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Coalition Members Set and Implement Price Cap for Maritime Transport of Russian-Origin Crude Oil

Client Alert | December 19, 2022

On December 2 and 3, 2022, the G7 (the United States, Canada, France, Germany, Italy, Japan and the United Kingdom) and Australia,[1] and the Council of the European Union ("EU")[2] (collectively, the "Price Cap Coalition"), announced the setting of a price cap of $60 per barrel on seaborne crude oil which originates in or is exported from Russia ("Price Cap"). The Price Cap is implemented as an exception to a general prohibition on providing certain services for the maritime transportation of seaborne Russian-origin oil which had previously been announced or was in effect in some of the Price Cap Coalition member jurisdictions ("Price Cap Programs" or "Programs").

The setting of the Price Cap is the result of close collaboration among the Price Cap Coalition members, and is another tangible examples of multilateral cooperation since the war in Ukraine began. The Price Cap Coalition itself represents a departure from traditional multilateral institutions (e.g., the UN Security Council), and the simultaneous implementation of the Price Cap Programs across several jurisdictions speaks to the strong alignment amongst the West and its allies against Russian aggression in the Ukraine.

The Price Cap Programs are not a monolith, as the three jurisdictions will implement the aligned principles of the Price Cap in slightly different ways, which adds complexity for global compliance.

In this alert we will set forth in a Q&A format the critical elements of the Price Cap Programs in the U.S., the UK and the EU, comparing and contrasting where key differences exist, although such differences are relatively slight given the high degree of coordination between the implementing jurisdictions. Readers should be aware that the other Price Cap Coalition members are implementing respective Price Cap Programs as well, which are not addressed in this particular analysis.

Question 1: What are the Price Cap Programs and when do the measures take effect?

The Price Cap Programs are laws and regulations that prohibit the provision of certain services that support the maritime transport of Russian-origin crude oil and petroleum products from Russia to third countries or from a third country to other third countries, unless the oil or petroleum product has been purchased at or below the relevant Price Cap. The current Price Cap only applies to Russian-origin crude oil and became effective along with the applicable prohibitions on December 5, 2022. A separate price cap with respect to Russian-origin petroleum products will be announced by February 5, 2023, when the applicable prohibitions on petroleum products go into effect. *See* Question 3 below for detail on the distinction between the products covered under each of these respective price caps and prohibitions.

Following months of volatility in supplies and rising prices in the wake of Russia's further

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invasion of Ukraine, the Price Cap Programs establish a framework for the transport of seaborne Russian oil and petroleum products intended to reduce upward pressure on energy prices globally and maintain a stable supply of these products on the global market. While the Price Cap Programs were conceived as a mechanism to curtail Russia's ability to generate revenue from the sale of its energy resources, they are also designed to avoid imposing a blanket ban on the provision of all services relating to the transport of Russian oil and petroleum products, which could have far reaching and unintended consequences on global energy markets as well as on third countries that may already be experiencing economic impact as a result of the war in Ukraine.

The focus of the Price Cap-related restrictions is on maritime transport to *third countries*, not to the implementing jurisdictions themselves. Each of the U.S., UK and EU either have already banned or are in the process of phasing out the import of Russian-origin crude oil and petroleum products to their own respective jurisdictions.

While the Price Cap is set in U.S. dollars, purchases of Russian oil and petroleum products in any other currency are also implicated. If the price per barrel of the products within scope is denominated in a currency other than U.S. dollars, it must be converted for purposes of calculating whether the price falls within the Price Cap. The EU has issued specific guidance on the conversion rate to be used.[3] While guidance issued by the European Commission is not legally binding, it is viewed as highly persuasive within the EU, and other members of the Price Cap Coalition may draw upon the EU's approach.

Shipping, freight, customs and insurance costs are not included in the Price Cap. These costs should be invoiced separately and at commercially reasonable rates. Regulators have noted that unusually high costs and fees are a red flag that may indicate attempts to circumvent the Price Cap.[4] Market participants should strengthen invoicing protocols, if needed, to separately itemize and track such costs and fees and conduct risk-based due diligence where such amounts may be inflated for the purpose of evading the cap.

Question 2: What are the various implementing laws and regulations of the U.S., EU and UK Price Cap Programs?

	U.S. Department of the Treasury, Office of Foreign Assets Control ("OFAC")	**EU** Council of the European Union and European Commission	**UK** Office of Financial Sanctions Implementation ("OFSI")
Primary Legal Act	Determination Pursuant to Section I(a)(ii) of Executive Order 14071: Prohibitions on Certain Services as They Relate to the Maritime Transport of Crude Oil of Russian Federation Origin. (published Nov. 21, 2022 and effective at 12:01 a.m. eastern standard time on Dec. 5, 2022)[5] Determination Pursuant to Sections I(a)(ii), 1b and 5 of Executive Order 14071: Price Cap on Crude Oil of Russian Federation Origin. (published on and effective as of 12:01 a.m. eastern standard time on Dec. 5, 2022)[6] (Collectively, the "U.S. Determinations")	Establishing the legal basis for the price cap: Council Decision (CFSP) 2022/1909 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (Oct. 6, 2022)[7] Council Regulation (EU) 2022/1904 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (Oct. 6, 2022)[8] Implementing the price cap: Council Decision (CFSP) 2022/2369 amending Decision 2014/512/CFSP (Dec. 3, 2022)[9] Commission Implementing Regulation (EU) 2022/2368 amending Council Regulation	Chapter 4IA of the Russia (Sancti (EU Exit) Regulations 2019[12 Regulation 60HA of the Russia (Sanctions) (EU Exit) Regulatio 2019[13]

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		(EU) No 833/2014 (Dec. 3, 2022)[10] Council Regulation (EU) 2022/2367 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (Dec. 3, 2022)[11]	
Guidance	OFAC Guidance on Implementation of the Price Cap Policy for Crude Oil of Russian Federation Origin ("U.S. Guidance")[14]	European Commission Guidance on the Oil Price Cap[15] ("European Commission Guidance")	His Majesty's Treasury Industr Guidance on the Maritime Servic Prohibition and Oil Price Cap[16] (" Guidance")

Question 3: What products are covered by the Price Cap Programs and when does the Price Cap apply?

The various Price Cap Programs apply to Russian origin crude oil as described by Harmonized System ("HS") code 2709, and Russian origin petroleum products as described by HS code 2710. HS codes are administered by the World Customs Organization and are adopted nearly uniformly across all countries.

HS Code	Description
2709	Petroleum oils and oils obtained from bituminous minerals, crude. Includes Clean Condensate.
2710	Petroleum oils and oils obtained from bituminous minerals, other than crude; preparations not elsewhere specified or included, containing by weight 70% or more of petroleum oils or of oils obtained from bituminous minerals, these oils being the basic constituents of the preparations; waste oils. Includes HSFO, VGO, Kerosene.

For Russian crude oil, the Price Cap begins at the embarkment of Russian oil to sea, and lasts until the first landed sale of such oil, after customs has been cleared in a jurisdiction outside Russia. Any intermediary trade at sea as well as all ship-to-ship transfers must also occur at or below the Price Cap. The Price Cap will still apply if, after clearing customs, the oil is reintroduced into maritime commerce without undergoing origin-changing substantial transformation (as described in greater detail below).

Whether crude oil can be deemed to be of Russian origin will be determined with reference to non-preferential rules of origin. Non-preferential rules of origin are traditional customs rules used to determine the origin of products traded outside the remit of bilateral or multilateral trade agreements. The introduction of the Price Cap Programs has not changed the way in which these rules apply to determine the origin for customs purposes of Russian crude oil and petroleum products. Crude oil will not be deemed Russian origin or be subject to the Price Cap in the following circumstances:

- **Substantial transformation**: where Russian origin oil undergoes a substantial transformation in a country other than Russia, for example as a result of processing or due to a material stage of manufacturing which alters the key features of the product, it will no longer be deemed Russian origin. Generally speaking, substantial transformation includes refinement, as well as other economically justifiable actions via which the oil becomes a new product (i.e., "with a new name, character and use") or falls under a different HS code. Merely mixing or blending Russian crude oil with other non-Russian oil is generally not sufficient to constitute substantial transformation. Note that the legal tests and rules governing activities that qualify as "substantial transformation" may vary across the EU, UK and U.S. and may be product-specific.
- ***De minimis* amount**: In line with the normal application of non-preferential rules of origin, crude oil originating in a country other than Russia will not be deemed Russian origin merely because it was mixed with a *de minimis* amount of Russian crude oil by virtue of being transported in a container or tank which previously contained Russian origin crude. An example of a *de minimis* amount would be an un-pumpable amount of oil (e.g., a "tank heel") that cannot be removed without causing damage to the container.

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- **Non-Russian oil transiting through Russia**: Crude oil that can be verified as originating from a third country will not be considered Russian origin crude oil subject to the Price Cap even if it is transported through or is departing from Russia. This is consistent with the application of non-preferential rules of origin, as mere transport of goods is not an origin-conferring activity. For example, according to guidance provided by the Price Cap Coalition members, Kazakh origin oil transported through the Caspian Pipeline Consortium or the Atyrau-Samara pipeline is generally not subject to the Price Cap. However, the EU guidance notes that oil subject to the Price Cap remains so even if mixed with oil which is not subject to the Price Cap, and the Price Cap is to be applied to the relevant proportion of such commingled oil.[17] Operators may reasonably rely upon a certificate of origin provided in the ordinary course of business, but they must be alert to circumstances that suggest the a certificate has been falsified or is otherwise erroneous. Note that for this particular exception to apply, the EU and the UK require that the oil being transported through Russia be owned by a non-Russian person.

Question 4: What do the Price Cap Programs prohibit and to whom do the respective prohibitions apply?

The chart below summarizes the key prohibition in the Price Cap Programs:

	U.S.	EU	UK
Key Prohibitions	**Maritime Transport:** It is prohibited to export, re-export, sell, or supply, directly or indirectly, Covered Services (as defined below) to any person located in the Russian Federation where the purchase price of the underlying Russian origin crude oil exceeds the Price Cap.[18]	**Maritime Transport:** It is prohibited to trade, broker or transport, including via ship-to-ship transfer, crude oil and petroleum products which originate in Russia or which have been exported from Russia unless the price per barrel of such products does not exceed the Price Cap.[19]	**Maritime Transport:** It is prohibited to directly or indirectly supply or deliver by ship, including vi ship-to-ship transfer, crude oil and petroleum products which originate i Russia or which are consigned from Russia from a place in Russia to a thi country, or from one third country to another third country (i.e., countries th are neither the UK, the Isle of Man o Russia).[20]
	"**Covered Services**" means the provision of the following categories of services, as they relate to the maritime transport of Russian origin crude oil: • trading/commodities brokering • financing; • shipping; • insurance, including reinsurance and protection and indemnity ("P&I"); • flagging; and • customs brokering services.[21]	**Ancillary Services:** It is prohibited to directly or indirectly provide the following ancillary services in relation to the maritime transportation of Russian origin oil and petroleum products: • technical assistance; • brokering services; • financing; or • financial assistance, unless the purchase price per barrel of such products does not exceed the Price Cap.[22]	**Ancillary Services:** It is prohibited to directly or indirectly provide the following ancillary services pursuance of or in connection with a arrangement whose object or effect i the supply or delivery by ship of cover crude oil and oil products: • financial services; • funds; or • brokering services.[23] General Licenses are made available otherwise prohibited activities relating products sold at or below the Price Ca
Jurisdictional Scope	Applies to U.S. persons, defined to include: • any United States citizen or lawful permanent resident, wherever located;	Applies: • within the territory of the EU; • to EU nationals, wherever located;	Applies to: • United Kingdom nationals, wherever located;[26] • bodies incorporated or constituted under the law of an

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	• any entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches); or • any individual or entity in the United States.[24]	• to companies and organizations incorporated under the law of an EU member state, wherever located; • to any company or organization in respect of any business done in whole or in part within the EU; and • on board aircrafts or vessels under the jurisdiction of an EU member state.[25]	part of the United Kingdom; an • conduct in the United Kingdom in the United Kingdom's territorial sea by any person.[2

The U.S. Guidance offers additional detail on the categories of services that are "Covered Services." This guidance is summarized below:

- **Trading/commodities brokering**: Buying, selling, or trading commodities directly or brokering such transactions on behalf of others.
- **Financing**: Any commitment to provide economic resources, such as investments, funds, advances, grants, loans, guarantees or letters of credit. Note however that the following activities are specifically carved out as **not** constituting covered financial services:
    - The processing, clearing, or sending of payments by an intermediary bank that does not have any direct account relationship with the person providing the Covered Services; or
    - Foreign exchange transactions and clearing commodities futures contracts.
- **Shipping**: Owning, operating or chartering a ship to carry cargo or transport freight, as well as brokering such relationships and serving as a vessel agent.
- **Insurance**: Providing insurance and protection and indemnity ("P&I") services, whether satisfying claims for property damage or assuming risks of existing insurance policies originally underwritten by other insurance carriers, and providing liability insurance for maritime liability risks associated with the operation of a vessel.
- **Flagging**: Registering a vessel (including maintaining such registration) with a country's national registry of vessels. However, de-flagging vessels that are transporting Russian oil above the Price Cap is excluded.
- **Customs brokering**: Assisting importers and exporters to meet requirements governing imports and exports, excluding legal services or assistance meeting the requirements of U.S. sanctions.

In the EU, Council Regulation (EU) No 833/2014 and European Commission Guidance provide some definitions and explanations related to the scope of prohibited activities:

- **Technical assistance:** "Any technical support related to repairs, development, manufacture, assembly, testing, maintenance, or any other technical service, and may take forms such as instruction, advice, training, transmission of working knowledge or skills or consulting services, including verbal forms of assistance."[28]
- **Brokering services:** Services related to "(i) the negotiation or arrangement of transactions for the purchase, sale or supply of goods […] or of financial and technical services, including from a third country to any other third country, or (ii) the selling or buying of goods […] or of financial and technical services, including where they are located in third countries for their transfer to another third country."[29] In the context of the EU Price Cap Program, the European Commission stated that the Price Cap Program applies widely to a range of

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brokering services such as “commodities brokering, insurance brokering, customs brokering, [and] ship brokering.”[30]

- **Financing or financial assistance:** “Any action, irrespective of the particular means chosen, whereby the person, entity or body concerned, conditionally or unconditionally, disburses or commits to disburse its own funds or economic resources, including but not limited to grants, loans, guarantees, suretyships, bonds, letters of credit, supplier credits, buyer credits, import or export advances and all types of insurance and reinsurance, including export credit insurance;” note that “payment as well as terms and conditions of payment of the agreed price for a good or a service, made in line with normal business practice, do not constitute financing or financial assistance.”[31]

Similar to the EU, the UK Russia (Sanctions) (EU Exit) Regulations 2019 and UK sanctions guidance provide definitions of the services caught:

- **Financial services:** means any service of a financial nature, including (but not limited to) payment and money transmission services, charge and debit cards, travellers’ cheques and bankers’ drafts[32], insurance or re-insurance, and other related services.[33]
- **Funds**: means financial assets and benefits of every kind.[34]
- **Brokering services**: means any service to secure, or otherwise in relation to, an arrangement, including involving the selection or introduction of persons as parties or potential parties to the arrangement; the negotiation of the arrangement; the facilitation of anything that enables the arrangement to be entered into; or the provision of any assistance that in any way promotes or facilitates the arrangement.[35]

Question 5: Are there any applicable exceptions or licenses?

Yes, the Price Cap Programs do contain certain exceptions and licenses:

- **Russian oil loaded before the Price Cap effective date**: Russian oil that is loaded onto a vessel at the port of loading before 12:01 a.m. EST on December 5, 2022 and unloaded at the port of destination before 12:01 a.m. EST on January 19, 2023 is not subject to the Price Cap. This means that providers of Covered Services (in the U.S. terminology), or providers of relevant Ancillary Services (in the UK and EU terminology), can provide such services related to Russian origin crude oil that meets these terms without respect to the Price Cap.
- **Sakhalin-2 project**: The U.S.,[36] the UK,[37] and the EU,[38] each permit the provision of services related to maritime transportation of Russian origin crude oil originating from the Sakhalin-2 project until September 30, 2023 (U.S. and UK), or June 5, 2023 (EU), as long as such oil is destined solely for importation into Japan.
- **Imports into certain EU member states**: The U.S.,[39] EU,[40] and UK,[41] each permit the provision of services for maritime transportation of Russian origin crude oil if it relates to permissible importation of such oil into Bulgaria, Croatia, or landlocked European Union Member States, consistent with the terms of pre-existing EU exceptions.
- **Processing of payments**: The UK issued a General License indefinitely authorizing certain institutions to process, clear or send payments from any person/entity in connection with activities that would otherwise breach the prohibition to provide financial services and funds relating to maritime transportation of certain oil and oil products, subject to certain conditions.[42] As noted above, the U.S. also authorizes similar activities by way of definitional carve out related to what constitutes covered “financial services,” as opposed to using a General License.

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- **Emergencies**: The U.S.,[43] EU,[44] and UK[45] each authorize otherwise prohibited services that are necessary to address vessel emergencies related to crew health or safety or protection of the environment. The exception does not cover the sale of the subject cargo. In the UK, any person purporting to act under this exception must notify OFSI within 5 working days of the act using the appropriate form.[46] In the EU, operators must notify the national competent authority immediately once the event has been identified.
- **Specific licenses**: The availability of specific licenses for activities not within the Price Cap differ across the three principal jurisdictions. In the U.S., if a provider of Covered Services becomes aware that it is providing a Covered Service for Russian oil purchased above the Price Cap, they must immediately stop providing such services and contact OFAC. If the U.S. person has complied with the attestation process (described below) and believes that it should continue to provide services despite violations by third parties, the U.S. provider may submit a written application for a specific license, which OFAC will consider on a case-by-case basis. In the UK, a specific licence may be applied for to deal with an extraordinary situation (one that is unexpected, unavoidable, and not recurring) by filling out the relevant application form and returning it to OFSI.[47] Note that in neither jurisdiction will specific licences be issued retroactively. Note that the EU has not issued any General Licenses. All the derogations from the prohibitions are contained in the main body of Council Regulation 833/2014.

Question 6: What are the U.S., UK and EU Price Cap Program compliance obligations and diligence expectations (including attestation and reporting requirements)?

Each of the principal jurisdictions has gone to significant lengths to provide tailored compliance and recordkeeping guidance to the various actors within the maritime transportation services supply chain. Notably, the U.S., UK and EU have each set forth a detailed attestation process by which maritime transportation industry actors can benefit from a “safe harbor” from prosecution arising out of violations by third parties. By obtaining price information or an attestation from relevant counterparties, ship owners, charterers, insurers, financial institutions and others throughout the maritime supply chain may substantially mitigate their risk of non-compliance arising out of misrepresentations or evasive actions taken by third parties in violation of the Price Cap Programs. Relevant authorities in the three principal jurisdictions have indicated that compliance with the recordkeeping and attestation framework will generally shield a service provider from the otherwise strict liability regime.

With respect to the compliance framework, the U.S., UK and EU have divided maritime transportation service providers into three tiers. In general terms, Tier 1 actors are those who have access to price information in the ordinary course of business (e.g., commodities brokers and importers). Tier 2 actors are those who have direct relationships with Tier 1 actors (e.g., financial institutions engaged in trade finance and charterers). Tier 3 actors are those who have direct relationships with Tier 2 actors (e.g., ship owners and insurers). At each tier, a service provider that obtains price information or, where it is not practical to request price information, obtains an attestation from the tier above it, and otherwise conducts appropriate, risk-based due diligence, will be eligible for the safe harbor and generally will not be the target of an enforcement action. To qualify for the safe harbor, price information and/or an attestations must be retained for five years. Further, actors must act reasonably and in good faith when relying on price information or an attestation and should follow up on any red flags that may suggest price information or an attestation is misleading or unreliable.

The table below provides a side-by-side comparison by jurisdiction of the documentary, due diligence and reporting requirements expected of actors within each tier.

	Tier 1	Tier 2	Tier 3

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	Actors with direct access to price information	Actors who are sometimes able to request and receive price information in the ordinary course of business	Actors who do not regularly have access to price information in the ordinary course of business
Actors	***U.S./UK/EU***. Including, but not limited to: • commodities brokers and traders; • importers; • refiners; and • other persons acting in their capacity as seller or buyer of Russian oil.	***U.S./UK/EU***. Including, but not limited to: • financial institutions providing relevant financing; • customs brokers; • ship/vessel agents; and • charterers.	***U.S./UK/EU***. Including, but not limited to: • ship owners; • insurance brokers; • cargo and HM insurers; • P&I clubs; • reinsurers; • flagging registries; and • ship managers.
Price Information and Attestations	***U.S. and EU***. Tier 1 actors must retain and share price information, or provide an attestation, to Tier 2 or Tier 3 actors, as needed. Price information may be documented in invoices, contracts or receipts/proof of accounts payable. Price should be invoiced separately from shipping, freight, customs, and insurance costs.	***U.S. and EU.*** Tier 2 actors request and retain price information or an attestation from Tier 1 actors or customers/counterparties. Tier 2 actors must also provide price information or an attestation to Tier 3 actors, as needed.	***U.S. and EU.*** Tier 3 actors must receive an attestation from Tier 1 or Tier 2 actors or customers/counterparties regarding compliance with the price cap. For insurers and ship owners, they may include price cap compliance language in relevant contracts.
	UK. Tier 1 actors must, on request, share with Tier 2 and Tier 3 actors information on: i. the unit price; ii. details as to the most recent transaction (including point of departure and ultimate destination, the unit price of the oil at the time of the transaction and the Price Cap at the time of the transaction); and iii. details of the Price Cap at the time of sharing the price information. If the above is not practicable, a signed attestation that the price paid on a per-barrel basis (i.e. the unit price) does not breach the Price Cap set out in the GL on the date of the transaction.	***UK.*** Tier 2 actors must: i. request and retain price information or an attestation form from their Tier 1 counterparty (or in the case of financial institutions, downstream customer or subcontractors); ii. share price information/attestation with any counterparty that requests it; and iii. undertake appropriate due diligence to satisfy themselves, based on the information available, of the reliability and accuracy of any price information/attestation received. A service provider must not proceed with any transaction if it has not received price information/attestation within 5 days of such request.	***UK.*** Tier 3 actors must: i. ensure any counterparty has committed not to purchase Russian oil or oil products above the Price Cap – either through provision of a signed attestation or inclusion of an attestation in contractual obligations; and ii. undertake appropriate due diligence to satisfy themselves, based on the information available, of the reliability and accuracy of any price information/attestation received.
Reporting Obligations	***U.S.*** U.S. persons are not required to report transactions in compliance with the Price Cap. U.S. persons are required to reject participation in an evasive transaction or a transaction that violates the Price Cap, and report such rejection to OFAC consistent with existing reporting requirements. ***EU***. EU operators are not required to report transactions in compliance with the Price Cap. Tips or information regarding possible circumvention should be reported to national competent authorities or via the EU whistle-blower tool.		
	UK. UK persons are required to report to HM Treasury each time an activity purporting to be permitted under the GL	***UK.*** UK persons are required to ask and receive confirmation that the Tier 1 actor has reported to HM Treasury as required	***UK.*** When dealing directly with a Tier 1 actor, UK persons are required to ask and receive confirmation from the Tier 1

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	is undertaken. These activities must be notified to HM Treasury within 40 days of each transaction. Where there are multiple activities undertaken within a 30-day period, the Tier 1 actor may combine them into one consolidated report. All UK involved persons must report to HM Treasury as soon as practicable if they know or have reasonable cause to suspect a person is a designated person or has violated the Price Cap.	under the GL. This confirmation can be received on a quarterly basis. Where confirmation is not received, a Tier 2 actor is required to report to HM Treasury within 60 days and withdraw their services as soon as reasonably practicable. No confirmation is required for transactions with a non-UK Tier 1 actor, but notification to HM Treasury of this situation within 60 days, which can be undertaken on a quarterly basis. All UK involved persons must report to HM Treasury as soon as practicable if they know or have reasonable cause to suspect a person is a designated person or has violated the Price Cap.	actor that it has reported to HM Treasury as required under the GL. This confirmation can be received periodically, in line with the attestation process described above. Where confirmation is not received, a Tier 3 actor is required to report this to HM Treasury within 60 days and withdraw their services as soon as reasonably practicable. No confirmation is required for transactions with a non-UK Tier 1 actor, but notification to HM Treasury of this situation is required within 60 days, which can be undertaken periodically, in line with the attestation process described above. All UK involved persons must report to HM Treasury as soon as practicable if they know or have reasonable cause to suspect a person is a designated person or has violated the Price Cap.
Record Keeping Obligations	***U.S.*** To be eligible for the safe harbor, U.S. service providers must retain relevant records, including price information or attestations as well as all other relevant business records, for five years. ***EU.*** EU operators are expected to retain relevant records for a minimum of five years from the date of transport. ***UK.*** All involved persons must keep accurate and complete records demonstrating compliance with the terms of the relevant general license, which should include the following information: i. a description of the activity taking place; ii. a description of the nature of any goods, services or funds to which the activity relates; iii. the date of the activity or the dates between which the activity took place; iv. the value and/or quantity of any goods, services or funds to which the activity relates; v. the person's name and address; vi. the name and address of any consignee of goods to which the activity relates or any recipient of services or funds to which the activity relates; vii. the name and address of the end-user of the goods, services or funds to which the activity relates (in so far as known); viii. the name and address of the supplier of any goods to which the activity relates; and ix. copies of any attestation produced or supplied. UK persons must retain documentation related to a transaction conducted under a GL for a minimum of 4 years beyond the end of the calendar year in which the record was created.		
Due diligence expectations	***U.S.*** U.S. service providers must continue to implement and perform the standard due diligence practices that are customary for their industry and for a person in their role in a particular transaction in order to be eligible for the safe harbor. U.S. persons should review all relevant documentation received in the ordinary course of business to determine whether a transactions is prohibited or whether there are red flags that indicate potential circumvention.		

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	EU. EU operations have to perform appropriate due diligence calibrated according to the specificities of their business and the related risk exposure, accounting for the tier they are in, in order to ensure compliance. ***UK***. As noted above, UK persons must undertake appropriate due diligence to satisfy themselves, based on the information available, of the reliability and accuracy of any price information or attestation received.

OFAC and the HM Treasury have published a sample attestation form, which can be accessed here and here, respectively. The European Commission has published a similar attestation form in its guidance.[48]

Service providers are not required to adopt the exact language provided by the sample attestations in order to be afforded the safe harbor; depending on a service provider's role in the transaction, they may tailor the sample language based on the availability of information available to them and the identity of their counterparty. Furthermore, depending on timing, the attestations may state that the Russian oil was or will be purchased in compliance with the Price Cap. Note that an authorized representative of the customer or counterparty must sign the attestation for it to be effective.

Given that a violation of the prohibition can lead to civil or criminal penalties, it is important that service providers follow the relevance guidance on due diligence and recordkeeping, on top of carrying out their existing due diligence practices. As a general point of compliance, service providers should update their internal procedures and standard forms to incorporate requirements for price information or requests for signed attestations. Service providers should also provide regular training to staff on how to identify red flags in the supply chain or signs of fraud in price documentation.

Finally, OFAC and OFSI have a wide remit to take actions against those who willfully breach, evade, avoid, cause a violation of, or attempt to violate the Price Cap Program. The U.S. Guidance provide several examples of conduct that could elicit an enforcement response, including a purchase of Russian origin oil above the Price Cap while knowingly relying on U.S. service providers who provide covered services, or knowingly providing false information, documentation, or attestations to a service provider. Evasive tactics such as using side deals to obfuscate the "real" purchase price paid by an intermediary or the ultimate purchaser may also warrant civil or criminal penalties.[49] Similarly, UK guidance notes that enforcement actions will be taken against those who falsify the information on attestations.[50]

In the EU, national competent authorities in EU Member States are in charge of sanctions enforcement. As such, they will be in charge of determining whether the Price Cap measures are being circumvented. In doing so, national competent authorities will consider whether the EU operator took the appropriate steps to ensure compliance with the Price Cap. It is important to remember that liability for inchoate offences (such as conspiring to commit) or offences of complicity (such as aiding, encouraging, abetting, assisting) take effect through the domestic legal orders of EU Member States. These laws can vary significantly from one EU Member State to another (including on key issues such as jurisdiction or the required mental element).

Conclusion

As is apparent from the above analysis, the U.S., UK and EU Price Cap Programs are quite similar in their focus and applicability from a general sense, but there are nuances among the various Programs which impose slightly different requirements on service providers based on their jurisdiction.

It remains to be seen whether other countries will eventually join the Price Cap Coalition and/or agree to implement similar restrictions in the future, which could create additional complexity in the global energy supply chain where Russian origin oil or petroleum products are involved.

Notably, the level of the Price Cap may not have resulted in as significant an impact as

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was anticipated prior to its imposition, as the price of Russian Urals crude has been declining since December 1, 2022 through the implementation of the Price Cap on December 5, 2022, and as of the publication of this alert, is already trading below $55 per barrel. We would expect to see further impact and disruption from the Price Cap Programs if, and likely when, the Price Cap Coalition lowers the Price Cap of $60 per barrel of crude oil in the future.

The higher the global market clearing price for oil is above the Price Cap, the more distortions in the market we would expect to see, along with some potential unpredictable effects including supply challenges, more sophisticated sanctions evasion efforts and networks, or more meaningful push back from Russia. Already the Price Cap has resulted in some unintended hiccups, such as creating a bottleneck of tankers blocked at the Bosphorous and Dardanelles straits by Turkish authorities requiring vessels to produce evidence of proper P&I insurance, even though a significant number of the tankers may not have been transporting Russian origin oil.[51]

Finally, given the global nature of energy markets, there are various other externalities which could affect market prices for crude oil and the effectiveness and implications of the Price Cap, including decisions by OPEC to alter production levels, or other actions affecting the overall supply of oil in the market (for example, OFAC recently issued a license authorizing Chevron to resume extraction and exportation to the U.S. of Venezuelan crude).[52]

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[1] See Statement of Treasury Sec'y Janet L. Yellen on the announcement of the price cap, U.S. Dept of the Treasury (December 2, 2022), https://home.treasury.gov/news/press-releases/jy1138; Statement of the G7 and Australia on a price cap for seaborne Russian-origin crude oil, published by the German Federal Foreign Office (December 2, 2022), https://www.auswaertiges-amt.de/en/newsroom/news/g7-australia-price-cap-seaborne-russian-origin-crude-oil/2567026.

[2] See Official Press Release by the European Council (December 3, 2022), https://www.consilium.europa.eu/en/press/press-releases/2022/12/03/russian-oil-eu-agrees-on-level-of-price-cap/.

[3] See FAQ 3 of the European Commission Guidance on the Oil Price Cap, available at https://finance.ec.europa.eu/system/files/2022-12/guidance-russian-oil-price-cap_en_0.pdf .

[4] See, e.g., OFAC Guidance on Implementation of the Price Cap Policy for Crude Oil of Russian Federation Origin, Nov. 22, 2022, available at https://home.treasury.gov/system/files/126/price_cap_policy_guidance_11222022.pdf.

[5] Available at https://home.treasury.gov/system/files/126/determination_11222022_eo14071.pdf.

[6] Available at https://home.treasury.gov/system/files/126/20221205_Price_cap_determination.pdf.

[7] Available at https://eur-lex.europa.eu/eli/dec/2022/1909/oj. Note that Council Decisions are only binding on those to whom they are addressed, i.e. Member States. Regulations are needed to make Decisions apply automatically and uniformly within each Member State.

[8] Available at https://eur-lex.europa.eu/eli/reg/2022/1904/oj.

[9] Available at https://eur-lex.europa.eu/eli/dec/2022/2369/oj.

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[10] Available at https://eur-lex.europa.eu/eli/reg_impl/2022/2368/oj. Note that Implementing acts by the Commission are legally binding and set conditions to ensure the uniform application of EU laws.

[11] Available at https://eur-lex.europa.eu/eli/reg/2022/2367/oj.

[12] Available at https://www.legislation.gov.uk/uksi/2022/1122/regulation/4/made.

[13] Available at https://www.legislation.gov.uk/uksi/2022/1122/regulation/5/made.

[14] OFAC Guidance on Implementation of the Price Cap Policy for Crude Oil of Russian Federation Origin, Nov. 22, 2022, available at https://home.treasury.gov/system/files/126/price_cap_policy_guidance_11222022.pdf; See also U.S. Publishes Preliminary Guidance on the Implementation of a Maritime Services Policy and Related Price Exception for Seaborne Russian Oil, published by Gibson, Dunn & Crutcher LLP (September 19, 2022), https://www.gibsondunn.com/us-publishes-preliminary-guidance-on-implementation-of-maritime-services-policy-and-related-price-exception-for-seaborne-russian-oil

[15] European Commission Guidance on the Oil Price Cap, available at: https://finance.ec.europa.eu/system/files/2022-12/guidance-russian-oil-price-cap_en_0.pdf .

[16] His Majesty's Treasury Industry Guidance on the Maritime Services Prohibition and Oil Price Cap, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1121744/Russian_Oil_Services_Ban_-_HMT_Industry_Guidance.pdf

[17] See FAQ 8 of the European Commission Guidance on the Oil Price Cap.

[18] Determination Pursuant to Section l(a)(ii) of Executive Order 14071: Prohibitions on Certain Services as They Relate to the Maritime Transport of Crude Oil of Russian Federation Origin, available at https://home.treasury.gov/system/files/126/determination_11222022_eo14071.pdf.

[19] Arts. 3n(4) and 3n(6)(a) of Council Regulation (EU) No 833/2014, as amended.

[20] Reg. 46Z9B of The Russia (Sanctions) (EU Exit) Regulations 2019.

[21] Determination Pursuant to Section l(a)(ii) of Executive Order 14071: Prohibitions on Certain Services as They Relate to the Maritime Transport of Crude Oil of Russian Federation Origin, available at https://home.treasury.gov/system/files/126/determination_11222022_eo14071.pdf.

[22] Arts. 3n(1) and 3n(6)(a) of Council Regulation (EU) No 833/2014, as amended.

[23] Reg. 46Z9C and 46Z9D of The Russia (Sanctions) (EU Exit) Regulations 2019.

[24] See Executive Order 14071, 87 Fed. Reg. 20999 (Apr. 6, 2022), https://home.treasury.gov/system/files/126/14071.pdf.

[25] Art. 13 of Council Regulation (EU) No 833/2014.

[26] Note that this includes a British overseas territories citizen, a British National (Overseas) or a British Overseas citizen, a person who under the British Nationality Act 1981 is a British subject, or a British protected person within the meaning of the British Nationality Act 1981.

[27] See s. 21 of the Sanctions and Anti-Money Laundering Act 2018 available here:

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https://www.legislation.gov.uk/ukpga/2018/13/section/21

[28] Art. 1(c) of Council Regulation (EU) No 833/2014.

[29] Art. 1(d) of Council Regulation (EU) No 833/2014.

[30] Guidance on oil price cap, published by the European Commission (December 3, 2022), https://finance.ec.europa.eu/document/download/a4ae6bb7-538b-4b54-ad21-f22c4412ddb5_en?filename=guidance-russian-oil-price-cap_en_0.pdf, Question 19.

[31] Art. 1(o) of Council Regulation (EU) No 833/2014.

[32] OFSI Guidance on General guidance for financial sanctions under the Sanctions and Anti-Money Laundering Act 2018 available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1100991/General_Guidance_-_UK_Financial_Sanctions__Aug_2022_.pdf

[33] See s. 61 of the Sanctions and Anti-Money Laundering Act 2018 for further details.

[34] See s. 60 of the Sanctions and Anti-Money Laundering Act 2018 for further details.

[35] See regulation 21 of the Russia (Sanctions (EU Exit) Regulations 2019

[36] General License No. 55 Authorizing Certain Services Related to Sakhalin-2, Russian Harmful Foreign Activities Sanctions Regulations, 31 CFR part 587, published by OFAC (November 22, 2022), https://home.treasury.gov/system/files/126/russia_gl55.pdf.

[37] By virtue of General License INT/2022/2470156, available here https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1121733/2470156_Sakhalin_Island_GL.pdf.

[38] Art. 3n(6)(c) and Annex XIX of Council Regulation (EU) No 833/2014, as amended.

[39] General License No. 56 Authorizing Certain Services with Respect to the European Union, Russian Harmful Foreign Activities Sanctions Regulations, 31 CFR part 587, published by OFAC (November 22, 2022), https://home.treasury.gov/system/files/126/russia_gl56.pdf.

[40] Council Regulation (EU) 2022/879 of June 3, 2022.

[41] By virtue of General License INT/2022/2470156, available here https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1121733/2470156_Sakhalin_Island_GL.pdf.

[42] GL INT/20222/2470056, available here https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1121732/2470056_Correspondent_Banking_GL.pdf.

[43] General License No. 57 Authorizing Certain Services Related to Vessel Emergencies, Russian Harmful Foreign Activities Sanctions Regulations, 31 CFR part 587, published by OFAC (November 22, 2022),https://home.treasury.gov/system/files/126/russia_gl57.pdf.

[44] Art. 3n(9) of Council Regulation (EU) No 833/2014, as amended.

[45] Regulation 61 of The Russia (Sanctions) (EU Exit) Regulations 2019

[46] Available here https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_

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[47] Available here https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1121881/Extraordinary_Situation_Specific_Licence_Application_form_.docx

[48] See European Commission Guidance on the Oil Price Cap, p. 19.

[49] *See* U.S. Guidance, p. 6.

[50] See His Majesty's Treasury Industry Guidance on the Maritime Services Prohibition and Oil Price Cap, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1121744/Russian_Oil_Services_Ban_-_HMT_Industry_Guidance.pdf

[51] *See* Butler, Daren and Sezer, Can, "Turkey oil tanker logjam snarls Russia oil sanctions," Reuters (Dec. 9, 2022), available at: https://www.reuters.com/world/oil-tankers-waiting-pass-through-istanbuls-bosphorus-strait-rises-20-shipping-2022-12-09/.

[52] General License No. 41 Authorizing Certain Transactions Related to Chevron Corporation's Joint Ventures in Venezuela, Venezuela Sanctions Regulations, 31 CFR part 591, published by OFAC (November 26, 2022), https://home.treasury.gov/system/files/126/venezuela_gl41.pdf

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