

Sweeping New Sanctions Imposed on Libya by the United States, United Nations, European Union, and United Kingdom

On Friday, February 25, 2011, and over the weekend, a cascade of sanctions fell on Libya, first from the United States, then from the United Nations, and then from the United Kingdom. The European Union followed suit on Monday, February 28. The sanctions of broadest impact are likely to be those that freeze certain Libyan assets and narrow significantly the scope of permissible Libyan commerce for financial institutions and other businesses in the United States, the European Union, and elsewhere. Notably, the US, UN, EU, and UK sanctions differ from one another in important ways, so compliance with one set of sanctions does not guarantee compliance with the others. Financial institutions and companies with any Libyan commercial relationships will need to proceed with great care.

US Sanctions

By Executive Order 13566, President Obama blocked certain property and prohibited certain transactions related to Libya. The Executive Order became effective as of 8:00 p.m. (EST) on February 25, 2011.

The Executive Order applies to “US Persons,” defined to include: (i) US citizens, nationals, and permanent residents; (ii) entities organized under the laws of the United States, including foreign branches (but not foreign subsidiaries organized under the laws of a foreign jurisdiction); and (iii) any person in the United States.

Under the new US sanctions, all property and interests in property of (i) the government of Libya, its agencies, instrumentalities, and controlled entities; (ii) the Central Bank of Libya; and (iii) certain designated individuals (Muammar Qadhafi, three of his sons, and his daughter) are blocked and may not be transferred, paid, exported, withdrawn or otherwise dealt in. Prohibited transactions include making any contribution or provision of funds, goods, or services by, to, or for the benefit of, any blocked individual or entity, and from receiving any contribution or provision of funds, goods, or services from any such individual or entity. These prohibitions apply notwithstanding any contract, license, or permit granted or entered into prior to the effective date of the Executive Order.

The Office of Foreign Assets Control (OFAC) has issued General License No. 1 authorizing transactions by US Persons with financial institutions owned or controlled by the government of Libya that are organized under the laws of a country other than Libya.

In addition, the United States has halted defense-related exports to Libya. The ban suspends current and pending export licenses issued by the US Department of State.

UN Sanctions

On February 26, 2011, the United Nations Security Council adopted Resolution 1970. The UN Resolution imposes targeted sanctions on

key figures of the Qadhafi regime, including an international travel ban on 17 individuals identified in Annex I to the Resolution. Six of these individuals—Muammar Qadhafi, four sons, and one daughter—are identified in Annex II to the Resolution as also subject to an asset freeze. (One son, Hannibal Qadhafi, is listed by the United Nations but not yet by the United States.) Specifically, all funds, other financial assets, and economic resources, which are owned or controlled, directly or indirectly, by these individuals, or by individuals or entities acting on their behalf or at their direction, or by entities owned or controlled by them, must be frozen. No funds, other financial assets, or economic resources may be made available to, or for the benefit of, these individuals or entities.

The UN sanctions also impose a comprehensive arms embargo on Libya designed to prevent the direct or indirect supply, sale, or transfer of arms and military equipment to Libya and to prohibit Libya from exporting any arms. Finally, the Resolution gives the International Criminal Court (ICC) jurisdiction over crimes committed in Libya after February 15, 2011.

EU Sanctions

On February 28, 2011, the EU Council enacted the UN sanctions by the adoption of Council Decision 7081/11. The press release announcing the Decision states that the EU sanctions include an arms embargo, a ban on trade in equipment that might be used for internal repression, a travel ban on the individuals designated by the United Nations as well as 10 additional individuals, and an asset freeze on the six Qadhafi family members designated by the United Nations, as well as 20 additional individuals “responsible for the violent crackdown on the civilian population.” The names of the additional individuals designated by the European Union are not immediately available, nor is any detailed information about the sanctions, particularly the operation of the asset freeze. On the assumption that the

Decision, when published in the Official Journal, will be addressed to the EU Member States, each Member State will need to implement the Decision through the passage of domestic legislation.

UK Sanctions

The UK authorities did not wait for the European Union to act before implementing the UN sanctions. HM Treasury issued the Libya (Financial Sanctions) Order 2011 to give effect to the UN Resolution. It came into force at 5:15 p.m. (GMT) on February 27, 2011.

The Order applies to any person in the United Kingdom or any person located elsewhere who is (i) a British citizen, a British overseas territories citizen, a British overseas citizen, a person who under the British Nationality Act 1981 is a British subject, a British National (Overseas) or a British protected person, or (ii) a body incorporated or constituted under the law of any part of the United Kingdom, including a Scottish partnership. The Order does not apply to subsidiaries of UK companies operating wholly outside the United Kingdom and which do not have legal personality under UK law.

The Order provides for the freezing of all funds, other financial assets, and economic resources owned or controlled by persons designated in Annex II to the Resolution (or designated by the competent UN sanctions committee) or persons acting for those designated persons, on their behalf, or at their direction, as well as entities owned or controlled by those designated persons. Further, no funds, other financial assets or economic resources shall be made available to, or for the benefit of, designated persons. An HM Treasury Notice issued concerning the Order provides specific guidance as to what might constitute “funds” or “economic resources.”

By its terms, the asset freeze does not apply to the government of Libya. However, the HM Treasury Notice states that: “The effect of the asset freeze is not limited to assets held in the name of a

designated person. [I]t also extends 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.”

Specific authorization may be obtained from HM Treasury to make available certain frozen funds, other financial assets, or economic resources where such payments are: (i) necessary to satisfy the basic expenses of designated persons (e.g., food, rent and medical expenses); (ii) intended exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services; (iii) intended exclusively for payment of fees or service charges for routine holding or maintenance of frozen funds; or (iv) necessary for extraordinary expenses. (These exceptions are also stated in the UN Resolution.)

Further, all financial institutions and other bodies and persons in the United Kingdom are required to determine whether they maintain any accounts or otherwise hold any funds for designated persons and, if so, they must report to HM Treasury the details of all funds, other financial assets or economic resources that they have frozen.

Some Practical Implications of the New Libya Sanctions

Although many aspects of the various sanctions regimes remain uncertain due to the lack of interpretative guidance, a few preliminary observations can be made.

- The US, UN, and UK sanctions are generally similar in their targeting of the assets of the designated members of the Qadhafi family. But beyond that common approach, significant differences are apparent.
- The US sanctions expressly apply to the assets of the government of Libya, including the Central Bank. The only exception is provided by OFAC’s General License No. 1, which permits transactions with financial institutions that are organized under the laws of a country other than Libya. This General License includes subsidiaries, but not branches or representative offices unless they are incorporated entities. The General License also does not include non-financial institutions owned or controlled by the government of Libya that are organized under the laws of a country other than Libya.
- The UN sanctions do not, by their terms, apply an asset freeze to the government of Libya. They go only so far as to freeze the economic resources “owned or controlled, directly or indirectly,” by the designated Qadhafi family members. The UN freeze thus covers entities owned or controlled by the designated individuals, but no indication is given that this freeze extends to Libyan state agencies or enterprises generally.
- The UK sanctions are expressly intended to implement the UN sanctions, but the HM Treasury Notice appears to reach toward the US position by noting the “considerable control” that the Qadhafi family has over the “Libyan state and its enterprises.” The HM Treasury Notice encourages UK financial institutions, when engaging in due diligence, to bear in mind that transactions involving Libyan state assets could be deemed to involve assets owned or controlled by Muammar Qadhafi and his family.
- Another difference among the sanctions regimes relates to the impact of the new sanctions on already executed contracts. The US Executive Order essentially prohibits dealings with Libya even if they would be required by a contract pre-dating the Executive Order. The Executive Order leaves little doubt on this issue: it states that the prohibitions apply “notwithstanding any

contract entered into or any license or permit granted” prior to 8:00 p.m. EST on February 25.

- The UN sanctions, by contrast, contain limited contract sanctity provisions. The Security Council Resolution states that its measures “shall not prevent a designated person or entity from making payment due under a contract entered into prior to the listing of such person or entity,” provided that the payment is not received by a listed person or entity and that 10 working days’ notice is given to a UN committee established to administer the Libya sanctions.
- The UK sanctions take a different approach. They do not expressly address the receipt of a payment *from* a designated person or entity. Rather, they address payments *to* a designated person or entity, permitting such payments arising from contracts predating the sanctions to be credited to a frozen account, provided that HM Treasury is informed without delay and provided also that such payments are also frozen.
- When relying on commercial interdiction software to screen against the newly sanctioned individuals, companies should be aware of the many variations of the English spelling of “Qadhafi.” OFAC has updated its SDN List to include a number of these spelling variations, but those may not be exhaustive.

Links to the official sanctions documents are as follows:

- http://www.treasury.gov/resource-center/sanctions/Programs/Documents/2011_libya_eo.pdf;
- http://www.treasury.gov/resource-center/sanctions/Documents/libya2_GLI.pdf;
- http://www.pmdotc.state.gov/documents/ LibyaSuspension_02262011.pdf;
- <http://www.un.org/News/Press/docs/2011/sc10187.doc.htm>;
- http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/119524.pdf;
- http://www.hm-treasury.gov.uk/d/libya_financial_sanctions_order270211.pdf;
- http://www.hm-treasury.gov.uk/d/public_notice_270211.pdf

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