The Libyan Sanctions Regime - A Review

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On 7 June 2011 the Council of the European Union agreed Council Decision 2011/332/CFSP setting out the Council's intention to add six port authorities to the now extensive list of Libyan companies and individuals blacklisted under the UN asset freeze. This Decision, following on from the UN Resolution of 26 February 2011, further tightens the financial sanctions noose around the Gaddafi regime and those associated with it.

UN Resolution 1970

As is well known, on 26 February 2011 the UN Security Council adopted Resolution 1970 in the wake of Colonel Gaddafi's crackdown on protesters against his regime. The Resolution imposed an arms embargo on Libya and slapped a global travel ban on Gaddafi, his family, and a number of henchmen. In addition, the Resolution ordered the freezing of assets of Gaddafi and 5 family members.

The Resolution applies to all 192 UN members, and a UN Committee has been formed to monitor its implementation. All member states are obliged to report to the Committee on the steps they have taken to implement the Resolution by 26 June 2011.

Implementation by the UK

Insofar as the UK is concerned, on 27 February 2011 the Libya (Financial Sanctions) Order 2011 was issued pursuant to the United Nations Act 1946. This implemented the UN Resolution. On 2 March 2011 the European Union issued Council Regulation (EU) No 204/2011 effectively adopting the UN Resolution, and on 3 March 2011 the UK passed a further Statutory Instrument, the Libya (Asset-Freezing) Regulation 2011 which regularised the EU Council Regulation. A Financial Sanctions Notice was issued by H.M. Treasury on 3 March 2011, with a further Notice being issued on 11 March 2011.

A number of further Council Regulations have been issued by the EU, generally speaking adding more individuals and entities to the "blacklist" of those whose assets are subject to the freezing order, and to date there are a total of 40 individuals and 47 organisations on this list.

All of the EU Council Regulations are, by European law, applicable in the UK, and all those designated on the blacklist by the EU have been so designated by the UK. A current list of those individuals and entities on the blacklist can be found at: www.hm-treasury.gov.co.uk/d/libya.htm.

Effect of the Regulation under UK Law

Under UK law, all funds and economic resources belonging to, owned or controlled by persons or entities on the blacklist are frozen. It is a criminal offence to make available directly or indirectly any funds or economic resources to "designated persons" unless licensed by (in the case of the UK) H.M. Treasury. No payment may be made out of a frozen account.

The UK Notice makes it clear that the freezing order does not just extend to those on the blacklist: *"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."*

In practice, therefore, unless a payment falls within one of the exemptions in the Regulations, and a licence is obtained from H.M. Treasury, no payment can be made to a person or entity designated under the blacklist or any person or entity which appears to be associated with such an entity. Furthermore, all funds or economic resources which are held or controlled by persons or entities which have been blacklisted are frozen.

Under the Regulations contravention is punishable by a prison term not exceeding 2 years or a fine.

Business with Libya

In its Financial Sanctions Supplement of 8 June 2011, H.M. Treasury has made it clear that business with Libya will be caught by the sanctions if it involves:

(a) trading directly with designated persons/entities;

(b) trading with entities that are owned or controlled by designated persons such as Colonel Gaddafi or his son Saif Gaddafi;

(c) making or receiving payments through designated Libyan State banks.

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Listing of Libyan Ports

On 7 June the EU Council agreed upon its intention to designate six port authorities in Libya for an asset freeze.

The port authorities which will be designated are:

- Tripoli
- Al Khoms
- Brega
- Ras Lanuf
- Zawia
- Zuwara

Clearly, the intention of this designation is to starve those ports controlled by the present Libyan government of any international trade.

In practice, once the Regulation comes into force (which will happen shortly), it will not be possible to pay any port dues or other fees to these ports for any reason.

H.M. Treasury has stated that it will be able to authorise exemptions from the asset freeze of the port authorities for contracts which were entered into prior to the Libyan Port Regulation coming into force, until 15 July 2011.

It is important to note that this exemption (in relation to prior contracts) does **not** apply to contracts relating to oil, gas and refined products. It should also be noted that the exemption only applies to payments to port authorities, and all other elements of the existing sanctions apply. Thus it will not be possible to use the exemption to send goods to a designated person.

Exemptions and Derogations

There are a number of exemptions and derogations from the financial sanctions and it is these which are of particular interest to those who had or have dealings with Libya.

It is important to stress that anyone requiring an exemption from the financial sanctions regime must apply for and obtain a licence from (in the case of the UK) H.M. Treasury.

The relatively uncontroversial exemptions and derogations from the sanctions regime are as follows:

- Payments to cover the basic needs of designated persons and their dependants;
- Payments necessary for extraordinary expenses;
- Humanitarian aid; and
- Interest payable on accounts of designated persons or entities.

Certain fees of a professional nature are payable out of frozen accounts:

- Payment of reasonable professional fees and disbursements associated with the provision of legal services; and
- Payment of fees or service charges for routine holding or maintenance of frozen funds or economic resources (i.e. bank charges).

There are two exemptions of considerable interest to those who were doing business in Libya prior to the financial sanctions coming into force.

First, under Article 8 of the EU Regulations, H.M. Treasury may release certain funds if the funds or economic resources are the subject of *"a judicial, administrative or arbitral lien"* established before the date on which the person, entity or body was included as a designated person provided that the funds will be used exclusively to satisfy claims secured by a lien or recognised by a judgment.

The UK Treasury Notice adopts a similar wording, but in any event the EU Regulation prevails. Clearly, any judgment obtained against a blacklisted person or entity prior to their blacklisting should be payable out of frozen assets, subject to the Treasury granting a licence.

It remains to be seen how the UK Treasury will interpret the phrase *"judicial, administrative or arbitral lien",* and no doubt there will be circumstances where a Claimant considers that it has obtained a form of lien and H.M. Treasury does not. An obvious example may be a right to retain goods in the event of non-payment, commonly known in English law as a "Romalpa Clause". It may be argued that this would be an "administrative lien" for the purposes of the Regulation. No guidance was provided by the Treasury in its Financial Sanctions Supplement dated 8 June 2011.

Second, Article 10 of the EU Regulation provides that if a payment by a blacklisted person or entity is due under a contract or agreement that was concluded before blacklisting, then the competent authority (H.M. Treasury) may authorise the release of frozen funds.

It is interesting, and perhaps significant, that in neither of the Notices issued by H.M Treasury was this exemption mentioned. It is not clear why this is the case. On its face, Article 10 entitles Claimants to apply for a licence in

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circumstances where a payment obligation of a blacklisted person or entity arises out of a contract entered into prior to the blacklisting. If this is the case, then companies which were involved in contracts with blacklisted persons or entities, or those associated with them, should consider whether any payment obligation arose prior to the blacklisting and, if so, consider applying for a licence.

However, H.M. Treasury has provided some guidance in its 8 June 2011 Supplement. It makes the distinction between:

(a) Cases where the reason for non-payment is that the Libyan counterparty is refusing to or is unable to pay; and
(b) Cases where the Libyan counterparty or other payer has made funds available to pay but payments are prevented from getting through by the sanctions.

H.M. Treasury has made it clear that where there is a dispute as to payment, then the Government cannot intervene and the issue of payment must first be resolved with the Libyan counterparty because "a licence can only be effective if payment instructions have first been received from the counterparty (or other payer)". In our view this does not necessarily follow from the terms of Article 10, but this also appears to be the position being taken by the European Commission in discussions we have had with them. In any event, H.M Treasury guidance is going to be crucial in any application for a licence in the UK.

H.M. Treasury advises that in cases where the Libyan counterparty (or other payer) has made funds available, companies should check with their bank in the UK whether the transaction is covered by an existing licence and, if not, apply for a licence.

There are many instances where goods or services were contracted for before the blacklisting, and in respect of which payment is now due. In many of these instances the Libyan counterparty will not have "made funds available", but there are funds available out of which payment could be made if the sanctions were not in place. It is likely that H.M. Treasury will need to consider these cases in the future.

Licences

H.M. Treasury has stated that one of its guiding principles in the granting of licences is to minimise, where possible, the impact of the financial sanctions on legitimate business and other third parties. The other guiding principles focus on protecting the frozen assets for the future benefit of the Libyan people.

Some licences have been granted already, including a general licence to enable the Libyan banks in London to carry out their business.

H.M. Treasury says that it has granted licences covering payments for goods and services supplied prior to the sanctions, and payments due under prior contracts in cases where goods and services were supplied to Libya after sanctions except if supplied to blacklisted persons.

H.M. Treasury is clearly aware of the concerns of many who have business dealings with Libya, and is attempting to streamline the way in which enquiries are dealt with. It has also issued a licence application form.

A large number of companies which have been conducting legitimate business with Libyan entities in the past are now being sorely affected by the sanctions regime. The Financial Sanctions Supplement issued by H.M. Treasury on 8 June 2011 makes it clear that it is approaching the issuing of licences very cautiously. Any application for a licence will, therefore, need to be carefully drafted.

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