

NEWSLETTER

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CURRENCY LEGISLATION

Easement of currency restrictions

On 7 June 2016, the National Bank of Ukraine (the NBU) adopted its Resolution No. 342 “On stabilization of credit and currency control markets of Ukraine”, which significantly eased some currency restrictions. The Resolution became effective on 09 June 2016 and will be valid until 14 September 2016.

Thus, the NBU decreased the threshold for mandatory sale of the foreign currency proceeds received by legal entities from 75% to 65%, and also increased the upper limit for purchase of cash in foreign currency to UAH 12,000 (approx. USD 480) per one business day.

Furthermore, the banks are now able to issue their clients with cash in foreign currency from their current accounts in the amount of up to UAH 100,000 (approx. USD 4,000) per one business day, which is twice the amount effective previously.

In addition, the NBU allowed repatriation of dividends accrued to foreign investors in 2014 and 2015. This provision became effective on 13 June 2016, but will be applied with certain restrictions. Thus, the upper limit for dividends to be returned abroad shall not exceed USD 1 million per one calendar month or 10% of the total amount of dividends. If the respective 10% exceeds USD 5 million, the maximum amount for repatriation of dividends per calendar month shall not be more than USD 5 million.

In addition, it is worth mentioning that on 24 June 2016 the NBU decreased the discount rate from 18% to 16.5%.

How to avoid sanctions for breach of terms of settlements in foreign currency

Many Ukrainian companies actively import goods and services. Frequently, their foreign counterparties require prepayment for delivered goods or rendered services. Therefore, it is worth remembering that prepayment in favour of the non-resident under foreign economic contracts triggers provisions of the Ukrainian legislation in relation to settlements in foreign currency, such as Article 2 of the Law of Ukraine “On procedure for settlements in foreign currency”. This Article specifies that import transactions of residents, which are made on conditions of deferred delivery, if such deferral exceeds 180 calendar days from the day of prepayment or issuance of a promissory note in favour of the supplier of imported goods (works, services), require conclusion of the Ministry of Economic Development and Trade of Ukraine. Taking into consideration difficult situation in the country and the state’s desire to control proceeds in foreign currency, the National Bank of Ukraine for over two years has been reducing the term for settlements in foreign currency to 90 calendar days.

Breach of currency regulations regarding terms for settlements in foreign currency will have negative consequences for a company. Firstly, there is a penalty for each day of delay in the amount of 0.3% of non-received proceeds in foreign currency (value of non-delivered goods) calculated in the Ukrainian national currency at the date of occurrence of indebtedness (the amount of penalty shall not exceed the sum of non-delivered goods). Secondly, the Ministry of Economic Development and Trade of Ukraine will sanction Ukrainian companies by imposing an individual licensing regime pursuant to Article 37 of the Law of Ukraine “On foreign economic activity”.

The individual licensing regime for Ukrainian and foreign companies means that the Ministry of Economic Development and Trade of Ukraine will individually license each foreign economic transaction of such companies. Such consequences of breach of currency regulations lead to unfavourable position of Ukrainian importers and their foreign counterparties as they significantly complicate economic activity.

At the same time, it is worth mentioning that the imposition of a penalty for breach of currency regulations and individual licensing regime on the Ukrainian company directly depends on good faith and timely implementation of the contract by the foreign counterparty. Therefore, any delay in supply of goods or services, which often

happens during manufacturing of goods, their delivery or customs procedures, may significantly complicate business activities of both Ukrainian importer and its foreign counterparty.

In certain cases, the parties understand as early as the execution stage of the agreement that due to the technological features of manufactured goods or difficulty of their delivery the 90-days period for settlements in foreign currency would not be complied with.

In order to avoid any penalties and application of the individual licensing regime by the Ministry of Economic Development and Trade of Ukraine, a party may obtain a conclusion for extension of term for settlements under foreign economic transactions. Such mechanism is provided in the Resolution of the Cabinet of Ministers of Ukraine “On approval of the Procedure for extension of term for settlements under foreign economic transactions”.

Extension of terms for settlements in foreign currency is permitted in the following transactions:

1. industrial cooperation agreements (transactions on supply of raw materials, parts, spare parts, semi blanks, components and other industrial and related products, which are technologically interrelated and necessary for manufacturing of the final product), and also transactions for project and repair works and technical maintenance related to production and distribution of the final product;
2. consignment contracts;
3. complex construction agreements (transactions on project and search works, transfer of know-how in construction, manufacturing of construction materials, performance of construction works, Build-Operate-Transfer agreements, author supervision in construction, etc.), and also supply of machines, materials, equipment and building constructions for performance of such works (rendering services);
4. tender supply agreements;
5. guarantee maintenance agreements (export transactions on supply of goods, works, services, which provide for partial settlements upon signing respective certificates of technical acceptance, and also for final settlements following completion of the respective guarantee period);
6. supply of complex technical products (import of equipment parts or complex technical products, which require installation, construction, setting up, guarantee maintenance and commissioning, and also supply of complex technical products, manufacturing and transportation term of which exceeds 180 days);
7. supply of special purpose goods (international transfer of military goods and goods with double use, transportation (transit) of gas from foreign owner for its supply in the specified location (points), under terms of which the final settlement is made upon signing of relevant certificates).

Application for extension of term for settlement in foreign currency shall be submitted to the Ministry of Economic Development and Trade of Ukraine, which shall consider it within 10 days.

Therefore, the company may avoid being penalized or sanctioned for breaching the currency regulations through obtaining of a conclusion on extension of term for settlements in foreign currency.

DISPUTE RESOLUTION

Private enforcement officers to be introduced in Ukraine

On 2 June 2016, the Verkhovna Rada adopted the Law “On authorities and officers which enforce court judgments and decisions of other authorities”, which introduced a mixed system of enforcement of court judgments and other authorities’ decisions consisting of state and private enforcement officers.

Pursuant to the Law, the state enforcers are heads of the State Enforcement Service authorities, their deputies, chief state enforcers, senior state enforcers, and state enforcers of the State Enforcement Service.

At the same time, it is specified that the Ministry of Justice shall ensure preparation of private enforcement officers who could be citizens of Ukraine aged 25 and older with a second level law degree and with work experience of at least two years following completion of education. In addition, such person should pass the qualification test.

The Qualification Commission of private enforcement officers will be formed by the Ministry of Justice of Ukraine in order to determine the level of professional capability of persons by means of qualification testing. The Commission will also issue a certificate of private enforcer upon successful passing of the test.

A person willing to become a private enforcement officer shall also undertake respective courses and internship.

The Law specifies a list of persons who cannot become a private enforcement officer within a certain period of time or never:

- persons who committed a corruption crime or related violation – within three years following the day of commitment;
- persons who are banned from private enforcement activity – within three years following the day of the respective decision;
- persons dismissed from the position of a judge, prosecutor, law enforcement officer, state or municipal service due to disciplinary violation – within three years following the day of dismissal;
- persons having conviction for a crime if such conviction is not lifted (except for rehabilitated persons);
- persons declared incapacitated or with limited capacity pursuant to the court judgment;
- persons which are not citizens of Ukraine or which became citizens of other states;
- persons aged over 65 years old.

The Law also envisages restrictions in the activities of private enforcement officers, such as prohibition to enforce judgments wherein the claimant is the state or state authorities, judgments regarding state or communal property and judgments on eviction of individuals.

The Law becomes effective after the signing by the President of Ukraine.

DOING BUSINESS

Privatization. Attraction of foreign investors

The long announced plans of Ukraine in relation to massive privatization are being gradually implemented. The importance of privatization is backed by the need, on the one hand, to fulfil the state budget, and, on the other hand, to increase the effectiveness of state enterprises' management. All matters in relation to privatization in Ukraine are implemented under the close control of the European institutions, whose task lies in prevention of corruption and ensuring transparency of the privatization process.

Following transfer of state owned companies to private investors their effectiveness should significantly increase because, as known, the state is not a good manager at the entities with complex internal structure. Therefore, the state may receive substantial benefits, such as getting rid of badly managed companies and ensuring receipt of regular payments to the state budget in future subject to preservation of some shareholding in the privatized entities.

The State Property Fund is responsible for privatization in Ukraine. It is planned that at least 450 entities will be privatized in the next few years. However, the responsible persons stated earlier that this could even be performed already in 2016. Among 450 entities there are 70 enterprises which are classified as big and middle sized companies and will be the primary aim for foreign investors.

For the purposes of improving the privatization process, the Parliament of Ukraine introduced a number of amendments to the law on privatization of state property.

The most important novelties for participants of privatization process are provisions on methods of privatization. State owned entities could be sold at the auction, on a competitive basis or at a stock exchange. At the same time, the provision on mandatory sale of share package of 5-10% was cancelled.

In addition, privatization is conducted with the assistance from advisors. Pursuant to the procedure approved by the Cabinet of Ministers of Ukraine, advisors are engaged on the basis of the principles of competitiveness, equality, accessibility, transparency and independence of the members of tender commission. The Law also established certain requirements for the advisors, who participate in privatization process, with competence and experience of the advisor to be the key factors.

The Government decides on attraction of the advisor to the privatization process, whose main responsibilities are collection and analysis of economic, technical and financial indicators of the entity's activity, conduct of due diligence, restructuring of indebtedness, preparation of documentation on the entity in accordance with the antimonopoly laws, search for possible investors, etc.

In the new restatement of the law on privatization, there is also specification of persons, who can take part in privatization of state property. It is worth mentioning that not all foreign investors are welcome in the privatization. Legal persons and their affiliates from countries, which are regarded as the aggressor states by Ukraine, are not able to participate in privatization. This mainly applies to Russian companies. In addition, participation of companies from countries under Ukrainian sanctions is also limited.

The additional requirement to the potential purchasers is to disclose their ultimate beneficiaries. This is due to ensuring transparency of the process and avoidance of further re-sale of the privatization objects to the affiliated persons at the discounted price.

Among the most interesting privatization objects for investors are fertilizer producer plant "Odessa Port Plant", State Enterprise of Alcohol and Liquor Industry "Ukrspirit" and regional electricity suppliers. These are such entities, privatization of which will give the highest proceeds to the budget.

The privatization auction for "Odessa Port Plant" started on 26 June 2016 with the sale of 99.567% state owned shares. The start bidding price is around USD 500,000. In accordance with the privatization auction rules, at least two bidders should be non-residents.

The privatization procedure and timeframe for its implementation are widely debated. Many experts state that at the moment there is no reason to conduct privatization of large companies because due to the economic situation in Ukraine the bidding price would be low. However, some mention that launching an open and transparent privatization process with attraction of foreign investors would be not only a source of additional funds in the state budget, but also would increase the attractiveness of Ukraine with the foreign partners and investors and be regarded as a substantial step forward towards elimination of corruption and introduction of effective administrative measures.

Based on the announced terms, difficulties in sale of large state companies and a number of privatization objects, it is clear that the sale of state entities may take many years. The initial bidding price at the privatization auction is determined within three years following the Government's decision on privatization.

As a conclusion, it is worth mentioning that the privatization measures taken by the Ukrainian Government deserve appreciation. Legal and organizational base prepared gives grounds for optimistic future. Many European institutions also point out the progress made in this matter. Therefore, there are hopes that the planned massive privatization of state entities will become a symbol of transparency and transformation of the state apparatus and not another example of corruption.

Registration of foreign investment abolished

On 31 May 2016, the Verkhovna Rada of Ukraine adopted the Law on abolition of mandatory state registration of foreign investment, which became effective on 25 June 2016.

The purpose of this Law is to create up-to-date conditions for attraction of investment by way of full simplification of financing process.

In particular, the Law provides for abolition of the respective provision of the Commercial Code of Ukraine, which deals with mandatory state registration of foreign investment, as well as restatement of the relevant article of the Law of Ukraine “On foreign investment regime”.

However, for entities with foreign investment and bank institutions the mandatory statistical reporting on already made foreign investment pursuant to Ukrainian legislation remains in force.

In addition, the Law provides that both foreign investment registered before effectiveness of the Law and foreign investment not registered following effectiveness of this Law are equally considered to have benefits and guarantees in accordance with Ukrainian legislation.

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This newsletter is intended to provide a brief overview of current changes to the Ukrainian legislation and should not be viewed as legal advice. For more details or if you would like a specific advice, please, e-mail the named contact persons or use our contact form.

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