

Sanctions of the Ministry of Economic Development and Trade

One of the most common types of violation of currency legislation of Ukraine is breach of import-export transactions procedure. Breach of this procedure is not always a consequence of a fault of a business entity, including a foreign company. Also, it is worth mentioning that sanctions for breach of import-export transaction procedure may significantly complicate activities of a foreign company and block its supplies to Ukraine.

The procedure for import-export transactions is specified in the Law of Ukraine "On the Procedure for Settlements in Foreign Currency". This law stipulates that the proceeds of entities which perform foreign economic activity shall be credited to their currency accounts in the authorized banks within the period of debt repayment, specified in the contract, but not later than 180 days following the prepayment. In addition, the National Bank of Ukraine is entitled to introduce other terms for settlements for up to six months. During the last two years the National Bank of Ukraine has been using its right regularly by prolonging validity of its restrictions, under which the period for settlements in foreign economic activity is reduced to 90 calendar days.

In practice, this means that if within 90 calendar days following the prepayment date the goods fail to pass customs clearance on the territory of Ukraine or are supplied in volumes different from those for which prepayment was made, the special sanctions may be applied to entities which perform foreign economic activity pursuant to the Law of Ukraine "On the Procedure for Settlements in Foreign Currency".

The sanctions are applied by the Ministry of Economic Development and Trade of Ukraine on the basis of the submission from the State Fiscal Service of Ukraine, and such sanctions provide for application of the special licensing regime to entities which perform foreign economic activity. This regime causes considerable problems for performance of foreign economic activities, because it requires obtaining of approval from the Ministry of Economic Development and Trade of Ukraine for each separate foreign economic transaction.

One should pay attention to the fact that in the event of breach of terms for settlements the special sanction of individual licensing regime is also applied to the foreign counterparty of the Ukrainian party at fault. However, there could be no fault of the foreign counterparty in the breach of the currency legislation. Such foreign counterparty, as provided by the agreement, could have fully performed all its undertakings for supply of goods to Ukraine.

Such decision of the Ministry of Economic Development and Trade of Ukraine actually blocks activities of a foreign company, because, while not being notified on the applied sanctions, its foreign economic transactions with other Ukrainian counterparties are suspended and may be resumed only upon obtaining individual license for each separate transaction (which is very demanding and may result in breach of terms of supply) or cancellation / suspension of the individual licensing regime (pursuant to the effective procedure, suspension or cancellation of the

individual licensing regime may take up to 30 days).

Such sanctions, due to absence of legislation breach on the part of a foreign counterparty, are commonly misunderstood by the foreign importers and, taking into account speed of the modern trade, are deemed to be archaic. So what is the logic of the Ministry of Economic Development and Trade of Ukraine in application of the special sanctions, and why the foreign economic entities are held liable without any fault on their part?

The answer to this question lies in the approaches used in legal regulation of liability of the entities which perform foreign economic activity (residents) and their counterparties (foreign entities). Foreign economic activity is treated as a very special area of business activity, where, in certain cases, sanctions might be applied to the entities without their active involvement in violation of the legislation. This is due to the fact that actions of Ukrainian, as well as foreign, entities which perform foreign economic activities may harm economic security of the state and, therefore, prevent performance of the international obligations of Ukraine.

Application of sanctions to the foreign counterparties aims at prevention of violations, which may have negative consequences for the state overall. Thus, application of the special licensing regime is an instrument of control, which helps the Ministry of Economic Development and Trade of Ukraine to identify all circumstances, under which violation of the currency legislation took place, and make a decision on the further activity of the companies.

In the circumstances when a breach of import-export transaction procedure by a counterparty led to application of the special sanctions, all parties to a foreign economic contract are required to obtain approval from the Ministry of Economic Development and Trade of Ukraine on their foreign economic transactions and register their individual licenses. Pursuant to Regulations on Procedure for Issuing of Individual Licenses, application for individual license is considered within 15 business days. In addition, a state duty of 0.2% of the contract value shall be paid.

As evidenced by the court practice in 2014-2015, efforts of the parties to a foreign economic contract, to which the Ministry of Economic Development and Trade applied its special sanctions, to appeal the Ministry's decision in court were, in most cases, unsuccessful. Even in the absence of a fault in breaching of the currency legislation of Ukraine, the courts take into consideration the fact that in the event of breach of import-export transaction procedure the State Fiscal Service of Ukraine is entitled to make submissions to the Ministry of Economic Development and Trade of Ukraine pursuant to Article 37 of the Law of Ukraine "On Foreign Economic Activity", and, respectively, the Ministry itself, on the basis of such submission, shall make its own decision on whether to apply the special sanctions.

The State Fiscal Service of Ukraine, by initiating application of the special sanctions towards the entities which perform activities, has several objectives, which are: to prevent mechanisms of illegal exportation of foreign currency abroad and outflow of foreign currency from Ukraine; to detect activities on legalization of proceeds acquired in illegal manner; and to identify non-resident companies whose activities might be fictitious.

As mentioned, application of the special sanctions by the Ministry of Economic Development and Trade of Ukraine towards the bona fide non-resident companies might come as a complete surprise to the latter ones and will result in additional expenses connected with, for example, payment for storage of goods at the customs warehouse. In order to minimize the risk of additional expenses incurred during cooperation with Ukrainian counterparties, the foreign companies should thoroughly track terms for settlements under the foreign economic contract and, in case of their breach, check the list of companies towards which the special sanctions were applied (in order to identify whether the company was included in such list). In the event the company timely identifies that the Ministry of Economic Development and Trade of Ukraine decided to apply the special sanction in the form of individual licensing regime towards the company, application of such sanction might be prevented upon early reaction.

The risk of application of the individual licensing regime towards the foreign company due to breach of terms for settlements under the foreign economic transactions on the part of a Ukrainian counterparty might be fully mitigated in case of 100% prepayment for the supplied goods. This is due to the fact that in such cases sanctions will be applied to a foreign company only in the event of breach of currency legislation of Ukraine by such foreign company itself.

Taking into consideration the difficult economic situation in Ukraine and deficit of foreign currency in Ukraine, such measures are one of the means of prevention of the outflow of foreign currency abroad. However, on the other hand, in the modern trade, where speed, predictability and certainty play important role, such demanding, and in some cases completely unexpected for the foreign companies, measures under Ukrainian law will not contribute to strengthening of the image of Ukraine as a suitable platform for trade and commerce.