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EU Adopts Price Cap for the Trading, Brokering and Transport of Russian Crude Oil to Third Countries and Releases a Draft Directive to Harmonize Definitions and Penalties for Violations of EU Sanctions

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December 6, 2022 – In the past week, the European Union (“EU”) has taken two significant steps on the sanctions front, one by itself and the other in coordination with the G7 and Australia.

On December 3, 2022, the EU, the G7 countries and Australia agreed to set an initial cap on the price of Russian crude oil at USD 60 per barrel. This price cap builds on the commitments expressed by the G7 Finance Ministers on September 2, 2022, whereby certain transactions and services relating to Russian crude oil and petroleum products destined for third countries should be prohibited, unless such products are purchased at or below the cap price. Subject to a review mechanism, the price cap is intended to “[...] limit price surges driven by extraordinary market conditions and drastically reduce the revenues Russia has earned from oil” and “stabilise global energy prices while mitigating adverse consequences on energy supply to third countries.” The EU initially adopted the legal framework for this price cap through the eighth package of sanctions. On December 4, 2022, a day before prohibitions on Russian crude oil became fully effective, the EU adopted Council Decision 2022/2369, Council Regulation 2022/2376 and Commission Implementing Regulation 2022/2368 implementing the agreed price cap for Russian crude oil and amending associated prohibitions. The price cap level for Russian petroleum products will be finalized in due course, before the entry into force of the relevant prohibitions on February 5, 2023.

Earlier that week, on November 28, 2022, the Council of the European Union adopted a Council Decision adding the violation of EU restrictive measures (i.e., sanctions) to the list of particularly serious crimes with a cross-border dimension in Article 83(1) of the Treaty on the Functioning of the European Union. That decision allowed the European Commission to put forward a proposal for a Directive on December 2, 2022 on “the definition of criminal offences and penalties for the violation of Union restrictive measures” (“Proposal”). This Proposal intends to (a) harmonize definitions of criminal offences relations to violations of EU sanctions, (b) ensure effective, dissuasive, and proportional penalty types and levels, (c) foster cross-border investigation and prosecution, and (d) improve the operational effectiveness of enforcement in Member States.

1. Price Cap for the Trading, Brokering and Transport of Russian Crude Oil to Third Countries and Related Services

On October 6, 2022, as part of its eighth sanctions package against Russia, the EU introduced, through Article 3n of Regulation 833/2014, a ban on (a) the transport to third countries of crude oil (CN 2709 00), as of December 5, 2022, and petroleum products (CN 2710), as of February 5, 2023, originating in or exported from Russia (together, “Russian Oil Products”), and (b) the provision of related technical assistance, brokering services, financing or financial assistance. The eighth package already foresaw that such prohibitions would apply only if the purchase price per barrel exceeded a price to be agreed by the Council of the European Union. The transport ban was scheduled to apply only once an agreement would be reached on the price cap level. A wind-down period applied for prohibited services to permit the continued performance of contracts concluded before June 4, 2022 until December 5, 2022 for crude oil and until February 5, 2023 for petroleum products.

Through Council Decision 2022/2369, Council Regulation 2022/2376 and Commission Implementing Regulation 2022/2368, Article 3n of Regulation 833/2014 has now been substantially amended to implement the price cap mechanism. Restrictions targeting Russian crude oil destined to third countries entered into force on December 5, 2022, while restrictions targeting Russian petroleum products will become fully effective on February 5, 2023 (subject to the existence of a contract pre-dating June 4, 2022 for restricted services). As of the date of this alert, the price cap had only been set for Russian crude oil.

The amended Article 3n of Regulation 833/2014 lays out a number of prohibitions:

- **Extension of the prohibition on the transport of Russian crude oil and petroleum products to trading and brokering** – The prohibition against transport (including through ship-to-ship transfers) of Russian Oil Products to third countries (i.e., outside the EU) now also applies to the trading and brokering of those products to third countries (together with transport, “Restricted Activities”).
- **Corresponding extension of the prohibition against providing related services** – Technical assistance, brokering services, financing and financial assistance (“Restricted Services”) are now prohibited not only in relation to the transport of Russian Oil Products to third countries, but also in relation to the trading and brokering of these products to third countries.
- **Application of the price cap** – Prohibitions on Restricted Activities and Restricted Services applicable to Russian Oil Products destined to third countries do not apply if the purchase price per barrel of these products does not exceed the price cap laid down in Annex XXVIII to Regulation 833/2014.
 - Price cap level: The initial price is set at USD 60 per barrel for Russian crude oil and will be subject to review.
 - Shipping, freight, customs, and insurance costs are not included in the price cap and must be invoiced separately and at commercially reasonable rates.
 - The price cap for Russian petroleum products will be set in due time.
 - Price cap review: The functioning of the price cap mechanism and associated prohibitions will be reviewed first in mid-January 2023 and every two months thereafter to adapt to market developments and technical changes. Such review will consider a variety of factors, including (a) the effectiveness of the measure in terms of expected results, (b) its implementation, (c) its international adherence to and informal alignment with the price cap mechanism, and (d) its potential impact on the EU and Member States. However, in order to achieve its objectives, the price cap will be set at least 5% below the average market price for Russian oil and petroleum products, based on the data provided by the International Energy Agency.
 - Initial wind-down period: As of December 5, 2022, a wind-down period of 45 days exempts Restricted Activities and Restricted Services in relation to Russian crude oil *en route* to a third country. Such crude oil must have been loaded onto a vessel at the port of loading prior to December 5, 2022 and be unloaded at the final port of destination prior to January 19, 2023.
 - Subsequent wind-down periods: Each time the price cap will be amended, a wind-down period of 90 days will exempt the transport of Russian Oil Products to third countries and related Restricted Services, provided such transport and Restricted Services are based on a contract pre-dating the adoption of the new price cap and the price was at or below the previously applicable price cap.
- **Clarification of the anti-circumvention safeguard** – To avoid circumvention of the prohibitions set out in Article 3n, it is prohibited to provide Restricted Services in relation to the transport of Russian Oil Products to a vessel that has transported such products if they were purchased at a price above the (then) applicable price cap on the date of the conclusion of the contract. This prohibition now applies for a period of 90 days following the date of unloading of the cargo purchased at a price above the (then) applicable price cap.
 - To ensure legal certainty, the EU clarified that the prohibition only applies where the operator responsible for the transport of the cargo knew or had reasonable cause to suspect that the cargo was purchased at a price above the (then) applicable price cap.
- **Introduction of a new exemption from Restricted Activities and Restricted Services** – The transport of Russian Oil Products and related Restricted Services are exempted when these are necessary for the urgent prevention or mitigation of an event likely to have a serious and significant impact on human health and safety or the environment, or as a response to natural disasters.

- Note that the effective use of this new “emergency clause” is conditioned on the immediate notification by the operator of the relevant enforcement authorities of the competent Member State (“National Competent Authority”) once the event has been identified.
- **Exemptions maintained** – Exemptions already provided for in the eighth sanctions package, as explained in our previous [alert](#), have been maintained in the following cases:
 - Exemptions in relation to Restricted Services for:
 - The performance of contracts concluded before June 4, 2022 and ancillary contracts until December 5, 2022, for crude oil and February 5, 2023, for petroleum products;
 - The payment of insurance claims after December 5, 2022, for crude oil and after February 5, 2023, for petroleum products on the basis of insurance contracts concluded before June 4, 2022, provided the insurance coverage has ceased by the relevant date; and
 - The provision of pilot services necessary for reasons of maritime safety.
 - Exemptions in relation to both Restricted Activities and Restricted Services:
- Exemptions in relation to both Restricted Activities and Restricted Services:
 - If Russian Oil Products originate in a third country and are only being loaded in, departing from or transiting through Russia, provided that both the origin and the owner of those goods are non-Russian;
 - For transport or Restricted Services relating to products mentioned in Annex XXIX of Regulation 833/2014, to the third countries mentioned therein, for the duration specified in that Annex.
 - Currently, this covers transport to Japan and related Restricted Services for crude oil originating in the Sakhalin-2 Project until June 5, 2023.
- **Coordination mechanism** – The Member States and the European Commission are expected to inform each other of detected instances of a breach or circumvention of the prohibitions on Restricted Activities and Restricted Services in relation to Russian Oil Products destined to third countries.
- **Guidance** – The European Commission has already published an [FAQ](#) on the oil price cap, which notably details due diligence expectations through a three-tier system, with varying degrees of due diligence to be implemented based on the availability of price information to EU operators.

2. **Proposal for A Directive to Harmonize Across the EU Definitions, Prosecutions, and Penalties for Violations of EU Sanctions**

In the absence of harmonization at the EU level, national systems differ significantly in the penalties they prescribe for violations of EU sanctions, with Member States imposing different types of penalties (in some cases, only administrative in nature) with widely different degrees of severity. The Proposal sets out to address this problem.

- **Harmonization of criminal offences** – The Proposal would require Member States to criminalize the violation of EU sanctions and provide for a common definition of what constitutes a violation of EU sanctions.
 - A violation of EU sanctions would have to be criminalized when committed intentionally, but also – in most instances – in case of serious negligence or attempted violations. Inciting, aiding or abetting a violation of EU sanctions would also be criminalized.
 - The common definition of what constitutes a “violation” of EU sanctions would be defined broadly and cover:
 - Violating all types of individual and sectoral sanctions, such as failing to freeze funds belonging to, held or controlled by a designated person or engaging in restricted trade activities, such as importing or exporting goods covered by trade restrictions;
 - Engaging in actions or activities that seek to directly or indirectly circumvent the restrictive measures, notably by failing to comply with enhanced reporting obligations imposed under [Regulation 269/2014](#);
 - Breaching or failing to fulfil the conditions of authorizations granted by National Competent Authorities to conduct certain activities otherwise prohibited under EU sanctions.
 - A number of exemptions are foreseen, namely for (a) legal professionals (under certain conditions), (b) the provision of goods or services of daily use for the personal use of designated persons and (c) humanitarian aid.
- **Harmonization of penalties** – The Proposal foresees that Member States would have to ensure that penalties for violation of EU sanctions are effective, proportionate and dissuasive, with minimum thresholds to be observed:
 - **For natural persons**, penalties should include, at least, prison sentences and fines:
 - Any violation of EU sanctions, either committed with intent or serious negligence, would have to be punishable by a maximum penalty providing for imprisonment. The Proposal specifies the maximum prison terms thresholds in case the violation of EU sanctions involves funds or economic resources of a value of at least EUR 100 000:
 - A maximum of at least one year of imprisonment for a violation of reporting obligations; and
 - A maximum of at least five years of imprisonment for another violation of EU sanctions.
 - Additional penalties, and at least fines (of an unspecified amount), must be provided for in case of violation, attempted violation of inciting, aiding or abetting a violation of EU sanctions.
 - **For legal persons**, the Proposal would require Member States to establish provisions to ensure that legal persons can be held liable for violation, with intent or serious negligence, attempting to violate or inciting, aiding or abetting a violation of EU sanctions, if the offence is (a) committed for their benefit by persons having a leading position within the legal person or (b) in case of a lack of supervision and control by such persons that has made possible the commission of that offence.
 - The liability of legal persons would not exclude criminal proceedings against natural persons who are perpetrators, inciters or accessories in the offences.
 - **For legal persons**, the Proposal would also provide for harmonized penalties:
 - Two mandatory types of penalties: (a) criminal or non-criminal fines and (b) exclusion from access to public funding, including tender procedures, grants and concessions.
 - Minimum fines would only be foreseen in case of violation with intent or serious negligence, as follows:
 - A maximum limit of at least 1% of the total worldwide turnover of the legal person for a violation of reporting obligations;
 - A maximum limit of at least 5% of the total worldwide turnover of the legal person for another violation of EU sanctions
 - Five optional types of penalties: (a) disqualification from the practice of business activities, (b) withdrawal of permits and authorizations to pursue activities that have resulted in committing the offence, (c) placement under judicial supervision, (d) judicial winding up and (e) closure of establishments that have been used for committing the offence.
 - **Aggravating and mitigating circumstances** – The Proposal also sets out the aggravating and mitigating circumstances, with the latter including self-disclosure, to be taken into account when penalties are applied.
- **Harmonization of prosecution** – The Proposal foresees common jurisdiction rules for all EU Member States and harmonized limitation periods:
 - **Jurisdiction rules:** A Member State would be competent to exercise its jurisdiction over criminal offences (a) committed in whole or in part within its territory, (b) on board any aircraft or vessel under its jurisdiction, (c) committed by one of its nationals or habitual residents, (d) committed by one of its officials acting in his/her official duty, (e) committed for the benefit of a legal person established on its territory or (f) committed for the benefit of a legal person in respect of any business done in whole or in part on its territory.
 - **Limitation periods:** The Proposal would require Member States to provide for adequate limitation periods to allow National Competent Authorities to investigate, prosecute, try and adjudicate criminal offences and enforce penalties during a period of time that is sufficient to tackle EU sanctions violation effectively. Minimum durations would only be provided for certain offences.
- **Facilitating prosecution and confiscation** – The Proposal seeks to empower National Competent Authorities with sufficient resources, foster cooperation between all stakeholders and ensure consistency with other provision of EU law:
 - **Cooperation:** Member States would be required to ensure (a) coordination and cooperation at strategic and operational level among all their competent authorities involved in the prevention, investigation and prosecution of sanction-related criminal offenses and (b) cooperation with Europol, Eurojust, the European Public Prosecutor’s Office (“EPPO”), and the European Commission to enhance the investigation of cases with a cross-border element.
 - **Sufficient resources:** Member States would be required to ensure that effective investigative tools would be available for investigating or prosecuting violations of EU sanctions.
 - **Whistleblower protection:** Member States would be required to afford protection to whistle-blowers in accordance with Directive 2018/1673.
 - **Consistency with other pieces of EU law:** To reinforce the prosecution of EU sanctions violation, the Proposal (a) foresees an amendment to the Directive on combating money laundering by criminal law to ensure that the money laundering offence applies to property derived from sanction-related criminal offences and (b) would require Member States to treat assets concealed in violation of EU sanctions as “proceeds of crime” for the purposes of the [proposed Directive](#) on asset recovery and confiscation.
- **Entry into force and implementation – Member States would have six months, as from the entry into force of the Directive, to implement its requirements.**
 - However, before the Directive is adopted and enters into force, it must be discussed by the European Parliament and the Council as part of the ordinary co-legislative procedure, meaning that both institutions will be able to table amendments. As a result, the adoption of the Directive may be delayed and there is no guarantee that it will be adopted shortly, nor without substantial amendments.

3. **EU FAQ**

Since October 7, 2022, the European Commission has issued a [consolidated version](#) of its FAQs, last updated on December 2, 2022, on the implementation of Council Regulation 833/2014 and 269/2014 on its [dedicated webpage](#).

4. Next Steps

On November 24, 2022, European Commission President Ursula von der Leyen [announced](#) that the EU was preparing a ninth sanctions package against Russia, after the EU Parliament [called on](#) EU Member States to adopt the legal framework for designating Russia a state sponsor of terrorism for its military attacks against Ukrainian civilians and civilian infrastructures. The content of the new package is unknown to date. Meanwhile, initial discussions at [the EU level](#) and between some Member States on potentially extending the powers of the EPPO to violations of EU sanctions have been reported in the last few weeks. On November 29, 2022, the Justice Ministers of France and Germany jointly called for the EPPO to be given jurisdiction over EU sanctions violations. At the time of this alert, however, there was no formal legislative initiative in this respect.

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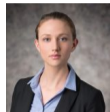
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