



Russian counter-sanctions

Review of 2018 and outlook for 2019

/ Executive summary

Introduction

In 2018, the Russian Federation for the first time took comprehensive counter-measures to respond to the US/EU sanctions. This response was triggered mainly by the adoption of CAATSA¹ on 2 August 2017 and the extension of the US sanctions on 6 April 2018. The counter-measures are a combination of economic sanctions and measures to prevent the implementation of the US/EU sanctions in Russia. Further counter-measures – in particular the introduction of liability for sanctions compliance in Russia – are expected in 2019.

Key developments

- On 15 May 2018, the State Duma adopted at its first reading a draft blocking law providing for criminal **liability for sanctions compliance** with a penalty of up to four years' imprisonment. While such a criminal liability for sanctions compliance now seems to be off the table, administrative liability may still be introduced.
- The **new framework law on counter-measures** which came into force on 4 June 2018 constitutes another basis for the Russian President to take extensive economic counter-measures against the United States and EU Member States. To date, however, counter-measures under this law have been taken only against Ukraine.
- Throughout 2018, the Russian Government issued a number of orders **restricting** the disclosure of **information with respect to sanctioned persons**. Information from publicly available sources may now be incomplete with respect to these persons.
- On 6 July 2018, **import customs duties** for certain types of goods originating from the United States were increased. On 12 July 2018, the **import ban on agricultural products**, raw materials and food from the United States and EU Member States was extended until 31 December 2019.
- On 1 November 2018, the first **economic measures** under the new framework law on counter-measures were imposed **on Ukraine**. The Russian assets of 567 individuals and 75 companies – almost all Ukrainian – have been frozen. Further, on 29 December 2018, the import of a variety of Ukrainian goods was prohibited.

¹ Countering America's Adversaries Through Sanctions Act (Public Law 115-44).

- International companies operating in Russia are trying to avoid violations of the US/EU sanctions which may lead to **breaches of Russian antitrust law**. However, to date there has been no indication that the Federal Antimonopoly Service (FAS) will investigate these cases.
- Throughout 2018, Russian courts further developed their **case law** which complicates the implementation of the US/EU sanctions in Russia. **Sanctions clauses** in agreements have to be drafted on a case-by-case basis taking into account this court practice and the proposed liability for sanctions compliance.

/ Counter-measures

1. Legislative initiative for liability for sanctions compliance

On 15 May 2018, the State Duma adopted at its first reading a draft blocking law² which provides for criminal liability with a penalty of up to four years' imprisonment for any Russian or non-Russian individual who complies with foreign sanctions and thereby restricts the ordinary business operations of Russian persons. In addition, deliberate actions by Russian individuals which facilitate the introduction of foreign sanctions against Russian persons shall be punishable by up to three years' imprisonment ([please see Noerr Newsletter of 21 May 2018](#)).

While according to press reports, criminal liability for the facilitation of the introduction of foreign sanctions will likely become law³, the initiative to introduce criminal liability for compliance with the sanctions seems to have lost support. The Russian President stated, for example, that Russia will not punish its foreign partners operating in Russia for complying with anti-Russia sanctions (this question had been “*decided*”).⁴ Also, Duma members now seem to favour a less severe administrative liability for sanctions compliance instead of criminal liability.⁵ To date, however, no draft law for such an administrative liability has been published.

It is likely that this legislative initiative (criminal liability for sanctions facilitation and administrative liability for sanctions compliance) will be further pursued by the Duma in 2019.

2. New framework law for counter-measures

On 4 June 2018, the Federal Law No. 127-FZ “On measures (counter-measures) in response to unfriendly actions of the United States [...]” came into force. This law constitutes another basis for the Russian President to take extensive economic counter-measures against the United States and other “unfriendly states” supporting the anti-Russia sanctions. In contrast to measures under the Federal Law No. 281-FZ “On special economic measures” of 30 December 2006 (please see item 5 below), counter-measures under this law can be unlimited in time. Import bans can be imposed for any goods originating from unfriendly states or

² Draft Law No. 464757-7.

³ E.g. https://www.gazeta.ru/politics/2018/06/19_a_11807005.shtml?updated.

⁴ E.g. <https://www.rbc.ru/business/26/05/2018/5b0872619a7947339498aedc?story=5af980859a7947b069a0a9d3>.

⁵ E.g. <https://www.vedomosti.ru/politics/news/2018/07/10/775124-volodin-sanktsii?cldee=c3RlZmFuLndlYmVyQG5vZXJyLmNvbQ%3D%3D&recipientid=contact-7469d7ddc87be0118e0e18a905770860-4a1b11d8f1334ea7aa41bf43a6b9256a&esid=2c61c503-ff84-e811-8134-5065f38a5b01&urlid=2>.

produced by companies incorporated in these states, except for goods which are lifesaving and have no equivalent produced in Russia ([please see Noerr Newsletter of 21 May 2018](#)).

The taking of any counter-measures is still at the sole discretion of the Russian President. To date, counter-measures under this law have been taken only against Ukraine (please see item 6 below). Counter-measures under this law against the US or EU Member States have neither been taken nor proposed.

3. Restriction of access to information on sanctioned persons

As early as 31 December 2017, Federal Laws No. 481-FZ and 482-FZ authorized the Russian Government to determine the cases in which the mandatory disclosure of information can be restricted with respect to sanctioned persons ([please see Noerr Corporate ABC Report 2017](#)). Apparently, these restrictions are designed to protect the business partners of sanctioned persons from the consequences of sanctions violations.

Based on these laws, throughout 2018 the Russian Government issued orders restricting the disclosure of information relating to sanctioned persons by the Unified State Register of Legal Entities (Governmental Order No. 5 of 12 January), Russian joint stock companies and limited liability companies (No. 10 of 15 January), issuers of securities and credit history sources (No. 37 and 38 of 20 January; amended by Governmental Order No. 959 of 17 August), the Register of Notifications on Movable Property Pledges (No. 65 of 25 January), private pension funds (No. 1150 of 28 September), investment funds (No. 1201 of 5 October), insurance companies (No. 1322 of 3 November) as well as banks and credit organizations (No. 1403, 1404 and 1405 of 23 November). Information available from these sources may now be incomplete with respect to sanctioned persons (e.g. PAO GAZ has not disclosed its issuer report for Q3/2018 as required under Federal Law No. 39-FZ “On the securities market”⁶).

In addition, based on Federal Law No. 310-FZ of 3 August 2018 the Russian Government can restrict the mandatory disclosure of insider information. A draft Governmental Order published in October 2018 proposes limiting any disclosure relating to sanctioned persons from 1 May 2019.⁷

4. Increase of import duties on certain US goods

Governmental Order No. 788 of 6 July 2018 increased the import customs duties for certain types of goods originating from the United States to rates ranging from 25% to 40%. These types of goods include means of transport for the carriage of goods, road construction machinery, oil and gas equipment, metal processing and rock-drilling equipment as well as optical fibres. The new import customs duties apply since 6 August 2018.

⁶ <https://www.e-disclosure.ru/portal/event.aspx?EventId=k826j2t3hE6lFF-All2qeOg-B-B>.

⁷ Draft order published under <https://regulation.gov.ru/projects#npa=85195>.

This measure is intended to counter the increase of US import tariffs on steel (to 25%) and aluminium (to 10%) originating from Russia and other states, which has been in effect since 23 March 2018. It is therefore not a counter-measure under the new framework law (please see item 2 above), but a measure based on the principles of the World Trade Organisation (WTO), the Treaty on the Eurasian Customs Union and Federal Law No. 164-FZ “On the fundamentals of state regulation of foreign trade activity”.

5. Extension of import ban on US and EU agricultural products

Based on Presidential Decree No. 420 of 12 July 2018 and Governmental Order No. 816 of the same date, the import ban on agricultural products, raw materials and food from the United States, EU Member States and other states supporting the anti-Russia sanctions has been extended for the period 1 January to 31 December 2019.

This import ban was initially imposed on 7 August 2014 for one year and has been regularly extended since then. It is based on Federal Law No. 281-FZ “On special economic measures” of 30 December 2006 which authorises the Russian President to take temporary measures to respond to unfriendly actions of foreign states which threaten the interests of the Russian Federation.

6. Economic counter-measures against Ukraine

In response to “unfriendly actions” by Ukraine, Presidential Decree No. 592 of 22 October 2018 and Governmental Order No. 1300 of 1 November 2018 imposed the first measures under the new Federal Law No. 127-FZ “On measures (counter-measures) in response to unfriendly actions of the United States [...]” (please see item 2 above). The assets (non-cash funds, non-documentary securities, property) of 322 individuals and 68 companies – almost all of them Ukrainian – and of the legal entities controlled by them which are located in Russia have been blocked/frozen with effect from 22 October 2018. Their funds are prohibited from being transferred out of Russia. There are, however, no other restrictions imposed in relation to the listed persons (e.g. Russian persons are not prohibited from providing any resources or assistance; there are no secondary sanctions for non-Russian persons). On 25 December 2018, Governmental Order No. 1656 updated the list of sanctioned persons which now includes 567 individuals and 75 companies.

Also based on Presidential Decree No. 592, Governmental Order No. 1716-83 of 29 December 2018 prohibited the import of a variety of goods originating or shipped from Ukraine, including certain agricultural products, raw materials, food, spirits, construction materials, furniture, turbines, agricultural machinery and electrical conductors. Goods which had been delivered to Russia prior to 29 December 2018 may not be released for free consumption by the Russian customs authorities. Special rules apply to the transit of these goods through Russia.

7. Breach of antitrust law by sanctions compliance

To avoid violations of the US/EU sanctions, many international companies operating in Russia are trying to prepare for a potential future listing of their Russian counterparties (e.g. through special termination rights). They are also trying to ensure that their Russian counterparties do not violate the sanctions (e.g. do not resell goods to listed Russian persons or customers in Crimea). This approach however may lead to breaches of Russian antitrust law such as the prohibition on abusing a dominant market position or on restricting the resale of goods ([please see Noerr Newsletter of 12 September 2018](#)).

However, currently there are apparently no cases in which the Federal Antimonopoly Service (FAS) has prosecuted breaches of Russian antitrust law caused by compliance with anti-Russia sanctions. At the same time, FAS is actively requesting information on potential breaches (e.g. with respect to prohibitions for retailers to sell goods in Crimea⁸). According to an interview with the Head of FAS, Igor Artemyev, back in September 2014, FAS could have opened dozens of cases against foreign companies in connection with the sanctions, but *“the position of the Russian Government is not to use such tools, at least at this stage, in order not to worsen relations.”*⁹ There is no indication that this position of the Russian Government has changed since 2014.

8. Unenforceability of sanctions clauses in Russian courts

Throughout 2018, Russian courts further developed their case law which complicates the implementation of the US/EU sanctions in Russia ([please see Noerr Newsletter of 12 April 2018](#)). Two court decisions stand out:

- On 13 February 2018, the Russian Constitutional Court issued a landmark decision on parallel imports ([please see Noerr Newsletter of 15 February 2018](#)) in which it stated in an *obiter dictum* that *“compliance with a sanctions regime against the Russian Federation [...] can by itself be viewed as bad-faith conduct.”* Since the Russian Civil Code obliges all parties to exercise their civil law rights in good faith, the court’s position may render unenforceable any sanctions clauses in agreements governed by Russian law (e.g. rights to terminate the agreement if the Russian counterparty becomes sanctioned).
- In *Siemens v Technopromexport* concerning the delivery of gas turbines to Crimea, the Ninth Commercial Appellate Court stated in its dismissal of Siemens’ appeal¹⁰ that *“the main consequence of granting the appeal would be the de jure application of economic sanctions imposed by the European Union on the territory of the Russian Federation (i.e. the acknowledgement by the court that Russian legal entities have an obligation to comply with them [...]), which would clearly contradict the fundamentals of the legal system of the Russian Federation (public order) – and cause damage to the sovereignty of the state.”* Since the contradiction of

⁸ <https://solutions.fas.gov.ru/ca/upravlenie-po-borbe-s-kartelyami/ats-14552-18>.

⁹ <https://ria.ru/20140923/1025286137.html>.

¹⁰ Order of 10 April 2018 No. 09AP-9815/2018.

public order can be a ground for refusing the recognition of foreign arbitral awards in Russia, this position may render unenforceable any arbitral awards which are based on the exercise of rights under sanctions clauses.

In practice, sanctions clauses have to be drafted on a case-by-case basis taking into account this court practice and the proposed liability for sanctions compliance (please see item 1 above).

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