International Group of P&I Clubs

New European Union Measures against Iran - Council Decision 2012/35 dated 23 January 2012 - Frequently Asked Questions – issued on 8 February 2012

Background

On 23 January 2012 The European Union Foreign Affairs Council agreed to introduce further measures impacting on trade that would or could support the furtherance of the Government of Iran's nuclear aspirations. Specifically the Council has introduced new measures to prohibit the trade and transportation of crude oil, petroleum products and petrochemical products. The new measures are set out in **Council Decision 2012/35** on Iran and it is anticipated will be incorporated in a Council Regulation.

The International Group has met and is engaging with the European Commission Service for Foreign Policy Instruments (ECSFPI) in relation to issues arising out of the potential application of the provisions of the Decision on shipowners and clubs. ECSFPI is the Commission body which will be engaged in the drafting of the Regulation which will be presented to the Council for discussion and finalisation. In addition, the Group has met and is engaging with the UK Treasury on a similar basis.

The application, or potential application, of the provisions of the Decision has led to a number of questions from shipowners and clubs on various issues relating to the extent of the prohibitions and impact on insurance and reinsurance cover arrangements which are addressed so far as possible below. The position in relation to these and other issues arising will be kept under continuing review pending the finalisation of the Council Regulation and the FAQs will be updated and republished to reflect any further clarification obtained and new issues arising..

The FAQs which follow cover the following current issues;

- The legal Status of EU Council Decision 2012/35;
- The likely timing and effect of the amending Regulation;
- The geographical scope of the Decision;
- The range of entities that are covered by the Decision;
- The effect of the "grace periods";
- Ancilliary contracts provisions;

- The impact on P&I cover and renewals;
- "Blue Card" exposure;
- The impact on bunkering activities;
- Trans-shipment and loading outside Iran.

1. What is the legal status of the Decision pending the publication of the Regulation?

Whilst the Decision has immediate effect on EU Member States, it will not be binding on individuals and corporations (including shipowners and clubs who may be subject to the terms of the Decision) until the Council Regulation has been issued. There is no current date set for the issue of the Regulation, but the indications are that this is unlikely to be published before early March. By way of historical background, Council Regulation 961/2010 on restrictive measures against Iran issued on 25 October 2010 implemented the measures contained in Council Decision 2010/413/CF SP issued almost three months earlier on 26 July 2010.

2. Will the implementing Regulation have retrospective effect in relation to shipping and insurance activities between the date of the Decision and the date of the Regulation?

The usual procedure is for a Regulation to enter into force on the day of its publication in the Official Journal of the European Union. Normally this is up to one or two days after the Regulation is signed off by the Council. Until the Regulation is published it is not possible to assess what retrospective effect this might have.

The practice in relation to previous Decisions and Regulations does not provide any clear guidance on whether the Regulation will have retrospective application. Pending entry into force of the Regulation, it would be prudent to assume that the prohibitions (and any relevant exemptions therefrom) will be effective from the date of the Decision, rather than the later date of the Regulation.

3. To whom does the Decision apply?

The Decision does not contain specific scope of application provisions. It does however make amendments to Decision 2010/413 the provisions of which were implemented in Regulation 961/2010. The new measures proposed in the Decision will be implemented by way of amendment to Regulation 961/2010 which currently contains in Article 39 scope of application provisions as below;

This Regulation shall apply:

(a) within the territory of the Union, including its airspace;

(b) on board any aircraft or any vessel under the jurisdiction of a Member State;

(c) to any person inside or outside the territory of the Union who is a national of a Member State;

(d) to any legal person, entity or body which is incorporated or constituted under the law of a Member State;

(e) to any legal person, entity or body in respect of any business done in whole or in part within the Union.

It is not anticipated that these scope of application provisions will change when the amended Regulation incorporating the measures contained in Decision 2012/35 is issued.

In the context of shipping activity, the scope of application will include shipowners incorporated, domiciled or regulated within an EU Member State, vessels registered in and/or flying the flag of an EU Member State and vessels regardless of ownership or flag which trade to ports in EU Member States. The Decision does not specifically address the position of charterers, but the broad wording of the prohibition in relation to “import” and “transport” may well extend to the charterers of a vessel undertaking a voyage which contravenes the prohibitions. Further clarification will be sought on this issue but pending such clarification it would be prudent to assume that charterers, as well as shipowners, will be subject to the scope of the prohibitions.

In the context of insurance cover provided to shipowners and charterers, the scope of application will extend to cover insurers (including clubs) and reinsurers incorporated, domiciled or regulated within an EU Member State and may also extend to cover non-EU insurers and reinsurers in respect of cover provided for vessels trading to ports within the EU Member States. (See also FAQ 9 below.).

4. What is the geographical scope of the words "import" and "transport" in the Articles 3a and 3b.?

The Decision does not contain any definition of these terms. Absent any stipulated geographical constraint, and in the context of the objective of the Regulation, the consistent interpretation is that "import" means import into an EU member state and "transport" means transport to states either **within or outside** the EU i.e. worldwide. This point was raised with the UK Treasury at a meeting on 25 January 2012 at which they indicated that they shared this interpretation. Similar confirmation has been received from ECSFPI.

As a consequence, in the case of (i) shipowners incorporated, domiciled or regulated within an EU Member State, and (ii) vessels registered in and/or flying the flag of an EU Member State carriage of the prescribed cargoes will be prohibited regardless of whether the destination is within or outside the EU. In the case of shipowners incorporated, domiciled or regulated outside an EU member state and vessels

registered in and/or flying non-EU flags they will also be prohibited from transporting prescribed cargoes to EU Member States but not to non-EU member states. (However see FAQ 9 below).

5. Effect of the "grace periods" provided for in Articles 3c and 3d in the Decision.

The Decision makes provision for two "grace periods" which relate only to the performance of contracts which were concluded **prior to 23 January 2012**:

(i) For petro-chemical products, until 1 May 2012, and

(ii) For crude and petroleum products, until1 July 2012.

It is understood that the reasoning behind these " grace periods " is that these are intended to allow certain EU member states which are currently significantly dependent on Iranian oil supplies to put in place alternative supply arrangements without any immediate disruption to their current arrangements.

ECSFPI has confirmed that the continuing performance (until 1 May or 1 July as appropriate) of obligations in trade contracts concluded prior to 23 January 2012 and ancillary contracts necessary for their execution, is not prohibited by Articles 3a or 3b, by virtue of articles 3c and 3d.

6. What types of contract could constitute "contracts concluded before 23 January 2012" the purposes of Articles 3c and 3d?

The Decision does not contain any definition of the contracts envisaged and absent any restrictive wording in the Decision it could reasonably be assumed that these will include, amongst others, cargo sale/supply contracts, contracts of affreightment, time and voyage charterparties, bunkering contracts and insurance contracts including the annual cover provided by clubs for the 2011/12 policy year.

7. What types of contract would constitute "ancillary contracts"

Article 3c (relating to crude oil and petroleum products) of the Decision provides that:

"The prohibitions set out in Article 3a shall be without prejudice to the execution, until 1 July 2012 of contracts concluded before 23 January 2012 or ancillary contracts necessary for the execution of such contracts, to be concluded and executed not later than 1 July 2012."

Article 3d (relating to Petro-chemical products) mirrors this wording except for the earlier cut-off date of 1 May 2012.

"Ancillary contracts" are not further defined in the Decision. Applying a standard dictionary definition of the word ancillary, coupled with the qualification that such contracts should be "necessary for the execution" of the pre-23 January 2012 contracts, and against the background of the apparent underlying intention of the "periods of grace" provided for in the Articles in relation to pre-23 January 2012 contracts, it would be reasonable to assume that "ancillary contracts" could include contracts (such as charterparties) relating to the carriage of and the insurance of cargoes shipped during the “periods of grace”, and the insurance (including Hull and Machinery, War risks and P&I) of vessels carrying such cargoes during such periods.

Pending possible further clarification in the Regulation, in the meantime ECSFPI has confirmed that transport and insurance contracts would be deemed "ancillary" contracts.

8. Must "ancillary contracts" have been concluded prior to 23 January 2012 or can they be entered into after that date?

The only time requirement in the Decision wording on "ancillary contracts" is that they must be concluded and executed not later than 1 July 2012 (crude oil and petroleum) or 1 May 2012 (petro-chemical products). The decision does not provide that they must have been concluded before 23 January 2012. Again, against the background of the underlying intention of the "grace period" provisions, it would be reasonable to assume that "ancillary contracts" may be entered into after 23 January 2012 provided that they are concluded and executed by not later than 1 July 2012 or 1 May 2012 as applicable.

ECSFPI has confirmed that it is correct that the ancillary contracts would not have to have been concluded prior to 23 January 2012.They simply have to be necessary for the execution of obligations under trade contacts which were concluded prior to 23 January. It is envisaged by the Commission, as noted above, that the Regulation will clarify that transportation and insurance contracts amongst others will be considered as "ancilliary" contracts. At this stage this confirmation should be treated as non-binding guidance pending entry into force of the final Regulation.

9. How will the Decision impact on the P&I cover provided by clubs?

(a) Trading prohibitions

The relevant wording proposed in Article 3a and article 3b prohibits the provision, directly or indirectly, of insurance and reinsurance related to the import, purchase or transport of Iranian crude oil, petroleum products and petro-chemical products. These prohibitions are therefore specific to the prescribed cargoes and do not purport, or operate, to interfere with insurance cover arrangements in respect of the import or transport of other cargoes. However shipowners should always check to

determine if other sanctions (whether imposed by EU Member States or other countries) apply to specific cargoes or entities or individuals.

All International Group clubs have included within their rules, in one form or another, either express sanctions cover termination or exclusion provisions or imprudent or improper trading cover exclusion provisions. The effect of those rules is will be to withdraw or exclude insurance cover in relation to sanctions or prohibition offending voyages. To the extent that a shipowner undertakes such a voyage, his liabilities will not be insured by his International Group Club.

(b) Insurance and reinsurance prohibitions

Not all International Group clubs are incorporated, domiciled or regulated within the EU.

(i) EU regulated clubs

An issue may arise where the performance of a voyage carrying a prohibited cargo does not place the shipowner in breach of the prohibition (e.g. a voyage by a non-EU incorporated domiciled or regulated shipowner/vessel to a port outside the EU), but would place an EU regulated club in breach of the prohibition against the provision of insurance coverby virtue of the club's incorporation, domicile or regulation within an EU Member State It is quite likely that the club would be unaware of the voyage and of its consequent potential breach of the insurance cover prohibition contained in Article 3. All International Group clubs which are subject to EU regulation however, have provisions in their rules which would operate to automatically exclude cover or rights of recovery from the club in such circumstances.

(ii) Non-EU regulated clubs

The International Group clubs which are not EU regulated will not be subject to the insurance prohibitions contained in the Regulation, except possibly (and depending on the final scope of application provisions of the Regulation) in relation to (i) cover provided to EU owned or flagged vessels, or (ii) in the case of a voyage by a non-EU owned or flagged vessel carrying a prohibited cargo to an EU destination. However, even if non-EU regulated clubs are not directly subject to prohibition on providing cover in relation to a particular voyage, rights of recovery under the International Group pooling arrangements from clubs which are EU regulated will be affected, and under the International Group Reinsurance Contract and other reinsurances taken out for the benefit of the clubs members, may be affected. The non-EU regulated International Group clubs have however incorporated provisions in their rules to exclude cover where, as a result of sanctions measures, the pool and/or reinsurers are themselves subject to prohibitions on cover/payment.

It should also be borne in mind that there may be circumstances where such clubs may not be subject to the prohibitions contained in the EU Decision, but may nevertheless be subject to other applicable sanctions legislation or regulation. Shipowners should always check to determine if other sanctions (whether imposed

by EU Member States or other countries) apply to specific cargoes or entities or individuals.

10. Will the Decision impact on renewal of annual P&I cover from 20 February 2012?

The cover provided by clubs for the current policy year from 20 February 2011 to February 20, 2012 would constitute contracts concluded before 23 January 2012

As noted under 7 above, the prohibitions in relation to transportation and insurance are trade specific and do not impact on the carriage and insurance arrangements of other trades/cargoes. There is no blanket prohibition on cover and consequently no general reason why annual cover may not be renewed. Possible exceptions to this general proposition might arise where a vessel is at the date of renewal performing a voyage which exposes the shipowner and/or the club to prohibition under article 3 which would effectively prevent renewal so long as that voyage was being performed, or in an extreme case where a vessel or fleet is exclusively engaged in lawful trading with prohibited cargoes (voyages by a non-EU incorporated domiciled or regulated shipowner/vessel to ports outside the EU) but in respect of which the insurance prohibition applies. In this event again the cover could not be renewed.

ECSFPI has confirmed as "sensible" that in the context of the annual cover provided by clubs, the approach that the insurance prohibitions would only apply to cover for the offending voyage but not for all other non-offending voyages.

11. How do the prohibitions impact on clubs' potential liabilities under "Blue Cards"?

Following a termination or cesser of cover, where clubs have issued "Blue Cards" pursuant to CLC or the Bunker Convention, clubs will have a residual direct action exposure for up to three months following notification of the cover termination or cesser to the relevant Flag State. In such circumstances payment of liabilities pursuant to the relevant Convention would be caught by the insurance prohibitions in the Decision.

The issue of Club's exposure under "Blue Cards" has been raised with the EU Commission and the UK Treasury on numerous occasions since the implementation of initial measures against Iran in 2009. The dilemma faced by clubs as a result of conflicts between EU and national sanctions measures and the International Convention regime is appreciated and understood by regulators. Whilst the relevant Decisions and Regulations do not provide an exemption in respect of clubs' exposure under "Blue Cards", such exposure and payments may be authorised by licences on a case-by-case basis.

12. Will the Decision impact on bunkering from Iranian suppliers/sources?

It is the practice for some vessels (including non-tankers) trading to ports within the Arabian Gulf (both Iranian and non-Iranian ports) to load bunker fuel by barge/lightering vessels from Iranian suppliers off the Iranian port of Bandar Abbas and elsewhere in the Arabian Gulf region. The Decision does not expressly address bunkering activity but it is likely that the supply of Iranian bunker fuel would fall within the "purchase" prohibition in the proposed Article 3a so that shipowners who are subject to the decision/regulation would be prohibited from purchasing bunker fuel of Iranian origin.

ECSFPI has confirmed that it considers that this analysis is correct.

13. Will the Decision impact on trans-shipment cargoes or Iranian cargoes loaded outside Iran?

The wording of the relevant sections of the Decision are not restricted to prohibited cargoes loaded in Iran and on a straight reading include trans-shipment cargoes or cargoes originating from Iran but loaded outside Iran. Shipowners may be asked to carry, and insurers to insure, cargoes and/or vessels carrying such cargoes, loaded at ports or places outside Iran but which originate from Iran. Clearly if the shipowner or insurer knows the origin of the cargo then they would be aware of the sanctions impact, but it may well be that they will not be aware of the cargo origin.

Regulation 961/2010 on restrictive measures against Iran contains in Article 32 (2) a provision which provides as follows;

"The prohibitions set out in the present Regulation shall not give rise to liability of any kind on the part of the natural or legal persons or entities concerned, if they did not know, and had no reasonable cause to suspect, that their actions would infringe these prohibitions."

ECSFPI has confirmed that the Regulation relating to the present Decision will contain a similar exempting provision. They have further commented that a person who has conducted all reasonable enquiries, and in light of them, has no reason to suspect that their actions would infringe the prohibitions would be covered by the exemption.

14. Further Developments

The Group will continue to engage with ECSFPI and the UK Treasury with regard to further clarification on the scope of application of the Decision and the final form of the Regulation, and in relation to specific new issues arising. The FAQs will be periodically updated to reflect further clarifications and guidance received. Until the entry into force of the Regulation, the guidance set out in the FAQs is advisory only and will be monitored on a continuing basis. Shipowners are strongly recommended to consult with their clubs in relation to any queries arising out of the potential application of the provisions of the Decision to their current or anticipated trading or associated activities to the extent that these may be impacted by the provisions of the Decision.