

# The Brief

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## Kyiv Banking & Finance Department

### Significant Changes in the Legal Framework Governing Foreign Investments

On 1 March 2010, the Ministry of Justice of Ukraine registered the Regulation "On Certain Issues Relating to Making and Registration of Foreign Investments", approved by the Resolution of the Board of the National Bank of Ukraine (the "NBU") No. 762 dated 23 December 2009 ("Regulation No. 762"). Regulation No. 762 is aimed at implementing selected provisions of the Law of Ukraine "On Amending Certain Laws of Ukraine Designed to Overcome Negative Impact of the Financial Crisis" No. 1533-IV dated 23 June 2009 (the "Anti-Crisis Law").

In particular, Regulation No. 762 significantly changes the existing legal framework and procedure for making and repatriating foreign investments into and from Ukraine. Therefore, in addition to introducing the Regulation "On State Registration of Foreign Investments" applicable to foreign investments made in monetary form, Regulation No. 762 amended (1) the Regulation "On the Procedure for Making of Foreign Investments into Ukraine", approved by the Resolution of the NBU Board No. 280 dated 10 August 2005, as amended (the "Foreign Investment Regulation"), and (2) the Regulation "On the Procedure for and Terms of Foreign Currency Trading", approved by the Resolution of the NBU Board No. 281 dated 10 August 2005, as amended (the "Foreign Currency Trading Regulation").

Regulation No. 762 became effective on 15 March 2010.



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## State registration of foreign investments in monetary form

The Anti-Crisis Law introduced a major requirement whereby (i) all foreign investments into Ukraine, irrespective of the form (monetary or non-monetary), are subject to mandatory state registration, and (ii) foreign investments in monetary form are required to be made in the national currency of Ukraine and through a so-called “investment account” opened with a Ukrainian bank.

While the procedure for registering non-monetary foreign investments was implemented by the Resolution of the Cabinet of Ministers of Ukraine dated 7 September 1996 (No. 928), before the Anti-Crisis Law entered into force, the procedure for registering monetary foreign investments was not drafted until recently, thus making foreign investment in monetary form effectively impossible. Regulation No. 762 eliminates this legislative loophole and introduces a special procedure for the state registration of foreign investments in monetary form (the “**Monetary Investments Registration Procedure**”).

Pursuant to the Monetary Investments Registration Procedure, foreign monetary investments must be registered with a respective territorial department of the NBU within thirty (30) days after the date when such investments are actually made in Ukraine. Therefore, in accordance with the spirit of Regulation No. 762, the registration functions as a foreign investor’s obligation to register a monetary investment which has already been made, rather than an obligation to obtain registration in order to be entitled subsequently to make a monetary investment in Ukraine.

Regulation No. 762 further provides that the “30 days” rule for the registration of monetary investments, which were made between 24 November 2009 and the date at which Regulation No. 762 became effective, commenced as of 15 March 2010.

The NBU has ten (10) business days, starting from the next business day following the day on which the request and all accompanying documents were filed, to consider the foreign investor’s request for registration of the monetary investment and to provide a foreign investor with a registration notice or a refusal. But the NBU reserves the right to postpone the registration for up to five (5) business days if additional documents or foreign investor’s explanations are required.

In order to register its monetary investment, a foreign investor should submit the following documents to the NBU:

- a request, drawn up on the form attached to Regulation No. 762;
  - an original or notarised copy of the document evidencing authority of the person appointed by a foreign investor to carry out the registration of monetary investment (if applicable);
  - an original or notarised copy of the agreement proving that a foreign investment has, in fact, been made;
  - original or notarised copies of the constituent documents of the target company (in case of equity financing);
- and
- an account statement evidencing that monetary investment was actually made into Ukraine from the investment account opened by the foreign investor with the Ukrainian bank

The documents drafted in a foreign language (except for Russian) must be translated into Ukrainian by a certified translator whose signature must be notarised.

It should be mentioned that the above list of documents is not exhaustive and the NBU may request any additional documents or explanations at its discretion. If the filed documents do not comply with the requirements provided for by Regulation No. 762, or contain misleading information, the NBU may refuse to register such a foreign investment.



We also note, generally, that Regulation No. 762 does not specify any consequences (in the form of financial sanctions or otherwise) for a foreign investor's failure to register a monetary investment with the NBU. In our view, however, a failure to register should result in the foreign investor being unable to repatriate in future its investments and profits without seeking a respective individual licence from the NBU.

### **Amendments to the Foreign Investment Procedure (NBU Regulation No. 280)**

The following summarises key amendments made to the Foreign Investment Regulation:

- (i) Foreign investments in monetary form are reclassified into "portfolio investment" or "foreign investment" categories. The former "direct investment" category (including all references thereto) has been removed from the text of the Foreign Investment Regulation. The "portfolio investment" category is defined to mean acquisition by a foreign investor of securities of Ukrainian issuers and their derivatives on the stock exchange for an amount of less than ten (10) per cent of the charter capital of such issuers. All remaining scenarios fall under the "foreign investment" category.
- (ii) To ensure compliance with both the Anti-Crisis Law requiring all foreign investments to be made in UAH with the use of an investment account in Ukraine, it is no longer possible to conduct foreign investment (i) by means of a direct money transfer from a foreign investor's account abroad onto a resident's current account in Ukraine; and (ii) by transferring foreign currency from a foreign investor's investment account in Ukraine to a resident's current account.
- (iii) As the term "securities trader" (including all references thereto) has also been removed from the text of the Foreign Investment Regulation, it is, *inter alia*, no longer possible to conduct foreign investment (i) by means of a direct money transfer from a foreign investor's (non-resident's) bank account abroad to a securities trader's current account in Ukraine; and (ii) by transferring foreign currency or UAH allocated to a non-resident's investment account to a securities trader's current account.
- (iv) Repatriation of foreign investments is possible with the use of the following options:
  - from a resident's current account in foreign currency to a foreign investor's (non-resident's) account abroad – as the requirement of the Anti-Crisis Law imposing mandatory settlement in UAH does not have retroactive effect, it appears that this option should, ostensibly, be applicable in relation to the repatriation of foreign investments made prior to 24 November 2009 only (i.e., the date when the Anti-Crisis Law entered into force) regardless of the settlement option chosen at that time (i.e., whether it was transfer of foreign currency funds from the investment account or from the securities broker's account or a direct transfer from the non-resident's account abroad);
  - from a resident's current account in UAH to a non-resident's investment account in UAH;
  - from a non-resident's investment account in foreign currency to its own account abroad;
  - from a non-resident's investment account in UAH to another foreign investor's investment account in UAH; and
  - from a foreign investor's deposit account in UAH to its investment account.

Please note that the above repatriation rules no longer foresee the use of the securities trader's current account in foreign currency or UAH.

- (v) Foreign investors are no longer allowed to decrease the amount of the investment deposit that they have already made (i.e., regardless of the currency of deposit). Besides, a foreign investor will be allowed to place funds in new investment deposits in UAH only, and by transferring such funds from its investment account.



## **Amendments to the Foreign Currency Trading Regulation (NBU Resolution No. 281)**

The following summarises key amendments made to the Foreign Currency Trading Regulation:

- (i) Conditions for purchase and exchange of foreign currency on the interbank currency market have been amended to reflect changes in the framework governing foreign investments promulgated by the Anti-Crisis Law and the Foreign Investment Regulation, as amended by Regulation No. 762. In particular, the description of the documentation to be submitted by a foreign investor to a Ukrainian bank in order to purchase foreign currency for its subsequent repatriation has been amended. It is worth noting that a tax certificate confirming payment of income tax will be required for the purchase of foreign currency only if the sale price exceeds the purchase price or the Ukrainian bank acts as a tax agent for the foreign investor.
- (ii) Ukrainian banks are required to provisionally credit UAH funds which were transferred for the purchase of foreign currency funds to a separate analytical account for at least five (5) calendar days before the actual purchase of foreign currency at the interbank currency market. Hence, it appears that if foreign currency is purchased on the 5th day after UAH funds are transferred to a Ukrainian bank, the foreign investor will bear a respective currency exchange risk throughout this period. Please note that this requirement does not apply to the purchase of foreign currency funds for transactions with securities appearing in first level quotation lists of the Ukrainian stock exchange except for over-the-counter or off-exchange transactions with such securities.
- (iii) Ukrainian banks are no longer allowed to purchase or exchange foreign currency on the domestic interbank market for the repayment of foreign currency deposits made by their clients, except for the purchase of foreign currency to finance repayment of interest accrued under such deposits.



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