

newsletter

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DOING BUSINESS

Protection of Investors' Rights to Be Strengthened

On 7 April 2015, the Parliament adopted the Law on Amending Certain Laws of Ukraine regarding Protection of Investors' Rights (the "Law") aimed at adaptation of the Ukrainian law to the EU law in terms of protection of minority shareholders' rights, increase of the attractiveness of Ukrainian business companies for investors, and deregulation of their commercial activities. The Law was signed by the President and for the most part will take effect on 1 May 2016, except for a couple of the least significant amendments which enter into force upon the publication. Until 1 January 2018 certain provisions of the Law will apply only for listed public joint stock companies.

The Law introduces important amendments to a number of laws and codes, which concern, in particular, the following:

Personalization and strengthening responsibility of business company's officers

The Law introduces responsibility of business company's officers for damages caused to the company and a fundamentally new for the Ukrainian legislation tool for protection of investors' rights - a *derivative lawsuit*. Minority shareholders of all types of business companies owning jointly or severally at least 10% in the share capital will have a right to file a lawsuit in the interests of the company for recovery of damages caused to the company by its officers.

The amendments strengthen the principle of personal responsibility of members of the Supervisory Board of a joint stock company stating that only natural persons may be elected to this position. They distinguish between 3 categories of the Supervisory Board members: shareholders, representatives of shareholders (provided that a shareholder may replace his/its representative at any time by means of a written notice to the company) and independent (non-executive) directors who are understood as natural persons not affiliated with the company, its shareholders or subsidiaries.

The concept of independent directors was already known to the Ukrainian banking law but is a brand new for the company law. Its introduction is aimed at improving the corporate governance of joint stock companies, increasing independence of the Supervisory Boards and protecting minority shareholders' rights by way of engaging impartial qualified experts to the management of the company. It was defined that Supervisory Boards of public joint stock companies should have at least 5 members, including 2 independent directors. In addition, the term of their office was shortened to one year - until the next annual general meeting of shareholders.

The Law also introduces solidary liability of a shareholder and his/its representative acting as a member of the Supervisory Board for damages caused by such a member to the company.

Deregulation of commercial activities of business companies

The amendments create conditions for transformation to a private form of quasi-public joint stock companies, e.g., companies created in the course of privatization and forced to be public due to a number of shareholders, but having no intention to attract investors. In particular, the Law removes the limitation for a number of shareholders of a private joint stock company (100 shareholders until now) that will allow many companies to switch to this form and avoid numerous regulatory requirements applicable to public joint stock companies.

The Law restored the right of joint stock companies to pay dividends directly to shareholders rather than only through the depositary system, which is less time and labour consuming and more cost effective for a company.

It also abolished the requirement to indicate the registered address of a business company in its charter that will simplify registration of change of the location. This norm should enter into force on the next day upon publication of the Law.

Protection of minority shareholders in case of interested party transactions

The Law increases the level of protection of minority shareholders in case of entering of the company into an interested party transaction by means of introducing a value threshold (100 minimal wages) over which a prior corporate approval is required and providing a shareholder who voted against such transaction with a right to require the company to buy out his shares.

The Law also touches on other aspects of joint stock companies' activities, including introduction of stricter requirements for public joint stock companies and improvement of corporate procedures. The amendments seek to ensure a higher level of protection for minority investors and promote Ukraine's compliance with the commitments under the Ukraine-EU Association Agreement.

New Law on Licensing adopted

Licensing of business activity used to be a major obstacle for many businesses over years, giving state officials manifold opportunities to hamper private business and to ask for grease money for facilitation. Licensing regulations has been reduced over the last years in several

waves and the latest law, coming into effect on 28 June 2015 will further simplify licensing matters. In particular, the licensing authority must not request from the applicant documents available to other state or municipal authorities (including constituent documents, registration documents of the transport vehicles). The list of activities subject to licensing has been significantly shortened and according to the new law, licenses will be issued for an unlimited term. Furthermore, the transfer of licenses during reorganization was simplified. Politically interesting is that the licensing authority can by way of by-laws restrict granting of licensing for "residents of countries that conduct armed aggression against Ukraine and/or create conditions that give rise to military conflict and armed aggression against Ukraine".

Disclosure of ultimate beneficial owners

By 25 May 2015 the companies are obliged to provide local registration authorities with the following information about their ultimate beneficial owners: full name, citizenship, passport details, Ukrainian tax number (if any), and residence address.

No verification of such information by documents (e.g. trade register excerpts) is required.

The Law provides for an administrative fine of up to 500 tax exempt allowances (currently, UAH 8,500 or EUR 350) for a failure to submit information about beneficial owners. The fine can be imposed on the company's management.

Although it is not clearly provided by the law, we cannot exclude that in practice local registration authorities may be reluctant to register any other changes (e.g., a share capital increase or change of a director) before providing by the companies of respective information about the ultimate beneficial owners.

Change of business registration law

The Ukrainian Parliament recently adopted the law on simplification of the reorganization procedure. According to the new law companies will now be able to change their participants, increase their charter capital and make other corporate changes during reorganization. Thus, reorganization procedures become much easier and more flexible.

REAL ESTATE

Changes in the procedure of registration of real and derivative rights

According to the Law of Ukraine on Amendments to Certain Laws of Ukraine Regarding Notaries' Powers and Peculiarities of Registration of Derivative Rights to Agricultural Land (the "Law"), Ukrainian notaries will get access to the State Land Cadastre and will be authorised to register derivative rights to agricultural land. The Law also provides for an automatic transfer of data from the State Land Register to the State Register of Real Rights to Immovable Property which should be completed till 1 July 2016.

According to the Resolution of the Cabinet of Ministers of Ukraine titled 'Some Issues of Simplification of Rendering of Administrative Services Related to the State Registration of Real Rights to Immovable Property and Their Encumbrances' dated 18 March 2015 No.137 (the "Resolution") officials of local authorities and one stop-shop administrators will be authorised to collect documents necessary for registration. The Resolution also provides for equal legal force of paper documents and electronic documents issued upon the results of registration which will make registration procedure more comfortable for applicants.

Reform of architectural and construction control

The Law of Ukraine on Amendments to Certain Laws of Ukraine Regarding Decentralisation of Architectural and Construction Control Functions and Improvement of City Planning Laws (the "Law") introduces a two-level control in construction namely architectural and construction control and architecture and construction supervision.

Architecture and construction control departments of village and city councils and of the Kyiv city state administration will monitor developers and contractors' compliance with construction while chief inspectors of the State Architectural and Construction Inspectorate will supervise local authorities through scheduled and unscheduled audits. The Inspectorate's officials will be authorised to suspend acts of local authorities if such acts violate requirements of construction laws.

ENERGY

Ukraine opens doors to ESCO companies and energy performance contracting

According to the Law of Ukraine on Introduction of New Investments Opportunities, Guaranteeing Rights and Lawful Interests of Business Entities for Conducting Large Scale Energy Modernisation any actions aimed at energy/cost saving will be treated as energy services and will be subject to public procurement. The successful bidder will enter into an energy performance contract with a state-funded organisation. A template of such contract will be approved by the Cabinet of Ministers of Ukraine while material terms and conditions should be approved by the Ministry of Finance of Ukraine (in case of upgrade of state owned facilities) or by city councils (in case of upgrade of municipal facilities).

The Law of Ukraine on Amendments to the Budget Code of Ukraine (Regarding Introduction of New Investments Opportunities, Guaranteeing Rights and Lawful Interests of Business Entities for Conducting Large Scale Energy Modernisation) aims to enable state and municipal organisations to sign energy performance contracts and to consider them as long-term energy service obligations for budgeting purposes. The Law will resolve the problem of one-year budget obligations and will allow public sector to sign energy performance contracts with ESCO companies.

BANKING AND FINANCE

NBU makes a step to relax exchange control restrictions

The National Bank of Ukraine (NBU) issued the Resolution No. 248 dated 14 April 2015 which has slightly relaxed the exchange control restrictions imposed by NBU Resolution No.160 dated 3 March 2015, in particular:

- the purchase of foreign currency by the bank received from foreign investors with the purpose of increasing its share capital was removed from the list of banks' own transactions which fall under the limitation on the surplus between the purchased and sold foreign currency by the bank at 0.1% of its regulatory capital;
- overseas payments by legal entities and private entrepreneurs in an amount not exceeding the equivalent of USD 50,0000 are no longer subject to the NBU's confirmation; and
- certain categories of funds in foreign currency deposited by legal entities on the accounts in Ukrainian banks were excluded from the sums which have to be taken into account when calculating the amount of foreign currency which may be bought by a legal entity on the interbank market. Moreover, the NBU allowed for legal entities to exchange foreign currencies of the 1st group of the classifier for foreign currencies of the 2nd group of the classifier in order to perform their obligations in such currency.

In addition, in accordance with NBU Resolution No. 222 dated 9 April 2015 the requirement whereby an advance payment under import contract exceeding USD 500,000 is only allowed to be made with the use of a letter of credit should not apply to a so-called "critical import", that is the import of commodities that are of high importance to the state (e.i. oil, gasoline, oncological medical equipment, etc.). However, such exemption is conditional upon payment to be made directly to (i) the goods' producer (or its related person), and (ii) the country of goods' origin. ■

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