

RUSSIAN OIL PRICE CAP: PROBLEMS OF REGULATION BY EU LAW

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ABSTRACT

This article analyses the legal challenges and uncertainties faced by the European Union in regulating the price cap on Russian oil. Initiated by the Price Cap Coalition, comprising major Western nations, the price cap is an innovative legal tool aimed at restricting Russian oil revenues amidst the ongoing war between Russia and Ukraine. The article examines the legal nature of the Price Cap Coalition and discusses whether this coalition constitutes an international agreement. It includes an in-depth analysis of the price cap's legal framework, including its personal, temporal, and material scope. Furthermore, the article scrutinises the legal complexities, such as compliance issues, exemptions, contradictions, and imperfections within EU rules. Additionally, it addresses Russian legal countermeasures against the price cap mechanism. The analysis concludes that while legally innovative, the mechanism's efficacy is undermined by structural weaknesses in its legal design and compliance framework.

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I. INTRODUCTION

In December 2022, ten months after the beginning of the full-scale war between Russia and Ukraine, the EU, the USA, the UK, Canada, Japan, and Australia established a price cap for Russian oil at \$60 per barrel. Subsequently, they set an additional price cap for Russian petroleum products. In press releases, those countries and entities named themselves the Price Cap Coalition.

Despite this somewhat misleading name, the members of the Price Cap Coalition do not buy Russian oil at any price because they had completely prohibited such deliveries several months before the price cap was established. However, under the price cap mechanism, they try to regulate the prices of Russian oil supplied to third countries, i.e., countries not participating in the Price Cap Coalition, such as China and India. For that purpose, the members of the Coalition prohibited the provision of certain services related to the transportation of Russian oil to third countries, if the price of that oil is higher than the established price cap.

This type of international sanction has never been used before, and some researchers characterise it as ‘an experiment in global economic and security management’¹. Consequently, it has attracted significant attention from researchers and commentators. Currently, most publications concerning the price cap mechanism focus on issues of its impact (or lack of impact) on the Russian economy and war potential, as well as Russian efforts to circumvent the sanctions and mitigate their impact². At the same time, the purely legal aspect of the Russian oil price cap mechanism attracts less scientific attention.

The price cap mechanism, being an international political arrangement, is not an international legal instrument itself. Rather, from a legal point of view, the price cap mechanism operates as a sum of similar legal norms independently adopted by the respective participants of the Price Cap Coalition. The European Union is one of the participants of the Price Cap Coalition, and it regulates the price cap mechanism by its own supranational law. This article is devoted to the legal problems and uncertainties of this regulation under EU law.

¹ Jan Stockbruegger, ‘Reducing Russia’s Oil Revenues’ (2023) 168 *The RUSI Journal* 34.

² For example, Simon Johnson, Lukasz Rachel and Catherine Wolfram, ‘Design and Implementation of the Price Cap on Russian Oil Exports’ (2023) 51 *Journal of Comparative Economics* 1244; A.I. Gromov, ‘New Geography of Russian Oil Cargo Exports under Embargo and Price Ceiling Conditions’ (2025) 15 *Regional Research of Russia* 228; Jan Stockbruegger, ‘Reducing Russia’s Oil Revenues’ (2023) 168 *The RUSI Journal* 34; Khaled Fouad, ‘The Russian Oil Ban: Reassessment of The Effectiveness of Sanctions’ (2024) 30 *European Journal on Criminal Policy and Research* 261; Johan Gars, Daniel Spiro, Henrik Wachtmeister ‘Winners and Losers of a Russian Oil-Export Restriction’ [2025] *Public Choice*.

II. LEGAL NATURE OF THE PRICE CAP COALITION

The first step to introduce the price cap mechanism was taken during the G7 summit at Elmau, Germany, on 28 June 2022. The final G7 communiqué states: *‘as we phase out Russian oil from our domestic markets, we will seek to develop solutions that meet our objectives of reducing Russian revenues from hydrocarbons, and supporting stability in global energy markets, while minimising negative economic impacts, especially on low- and middle-income countries. In this respect, we welcome the decision of the European Union to explore with international partners ways to curb rising energy prices, including the feasibility of introducing temporary import price caps where appropriate’*³.

Then, on 2 September 2022, G7 ministers of finance issued a common statement⁴. In that statement, the ministers confirmed their joint political intention to finalise and implement a comprehensive prohibition of services which enable maritime transportation of Russian-origin crude oil and petroleum products globally if those goods are purchased above the price cap determined by the coalition of countries implementing the price cap. The G7 finance ministers expressed their objective to establish a broad and diverse oil price coalition and invited all countries to provide input on the future price cap’s design.

On 2 December 2022, the G7 countries announced that they had agreed on the specific level of the Russian oil price cap, i.e., \$60 per barrel⁵. The statement also included an expression of the G7 countries’ intention to harmonise the implementation of the price cap across their jurisdictions to the maximum extent possible, minimising complexity and burdens for market actors.

The price cap mechanism was established as a coordinated measure agreed upon in detail by several countries. Importantly, this measure by its nature cannot be effectively implemented without close coordination between several states. For the oil price cap to be enforceable, all participants of the coalition should use the same level of the price cap, the same definitions and exemptions, and the same methodology for control.

In practice, those aspects of the price cap measure are indeed closely coordinated between the members of the Coalition. However, such a factual

³ G7, ‘G7 Leaders’ Communiqué’ (28 June 2022) <www.consilium.europa.eu/media/57555/2022-06-28-leaders-communiqué-data.pdf> accessed 21 July 2024.

⁴ G7, ‘G7 Finance Ministers’ Statement on the united response to Russia’s war of aggression against Ukraine’ (2 September 2022) <www.bundesfinanzministerium.de/Content/EN/Downloads/G7-G20/2022-09-02-g7-ministers-statement.pdf> accessed 21 July 2024.

⁵ ‘Statement of the G7 and Australia on a price cap for seaborne Russian-origin crude oil’ (2 December 2022) <www.auswaertiges-amt.de/en/newsroom/news/g7-australia-price-cap-seaborne-russian-origin-crude-oil/2567026#:~:text=The%20G7%20and%20Australia%2C%20as,for%20the%20price%20cap%20on> accessed 21 July 2024.

coordination does not necessarily mean that the participants of the coalition are legally obliged to establish the price cap in the same manner.

The political agreement between the participants of the oil price cap cannot be considered an international treaty. There are both formal and practical arguments for this conclusion. From a formal point of view, no written instrument has been agreed to between the participants of the Coalition which can be considered as an international treaty establishing the price cap. The above-mentioned G7 communiqués are not precise and do not include specific legal obligations for participants. Also, there are participants in the coalition (such as Australia) who are not members of the G7.

From a purely theoretical point of view, it can be imagined that the price cap mechanism is some kind of unusual international treaty agreed to in oral form. However, this is not the case because the participants of the coalition themselves do not perceive their participation in the price cap mechanism as an international legal obligation (at least, nobody has expressed such a perception). It is not impossible to recognise a certain agreement as a binding treaty if some participants consider it binding and others consider it non-binding. However, it would be contrary to logic to argue for the binding nature of an agreement, if all participants consider it non-binding.

In doctrine, the intention of parties to create binding obligations is considered the key distinction between international treaties and mere political agreements: ‘as a general rule, the parties must intend to create a legally binding instrument comprising rights and obligations in order to conclude a “treaty” in terms of the VCLT’⁶. Additionally, the lack of intention to create legally binding obligations means that the respective agreement is not ‘governed by international law’ and, therefore, is not a treaty for the purpose of the Vienna Convention on the Law of Treaties.⁷

In the case of the price cap coalition, there is no indication that the parties consider their participation in the scheme as legally obligatory. For example, no party has tried to register that agreement with the UN Secretariat according to Art. 102 of the United Nations Charter. Hence, the agreement of the Coalition states regarding the price cap mechanism and its specific configuration is rather a political arrangement which does not impose specific obligations on its participants under international law.

⁶ Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2011) 40.

⁷ „Whilst not immediately apparent from the text, the requirement that an agreement is governed by international law embraces the intention of the parties to create international legal obligations rather than non legally binding statements of policy”. Mark E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill 2009) 81.

However, internal legal acts of the Coalition's participants may legally oblige such a participant to coordinate steps related to the price cap mechanism with other members of the Coalition. For example, according to Article 4p(9) of Council Decision 2014/512/CFSP⁸, the Council, acting by unanimity on a proposal by the High Representative with the Commission's support, shall amend the level of the price cap *on the basis of the prices agreed by the Price Cap Coalition*. Thus, formally speaking, it would be illegal for the EU to amend the price cap level without an agreement with the other Coalition members. Hence, not only political but also legal obligations exist among the Price Cap Coalition members. However, those obligations arise from internal legal acts, not from an international treaty.

III. LEGAL GROUNDS OF THE PRICE CAP MECHANISM

Since the Price Cap Coalition is not founded on a binding international treaty, each member of the Coalition regulates the price cap mechanism by its own internal laws.

For example, in the USA, the legal grounds for a price cap mechanism include the International Emergency Economic Powers Act⁹, Executive Order 14071 of 6 April 2022¹⁰, the Determination pursuant to section 1(a)(ii) of executive order 14071 - Prohibitions on Certain Services as They Relate to the Maritime Transport of Crude Oil of Russian Federation Origin (issued by the US Department of the Treasury), and General Licenses nr. 55, 56, and 57¹¹ issued by the Office of Foreign Assets Control.

In the EU, the price cap mechanism is regulated by legal acts adopted at the Union level. Back in 2014, the Council of the European Union adopted Council Decision 2014/512/CFSP establishing economic sanctions against Russia. Simultaneously, that Council Decision was supplemented by Council Regulation (EU) No 833/2014¹². Since then, those acts have been significantly expanded, most notably in 2022. On 6 October 2022, those acts were amended by Council

⁸ Council Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2014] OJ L229/13

⁹ International Emergency Economic Powers Act, 50 USC § 1701.

¹⁰ Exec Order No 14071, Prohibiting New Investment in and Certain Services to the Russian Federation in Response to Continued Russian Federation Aggression, 87 FR 20999 (6 April 2022).

¹¹ Publication of Russian Harmful Foreign Activities Sanctions Regulations Determination and Web General Licenses 55, 56, and 57, 87 FR 76931 (16 December 2022).

¹² Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2014] OJ L229/1.

Decision (CFSP) 2022/1909¹³ and Council Regulation (EU) 2022/1904¹⁴ which introduced the price cap mechanism.

The content of Council Decision 2014/512/CFSP and Regulation 833/2014 is similar, but those acts have different legal nature. Council Decision 2014/512/CFSP was adopted unanimously in the framework of the common foreign and security policy, under Title V Chapter 2 of the Treaty on the European Union¹⁵, and may be amended only in the same way. Regulation 833/2014 was adopted by a qualified majority of the Council under Article 215 of the Treaty on the Functioning of the European Union¹⁶. The purpose of Regulation 833/2014 is to provide the necessary legal measures in order to implement Council Decision 2014/512/CFSP which has a rather political nature.

Additionally, members of the Price Cap Coalition issued acts of soft law, such as official guidelines which describe the application of the price cap mechanism. For example, in the USA, the Office of Foreign Assets Control (OFAC) published Guidance on Implementation of the Price Cap Policy for Crude Oil and Petroleum Products of Russian Federation Origin¹⁷.

According to recital 20 to Council Decision (CFSP) 2022/1909 of 6 October 2022, *the Commission, in close consultation with the Council, would issue guidance to specify the practical aspects of the price cap application, in order to facilitate uniform application and enable a level playing field in the Union and globally*. Such guidance was added to a broader document prepared by the Commission: Consolidated FAQs on the implementation of Council Regulation No 833/2014 and Council Regulation No 269/2014¹⁸.

¹³ Council Decision (CFSP) 2022/1909 of 6 October 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2022] OJ L259I/122.

¹⁴ Council Regulation (EU) 2022/1904 of 6 October 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2022] OJ L259I/3.

¹⁵ Consolidated version of the Treaty on European Union [2016] OJ C202/13

¹⁶ Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C202/47

¹⁷ Office of Foreign Assets Control, 'Guidance on Implementation of the Price Cap Policy for Crude Oil and Petroleum Products of Russian Federation Origin' (20 December 2023) <https://ofac.treasury.gov/media/931036/download?inline> accessed 21 July 2024.

¹⁸ European Commission, 'Consolidated FAQs on the implementation of Council Regulation No 833/2014 and Council Regulation No 269/2014' (22 June 2022, as updated) https://finance.ec.europa.eu/document/download/66e8fd7d-8057-4b9b-96c2-5e54bf573cd1_en?filename=faqs-sanctions-russia-consolidated_en.pdf accessed 21 July 2024.

IV. OBJECTIVES OF THE PRICE CAP MECHANISM

Only one purpose of the price cap mechanism is mentioned in Regulation 833/2014. According to Article 3n(11) of that Regulation, the objectives of the price cap mechanism include reducing Russia's oil revenues. However, it is clear from the plural noun 'objectives' that other, unmentioned purposes also exist.

Additional information may be found in the preambles to EU legal acts and in the Commission's FAQs. According to recital 20 to Council Decision (CFSP) 2022/1909 of 6 October 2022, the price cap mechanism should a) mitigate adverse consequences on energy supply to third countries and b) reduce price surges driven by extraordinary market conditions, while c) limiting Russian oil revenues.

According to the Commission's FAQs, there are three objectives of the price cap mechanism: a) maintain a reliable supply of seaborne Russian crude oil and petroleum products to the global market; b) reduce upward pressure on energy prices; and c) reduce Russia's revenues and curtail its ability to wage a war of aggression against Ukraine.

It is necessary to mention that the reduction of Russia's oil production is not a purpose of the price cap mechanism (although it may be a purpose of other international sanctions against Russia).

V. PERSONAL SCOPE OF THE PRICE CAP MECHANISM

There are many parties which may be involved in trade in Russian oil and petroleum products: a Russian company selling oil, a buyer from a third country, a ship transporting Russian oil (possibly under the flag of Russia, a third country, or an EU Member State), or a person providing services in relation to the transportation of Russian oil, which may be established in Russia, in a third country, or in the EU. Therefore, it is necessary to clarify, which of those persons are obliged to comply with the price cap mechanism under EU law.

According to Article 13 of Regulation 833/2014, this Regulation shall apply: a) within the territory of the Union; b) on board any aircraft or any vessel under the jurisdiction of a Member State; c) to any person inside or outside the territory of the Union who is a national of a Member State; d) to any legal person, entity or body, inside or outside the territory of the Union, which is incorporated or constituted under the law of a Member State; e) to any legal person, entity or body in respect of any business done in whole or in part within the Union.

Under this provision, Regulation 833/2014 applies to persons having a genuine link with the EU, i.e. the territorial link or the link of nationality. The territorial link applies to any person located within the EU and to business activities of non-EU persons within the EU. The link of nationality, regardless of

the location, applies to citizens of EU Member States, to legal persons incorporated under the law of a Member State, and to vessels under the flag of a member State (according to Article 91 of the United Nations Convention on the Law of the Sea¹⁹, ships have the nationality of the State whose flag they are entitled to fly).

It seems that the phrase ‘any legal person, entity or body in respect of any business done in whole or in part within the Union’ used in Article 13 of Regulation 833/2014 does not mean that every non-EU legal person doing business within the EU must unconditionally comply with this Regulation. Rather, the words ‘in respect of’ suggest that only intra-EU activities of non-EU legal persons should be in compliance with Regulation 833/2014. For example, if a non-EU company owns a refinery in a third country, buys Russian oil above the price cap, refines it, and then sells petroleum products within the EU, it does not violate Regulation 833/2014 ‘in respect of’ its intra-EU business (because its intra-EU business is not involved in trade in Russian oil).

Persons not mentioned in Article 13 of Regulation 833/2014 are not under an obligation to comply with the Price Cap (unless such a person is under the jurisdiction of another member of Price Cap Coalition). Hence, from a formal point of view, Russian companies selling oil above price cap and third-country buyers which purchase Russian oil above the price cap do not violate the price cap mechanism. As indicated by researchers, ‘purchases that do not involve coalition services – e.g., a purchase by a Chinese trader carried on a Chinese ship to a Chinese refinery, paid in rubles through a Chinese bank, and insured by a Russian company – are not be subject to the price cap’²⁰.

However, there are legal consequences for certain third-country actors violating the price cap mechanism. According to Article 3n(7) of Regulation 833/2014, *in the event that a vessel has transported the Russian crude oil or petroleum products, and the operator responsible for the transport knew or had reasonable cause to suspect that such crude oil or petroleum products were purchased above the price cap, it shall be prohibited to provide the services relating to the transport of crude oil or petroleum products that originate in Russia or are exported from Russia by that vessel for 90 days following the date of unloading of the cargo purchased above the price cap*. Recital 8 to Council Decision 2022/2369 clarifies that this prohibition applies to a third country flagged vessel which in the past transported Russian oil or petroleum products purchased above the price cap.

Consequently, if a third country flagged vessel transports of Russian oil purchased above the price cap, in the next 90 days EU persons are prohibited

¹⁹ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3

²⁰ Simon Johnson, Lukasz Rachel and Catherine Wolfram, ‘Design and Implementation of the Price Cap on Russian Oil Exports’ (2023) 51 Journal of Comparative Economics 1246.

from providing services related to the transportation of Russian oil by that vessel, regardless of whether new cargoes of Russian oil are purchased above or below the price cap. Hence, from the perspective of a third country vessel operator, Article 3n(7) of Regulation 833/2014 constitutes an extraterritorial legal requirement not to transport Russian oil purchased above the price cap.

Additionally, according to Article 4hb(1) of Council Decision 2014/512/CFSP, it is prohibited to provide access to ports and locks in the territory of the EU to any vessel performing ship-to-ship transfers, at any point of the voyage to a Member State's ports or locks, if the competent authority has reasonable cause to suspect that the vessel is in breach of the price cap mechanism. According to recital 29 to Council Decision (CFSP) 2023/1217 of 23 June 2023,²¹ that prohibition applies to all vessels, regardless of their flag of registration.

VI. ACTIVITIES COVERED UNDER PRICE CAP MECHANISM

According to Article 4n(1) and (4) of Regulation 833/2014, the following activities are prohibited if related to Russian oil sold at a price above the price cap: (a) trading, (b) technical assistance related to trading, (c) brokering services related to trading (d) financing related to trading (e) financial assistance related to trading, (f) brokering, (g) technical assistance related to brokering, (h) financing related to brokering (i) financial assistance related to brokering, (j) transport, (k) technical assistance related to transport, (l) brokering services related to transport (m) financing related to transport (n) financial assistance related to transport.

Additionally, it is prohibited to 'indirectly' provide technical assistance, brokering services, financing or financial assistance, related to the trading, brokering or transport of Russian oil sold above the price cap.

Hence, Regulation 833/2014 creates a system of 'layers' of prohibited activities related to Russian oil sold above the price cap. The first layer includes trading, brokering, and transport. The second layer includes 'direct' technical assistance, financing, and financial assistance related to activities of the first layer. The third layer includes 'indirect' technical assistance, brokering services, financing, and financial assistance related to 'direct' activities of the second layer.

Finally, according to Article 12 of Regulation 833/2014, it is prohibited to participate, knowingly and intentionally, in activities the object or effect of which is to circumvent prohibitions in this Regulation. So, the circumvention of the

²¹ Council Decision (CFSP) 2023/1217 of 23 June 2023 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2023] OJ L 159I/451.

above-mentioned prohibitions may be considered as the fourth layer of activities covered under the price cap mechanism.

Regulation 833/2014 includes definitions of some of the above-mentioned activities. Article 1 of Regulation 833/2014 defines, for the purposes of that Regulation, such concepts as ‘brokering services’ and ‘financing or financial assistance’. The scope of other concepts, such as ‘transport’ may be found in EU documents of a general character, e.g., in the Statistical classification of economic activities in the European Community NACE Rev 2²².

There are some problematic issues regarding the scope of activities covered under the price cap mechanism. Recital 19 to Council Decision 2022/1909 of 6 October 2022 states that *in addition to the existing prohibitions related to the provision of services for the maritime transport of crude oil and certain petroleum products to third countries, it is appropriate to further prohibit the maritime transport of such goods to third countries. That prohibition should be conditional upon the Council introducing a pre-established price cap agreed by the Price Cap Coalition*. This wording suggests that only the maritime transport of Russian oil is covered under the price cap mechanism.

The same approach can be found in the Commission’s Consolidated FAQs. That document explains that *the EU introduced an exemption from the prohibition to provide maritime transport and the prohibition of services for the maritime transport to third countries of Russian seaborne oil and petroleum products when such goods are purchased at or below the price cap*. A reader may conclude that the land transport of Russian oil is not covered under the price cap mechanism.

However, there is nothing in Regulation 833/2014 itself that may support such a conclusion. This Regulation prohibits ‘transport’ of Russian oil sold above the price cap, not ‘maritime transport’. According to the Statistical classification of economic activities NACE Rev 2, Section H – Transportation and Storage includes both (a) land transport and transport via pipelines and (b) water transport.

The point of view that the price cap mechanism covers only maritime transport of Russian oil can be partially explained by the fact that transportation of Russian oil to the EU by pipelines is partially allowed under Art. 3m(3)(d) of Regulation 833/2014. Hence, since pipeline transport of Russian oil is allowed, the only ‘remainder’ which may be covered by the price cap is the maritime transport.

However, there are other, non-pipeline means of land transport of Russian oil, e.g. railroad transport. Additionally, there are pipelines that deliver Russian oil to non-EU countries, for example, an oil pipeline from Russia to Belarus.

²² Eurostat, *NACE Rev. 2: Statistical classification of economic activities in the European Community* (Office for Official Publications of the European Communities 2008).

From the literal wording of Regulation 833/2014 Article 3n, it is clear that such means of land transport are also covered under the price cap mechanism.

Another problematic question is whether the processing of payments for Russian oil by EU banks is covered under the price cap mechanism as ‘financial assistance’. The Commission’s FAQs are ambiguous in answering the question ‘Is the processing, clearing or sending of payments by intermediary banks included in the maritime related services ban?’. The FAQ refers to the ruling of the Court of Justice in case C-72/15²³ where the CJEU in 2017 stated that the term ‘financial assistance’ used in Article 4(3)(b) of Regulation 833/2014 ‘does not include the processing of a payment, as such, by a bank or other financial institution’.

However, the same FAQ simultaneously warns that, according to the same ruling of the CJEU, the processing of payments linked to the sale, supply, transfer or export of prohibited items, is prohibited. Since Russian oil may be considered a ‘prohibited item’ in the EU (under Article 3m of Regulation 833/2014) it is not clear from the point of view of EU banks whether they are allowed to process payments for Russian oil sold to third countries above the price cap.

A review of the ruling in case C-72/15 shows (in paragraphs 179-181) that the CJEU’s interpretation of ‘financial assistance’ was given in respect to the specific language and context of Article 4(3)(b) of Regulation 833/2014 and is not intended to be universal.

Also, the CJEU made a reservation (in paragraph 183) that the foregoing interpretation *is without prejudice to the prohibition that applies to any processing of payments that is related to a commercial transaction that is itself prohibited under Article 3(5) of Regulation No 833/2014*. Therefore, the CJEU stated that the processing of payments is prohibited in respect to ‘prohibited transactions’, not to ‘prohibited goods’ (the wording of the abovementioned FAQ). Since under Regulation 833/2014 transactions between Russian oil sellers and third country buyers are not themselves prohibited even if made above the price cap, the abovementioned position of the CJEU is not applicable to such transactions. Hence, the ambiguous reference to case C-72/15 made in the Commission’s FAQ is not helpful because the interpretation of ‘financial assistance’ in that ruling does not concern the price cap mechanism.

However, the crucial factor in this legal problem is that the ruling in the case C-72/15 appeared in 2017, before the official definition of ‘financial assistance’ was added into Regulation 833/2014 by Council Regulation (EU) 2022/328²⁴ (in 2022).

²³ Case C-72/15 *PJSC Rosneft Oil Company v Her Majesty’s Treasury* EU:C:2017:236.

²⁴ Council Regulation (EU) 2022/328 of 25 February 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia’s actions destabilising the situation in Ukraine [2022] OJ L49/1.

According to Article 1(o) of Regulation 833/2014, ‘financing or financial assistance’ means *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; 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.*

Under this definition, ‘financial assistance’ means only an action where a person spends or commits to spend their own financial resources in the context of a transaction. However, when processing payments for goods and services, a bank does not spend its own financial resources, even potentially. Rather, a bank increases its resources by charging a fee for its services. Hence, under this definition, the processing of payments for Russian oil does not constitute ‘financial assistance’. Obviously, it is still prohibited for EU banks to process payments for Russian oil sold to the EU (since such sales constitute prohibited transactions under Article 3m of Regulation 833/2014).

VII. NOTION OF ‘CRUDE OIL’ AND ‘PETROLEUM PRODUCTS’ IN THE PRICE CAP MECHANISM

Under the price cap mechanism, limitations are imposed on services related to ‘crude oil’ and ‘petroleum products’. The notion of ‘crude oil’ is described in Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature²⁵. This category contains petroleum oils and oils obtained from bituminous minerals, crude (including the subcategory 2709 00 10 - Natural gas condensates).

However, it is clear from recital 20 to Council Regulation 2022/2474 of 16 December 2022²⁶ that natural gas condensates produced in liquefied natural gas (LNG) production plants are excluded from the scope of the price cap mechanism. Hence, natural gas condensate may or may not fall into the scope of the price cap mechanism depending on the origin of this commodity. It does not fall into the

²⁵ Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff [1987] OJ L 256/1.

²⁶ Council Regulation (EU) 2022/2474 of 16 December 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia’s actions destabilising the situation in Ukraine [2022] OJ L3221/1.

scope of price cap mechanism if produced in an LNG plant. However, natural gas condensate does fall into the scope of the price cap mechanism if produced in other ways, e.g. from crude oil wells.

As to petroleum products, Article 3n of Regulation 833/2014 refers to Annex XXV to this Regulation and to Combined Nomenclature code 2710. Those sources contain the same definition of petroleum products: *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*. CN code 2710 includes, inter alia, such petroleum products as motor spirit, kerosene, and jet fuel. Importantly, the list of petroleum products is open (it includes CN code 2710 99 00 ‘Other’) which means that the price cap mechanism cannot be circumvented by the invention of ‘new’ types of petroleum products originating from Russia.

Natural gas (both in the liquefied and gaseous state) does not fall into the scope of the price cap mechanism.

VIII. NOTION OF ‘RUSSIAN’ OIL

The price cap mechanism concerns only crude oil and petroleum products ‘which originate in Russia or which have been exported from Russia’. It appears to be an uncomplicated task to determine whether oil originates in Russia because oil is a simple commodity which is usually produced in one country only. Despite that, there are certain practical problems in this area.

In some cases, oil produced outside Russia is transited across Russia and exported from Russian ports. The most important example is the transit of Kazakh oil through Russian territory by the Caspian Pipeline Consortium to the Black Sea port of Novorossiysk (which is the only way to export oil from some important Kazakh oil fields). According to the Commission’s FAQ, such oil is not considered Russian if its owner is a non-Russian person. Hence, mere transit of oil through Russia does not transform foreign oil into ‘Russian’ oil for the purposes of the price cap mechanism.

Additionally, Russian oil may be blended with non-Russian oil (for example, in an oil tanker). Then the price cap mechanism still applies to the share of such a blend which represents the ‘Russian’ part of the mixture.

Also, Russian oil may be transported to a third country and then resold to another third country. In such a case, oil transported from third country A to third country B is still considered to be ‘Russian’ even though it is transported between third countries, not from Russia.

For the purposes of the price cap, Russian oil ceases to be ‘Russian’ only after it is processed in a third country in a way which causes a change in the Combined Nomenclature code of this product. For example, Russian oil may be delivered to a third country where it is processed into gasoline. In such a case, gasoline produced from Russian oil will not be considered ‘Russian’ for the purposes of the price cap mechanism.

IX. PRICE CAP LEVEL

Currently, the EU applies 3 price caps: \$45 per barrel – for petroleum products sold with a discount to crude oil, \$47.6 per barrel – for crude oil, and \$100 per barrel – for petroleum products sold with a premium to crude oil. Those price caps are included into Annex XXVIII to Regulation 833/2014. Previously, from 5 December 2022 to 2 September 2025, the price cap for crude oil established by EU law was \$60. The current price cap for crude oil has been in effect since 3 September 2025.

Recital 4 to Council Decision (CFSP) 2022/2369 of 3 December 2022 lists the following factors taken into account when establishing the specific level of the price cap for crude oil: 1) discussions within the Price Cap Coalition, 2) the effectiveness of the measure in terms of its expected results, 3) international adherence to the price cap mechanism, 4) informal alignment with the price cap mechanism, 5) potential impact of the price cap on the EU and its Member States.

According to Article 3n(11) of Regulation 833/2014, in order to remain effective in achieving its objectives, including its ability to reduce Russia’s oil revenues, the price cap shall be set equal to the average market price for Russian crude oil minus 15%. The Commission shall publish a notice of that average market price and amend the price cap on 15 January 2026 and every six months thereafter.

There are at least two problems with this rule. First, it is problematic to find reliable data concerning the average market price for Russian oil and petroleum products. Unlike such exchange-traded sorts of oil as Brent or WTI, Russian oil is currently sold under non-transparent conditions to shady buyers who have no interest in providing information about their deals and prices.

The second problem is that this rule does not take into account the effect of the price cap mechanism itself. If the functioning of the price cap mechanism is effective, the market price for Russian oil would always be at or below the price cap (for example, \$60). Hence, on the next review date the price cap should be adjusted and set at a level 15% below this ‘market price’ (already affected by the price cap), and so on to infinity.

In this context, it would be more reasonable to use as a reference point not the ‘average market price of Russian crude oil’ but the market price of some well-known non-Russian sort of oil, for example, WTI. In such a scenario, the Price Cap Coalition would try to establish a fixed discount level of the Russian oil price to WTI price (e.g. 20% below the WTI price).

Article 3n(5) of Regulation 833/2014 creates a guarantee which will apply in case of a change in the price cap level. In such a scenario, during the 90 days from the price cap change, the ‘old’ price cap will be applicable to contracts concluded before the change. This rule is most important in the case of lowering the price cap. If the price cap is raised, contracts in compliance with the ‘old’ price cap would naturally be in compliance with the ‘new’ price cap.

X. EXEMPTIONS FROM THE PRICE CAP MECHANISM

There are situations when the price cap mechanism is not applicable, and services related to the trade in Russian oil are considered legal regardless of the oil price.

The first group of exemptions is listed in Article 3m of Regulation 833/2014 and includes exemptions from the ban on the import of Russian oil to the EU. In cases when the import of Russian oil to the EU is legal, it is legal at whatever price.

Such exemptions include: 1) delivery of Russian oil by a pipeline into an EU Member State (except for Germany, Poland, and Czechia), 2) temporary seaborne delivery of Russian oil into a landlocked Member State in case of pipeline supply disruption, 3) delivery of Russian oil to Bulgaria under contracts concluded before 4 June 2022, 4) delivery of certain Russian petroleum products to Croatia, 5) the purchase of Russian oil is required in order to meet the essential needs of the purchaser in Russia or of humanitarian projects in Russia. The last of those exemptions appears ungrounded and is not explained either in the recitals to the respective Council decision nor in the Commission’s FAQs. It is difficult to conceive, what kind of ‘essential needs’ in Russia (requiring delivery of Russian oil to the EU) may have an EU purchaser.

The second group of exemptions concerns the delivery of Russian oil to third countries. That list includes the following situations: 1) payment of insurance claims under insurance contracts concluded before 4 June 2022 if those claims concern incidents that happened before the price cap mechanism entered into force, 2) the import of Russian oil produced in the Sakhalin-2 project to Japan, 3) the provision of pilot services necessary for reasons of maritime safety, 4) provision of services that 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.

Some of those exemptions shall expire on a certain date in the future. However, those terms of expiration may be shifted. For example, the exemption for the Sakhalin-2 project was initially set to expire on 28 June 2024. Since then, the term of expiration has been shifted twice, and currently it is 28 June 2026.

However, some exemptions have actually been eliminated. Most notably, initially, the delivery of Russian oil by a pipeline into an EU Member State was allowed for all Member States. Subsequently, the EU began to reduce that exemption. From 23 June 2023, the EU prohibited the delivery of Russian oil by a pipeline into Germany and Poland. From 1 July 2025, that exemption is no longer applicable in relation to Czechia. Hence, the EU is trying to gradually reduce the scope of exemptions, as long as it is able to reach unanimity among the Member States in that regard.

XI. TEMPORAL SCOPE OF THE PRICE CAP MECHANISM

Council Regulation (EU) 2022/879 of 3 June 2022 imposed a prohibition to provide technical assistance, brokering services, financing or financial assistance, related to the transport to third countries of Russian oil or petroleum products. The Regulation was published in the Official Journal on 3 June 2022 and entered into force on the next day – 4 June 2022. However, the execution until 5 December 2022 of contracts concluded before 4 June 2022 was exempted from that prohibition.

The abovementioned prohibition was not imposed in the context of the price cap mechanism (because even the idea of this measure did not completely crystallise at that point). Under that rule the ban to provide services related to the transportation of Russian oil to third countries was comprehensive and did not depend on the price of that oil. The subsequent imposition of the price cap mechanism relaxed this comprehensive ban.

Council Regulation (EU) 2022/1904 of 6 October 2022 for the first time introduced the concept of the price cap mechanism into Regulation 833/2014. However, at that point the specific level of the price cap was not yet decided by the Price Cap Coalition.

The specific level of the price cap concerning crude oil was decided on 3 December 2022 in Council Decision (CFSP) 2022/2369. According to Regulation 833/2014, the first day of the price cap mechanism application was set for 5 December 2022. However, for Russian oil loaded onto a vessel prior to 5 December 2022, the first day of the price cap mechanism application was set for 19 January 2023. The first day of the price cap mechanism application in relation

to Russian petroleum products was set on 5 February 2023 (or 1 April 2023 regarding Russian petroleum products loaded onto a vessel prior to 5 February 2023).

Under the price cap mechanism, it is irrelevant when the contract on the sale or transportation of Russian oil was concluded. It should apply even if a contract related to Russian oil was concluded long before 5 December 2022.

Regulation 833/2014 itself does not have a specific term of expiration. However, that Regulation only provides the necessary measures in order to implement Council Decision 2014/512/CFSP taken in the framework of the common foreign and security policy. That Council Decision does have a specific date of expiration.

In practice, since 2014 the Council has always extended the term of this Decision's application twice a year for following 6 months. However, each extension of this term requires the unanimity of all EU Member States (under Article 31 of the TEU). If the Council fails to extend the term of Council Decision 2014/512/CFSP, it will expire, and Regulation 833/2014, including its norms concerning the price cap mechanism, also will no longer be applicable.

Thus, the functioning of the price cap mechanism and of the whole Price Cap Coalition depends on the ability of the 27 EU Member States to take - twice a year - a unanimous decision on the extension of the Council Decision 2014/512/CFSP expiration term.

It is necessary to mention that Title V Chapter 2 of the TEU does not require to establish the specific expiration dates of Council decisions taken in the field of common foreign and security policy, including the expiration date of sanctions against third countries. Hence, there are no legal barriers to establishing the indefinite term (i.e., until further decision) of the EU sanctions against Russia, including the price cap mechanism. However, currently the EU is unable or unwilling to take such a step.

XII. COMPLIANCE WITH THE PRICE CAP MECHANISM

Regulation 833/2014 includes only one rule concerning the compliance with the price cap mechanism. According to Article 3n(10) of that Regulation, Member States, and the Commission shall inform each other of detected instances of a breach or circumvention of the price cap mechanism.

However, the official Commission's FAQs include very specific recommendations regarding the compliance with the price cap mechanism. Recommendations are different for EU operators who have access to price information (such as commodities traders and customs brokers) and operators who do not have access to price information (such as shipowners and insurers).

If an operator does have access to price information regarding Russian oil, it should retain and keep for 5 years documents (such as contracts and invoices) that show that the Russian oil was purchased at or below the price cap.

If an operator does not have access to price information regarding Russian oil, it should obtain from its customers and keep for 5 years an attestation where the customer confirms that the Russian oil at issue has been purchased at or below the price cap. The commission's FAQs even include a recommended text of such an attestation: *[party to the contract/service] confirms that for [the service being provided], [party to the contract/service] is in compliance with the Russian price cap framework and any other restrictions on seaborne Russian oil and/or petroleum products applicable to [party to the contract/service].*

When checking whether the oil or petroleum products at issue are of Russian origin, EU persons may reasonably rely upon a certificate of origin or on other documentation containing information about origin 'but should exercise caution if they have reason to believe such certificate or document has been falsified or is otherwise erroneous'.

According to the Commission's FAQs, in cases when an EU operator without 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 it has acted in good faith.

Consequently, the whole functioning of the price cap mechanism depends on record-keeping and the good faith of EU persons. Therefore, in such conditions it is not hard to circumvent the price cap mechanism. For unscrupulous entities involved in deliveries of Russian oil abroad, it presents little difficulty to sign whatever attestation regarding the price or to present a document where Russian oil is named non-Russian. For financially motivated EU service providers, it is not hard to pretend that they trust such questionable documentation 'in good faith'.

Some EU legal acts confirm serious problems regarding compliance with the price cap mechanism. Recital 29 to Council Decision (CFSP) 2023/1217 of 23 June 2023 states that *attempts to circumvent Union restrictive measures have resulted in a sharp increase of deceptive practices by vessels transporting Russian crude oil and petroleum products.*

XIII. RUSSIAN LEGAL COUNTERMEASURES

According to the Russian President's decree of 27 December 2022²⁷, it is prohibited for Russian companies to supply crude oil and petroleum products to foreign consumers if the respective contracts of sale directly or indirectly stipulate compliance with the price cap mechanism. There are several problems with that countermeasure.

First, it is not clear who the targets of Russian oil sanctions are. The USA and the EU, according to their own sanctions policies, do not buy Russian oil anyway, at any price, even below the price cap. The price cap mechanism applies to the supply of Russian oil only to 'neutral' third countries, like China and India. By prohibiting its companies from complying with the price cap mechanism, Russia does no harm to 'unfriendly' countries which imposed the price cap, but potentially may cause energy shortages in 'neutral' countries.

The Second problem is difficulties with the control and compliance. Essentially, the Russian President's decree only prohibits Russian oil companies from mentioning the price cap in their sale contracts. However, oil may be sold at a price below the price cap without mentioning that mechanism. A Russian oil company may always explain that it sells oil at \$60 per barrel not because it complies with the price cap mechanism, but because \$60 is the highest market price available.

Hence, the objective of Russian countermeasures may lie rather in the propaganda dimension. It does not appear that Russian authorities really hope to defeat the price cap mechanism by that decree.

XIV. CONCLUSION

In many aspects the price cap mechanism is an important legal innovation. It does not fit the distinction between unilateral and multilateral sanctions. Rather, it is a system of multiple unilateral sanctions with the same parameters. Unlike previous sanction regimes against oil producing countries (such as UN sanctions against Iraq or US sanctions against Iran) it targets not oil production but only the country's revenue from oil export. Also, the price cap mechanism tries to influence oil trade between Russia and third countries without the threat of secondary sanctions against those third countries. Moreover, the price cap mechanism is

²⁷ Decree of the President of the Russian Federation No 961 of 27 December 2022 'On the application of special economic measures in the fuel and energy sector in connection with the imposition of a price cap on Russian oil and petroleum products by certain foreign states', *Rossiyskaya Gazeta* (29 December 2022) (in Russian).

economically profitable for ‘neutral’ third countries since (at least in theory) it gives them the opportunity to buy Russian oil at a cheaper price.

Analysis of EU legal acts regulating the price cap mechanism shows several serious problems. The first is that the term of application of EU sanctions against Russia (including the price cap mechanism) is limited by a specific date, which needs to be prolonged every 6 months by the unanimous decision of all EU Member States. The second is the contradiction between Regulation 833/2014 and the Commission’s FAQ regarding whether non-pipeline land transport of Russian oil is covered under the price cap mechanism.

Additionally, there are some puzzling exemptions from the price cap mechanism, including the right of an EU person to import Russian oil into the EU if such importation is necessary for the ‘essential needs’ of that EU person in Russia. Finally, there is the questionable system of attestation which gives EU persons an opportunity to provide whatever services related to Russian oil export, if they obtain an unverifiable promise that the oil is sold at or below the price cap.

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