

## MONTHLY LEGAL UPDATE



Kyiv, July 2018

### BANKING & FINANCE

#### *Ukraine to abolish exchange controls*

On 4 July 2018, the President of Ukraine signed the *Law On Currency and Currency Regulation No. 8152* which was passed by the Parliament a month ago. The new currency law, once officially published, will come into effect after the 7-month transition period and will abolish the outdated exchange controls which have existed in Ukraine for more than two decades. The following are amongst the most significant changes introduced by the law:

- the new law is built on the principle that residents may freely transact in foreign currencies and fully embraces the concept of free movement of capital which, although limited in practice, is fundamental for free market and investments;
- foreigners are granted the same rights as residents in transacting and otherwise dealing with currencies. This means, for example, that foreign entities will be able to maintain fully operational bank accounts in Ukraine as opposed to the limited-scope investment accounts available at the moment;
- presently, the general rule is that making payments overseas require a license unless such payments are specifically exempted, but once the new law is in place, such licenses should no longer be prerequisite. Residents will have the right to make payments overseas for whatever purpose, including making investments, depositing currency into foreign accounts or otherwise transacting in foreign property or securities;
- banks will not be obliged to apply for a general license for transacting in foreign currency and will be able to engage in FX transactions solely on the basis of the banking license. However, a general FX license will still be needed for non-banking financial institutions to enter into foreign exchange transactions; and

- measures such as suspension of foreign trade activities and an individual licensing regime, that have been frequently applied to companies for a breach of exchange controls, will be completely removed.

It is worth mentioning that the National Bank of Ukraine (NBU) will acquire much wider powers in determining exchange control policies than ever before. For example, the regulator may impose a so-called protective measures to curb an economic meltdown or a dollar/euro drain or in order to avert other negative impacts. The full spectrum of restrictions, including a compulsory sale of FX proceeds, time limits for settlements under trade contracts, bans on divestments and other limitations on free movement of capital, will fall under the ambit of the NBU's discretions. It, however, should be noted that the law introduces exhaustive grounds and time limits for the protective measures to safeguard the market from excessive regulation.

Now that the free market principles have been embedded in the legal landscape, the NBU is expected to thoroughly revise and adapt its regulations during the 7-month transition period. Until then, all existing restrictions, including registration of foreign loans, limitations on divestments and dividends payouts, strict licensing regime and many others will stay in place.

While some legal practitioners and financiers are sceptical about the practical effects of the law pointing out to its purely declarative nature, we remain cautiously optimistic. It is, however, clear that the breadth and depth of future changes in exchange and capital controls ultimately depends on the improvement in economic fundamentals of the country rather than wishes of the regulator or market players.

### ***Creditors gained additional protection***

On 3 July 2018, the Parliament passed a set of amendments<sup>[1]</sup> to various laws with the purpose of improving protection of creditors against dishonest debtors. Importantly, the law applies to all loan and security agreements made prior to the enactment of the amendments.

The law is the result of joint efforts between major Ukrainian banks and non-governmental organisations following a chain of court judgments which unfairly allowed the borrowers to escape from the obligations solely by playing on the loopholes in the law. The important changes to be taken into consideration are as follows:

#### **Suretyship Agreements**

- if several sureties guarantee, whether under a joint or separate agreements, the obligations of the principal debtor they are deemed to be jointly and severally liable by operation of law, unless otherwise expressly stated in the contract;
- a surety may not be discharged by sole reason that the underlying obligation has been amended (however fundamentally) without his consent. If any variations in the principal debt trigger material increase in the surety's liability, he is deemed to be liable only within the limits of the initially guaranteed debt;

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<sup>[1]</sup> Draft *Law of Ukraine on Amending Certain Laws of Ukraine Concerning Revival of Lending* no. 6027-д

- a suretyship ceases to exist either upon its expiry or the termination of the principal obligation. Where a suretyship is granted for an indefinite period, it automatically terminates if the creditor fails to make a claim within 3 years after the principal obligation has matured. If the principal obligation is also for an indefinite period, the suretyship expires after 3 years from its signing date unless the creditor made a claim against the surety within that period;
- the liability of jointly and severally liable sureties or debtors shall not be reduced, discharged or otherwise adversely affected if one of such sureties or debtors goes into liquidation or dies; and
- any liquidation or winding up of the surety shall not terminate the suretyship provided that the creditor had brought a legal action before the surety was removed from the register of companies.

### **Mortgage/Pledge Agreements**

- it has been clearly stated that the creditor has the right to claim all amounts which remain unpaid from the debtor or sureties even if he already enforced the security out-of-court but the proceeds appeared insufficient to satisfy the principal obligation in full;
- any liquidation or winding up of the debtor may not result in release or termination of the security agreements provided that the creditor commenced the enforcement prior to removal of the debtor for the register of companies; and
- the law significantly improved the procedure for public sale of the mortgaged assets through actions.

## **CORPORATE**

### ***Stock Market Developments***

On 24 July 2018 the Law of Ukraine on Introduction of Certain Amendments into the Law of Ukraine relating to Attraction of Foreign Investments (No. 2418-VIII dated 15 May 2018) was officially published.

The purpose of the Law is to bring the Ukrainian stock market regulations to the EU standards. More specifically, the Law introduces the definition of the “nominal holder” as a foreign financial entity registered in a EU member state or is a member of the Financial Action Task Force on Money Laundering (FATF), meets the requirements set forth by the National Commission for Securities and Stock Market and, in accordance with the laws of the country where it is registered, has the right to render services to its clients with respect to accounting of securities and transfer of the ownership right to securities, including in other countries on the basis of relevant agreements with foreign financial institutions.

The nominal holder has the right to open a securities account unless there is a risk that such nominal holder is involved in money laundering operations.

It is important to note that the nominal holder is obliged to provide the National Commission for Securities and Stock Market, upon request, with information about the securities’ owners.

The New Law enters into force on 24 November 2018.

## COMMERCIAL LAWS

### *Production, Sale and Labelling of Organic Products*

On 10 of July 2018, the Ukrainian Parliament adopted the *Law on Basic Principles and Requirements for Production, Sale and Labelling of Organic Products*. It will come into force 6 months after its publication.

This law is considered to be one of the steps for harmonization of the Ukrainian laws with the European legislation.

The law provides for the rules of certification of organic products' producers and marking of organic products. It provides for the list of substances (ingredients, components) which are allowed to be used in the process of organic production.

If the product was not certified as organic, it is prohibited to mark it with the state marking for organic product and to use the following words:

- organic
- biodynamic
- biological
- ecological
- any one-root and / or derivative words with prefixes "bio-", "eco-" etc. in any languages

If organic products were certified abroad by the authorities recognized in Ukraine or accompanied by the certificate confirming their organic production, they are not subject to new certification in Ukraine. Imported organic products marked with the words "organic", "biodynamic", "biological", "ecological", "organic" and / or any one-root and / or derivative words with prefixes "Bio-", "eco-" shall be translated into Ukrainian as organic product "органічний продукт".

Please note that this analysis is based on the last available version of the draft law. The final version to be signed by the published might slightly vary.

### *New Law on Labelling of Food Products Voted in the First Reading*

On July 10, the Ukrainian Parliament voted in the first reading the *Draft Law On Information for Consumers of Food Products*, which is called to harmonize the Ukrainian laws with the corresponding EU legislation.

In accordance with the draft law, producers and importers of food products will be required to indicate the following information in the Ukrainian language on the product's packaging:

- the name of the food product;
- a list of ingredients;
- any ingredients or processing aids that cause allergic reactions or intolerances;
- amount of certain ingredients or their categories;
- quantity of foodstuff in the established units of measurement;
- expiration date;
- special storage conditions or conditions of use;

- the name and location of the market operator responsible for the information on the food product, and for imported foodstuffs, such data on the importer;
- country of origin or place of origin (if the name may be misleading as to the country of origin);
- instruction for use - in cases where its absence complicates the proper use of the product;
- for beverages containing more than 1,2% alcohol - its actual content;
- information on the nutritional value of the product

To become effective the draft law needs to pass through the second reading and be signed by the President of Ukraine, which seems to be quite likely given the Ukraine's devotion to the integration with the EU.

### *Another De-Regularization Effort by the Ukrainian Government*

On July 18, the Government of Ukraine adopted Resolution No. 505. It abolishes a number of outdated licensing regulations. Besides, it instructs Ministries to revise several important state regulatory documents.

Most importantly, Resolution No. 505 abolishes licensing by the Ukrainian Ministry of Health of activities of blood banks. This is seen as the Government's attempt to accelerate operation of private medical centres specializing in collection, storage and processing of human blood.

Besides, the Resolution orders to revise and simplify the following two regulations, which are quite important for private businesses in Ukraine:

- The Regulation on Transportation of Dangerous Goods on the Territory of Ukraine adopted by the Order of Ministry of Internal Affairs of Ukraine (No. 822 dated July 26, 2004);
- The Procedure for Issuing Opinions on Electromagnetic Compatibility and Permits for the Operation of Radio Electronic Devices adopted by the Order of the National Telecommunication Commission of Ukraine (dated November 1, 2012, No. 559).

The Resolution shall be implemented by the relevant Ministries within 6 months after its official publication. The official publication of the Resolution is expected to occur in a week.

### *'Decentralization' of waste recycling tariffs suspended until May 2019*

On June 9, the legislative amendment to the *Law of Ukraine on Households* came into force suspending the reform of the waste recycling tariffs until May 1, 2019.

Under the amended Law, the right to set the waste recycling tariffs will be transferred back to city councils per the tariffs' decentralization law starting from May 2019 rather than July 2018.

It means that the existing regulation on tariffs adopted by the National Energy Regulation Commission (NERC) continues to be in force for the 2018-2019 season.

More specifically, under the existing regulation, waste recycling tariffs are set by the NERC for the period of 12 months, but only for operators of waste licensed by the

NERC (a reference is made to the Regulation on Determination and Fixing of Tariffs for Waste Treatment Services no. 1307 dated October, 27, 2017).

The licensing requirements for the waste recycling activities are set out in the NERC's Licensing Regulation dated May 25, 2017 No. 683.

## LABOUR LAWS

### *Changes with respect to employment of and permanent residence of foreigners*

On 25 April 2018 the Cabinet of Ministers of Ukraine adopted Resolutions Nos. 321 and 322 approving a new form and procedure for the issuance of a permanent and temporary residence permits.

#### New form of a permanent and temporary residence permit

Starting from 1 June 2018, permanent and temporary residence permits are to be issued in the form of a plastic ID card with an embedded contactless electronic chip, containing biometric data and additional information about a foreign national – holder of the document (i.e. digital photo and signature, fingerprints, etc.).

Please note that as of today, local departments of the State Migration Service of Ukraine continue to issue permanent and temporary residence permits in the form of a booklet due to the lack of technical and material support tools for processing and issuance of residence permits in the form of a contactless ID card.

#### Submission of an application for a residence permit issuance and/or exchange

Permanent residence permits are issued to foreign nationals who legally reside in Ukraine and who are at least 16 year of age for the duration of 10 years. Previously, permanent residence permits were issued for an unlimited term. Documents for a permit procurement and/or exchange should be submitted in person no later than fifteen (15) working days prior to the expiry date of the document.

After submission of the application for the exchange of a permanent residence permit, the valid residency permit which is subject to exchange is returned to the foreign national. A foreign national should hand back the mentioned document upon receiving a new permanent residence permit.

Temporary residence permits are issued to foreign nationals legally residing in Ukraine and who are at least 16 years of age (or who arrived to Ukraine with the purpose of study and are younger than 16) for a one-year term with the possibility of its exchange, except for the following specific cases:

- temporary residence permits for foreign nationals who arrived to Ukraine for the purpose of participation in international technical assistance projects are issued for the duration of the relevant international technical assistance project;
- temporary residence permits for foreign nationals who are founders and/or participants and/or ultimate beneficiary owners (controllers) of a legal entity registered in Ukraine are issued for a two-year term; and
- temporary residence permits for foreign nationals who arrived to Ukraine for the purpose of study are issued for the duration of their study in Ukraine.

In general, a foreign national who has arrived to Ukraine to be employed with a Ukrainian legal entity is entitled to obtain a temporary residence permit for the period of validity of his/her work permit.

According to the new procedure for the issuance and exchange of a temporary residence permit, the extension (prolongation) of the validity term of a temporary residence permit is not foreseen. Thus, in case of expiration of the term of a residence permit, a foreign national should submit the application for its exchange no later than fifteen (15) working days before the expiration date of the document.

Permanent and temporary residence permits issued before 1 June 2018 are valid for the entire term for which they have been issued.

#### Consideration of submitted applications for residency permits issuance and/or exchange

Permanent and temporary residence permits are issued within fifteen (15) working days after the date of submitting the application to local authorities of the State Migration Service of Ukraine.

After submission of the application for the exchange of a permanent and/or temporary residence permit, the valid residency permit which is subject to exchange is returned to the foreign national. A foreign national should hand back the old residence permit upon receiving a new one.

### ***Representative Office to Maintain Work Record Books***

On 17 July 2018, the Cabinet of Ministers of Ukraine adopted Resolution on Amendments to the Instruction for Maintenance of Work Record Books No. 58 dated 29 July 1993, as amended.

The suggested modifications allow representative offices of foreign companies to maintain work record books of their employees. Previously, representative offices were obliged to subcontract such service from the Directorate General for Rendering Services to Diplomatic Missions (often called GDIP).

The Resolution enters into force after its official publication which should take place in the coming days

## **REAL ESTATE**

### ***New rules of usage of agricultural land plots***

The Verkhovna Rada of Ukraine adopted the *Law of Ukraine on Amending Certain Laws of Ukraine with respect to Regularization of the issue of Collective Ownership over Land, Improving the Rules of Use of Agricultural Land, Prevention of Rading and Stimulation of Irrigation* (hereinafter – the “Law”). The Law will come into force on January 1, 2019, after it is signed by the President.

The Law sets forth the following main principles:

The user of the largest portion of the tract of land has the right to lease the field road within the borders thereof. However, he will be required to establish a land easement for other land users. The field road around the tract of land may be a public road only. The lessee of the land plot has the right to sublease the land plot to other land users within the border of the tract of land without preliminary consent of the lessor. The Law allows leasing the tree belt area (along the tract of land) without land auctions, but with the obligation for the lessee to preserve plantation. The Law sets forth the requirement to define the regulatory reference price during the inventory of the land. The regulatory reference price must be approved by the municipal council. It has the direct impact upon the rental payment for the state and municipal land plots.

### *Regulatory reference price*

Order of the Ministry of Agricultural Policy of Ukraine “On amendment the Procedure for Determination of the Regulatory Reference Price” no. 162 dated 27.03.2018 entered into force on July 17, 2018 (hereinafter – the Order). The Order provides that the regulatory reference price of land plots that were not registered in the system of the State Land Cadastre or land plots with undefined designation will increase with the coefficient of 3. Before the Order entered into force this coefficient was 2.

This amendment will affect the amount of the land tax and rental payments for state and municipal land plots, formed on the basis of regulatory reference prices. Registering information about the land plot into the State Land Cadastre with the land designation will allow to avoid the increase of the land tax and rental payment for a state and municipal land. The land designation should be defined in accordance with the State Classification of Land Designations, approved by Order of the State Committee of Land Resources of Ukraine no. 548, dated 23.07.2010.

## **INTELLECTUAL PROPERTY**

### *Reform of collective management of copyrights and related rights*

On 15 May 2018, the Parliament of Ukraine adopted the *Law on Effective Management of Property Rights of Holders of Copyright and (or) Neighbouring Rights* no. 2415-VIII. It entered into force on 22 July 2018.

The Law is aimed at filling in the gaps and removing inconsistencies in the regulation of activities of collective management organizations that manage the rights of holders of copyright and neighbouring rights and at adapting the Ukrainian legislation in this field to Directive 2014/26/EC of the European Parliament and the Council of 26 February 2014, that is a part of Ukraine’s obligations under the Ukraine – EU Association Agreement.

The Law defines collective management organizations (CMOs) as non-governmental non-profit institutions established by copyright and neighbouring rights’ holders and specifies the procedure for registration of CMOs in the Register of CMOs and their accreditation by the Institution (the Ministry of Economic Development and Trade of Ukraine), functions and forms of state supervision over their activities. It provides for the mechanism of relations of CMOs with IP rights’ holders and users/consumers on collection of royalties, distribution and payment of profits obtained by CMOs from IP rights. It establishes a transparent procedure for the determination of tariffs,



according to which the royalties will be charged, and provides for the upper limit of the management fee withheld by CMOs.

The Law provides for 3 forms of the IP rights' collective management (the last two of which are new):

- **voluntary collective management** when an IP rights' holder is free to decide whether to authorize the CMO to represent and exercise his rights;
- **extended collective management** which is exercised by accredited CMOs with regard to the rights of all IP rights' holders in the fields listed by the Law, irrespectively of conclusion by them of a management agreement with the CMO (provided that an IP rights holder may remove his rights from the management by the CMO);
- **mandatory collective management** which is exercised by accredited CMOs with regard to the rights of all IP rights' holders in the fields listed by the Law, irrespectively of conclusion by them of a management agreement with the CMO (provided that an IP rights holder may not remove his rights from the management by the CMO).

For each field of extended and mandatory collective management one CMO will be accredited.

To ensure the non-profitability and transparency of CMOs, the Law introduces the requirement for CMOs to purchase goods, works and services necessary for their activities in accordance with the procedures established by the *Law of Ukraine on Public Procurement*.

The final provisions of the Law establish a 9-month period for existing CMOs to register themselves in the Register of CMOS and the terms for announcement of tenders for election of accredited CMOs. They also set the procedure for the transfer of IP rights managed by one of Ukrainian major CMOs - the State Organization Ukrainian Agency of Copyright and Neighbouring Rights (UACRR) to a non-governmental CMO to be created yet, as well as subsequent liquidation of UACRR.

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**CONTACT:**

Bertrand Barrier, [bbarrier@jeantet.org](mailto:bbarrier@jeantet.org)

Jeantet  
4, Volodymyrska Street  
Kyiv, 01001, Ukraine  
+380-44-2060980