

NEWSLETTER

I. NEW LAW SIMPLIFYING PURSUIT OF BUSINESS

Please be informed that on 30 December 2009 the Law of Ukraine "On Amendment of Certain Laws of Ukraine Concerning Simplification of the Conditions of the Pursuit of Business in Ukraine" No. 1759-VI (the "Law") entered into force. The Law introduced important amendments to the effective laws, most notably, on licensing, permits issuance procedures, lease of property, company formation, as well as regulation of small businesses.

LEASE OF PROPERTY

The Law introduced important amendments to the Law "On the Lease of the State and Municipal Property". Even though the name of the law suggests that it regulates the lease of state and municipal property only, absent proper wording of the lease agreement it may also be applied to lease of privately owned assets as well, which makes legislative changes relevant for non-state sector as well.

Preemptive rights of current lessees to renewal of lease. Under the new rules, current lessees who duly fulfilled their duties under the lease agreement are granted a pre-emptive right. Property may be leased to a third person only if the current lessee does not notify the lessor of its intent to renew the lease. However, it is unclear whether the pre-emptive rights extends to any property subject to lease or to integral property complex only, or how this rule would correlate with the tender procedure prescribed where there are more than one prospective lessee.

Minimum 5 year term of lease. The law establishes a minimal 5 year term of lease is established, unless the lessee requests a shorter period (prior to the amendment, the lease term was not regulated but rather was left open for the agreement of the parties).

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To the leases of state and municipal property entered into by small business (i.e. entrepreneurs and entities with up to 50 employees and up to UAH 70 million annual revenue), this provision applies retroactively, so the lease agreements which were concluded before the Law entered into force are deemed to have automatically been extended to 5 years unless the lessee requests a shorter lease term.

PERMIT ISSUE PROCEDURES

The Law introduced the maximum 10 days period for the issue of business related permits, unless a longer term is expressly established by the laws. This rule appears to apply to issuance of various types of documentation, including as might relate to land, construction, etc.

Importantly, the Law established that in case the application and supporting documents necessary for the issue or extension of a permit were duly submitted but the permit was not issued / extended within the statutory term, the applicant is deemed to have been allowed to pursue the respective activities on the basis of the list of submitted documents bearing the date of their submission (the "Acquiescence Principle").

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LICENSING

The Law revoked the requirement of licensing with respect to the following business activities:

- wholesale trade in seeds;
- professional activities in the field of social services;
- development of projects and performance of works regarding preservation, restoration, renewal, repair, or adjustment of cultural heritage monuments;
- breeding of pets (dogs, cats, exotic and decorative animals) at the breeding facilities, dog training as well as preparation of specialists in those fields;
- activities related to the re-sale of artworks, collectables and antiques, organization of trade (auctions) in artworks, collectables and antiques.

Under the Law, licenses for business activities should be issued for the indefinite term. The Cabinet of Ministers of Ukraine, acting upon the submission of a state licensing authority may limit the term of the license; however, the minimal term of a license should not be less than 5 years. This provision, however, does not apply retroactively to licenses issued before the Law entered into force.

REGULATION OF SMALL BUSINESSES

Specifically with respect to the small businesses (i.e. individual entrepreneurs and entities with up to 50 employees and up to UAH 70 million annual

revenue), the Law introduced a 1 year moratorium (effective till 1 January 2011) temporarily banning:

- 1) the increase of the rent payments under state property lease agreements concluded between the State Property Fund or its territorial branches with the small businesses. Additionally, the Law recommends the municipal authorities to introduce the same moratorium with respect to the rent payments under municipal property lease agreements with small businesses;
- 2) any measures of state or municipal supervision or control with respect to small businesses, except for the inspections of high-risk businesses, ordinary and extraordinary audits by tax authorities, audits by the Pension Fund authorities of the high- and medium risk businesses, as well as extraordinary inspections by the consumer protection authorities acting upon consumers' complaints.

CORPORATE

The Law considerably reduced the amount of the minimal authorized capital required for the formation of a limited liability company (TOV) from 100 minimal wages to 1 minimal wage, as applicable at the date of the registration of a TOV. Currently, 1 minimal wage is UAH 869 (approx. USD 109, or EUR 75); as of 1 April 2010 a minimal wage will increase to UAH 884 (approx. USD 110.5, or EUR 76). This amendment does not affect TOVs registered before the Law entered into force.

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II. EARLY REPAYMENT OF DEBT OWED TO NON-UKRAINIAN RESIDENTS

The Law of Ukraine "On Amendments to Certain Laws of Ukraine for the Purpose of Overcoming the Negative Consequences of the Financial Crisis" dated 23 June 2009 and effective as of 24 November 2009 (the "Anti-Crisis Law") prohibits, in its chapter II, sections 8 and 10, early repayment (dostrokovye vykonannia) of the amounts due under the loan agreement between resident borrowers and non-resident lenders during the period from 24 November 2009 until 1 January 2011. There is a risk that the repayment of amounts demanded by the lender (known as acceleration – for example in the event of default) due under the loan agreement may be viewed as early repayment according to the Anti-Crisis Law and may therefore be subject to the restrictions imposed in it. International instruments and recent letters of the National Bank of Ukraine (the "NBU") regarding application of these sections, however, may mitigate this risk.

The provisions of the international treaty to which Ukraine is a party should prevail over the Anti-Crisis Law. Ukrainian law establishes the primacy of the provisions of international treaties over the respective provisions of national laws (pursuant to the Law of Ukraine "On International Agreements of Ukraine" dated 26 June 2006, as amended). The NBU and other state agencies, such as the Ministry of Justice and the Committee on Finance and Banking of the Ukrainian Parliament (Verkhovna Rada) have confirmed in their letters to international financial organisations that a bilateral agreement between Ukraine and relevant international financial organisations should prevail over the provisions of the Anti-Crisis Law if the law contradicts the corresponding agreement.

INTERNATIONAL INSTRUMENTS

Ukraine has also entered into some 70 bilateral agreements for the promotion and reciprocal protection of investments with its trading partners,

most of which have become effective. The majority of treaties contain provisions that protect loans given to economic entities from discrimination on the basis of nationality. For example, an Agreement between the Federal Republic of Germany and Ukraine for the Promotion and Reciprocal Protection of Investments" dated 15 February 1993 and effective as of 29 June 1996 (the "IPPA"), provides in its articles 3 and 5 that Ukrainian laws shall treat the lenders resident in Germany in the same way as the lenders residing in Ukraine. The procedure for the performance of obligations by resident borrowers towards resident lenders was not affected by the Anti-Crisis Law. Accordingly, the ban on early repayment set forth by the Anti-Crisis Law should not apply to the lender as it constitutes a "company (tovarystvo) of Germany" and the loan constitutes, respectively, the "claim on monetary funds that are used for production of tangible or intangible values" (Ukrainian - pravo vymohy shchodo hroshovykh koshtiv, iaki vykorystovuyutsia dlia stvorennia materialnykh abo nematerialnykh tsinnostei / German - Ansprüche auf Geld, das verwendet wurde, um einen materiellen oder immateriellen Wert zu schaffen) within the meaning of Article 1 of the IPPA. It should be noted that some bilateral agreements, for example between Ukraine and the United Kingdom of Great Britain and Northern Ireland, have an even wider scope of protection that extends to "claims to money or to any performance under contract that has a financial value" (pravo vymohy po hroshovykh koshtah abo shchodo vykonannia zoboviazan za kontraktom, iaki maiut finansovu tsinnist).

NBU CLARIFICATION

In response to our enquiry dated 22 December 2009 on the issues described above, the NBU issued a letter dated 28 December 2009 (the "NBU's Letter") in which it declined to comment on the provisions of international treaties regarding reciprocal protection of investments. Instead, in its capacity as currency control regulating authority, it supported a distinction between repayment in due time (vchasne vykonannia), including repayment upon demand of

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the creditor (lender) and early repayment (dostrokovye vykonannia). Thus, the NBU points out that the clauses of each agreement will be interpreted individually if the payment obligations can be made before the latest maturity date. In the context of analysis laid out in the NBU's Letter, the performance by the borrower of its payment obligations upon demand of the lender will not constitute early repayment for the purposes of the Anti-Crisis Law, but rather repayment in due time (vchasne vykonannia) according to the terms of the underlying agreement.

The NBU's Letter can be used to interpret section 10, chapter II of the Anti-Crisis Law, that is, the NBU is likely to register amendments to the loan agreements that: (i) decrease the term for final repayment (maturity) of the loan and/or (ii) expand the rights of

the lenders to declare due and payable the principal or other payments under the loan agreement. It should be noted that letters of the NBU do not have mandatory force (as opposed to NBU Board resolutions). In practice however they are widely used as guidance with respect to the matters they refer to and as an indication of the NBU's position.

Please note also that bill (draft law) No. 5378 On Amendments to Certain Laws of Ukraine (Regarding Overcoming Negative Effects of the Global Economic Crisis) repeals chapter II, sections 8 and 10 of the Anti-Crisis Law. The first reading of bill No. 5378 was positively voted by the Verkhovna Rada of Ukraine on 23 December 2009 and the second reading is planned for the coming plenary session.

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