

Libyan sanctions

Criminal offences, their jurisdictional reach and recent cases

The international community wasted little time in implementing the recent sanctions against Libya for the first time since 2003. On 26 February 2011, the United Nations passed Resolution 1970 referring the situation in Libya to the International Criminal Court and requiring all Member States to implement an asset freeze, a travel ban and an arms embargo. The Resolution names key individuals against whom the measures are to take effect. The EU has taken additional measures.

Criminal offences created by the UK implementing measures may be committed by UK nationals or companies even where the relevant conduct occurs wholly outside the UK. As recent cases have shown, the penalties imposed are likely to be severe and there may be little recourse to the courts to challenge the executive power used to implement these international measures.

Sanctions imposed

In the UK, the Queen, exercising powers under the United Nations Act 1946, made an Order in Council at Windsor Castle at 5pm on 27 February 2011, the Libya (Financial Sanctions) Order 2011 (the Order). It came into force 15 minutes later and was laid before Parliament the next day.

In Europe, the Council of the European Union by its Decision of 28 February and Council Regulation (EU) 204/2011 made on 2 March 2011 imposed an arms embargo and targeted sanctions going further than UNSCR 1970/2011 by prohibiting trade with Libya in equipment which might be used for internal repression as well as a visa ban on a wider group of persons.

The UK Treasury, acting in accordance with its powers under the European Communities Act 1972, implemented the EU Regulation by making The Libya (Asset Freezing) Regulations 2011 (the Regulations) at 1pm on 3 March which came into force at 3.30pm the same day.

Criminal offences

Similar criminal offences are created by the UK Order and Regulations above. Although no prosecution can

be started without the consent of the Attorney General (unless it is a summary offence punishable only in the magistrates courts), a person may be arrested and remanded in custody pending such consent. Offences punishable on indictment with up to two years imprisonment and/or an unlimited fine may be committed where:

- a person deals with funds or other financial assets or economic resources owned or controlled by a designated person or someone acting on their behalf or an entity controlled by a designated person. The term “deal with” is widely defined and could include the amendment of commercial agreements or trust documents.
- funds or financial assets or economic resources are made available to or for the benefit of a designated person.
- a person intentionally takes part in activities to circumvent the prohibitions or to enable or facilitate the contravention of a prohibition.

Summary offences punishable by up to three months imprisonment and a maximum £5,000 fine are created in relation to financial institutions which fail to notify

the Treasury of certain information relating to designated persons coming into its possession in the course of business. A designated person or any other person requested to do so may commit a summary offence by failing to produce information requested by the Treasury or by providing false information, destroying documents or obstructing the Treasury in the exercise of its powers.

There is a time limit for offences to be prosecuted. Proceedings may not be started more than three years after the offence was committed and more than 12 months after a prosecutor had sufficient evidence to bring proceedings.

Recent cases

In a recent case before the Supreme Court, *R v Forsyth and Mabey* [2011] UKSC 9, two former directors of the British engineering company Mabey & Johnson Limited argued unsuccessfully that an executive Order made under the United Nations Act 1946 in relation to sanctions against Iraq was *ultra vires* because it had been made 10 years after the relevant Security Council Resolution. The two appellants were convicted and sentenced earlier this year to 21 months and eight months imprisonment for breaching the Iraqi sanctions regime. They also received directors disqualification orders and were ordered to pay costs. Two other defendants have recently been convicted of Iraqi sanctions offences.

In a previous Supreme Court case, *HM Treasury v Ahmed and others* [2010] UKSC 2, the court held that the Terrorism (United Nations Measures) Order 2006 was *ultra vires* in that the Treasury had exceeded its powers under the United Nations Act 1946 by adversely affecting the rights of the citizen without clear Parliamentary authority. A provision in another Order which had the effect of denying a designated person the right to judicial review was also found to be *ultra vires* but there remains a conflict between the fundamental rights guaranteed by the European Convention on Human Rights and the impact of executive Orders under the United Nations Act. Only the European Court of Human Rights, to which the case will now go, can decide which ought to prevail.

Conclusion

The recent prosecutions under the Iraqi sanctions regime show that serious penalties are being handed down by English courts for sanctions offences. The wide scope of the Libyan sanctions described above is a reminder to a wide range of businesses, not just those in the financial sector, of the importance of sound compliance systems when dealing with the trade in goods or services likely to be affected by the various sanctions regimes now in force in the UK. Offshore activity will also be caught where those involved are British citizens or companies.

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