

newsletter

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BANKING AND FINANCE

Pressure on the Foreign Currency Proceeds

The National Bank of Ukraine introduced a new measure requiring conversion of 100% of proceeds from exports and loans (Resolution no. 515 dated 20 August 2014) citing, in particular, such diverse grounds as “uncertainty in the development of the situation”, fighting against terrorism and money laundering, and political tension in the society. The usual exemptions apply, however: financing by international financial institutions and under the governmental auspice, transactions of correspondent banks, transit payments. The regulator had also re-introduced the shorter 90 days term for transferring foreign currency proceeds to Ukrainian residents. Both measures will be reviewed no later than on 21 November 2014.

The National Bank had only few instruments remaining within current model of limited convertibility of the current and capital accounts, two of such instruments being conversion of loans and deposits. One of the measures to discourage foreign currency denominated savings became effective on 19 August 2014 (Resolution no. 480): the reserves on UAH denominated accounts are lowered to 0% whereas deposits and current accounts denominated in a foreign currency require reserves from 5% (interbank borrowing) to 15% of the current accounts and on-demand deposits by individuals.

Emergency Situation

The regulator was making use of its recent (July 2014) regulation on the emergency measures in the financial sector. First, the National Bank ordered to stop all financial transactions in the territories outside control of the Ukrainian government, second, it undertook to liaise, on the daily basis, with the Headquarters of the Anti-terrorist Operation and informing banks about such territories (Resolution no.466 dated 6 August 2014). The territory controlled by the Ukrainian government must have functioning banks and other licensed financial institutions immediately. Generally a positive development, the resolution falls short of defining the “government” and “control” - (“vlada” or power - in original); local councils and their executive bodies are the government, too. For example, in Donetsk the council and the executive committee manage quite many of the issues in the daily life. Importantly, it has ramification for the businesses functioning in such circumstances - e.g. utilities, bakeries, markets, and carriers - that remain subject to the cash management requirements, such as daily cash desk limitations, limits on cash transactions, payment of taxes, settlements with the state treasury. The regulator offered no guideline to such businesses; ironically, the general ban on financial transactions can be extended to their still available e-transactions such as Internet-banking, offline card transactions, e-money.

The NBU had also offered the banks to use the reference note to identify recipients of the social security among the displaced persons (in relation to ATO in the Eastern Ukraine) - Letter no. 25-111/42606 dated 6 August 2014.

E-Money Restart

The regulator has overhauled its regulations on the electronic money improving definitions and revising most of the provisions, including registration of the e-money rules with the National Bank of Ukraine.

Among other changes, the NBU limited amounts of e-money transfers between individuals at up to UAH 500 (EUR 27) per day (Resolution no. 378 dated 19 June 2014). With the thresholds way below the transactions for financial monitoring (UAH 150 000) this can only be a concern for the security of payments. The monthly turnover is capped at UAH 4,000 (EUR 220), while the annual cap stands at UAH 35,000 (EUR 1,910). Such restriction is certainly a push-back to the innovations with the small purchase niche - the average utility bill is above UAH 500, same as the cost of an average online purchase.

Special Purpose Account

The National Bank of Ukraine ordered banks to open special current accounts that can be credited exclusively with salaries and social security payments; existing current accounts may also be used for this purpose provided that the bank and the customer amend the original bank account agreement (Resolution no. 499 dated 18 August 2014). The National Bank introduced such special account as payments that it may be credited with are exempt from the tax on interest. Interestingly, this type of account is not provided by civil or commercial laws and, therefore, its contents must be guided by the freedom of contract principle under the Civil Code of Ukraine. The Ukrainian legal system has been missing ‘special purpose [current] accounts’ that have contractually defined sources of funding and restricted purposes for spending - such structures are quite instrumental in the developed markets to finance the projects and manage the cash flows of the corporate sector. In contrast, many Ukrainian banks believe to date that customer may not be restricted in the disposal of the funds on their accounts and may freely credit their accounts from any source. Doctrinally, therefore, the NBU’s ‘salary account’ can be seen as a step towards recognition of the contractually limited scope of operations with the current accounts: as explained by the NBU, stipulation of the limited use can be made by the

application to the bank, specifically in the Section Additional Information of the form, or by an amendment to the existing agreement.

DOING BUSINESS

Temporary Restriction for Public Audits of Businesses

On 16 August 2014 the Article 31 of the Law on Amendment of the State Budget No. 1622-VII was enacted. This article restricts public audits of companies for the period of August - December 2014.

More specifically, audits of businesses may be launched by public controlling bodies during the said period only upon permission by the Cabinet of Ministers of Ukraine. The restriction applies to both scheduled and unscheduled audits / dawn raids.

The above law was pointed out by the current Ukrainian PM Yatsenyuk as one of preconditions for his decision to stay in the office at least until the early parliamentary elections expected in October - November this year.

The effect of the Law is explicitly excluded with respect to tax audits undertaken by the State Fiscal Authority of Ukraine. In addition, the Law will most probably not apply to inspections rendered by the police and state prosecution, as they are considered to be law enforcement rather than law controlling authority.

So far numerous public authorities declared complete suspension of audits. Reference could be made to the State Transport Inspection (<http://www.mtu.gov.ua/uk/news/2014-08-13/44333.html>), State Industrial Safety Services (<http://www.dnop.gov.ua/index.php/uk/pres-sluzhba/vsi-novini/10606-povidomlennya-pro-timchasove-pripinennya-provedennya-perevirok>) and others. At the same time, some public authorities have already applied for the above individual permissions of the Ukrainian government (e.g. the National Telecommunication Authority).

In addition, the Law of Ukraine on Amendments to Certain Laws of Ukraine for the Purposes of Limiting of Interference into Companies Activities was signed by President of Ukraine on 12 August 2014 and will become effective upon its official publication. As we have previously informed you, this law establishes a "one year-one audit" rule, as well as a number of other restrictions and requirements to public inspections having positive impact on businesses. This law applies to any kinds of scheduled public audits, save for tax and construction law audits.

Law on Sanctions Adopted

On 14 August 2014 the Parliament of Ukraine adopted the Law of Ukraine On Sanctions, according to which Ukraine may impose restrictive measures (sanctions) against foreign states and individuals as well as legal entities controlled by them in case of real or potential threat to national interests, national defence, sovereignty, territorial integrity of Ukraine as well in case of terrorist activity, violation of rights, causing losses or blocking stable economic development of Ukraine. The decision on application of sanctions is taken by the National Security and Defence Council and may be initiated by the Verkhovna Rada, the President, the Cabinet of Ministers, the National Bank or the Security Service of Ukraine. Sanctions will be enacted by a Decree of the President which will then need an approval of the Verkhovna Rada of Ukraine in case such sanctions are enacted against a specific state or public at large. In case of imposing sanctions against specific foreign citizens, legal entities controlled by foreign states and/or citizens, the sanctions will be enacted by a Decree of the President on the basis of a decision of the National Security and Defence Council while approval by the Parliament will not be required. A decision on imposing sanctions will be effective as of the moment of issuance of a

Decree by the President of Ukraine or adoption of a Resolution by the Verhovna Rada of Ukraine if such approval is required.

The Law covers administrative (annulment of licenses and permits, refusal to issue visas to foreigners, prohibition of entry into Ukraine), commercial (restriction of commercial transactions, termination of trade agreements), corporate (prohibition to increase charter capital of companies and banks where foreigners own 10 or more per cent of the charter capital), banking and financial (freezing assets, refusal to issue an NBU license for investments abroad) ecological (introduction of additional measures in the sphere of ecological, sanitary, phytosanitary and veterinary control), cultural (cessation of cultural exchanges) and other restrictive measures (sanctions), which list is non-exhaustive.

The Law will enter into force upon signing by the President and its official publication thereafter.

Law on Business Activities in Crimea Adopted

On 14 August 2014, the Parliament passed the draft law On the Tax and Customs Control in the Free Economic Zone Crimea and on the Particularities of the Pursuit of Economic Activities within the Temporarily Occupied Territory of Ukraine (the FEZ law) which is primarily aimed at regulating business activities of the Ukrainian and foreign companies within the territory of the temporarily occupied land of Crimea. Introduction of this law was expressly stipulated in the Law On Ensuring Rights and Freedoms of Citizens as well as A Legal Regime within the Temporarily Occupied Territory of Ukraine (Article 13).

The FEZ Law does not prohibit Ukrainian companies to pursue economic activities in Crimea. Instead, the regime of a free economic zone (FEZ) is introduced for 10 years in the territory of Crimea (the Crimean Autonomous Republic and the City of Sevastopol), subjecting migration to and from Crimea and economic operations in Crimea, on the one hand, to a number of limitations and, on the other hand, numerous derogations from the regulatory tax and customs laws. Moreover, establishing the FEZ regime, the FEZ Law simultaneously introduces a number of exceptions to its provisions applicable as long as Crimea remains under Russian occupation.

Importantly, economic activities in Crimea will be exempt from general Ukrainian taxation as well as from the requirement of the mandatory sale of a foreign currency. The FEZ Law confirms the validity of any Ukrainian licenses and permits received by the Crimean businesses prior to the FEZ Law. Crimean companies are allowed to participate in the Ukrainian public procurement procedures.

At the same time, for the purposes of customs, Crimean businesses will be treated as non-resident, effectively subjecting thereby and goods originating from Crimea or designated to Crimea to the customs clearance procedures. Moreover, the FEZ Law expressly prohibits transfers of real property to companies owned or controlled by the government of the Russian Federation.

To become effective the law is to be signed by the President and will enter into force the next day after its official publication.

ENERGY

Law on Concession of Gas Distribution and Storage Networks Passed

After heavy political debates the Ukrainian Parliament finally passed on 14 August 2014 the Law On Reform of the Energy Sector (the Law).

As we previously informed you, the Law provides for the possibility of lease / concession (but not ownership) of the national gas distribution network as well as gas storage facilities.

More specifically, in accordance with the Law Ukraine represented through its national gas operator Naftogaz shall create a joint-venture company (the Operator) together with a private partner to operate the gas distribution network. The network's assets will be granted into use by the Operator under concession or lease terms. Importantly, the state shall control no less than 51% in the share capital of the Operator.

The private partner will be selected by the Cabinets of Ministers and finally approved by the Ukrainian Parliament among those companies, whose controlling shareholders are operators registered in US, EU or one of the countries-members of the Energy Community (which currently includes Ukraine, Moldova and countries of former Yugoslavia) and certified pursuant to Article 10 of Directive 2009/73/EC of the European Parliament and of the Council. Importantly, a potential private partner shall have at least 5 years of the relevant operating experience on American or European markets.

It has to be already noted that the Law is less restrictive with respect to companies, which may be partnered with Ukraine to operate the national gas storage facilities. More specifically, these companies may be founded by any resident of US, EU or Energy Community. The final approval of the private partner will again be taken by the Ukrainian Parliament.

During final reading of the Law the public deputies introduced an amendment relating to the approval by Ukraine of possible change of control in the private partner. The official text of this amendment is not available yet.

To become effective the law is to be signed by the President of Ukraine.

Further on the Cabinets of Ministers of Ukraine is expected to detail the tender process and requirements in a separate regulation. ■

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