EU and UK Price Cap on Russian Crude Oil

Skadden

12 / 20 / 22

If you have any questions regarding the matters discussed in this memorandum, please contact the attorneys listed on the last page or call your regular Skadden contact.

One Manhattan West
New York, NY 10001
212.735.3000

40 Bank St., Canary Wharf
London, E14 5DS, UK
44.20.7519.7000

68, rue du Faubourg Saint-Honoré
75008 Paris, France
33.1.55.27.11.00

On 5 December 2022 the $60 per barrel price cap on Russian crude oil announced by the G-7 finance ministers in September 2022 came into effect in the United States, European Union and United Kingdom. The price cap is implemented by prohibiting the provision of services that enable maritime transportation of Russian crude oil unless the oil is purchased at or below the price cap. In our 12 December 2022 client alert, "Price Cap on Russian Crude Oil Becomes Effective," we discussed the implementation in the US. This article covers the EU and UK rules. All three jurisdictions focus on the supply or delivery of Russian oil to third countries. Importation of Russian oil to the EU and UK is prohibited.[1]

The EU and UK rules apply to all EU and UK persons, but will be of most relevance to those involved in the maritime transport of oil, as well as insurers. Given the cross-border nature of maritime transportation of oil, along with the extensive guidance issued by the EU and UK and the slightly differing EU and UK prohibitions, those impacted by the price cap will need to monitor the rules carefully to ensure compliance.

Here are key aspects to note:

- The US, EU and UK have all applied the same price cap at $60 per barrel, with similar attestation and record-keeping requirements, broken down into three tiers of entities based on their access to information about the price paid.
- All three jurisdictions have issued detailed guidance that will be helpful in complying with the rules, and these include transitional wind-down provisions.
- The UK has imposed additional reporting obligations beyond those of the EU and US.

European Union

On 3 December 2022, the EU Council (Council) set an oil price cap at $60 per barrel for crude oil and petroleum oils obtained from bituminous minerals[2] that originate in or are exported from Russia to a non-EU country.[3] The price cap takes the form of an exemption from the ban on maritime transport, and technical assistance, brokering services, and financing or financial assistance related to the trading, brokering, or transport of Russian crude oil and petroleum products to non-EU countries, if those products are purchased at or below $60 per barrel.

The price cap exemption applies to the trade and transport, and covered services, by EU operators of Russian seaborne crude oil and petroleum products to support critical energy supply to non-EU countries only. Per the EU, the price cap has three objectives, (i) to maintain a reliable supply of seaborne Russian crude oil and petroleum products to the global market; (ii) to reduce upward pressure on energy prices; and (iii) to reduce Russia's revenues and curtail its ability to fund its war in Ukraine.

[1] This client alert is for informational purposes only and does not constitute legal advice. Complex assessments often have to be made as to which sanctions regime applies in any given instance, given the multinational touch points of many entities and individuals. In that regard, given the complex and dynamic nature of these sanctions regimes, there may be developments not captured in this summary. Moreover, while the summary was accurate when written, it may become inaccurate over time given developments. For all of these reasons, you should consult with a qualified attorney before making any judgments relating to sanctions, as there are potentially severe consequences of failing to adhere fully to sanctions restrictions.

[2] CN code 2709 00.

[3] *See* Council Decision (CFSP) 2022/369 of 3 December 2022, amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilizing the situation in Ukraine. *See also* Council Regulation (EU) 2022/2367 of 3 December 2022, amending Regulation (EU) No 833/20141 concerning restrictive measures in view of Russia's actions destabilizing the situation in Ukraine. *See also* Commission Implementing Regulation (EU) 2022/2368 of 3 December 2022 amending Council Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilizing the situation in Ukraine.

EU and UK Price Cap on Russian Crude Oil

The ban on the import into the EU of most Russian crude oil and petroleum products and related covered services still applies.[4] Per the EU Commission's (Commission) guidance, the price cap does not affect in any way the exceptions and derogations in Council Regulation 833/2014 (Regulation 833), which authorizes certain member states to continue importing crude oil and petroleum products from Russia due to their specific situation or to import seaborne crude oil from Russia if the supply of crude oil by pipeline from Russia is interrupted for reasons beyond their control.[5]

The EU established the level of the cap in close cooperation with the Price Cap Coalition, composed of G7 members and other participating countries. The price cap on Russian crude oil entered into force on 5 December 2022 and will take effect for petroleum products on 5 February 2023.[6]

Ban on Oil Transport Services

Regulation 833 prohibits the provision, directly or indirectly, of technical assistance, brokering services, or financing or financial assistance, related to the trading, brokering, or transport, including through ship-to-ship transfers, of crude oil or petroleum products set forth in its Annex XXV, to third countries if the covered products originate in or are exported from Russia.[7] Services such as insuring and financing the transport of oil to third countries are within the scope of this restriction. For petroleum products falling under CN code 2710, Regulation 833 provides an exemption for the execution of contracts concluded before 4 June 2022 (or ancillary contracts necessary to execute such contracts) until 5 February 2023.

Regulation 833 also prohibits the trade, brokering, transport, including through ship-to-ship transfers, of crude oil (CN code 2709 00) or petroleum products (CN code 2710) to third countries, if those products originate in or are exported from Russia. The transport prohibition applies to all EU vessels (*i.e.*, EU- flagged vessels). It also applies to vessels that are owned, chartered or operated by EU companies or nationals, including agents acting on their behalf.

[4] *See* our August 1, 2022, client alert, "EU and UK Adopt Further Sanctions and Export Controls Targeting Russia."

[5] *See* Article 3m of Regulation 833. *See also* the EU's Notice to operators regarding the imports of Russian crude oil or petroleum products into the Union (2022/C 296/05).

[6] On December 16, 2022, the EU Council (Council) adopted a ninth package of sanctions against Russia. It includes additional listings of individuals and entities and expands existing sectoral sanctions, including new trade restrictions and export controls, and a ban on new investments in the Russian mining sector. Other sanctions will target consulting services, dual-use goods and technology, and advanced technology items. The Council is expected to introduce the regulations on the ninth sanctions package

[7] *See* Article 3n of Regulation 833 (amended by Regulation 2022/2367).

The prohibitions do not apply to the covered crude oil or petroleum products if the covered goods originate in a third country and are only being loaded in, departing from, or transiting through Russia, provided that the origin and owner of such goods are non-Russian.

The prohibition on Russian crude oil took effect on 5 December 2022, while the prohibition for petroleum products will come into force on 5 February 2023.

Price Cap Exemption

The price cap provides an exemption to the sanctioned activities described above, and authorizes EU operators to trade, broker, transport, and provide covered services for Russian seaborne crude oil and petroleum products to third countries if those products are purchased at or below $60. The price cap exemption applies to the transport, trading and brokering (and related services) of Russian seaborne crude oil and petroleum products to third countries (non-EU) only.

Notably, as of 5 December 2022, EU operators may also provide insurance for the transport of Russian seaborne oil to non-EU countries if the product is purchased at or below the price cap.[8]

The price cap on Russian crude oil entered into force on 5 December 2022. For petroleum products, the price cap will take effect on 5 February 2023.

Scope of the Price Cap

Per the EU guidance, shipping, freight, customs and insurance costs are not included in the price for purposes of the cap and must be invoiced separately and at commercially reasonable rates. The EU guidance also states that, although shipping and insurance are covered services, these costs are distinct from the price cap on Russian oil.[9] The guidance cautions, however, that such services must not be used as a means of subverting the price cap.

The price cap applies at receipt of cargo of Russian-origin crude oil or petroleum products on a vessel (*i.e.*, loading). Any intermediary trade, including ship-to-ship transfers, conducted while the oil is at sea must occur at or below the price cap, according to the EU guidance.

[8] Per EU guidance, if the insurance ceases by 5 December 2022, claims arising between 4 June 2022 and 5 December 2022 can be lawfully paid out even after 5 December 2022. If the insurance continues after 5 December 2022, in compliance with the price cap, there is no limitation as to when the claims need to be lawfully paid out (EU Commission Guidance, Section E.5, Energy, Oil Price Cap, FAQ #15, page 221).

[9] *See* EU Commission Guidance, Section E.5, Energy, Oil Price Cap, FAQ #4, page 218.

The price cap stops applying after the crude oil or petroleum products are released for free circulation in a jurisdiction outside of Russia and are consigned to the landed purchaser.[10] However, if the oil has been customs cleared and becomes seaborne again without being substantially transformed[11] into a different good in line with the EU's non-preferential rules of origin (*i.e.*, without being refined), the price cap will still apply.

Currency of the Price Cap

Under Annex XXVIII of Regulation 833, the price cap rate is specified in U.S. dollars only. Where a purchase contract is denominated in another currency, the guidance sets out a conversion method based on exchange rates posted by the U.S. Federal Reserve or, if those are not available, on a triangular conversion between the euro and the dollar based on exchange rates provided by the European Central Bank (ECB). If the ECB's rate is not available, the triangular conversion of the daily exchange rate between the special drawing rights (SDR) and the US dollar and of the exchange rate between the SDR and the currency of purchase published by the International Monetary Fund may be used. Other methods may be used if those three are not feasible.[12]

Compliance Framework: Attestation and Recordkeeping

The EU guidance provides that the price cap exemption will rely on a recordkeeping and attestation process that allows each party in the supply chain of seaborne Russian crude oil to demonstrate or confirm that such product complies with the price cap.[13] EU operators should collect the attestation at the moment they conclude the relevant contract relating to the transport of Russian crude oil to third countries. For banks, they should collect the attestation when loan is signed. EU operators are expected to retain relevant records for a minimum of five years from the date of transport.

The EU guidance provides specific recommendations on attestations and recordkeeping for three tiers of persons based on their access to price information:

- *Tier 1: actors who have direct access to price information in the ordinary course of business* (*e.g.*, commodities brokers, commodities traders, and other persons acting in their capacity as seller or buyer of Russian oil). They should retain and share, as needed, documents that show that seaborne Russian oil was purchased at or below the price cap.
- *Tier 2: actors who are sometimes able to request and receive price information from their customers in the ordinary course of business* (*e.g.*, financial institutions, custom brokers). When practicable, they should request, retain and share, as needed, documents that show that seaborne Russian oil was purchased at or below the price cap. If it is not practicable to request and receive such information, Tier 2 actors should obtain and retain customer attestations in which the customer commits to not purchase seaborne Russian oil above the price cap.
- *Tier 3: actors who do not have direct access to price information in the ordinary course of business* (*e.g.*, insurers, including protection and indemnity (P&I) clubs, shipowners, ship management companies, flagging registries). They should obtain and retain customer attestations in which the customer commits to not purchase seaborne Russian oil above the price cap, for example as part of their annual insurance policy or ordinary business operations. The guidance states that it can be done through a sanctions exclusion clause or through the use of a price cap attestation.

The recordkeeping and attestation process adds to the standard due diligence process that EU operators must continue to conduct for such transactions. The EU guidance recommends that EU operators perform due diligence calibrated according to the specificities of their business and the related risk exposure.

The recordkeeping and attestation process is also intended to provide assurances to EU operators. If an EU operator that does not have direct access to price information reasonably relies on an attestation after performing appropriate due diligence, and such an attestation was falsified or provided by illegitimate actors, the EU operator would not be considered in breach of the price cap provided that it acted in good faith, according to the guidance.[14]

Wind-down Period

Regulation 833 provides a 45-day wind-down period for seaborne Russian oil purchased above the price cap, provided that that it was loaded onto a vessel at the port of loading prior to 5 December 2022 and unloaded at the final port of destination prior to 19 January 2023. In case of proven *force majeure* preventing the unloading of such product at the final port before 19 January 2023, the wind-down period can be extended beyond 45 days until the hindering exception circumstance has ceased to exist.

[10] *See* EU Commission Guidance, Section E.5, Energy, Oil Price Cap, FAQ #6, page 218.

[11] Per EU guidance, a substantial transformation is a transformation into a good such that the product then comes under a different HS code.

[12] *See* EU Commission Guidance, Section E.5, Energy, Oil Price Cap, FAQ #3, page 217, for details on the conversion methods.

[13] *See* EU Commission Guidance, Section E.5, Energy, Oil Price Cap, FAQ #35, page 226.

[14] *See* EU Commission Guidance, Section E.5, Energy, Oil Price Cap, FAQ #35, page 227.

EU and UK Price Cap on Russian Crude Oil

United Kingdom

The UK has issued the same basic restrictions around the oil price cap as the EU and US in the form of a general licence, but it also adopted a reporting obligation in addition to record-keeping and attestation requirements that parallel those of the EU and US. In addition, there are small differences in the details relating to attestation and record-keeping amongst the three jurisdictions.

Scope of Relevant Prohibitions

On 1 November 2022, the UK laid out its prohibitions regarding maritime transport (Regulations).[15] These came into force on 5 December 2022 prohibiting:

1. the direct or indirect supply or delivery by ship, on or after 5 December 2022, of crude oil and oil products originating in or consigned from Russia, from a place in Russia to a third country,[16] or from one third country to another third country; or
2. the direct or indirect supply or delivery by ship, on or after 5 February 2022, of non-crude oil and oil products originating in or consigned from Russia, from a place in Russia to a third country, or from one third country to another third country; or
3. the direct or indirect provision of associated services such as financial services and funds and brokering, in relation to the above.

If the price paid is below the cap, however, general licenses allow shipments to third countries under certain circumstances, as discussed below.

The civil penalties for breaches of these restrictions are on a strict liability basis which means that knowledge or reasonable cause to suspect the conduct amounted to a breach of sanctions is not relevant. There are limited exceptions to the restrictions relating to: (i) oil products that originate in a country that is not Russia, are not owned by a person connected with Russia, and are only being loaded in, departing from or transiting through Russia, and (ii) emergencies in certain cases.

Specific licences are only allowed for an "extraordinary situation".

General Licenses

In the UK, the oil price cap is implemented through a general licence. On 4 December 2022, the UK issued four of those. Each came into force on 5 December 2022 and is of indefinite duration.

- **General Licence INT/2022/2469656:** This effectively implements the oil price cap by:
  - (i) permitting persons to supply or deliver Russian oil by ship from a place in Russia to a third country, or from one third country to another third country, provided that the price per barrel of Russian oil is at or below the price cap; and
  - (ii) permitting service providers to provide associated services for supply or delivery of Russian oil by ship to third countries provided that the price is at or below the price cap.

  It also permits relevant institutions to process payments in relation to the above. The licence does not permit the supply or delivery of Russian oil or associated services to designated persons, nor does it apply to the import of Russian oil or oil products into the UK. As in the US and EU, there are detailed attestation requirements for three tiers of providers based on the parties' access to price information,[17] as well as appropriate due diligence requirements.[18] There are also record-keeping requirements for a period of four years, and reporting requirements to HM Treasury.
- **General Licence INT/2022/2470256:** This implements a wind down with respect to the oil price cap, permitting persons to supply or delivery Russian oil by ship, service providers to provide associated services, and relevant institutions to process payments, where the Russian oil is loaded onto a ship at the port of loading prior to 5:01 am GMT on 5 December 2022, and offloaded at the port of destination prior to 5:01 am GMT on 19 January 2023. There are detailed attestation requirements for the three tiers of providers, as well as appropriate due diligence requirements. There are also record-keeping requirements for a period of four years, and reporting requirements to HM Treasury.

[15] The Russia (Sanctions) (EU Exit) (Amendment) (No. 16) Regulations 2022, relating to the prohibition on maritime transportation of certain oil and oil products, amending the Russia (Sanctions) (EU Exit) Regulations 2019.

[16] Any country other than the UK, Isle of Man or Russia

[17] **Tier 1 provider:** A service provider who knows or can directly access the unit price of the Russian oil to be (or being) supplied or delivered, including but not limited to commodities brokers, commodities traders and importers.

Tier 2 provider: A service provider directly interacting with parties with price information, who can request and receive the unit price of the Russian oil to be (or being) supplied or delivered to/from their customers in the ordinary course of business, including but not limited to financial institutions providing transaction-based trade finance, customs brokers and ship agents.

Tier 3 provider: A service provider with no direct access to price information, who does not know and cannot access the unit price of the Russian oil to be (or being) supplied or delivered. Including but not limited to cargo insurers, flagging registries, insurance brokers, P&I clubs, reinsurers, ship owners and ship management.

[18] The OFSI guidance states that a person relying on attestation or other price information documentation from other persons involved, or any associated counterparties, must undertake appropriate due diligence to satisfy themselves, based on information available, of the reliability and accuracy of that information. This process may including considering the international scope of activities, assessing their own exposure, considering own risk appetite, seeking legal advice and implementing appropriate due diligence measures to identify and mitigate potential risk of breaching trade sanctions.

EU and UK Price Cap on Russian Crude Oil

- **General Licence INT/2022/2470056:** This permits relevant institutions to process, clear or send payments notwithstanding the prohibitions regarding providing financial services and funds relating to maritime transportation of Russian oil and oil products. The relevant institution must be operating solely as an intermediary, and not have any direct relationship with the person providing services relating to the maritime transportation of the Russian oil.
- **General Licence INT/2022/2470156:** This permits the supply or delivery by ship of Russian oil from a place in Russia to a third country or from one third country to another third country, as well as the provision of associated services relating to the above, where it relates to a specified activity and specific dates, including the Sakhalin-2 Project, as well as in certain situations relating to Bulgaria, Croatia and a landlocked EU member state. The licence does not extend to the reselling of Russian oil to or in a third country. There are also record-keeping requirements for a period of four years, and reporting requirements to HM Treasury.

Guidance

The oil price cap is a highly complex tool, demonstrated by the extensive guidance issued by the UK. In particular, the Office of Financial Sanctions Implementation (OFSI) within HM Treasury published detailed guidance in November 2022 and updated it in December 2022. That addresses: (i) the purpose of the ban, (ii) a summary of the prohibitions, (iii) implementation and enforcement, (iv) exceptions and licensing, (v) how attestation works, and (vi) reporting.

OFSI notes that "the prohibition will be enforced by OFSI and there will be a robust enforcement regime backed up by a criminal prosecution option". OFSI has indicated that it does not anticipate taking enforcement action against a person who can demonstrate to OFSI that they have fulfilled the requirements of the attestation process in a timely manner and to OFSI's satisfaction, and undertaken appropriate due diligence.

The guidance also refers to the potential for the costs of shipping and other services relevant to the transit of the oil to be used as a means to circumvent the price cap, and notes that entities should report to OFSI when they become aware of a transaction for shipping or associated services where prices deviate significantly from the standard prices available in the market at that point in time.

In an OFSI blog published on 14 November 2022, OFSI specifically noted the establishment of a new unit to set up the licencing and enforcement system for the oil price cap, engage with industry to ensure readiness for the cap, and monitor the level and impact of the cap on an ongoing basis.

On 2 December 2022, the Department for Business, Energy & Industrial Strategy issued guidance on the UK ban on Russian oil and oil products. This provides detailed information on situations specific to oil *e.g.*, substantial processing, tank heeling and co-mingling, and how the ban applies in such scenarios.

The UK has also published several forms for use in relation to reporting about the use of the general licences, attestation, notification requirements, breach reporting and specific licence applications.

Conclusion

As we noted in our US alert, the price cap will raise new compliance challenges for service providers engaging in transactions related to Russian-origin crude oil. The extensive guidance issued by the UK and EU demonstrate the complexity of these prohibitions. Service providers will need to be cognizant not only of the slightly differing UK, EU and U.S. prohibitions, but also prohibitions issued by other G-7 countries and Australia. The oil price cap will be of particular significance to the UK, given its global role in the insurance and shipping industry.

Contacts

Pascal Bine
Partner / Paris
33.1.55.27.11.01
pascal.bine@skadden.com

Elizabeth Robertson
Partner / London
44.20.7519.7115
elizabeth.robertson@skadden.com

Vanessa K. McGoldrick
European Counsel / London
44.20.7519.7278
vanessa.mcgoldrick@skadden.com

Wesley Laine
Associate / Paris
33.1.55.27.11.73
wesley.laine@skadden.com

Zahra Mashhood
Associate / London
44.20.7519.7119
zahra.mashhood@skadden.com