treasury Department to list additional individual Libyan officials or others contributing to the ongoing repression as SDNs.

Compliance with the blocking requirements is required of all "US persons." This includes US citizens and resident aliens, entities organized under the laws of the United States or any jurisdiction within the United States (e.g., companies, non-profit groups, government agencies, and including foreign branches, wherever located), and any person within the US.

Libya has a broad array of state-owned entities and sovereign wealth investment funds, so the reach of this blocking order appears to go beyond entities that are easily identified as government agencies. Libyan authorities control a broad range of state-owned companies, including the National Oil Company and several other infrastructure, energy and utility companies. In addition, press reports indicate that Libya's main sovereign wealth fund, the Libyan Investment Authority, controlled $70 billion in assets prior to the sanctions. The US Treasury reportedly already has frozen more than $32 billion of Libya's assets, and its efforts are continuing. Accordingly, due diligence must be undertaken by "US persons" in transactions with any companies with seeming ownership or control ties to Libya, even outside that country.

A number of questions have arisen regarding application of the rules to in-process transactions involving Libya-origin goods. In general, it appears that if goods were sold by Libya to non-Libyan entities prior to the imposition of sanctions, then the goods may not be considered blocked. However, if Libyan government entities owned commodities when the sanctions were imposed (or any time thereafter), the commodities likely will be considered to be blocked under the US law, and will remain so, even if sold on to non-Libyan third-country entities.

Separately, OFAC released a General License providing an exception to the President's broad blocking order for Libyan-owned banks established outside that country. The license states that "All transactions involving banks that are owned or controlled by the Government of Libya and organized under the laws of a country other than Libya are authorized, provided the transactions do not otherwise involve the Government of Libya or any person whose property and interests in property are blocked."

THE UN

On February 26, 2011, the United Nations Security Council adopted Resolution 1970 (2011). In addition to an arms embargo and an international travel ban on 17 individuals, the Resolution imposes sanctions on six Qadhafi family members, including Muammar Qadhafi himself. The details of these six individuals are set out in Annex II to the Resolution.

The Resolution provides that Member States should freeze without delay all funds, other financial assets, and economic resources within their territories, owned or controlled, directly or indirectly, by the persons listed in Annex II, or by individuals or entities acting on their behalf or at their direction, or by entities owned or controlled by them.

The Resolution further provides that all Member States shall ensure that any funds, financial assets or economic resources are prevented from being made available by their nationals or by any individuals or entities within their territories, to or for the benefit of the persons listed in Annex II.

In the UK, the Libya (Financial Sanctions) Order 2011 that gives effect to Resolution 1970 (2011), came into force February 27, 2011. The accompanying HM Treasury briefing note makes the point that the impact of the asset freeze and prohibition on making funds, financial assets and economic resources available, extends beyond the six named individuals to:

"any funds, other financial assets or economic resources owned or controlled by them. The financial sector and other persons should bear in mind that Muammar Qadhafi and his family have considerable control over the Libyan state and its enterprises in deciding how to conduct proper due diligence over any transactions involving Libyan state assets."

The extent to which the sanctions extend beyond the named individuals is of critical importance, particularly bearing in mind the analogous provisions of Council Regulation (EU) No.204/2011 (see below). It seems unlikely that these sanctions (both UN and EU) should be read as extending to every entity that is Libyan state owned or controlled. If that was the intention, then it would have been expected for such organisations to have been specifically named (and the list of names can be compared with the much more detailed lists of designated persons in, for example, the Iranian sanctions) or for the UN Resolution / EU Regulation to have been more explicit. Some support for this view can be drawn by HMT's enactment of specific subordinate legislation to prohibit the export of bank notes and currency to the Libyan National Bank, which suggests HMT did not regard the latter as falling into the scope of the UN Resolution or EU Regulation.

THE EU

On 2 March 2011, the Council of the European Union adopted Council Regulation (EU) No. 204/2011, which implements UN Resolution 1970 (2011) in the European Union.

The Regulation goes further than the UN Resolution in that it prohibits the sale, supply, transfer, export, purchase, import or transport of listed equipment that might be used for internal repression.

It also adds a further 20 names to the individuals who are subject to the asset freeze and the prohibitions on persons making funds, financial assets and economic resources available to them. There is limited scope to obtain a licence to deal with designated persons' assets, or to make funds, financial assets and economic resources available to them.

There is no overall ban on trading to/ from Libya or with Libyan people or entities.

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