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# REAL ESTATE & CONSTRUCTION

## Amendments to construction legislation

- On 11.05.2010 the Parliament of Ukraine has passed the Law “On amendments to certain laws of Ukraine on improvement of state regulation as to housing construction” (as of 26.05.2010 has not come into force). The draft law N2464 introduces changes to the laws “On investment activity”, “On insurance”, “On financial and credit mechanisms and property management at housing construction and real estate transactions”, “On advertisement” and others in order to ensure rights of investors and increase of state control over this market.

In particular, it is provided that investment and financing of housing construction with use of non-budget financing, financing provided by individuals and legal entities, including financing provided for management purposes, shall be conducted only through construction financing funds, real estate funds, joint financing institutions as well as through issue of securities, fulfillment of obligations under which is secured by real estate object pursuant to the legislation. Other means for financing of such real estate objects shall be determined only by laws.

Pursuant to the Law the Chamber of Commerce and Industry of Ukraine and regional chambers of commerce and industry with participation of the central construction and architecture executive body shall issue certificates evidencing force majeure events pursuant to contract terms upon applications of business entities-constructors (clients, contractors).

Amendments have been introduced to the Law of Ukraine “On territorial planning and development” according to which construction permit for reconstruction or capital repairs of roads, rail ways, power lines, communication lines, pipelines, other line communications within existing rights of way can be issued without the document evidencing the title or use rights to land plot.

The amendments also envisage that for obtaining of construction permit foreign legal entities shall additionally submit a document confirming engagement of Ukrainian citizens and legal entities at construction works in volume not less than 90% of their general amount as well as use for construction

works of not less than 50% of domestic products and materials, in particular, building constructions.

## Draft of the Town Planning Code of Ukraine

- In May 2010 people’s deputies introduced for consideration of the Parliament of Ukraine the draft of the Town Planning Code of Ukraine.

The draft code includes suggestions of the Main scientific-and-expert administration as to the government bill N5181 which has been withdrawn due to resignation of the previous Cabinet of Ministers of Ukraine.

The draft code completely encloses the laws of Ukraine “On town planning basis”, “On architectural activity”, “On territorial planning and development”, “On liability of enterprises, their unions, institutions and organizations for violations in the town planning sphere”, “On town planning norms”. After coming into force of the Town Planning Code these laws cease to be in force.

During preparation of the draft law many duplications of norms have been eliminated, respective contradictions have been corrected, architectural objects and town planning objects have been clearly dissociated.

Town planning substantiation as one of main reasons for actual stoppage of works on renewal of town planning documentation has been eliminated.

The draft law provides a direct norm as to free access of population to digital data base of the state building norms and materials of approved town planning documentation.

There is regulation not only on terms for development of town planning documentation by a respective project organization, but also on terms for its approval by the client. If there is no approval from city, settlement or village council of an approved town planning documentation within

the set term, a “forced” approval method shall be applied.

In order to make licensing procedure easier for citizens intending to build their own house, garden or summer cottage, the code envisages application of a building passport.

The Code consists of 9 sections, 23 chapters and 162 articles and stipulates general legal and organizational principles for planning and development of territories in Ukraine and is directed at formation and development of optimal living conditions of population, provision of steady development of settlements, coordination of state, public and private interests.

## Comments to the law “On the state budget of Ukraine for 2010”

- Law “On the State budget of Ukraine for 2010”. Lease of state and communal property.

The new Law on the State budget for 2010 concerns important issues as to lease of state and communal property. In particular, same as in the Law on the State budget for 2009, the Law on the State budget for 2010 practically excludes the possibility for transfer of such property into lease for commercial enterprises on non-auction basis and obliges lessors to conduct auctions as to any lease objects (with only a few exceptions for budget institutions and non-governmental organizations). Due to the mentioned provision, application of article 9 of the Law of Ukraine “On lease of state and communal property” regulating non-auction procedure for lease agreement conclusion in 2010 is not possible.

As to the existing lease agreements the Law on the State budget for 2010 (article 72), as well as the previous Law on the State budget for 2009, provides for a right of the lessee to prolong the agreement for a new term not exceeding, however, two years, provided the lessor has been informed about it not less than one month before the expiration of the agreement. As the Law does not contain a reference to “priority” rights of the lessee to conclude such agreement for a new term, in the practice there is possibility for different approaches as to application of this provision. Moreover, as contractual relations provide for declaration of intention from both

parties, the initiative only of the lessee, even by virtue of the direct provision of law, is not enough – for prolongation of a lease agreement respective decision of the lessor is needed.

As to the procedure and terms for prolongation of the lease agreement it shall be noted that mentioned provision of article 72 does not comply with the provision of article 17 of the Law of Ukraine “On lease of state and communal property” according to which “in case there is no notice from any of the parties as to termination or change of agreement provisions within one month after its expiration date, the agreement shall be deemed to be prolonged for the same term and on the same conditions”, i.e. without respective notice from the lessee and with tacit prolongation of the term, if there are no objections of the parties. And, as long as according to the Law of Ukraine “On introduction of amendments to certain laws of Ukraine as to simplification of business conduction in Ukraine” lease agreements concluded before 30.12.2009 for a term not exceeding 5 years shall be deemed to be concluded for a 5-years term, if the lessee does not propose a shorter term, they shall be also prolonged, according to the law, for another 5 years. De facto, the Law on the State budget for 2010 did not extend the rights of the lessees of state property, as it could be seen by its separate interpretation, but made them more puzzled. In the context of conclusion and prolongation of lease agreements for capital constructions it shall be also remembered that such agreements concluded for more than three years are subject to notarization and state registration according to articles 793, 794 of the Civil Code of Ukraine. Due to this, at prolongation of existing lease agreements for a new term pursuant to the law, contractual relations shall be executed not in form of a supplementary agreement but in form of a separate fully valid agreement.

Special attention is required in connection with the novelty as to permissible lease objects. In particular, the Law on the State budget for 2010 allows transferring into lease real estate property of executive power and local self-government authorities for a term till 01.01.2011 provided such property “is not used by such authorities for execution of their functions”. The legality of this provision is questionable taking into account that according to provision of part 2 article 4 of the Law of Ukraine “On lease of state and communal property” and part 2 article 5 of the Law of Ukraine “On privatization of state and communal property” any property of government or self-government authorities transferred to them for exercise of their

functions is deemed to be property of national importance and is no subject to lease.

Finally, especially important is article 80 of the Law on the State budget for 2010 according to which “till passing of the law regulating the procedure for sale of land plots of non-agricultural designation being in state or communal property or rights to them in an auction (land auction) the sale of such land plots of non-agricultural designation shall be conducted according to the procedure approved by the Cabinet of Ministers of Ukraine”. We would like to remind you that last time when the Cabinet of Ministers determined the procedure of land auctions with its Decree N394 it was declared unconstitutional due to requirements of article 137 of the Land Code of Ukraine as to regulation of the procedure for conduction of land auctions on the law level. Besides, the necessity of a legislative, and not a sub-legislative, regulation for a procedure of land auctions is stated in the number of decisions of the Constitutional Court of Ukraine. Nevertheless, existing decisions of the Constitutional Court of Ukraine did not prevent the Parliament from passing the Law on the State budget for 2010, which means, new Decree of the Cabinet of Ministers of Ukraine on the procedure for land auction conduction shall be expected in the future. And though on the one side, with passing of the Law on the State budget for 2010 the Cabinet of Ministers is empowered to regulate the land auctions on the law level, on the other hand, such powers do not diminish the fact that the current legislation of Ukraine requires regulation of the procedure for the land auction conduction on the level of a law (and not a Decree of the Cabinet of Ministers of Ukraine). In this connection, in case the Cabinet of Ministers approves the respective procedure for the land auction conduction, there is a possibility for court proceedings as to its constitutionality. The Constitutional Court of Ukraine has the final say in this matter.

## RETAIL AND LEISURE

### Development of hotel infrastructure for EURO 2012

- On 21.05.2010 the Parliament of Ukraine took as basis the draft law on amendments to certain laws of Ukraine on development and preparation of hotel infrastructure holding of the final part of the

2012 European Football Championship in Ukraine. The draft law N 6309 has been elaborated in order to ensure respective preparation to successful holding in Ukraine of the final part of the 2012 European Football Championship, in particular, as to stimulation of construction (reconstruction) of new and operation of newly constructed and reconstructed hotels (hotel complexes). It envisages tax redemption for 10 years beginning with January 1, 2011 as to profits of 5\*, 4\* and 3\* hotels if such hotel, including, newly constructed or reconstructed, or after capital repairs or restoration of existing buildings and constructions, will be put into operation before September 1, 2012.

## EMPLOYMENT

### Regulation as to application of minimal wages in hourly amount

- The Cabinet of Ministers of Ukraine with its resolution “On determination and application of minimal wages in hourly amount” as of 05.05.2010 N 330 stipulated that:
  - minimal wages in hourly amount shall be stipulated simultaneously with determination of the monthly minimal wages amount established by legislation;
  - minimal wages in hourly amount shall be determined based on amount of monthly minimal wages and monthly average of working hours per annum with 40-hours working week;
  - increase of minimal wages in hourly amount shall not lead to increase of regulated tasks determined for a working hour;
  - determination of hour rate wage shall not lead to decrease of normal working hours.

At this, the Cabinet of Ministers stipulated that minimal wages in hourly amount shall be applied to:

- enterprises irrespectively their ownership form if the collective agreement or upon agreement with trade unions or other bodies authorized to representation of labour collective stipulates hour rate wage with application of respective regulated tasks and taking into account of actual working hours;

- individuals using hired labour with hour rate wage;
- budget institutions and organizations if the Cabinet of Ministers decides on hour rate wages for their employees.

## BANKING & FINANCE

### Law on lifting of restrictions on foreign investment has come into force

- On 15.05.2010 the long-expected Law canceling obligatory registration of foreign investment and prohibition on early repayment of loans granted by non-residents has come into force.

This Law:

- 1) cancels the obligatory registration of foreign investment;
- 2) cancels the prohibition on early repayment of loans and credits granted by non-residents as well as the prohibition on introduction of such amendments to already concluded agreements;
- 3) cancels the obligatory investment in Ukraine in national currency through investment accounts (now, as previously, by direct investment is allowed to invest in foreign currency).

Therefore, the Law lifts all novelties negative for foreign investors which came into force on November 24, 2009 pursuant to the Law “On introduction of amendments to certain laws of Ukraine in order to overcome negative consequences of the financial crisis”.

Due to coming into force of the Law the National Bank of Ukraine with its Letter N 13-214/2594-8235 dd. 17.05.2010 declared ceasing of state registration of foreign investments.

The Parliament of Ukraine has passed the law which presented the new version of the Law of Ukraine “On prevention and fight against legalization of illegally gained money (money laundering)”.

The Parliament of Ukraine has passed the law which presented the new version of the Law of Ukraine

“On prevention and fight against legalization of illegally gained money (money laundering)”. It is provided that this law shall come into force 90 days after its publication.

The Law also envisages introduction of amendments to part 1 article 24 of the Law of Ukraine “On state registration of legal entities and private entrepreneurs” determining a list of documents to be submitted for state registration of a legal entity. It is provided that state registrar shall receive “information with documents conforming the ownership structure of founders – legal entities, which allows to determine individuals – owners of the essential shares in such legal entities”. At this, according to the Law an essential share is a direct or indirect ownership of a share in amount of 10 and more percent of the charter capital, 10 and more stocks or voting rights in a legal entity, direct or indirect influence on a legal entity.

Taking into account that definition of this requirement is loose, it can lead to significant complications during state registration of legal entities (especially with participation of a holding), as the registrar can require provision of documents “in tens generation” in order to see who actually has the influence on the legal entity. That is why this provision requires urgent improvement.

If before amendments to the law subjects of initial financial monitoring included, in general, financial institutions, now this list comprises also so called “special determined subjects of initial financial monitoring” which according to the Law are legal entities providing legal services, as well as notaries, attorneys-at-law, auditors, audit firms, private entrepreneurs providing accounting services.

Previously, the Law contained a definition of “financial operations” connected, in general, to conduction of settlements, now this term is wider and determined as follows:

Financial transaction – any actions as to assets (money, property, proprietary and non-proprietary rights) conducted with help of a subject of initial financial monitoring;

The law provides that participants of a financial transaction are the client, the contracting party as well as persons acting on their behalf or in their interests. At this, the client is considered to be any person requiring or using services of a subject of initial financial monitoring.

Persons providing legal services (as well notaries, attorneys-at-law, auditors, audit firms, private entrepreneurs providing accounting services) shall execute duties of a subject of initial financial monitoring in following cases: if they participate at preparation and execution of a deed on

- real estate sale and purchase;
- clients' asset management;
- bank account or security account management;
- money raising for establishment of legal entities, securing of their activity and management;
- establishment of legal entities, securing of their activity and management, acquisition and sale of legal entities.

What duties of a subject of initial financial monitoring shall, in particular, legal firms execute?

Among many duties there are following:

- to register with Special authorized body as subject of initial financial monitoring (the procedure will be determined by the Cabinet of Ministers);
- to set rules, to elaborate programs for financial monitoring and to appoint a responsible employee;
- to conduct an identification and study of clients in cases set by the law (detailed information in article 9 of the Law);
- to ensure revealing of financial operations subject to financial monitoring, to inform the special authorized body about respective transactions (detailed information in the Law);
- upon documented request to ensure free access for state financial monitoring authorities and law enforcement agencies to documents or information according to law requirements;
- as to public personalities or their representatives – to take actions for determination of money sources during business contact establishment and provision of services to them.

As to identification of clients:

Pursuant to the Law the subject of initial financial monitoring is obliged according to the legislation to

identify clients conducting financial transactions based on submitted official documents or their copies certified in set procedure.

Identification of clients shall be conducted before and/or during establishment of business relations, conclusion of deeds but before conduction of the financial transaction, opening of an account. Pursuant to the law, business relations are relations between the client and the subject of initial financial monitoring which arise based on an agreement on provision of financial or other services.

List of information provided for identification is determined in article 9 of the Law.

It is important that legal companies are as well subjects to following requirement of the Law (part 15-16 article 9). If the client (person) is acting on behalf of other persons or in their interests or if the subject of initial financial monitoring has doubts as to this person acting in its own name or as a beneficiary of some other persons, pursuant to requirements of this article and provisions of other laws regulating identification procedure the subject of initial financial monitoring is obliged as well to identify the person on behalf of who or in whose interests such financial transaction is conducted or who is the beneficiary. If the person is acting as representative of some other person, the subject of initial financial monitoring shall also this person's powers.

Pursuant to article 10 of the Law the subject of initial financial monitoring is obliged to refuse establishment of business relations or conduction of a financial transaction if identification of the client according to the law requirements is impossible.

## CORPORATE LAW

### **Procedure for supervision over shareholders' registration, conduction of general meetings, voting and vote counting during general shareholders' meetings of joint stock companies**

- The State Commission on securities and stock market has approved the Procedure for supervision

over shareholders' registration, conduction of general meetings, voting and vote counting during general shareholders' meetings (hereinafter – the Procedure) with its Decision dd. 22.12.2009 N1607 (hereinafter - the Decision) registered with the Ministry of Justice of Ukraine as of 28.04.2010 under N 310/17605. Pursuant to par. 4 of the Decision it shall come into force as of its publishing date (as to 13.05.2010 the Decision has not been published yet). The powers of the State Commission to supervise the registration of shareholders, conduction of general meetings, voting and vote counting during general shareholders' meetings are provided in part 4 article 40 of the Law of Ukraine “On Joint Stock Companies”.

The goal of the Procedure is that the State Commission and its territorial subdivisions shall exercise control over the adherence to the legislation on securities and joint stock companies and shall determine the procedure of appointment by the State Commission of representatives for supervision during general shareholders' meetings of joint stock companies.

The Procedure envisages that representatives of the State Commission are authorized to supervise the registration of shareholders, conduction of general meetings, voting and vote counting during general shareholders' meetings of joint stock companies

- upon request of a shareholder (shareholders), officials of a joint stock company as well as a registrar or depository if powers of counting commission have been entrusted with them;
- on initiative of the State Commission itself.

The Procedure contains detailed information as to organization of the supervision (the order of notification for the company, documents conforming the powers of the Commission representatives, what shall be supervised and how shall the results be executed). Upon results of the supervision a protocol shall be executed in approved form. The actions of the Commission representatives can be contested by the State Commission itself or in court.

Participation of the Commission representatives at the general meeting will have in practice an essential influence on process and results of general meetings. Most likely, minority shareholders will use their right to invite the Commission representatives, as mostly their rights are violated during general shareholders' meetings. At the same time, in some cases participation of the

Commission representatives can be advantageous for major shareholders as well, especially if there are greenmailers in the company – shareholders interested in creation of obstacles for the activity of the company (and, therefore, in increase of the value of their block of stock). The participation of the Commission representatives can also sufficiently complicate the activity of well known raiders. At this, the Procedure especially provides that there shall be no conflict of interest by the Commission representatives.

It is important to mention that at conduction of general meetings in joint stock companies it often comes to complicated and unambiguous situations in which responsible persons of the company are not always able to make right decision, even if they want to. That is why the participation of the Commission representatives can help to solve contestable matters then and there.

## REGULATORY

### Change of the procedure for licensing of economic activity

- On 18.05.2010 the Parliament of Ukraine approved in the first reading the draft law on introduction of amendments to certain laws of Ukraine on licensing of certain types of economic activity. The draft law N 6153 envisages improvement of the licensing procedure, in particular, through introduction of unified criteria according to which certain economic activity type shall be the subject to licensing.

The idea is to stipulate in article 3 of the current edition of the law the norm according to which licensing of a single economic activity type shall be applied if such activity type matches to one of the following criteria: provides increased risks to life, health, constitutional rights and freedoms of citizens or environment, or state security, or moral principles of society or is connected with access to natural or other limited resources.

The draft law also proposes to introduce changes to the Law “On licensing of certain types of economic activity” and to some branch normative and regulatory acts and to exclude from the list of types of economic activity subject to licensing of such activity types which do not match the aforementioned criteria and principles of licensing.

It is proposed to exclude from types of economic activity subject to licensing: foreign economic activity; production of precious metals and gemstones, organic gemstones, semiprecious stones; production of goods from precious metals and gemstones, organic gemstones, semiprecious stones; trade with goods made from precious metals and gemstones, organic gemstones, semiprecious stones; wholesale and retail with pesticides and agrochemicals (only plant growth regulators); freight transport services (only licensing of hazardous freights); collection, primary processing of waste and scrap of precious metals and gemstones, organic gemstones, semiprecious stones; collection and stock of some waste as secondary raw materials (according to lists stipulated by the Cabinet of Ministers of Ukraine); topographic-geodesic and cartographic works; post-office transfers, sending of ordinary and registered letters, post cards, letter packets and packages up to 30 kg; travel agency activities; health and fitness and sport activity; customs broker and customs carrier activity; car and bus production.

## Adjustment of legislative regulation as to licensing procedures

- On 13.05.2010 the Parliament of Ukraine adopted the Law “On introduction of amendments to certain laws of Ukraine on adjustment of licensing procedures” (draft law N 3005). This legislative act introduces changes to the laws “On fire safety”, “On labour protection” aimed on simplification of licensing procedures in the field of application of these laws pursuant to requirements of the Law “On permissions system in the field of economic activity”.

In particular, the norms regulating the procedure and basis for issuance by the state fire safety department of permits for conduction of economic activity were added to the Law “On fire safety”. The procedure for taking some actions on conduction of economic activity or types of economic activity based on declaration of conformity of the material and technical basis with requirements of legislation has been regulated as well.

According to amendments introduced to the Law of Ukraine “On labour protection” the right for performance of high risk jobs and operation of high risk machines, mechanisms and equipment can be acquired based on declaration of conformity of the

material and technical basis with requirements of labour safety legislation. List of such works, machines, mechanisms and equipment shall be approved by the Cabinet of Ministers of Ukraine.

## Marking of medications

- On 11.05.2010 the Parliament of Ukraine adopted the Law “On amendments to article 12 of the Law of Ukraine “On medicines” as to marking of medicinal products (medical drugs) with Braille letters (draft law N5506). The law provides for that external package of medicinal products shall contain name of medicinal product, active substance dosage and form of administration stated as well in Braille letters. Additionally, the Ministry of Health of Ukraine shall determine medicinal products package of which is not subject to marking with Braille letters or only the name of medicinal product shall be put in Braille letters.

The Law shall come into force after its publication. Requirements as to marking of medicinal products introduced by this Law shall be applied to such medicinal products which are to be registered (re-registered) in Ukraine after coming into force of this Law.

## DISPUTE RESOLUTION

### Legislative measures on prevention of right to appeal abuse

- The Parliament of Ukraine adopted the Law “On amendments to certain legislative acts of Ukraine on prevention of right to appeal abuse “ # 2181-VI dd. 13.05.2010 (entered into force on 15.05.2010).

The Law introduces some changes to a number of legislative acts, in particular to the Code of Administrative Court Procedure, which stipulate that cases on determination of election results by the Central Election Commission or results of the All-Ukrainian Referendum as well as cases as to appeal against acts, actions or omissions of the Parliament of Ukraine, the President of Ukraine, the High Council of Justice, fall into competence of the Supreme Administrative Court of Ukraine as court of first instance.

However, the Law determines peculiarities of proceedings on cases as to appeal against acts, actions or omissions of the Parliament of Ukraine, the President of Ukraine or the High Council of Justice.

At the same time, a special chamber shall be established in order to hear such cases at the Supreme Administrative Court of Ukraine. The case shall be tried by a panel of not less than 5 judges within reasonable time, but not later than within one month after commencement of proceedings. In exceptional cases taking into account peculiarities of proceedings the court can decide on prolongation of the hearing terms, but not more than for one month.

Upon proceedings' results the Supreme Administrative Court of Ukraine can:

- declare whole or partial illegality of the act of the Parliament of Ukraine, the President of Ukraine or the High Council of Justice;

- declare illegality of acts or omissions of the Parliament of Ukraine, the President of Ukraine or the High Council of Justice, oblige them to take certain actions.

If some regulatory legal acts have been declared illegal or invalid, judicial disposition shall be immediately published by the defendant after court decision entering into force in the edition, where it was officially published.

Decision of the Supreme Administrative Court of Ukraine on appeal against acts, actions or omissions of the Parliament of Ukraine, the President of Ukraine or the High Council of Justice is final and not subject to contest in appeal or cassation procedure.

Suit securing through suspension of acts of the Parliament of Ukraine, the High Council of Justice and prohibition for them to take certain actions is inadmissible.