The EC guidance on the Russian ‘gas for rubles’ decree: all things to all people?
Summary

On 31 March 2022, President Vladimir Putin signed a decree, which introduced a new payment mechanism, requiring buyers from all EU Member States (and some non-EU countries) to pay for Russian (pipeline) gas, delivered to them after 1 April 2022, in rubles. The decree and its implications for gas supply contracts have been analysed in a previous OIES publication. On 21 April 2022, the EC published a guidance on the decree for buyers on making their next payments for Russian gas deliveries. This comment analyses the guidance to understand what impact it might have on buyers’ decisions in respect of the new payment mechanism. Although the guidance does not deliver any solutions for the buyers, it allows them to choose their own ways of following the new mechanism. It provides alternatives for those buyers who may consider the new mechanism compatible with their LTSCs and be ready to accept. It also provides alternatives for those buyers who wish to argue that the new mechanism goes beyond their contractual obligations, seeing it as an opportunity for suspending or terminating their LTSCs ahead of their expiry and removing a contractual constraint on their ability to eliminate their dependence on Russian gas, albeit with the risk that their supplies may be immediately cut off. Should the guidance be amended to exclude the alternative allowing buyers to accept the new procedure by declaring it being in breach of sanctions, the risk of supplies being cut off for all buyers would increase sharply.

Payment under the old payment mechanism

Gazprom sells most of its gas to Europe under Long Term Supply Contracts (LTSCs). Although these contracts – and their payment clauses – are confidential, it is understood that most – albeit not all – of them specify euros as the currency of payment. It is understood that, prior to the Russian decree’s entry into force on 1 April 2022, an EU buyer was able to pay for Russian gas in euros through a direct transfer from its designated account in a European bank to a Gazprom’s designated account in a European bank, acting as a correspondent bank for Gazprombank; payment was considered completed once the euros in question had been credited to Gazprom’s account in the European bank. Alternatively, an EU buyer was able to pay through a direct transfer to Gazprom’s euro account in Gazprombank itself. These schemes were vulnerable to sanctions as ‘[a]ny euro exchange’ attempted by the Russian state would have to be settled within the euro area’s settlement system and potentially ‘captured’ by sanctions.

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5 All Eurozone buyers will specify euros, only South East European buyers may not but these will be small volumes.
8 Ibid.
Payment under the new payment mechanism

The decree has changed the payment mechanism by mandating several additional steps both by an EU buyer and Gazprombank. It required the EU buyer to open two new “K” accounts in Gazprombank—one in euros and another one in rubles—and make payment in euros to the buyer’s new euro account. It also required Gazprombank, acting on instructions from the buyer, to convert these euros into rubles (by selling euros and buying rubles at the Moscow Exchange), credit them to the buyer’s new ruble account, and make a transfer to Gazprom’s ruble account in Gazprombank. Once all of these steps have been made, payment is considered completed.

Importantly, under this procedure, it would be impossible for gas payments to be frozen or confiscated by European authorities. The fear of payment being withheld might have been one of the reasons why the new payment procedure was established, given that some EU Member States called for payments to be made on an escrow account in a European bank so that Gazprom would not be able to access it.9 According to the Russian foreign minister, Sergey Lavrov, gas payments made to Gazprom’s accounts in European banks after the EU sanctions regime was introduced after 24 February 2022 have been made inaccessible.10

The decree empowered the Russian customs authorities to ban deliveries should the new payment mechanism not be complied with. In practice, this means that Gazprom would be prohibited from continuing gas supplies to those EU Member States’ buyers which have not paid for their supplies delivered after 1 April 2022 in line with the new mechanism unless an exemption (derogation) – possible under the decree – has been granted by the Russian government. The decree does not specify a procedure, including a set of criteria, for granting a derogation.

Compatibility of the new mechanism with the EU sanctions regime and European LTSCs

The decree has raised several concerns as to whether the new Russian payment mechanism is compatible with European LTSCs with Gazprom and with the EU sanctions regime against Russia. The decree does not violate any specific provision of the EU sanctions legislation and therefore does not appear to be in conflict with it. Gazprombank has been largely exempted from the EU sanctions (which have excluded many Russian banks from the SWIFT messaging system) precisely not to jeopardise payments for Russian gas imports.11 The decree does not envisage any transactional role for the Russian Central Bank (CBR) in executing the new payment mechanism (a sanctionable activity12) and does not give any grounds for gas payments being used as a short-term loan to Gazprombank (a sanctionable activity). Any actual or perceived risks, associated with additional steps introduced by the decree, could be alleviated by e.g. committing to waive a commission fee for conversion and limiting the time period within which conversion must be completed.13 On 29 April 2022, the CBR’s head, Elvira Nabiullina, stated that the conversion time period would be limited to two working days thus confirming that payment could not be considered being a short term loan.14 On 4 May 2022, another presidential

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9 ‘Eastern Europeans push for new penalties as EU sanctions fail to end Putin’s war’, Politico, 1 April 2022, https://www.politico.eu/article/eastern-europeans-conjure-up-plans-to-raise-new-penalties-pressure-on-vladimir-putin-russia/


12 Under the EU sanctions regime ‘transactions related to the management of reserves as well as of assets of the Central Bank of Russia, including transactions with any legal person, entity or body acting on behalf of, or at the direction of, the Central Bank of Russia’ are prohibited. Notably, the regime envisages a possibility for derogations to be granted by the competent authorities if it is ‘strictly necessary to ensure the financial stability’ of the EU or the member states concerned, see EC Regulation 2022/334, 28 February 2022, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32022R0334

13 Ason A., ‘Rouble gas payment mechanism: implications for gas supply contracts’.

14 ‘Nabiullina does not see obstacles for payments for Russian gas in rubles’, Interfax, 29 April 2022, https://www.interfax.ru/russia/838752
decree was signed, clarifying that currency conversion will be accomplished by the National Clearing Centre (fully owned by the Moscow Exchange) thus excluding the possibility of any third party being involved in the transactions.\textsuperscript{15}

As far as contractual compatibility is concerned, although the decree has amended the old payment procedure by introducing additional steps – such as euros-to-rubles conversion, followed by a transfer to Gazprom’s ruble account by Gazprombank – the new procedure is not necessarily in conflict with European LTSCs and may be compatible with some or all of them, depending on their specific provisions. As noted in Ason (2022), the new payment procedure ‘would need to be measured against, and potentially reconciled with’ with LTSCs. Different buyers could come to different conclusions in respect of their compatibility with the new procedure. Some buyers may consider the new procedure compatible with their LTSCs and agree to follow it, in which case gas supplies would continue as normal. However, some buyers – especially if under pressure from their national governments and the European Commission (EC), keen to phase out Europe’s dependence on Russian gas – may argue that the new mechanism goes beyond (or violates) their contractual obligations and refuse to accept it, seeing it as an opportunity for suspending or terminating their LTSCs ahead of their expiry and removing a contractual constraint on their ability to eliminate their dependence on Russian gas. Irrespective of the validity of this argument, there would be a very real risk of supplies being cut because the decree empowers the Russian customs authority to ban delivery, thus prohibiting Gazprom from supplying gas if payment is not made in line with the new procedure.

At the time of writing, two European buyers – Polish and Bulgarian state-owned gas companies, PGNiG and Bulgargaz – have confirmed they considered the new payment procedure being a breach of contract and refused to make payment in line with the new procedure.\textsuperscript{16} Both companies have subsequently seen their gas deliveries suspended on 27 April 2022. According to Bulgaria’s deputy prime minister and finance minister, Asen Vasilev, and energy minister Alexander Nikolov, the Bulgarian state-owned gas company, Bulgargaz received a contract addendum from Gazprom providing instructions for making payment in line with the new payment procedure but refused to accept them. It has instead made payment in line with the old procedure but it has not been accepted and supplies were suspended.\textsuperscript{17} On its part, PGNiG refused to make payment in accordance with the new payment procedure and rejected ‘the option of making final payments in Russian rubles from PGNiG’s accounts which would be opened with AO Gazprombank’, while stating that it ‘will continue to settle’ its obligations ‘in accordance with the terms of the contract’.\textsuperscript{18} PGNiG reported that suspension of deliveries was ‘a consequence of a ban’ imposed on Gazprom in line with the decree due to PGNiG ‘continuing to settle its liabilities’ in accordance with ‘current terms’ of its contract and its ‘refusal to make a final payment in Russian rubles’ and referred to the suspension being in breach of contract. PGNiG stated it will take ‘adequate action’ to reinstate deliveries and reserved the right to claim damages.\textsuperscript{19} PGNiG and Bulgargaz’ LTSCs with Gazprom are set to expire at the end of 2022 and both companies had stated they had no intention of extending them, even before the new payment procedure was introduced.

\textsuperscript{15} ‘Decree on temporary measures for servicing financial obligations with some foreign creditors in the corporate sphere’, 4 May 2022, http://publication.pravo.gov.ru/Document/View/0001202205040017?index=0&rangeSize=1


\textsuperscript{17} ‘Commission’s ruble-for-gas scheme won’t work, Bulgaria warns’, Politico, 28 April 2022, https://www.politico.eu/article/russia-sanctions-energy-europe-gas-ruble-bulgaria/


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Meanwhile, four European buyers have reportedly made their payments in rubles whereas ten buyers have opened ruble accounts in Gazprombank, as required by the decree.\(^{20}\) According to Hungarian cabinet minister, Gergely Gulyas, ‘Hungary […] along with nine other nations and complying with the EU’s sanctions policy to the letter, is paying euros at Gazprombank which Gazprombank converts to rubles’.\(^{21}\) This suggests that several European buyers do not necessarily see the new payment procedure being contradictory to their LTSCs and may be ready to accept it, provided they are given assurances that doing so does not violate the EU sanctions regime.

The EC guidance

The EC guidance, published on 22 April 2022, does not provide a definitive answer on whether the decree’s new payment mechanism is in conflict with the EU sanctions regime and if so which of its provisions are violated.\(^{22}\) It only says that the new mechanism may potentially be in conflict with the sanctions regime as the decree allegedly provides scope for the Russian authorities ‘to involve’ the CBR in the process of converting the currency of payment and making a final transfer into Gazprom’s account ‘through a number of transactions linked to the management of the CBR’s assets and reserves, which is prohibited under the EU sanctions’. It also argues that as the currency conversion process ‘may take an undefined amount of time’ it ‘may even be considered as a loan granted by EU companies’ whereas new short term (in excess of 30 days) loans to Gazprombank are prohibited under the EU sanctions regime.\(^{23}\) However, as noted above, these concerns could be alleviated by pointing out that the decree does not envisage any transactional role for the CBR in executing the new payment mechanism and there is a two-day time limit on currency conversion process.\(^{24}\) It is clear from the guidance that the EC preference would be for European buyers to continue following the old payment mechanism, possibly by means of exploring the possibility of being granted an exemption (derogation) by the Russian government, although it admits that the exemption procedure ‘is not clear yet’. At the same time, the guidance is exploratory in respect of the possible usage of the new payment mechanism and suggests the EC is open for EU buyers to engage with Gazprom and Gazprombank to seek ‘additional information’ and ‘an acceptable solution’. The guidance does not dispute the fact that neither ‘engagement’ with Gazprom or Gazprombank nor opening an account with Gazprombank are prohibited under EU sanctions regime – both of which are required under the decree’s new payment mechanism. However, while it confirmed that opening an account in euros with Gazprombank is not prohibited, the guidance is silent on whether opening an account in rubles is not prohibited.

On 28 April 2022, a week after the guidance was published, an EC chief spokesperson, Eric Mamer, speaking at a press briefing, clarified that the EC ‘cannot accept’ that ‘companies are obliged to open a second account in rubles and that the payment is complete only when payment is converted into rubles’. He further stated that following the new payment procedure would be a ‘circumvention’ of sanctions, although he stopped short of referring to it as an actual breach of sanctions and said that it is for member states to ensure that the sanctions legislation is complied with.\(^{25}\) At the same time, Mamer suggested that the new procedure constitutes a breach of contracts – an assertion that is absent in the

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\(^{22}\) Although the EC president, Ursula von der Leyen, has previously stated that the new payment mechanism violates the EU sanctions regime she, as well as an EC deputy chief spokesperson, Dana Spinant, failed to explain which specific provisions are believed to be violated, https://audiovisual.ec.europa.eu/en/video/1-223982


\(^{24}\) ‘Nabiullina does not see obstacles for payments for Russian gas in rubles’, Interfax, 29 April 2022, https://www.interfax.ru/russia/838752


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guidance itself and that is impossible to substantiate without assessing individual contracts. These comments came a day after the EC president, Ursula von der Leyen, stated that Russia’s request to pay in rubles is ‘not according to the contracts’ and ‘a breach of sanctions’. On 2 May, Energy Commissioner, Kadri Simson, speaking at a press conference after the EU Member States energy ministers’ meeting, stated that ‘payment in rubles is ‘a unilateral change to contracts’ and such payments ‘lead to a clear breach of sanctions’. Simson stated that the EC Directorate for Energy, DG ENER, together with the Legal Services of the EC and the Council will prepare ‘a more detailed guidance on what the companies can and cannot do’ within the EU sanctions framework.

While the EC would prefer if EU buyers were to continue paying for Russian gas in line with the old mechanism, the fact that the EC confirmed that opening (euro) accounts in Gazprombank does not violate the sanctions regime, suggests that it is open for them to find a way(s) to follow the new payment procedure – such that it would be compatible both with the EU sanctions regime and European LTSCs. The guidance offers a potential way of doing so, such that an EU buyer would be making a transfer in euros to its newly opened (euro) account in Gazprombank, while making a written statement (previously or simultaneously) that it considers its contractual payment obligation to have been fulfilled as soon as the money has reached its account. In other words, the EC suggests that the payment is to be considered completed as soon as the EU buyer has made a transfer to its own (euro) account in Gazprombank instead of when Gazprombank has made a transfer to Gazprom’s (rubles) account in Gazprombank – as the decree requires. This advice is problematic as no payment can be considered completed if the buyer’s money has not reached the seller’s account and the guidance appears to acknowledge this by saying it is ‘advisable’ for EU buyers ‘to seek confirmation from the Russian side that this procedure is possible under the rules of the Decree’. At the same time, this advice does not preclude an EU buyer from opening an account in rubles and issuing instructions to Gazprombank to make conversion and a transfer, as a result of which rubles would reach Gazprom’s account in compliance with the decree, thus clearing the way for Gazprom to continue supplies to Europe.

Conclusions

Although the EC guidance does not deliver any solutions for EU Member States’ buyers, it allows them some room to choose their own way(s) of following the new payment procedure which would be compatible with their LTSCs and not in conflict with the EU sanctions regime. While the guidance is clear about EC preference for payments continuing to be made under the old procedure, it accepts that doing so may no longer be possible – unless an exemption (derogation) is granted. The guidance is therefore exploratory in respect of the new procedure and uncertain as to the consequences should all EU buyers refuse to make payment accordingly. Crucially, the guidance does not prevent an EU buyer from following the new procedure in full while being able to claim that payment has been made in euros. It provides alternatives for those buyers who may consider the new mechanism compatible with their LTSCs and be ready to accept. It also provides alternatives for those buyers who wish to argue that the new mechanism goes beyond their contractual obligations, seeing it as an opportunity for suspending or terminating their LTSCs ahead of their expiry and removing a contractual constraint on their ability to eliminate their dependence on Russian gas, albeit with the risk that their supplies may be immediately cut off. Should the guidance be amended to exclude the alternative allowing buyers to accept the new procedure by declaring it being in breach of sanctions, the risk of supplies being cut off for all buyers would increase sharply.

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26 ‘Europe sees ambiguity in EU’s advice on Russian gas demands’, Bloomberg, 27 April 2022.