

CIRCULAR

7/22 JULY 2022

[AMENDED 22 JULY] On 21 July 2022 the European Union published a Maintenance and Alignment Package. The package included amendments to Regulation (EU) No. 833/2014 which amongst other things clarified the circumstances in which the exceptions contained in Article 5(aa)(3) may apply.

The wording of this Circular 07/22 has been amended to reflect these changes.

OUTLINE

This circular focuses on:

- the measures in the 6th package of sanctions which impact on the transport and insurance of oil and petroleum products; and
- the prohibitions on transacting with Russian state-owned enterprises subject to the Article 5aa restrictions and as listed in Annex XIX of EU Regulation.

TO THE MEMBERS

SANCTIONS – THE EUROPEAN UNION’S 6TH SANCTIONS PACKAGE – EU REGULATION 833/2014 – (THE “REGULATION”)

On the 3rd of June 2022 the EU published its 6th package of sanctions against Russia. This circular is not intended to be a comprehensive summary of the EU sanctions against Russia. It focuses on:

- the measures in the 6th package of sanctions which impact on the transport and insurance of oil and petroleum products; and
- the prohibitions on transacting with Russian state-owned enterprises subject to the Article 5aa restrictions and as listed in Annex XIX of the Regulation.

EU Sanctions do not apply extra-territorially. Article 13 of the Regulation provides that they apply:

- a. within the territory of the EU
- 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 EU who is a national of a Member State
- d. to any legal person, entity, or body, inside or outside the territory of the EU, 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 EU

Transport and insurance of Russian oil and petroleum products

Pursuant to Article 3m of the Regulation, from the 4th of June 2022:

1. *It shall be prohibited to purchase, import, or transfer, directly or indirectly, crude oil or petroleum products, as listed in Annex XXV, if they originate in Russia or are exported from Russia.*

2. *It shall be prohibited to provide, directly or indirectly, technical assistance, brokering services, financing or financial assistance or any other services related to the prohibition in paragraph 1...*

The crude oil and petroleum products listed in Annex XXV are as follows:

CN Code	Description
2709 00	Petroleum oils and oils obtained from bituminous minerals, crude
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

Transport to the EU

Transport to the EU of Russian oil and petroleum products is now generally prohibited subject to the exemptions set out in Article 3m. “Transfer” is a broad concept which encompasses not only the movement of goods through customs controls but also the transport of goods. Russian oil transported together with oil of other origin in a mixed fashion is subject to these prohibitions.

The exemptions include those in Article 3m(3)(a) and (b):

3. *The prohibitions in paragraphs 1 and 2 shall not apply:*

- (a) until 5 December 2022, to one-off transactions for near-term delivery, concluded and executed before that date, or to the execution of contracts for the purchase, import or transfer of goods falling under CN 2709 00 concluded before 4 June 2022, or of ancillary contracts necessary for the execution of such contracts, provided that those contracts have been notified by the relevant Member States to the Commission by 24 June 2022 and that the one-off transactions for near-term delivery are notified by the relevant Member States to the Commission within 10 days of their completion;*
- (b) until 5 February 2023, to one-off transactions for near-term delivery, concluded and executed before this date, or to the execution of contracts for the purchase, import or transfer of goods falling under CN 2710 concluded before 4 June 2022, or of ancillary contracts necessary for the execution of such contracts, provided that those contracts have been notified by the relevant Member States to the Commission by 24 June 2022 and that the one-off transactions for near-term delivery are notified by the relevant Member States to the Commission within 10 days of their completion;*

In respect of these exemptions:

- ‘One-off transaction for near-terms delivery’ means spot market transactions.
- The EU has clarified that the contract cannot foresee multiple deliveries and the oil should be delivered within a maximum of 30 days after the transaction has been concluded.
- Current guidance from the EU suggests that charterparties are unlikely to be ancillary contracts – *“An “ancillary contract” is a contract necessary for the execution of another (principal) contract, that is, a contract without which the main contract cannot be executed, such as insurance, financing etc. However, the execution of ancillary contract must not lead to circumvention of the regulation. For example, a contract on transportation would not be covered by the ancillary contract exception since it would fall under the prohibition of “transfer” or “transport””.*
- The EU has also clarified that, in the context of the pre-existing contract exemption it is the contracts for the import of the goods that should have been notified by 24th June 2022. The obligation to notify the EU
- Members engaging in such trades should take appropriate steps to satisfy themselves that the relevant notifications have or will be given to take advantage of the exemption/s. There is no requirement to also provide notice of insurance contracts or contracts for the services accompanying the maritime transport.

If it is indeed the case that charterparties are not ancillary contracts, then this would have the effect that the transportation contract must either:

- (a) pre-date 4th June 2022 to fall within the pre-existing contract exception¹.
- (b) itself constitute a separate one-off transaction for near-term delivery (whether in furtherance of a pre-4th June 2022 sale contract or a spot sale contract).

Insurance of the transport into the EU

Insurance (or reinsurance) of the transport into the EU of these goods is also prohibited subject to the exemptions in Article 3m as “financial assistance” is defined to include “all types of insurance and reinsurance”.

If a Member can rely on any of the exceptions mentioned above, then an insurer subject to EU jurisdiction can also provide insurance for such voyage, subject to applicable terms and conditions, as insurance would be deemed as being a necessary ancillary contract.

Transport to a third country

The EU has clarified that Article 3m of the Regulation prohibits only the purchase, import, and transfer where the cargo is destined for import into Member States. It does not prohibit the transport of crude oil or petroleum products when exported from Russia to a third country.

A company incorporated or constituted under the law of a Member State is still therefore generally permitted to transport Russian crude oil and petroleum products to a third country. Caution should however be exercised to ensure that sanctioned entities are not involved in the trade. Further, as explained below, the insurance and reinsurance of this trade by an insurer or reinsurer that is subject to the jurisdiction of the EU is generally prohibited.

Insurance of the transport to third countries

Article 3n of the Regulation provides that:

1. *It shall be prohibited to provide, directly or indirectly, technical assistance, brokering services or financing or financial assistance, related to the transport, including through ship-to-ship transfers, to third countries of crude oil or petroleum products as listed in Annex XXV which originate in Russia, or which have been exported from Russia.*
2. *The prohibition in paragraph 1 shall not apply to:*
 - (a) *the execution until 5 December 2022 of contracts concluded before 4 June 2022, or of ancillary contracts necessary for the execution of such contracts; or*
 - (b) *the transport of crude oil or petroleum products as listed in Annex XXV where those goods originate in a third country and are only being loaded in, departing from, or transiting through Russia, provided that both the origin and the owner of those goods are non-Russian.*

As a result of Article 3n, insurance of the transport of the oil and petroleum products falling within the scope of the Regulation is now prohibited, subject to the exemptions listed in Article 3n above. Therefore, whilst a shipowner subject to the jurisdiction of the Regulation may be able to lawfully transport the products, an insurer subject to its jurisdiction will not be able to insure that trade. Most of the clubs that comprise the International Group (IG) are subject to the jurisdiction of the EU. All IG Clubs, including those that are domiciled outside the territory of the EU, rely on a reinsurance programme that is heavily dependent on the participation of reinsurers that are domiciled within the EU. If any of the IG clubs are prohibited under these sanctions from contributing their share of any Pool claim, the individual member will bear the shortfall in accordance with their club's sanctions rules. The same principle will apply for claims above US\$100 million if any EU domiciled reinsurers on the IG reinsurance programme are prohibited under these sanctions from paying the claim.

¹ In respect of the transport of coal into the EU it would mean that the charterparty would need to have been concluded before 9th April in order for the exemption until 10th August to apply.

As set out above, the insurance prohibition does not apply to the execution until the 5th of December 2022 of contracts concluded before the 4th of June 2022. Our current understanding is that it is the contract of insurance which needs to have been concluded by the 4th of June 2022, as this is the contract execution of which would otherwise be prohibited by Article 3n. On that basis, it would be prohibited to provide cover where the insurance contract is entered into after 4th June.

The EU FAQs read:

Can an EU insurer continue to provide insurance to a vessel carrying Russian oil?

After a wind down period of 6 months, during which contracts signed before 4 June 2022 can still be executed until 5 December, EU operators will be prohibited from insuring and financing the maritime transport of goods set out in Annex XXV to third countries...

Can an EU entity provide insurance or reinsurance for a non-EU or EU vessel carrying Russian oil? i.e., could an Indian ship carrying crude from Russia to India get insurance from an EU firm?

No, unless this insurance results from a contract signed before 4 June 2022 and executed until 5 December 2022.

It is unclear what steps an insurer will be permitted to take in respect of claims that arose before the 4th of June 2022 or during the wind down period up to the 5th of December 2022, once the wind down period has expired.

Transacting with Russian state-owned entities

Pursuant to Article 5aa of the Regulation it is prohibited for anyone subject to EU jurisdiction “to directly or indirectly engage” in any transactions with certain Russian state-owned entities listed in Annex XIX of the Regulation. The prohibitions extend to any legal person, entity or body established outside the EU whose proprietary rights are directly or indirectly owned for more than 50 % by an entity listed in Annex XIX; and to any legal person, entity or body acting on behalf or at the direction of an entity referred to.

As set out in Article 5aa(3) the prohibitions shall not apply:

- (a) *transactions which are strictly necessary for the direct or indirect purchase, import or transport of natural gas, titanium, aluminium, copper, nickel, palladium and iron ore from or through Russia into the Union, a country member of the European Economic Area, Switzerland, or the Western Balkans;*
- (aa) *unless prohibited under Article 3m or 3n, transactions which are strictly necessary for the direct or indirect purchase, import or transport of oil, including refined petroleum products, from or through Russia;*
- (b) *transactions related to energy projects outside Russia in which a legal person, entity or body listed in Annex XIX is a minority shareholder;*
- (c) *transactions for the purchase, import or transport into the Union of coal and other solid fossil fuels, as listed in Annex XXII until 10 August 2022;*
- (d) *transactions, including sales, which are strictly necessary for the wind-down, by 31 December 2022, of a joint venture or similar legal arrangement concluded before 16 March 2022, involving a legal person, entity or body referred to in paragraph 1;*
- (e) *transactions related to the provision of electronic communication services, data center services, and the provision of services and equipment necessary for their operation, maintenance, security, including the provision of firewalls, and call center services, to a legal person, entity or body listed in Annex XIX*
- (f) *transactions which are necessary for the purchase, import or transport of pharmaceutical, medical, agricultural and food products, including wheat and fertilisers whose import, purchase and transport is allowed under this Regulation;*
- (g) *transactions which are strictly necessary to ensure access to judicial, administrative or arbitral proceedings in a Member State, as well as for the recognition or enforcement of a judgment or an arbitration award rendered in a Member State and if such transactions are consistent with the objectives of this Regulation and Regulation (EU) No 269/2014*

The prohibition applies to the provision of any sort of economically valuable benefit (such as services or payments) even in the absence of any contractual relationship; this would therefore include a vessel calling at a port which is owned by an Annex XIX entity (whether or not that port was in Russia). The prohibition applies even if the vessel is loading cargo at the port which is to be transported to a third country.

Transneft is one of the state-owned enterprises listed in Annex XIX. The website of Novorossiysk Commercial Sea Port (“NCSP”) as at 24th June 2022 states that PJSC Transneft is NCSP’s controlling shareholder with a 62% share. It further indicates (emphasis added) that “*NCSP Group comprises PJSC NCSP, **Primorsk Trade Port LLC**, JSC Novorossiysk Ship Repair Yard, JSC NCSP Fleet, SC NCSP Fleet, IPP LLC, Baltic Stevedore Company LLC, and «SFP» LLC. PJSC NCSP and PJSC Transneft own NCS LLC on a parity basis*”.

A shipowner that engages with one of these entities directly or indirectly would breach the prohibition unless an exemption applies. For example, Article 5aa(3)(aa) provides an exemption for transactions that are strictly necessary for the import, purchase, and transport of oil from or through Russia regardless of the destination (EU or non-EU ports) – this means that EU vessels can lawfully transport oil from a port which falls within the Article 5aa restrictions, subject to the restrictions and requirements on oil imports under Article 3m. However, please note that for transport to non-EU ports clubs will not be able to provide cover for such trades other than in accordance with Article 3n (2)(a) and (b) discussed above.

Article 13 of the Regulation makes clear that the prohibition applies not just to vessels flagged within the EU but also any party (such as an individual or a ship management company) conducting the whole or part of its business within the EU.

The provision of insurance for a vessel calling into a port owned by an entity listed in Annex XIX is not prohibited but in the event of a claim or incident an insurer subject to the EU sanctions would not be permitted to make a direct or indirect payment to the port or reimburse liabilities for damages occurring.

Summary

It is important to read the restrictions in context and in full. In broad, general terms, the position is now that:

- EU shipowners can carry Russian oil and petroleum products to third countries (so long as no sanctioned parties involved).
- It is prohibited for EU insurers to insure the transport of Russian oil and petroleum products being carried to third countries. However, it is permitted to execute contracts concluded before 4th June 2022 until 5th December 2022. It is thought that it is the insurance contract which needs to have been concluded by 4th June for the exemption until 5th December 2022 to apply.
- EU shipowners are generally prohibited, subject to the exemptions set out in the Regulation, from carrying Russian oil into the EU. There is a corresponding insurance ban.

Members are also reminded that Club cover is not available for unlawful trading. Cover may also be terminated where there is a risk to the Club and the provision of insurance may put the Club at risk of, or in breach of sanctions, even if the underlying trade is lawful.

Further information

A consolidated version of the Regulation is available on the EUR-Lex: EUR-Lex - 02014R0833-20220604 - EN - EUR-Lex (europa.eu)

References to EU guidance and clarification in this Circular are references to the EU Consolidated FAQs on the implementation of Council Regulation No 833/2014 and Council Regulation No 269/2014: Consolidated version of the frequently asked questions concerning sanctions adopted following Russia's military aggression against Ukraine (europa.eu)

Yours faithfully

THE MANAGERS

For more information

Members requiring further information should contact their usual underwriting contact at the Club.