

NBU PERMISSION SYSTEM



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Transactions and legislation

Ukraine as any other country is open for foreign investments if it has advantages and favourable rules of currency regulation, which make it an attractive field of investment activity and allow foreign investors to place their funds freely into our economy. Moreover, such rules must not prevent local individuals and legal entities from effective operating on international markets and cooperating with foreign banks and financial institutions. All the determined rules must strictly correspond to the economy's requirements. That is why in order to ensure the growth of Ukraine's positions on the international market due attention by government authorities must be paid to the policy of currency regulation. However, applicable Ukrainian legislation contains a lot of restrictions and conflicting provisions in this area, which sometimes do not facilitate the forming of transparent investment policy for foreign investors. The policy of currency regulation is aimed at governing issues related to international payments and regime of transactions with currency values. In Ukraine it is performed through the mechanism of currency limitations and currency control, in particular, control over currency transactions, which are conditionally divided into three main groups and relate to:

— the transfer of ownership rights to the currency assets, excluding transactions between residents in the national currency of Ukraine;

— the application of currency values in international turnover as the form of payment together with transfer of indebtedness and other obligations having currency values as its subject;

— import, remittance and transfer of currency values to the territory of Ukraine and export, remittance and transfer from Ukraine.

Fundamental regulations in this area are those adopted by the National Bank of Ukraine (NBU) as the main government authority performing currency policy and currency control in Ukraine, the Cabinet of Ministers

of Ukraine, tax authorities, the Ministry of Communications of Ukraine, the State Customs Committee:

1) Decree of the Cabinet of Ministers of Ukraine *On Currency Regulation and Control of 19 February 1993, No.15-93* (Decree 15-93);

2) *The National Bank of Ukraine Act of Ukraine of 20 May 1999, No.679-XIV*;

3) *Banks and Banking Activities Act of Ukraine of 7 December 2000, No.2121-III*;

4) *Payments in Foreign Currency Act of 23 September 1994, No.187/94-BP*;



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5) Resolution of the National Bank of Ukraine *On Currency Control of 8 February 2000, No.49*;

6) Resolution of the National Bank of Ukraine *On Issuance of Bank Licenses, Written Permits and Licenses for Certain Transactions of 17 July 2001, No.275* (NBU Resolution 275);

7) Numerous NBU resolutions regulating specific licensing issues and specifying the conditions of transferring currency assets through the boarder of Ukraine with/without customs declarations.

These acts contain key principles for establishing the regime of performing currency transactions on the territory of Ukraine. They cover currency transactions between residents of Ukraine and non-residents, banks, credit and financial institutions, other legal entities and individuals; issues on declaring currency values and other property situated abroad and owned by residents; determine the list of transactions which may be subject to

licensing, or written permission, or both such instruments at the same time, set up a procedure for obtaining such permissions by banks and other entities; determine the powers of government authorities and functions of parties to such relations, their rights and obligations and, accordingly, their responsibility for breach of relevant legislative provisions.

Licensing system

The NBU permission system includes bank licenses, written permits, and licenses for certain currency transactions, general and individual licenses and is based on the above legislative acts and NBU regulations. The licensing system is applied to all bank and currency operations and is intended to enhance the reliability and stability of Ukrainian banking system as well as not to admit the entry of commercial banks that do not meet NBU requirements for the Ukrainian and international banking services markets. Thus, it was brought in to control currency transactions performed by banks and other subjects, to improve the level of the Ukrainian banking system, to protect interests of creditors and bank depositors, and is required to ensure that each particular bank meets NBU standards.

According to the *Banks and Banking Activities Act* and NBU Resolution 275:

— bank license is issued by the NBU and is the basis for the banks to perform their business in general;

— license issued to banking corporations for certain bank operations is issued by the NBU based on the size of consolidated charter capital of all banks participating in banking corporation, and entitles such corporation to perform any specific operation.

A written permit is issued by the NBU and is the basis for banks to carry out transactions envisaged by Para 1-4, part 2

and Para 1-6, part 4 of Article 47 of the above Act, where the category of currency operations is included.

At the same time, Clause 5.3 of NBU Resolution 275 determines a written permit for currency transactions as the general license for performing currency transactions under Decree No. 15-93 that may be issued to a bank provided it complies with respective requirements established for a particular type of activity. Both the terms “license” and “written permit” are used in the applicable banking legislation. Thus, we may assume, that the general license appears at the beginning of banking activity as the initial and general permission, and that the written permit is the basic instrument for carrying out certain additional currency transactions. Bank licenses and permits cover different spheres of bank relations and are applied in different situations. If a commercial bank has such a permit for currency operations it acquires the status of an authorised bank, which is to fulfil currency control.

The NBU issues general and individual licenses for currency transactions depending on the nature of and the term for the performance of each particular currency operation.

General licenses are issued to commercial banks, credit and financial institutions in Ukraine, to the national post operator for carrying out currency transactions, which do not require an individual license. Here, we suppose that certain priority is established for individual licenses, acquisition of which needs to be considered on a primary basis nearly in every case. It also means all the transactions that require individual license cannot be covered by the general one. Individual licenses are issued to residents and non-residents (both individuals and legal entities) in order to perform certain single currency transaction and

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are valid only for the period required to carry out such transaction.

The list of transactions where an individual license is required is determined in Decree 15-93:

1) export, remittance and transfer of currency values from Ukraine, excluding:

- export, remittance and transfer of currency values from Ukraine in the amount established by the NBU (but if the amount of values exceeds the limits — an individual license is required) by individuals who are residents of Ukraine;

- export, remittance and transfer from Ukraine of foreign currency, previously brought to Ukraine on a legal basis by individuals who are residents of Ukraine and non-residents;

- payments in foreign currency made by residents from Ukraine in order to comply with their obligations in such currency to non-residents in relation to payment for products, services, works, intellectual property rights and other property rights, excluding payments for currency values and under life insurance contracts (insurance policies and certificates);

- payments in foreign currency from Ukraine in the form of interest on loans, income from investment;

- export of foreign investments in foreign currency from Ukraine in case of termination of the respective investment activities in Ukraine;

- payments in foreign currency by the European Organization for Air Navigation Safety (Eurocontrol) from Ukraine as payment for air navigation services provided to aircrafts in accordance with the Multilateral Agreement *On Payment of Route Fees* which entered into force in Brussels on 12 February 1981 and other international agreements;

2) import, remittance and transfer of Ukrainian currency to the territory of Ukraine, except

for cases specified in Paragraph 2 of Clause 3 of the above Decree No.15-93 (the said provision contemplates that the NBU is entitled to determine the order of transferring values in the national currency from and to Ukraine both by residents and non-residents);

3) granting and borrowing by Ukrainian residents (including residents banks) loans in foreign currency provided that the term and amount of such loan exceed the limits established by applicable legislation;

4) use of foreign currency on the territory of Ukraine as the instrument of payment or as security;

5) placement of currency values on accounts outside Ukraine, except for cases where:

- Ukrainian individuals open foreign currency accounts for the relevant period of their stay abroad;

- authorized banks open correspondent accounts;

- Ukrainian residents, having status of diplomatic, consular, trading or other official representative offices of Ukraine abroad, open foreign currency accounts;

6) making investments abroad through purchasing securities, except for cases when securities and corporate rights are received by Ukrainian individuals as a gift or inherited.

The problem is that applicable legislation provides for a definite list of currency transactions which require the acquisition of an individual license. However, when performing operations which are not stipulated directly in the Decree 15-93 or any other applicable regulation, certain difficulties may arise. The NBU has adopted a number of regulations that cover, *inter alia*, the following issues: placement by residents and non-residents of currency values on accounts opened abroad; remittance of currency values by residents from Ukraine in order to purchase bonds of external

government loans of Ukraine; remittance by residents of foreign currency from Ukraine to pay for currency values; making investments abroad; payments between residents and non-residents in the Ukrainian national currency within commercial turnover; remittance of foreign currency from Ukraine to pay for banking metals and carry out certain currency operations; use of foreign currency in Ukraine as a payment instrument; transfer of currency values and cheque forms to and from Ukraine by authorized banks and remittance of foreign currency from Ukraine in order to pay for banking metals; obtaining loans in foreign currency by residents from non-residents and provision of loans to non-residents by residents of Ukraine, etc.

NBU licenses are issued on a paid basis and in any case must be obtained prior to carrying out any particular currency transaction. If one of the parties to a currency transaction has obtained an individual license, it means that the other party or any third party is allowed to carry out the same transaction, unless otherwise contemplated by such a license. The NBU's refusal to issue a relevant license can be contested in a court or arbitration.

Thus, the subject of licensing is a rather complicated issue governed by a bunch of legislative acts that currently form a vast and, unfortunately, at times ambiguous legal base. We believe that the terms "license", "written permit" and "general/individual license" should be clearly differentiated and that straight criteria for issuing various types of licenses should be specified. In other words, the relevant clauses of applicable currency legislation should be worded in a more precise and clear way, which would help to avoid inconsistencies in legislative provisions and any potential misunderstandings in the interpretation thereof.

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