

MONTHLY LEGAL UPDATE



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JUDICIAL NEWS

THE PARLIAMENT OF UKRAINE LAUNCHED A MAJOR JUDICIAL REFORM

On 2 June 2016, the Verkhovna Rada of Ukraine adopted amendments to the Constitution of Ukraine and the new *Law of Ukraine on the Judicial System and the Status of Judges* aimed at fighting corruption in the judicial system and creation of independent, fair and impartial courts in Ukraine.

In addition, the Parliament adopted the new *Law on Institutions and Persons Enforcing Court Decisions and Decisions of Other Institutions*, in order to raise the effectiveness of enforcement of court decisions.

These amendments repeal the existing *Law on the Judicial System and the Status of Judges* and the *Law of Ukraine on the State Enforcement Service* and introduce a number of important novelties related to organization and functioning of courts, appointment and dismissal of judges, their remuneration and the system of legal support. The major amendment are as follows:

- + Transformation of the Ukrainian judicial system from a 4-tier to a 3-tier structure (courts of first instance, courts of appeal and the Supreme Court);
- + Dissolution of the existing Supreme Court of Ukraine and the cassation courts (the Higher Specialized Court of Ukraine for Civil and Criminal Cases, the Higher Commercial Court of Ukraine and the Higher Administrative Court of Ukraine);



- + Creation of a new Supreme Court, which should replace the existing cassation courts and the Supreme Court of Ukraine within 6 months after the entry of the amendments into force. The Supreme Court will include the Grand Chamber and 4 cassation courts: Cassation Administrative, Commercial, Criminal and Civil Courts;
- + Dissolution of existing local courts, creation of circuit courts which will cover one or several cities, towns and/or districts;
- + Creation of a Higher Specialized Intellectual Property Court and a Higher Specialized Anti-Corruption Court, which will act as courts of first instance with regard to relevant disputes;
- + Abolishment of the President's right to create and liquidate courts. Henceforward, courts will be formed, reorganized and liquidated by laws adopted by the Parliament;
- + Abolishment of the practice of appointment of judges to a position for the first time for a five-year term by the President. According to the amendments, judges should be appointed for an unlimited term by the President upon recommendations of the High Council of Justice. Candidates will be elected on a competitive basis;
- + Gradual increase of the remuneration of judges up to 30-75 minimum monthly wages, depending of the court's level;
- + Introduction of the obligation of judges to declare family connections and to declare their integrity, as well as confirm sources of their property. Limitation of judges' immunity, and amendment of the grounds for dismissal of judges;
- + Strengthening of the role of bar associations by way of introduction of the rule, according to which only those lawyers who are members of the bar may defend in criminal proceedings and represent parties in courts, except for a limited number of cases to be further clarified by the law. The bar's monopoly will be implemented gradually from 2017 to 2019;
- + Introduction of the institute of private enforcement officers in addition to the state enforcement service. Such persons will have to meet certain educational, age and other requirements, pass a test and insure their professional liability.

The amendments to the Constitution of Ukraine and new laws are yet to be signed by the President of Ukraine. If signed, they will enter into force, for the most part, 3 months from the date of publication, however, the new *Law of Ukraine on the Judicial System and the Status of Judges* will come into force only after the amendments to the Constitution have become effective.

BANKING & FINANCE

NBU EASES EXCHANGE CONTROLS

By virtue of NBU Resolution no. 308 dated 5 May 2016, which took effect on 11 May 2016, Ukrainian residents are no longer required to sell foreign currency proceeds received from a non-resident as a foreign investment. A foreign investment is defined as any valuables



(currencies, securities, claims, property etc.) contributed by foreign investors into investment objects with the purpose of deriving profit or achieving social effect. A foreign investment can take the form of a share capital contribution, acquisition of moveable or immoveable assets, purchase of claims and joint venture.

It is, however, important to note that 75% of proceeds under cross-border loans, trade receivables and any other foreign currency proceeds of whatever nature are still subject to mandatory exchange into national currency of Ukraine. We note that, previously, Ukrainian entities were required to sell 75% of all foreign currency proceeds received onto their accounts held with the Ukrainian banks, without any limitations or exceptions.

By another Resolution (No.140 dated 3 March 2016), starting from 29 April 2016, Ukrainian importers were released from the requirement to sell foreign currency proceeds under loans disbursed by lenders directly to bank accounts of foreign exporters. It also worth mentioning that Ukrainian importers received the right to buy foreign currency on the interbank market to pay under assigned/transferred contracts for goods imported prior to 1 January 2015.

This move is a part of more broad plans pursued by the regulator to relax harsh exchange controls put into operation in response to the economic downturn in the country. In particular, the regulator has publically announced its intention to allow payment of dividends by Ukrainian companies abroad.

CORPORATE

AMENDMENTS TO THE *LAW ON JOINT STOCK COMPANIES*

On 1 May 2016 amendments to the *Law of Ukraine on Joint Stock Companies introduced by the Law of Ukraine on Amending Certain Laws of Ukraine regarding Protection of Investors' Rights* (No. 289-VIII dated 7 April 2015) have become effective.

The amendments introduce important novelties aimed at adaptation of the Ukrainian laws to the EU standards in terms of protection of minority shareholders' rights, increase of the attractiveness of Ukrainian joint stock companies for investors, and deregulation of their commercial activities. They include, inter alia, the following major changes related to business activities and corporate governance of joint stock companies:

- + Cancellation of the limitation upon the number of shareholders of a private joint stock company (100 shareholders until now) that will allow public companies to switch to the private form and avoid numerous regulatory requirements applicable to public joint stock companies;
- + Introduction of the obligation for public joint stock companies to undergo a listing procedure and remain registered in at least one stock exchange;
- + Strengthening of the principle of personal responsibility of members of the Supervisory Board of a joint stock company by stating that only natural persons may be elected to this position;
- + Introduction of a concept of non-executive directors of the Supervisory Board. Since 1 May 2016 election of at least 2 non-executive directors became mandatory for listed public joint stock companies;



- + Amendment of the procedure for convocation and holding of the general shareholders meeting. In particular, the amendments improve the procedure for notifications of shareholders about the meeting, introduce the obligation of voting exclusively by ballots for all types of joint stock companies on all items of the agenda;
- + Improvement of provisions on interested party transactions, introduction of a value threshold of 100 minimal wages over which the restrictions will apply. The company's charter may reduce this threshold and establish additional criteria to qualify the transaction as an interested party transaction;
- + Restoration of the right of joint stock companies to pay dividends directly to shareholders rather than only through the depositary system, etc.

The amendments also touch 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.

Although a deadline for bringing charters of joint stock companies in compliance with the amendments described above has not been established, it is recommended to approve the respective decisions (if not done yet) as soon as practicably possible.

CONVERSION OF DEBT INTO EQUITY

On 10 May 2016, the Parliament of Ukraine adopted, in the first reading, the draft *Law on Introduction of Amendments to Certain Laws Aimed at Enabling the Exercise of the Right to Conversion of the Right of Monetary Claim against to the Contribution into its Capital* (Draft No. 2764).

As it entails from the name, according to Draft No. 2764, participants of limited liability companies will have a right to convert their monetary claims (in particular, claims under loan agreements) against the company into the share capital of such companies.

Today, such right is not well-regulated by the laws of Ukraine, which causes ambiguous situations in practice.

Draft No. 2764 addresses one of the most common situations in Ukraine when a parent company extended an intercompany loan to its Ukrainian subsidiary and the latter cannot repay the debt.

At the same time, Draft no. 2764 does not clearly address similar situations, for example, when the debt between a parent company and a Ukrainian subsidiary arose under a supply agreement.

Finally, Draft no. 2764 does not address tax aspects of the operation which is usually one of the most sensitive issues.

Draft no. 2764 is now being prepared for the second reading and we hope that the shortfalls described above will be rectified.



CANCELATION OF STATE REGISTRATION OF FOREIGN INVESTMENTS

On 31 May 2016, the Parliament of Ukraine adopted, in the final reading, the *Law on Introduction of Amendments to Certain Laws Aimed at Abolishment of Obligatory State Registration of Foreign Investments* (Draft no. 2763).

Draft no. 2763 proposes abolishing the state registration of foreign investments as a precondition to benefiting from the state guaranties for foreign investors.

Draft no. 2763 was prepared under the general trend of deregulation and should create a better environment for investors.

Draft no. 2763 will enter into force after its signature by the President and official publication.

REAL ESTATE

CERTAIN STATE LAND PLOTS TO BE TRANSFERRED INTO MUNICIPAL OWNERSHIP

State land plots, located outside of borders of cities, will be transferred into municipal ownership

On 19.04.2016, the Verkhovna Rada of Ukraine adopted, in the first reading, the draft *Law of Ukraine on Amendments to the Laws with Regard to the Powers of Municipal Councils to Transact with Land Plots* (hereinafter – “Draft no. 4355”).

In accordance with Draft no. 4355, state land plots, located outside of borders of cities, will be transferred into municipal ownership. Municipal councils will transact with all land plots (agricultural and non-agricultural), located outside of borders of cities, except for natural and reserved land of national importance, land plots, underlying real estate objects, owned by the state authorities or state companies, forest and defence land plots. These land plots will remain in state ownership and will be managed by the Cabinet of Ministers of Ukraine.

The foregoing means that municipal councils will transfer land plots, located outside of borders of cities, into lease or ownership, issue decisions on changing the designation of a private land plot, requisition of land plots for public needs, etc.

Currently, all land plots outside of borders of cities are in state ownership. The State Service of Land Resources of Ukraine manages state agricultural land plots, while the Cabinet of Ministers of Ukraine and state administrations manage other state land plots.

The executive bodies of municipal councils will have land inspectors, who will be responsible for control over the use and protection of land. Land inspectors will have the powers to impose fines, initiate termination of the permanent use and land lease. The State Service of Land Resources of Ukraine will supervise them.

Draft no. 4355 amends 3 Codes and 17 laws of Ukraine with regard to the state and municipal land plots. Draft no. 4355 is important for companies that leased or own land plots outside of borders of cities.



AMENDMENTS TO THE *LAW OF UKRAINE ON FARMING*

Please be informed that the *Law of Ukraine on Amendments to the Law of Ukraine on Farming* (no. 1067-VII) entered into force on 01.05.2016 (hereinafter – the “Law”).

The innovation of the Law is a farm may be registered in the form of a private entrepreneur as well as a legal entity.

The Law also introduces the concept of a “family farm”. A family farm, in the form of a private entrepreneur or a legal entity, may include only family members.

A family farm in the form of a private entrepreneur acts on the basis of a notarized agreement, executed between family members. A farm may be created by citizens of Ukraine if they lease or own a land plot.

The Law provides special state support for family farms.

PUBLIC PROCUREMENT

UKRAINE’S ACCESSION TO THE AGREEMENT ON GOVERNMENT PROCUREMENT

On May 18, 2016, Ukraine officially acceded to the revised Agreement on Government Procurement (GPA).

The purpose of the GPA is to mutually open public procurement markets among its parties. A large number of WTO members, including the EU, are parties to the GPA.

In Ukraine, the GPA covers public procurement of goods or services initiated by ministries and other governmental bodies, as well as municipalities, for the amount equalling to or exceeding SDR 200,000 (EUR 250,000 in equivalent). Besides, the GPA covers procurement of civil works, including, notably, civil works ordered by public operators of infrastructure (e.g. highway and railway operators, airports, water treatment plants etc.) for the amount equalling to or exceeding SDR 5,000,000 (EUR 6,264,847 in equivalent) (the “Covered Procurement”).

The GPA directly regulates the Covered Procurement in Ukraine and prevails, in case of a conflict, over the *Law of Ukraine on Public Procurement* (the “Ukrainian PPL”). Further, as the Ukrainian Constitution proclaims international treaties to be an integral part of the national legislation, Ukrainian courts are likely to start direct application of the GPA in public procurement disputes, whether or not Ukraine actually appoints a specific review body.

In terms of the GPA’s practical importance, it is somewhat balanced by the fact that the Ukrainian PPL does already provide for the equal treatment of national and foreign bidders. Nevertheless, the GPA contains a number of other important provisions, which are not present in the Ukrainian PPL or are regulated differently, especially where it concerns



protection against dumping or obviously unprofessional bids, such as:

- + Provisions relating to the exclusion of a bidder from a tender due to its professional misconduct in the past;
- + Provisions on the possibility to introduce supplier registration systems and multi-use lists of suppliers to make Ukrainian tenders more consistent and sustainable in terms of potential bidders;
- + The priority use of international rather than national standards in technical specifications;
- + Possibility for procuring entities to request additional guarantees from a bidder that submitted an abnormally low bid;
- + Obligation of procuring entities to preserve confidentially of bidding information and documents (the similar obligation was abolished in the current version of the Ukrainian PPL).

Last but not least, the GPA provides for a number of additional circumstances, which do not exist under the Ukrainian PPL, where procuring entities should be in the position to organize limited tendering.

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