

EU Amends Libyan Sanctions Regime and Extends Asset Freeze

The EU Council of Ministers (the “Council”) has adopted several new measures extending the EU Libyan sanctions regime, which was last extended on March 21.¹ The new measures are Decision 2011/178 of March 23, 2011 (the “Decision”),² which implements UN Security Council Resolution 1973 of March 17, 2011,³ but goes further in some respects, and Regulations 288/2011 of March 23, 2011 (the “March 23 Regulation”)⁴ and 296/2011 of March 25, 2011 (the “March 25 Regulation”).⁵

The new measures extend the EU asset freeze to a number of additional persons and entities. Importantly, the Regulations confirm that the EU’s freeze of funds and economic resources do not apply to entities in which sanctioned persons or entities have a stake; these entities may continue with their legitimate business, as long as this does not involve making any funds or economic resources available to designated persons or entities. At the same time, the Decision obliges Member States to require persons and entities under their jurisdiction to exercise “vigilance” in dealing with Libyan entities that are not covered by the asset freeze to prevent business that could contribute to violence against civilians, without indicating what specific measures would be required or sufficient. The limitation on “legitimate” business activities of entities whose shareholders are subject to sanctions and the new “vigilance” requirement can be read as increasing the level of diligence required by EU persons and entities in dealing with affiliates of sanctioned persons and entities.

The new measures also implemented the no-fly zone over Libyan airspace and extended the existing arms embargo.

¹ See Cleary Alert Memo at http://www.cgsh.com/eu_further_extends_libyan_asset_freeze/.

² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:078:0024:0036:EN:PDF>.

³ United Nations Security Council Resolution 1973 of March 17, 2011. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/268/39/PDF/N1126839.pdf?OpenElement>.

⁴ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:078:0013:0020:EN:PDF>

⁵ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:080:0002:0004:EN:PDF>.

I. ASSET FREEZE EXTENSION

The Decision and the March 23 Regulation extend the asset freeze to the following additional entities:

- Libyan National Oil Corporation;
- Azzawia (Azawiya) Refining;
- Ras Lanuf Oil and Gas Processing Company (RASCO);
- Brega;
- Sirte Oil Company; and
- Waha Oil Company.

For completeness, previous Council decisions and regulations froze the funds and economic resources of the following entities: Central Bank of Libya, Libya Africa Investment Portfolio, Libyan Foreign Bank, Libyan Housing and Infrastructure Board, Libyan Investment Authority, Libyan Arab African Investment Company, National Commercial Bank, Gumhouria Bank, Sahara Bank, Libyan Jamahiriya Broadcasting Corporation, Gaddafi International Charity and Development Foundation, Economic and Social Development Fund, Waatassimou Foundation, and the Revolutionary Guard Corps.

Assets of several additional individuals have also been frozen by the March 23 Regulation. These include two sons of Muammar Qadhafi, a minister, and several individuals in charge of Special Forces, Military Intelligence and External Security Organization.

II. ENTITIES IN WHICH DESIGNATED PERSONS OR ENTITIES HAVE A STAKE

The March 25 Regulation introduces a new Article 6a to Regulation 204/2011, which confirms that the funds freeze and prohibition against making economic resources available to sanctioned persons and entities apply only to persons or entities expressly designated by the Council, and not to entities in which these persons or entities have a stake. Such entities can continue to do “legitimate” business (*i.e.*, are not automatically also sanctioned), provided “*this business does not involve making available any funds or economic resources to a designated person.*” The principle that persons and entities not specifically designated by the Council are not covered by sanctions is consistent with the case law of the EU’s General Court,⁶ and the qualification, as applied to an affiliate of a sanctioned person,

⁶ See General Court, Judgment of 9 July 2009, joined Cases T-246/08 and T-332/08, *Melli Bank plc v Council*, [2009] ECR II-2629, at para. 146.

corresponds to the requirement under Article 5(2), which prohibits making funds or economic resources available to sanctioned persons.

The implications of Article 6a may however go beyond the affiliates of sanctioned persons. Article 6a makes clear that third parties can do business with affiliates of sanctioned persons, since if it is permissible for such affiliates to do business, it must be permissible for their counterparties also. However, the fact that affiliates of sanctioned entities may only conduct business that does not involve making funds or economic resources available to a sanctioned entity may imply that EU persons and entities may violate the Article 5(2) obligation not to make funds “indirectly” available to sanctioned persons if the affiliates do not respect the limitation enshrined in Article 6a. The implications of Article 6a for EU entities doing business with affiliates of sanctioned entities are not clear, but EU entities could be subject to some obligation to ensure that the funds they make available to such affiliates are not passed on to the sanctioned person itself.

The extent of any such obligation would likely depend on the circumstances, including past course of dealing with the affiliate in question. For example, we would understand (irrespective of the existence of Article 6a) Article 5(2) to prohibit EU persons and entities from knowingly doing business with a newly formed subsidiary of a sanctioned entity with a back-to-back arrangement with the sanctioned entity, so that the price paid for goods or services only passes through the new subsidiary and is promptly transferred to the sanctioned entity. On the other hand, the mere fact that transactions with an affiliate of a sanctioned entity generate profits that the sanctioned entity may ultimately receive as dividends (for example from or through non-EU subsidiaries, which are not subject to the sanctions) would presumably not make such transactions illegal. Article 6a may, however, influence the analysis of intermediate cases, in so far as it seems to require that third parties look more closely into the question of whether the funds they make available to an affiliate may be transferred to the sanctioned person. As a result, many situations, ranging from expanding an existing course of dealing to commencing a new line of business with no apparent link to the sanctioned entity, may require more careful analysis.

Similarly, the Decision introduces a (different) new Article 6a of Decision 2011/137/CFSP. This article obliges Member States to require persons and entities under their jurisdiction to exercise “vigilance” in dealing with Libyan entities not covered by the asset freeze “*with a view to preventing business that could contribute to violence and the use of force against civilians*”. This “vigilance” requirement must be implemented by Member States before it becomes binding on natural and legal persons.

The uncertainty resulting from the vigilance requirement and the possibility that transactions with affiliates of sanctioned entities may be caught by the freeze in certain circumstances is only partially diminished by Article 11(2), which exonerates persons acting in good faith from violations of Article 5(2). Reliance on Article 11(2) requires that the person in question “*did not know, and had no reasonable cause to suspect, that their actions*

would infringe the prohibition in question”. Thus, companies seeking to rely on Article 11(2) would have the burden of showing that they had no reason to suspect an infringement, which may require some due diligence as regards contracting parties that could possibly have Libyan shareholders. The two new Articles 6a seem intended to increase the level of care that third parties need to exercise when entering into transactions with affiliates of sanctioned persons.

III. NO FLY ZONE

The Decision imposes a new obligation on Member States to take all necessary measures to prevent flights by aircraft under their jurisdiction in Libyan airspace except for solely humanitarian purposes or where authorized by the UN. Member States are authorized to deny permission to any Libyan aircraft⁷ to take off, fly over or land in the territory of that Member State, unless the flight has been approved in advance or in case of emergency landing. This prohibition also applies to non-Libyan aircraft if there is reasonable ground to believe that the aircraft contains items covered by the arms embargo. The March 25 Regulation extends this restriction to EU aircraft in relation to Libyan territory.⁸ Exemptions must be authorized by the UN or a Member State.

The Decision also extends Member States’ power of inspection. They are now authorized to inspect vessels and aircraft bound to or from Libya, not just cargo.

IV. ARMS EMBARGO

The March 25 Regulation prohibits the provision of technical assistance, financing or financial assistance, and transport services that facilitate the provision of prohibited items to mercenary personnel in Libya or for use in Libya. Exemptions are allowed for services related to non-lethal military equipment, intended solely for humanitarian purposes or protective use or when it relates to a sale or supply of arms that has been previously authorized by the Sanctions Committee. Member State authorities may authorize the provision of services related to military equipment when necessary to protect civilians.

If you have any questions, please feel free to contact any of your regular contacts at the firm.

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⁷ Any aircraft registered in Libya or owned or operated by Libyan nationals or companies.

⁸ Libyan aircraft include any aircraft or air carrier registered in Libya, or owned or operated by Libyan nationals or entities, and Union aircraft meaning any aircraft or air carrier in the Union, or owned or operated by citizens of the Union or by entities incorporated or constituted under the law of a Member State.

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