Ukraine

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Introduction

Having declared itself an independent state in 1990, Ukraine approved the first special law on the regulation and function of foreign investments in 1992 ("Law Number 1992"),[1] a law that was repealed by the Law on the Regime of Foreign Investment of 1996 ("Foreign Investment Law"),[2] which is the effective legislation on foreign investments in Ukraine.

At the beginning of Ukraine's independence, the government restricted or prohibited foreign investment in certain activities.[3] Furthermore, minimum capital requirements for companies with foreign investments significantly exceeded those stipulated for local entrepreneurs.[4] These restrictions have been cancelled and the government presently treats foreign and national investors equally. Local and foreign investors pay equal fees and duties, and national and foreign capital is allowed in all fields of the Ukraine economy.

The events that occurred in 2014 have significantly destabilized the economic system of Ukraine and led to profound structural deformations. The armed conflict in the Eastern Ukraine resulted in political and economic instability with outflow of foreign direct investment due to lack of security guarantees for

1 *Verkhovna Rada*, Number 26 (1992).
2 *Golos Ukrainy*, 25 April 1996.
3 These included the requirements that foreign investors' share in any television company, information agency, or radio company should not exceed 30 per cent; foreign investors' share in insurance and communication companies should not exceed 49 per cent; offshore companies and banks may not participate in local banks; foreign persons without (Ukrainian) citizenship may not purchase land; shares in a bank operating in Ukraine may not be sold to a foreign investor without prior permission from the National Bank of Ukraine; loans may not be granted to a resident company or citizen of Ukraine without prior permission from the National Bank of Ukraine; and foreign investors are not allowed to own customs license stores and duty-free shops located in Ukrainian territory.
4 For instance, an insurance company with foreign investments had to have a minimum statutory capital of €500,000, while the requirement for locals was €100,000. A newly created bank where the foreign investors' share was less than 50 per cent should have had a minimum capital of €5,000,000; otherwise, the minimum capital would have been €10,000,000. Minimum foreign investors' contribution was set at €1,000,000.

investors and a high-risk level for businesses in Ukraine. Though the armed conflict is going on, the situation in Ukraine is stabilized. Foreign Direct Investment in Ukraine increased by $800 million in the first quarter of 2019. Foreign Direct Investment in Ukraine averaged $998.24 million from 1998 until 2019, reaching an all time high of $6,502 million in the fourth quarter of 2005 and a record low of $589 million in the first quarter of 2014.[5]

Forms in Structuring Joint Venture

In General

The Law on Foreign Trade defines a joint venture as an enterprise based on joint capital of Ukrainian and foreign entrepreneurs, joint management, and split of risks and profits. A foreign investor may freely decide on the legal form in structuring its joint venture activities in Ukraine.

Representative Office

A foreign investor may perform activities through a representative office, which is similar to a branch office in function. The parent company may delegate some of its own functions to the representative office, which has its own bank account and the right to employ its staff. A representative office also may have the right to carry out commercial activities. A representative office with the right of commercial activity can release payments for the goods and services of third parties and receive payments from local customers.

Otherwise, a representative office may only use the money at its Ukrainian bank account to maintain its activities, and proceeds from the sale of products will accrue to the head office account. A head of the representative office, which may be a foreign or Ukrainian citizen, should be appointed. He acts under a notarized and authenticated proxy and ensures the fulfillment of the instructions received from the head office.

A foreign head of the representative office does not need to receive a work permit for employment in Ukraine. The representative office is registered at the Ministry of Economic Development and Trade[6] by submitting the required documents no later than six months from the date of their issue in the country of origin thereof, and by paying a state fee of US $2,500. These documents include:

- A written request[7] for registration on a letterhead of the foreign investor company, signed by an authorized official, and sealed;

5 https://tradingeconomics.com/ukraine/foreign-direct-investment.

6 Instruction on Registration of Foreign Representative Offices in Ukraine, Ministry of Economy, Order Number 179 of 15 June 2007.

7 The request should contain the foreign investor company name and address; telephone and telefax numbers; city where the representative office is being opened, with reference to future address; if branch offices are to be found, a list of the branches in Ukraine;

- A record from the trade register of the country where the foreign investor company is officially registered;
- A record from the bank where the foreign investor company's account is opened, with its account number;
- A proxy for the head of the representative office, including a list of the powers given; and
- A copy of special authorization on establishing of a representative office of the country where the foreign investor company is officially registered if such authorization is required by that country.

The documents should be notarized, apostilled, and accompanied with an authorized and notarized translation into Ukrainian. The Ministry of Economic Development and Trade will review the documents for 60 days, after which it will issue a certificate of registration which allows the representative office to import the equipment and instruments necessary for its duty-free functions and open accounts at Ukrainian banks.[8]

Subsidiary

Due to the long registration process and high registration fees for representative offices, foreign investors prefer to establish subsidiaries. The Law on Banks and Banking Activities defines subsidiary as an entity controlled by another entity (a parent company).[9]

The Commercial Code distinguishes between unitary and corporate enterprises as to the method of establishment and the forming of capital. A unitary enterprise is set up by one shareholder that allocates the required property, forms the capital not divided into shares, approves the charter, distributes incomes, manages the enterprise directly or through the appointed manager, hires personnel, and resolves the issues of reorganization and liquidation of the enterprise.

A corporate enterprise is set up by two or more founders upon their mutual decision (contract), and acts on the basis of association of property and/or entrepreneurial or working activity of founders (employees), their joint conduction of business, and on the basis of equity rights. Cooperative enterprises and business societies are corporate. Both types of enterprises may be recognized as a subsidiary. The Commercial Code set up the term "associated companies", which means a group

number of foreign citizens that will work at the representative office; date of establishment of the foreign investor company; name of bank and account number; field of the company business; and purpose for opening the representative office, the field of its activities, information about business relations with Ukrainian partners, and outlook for development of cooperation.

8 Instruction on the Procedure to Open and Close Accounts of Banks' Clients And Correspondent Accounts Of Resident And Non-Resident Banks, National Bank of Ukraine Regulation Number 492 of 12 November 2003, as amended.

9 Law on Banks and Banking Activities of 7 December 2000.

of economic entities connected by economic relations and/or organizational independence in participation in the charter capital and/or control thereof. Such independence may be simple or decisive.

Simple independence exists when one entity (a parent company) may block decisions to be made by the other (a subsidiary) under the provisions of law or charter documents of the latter. Decisive independence exists when among the entities the control and subordination relations have been established in cases where one entity (a parent company) owns an overwhelming part of charter capital and/or makes decisions on general elections or in other governing bodies or in particular holds majority interest in the other (a subsidiary). The relationship with the decisive independence may be established only after receiving the approval of appropriate bodies of the Anti-Monopoly committee of Ukraine.

Moreover, if simple or decisive independence exists, it must be mentioned during the registration of a subsidiary and published according to law.[10] Common provisions for the creation of enterprises (companies) and their registration are provided by the Code and the Law on State Registration of Legal Persons and Natural Persons – Entrepreneur and Civil Entities (the "Registration Law"). A subsidiary is registered within an administrative unit of its planned location. A subsidiary will be registered on the basis of the following documents' submission:

- A completed registration card for the state registration of legal entities, to which may be added as an addition an application on the choice by an entity of a simplified taxation system and/or registration application for voluntary registration as a payer of value added tax approved by the central executive body that ensures development and implements the national tax and customs policy;
- A notarized charter or founders' agreement duly signed by the foreign investor and certified by a notary;
- Two copies of charter documents (one in case of electronic registration);
- Notarized and authenticated record from the trade register of the country where the foreign investor is officially registered, translated into the Ukrainian language, or submission of the Taxpayer Record Card Registration Number at the State Fiscal Service of Ukraine if the foreign investor is a natural person;[11] and
- A document confirming booking of the subsidiary name, if already done.[12]

10 Commercial Code, Number 436-IV of 16 January 2003.

11 Tax Code, Number 2755/VI of 2 December 2010.

12 The Registration Law provides for voluntary booking, but entrepreneurs prefer to book the name of newly registered entities to avoid usage of already registered companies' names, which is a ground for denying registration. The name should have information on the company type (i.e., limited-liability company, joint-stock company, or private company). Under Order of the Ministry of Justice, Number 368/5 of 5 March 2012, the name should be written in Cyrillic, and may include certain symbols, as well as Arab and Roman.

The registering authority will then issue an Extract of the Unified State Register of Legal Entities and Individuals Entrepreneurs, which will serve as a basis to receive further filings by the subsidiary at other authorities (*i.e.*, tax, statistics, banks). Although not explicit in Ukrainian law, it may be proved that the parent company is responsible for the actions of the subsidiary. In case the foreign investor prefers to limit its responsibility for the subsidiary's actions, it may set up a limited-liability company.

Limited-Liability Company

Under article 140 of the Civil Code, a limited-liability company is allowed to be founded by one or more shareholders. The capital requirement for a limited-liability company is not restricted, but the minimum amount of its property must guarantee the interests of creditors thereof. The activities of limited-liability companies are regulated by the Law on Limited and Additional Liability companies[13] and the Civil Code. The procedure for limited-liability company registration is the same as that for a subsidiary.

Public or Private Joint-Stock Companies

Public or private joint-stock companies are regulated by the Law on Joint Stock Companies.[14] The minimum capital of a joint-stock company should be 1,250 minimal salaries, which in 2019 is UAH 5.2-million. The requirements for setting up a joint-stock company are more stringent than those for limited-liability companies, and registering a public joint-stock company needs considerable time and effort. The procedure for establishing a private joint-stock company is as follows:

- Decision by establishing a meeting of the shareholders to set up the company and to make a private subscription;
- Submission of application and all necessary documents to register securities issued at the State Commission on Securities and Stock Exchange ("State Commission");
- Registration by the State Commission and issuance of a temporary certificate on the issue registration;
- Grant of international identification code to the securities;
- Conclusion of a service agreement on the securities issue with a securities depository or registrar to take charge of the registry of registered shareowners;
- Private subscription of shares by the establishing shareholders;
- Payment by the establishing shareholders of the full nominal value of the shares;
- Approval of the results of the private subscription and charter of the company by the establishing meeting of the shareholders;

13 Number 2275-VIII of 6 February 2018.
14 Number 514-VI of 17 September 2008, as amended.

- Company registration at the state registering authority;
- Submission of report on the results of the private subscription to the State Commission;
- Registration of report on the results of the private subscription at the State Commission;
- Receipt of certificate on state registration of the shares issue; and
- Issuance of documents to the establishing shareholders as to their ownership of the subscribed shares.

Non-compliance with the procedure will result in a refusal by the State Commission to register the private subscription and to a liquidation of the private joint-stock company. The registration procedure may take six to nine months. Establishing shareholders may enter into a shareholders' agreement regarding the procedure for setting up the company, the quantity, type, and class of the shares to be purchased by each shareholder, the nominal and purchase value of the shares, the term and procedure to pay for subscribed shares, and the duration of the shareholders' agreement.

There is no need to execute a shareholders' agreement or to comply with the general procedure on convocation and holding of the general meeting of shareholders if the joint-stock company is set up by one shareholder. As the shareholders' agreement is not an establishing document, it expires on the date of registration of the report on the results of the private subscription at the State Commission. On the other hand, public subscription of the shares may be done only after receipt of the certificate as to first issue of the shares.

The establishment meeting of the joint-stock company should not be held later than three months after the founders pay for the first share issue in full. Furthermore, the founders should unanimously vote to adopt resolutions on the establishment of the joint-stock company (on appraisal of in-kind contribution to the capital fund and on approval of the charter). The decisions on other matters are adopted by simple majority vote of founders. A purchaser of 10 or more per cent of the capital fund of the joint-stock company should notify the company itself and the State Commission at least 30 days prior to the anticipated acquisition.

On the other hand, a purchaser of 50 per cent or more of the shares of the joint-stock company should send to all other shareholders a public irrevocable offer to purchase their shares within 20 days from the acquisition date and send an acquisition notification to the State Commission and to the stock exchange where the shares are listed.

The joint-stock company is entitled to issue shares or bonds to convert its obligations into securities, which shares should be issued only in non-documentary form. Preferred shares may be issued in one or several classes providing different rights to their owners. A public joint-stock company is obliged to list its shares and to be registered in at least one stock exchange, while the shares of a private joint stock company may not be listed.

Joint-Activities Agreements

A foreign investor may carry out activities in Ukraine without setting up an entity but through a joint activities agreement. Joint activities may be performed by combining the participants' contributions (simple partnership) or otherwise. A joint activities agreement should be in writing and should be geared towards a certain goal not contrary to law.

Unless otherwise provided by law, the agreement should name a party that will be treated as a manager of the joint activities with the concomitant duty to report to local tax inspection and to coordinate joint actions. The agreement also should provide for the procedure to carry out the business and to cover expenses and losses, legal status of the property allocated for joint activities, and participation in the results of the joint venture, among others. The agreement should be registered at the Ministry of Economic Development and Trade of Ukraine[15] after submission of the following documents:

- A request to register made in free form;
- An informational card in the prescribed form;
- An original of the agreement and its notarized copy;
- A notarized charter and certificate of registration for the Ukrainian party, and notarized and authenticated extract of the record from the trade register of the country where the foreign investor is officially registered;
- A license if activities envisaged by an agreement are subject to such license; and
- A document confirming registration fee payment (UAH 102).

Registration will be confirmed within 20 calendar days upon the issuance of three copies of a card of state registration. One copy is given to the Customs Office for the duty-free importation of equipment necessary for joint activities, another is submitted to the tax inspection where the Ukrainian party is located, and the last copy remains with the investor. The joint activities agreement may be refused registration if its terms contradict Ukrainian law,[16] there is a foreign trade sanction against the applicant under the Law on Foreign Trade,[17] or there is a prohibition to have joint activities in the chosen field. A foreign party with no registered representative office in Ukraine may not act as manager of the joint activities.

15 CMU Regulation Number 112 of 30 January 1997, as amended.

16 However, the Law on International Private Law allows the parties to agree on any law applicable to their relationship.

17 Article 37 allows the licensing of foreign trade for a Ukrainian entity or prohibition to carry out foreign trade if such trade may affect the national security of Ukraine. Sanction is imposed where the Ukrainian entity has supplied goods abroad, failed to receive money for such, but did not start court settlement for the non-payment.

Production-Sharing Agreements

The Law on the Agreements on Production Sharing (the "PSA Law")[18] seeks to create favorable conditions for investments in mineral search, prospecting, and production within the borders of Ukraine, its continental shelf, and exclusive (maritime) economic zones.

Investors[19] may search, prospect, and use minerals under production sharing agreements (PSAs) for a specified period of time, at their own risk, and with compensation for costs and remuneration in the form of a portion of the profit production. A PSA may refer to specific sites where there are mineral deposits of national and local importance, including areas within the subsoil of the continental shelf and exclusive (maritime) economic zone contained in a list of areas of subsoil mineral deposits. Such PSAs would be granted to an investor whose bid fulfills the following conditions:

- There is a responsibility to invest in the searching and prospecting for mineral resources and fulfill the terms of the tender;
- The mineral prospecting programs provide the most rational conditions for the further use of natural resources;
- The technological solutions for the proposed works are the most effective;
- There are optimum measures to protect the environment;
- The investment conditions are the most attractive; and
- The investor has sufficient financial security and international experience to execute the works and investment programs as stated in the tender documentation.

Under the PSA Law, the winner of the tender signs a PSA with the CMU or the local self-government bodies in whose territory the mineral wealth is located. The PSA Law stipulates the following conditions for agreement negotiation and signing:

- Within three months after the declaration of the tender results, a draft of the PSA made by the investor will be registered by the permanent Interdepartmental Commission formed by the CMU and composed of representatives from state bodies, local governments, and peoples' deputies of Ukraine;
- Within the next three months, the Interdepartmental Commission will propose its amendments to the draft agreement or propose a new draft;

18 Number 1039-XIVof 14 September 1999, as amended.

19 These investors may be citizens of Ukraine, foreigners, persons without citizenship, legal entities of Ukraine or other States, or associations of legal entities set up within or outside Ukraine that have the appropriate material, technological, and economic capabilities or an appropriate qualification for the use of subsoil, as certified by the documents issued in accordance with the laws of the investor's country.

- If, within six months from the first registration of the draft, the parties fail to negotiate all aspects of the agreement, either party may apply to any international non-government body to review the agreement using its expertise; and
- The amended agreement shall be signed by duly authorized representatives of parties after powers of representatives of investors have been examined by a working body of the Interdepartmental Commission.

A PSA may be bilateral or multilateral, such that several investors may be parties thereto, provided that they incur sole liability for the obligations under the PSA. Where the investor is an association of legal entities that is not a legal entity, the participants of such association incur sole liability for the obligations under the PSA. The parties may agree to additional terms and conditions not among the minimum prescribed by the PSA Law. The parties also should define the term of the PSA,[20] which should not be more than 50 years from the execution date.

All production completed up to the sharing moment is owned by Ukraine, while the rest of the profitable production is divided between the State and the investor. Production will be shared quarterly unless otherwise stipulated. The investor owns the compensation production and a share of profit production at the place where the parties measure mining production. The volume of compensating products, which will cover the investor's expenses to perform the agreement, cannot exceed 70 per cent of that totally made.

The PSA Law does not provide any tax incentives or tax holidays for investors, although it provides that investors are not required to sell currency under the norms of the currency laws or obtain licenses for equipment imported to carry out the PSA. The State should guarantee to the investors the lawful issuance of approvals, quotas, and special permits to carry out the works stipulated by the PSA. It also should guarantee the applicability of legislative norms that are in effect at the time of the signing of the PSA. However, it should not grant court immunity, immunity regarding interim measures, or immunity from judgment enforcement.

Concession Agreements

There a range of laws that regulate relationships in the sphere of concession:

- on Concessions (the "Concessions Law") adopted on 16 July 1999 that provides basic norms as regards concessions;[21]

20 The term may be prolonged at the initiative of the investor providing it performed all undertaken liabilities. In case of the investor's failure, the State may terminate the PSA with claims for reimbursement.

21 Works eligible for concession agreements include water supply and sewage disposal; public transportation services; garbage collection and utilization; heat supply; construction and reconstruction of highways, other roads, and related objects; construction and operation of motor expressways; construction and operation of ports and airports; mail and communication services; supply of natural gas; production and supply of electricity; public catering; construction of residential houses; housing and communal services;

- on peculiarities of lease or concession of state-owned objects of fuel and energy complexes;[22]
- on peculiarities of leasing or concession of objects in the areas of heat supply, water supply, and drainage which are in communal ownership;[23] and
- on Concessions to Build and Operate the Highways.[24]

A concession agreement is concluded with a winner of a tender conducted pursuant to the procedure in CMU Regulation Number 642 of 12 April 2000. The CMU has approved a model form for concession agreements that may be used as a basis for further negotiations of the parties.

Agreed terms may not be amended during the effectiveness of the concession agreement even when newly adopted laws contain provisions that may worsen the concessionaire's position. The term of concession agreements should not be less than 10 years and should not exceed 50 years. Concession agreements should be registered at the State Property Fund if the object of the concession is owned by the State and at some other executive body of relevant authority (which is still not defined) in case the object of the concession is communal property.

Under the Law on Concessions to Build and Operate the Highways (the "Highways Law") which took effect on 11 January 2000 and was fully reworded in 2009, concessions for the construction of highways are first given on all highways to international transport corridors and category "E" international highways. Only highways that are parallel to or near free roads in proper technical condition may be used as objects of concession. The concessionaire is compensated for free-of-charge movement on the highway.[25] The concessionaire also may obtain decreased concession payments, subsidies, or additional compensations under certain conditions.[26]

Governing Law and Language

The Civil Code and the Law on International Private Law allow parties to choose the governing law of their contract. Such choice should be clearly expressed or directly inferred from the actions of the parties, the terms of the agreement, and the circumstances of the case. The choice of law may be made either in the contract or in a separate agreement.

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use of social and cultural facilities; creation of communal parking entities; funeral services; construction and operation of hotels, tourist complexes, or motels; and construction and operation of reclamation systems and some objects of their engineering infrastructure.

22 Number 3687-VI of 8 July 2011, as amended.

23 Number 2624-VI of 21 October 2010, as amended.

24 Number 1286-XIV of 14 December 1999, as amended.

25 CMU Regulation Number 1521 of 4 October 2000, as amended.

26 CMU Regulation Number 1114 of 13 July 2000.

The choice of law may be modified at any time, and will be retroactive to the moment of the execution of the agreement. However, such modification will not be a ground to consider the agreement void for failure to preserve its form, or to limit or violate the vested rights of third parties.

The choice of law to govern the joint activities agreement will be upheld as valid and binding in any action in the courts of Ukraine, as the Commercial Procedure Code specifically stipulates that a commercial court will apply foreign law rules. If the parties fail to choose the governing law of their contract, the law that has the closest connection to the parties' relationship will be applied. This would be the law of the location or domicile of the party liable to make a performance decisive for the transaction.[27]

For an agreement as to an immovable, the law of the place where the immovable is located or the law of the State where registration has been made in case of necessity of registration will apply. For a joint activities agreement, the law of the place where the activities are carried out will apply. For an agreement executed as a result of a tender, the law of the place where the tender has been held will apply.

The choice of law only applies to obligations and does not affect the law applicable to the legal capacity of the parties and the form of the agreement. Legal capacity is governed by the law of the country of incorporation, while the form of the agreement is governed by the law of the country where the agreement is made.

As the activities of joint-stock companies, the relations between the company and its shareholders, and those between shareholders are regulated exclusively by the laws of Ukraine, any shareholders' agreement as to company activities governed by a foreign law is void for violating public order.[28] There is no requirement that

27 Under article 44 of the Law on International Private Law, the party liable to make a decisive performance is the seller under a sale agreement; the grantor under a gift agreement; the landlord under a rent agreement; the lessor under a lease agreement; the creditor under a credit agreement; the contractor under a construction contract; the carrier under a transportation agreement; the forwarder under a forwarding agreement; the keeper under a storage agreement; the insurer under an insurance agreement; the attorney under a retainer agreement; the commissionaire under a commission agreement; the manager under a property management agreement; the bank under a deposit agreement; the licensor under a licensing agreement; the franchisor under a franchise agreement; the mortgagor under a mortgage; and the guarantor under a guarantee agreement.

28 Recommendations on Practice as to Law Application within Consideration of Cases Arisen out of Corporate Disputes, Number 04-5/14 of 28 December 2007, as amended ('Recommendations'). The Recommendations are not obligatory under the law, but lower courts treat them as precedents. The Recommendations also state that shareholders may enter into shareholders' agreements only in cases directly provided by Ukrainian law, despite the absence of such prohibition in the Civil Code, the Law on Business Entities, and the Law on Joint-Stock Companies. The Recommendations also State that shareholders may not settle disputes connected with company activities at international arbitration courts, despite the Law on International Commercial Arbitration providing otherwise.

agreements should be written in a specific language. It may be discerned from articles 3, 203, and 639 of the Civil Code that an agreement may be executed in any language, but the foreign investor also should consider that the agreement needs to be translated into Ukrainian language on certain occasions.

Financing Joint Venture

A joint venture or a joint activities agreement may be financed by the parties' capital contributions or by local or foreign loans. Loans from Ukrainian or foreign banks may be taken without any limits. Due to currency regulation liberalization, previous normative acts as to registration of the loan agreement at the National Bank of Ukraine (NBU) have been cancelled.

As of 7 February 2019, local banks are required to provide the NBU with an information on foreign loan contracts to the NBU Automated System "Loan Agreements with Non-residents" (the "Automated System")[29] in electronic form, which is just a notification that is made by a local bank. Registration of foreign loans took and registered before 7 February 2019 is no longer valid. All information on such contracts is systematized in an automated mode and transferred to the Automated System.

Antitrust and Competition Issues

Under the Law on Protection of Economic Competition (the "Competition Law"), the following are treated as "concentration":

- Merger of economic entities or affiliation of an economic entity with another entity;
- Direct or indirect acquisition of control over one or several economic entities or over parts of economic entities by one or several economic entities through specified means;
- Establishing of the economic entity by two or more economic entities, which for a long period will independently carry out economic activity, but this establishing does not lead to the coordination of competitive behavior between economic entities that have established this entity or between them and the newly created entity; or
- Direct or indirect purchase, acquisition by other means, or receipt for management of shares that ensures attaining or exceeding 25 or 50 per cent of the votes at the higher board of management of the relevant economic entity.

29 NBU Regulation on the procedure for banks to provide an information on contracts under which residents perform debt obligations to non-resident creditors for borrowed credits and loans, Number 6 of 2 January 2019.

Concentration may be carried out with prior permission from the Anti-Monopoly Committee, after consideration of a prescribed set of documents in 30 days, under the following conditions:

- If the total cost of assets or total product sales in the last financial year of the participants in the concentration exceed €12,000,000 while the total assets or sales of products, including those abroad, of at least two participants in the concentration exceed €1,000,000 and the total assets or sales of products in Ukraine of at least one participant in the concentration exceed €1,000,000; or
- Irrespective of the total value of the assets or total product sales of the participants, if a share of any participant or the joint share of the participants in a market exceeds 35 per cent, as long as the concentration is made on the same or adjacent market.

Foreign Investment

In General

Under the Foreign Investment Law, investors may be legal entities set up under laws other than that of Ukraine, non-resident foreigners, foreign States, foreign governmental and non-governmental organizations, and other parties to investment activities under the laws of Ukraine.

The enterprise with foreign investment is an enterprise (entity) of any legal organizational form established in accordance with the Ukrainian legislation and foreign investment in the charter capital thereof, if any, is not less than 10 per cent. Investment may be done in:

- Foreign currency that is recognized by the NBU as convertible;
- Ukrainian currency in case of reinvestment in the object of the initial investment;
- Movable and immovable property and the rights connected to it;
- Securities and corporate rights valued in foreign currency;
- Bonds and claims to fulfill contractual obligations guaranteed by first class banks and valued in foreign currency;
- Intellectual property rights; or
- Rights to carry on business activities, including the right to use mineral resources.

To strengthen economic cooperation and to create and promote favorable conditions for foreign investments and their protection, Ukraine has ratified a range of bilateral treaties with various countries.[30]

30 These include Argentina, Austria, Belgium-Luxembourg Economic Union, Bulgaria, Canada, Chile, China, Cuba, Denmark, Finland, Germany, Greece, Hungary, Indonesia, Iran, Israel, Italy, Mongolia, The Netherlands, Poland, Slovak Republic, Sweden, Switzerland, and Turkey.

Incentives Available

The Customs Code[31] allows the duty-free importation of equipment as capital contribution to a joint venture or under a joint activities agreement. Customs bodies allow the importation under a simple promissory note issued by the joint venture. The promissory note is cancelled if the imported equipment is reflected in the balance sheet of the joint venture within 30 days and the relevant tax inspector takes note of this fact.

Where the joint venture is terminated before the expiry of three years, customs duties are paid at the rates applicable on the date of termination. Customs duties are not payable where contributed investment is withdrawn from Ukraine, as well as where a foreign investor sells its share in the joint venture to another foreign investor. Property imported into Ukraine for not less than three years under a registered investment (joint activities) contract also is exempted from customs duties, while property imported for the investor's own use or for further resale is taxed under the general rules.

Protection

The Constitution protects the right and interests of Ukrainian and foreign citizens, companies, and enterprises regardless of their ownership forms and activities. Property will not be compulsorily withdrawn[32] except in cases of public necessity and after due compensation for the price of the property,[33] which may be made before or after the compulsory withdrawal. Later compensation only applies in cases of war or state of emergency and requires the adoption of a special law.

Confiscation of property is only allowed pursuant to a court order under the procedure stipulated by law. Confiscation as a sanction for infringement is provided for by the Criminal Code and the Customs Code. The investor whose property is withdrawn has the right to:

- Apply to a Ukrainian court regarding the lawfulness of the withdrawal and the amount of compensation; or

31 Customs Code, article 287.

32 The Constitution does not recognize the terms "nationalization", "requisition", or "expropriation", and instead uses the term "compulsory withdrawal".

33 Compensation should be equal to the actual price of the investment fixed before or at the time of the announcement of the decision on withdrawal or at the time it became generally known, whichever comes first. The price of the investment is determined using international standards, taking into consideration investment capital, alterations in price, increase of capital, current non-shared profits and reserved funds, goodwill, and other factors. Compensation is calculated at the exchange rate on a date set before the announcement of the decision, and includes interest accrued on the basis of the general market rate, which is not lower or equal to the current LIBOR rate, for the period from the date of the announcement to the date of payment.

- Apply to the competent authorities of its State, which has a bilateral investment treaty with Ukraine, to review the propriety of the expropriation and the adequacy of the compensation, and to resolve other matters.

The Law on Investment Activities[34] also guarantees the stability of investment activities, and allows reimbursement for damages brought about by an act that violates the rights of investors. The Foreign Investment Law also provides the following guarantees:

- Guarantee in case of change of legislation, wherein the investor has the right to insist upon immunity for 10 years from the effectiveness of the new law;
- Guarantee as regards compulsory withdrawal and illegal actions of state bodies and officials;
- Guarantee to compensate and reimburse for damage to foreign investors;
- Guarantee that the foreign investor may withdraw its investment without paying any duty or fee in case of termination of the investment activities; and
- Guarantee to immediately transfer in foreign currency profits and money from investment activities, after the payment of due taxes and fees stipulated by law.

Taxation

A foreign investor's income in Ukraine includes discounts paid in its favor, dividends, royalties, income for services, lease payments, income from the sale of immovables or securities and corporate rights, income from joint activities and other investment contracts, broker or agent fees, contributions and premiums for insurance or reinsurance, and other income.

A resident company which makes any of such payments in favor of the foreign investor should deduct 15 per cent from the payment as withholding tax, unless otherwise stipulated by international treaties.[35] Concluded treaties may provide lower withholding tax on dividends, interests, and royalty. To benefit from a double taxation treaty, the Ukrainian entity should have evidence that the foreign investor is not a resident of Ukraine and that it has a permanent residence in the foreign country in question. A certificate of residency issued by the Minister of

34 Number 1560-XII of 18 September 1991, as amended.

35 Ukraine entered into double taxation treaties with Austria, Belgium, Bulgaria, Canada, China, Cyprus, Czech Republic, Denmark, Egypt, Finland, France, Germany, Greece, Hungary, India, Indonesia, Iran, Italy, Lebanon, Macedonia, Malaysia, The Netherlands, Norway, Poland, Portugal, Romania, Russia, Slovakia, Sweden, Switzerland, Turkey, United Kingdom, United States, and Vietnam. Ukraine also has concluded similar treaties with all 14 ex-USSR countries. Under the Law on Succession of Ukraine of 12 September 1991, Number 1543-XII, Ukraine is a successor of rights and liabilities under the international treaties concluded by the USSR, where they do not contradict with the Constitution and interests of Ukraine.

Finance (or other authorized body referred to in the treaty) will be treated as the necessary evidence.

Dispute Resolution

Investment disputes may be settled at common courts or arbitration courts depending on the nature of the dispute and the parties to the dispute. Where any party is a natural person, the dispute will be resolved by common courts, and the provisions of the Civil Code and the Civil Procedural Code will be applicable. Disputes between legal persons, if there is no arbitration clause, will be settled at the commercial courts of Ukraine under the provisions of the Commercial Procedural Code.

The Foreign Investment Law stipulates that disputes between foreign investors and Ukraine on matters of state regulation of foreign investments will be settled by the common courts of Ukraine, unless otherwise agreed in international treaties.

If the disputing parties have an arbitration agreement indicating that part or all matters concerning investment should be settled by a tribunal, the dispute will be resolved by such tribunal, which may be the International Center on Settlement of Investment Disputes (ICSID) or a special ad hoc arbitration tribunal formed under the general rules fixed by the United Nations Commission on International Trade Law (UNCITRAL) or other rules of permanent arbitration institutes.

The compulsory enforcement of the judgment or arbitral award depends on its place. A judgment or award rendered in Ukraine may be enforced under the Civil Procedural Code and the Law on Enforcement Procedure.[36]

A judgment of a foreign court may be recognized and compulsorily enforced in Ukraine if it is stipulated by an international treaty ratified by the *Verkhovna Rada* or pursuant to the reciprocity principle.[37] A party interested in the recognition

36 Number 327-IV of 28 November 2002, in the new wording effective as of 15 December 2017, as amended. Enforcement of the local judgment or award is carried out pursuant to Section IX of the Civil Procedural Code under the following main principles: (a) the enforcement bodies in Ukraine are bailiffs; (b) enforcement is carried out under a writ of execution for common courts and an executive order for commercial courts; (c) enforcement of a judgment is possible within three years since the judgment took effect; and (d) enforcement of a judgment may be carried out to recover a debtor's properties through arrest and sale of the properties, to recover a debtor's properties, including those possessed and/or used by third parties, and to withdraw from a debtor and to transfer to the recoverer certain goods or subjects mentioned in the judgment, among others.

37 Ukraine is a party to the New York Convention on Recognition and Enforcement of Foreign Awards of 1958 and the multilateral Newly Independent States Convention of 22 January 1993. It also has entered into bilateral treaties which provide for recognition and enforcement of judgments issued abroad with China, Estonia, Latvia, Lithuania, Moldova, Mongolia, and Poland. Bilateral treaties on assistance concluded by the USSR with Albania, Algeria, Bulgaria, Cuba, Cyprus, Czech Republic, Finland,

and enforcement of a foreign judgment should submit the following documents to the corresponding court at the place of fulfillment:

- A plea to fulfill the judgment;
- A copy of the judgment confirmed by the court, or an official document on the validity of the judgment, in case validity does not arise from the judgment;
- A document that proves that the respondent was duly served with summons;
- A document that defines in which part and upon which time foreign judgment shall be fulfilled (if such judgment has been fulfilled earlier);
- A document that certifies powers of representative (if such plea is submitted by a representative); and
- A certified translation of the above-mentioned documents.

Recognition and enforcement of a judgment may be refused on the ground that the limitation term for recognition and enforcement of the judgment has been missed, or the judgment does not become effective yet, or the respondent was not duly served with summons. It also may be refused on the ground that a judgment between the same persons and on the same matter has been already issued and took effect in Ukraine, or if a corresponding body in Ukraine initiated an earlier proceeding between the same persons and on the same matter.

Finally, recognition and enforcement may be refused if the judgment had to be exclusively decided by the Ukrainian courts. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

- The parties to the arbitration agreement were, under the law applicable to them, under some incapacity, or the agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;
- The party against whom the award is invoked was not properly notified of the appointment of the arbitrator or of the arbitration proceedings, or was otherwise unable to present his case;
- The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission, provided that the decisions on matters submitted to arbitration which can be separated from those not so submitted may be recognized and enforced;
- The composition of the tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

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Greece, Hungary, Iraq, Italy, Romania, Tunisia, Vietnam, Yemen, and Yugoslavia also are valid for Ukraine.

- The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Recognition and enforcement of an arbitral award also may be refused if a Ukrainian court finds that the subject matter of the dispute is not capable of settlement by arbitration under the law of Ukraine or the recognition or enforcement of the award would be contrary to the public policy of Ukraine.