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EDITORIAL

Poland: energy

Public procurement law in the energy sector

Today the energy sector is facing the challenge of how best to develop its infrastructure, in particular, the construction of new power generation sites and the extension of distribution networks. These tasks will be addressed, at different stages, by the majority of energy companies currently operating in the Polish market. To establish the legal framework and timetable for these complex investment processes, it will be crucial to identify those energy companies that are obliged to apply public procurement law when selecting joint contractors for construction work.

Energy company acting as contracting entity in procurement procedure

In principle, when selecting a joint contractor for construction work, an energy company must apply public procurement law in the following cases: (1) when it is a subsidiary of a public finances body (i.e. a municipal authority or the Treasury) and provides "public services," (2) when it is independent of bodies in the public finances sector and provides "public services" and these services are conducted on the basis of "exclusive" or "special" rights, or (3) if more than 50% of the investment is provided by public funds. It is also mandatory to apply public procurement law when the value of the contract is equal to or above EUR 4,850,000.

State-controlled energy companies

State-controlled energy companies include GEP SA, Tauron Polska Energia SA, ENEA SA, PGNiG SA and Gaz-System SA, which are all run by the Treasury. These undertakings are obliged to apply public procurement law if they supply "public services." The notion of "public services," as defined by Article 132 of the Public Procurement Act, is taken to cover the exploration, prospection and extraction of gas, oil and its natural derivatives, lignite, coal and other solid fuels, in addition to the setting up of networks for the supply of public services concerning the production, transmission and distribution of electricity, gas and heating, or the supply of electricity, gas and heating to these networks, or the management of these networks. In accordance with this provision, energy trading is not considered to be a public service.

Energy companies independent of public bodies

Private energy companies that provide "public services" in the energy sector may be involved as contracting entities on the condition that they carry out their activities on the basis of exclusive or special rights. These rights must be seen as rights that are granted to an energy company on the basis of a law or administrative decision and which reserve a precise type of activity for one or more entities, it being noted that satisfying the conditions for obtaining these rights, as provided for by the law, does not automatically give rise to the obligation to grant such rights. The notion of exclusive or special rights is an independent notion used in Community law and must be understood in light of the interpretation handed down by the case law of the General Court of the European Union.¹

In accordance with the *British Telecommunications plc*,² judgment, the granting of a licence (concession) cannot be interpreted as the granting of exclusive or special rights insofar as these rights may be granted to any undertaking which satisfies objective, proportional and non-discriminatory criteria. Energy concessions are granted by administrative decisions which, by their nature, are not discriminatory. These concessions are granted on the basis of objective and non-discriminatory criteria during open and transparent proceedings. Consequently, there may be an unlimited number of entities requesting concessions, subject to the sole condition that they satisfy the conditions provided for by the energy law.

This means that private energy companies operating in Poland are not, in principle, obliged to apply public procurement law since, by definition, a concession does not require the granting of exclusive or special rights. Nevertheless, it should be noted that current practice in public procurement law, as well as related case law, would seem to suggest that private energy companies are under an obligation to apply this law when they are "natural" monopolies in the market, as is the case for heat producers and energy distributors. It should be noted, however, that this practice has not yet been studied in depth and that its legal basis should be considered as questionable.

¹ Cf. Case C-283/81, *Srl CILFIT e Lanificio di Galardo SpA p. / Ministero della Sanita*, [1982] ECR 3415, point 20; Case C-149/97, *The Institute of the Motor Industry vs. Commissioners of Customs and Excise*, [1998] ECR I-7053, point 16.

² Case C-302/94, *The Queen vs. Secretary of State for Trade and Industry, ex parte British Telecommunications plc.*, [1996] ECR I-06417, point 39.



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PUBLIC LAW

The New Public Procurement Act

The Hungarian Parliament has adopted Act No. CVIII of 2011 on Public Procurement (the "NPPA"), which replaces the current act on public procurement as of 1 January 2012.

The new act mainly aims to regulate public procurement proceedings in a simpler way, by providing a regulatory framework for public procurement proceedings rather than regulating all their aspects in detail.

Amendments introduced by the NPPA

To ensure a simpler regulation, the NPPA intends to enhance the role of general principles throughout the public procurement proceeding (transparency, effective use of public funds, good faith business practice and duty to reasonably exercise procedural rights).

Moreover, the NPPA targets the following main objectives:

- **Fast and flexible procedure** (e.g. under the NPPA, restricted tenders without the publication of a tender announcement will always be allowed if the estimated contract value does not exceed HUF 25 million (about EUR 83,000) in the case of public supply and service contracts or HUF 150 million (about EUR 498,000) in the case of public works contracts);
- **Reducing corruption and other abuses** (e.g. it will no longer be possible for public service providers to avoid public procurement by awarding the required supply or service to their subsidiaries);
- **Modification of the rules related to subcontractors** (e.g. if a tenderer participates in the performance of a contract in a proportion exceeding 25% of the contract value, it may no longer be qualified as a sub-contractor but will be deemed to be a joint tenderer);
- **Facilitating the participation of SMEs in public procurement proceedings** (e.g. contracting authorities may restrict the circle of tenderers to SMEs with a turnover below HUF 100 million (about EUR 332,000) in the case of public service and supply contracts; and below HUF 1 billion (about EUR 3,320,000) in the case of public works contracts; the tenderers will be entitled to an advance payment in the case of public works contracts and contracts exceeding EU thresholds);
- **Flexible procurement regime** (i.e. contracting authorities or entities may apply their own rules for public procurements – a flexible procurement regime – in the case of public service and supply contracts provided that the value of the contract does not exceed the "national thresholds");

- **More efficient application of the law** (e.g. the Commission for Public Procurements will be entitled to adopt "decisions of principle" in order to ensure the correct interpretation of public procurement law).

REAL ESTATE

A new company type: the Regulated Real Estate Investment Company

Hungarian legal regulations recently introduced a new company type in Hungary: the Regulated Real Estate Investment Company ("**RIC**"). RICs are publicly listed companies limited by shares, similar to the real estate investment trusts established in the USA in the 1960s and introduced in France in 2003.

The law sets out beneficial rules such as that (i) RICs are exempted from paying corporate income tax and local business tax as their income is taxed at the shareholder level, and that (ii) RICs may acquire any real estate or capital shares in a company which owns real estate by paying a preferential acquisition stamp duty of 2% (instead of the general rate of 4%).

The law prescribes strict requirements for companies operating as a RIC. Subject to sanctions, the company must - among others:

- be registered by the tax authority as a RIC;
- be a publicly listed company limited by shares having an initial capital of at least HUF 10 billion (about EUR 33,200,000);
- limit its activities to the sale, lease and operation of its own real estate, management of real estate and asset management;
- pay out at least 90% of its profit to its shareholders as dividend;
- perform a mandatory re-evaluation of its real estate portfolio quarterly;
- ensure that at least 25% of its shares are owned by shareholders holding less than 5% of all shares; and that
- insurance companies and credit institutions do not hold more than 10% of all its shares.

Due to the beneficial tax treatment, RICs may present an attractive option to investors in the Central and Eastern European real estate market while also providing sufficient security thanks to the strict legal regulation.

TAXATION

Judgment of the European Court of Justice on refunding excess VAT

According to a recent ruling of the European Court of Justice (the "**ECJ**") the Hungarian VAT regulation that only allows reclaiming the input VAT if the purchaser has actually paid the purchase price does not comply with the provisions of the Council Directive on the common system of VAT (the "**Directive**").



Pursuant to the regulation challenged by the ECJ, if the taxpayer has not yet actually paid the purchase price, the input VAT attributable to the purchase will have to be deducted from the amount of VAT to be reclaimed by the taxpayer. In such a case, the VAT in question may have only been reclaimed in the preceding tax period, once the taxpayer has paid the purchase price in total.

The ECJ pointed out that this regulation infringed the Directive by allowing taxable persons to carry forward such an input VAT several times until the transaction is completed and by placing an unreasonable burden on companies.

In the light of the ECJ ruling, the Hungarian Parliament passed legislation on 19 September 2011 to modify the Hungarian VAT Act which has been repealed and substituted with new provisions. These include:

On the one hand, if the taxpayer reported not reclaimable VAT due to unpaid purchases in its last VAT return submitted before the entry into force of the bill, the taxpayer may apply for this VAT amount in a separate request by 20 October 2011 at the latest (subsequent to this deadline applications will not be accepted). The tax authority must transfer the refund within 30 days of receiving the application or within 45 days for refund over HUF 1 million (about EUR 3,320). Alternatively, the taxpayer may recover the VAT amount in its future VAT return.

On the other hand, if the tax authority levied a tax penalty and/or late payment interest on the taxpayer due to the now repealed VAT regulation before the entry into force of the bill, the taxpayer may request the review of such tax sanctions by 20 October 2011 at the latest (subsequent to this deadline requests will not be accepted).

Act on 'Chips-tax'

A public health product tax, otherwise known as "chips-tax" has been introduced to the Hungarian tax regime as of 1 September 2011. The products subject to "chips-tax" include pre-packaged food and drinks high in sugar, salt or caffeine content (e.g. certain sweetened drinks, energy drinks, cakes, salty snacks and food flavourings).

The "chips-tax" must be paid by the entity that sells the taxable product in Hungary for the first time, with however some exemptions.

The amount of the tax is based on the measurement unit applicable for the respective food and drink categories (HUF 5 - about EUR 0;02 - per litre for sweetened drinks, HUF 25 - about EUR 0;1 - per litre for energy drinks, HUF 100 - about EUR 0;4 - per kilogram for cookies, HUF 200 - about EUR 0;8 - per kilogram for salty snacks and HUF 200 per kilogram for food flavourings).

According to recent news, the government is considering extending the scope of taxable products.

LABOUR LAW

Amendments to the current Labour Code

The current Labour Code was modified by Act No. CV of 2011 published on 19 July 2011. Most of the amendments entered into force on 1 August and the rest will enter into force on 1 December 2011.

Extended probation period

Collective agreements may stipulate a probation period of up to 6 months, instead of the present limit of 3 months.

Length of working time

To mitigate the effects of the economic crisis and to allow more flexible employment, the Labour Code stipulates that the employer and the employee may agree on the application of a 36-hour working week, instead of the standard 40 hours in a separate agreement. As a consequence, the temporarily unused working hours (i.e. 4 hours per week) may be "used" later on, when the parties may agree to increase the weekly working time to 44 hours, without amending the employee's salary.

Originally such an agreement could only be concluded till 31 December 2011, but this limitation has been abolished and the new regulation sets out only one limitation: that such an agreement may only be concluded for a definite term of one year.

Allocation of holidays

Employers may now allocate holidays in more than two parts each year, if it is justified by their rightful economic interests. Nevertheless, employees are still entitled to 14 days of continuous holiday per year unless agreed otherwise.

If employees cannot use their holidays in a given calendar year due to illness or other hindrance lasting at least 183 days, then the untaken holidays may be rolled over by up to 183 days beyond the end of the illness or the other hindrance. Previously, holidays had to be used within 30 days.

Compensation for overtime work

Previously, employers were only allowed to offer extra holiday ("time off in lieu") as a compensation for overtime work if it was expressly allowed by the employment contract. The new regulation allows the employer to decide unilaterally on the form of compensation for overtime work, i.e. the employer is free to choose between paying for the overtime work or providing holiday for the extra time worked ("time off in lieu").

Termination of executives' employment contract

According to the earlier legislation, the employer was entitled to terminate certain executive employees' (the so-called "senior executives") employment contract by ordinary dismissal without giving justification.

Under the new regulation, the employer will need to justify the ordinary dismissal of these employees during the period of pregnancy or maternity leave.



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LABOUR LAW: termination of employment contracts under Polish law

The employment relationship may be terminated individually or within the collective redundancy process.

The Act on Specific Conditions for Terminating Employees' Employment for Reasons not Attributable to Employees of 13 March 2003 set out the criteria to distinguish between both situations and to provide additional obligations - when compared to the Labour Code - of the employer and rights of the redundant employee.

Employment contracts may be terminated for various reasons concerning the employee or the way in which he performs his contractual duties, or for reason independent of the employee.

Termination of an individual employment relationship

The employment relationship may cease as a result of the expiry of the employment contract (e.g. upon the employee's death or in other defined circumstances) or the termination of the employment contract.

The Labour Code sets out the following methods for terminating an employment contract:

- mutual agreement of the parties;
- a statement by one of the parties, observing a notice period – 'termination with notice';
- a statement by one of the parties, without observing a notice period – 'termination without notice';
- the expiry of the period for which it was concluded;
- the completion of the task for which it was concluded.

Where an employment contract is terminated by mutual consent, the parties will settle all issues connected with termination between themselves, in particular the termination date and financial conditions of the employee's departure, though they may not deprive the employee of the rights provided by legal binding provisions. The employment contract may be terminated by mutual consent at any time, even during the notice period given by one of the parties.

The termination of the employment contract with notice is a very common method of termination. The notice period depends on the type of agreement and the employee's length of service. The employer must justify the termination of the employment contract for an unlimited period. The grounds presented by the employer must be real and precise. The employee may appeal to a court against the dismissal and claim its illegal character and unreal, imprecise or intangible character. The employee does not have to justify the termination of the contract with notice.

Employment contracts may be terminated without notice (a) due to the fault of the employee, e.g. where the employee substantially fails to perform his basic duties, or where the employee, through his own fault, loses the qualifications required to perform the work, and (b) in certain cases defined by the Labour Code, where the employee is not at fault, e.g. due to a long-term absence caused by the illness of the employee or when the employer is at fault.

It should be emphasised that an employee whose employment contract is terminated, with or without notice, has the right of appeal to the Labour Court. If the court determines that the termination of the agreement was unjustified or unlawful, then the employee may claim either re-instatement at work or compensation.

Collective dismissals

The rules for making collective dismissals are outlined in the Act on Specific Conditions for Terminating Employees' Employment for Reasons not Attributable to Employees of 13 March 2003, which applies to employers employing at least 20 employees.

A collective dismissal takes place where, within a period of 30 days and for reasons not attributable to the employees, the employment relationship is terminated with at least:

- 10 employees, where the employer employs fewer than 100 employees;
- 10% of employees, where the employer employs between 100 and 300 employees;
- 30 employees, where the employer employs 300 or more employees.

An employer making collective dismissals must follow the procedure provided for by the Act, part of which involves negotiations with trade unions or consultations with employee representatives where trade unions are not present in the workplace. The aim of these is to define rules for making redundancies.

On the termination of the employment relationship as part of a collective dismissal, employees are entitled to severance pay of one, two or three months' gross remuneration, depending on their length of service with the employer. The guaranteed minimum severance pay is the lower of the severance pay by length of service, as set out above, and 15 times the minimum wage. Employers may not pay less than the guaranteed minimum, but can pay more at their discretion.

The same severance pay is due to an employee made redundant for reasons not attributable to the employee dismissed individually.



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THE NEW ROMANIAN CIVIL CODE (I): the introduction of hardship

One of the provisions introduced by the New Romanian Civil Code,³ which entered into force on 1 October 2011, concerns regulations with regard to the theory of hardship, as set out in Article 1271.

Hardship covers cases when an unforeseen event occurs during the performance of a contract and fundamentally alters the equilibrium of the contractual duties that the parties agreed to when the agreement was concluded. Based on the principle of equity, the theory of hardship seeks to restore the initial contractual balance by adapting the agreement to take into account the new circumstances.

Under the old Civil Code, in the absence of any legal texts on this matter, the Romanian courts applied this theory in a certain number of cases, basing their decisions on the principles of contractual equilibrium, equity and good faith in the performance of agreements. Consequently, the grounds for the obligation to renegotiate and adapt the contract to meet new circumstances were based only on case law and, as such, were difficult to reconcile with the principle of the binding force of agreements as expressly provided for by Article 969 of the old Civil Code ("*conventions legally entered into have the power of law between the contracting parties*").

The relation between the binding force of the contract and hardship

In the New Civil Code, the principle of the binding force of the contract is no longer an absolute rule and is subject to the constraints of social and economic life. Hardship does not constitute a lack of awareness of the binding force of the contract, but only a limit to its scope.

The *Principles of European contract law*, which are one of the sources for the New Romanian Civil Code, base the relation between the principle (binding force) and the exception (hardship) on the idea of "*contractual justice*". In this context, contractual justice means that in the absence of contractual terms, the costs resulting from an unforeseen event shall not be borne solely by one of the parties, and that if the parties cannot reach a settlement, the courts shall decide how the costs are to be allocated.⁴

When the change in circumstances renders the contractual obligation more onerous, the mandatory nature of the agreement is in no way affected. Hence, paragraph 1 of

Article 1271 provides that, "*The parties must fulfil their obligations, even if their fulfilment has become more onerous, either due to an increase in the costs for the performance of the obligation, or due to a decrease in the value of the counter-performance.*"

However, when performance of the agreement has become excessively onerous, the principle of binding force is limited by the application of the hardship mechanism. Thus, the second paragraph of the same article provides that, "*if performance of the agreement becomes excessively onerous due to an exceptional change in circumstances which would make it clearly unfair to oblige the debtor to perform its obligations, the court may order: (a) the adaptation of the agreement in order to reasonably allocate between the parties the losses and benefits resulting from the change in circumstances; or (b) the termination of the agreement at the time and under the terms set forth by the court.*"

Conditions for enforcement

Paragraph 3 of Article 1271 of the New Civil Code provides that the hardship mechanism can be applied if the following cumulative conditions are met:

- a) "*the change in circumstances occurs after the agreement is entered into;*
- b) "*the change in circumstances, and its scope, was not and could not have been reasonably foreseen by the debtor at the time the agreement was entered into;*
- c) "*the debtor has not assumed the risk of the change in circumstances, and it cannot reasonably be considered that the debtor could have assumed this risk;*
- d) "*the debtor has attempted, within a reasonable time and in good faith, to reasonably and fairly negotiate and adapt the agreement.*"

Significant imbalance in performance

The New Civil Code does not give an exact definition of what constitutes the "*excessively onerous nature*" of fulfilling an obligation. Legal doctrine proposes criteria that are subjective (bankruptcy of the debtor) and objective (a 50% increase in the value of the debtor's obligation, and a respective decrease in the value of the counter-performance received by the creditor)⁵. In practice, it is for the courts to decide which criteria are to be applied for an evaluation of this condition.

The effects of hardship

The effect of the hardship mechanism will be the adaptation or the termination of the agreement.

If negotiations between the parties, initiated by the debtor, do not lead to an agreement on the effects of hardship in a given case, the court may be asked to give its opinion in this matter.

The debtor must meet its obligation to begin negotiations within a reasonable time. Moreover, it must show good faith with a view to reasonably and fairly adapting the agreement. It would not be showing good faith if, for example, it behaved in a manner which showed its

³ Law No. 287/2009, as amended by Law No. 71/2011.

⁴ Cristina Zamsa, "*Hardship with regard to the implementing law of the new Civil Code. The declaration of the new conception of agreements*" (*Impreviziunea în lumina legii de aplicare a noului Cod civil. Reflectarea noii concepții asupra contractului*), in the Romanian corporate law review (*Revista română de dreptul afacerilor*), No. 5/2011.

⁵ *Idem*.



intention of bringing about the failure of the negotiations or of extending the discussions.

As indicated above, the court's involvement is accessory to cooperation between the parties and can only come about if the negotiations fail to reach a settlement. The court may acknowledge the existence of the conditions under which hardship may be applied and order either the adaptation or the termination of the agreement.

The timing of enforcement

In accordance with Article 107 of the implementing law⁶ of the New Romanian Civil Code, the provisions governing hardship will apply only to agreements entered into after 1 October 2011. Debtors that are party to agreements entered into before this date may not, therefore, benefit from such provisions.

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TAX: Recent Changes to Tax Legislation

Protocol to the Double Tax Treaty between Russia and Switzerland

The protocol introducing the amendments to the Double Tax Treaty signed between Russia and Switzerland was signed on 24 September 2011. It will come into force as of 1 January of the year following the year of ratification by Russia and Switzerland.

The most significant changes introduced by the Protocol are the following:

- 10% withholding tax on interest income has been abolished;
- capital gains of a resident of a Contracting State from the alienation of shares in a company deriving more than 50% of their value from immovable property situated in another Contracting State could be taxed in that other state. However, this rule will not apply to capital gains derived from the alienation of certain quoted shares or if the company carries out its business in this immovable property;
- the term "dividends" has been extended;
- a new article on "Exchange of information" has been introduced;

Tax Code

Federal Laws No. 227-FZ dated 18 July 2011, 245-FZ dated 19 July 2011, and 132-FZ dated 7 June 2011 have introduced numerous amendments to the Tax Code of the Russian Federation (the "TC RF"). These amendments will come into force on 1 January 2012 with a few exceptions. The principal changes are as follows:

Part 1-Transfer Pricing Rules

The new Russian transfer pricing rules will come into force from 1 January 2012. The key changes are:

- the list of transactions which may be controlled by the Russian tax authorities for tax purposes from transfer pricing standpoint has been reduced (the "Controlled transactions"). The Controlled transactions include:
 - certain cross-border transactions (in particular, cross-border transactions between related parties; transactions in the field of international commodities trade, provided the total income of such transactions with one entity in a calendar year exceeds RUB 60 million (approximately EUR 1.4 million); transactions with parties incorporated (domiciled, tax-resident) in a country included on the "blacklist" of countries, provided the total income of such transactions with one entity exceeds RUB 60 million (approximately EUR 1.4 million) per calendar year);
 - certain domestic transactions between Russian interdependent persons (in particular, if the amount of transactions between such parties within a year exceeds RUB 3 billion (approximately EUR 69.8 million) in the year 2012, RUB 2 billion (approximately EUR 46.5 million) in the year 2013 and RUB 1 billion (approximately EUR 23.3 million) starting from the year 2014, and/or if one party to a transaction is exempt from profits tax or applies a 0% profit tax rate, etc.), subject to certain exemptions;
- the list of interdependent persons has been expanded (in particular, the parties will be considered as interdependent if one party directly and (or) indirectly holds more than 25% of shares in the share capital of another party; companies in which the same person directly and (or) indirectly holds more than 25% of the shares in the share capitals of these companies; etc.). In addition a court may consider persons to be interdependent on other grounds which are not listed in the amended TC RF if the relationship between the parties may influence the conditions and/or results of a transaction between these parties and/or the results of the economic activity of these persons;
- the list of sources of information on market prices has been expanded;
- five methods for determining market prices have been adopted (comparable uncontrolled price method, resale price method, cost plus method, transactional net margin method, profit split method);
- "Pricing Agreements" of Russian legal entities registered as "major" taxpayers relating to determination of price and (or) application of the transfer pricing methods to the Controlled transactions have been introduced;

⁶ Law No. 71/2011.



- special transfer pricing audits which will be done by the Federal Tax Service have been introduced including provisions related to the transition period;
- penalties for underpaid/unpaid tax related to the Controlled transactions in the amount of 40% of unpaid tax, but not less than RUB 30,000 (approximately EUR 700), have been introduced as well as related transitional rules.

Part II- Taxes

Profit tax

Capital gains received by a foreign legal entity, which does not create a permanent establishment in Russia, from the sale of shares in Russian companies, of whose assets more than 50% consists of immovable property, and relevant derivatives, are not subject to Russian withholding profit tax if these shares qualify as listed according to point 3 of Article 280 of the TC RF. This rule will apply retrospectively to all legal relations originating from 1 January 2011.

Value Added Tax ("VAT")

- audit services are subject to Russian VAT if the purchaser has a place of activity in the Russian Federation for Russian VAT purposes;
- the taxable base for VAT purposes should the initial creditor assign the right to claim the debts related to the VATable sale of goods, works, services, property rights should be defined by the initial creditor as the difference between the income obtained by the initial creditor from the assignment and the value of the monetary claim in respect of which the rights have been assigned. In the event of subsequent assignment of the right to claim the debts, such assignment is VATable, regardless of whether the initial sale of goods, works, services, property rights was VATable or non-VATable;
- the rules for calculation of VAT in cases when the price of the transaction is denominated in foreign currency, with payment in roubles at the rate agreed by the parties (for example, a CBR rate on the date of payment), has been changed. According to the new rule the seller/purchaser should define the output/input VAT on the date when the goods are delivered (works and services are provided and property rights are transferred) and accepted by the buyer. The tax base should not be adjusted by the seller/purchaser on the date of subsequent payment. The difference in respect of VAT which could arise on the date of payment should be included by the seller and purchaser in the non-sales income/expenses for profit tax purposes;
- a 5% rule relating to the offset of input VAT if a taxpayer carries out VATable and non-VATable sales applies for taxpayers which carry out production activities as well as sale of goods, works, services, property rights;
- a "corrective VAT invoice" has been established.

NEW LAW ON LICENSING

On 4 May 2011, the President of the Russian Federation signed Federal Law No. 99-FZ "On the licensing of certain types of activity" (the "New Law"). The New Law will replace Federal Law No. 128-FZ dated 8 August 2001 "On the licensing of certain types of activity" as of its coming into effect on 3 November 2011.

The New Law is aimed at simplifying the framework for entrepreneurial activities, improving competition on the Russian market and modernising the licensing system in Russia. One of the deficiencies of the licensing legislation currently in force is due to the practical implementation of this legislation by the Russian authorities, since such authorities have large discretionary powers when implementing licensing legislation and defining licensing requirements.

The New Law sets up a uniform licensing procedure (concerning issue of the licence, control of licensing requirements, suspension, termination and cancellation of the issued license) and reinforces transparency, in particular by way of an electronic licensing procedure and the reallocation of powers between federal and local authorities.

Pursuant to the New Law, licences shall be issued for an unlimited term (instead of 5 years).

Furthermore, the scope of the New Law has been extended since the list of activities subject to licensing and regulated by specific law has been reduced. For instance, the New Law shall apply to activities connected with the production of audiovisual products and phonograms (except if such products are used by a person owning the required intellectual property rights) as well as the provision of communication services, TV and radio broadcasting, and private detective and security activities.

Moreover, types of activities belonging to the same sector have been grouped together in the list of activities subject to licensing in accordance with the New Law.

Finally, it should be stressed that the New Law preserves licensing only if such a mechanism is necessary and abolishes licensing for the following activities:

- manufacturing of prosthetic and orthopaedic appliances further to consumer orders;
- manufacturing and repair of measurement equipment;
- activities aimed at ensuring aviation safety;
- exhibiting and collecting weapons, firearms, bullets in bulk, etc.



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THE NEW CIVIL PROCEDURAL CODE

The New Civil Procedural Code No. 6100 ("the **New Code**"), which was adopted on 12 January 2011 and entered into force on 1 October 2011, brings significant changes to the procedures applying to civil hearings in Turkey.

We believe that the main changes under the New Code are to be welcomed. The main purpose of this New Code is to provide faster trials according to principles of a State of Law. Also, a further goal is harmonisation with European Union Law.

It should be noted that New Code entirely abolishes the previous Code and will be applicable to civil jurisdiction as from 1 October 2011. New provisions shall be enforceable to all ongoing trials. However, the provisions related to jurisdiction and appeal will not be applicable to proceedings which have begun before 1 October 2011.

This note aims to highlight the main changes under the New Civil Procedural Code.

Most doctrinal principles of procedural law now listed explicitly

The principles of procedural law are now clearly listed, including some which had already been settled by doctrine and Court of Cassation practice such as the right to be heard before the court, the administration of the proceedings or the undertaking to tell the truth.

Preliminary injunction

The wide-ranging term "preliminary injunction" was not specifically defined under the previous Code. The application of a preliminary injunction, the duration of said injunction, the warrant to be presented and the objection to a preliminary injunction are now included in the New Code under Article 391 et seq.

Choice of Jurisdiction

Agreements on the jurisdiction of courts may now only be made between merchants and/or public legal entities according to Article 17. Also, the parties may indicate one or more different courts under the Agreement on jurisdiction.

Partial action and indefinite debt action are now recognised

As an exception to Article 119 of the New Code, which provides that the demand shall be indicated clearly in the petition, if the debt between the parties is indefinite, the plaintiff may bring an indefinite debt action. Article 109 now also authorises partial debt recovery.

Pre-examination as a distinct and obligatory procedural stage

Pre-examination as a distinct and obligatory procedural stage is provided for by Article 137. The New Code provides an obligatory pre-examination stage during which disputes, conditions of receivability of a case and preliminary objections, i.e. jurisdiction and prescription, are identified and resolved. At this stage the parties may also reach an amicable settlement. And, if required, the judge may demand a pre-examination trial.

Preliminary objections

Preliminary objections are now defined under Article 116 and relate to (i) jurisdiction plea, (ii) plea of division and (iii) arbitration plea. They are to be brought at a preliminary stage and should be presented to the judge at the latest in the reply petition. Otherwise, they shall be automatically rejected by the Court.

Documentary evidence has been redefined

The New Code now clearly sets out what constitutes documents and deeds. A document can be anything which contains information.

On the other hand, a document with a secure electronic signature (also known as e-signature) is not a deed, but is deemed to be a document having "the effect of a deed".

Status and responsibilities of court-appointed experts

According to Article 268 et seq., the Court may appoint experts for providing reports of a technical nature. However, the Court may not appoint experts for providing reports of a legal nature.

Court-appointed experts are now to be selected from annually renewed lists prepared by Justice Commissions under District Civil Courts and are deemed to serve as "civil servants" within the meaning of the Turkish Criminal Code.

Court-appointed experts shall prepare their report within 3 months. If required, they may exceptionally ask for an additional period of 3 months in which to conclude their report.

Opinion

The New Code provides that the parties may submit to the Court opinions not only on technical aspects, but also on legal aspects under Article 293.

Introduction of the Appeal Courts

Although already included in the provisions of the previous Code, Appeal Courts were never implemented in Turkey, for various reasons.

Pursuant to Article 341 of the New Code, all pleadings against final judgments and preliminary injunctions of first instance jurisdiction shall be examined before these courts. Although not yet implemented in practice, reorganisation of the jurisdictions is currently in progress.

Consequently, in accordance with Article 361, the Court of Cassation only retains the power to review the merits and the procedure of the definitive and appealable judgments of the Appeal Courts and domestic arbitration judgments.



Advance payment

In all trials, the parties should pay court fees and charges based on the tariff which has been determined by the Ministry of Justice. In the New Code, Article 120 provides that these payments shall be made in advance.

Special authorisation for attorneys-at-law

The previous Code provided that attorneys-at-law may not perform legal transactions such as amicable settlement, recusation of judge or reclaim, without special authorisation.

This list has been extended in the New Code and attorneys-at-law shall not release an attachment, declare the bankruptcy of the client, conclude an arbitration contract, withdraw the lawsuit, accept an adversary's release, or bring an action before the Courts of Appeal without such special authorisation.

Amicable Settlement

Amicable Settlement is now defined under Article 313 of the New Code. The parties may always ask for an amicable settlement during the trial, and until the judgment becomes definitive.

National Jurisdiction Network

Bringing an action, paying fees and charges and analysing the court's documents are now made possible by means of the electronic signature on the National Jurisdiction Network ("UYAP" in Turkish). Also, the parties may prepare their documents through electronic signature and send them to the Court.

Duration

Duration periods under the previous Code have been extended.

Three types of duration are now provided for under the New Code, and to ensure a better understanding, the New Code uses the terms "week", "month" and "year" instead of days.

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EXCHANGE CONTROL: partial lifting of restrictions

A recent resolution of the National Bank of Ukraine has lifted certain exchange control restrictions in the country (Resolution No. 250 of 25 July 2011). Henceforth, Ukrainian legal entities and entrepreneurs are no longer required to obtain an individual licence from the National Bank to make foreign payments for the purposes of providing collateral or guarantees on loans granted by a foreign lender. However, the amount transferred must not exceed the amount of the initial loan.

The obligation to obtain an individual licence has also been lifted for payments made to foreign legal entities with regard to taking part in foreign invitations to tender. No maximum limit has been set for payments made within the scope of this second exemption.

Nevertheless, it should be noted that these exceptions only concern Ukrainian businesses and entrepreneurs and do not apply to private individuals.

CORPORATE LAW: major modifications

Major modifications have recently been introduced to Ukrainian corporate law with regard to joint stock companies and limited liability companies.

The most noteworthy changes for joint stock companies are as follows:

- The qualified majority of votes at the general meeting of shareholders is reduced to 75% of those shareholders present at the meeting instead of 75% of all shareholders as was previously the case.
- It is no longer mandatory to set up an Audit Commission (possible to appoint a single auditor).
- The loosening of the obligation for certain types of joint stock companies to be listed on the stock exchange. Henceforth, it is sufficient to declare the company in the "unlisted securities register."
- The 10-month deadline for increasing net asset value to above the legal minimum share capital has been removed from the law. According to the general rule in the Civil Code which remains in force, companies whose net assets are below the legal minimum share capital must make a decision on liquidation.
- All joint stock companies, except for single shareholder undertakings, must issue an official announcement 30 days before the convocation of a general meeting of shareholders.
- Shareholders that are legal entities may be elected to sit on the supervisory board.
- Mergers and divisions with companies of other corporate forms are now possible (previously limited to operations between joint stock companies).

The obligations incumbent on private joint stock companies to provide information have also been changed. Henceforth, these companies will be required to inform the State Commission for Securities and Stock Market of Ukraine of the following:

- the convocation for the general meeting of shareholders,
- the appointment and dismissal of corporate officers and auditors,
- the issuance of debt,
- a decision to redeem shares,
- the taking out of a loan for an amount of more than 25% of the company's share capital,
- the liquidation of branches or subsidiaries,
- a capital increase.



Furthermore, private joint stock companies will now be required to publish their annual accounts before 1 June of each financial year. These new disclosure rules have been criticised by business leaders who see them as all but destroying the specific nature of this type of joint stock company which, they maintain, should be subject to far fewer formalities than a public joint stock company.

The principle modification for limited liability companies concerns the increase in the maximum number of partners to 100. In addition, share capital is no longer a pre-condition for registering a limited liability company in Ukraine. Henceforth, share capital may be paid in the year following the filing of the company's articles of association, a move which facilitates the necessary procedures for setting up companies.

REAL ESTATE: Law of State Land Cadastre

The Law of Ukraine "On State Land Cadastre" was adopted by the Ukrainian parliament on 7 July 2011 and will come into force on 1 January 2012. However, it should be noted that several articles of the Law will come into force from 1 January 2013. The Law calls for the creation of a new unified digital register of all land plots (transactions with land plots) in Ukraine and introduces the registration procedure for the land rights.

The Law introduces the following significant innovations:

- launch of the unified digital land database (the "Register");
- access for banks and notaries to the register of private ownership rights and encumbrances over land plots;
- new procedure for State registration of ownership and lease rights over land plots on the basis of the land plot's technical documentation;
- a new set of documents for the verification of ownership (usage) rights.

An extract from the Register will be necessary for all kinds of legal transactions with land plots (except for wills). Such an extract can be issued by the registrar maintaining the Register or by notaries. However the Cabinet of Ministers adopted a regulation with regard to issuance of extracts by notaries. Starting from 1 January 2012 (1 January 2013 - for State and municipal lands), State Acts of Ownership Rights over Land Plots will no longer be issued as confirmation of the ownership rights over a land plot. Instead, such rights will be confirmed by an extract from the Register.

The Law is a very important step towards the contemplated launch of the land market in Ukraine, which is currently subject to a moratorium restricting the sale of certain types of land plots.

TAX: President approved changes to tax legislation

On 1 August 2011, the President of Ukraine signed a series of amendments to Ukrainian tax law and, in particular, the Tax Code which was adopted at the beginning of this year.

The law aims to resolve certain difficulties which arose while applying the provisions of the Tax Code by amending ambiguous and contradictory provisions.

In particular, these amendments create additional grounds for voluntary VAT registration. Henceforth, voluntary registration as a VAT payer will be possible for businesses with a charter capital exceeding UAH 300,000 (about EUR 27,000) to register as a VAT payer thus entitling the company in question to accrue VAT credits, as soon as such registration is completed. Previously, the limited scope of criteria for voluntary VAT registration required companies to operate for a certain period of time before qualifying, therefore forcing them to forgo VAT credits which they could otherwise have claimed.



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