

Alina Plyushch: Why are personal sanctions important for businesses in Ukraine?

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The National Corps Party graffitied VTB Bank on Pushkinska Street in Kyiv on Feb. 3 in protest of subsidiaries of Russian banks operating in Ukraine. Ukrainian activists on Feb. 2, 2017 protested against the presence of Russia's Sberbank in Ukraine urging depositors to withdraw their money from the bank as part of a national protest against Russian-owned banks in Ukraine. Russia has been waging war against Ukraine for nearly four years, after invading and illegally annexing the Crimean peninsula. Photo by **Pavlo Podufalov**

International sanctions were the headline news in 2017 due to the steps taken by the United States and the rhetoric of President Donald J. Trump.

At the same time, the development of the Ukrainian sanctions program against Russia was never widely discussed. This was a mistake. Several important changes, particularly relevant

for foreign and international businesses, were overlooked amid criticism of weak Ukrainian sanctions compared to those imposed by other countries.

Let's have a look at them in more detail.

Sanctions lists widened

Another 339 individuals and 202 legal entities were added to Ukraine's sanctions lists during the past year.

Since September 2015, the introduction date of the Russia-related sanctions program, the total number of sanctioned persons has almost tripled. Obviously, sanctions against Vkontakte, Yandex and several Russian banks – including Sberbank and VTB Bank, both targeted by the EU and US sanctions as well – have grabbed most attention.

However, the fact that the real number of sanctioned persons is much wider went largely unnoticed.

A key issue here is that the sanctions law does not indicate whether sanctions apply to persons who are not included in sanctions lists but connected to those who are.

For instance, if sanctions apply to an ultimate beneficial owner of a company, should its management bear this fact in mind while running the company? Should a holding company expect adverse repercussions when one of its Ukrainian subsidiaries becomes a sanctioned person?

A reserved “yes” would be the best response to these questions at this point, for a couple of reasons.

Firstly, many state authorities, including the National Bank of Ukraine and the Antimonopoly Committee of Ukraine, think so.

Shortly after the publication of the first sanctions lists, the NBU issued a regulation explaining how to apply the sanctions. In March 2017, the NBU amended it. Among other things, the central now prohibits Ukrainian banks from performing any action that might circumvent or contribute to the circumvention of sanctions.

As a result, banks tend to verify pro-actively all the circumstances and background of financial transactions of their clients. That includes checking information on affiliated persons and ultimate beneficial owners of transacting parties.

The Anti-Monopoly Committee intends to act in a similar way. At the end of the past year, the committee shared its vision as to the rules for granting clearances and approvals in cases

where one of the parties to a transaction is a sanctioned person. Although the Anti-Monopoly Committee has just started to form sanction-related practices, their implication on the Ukrainian mergers and acquisitions market will emerge in 2018. For example, now a buyer in such a deal will not be able to obtain clearance for a purchase of a subsidiary held by a seller if an assets freeze under Ukrainian law applies to the seller.

Curiously, the regulator will examine both the immediate parties to a deal and the companies that either control or are controlled by them (including their ultimate beneficial owners). Moreover, when filling applications for Anti-Monopoly Committee clearance, the parties shall indicate whether there are sanctioned persons among them.

Second, private businesses are getting more careful when dealing with sanctioned persons, scrutinizing potential partners and their beneficial owners.

Such precautions are mainly due to potential reputational losses (especially where such dealings are not under the radar) and the pragmatic unwillingness to feature themselves in the sanctions lists.

One-way ticket

Although 2017 has thrown some light on how sanctions should apply, it is still unclear when their effect shall cease.

The wording of the sanctions law is rather broad: “A decision to repeal sanctions shall be taken if the sanctions have achieved the goal of their introduction.” The goal of sanctions is to “protect the national interests, national security, sovereignty and territorial integrity, counter terroristic activities, as well as to prevent violence, restore violated rights, freedoms and lawful interests of Ukrainian citizens, the public and the state.”

Does it mean that sanctioned persons will remain listed until all goals of the law are fully achieved? Is it enough for the persons in question to prove that their activities neither threaten national security nor violate citizens’ rights? What shall be done if one’s name has been put on the lists by mistake?

The lack of a clear mechanism for contesting the sanctions lists complicates the issue. As court practice demonstrates, one should contest the presidential order on imposing sanctions to make amendments to the sanctions lists.

In 2017, several claimants tried to become unlisted. Is it worth mentioning that none of them succeeded?

The claim of M.S.L., a major lottery operator in Ukraine, against the President Petro Poroshenko is particularly interesting. The company has been seeking removal from the sanctions lists for more than a year. Its case reached the Supreme Court of Ukraine.

Unfortunately, some court rulings relating to these proceedings are classified. The definitive decision of the court is expected to shed light on many issues relating to sanctions. However, the proceedings are unlikely to end in 2018.

Trends in 2018

- Sanctions lists will expand again. Moreover, new names will not necessarily be added exclusively due to the Russian involvement in Ukraine. As Poroshenko suggested, Russian actions in South Ossetia, Abkhazia and Syria may be considered when drafting the newest sanctions lists.
- Ukraine's government intends to actively promote unification of the Ukrainian sanctions program with the EU and the US programs. One practical implication is that failure to comply with sanctions regulations abroad may lead to imposition of sanctions not only by the national state of the person in breach, but also by Ukraine, and vice versa.
- Restrictions will apply widely to persons connected to sanctioned companies. Court practice will keep on evolving in this direction. For instance, in February of this year, a court refused to satisfy the claim of a company seeking to recover debt from a Ukrainian contractor because the ultimate beneficiaries under this debt were under Ukrainian sanctions. The key issue here is that Ukrainian sanctions apply to one of the claimant's group of companies. Neither the claimant itself, nor its parent company appears to be on the sanctions lists.
- New amendments to the sanctions law are likely to be made in 2018. There are a few draft laws submitted before the parliament, proposing to widen grounds for imposing sanctions and to add new restrictions.

Will businesses notice these upcoming trends? Whatever the answer will be, it is beyond doubt that Ukrainian sanctions have already become a non-negligible risk factor for anyone working on the Ukrainian market.

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