

## Financial sanctions concerning Libya: an update on UN, EU and Dutch legislation

On 3 March 2011, Clifford Chance published a client briefing "[Sanctions affecting Libya](#)" outlining the first regulations with sanction provisions relating to the current situation in Libya. Since then, on 17 March 2011, the United Nations Security Council adopted a new resolution, (the **UN Resolution**) concerning the situation in Libya and authorising 'all necessary measures' to protect civilians and civilian populated areas.

Since then, the EU has also amended the Council Regulation (EU) 204/2011, dated 2 March 2011. In addition to designating a further number of persons and entities to Annex II and III of the Council Regulation (EU) 204/2011, rules regarding the no-fly zone have been incorporated. Also additional exemptions have been added to this regulation, of which the most important one is the exemption for subsidiaries in which a designated entity has a stake.

This below briefing summarizes the two latest amendments to Council Regulation (EU) 204/2011.

### **New UN Security Council Resolution**

The UN Resolution extends the asset freeze imposed under the previous resolution (which designated Muammar Qadhafi and five members of his immediate family as sanctions targets), by designating the following entities as additional sanctions targets on the grounds that they are under the direct control of Muammar Qadhafi and his family, and are a potential source of funding for the Qadhafi regime:

1. Central Bank of Libya
2. Libyan Investment Authority (**LIA**)
3. Libyan Foreign Bank
4. Libyan Africa Investment Portfolio
5. Libyan National Oil Corporation

The UN Resolution also directs the newly formed UN Libya Sanctions Committee to designate further Libyan authorities, individuals and entities to be subject to the asset freeze within 30 days of adoption of the Resolution (and thereafter as appropriate).

The UN Resolution requires States to 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 sanctions targets. Additionally, States are required to ensure that persons and entities within their jurisdiction exercise vigilance when doing business with entities incorporated in Libya (and with entities owned or controlled by them or acting on their behalf or at their direction), where those States consider there are reasonable grounds to believe that such business could contribute to violence and the use of force against civilians.

By way of protection for those required to comply with the above asset freeze requirements, the UN Resolution requires States to take necessary measures to ensure that no claim shall lie at the instance of the Libyan authorities, or of persons or bodies in Libya, or persons claiming through or for their benefit, in connection with any contract or other transaction where its performance has been affected by the Security Council Resolutions with respect to Libya (including the sanctions measures included in them). Such a bar on claims is already a feature of the EU measures (see below).

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## New UN Security Council Resolution

### Designated persons and entities

In the EU, the first four of the above listed entities were already designated as EU sanctions targets pursuant to Council Regulation (EU) 204/2011 of 3 March 2011 (the **EU Regulation**) (as subsequently amended by Council Implementing Regulation (EU) 233/2011 on 10 March 2011).

On 22 March 2011 and 24 March 2011, respectively Council Implementing Regulation (EU) 272/2011 and Council Implementing Regulation (EU) 288/2011 were published. These regulations amend the EU Regulation by designating a further number of Libyan entities as EU sanctions targets. Among the newly listed are

1. Libyan National Oil Corporation
2. Azzawia (Azawiya) Refining;
3. Ras Lanuf Oil and Gas Processing Company (RASCO);
4. Brega;
5. Sirte Oil Company, and
6. Waha Oil Company.

### Freezing measures and prohibition on making available funds or economic resources

Pursuant to Article 5 of the EU Regulation:

1. All funds and economic resources belonging to, owned or controlled by designated individuals or entities are to be frozen;
2. No funds or economic resources may be made available, directly or indirectly, to or for the benefit of the designated individuals or entities; and
3. Participation in activities intended to directly or indirectly circumvent these restrictive measures is prohibited.

The EU Regulation is directly applicable in all EU Member States, which means that the EU financial sanctions apply to nationals of Member States without the need for further domestic legislation within each Member State. However, individual Member States are responsible for laying down the rules on penalties that will apply within those Member States for infringements of the provisions of the EU Regulation, and for taking all measures necessary to ensure that they are implemented. The EU Regulation is directly applicable in all EU Member States, which means that the EU financial sanctions apply to nationals of Member States without the need for further domestic legislation within each Member State. However, individual Member States are responsible for laying down the rules on penalties that will apply within those Member States for infringements of the provisions of the EU Regulation, and for taking all measures necessary to ensure that they are implemented.

### Main exemptions on the measures

The EU Regulation contains provisions to the effect that the freezing of funds and economic resources or the refusal to make funds or economic resources available, carried out in

good faith on the basis that such action is in accordance with the EU Regulation, shall not give rise to liability, save where negligence can be established. Further, in similar fashion to the UN Resolution, the EU Regulation stipulates that no claims in connection with any contract or transaction, the performance of which was affected, directly or indirectly, wholly or in part, by reason of the EU Regulation, shall be granted to the Government of Libya, or any person or entity claiming through it or for its benefit.

On 26 March 2011 **Council Regulation (EU) 296/2011** was published, amending the EU Regulation concerning restrictive measures in view of the situation in Libya. A number of articles have been replaced, amended and inserted. Articles 4a and 4b have been added to the Regulation, imposing a no-fly zone on Libya for aircraft originating from both Libya and the European Union.

In addition, Article 6a has been inserted and stipulates that non-designated entities in which designated entities or persons have a stake (for example subsidiaries) shall not be prevented from **continuing to conduct legitimate business** in so far as this business does not involve making available any funds or economic resources to designated persons, entities or bodies.

Moreover, the amendment provides for a **humanitarian exception** to Article 5 of the EU Regulation, in Article 8a. On the basis of this provision, Member States are authorised to release frozen funds or to make funds or economic resources available belonging to sanctioned parties when it is deemed necessary to facilitate or to assist in humanitarian efforts.

## Dutch sanction regulation

In the Netherlands the Minister of Foreign Affairs has adopted a new sanction regulation concerning restrictive measures in view of the situation in Libya (*Sanctieregeling Libië 2011*). The new sanction regulation is dated 14 March 2011 and was published in the Government Gazette of 16 March 2011 (*Staatscourant 2011, 4782*). It implements the EU Regulation and Council Decision 2011/137/CFSP of 28 February 2011.

Sanctions implemented by the European Union are directly applicable in Member States of the Union and do not require further implementing local regulation other than is needed for penalizing violations of the EU Regulations. With reference to the Dutch Sanctions Act 1977, the *Sanctieregeling Libië 2011* forbids any breach of the main provisions (articles 2, 3, 4, 5 and 13) of the EU Regulation. Pursuant to the Economic Crimes Act (*Wet op de economische delicten*) any violation of these provisions is punishable with a maximum of 6 years imprisonment, doing community service, or a maximum fine of EUR 760'000 for each offence.

## UK sanctions

On 27 February 2011, the UK Government passed the Libya (Financial Sanctions) Order 2011 (the **Order**) and on 3 March 2011 it passed the legislation that makes provision for the enforcement of the EU Regulation (in the form of The Libya (Asset-Freezing) Regulations 2011).

The effect of this is that not only are UK persons bound to comply with the requirements of the EU Regulation, but also the potentially wider prohibitions under the terms of the Order.

The Order prohibits UK persons from dealing with funds, other financial assets or economic resources (all of which terms are defined broadly) that are owned or controlled, directly or indirectly by a designated person, or by any individual or entity acting on behalf of, or at the direction of a designated person, but also, by any entity owned or controlled by a designated person. For these purposes, a designated person is anyone listed by the UN Security Council, which now includes the 5 entities referred to above.

When the Order was first published, HM Treasury indicated in guidance that 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. This indicates that UK persons and entities cannot assume that a transaction may proceed just because a Libyan counterparty has not been listed specifically as a sanction target. By way of partial clarification of the intended scope of the Order,

HM Treasury has granted a General Licence that permits dealings with financial institutions incorporated outside of Libya that may be owned or controlled by the Libyan government. In all other cases, UK persons and entities need to determine for themselves whether or not planned activities may be prohibited.

While specific guidance on the Order and the Libya (Asset-Freezing) Regulations may be sought from HM Treasury by persons who are unsure how financial sanctions may affect them or a particular transaction, the lack of clarity has so far caused a number of problems for financial institutions and corporate entities seeking to exit or otherwise close out existing contractual obligations, where it is unclear whether or not their counterparties are caught by the sanctions.

## US sanctions

The US Executive Order of 25 February 2011 already imposes a broad freeze on the assets of members of the Qadhafi family and the Government of Libya (including designated senior officials, agencies, instrumentalities, controlled entities and the Central Bank of Libya). The sanctions block assets in the US or in the possession or control of US persons and preclude non-US persons from executing transactions for sanctions targets through US banks or the US financial system.

OFAC, which administers these sanctions in the US, has also issued a general license permitting transactions with financial institutions owned or controlled by the Government of Libya that are organised under the laws of a country other than Libya. ■

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