E-ALERT | International Trade Controls

March 28, 2011

EU IMPOSES ADDITIONAL ECONOMIC SANCTIONS AGAINST LIBYA

Last week, the European Union Council ("EU Council") adopted three further Regulations imposing additional restrictive measures against Libya in view of the government's ongoing repression of protestors. Council Regulation (EU) No 272/2011 and Council Regulation (EU) No 288/2011 of March 21 and 23, respectively, subject an additional eleven individuals and fourteen entities to asset blocking and other restrictive measures imposed by Council Regulation (EU) No 204/2011 (as described in our March 4, 2011 e-alert).

Council Regulation (EU) No 296/2011 of March 25 imposed new prohibitions on air traffic involving Libya, and was intended to clarify the scope of the asset blocking measures.

FREEZING OF FUNDS AND ECONOMIC RESOURCES

The newly designated entities include significant Libyan oil companies, including the Libyan National Oil Corporation, sovereign wealth funds, and financial institutions, as follows:

Entities designated as of 21 March 2011:

- Economic and Social Development Fund (ESDF);
- Libyan Arab African Investment Company - LAAICO;
- Gaddafi International Charity and Development Foundation;
- Waatassimou Foundation;
- Libyan Jamahirya Broadcasting Corporation;
- Revolutionary Guard Corps;
- National Commercial Bank;
- Gumhouria Bank; and
- Sahara Bank.

Entities designated as of 23 March 2011:

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

The newly designated individuals include the Libyan government officials involved in violence against demonstrators in Libya.

All funds and economic resources that belong to or are owned, held or controlled by the designated parties are frozen. The Member States are authorized to release frozen funds in certain circumstances, including as necessary to satisfy the basic needs of the designated persons.

In addition, the EU Regulation prohibits making available any funds or economic resources, directly or indirectly, to or for the benefit of the designated parties. The Regulation defines "economic resources" as "assets of every kind, whether tangible or intangible, movable or immovable, which are not funds but may be used to obtain funds, goods or services." According to informal advice from the EU Commission, "economic resources" is construed to include the provision of commercial services. In practice, this means that virtually all commercial transactions with designated entities and/or individuals are prohibited, including sales and purchases, leases, IP licensing, maintenance services, etc. Importantly, with respect to designated banks, any transfer of money to, from or through these banks is prohibited, including payments to non-designated persons or entities in Libya who have accounts with these banks, such as customers or employees of the payer.

DEALING WITH ENTITIES IN WHICH A DESIGNATED PARTY HOLDS A STAKE

In light of the many investments of Libyan State-owned entities and Libyan designated persons in Europe, questions have arisen regarding the application of both the asset freeze and the prohibition on making economic resources available to entities that are not themselves designated but that are controlled or (partially) owned by designated parties. Member States to date have taken a range of different views as to when dealing with such entities amounts to indirect dealings with designated parties.

The UN Security Council Resolution (UNSCR) 1970 (2011) of 17 March 2011 attempted to clarify the situation by providing that dealings are prohibited only in so far as entities are themselves listed. The EU did not adopt this approach. Instead, Council Regulation (EU) No 296/2011 provides that the freezing of funds and the prohibition on providing economic resources shall not prevent persons, entities and bodies who are not themselves designated, but in which a designated person, entity or body has a stake, "from continuing to conduct legitimate business in so far as this business does not involve making available any funds or economic resources to a designated person, entity or body." It is unlikely that this new provision will provide clarity and lead to a uniform application among the Member States. In particular, it remains uncertain at this stage:

(i) whether any stake by a designated party is sufficient to trigger sanctions or whether the stake must reach a certain threshold. Currently, most Member States seem to consider that a (combined) stake by designated parties of less than 25% raises no issues and that a combined stake of more than 50% can potentially implicate the sanctions, although other factors may also be relevant;

(ii) what is "legitimate business" and what criteria are relevant to determine this; and

(iii) how to determine whether a business with a non-designated person will not "involve making available any funds or economic resource" to a designated party. Most likely, this will depend very much on the stake held by the designated parties.

In light of these remaining uncertainties, companies are well advised to continue to consult the competent authorities before dealing with such entities.

PROHIBITIONS RELATED TO LIBYAN AIR TRAFFIC

Council Regulation (EU) No 296/2011 prohibits aircraft or air carriers registered in Libya, or owned or operated by Libyan nationals or entities, from: (a) flying over the territory of the European Union; (b) making stops in the territory of the Union for any purpose; or (c) operating any air service to or from the Union.

It also prohibits any aircraft or air carrier in the European Union, or owned or operated by citizens of the Union or by entities incorporated or constituted under the law of a Member State, from: (a) flying over the territory of Libya; (b) making stops in the territory of Libya for any purpose; or (c) operating any air service to or from Libya.

The above prohibitions are subject to certain exceptions, including for example flights for humanitarian purposes or evacuation flights.

SCOPE OF THE EU SANCTIONS AGAINST LIBYA

As noted in our earlier alerts, the EU sanctions against Libya apply:

- within the territory of the EU, including its airspace;
- on board any aircraft or vessel under the jurisdiction of the EU;
- to all EU Member State nationals whether within or outside the territory of the EU;
- to any legal person, entity or body incorporated under the law of an EU Member State; and
- to any legal person, entity or body in respect of business done in whole or in part within the EU.

*   *   *

Our EU and US offices are deeply involved in advising clients concerning the application of the EU and US sanctions and would be pleased to help clients navigate the new requirements affecting trade and investment in Libya.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our international trade controls practice group:

Georg Berrisch	+32.(0)2.549.5240	gberrisch@cov.com
Peter Flanagan	202.662.5163	pflanagan@cov.com
Corinne Goldstein	202.662.5534	cgoldstein@cov.com
Peter Lichtenbaum	202.662.5557	plichtenbaum@cov.com
Richard Mattick	+44.(0)20.7067.2023	rmattick@cov.com
Lisa Peets	+44.(0)20.7067.2031	lpeets@cov.com
Kimberly Strosnider	202.662.5816	kstrosnider@cov.com
Agnieszka Polcyn	+32.(0)2.549.5242	apolcyn@cov.com