VASIL KISIL & PARTNERS

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ADOPTION OF THE LAW OF UKRAINE "ON JOINT STOCK COMPANIES"

This NEWSLETTER has been issued to keep Vasil Kisil & Partners clients and other interested persons informed of the latest developments in the Ukrainian legislation and the firm news.

This NEWSLETTER does not constitute a legal advice or an opinion rendered upon specific request. The information below has been prepared without enquiry into any individual case and should not be treated as a substitute for detailed advice in any such case.

1. High Commercial Court of Ukraine updates its Recommendations regarding resolution of corporate-related disputes

On 18 June 2009 the Presidium of the High Commercial Court of Ukraine approved *Recommendations "On Amending and Supplementing Recommendations of the Presidium of the High Commercial Court of Ukraine "On Practice of Application of Legislation While Considering Cases Arising Out of Corporate Disputes" as of 28 December 2007 No. 04-5/14* (the "Amendments").

The original Recommendations issued by the High Commercial Court of Ukraine at the end of 2007 (the "Recommendations") introduced a set of clarifications with respect to resolution of corporate disputes, particularly, related to acquisition, enforcement, transfer, termination and protection of shares of business entities and rights arising thereof. The most controversial and widely discussed clarifications concerned the prohibition of foreign law choice in corporate relations between shareholders of Ukrainian joint stock company and non-enforcement in Ukraine of agreement in the part regulating the corporate relations under the foreign law.

Read in this issue:

1. High Commercial Court of Ukraine updates its Recommendations regarding resolution of corporate-related disputes 1
2. Securities and Stock Market State Commission clarifies transitory provisions of new Law of Ukraine "On Joint Stock Companies" 2
3. Responsibility of legal entities for corrupt practices 3

Although the Recommendations are not mandatory and appear to be the guidelines only, the courts intend to follow them in the similar jurisprudence.

The Amendments introduce, among other, several clarifications to the Recommendations in respect of the following:

Any transactions related to the sale, transfer and other operations with shares (relations with respect to shares circulation) may be governed by foreign law, except for the issues related to exercise of pre-emption rights to acquire shares, as well as corporate governance matters. As recommended, article 25 of *Law of Ukraine "On the International Private Law"* (ruling the mandatory application of the law of company's place of registration) should not apply to shares circulation matters. In other words, the court confirms that any agreements (contracts) in respect of transfer of shares of Ukrainian company may be governed by foreign law;

A shareholders agreement may not prevail the provisions established by the Ukrainian law or a company's charter as well as limit the statutory rights of other shareholders of the company. Particularly, a shareholders agreement may regulate the corporate governance matters only within the scope allowed by the Ukrainian law (e.g., Article 29 of Law of Ukraine "On Joint Stock Companies");

A shareholders agreement executed in respect of Ukrainian company and regulating the corporate governance matters under the foreign law shall be void. As recommended, corporate governance matters shall be regulated under the provisions of the Ukrainian law (pursuant to the article 25 of the Law "On the International Private Law");

A participant of a limited liability company may vote with its share even if the share (contribution) is not fully paid. Voting rights of a participant of a limited liability company may not be limited on the basis of partial payment of such participant's share (particularly, when determining the quorum at participants' meeting); and

A participant withdrawn or expelled from a limited liability company may claim in court determining the fair (market) value of the part of company's assets due to such participant pro rata to its share through the independent valuation.

2. Securities and Stock Market State Commission clarifies transitory provisions of the new Law of Ukraine "On Joint Stock Companies"

On 14 July 2009 the Securities and Stock Market State Commission (the "Commission") issued *the Clarification "On Application of Certain Provisions of Chapter XVII "Final and Transitory Provisions" of Law of Ukraine "On Joint Stock Companies" in connection with its entry into force" No. 8* (the "Clarification").

To bring the activity of joint stock company (the "JSC") in conformity with the new Law of Ukraine "On Joint Stock Companies" (the "JSC Law"), a JSC shall take the following actions:

Introduce amendments to its Charter, including, the change of JSC type in the JSC's name from *"open"* or *"closed"* JSC to *"public"* or *"private"* JSC; and

Bring its by-laws in conformity with the new JSC Law.

The JSC shall be deemed as having brought its activity in conformity with the JSC Law as from the date of state registration of amendments to its charter (including, the JSC type in the JSC name). Such actions do not require launching the procedure of JSC termination.

Considering the transitory period established by the JSC law, the Commission recommends approving the said amendments to the JSC Charter (and by-laws) in 2010 at the annual shareholders meeting.

According to the Clarification, until JSC activity is brought in conformity with the new JSC Law (which shall be done by 30 April 2011 at the latest), JSCs shall be governed by the Law of Ukraine "On Business Entities" and respective subordinated legislation. The said acts shall also govern the relations of JSC with its shareholders, investors, state bodies and any third parties. To the opposite, the JSCs that already brought their activity in conformity with the new JSC Law shall be governed by JSC Law and respective subordinated legislation.

However, the activity of all JSCs (including those who still have not brought their activity in conformity with the new JSC Law) shall be regulated by the following acts: Civil Code of Ukraine, Commercial Code of Ukraine, the Law "On Securities and Stock Exchange", "On National Depository System and Peculiarities of Securities Electronic Circulation in Ukraine", "On State Regulation of Securities Market in Ukraine", "On management of state property objects" as amended by the new JSC Law.

Since 30 April 2009 founders of JSC shall adopt the decision on establishment of either private or public JSCs pursuant to the new JSC Law at a foundation meeting(s).

3. Responsibility of legal entities for corrupt practices

On 11 June 2009, the President of Ukraine signed *the Law of Ukraine "Responsibility of Legal Entities for Corrupt Practices" No.1507-VI* (the "Law"). The Law shall become effective on the First of January 2010.

Pursuant to the Law, a private legal entity shall be responsible for the crimes committed on its behalf and in its interest by such entity's officers, founders, participants and other authorized person in the area of corrupt practices (so called, corrupt crimes).

WHO?

Any private legal entity.

WHEN?

After the officer(s), founder(s), participant(s) or other authorized person of a legal entity is found personally guilty in committing a corrupt crime.

Under the said law, the corrupt crimes are outlined under the Criminal Code of Ukraine as follows: commercial bribe (article 235[4]); bribe of a person, providing public services (article 235[5]); abuse of power or official status (article 364); excess of power (article 365); receipt of bribe (article 368); bribe offering or act of bribing (article 369); interference into court activity (article 376).

HOW?

Local court (the court considering the criminal case) shall issue the court resolution on imposing the penalties on the private legal entity as provided by Law.

PENALTIES

The following penalties shall be imposed by the court:

(1) Fine (UAH 17,000 – 255,000);

(2) Prohibition to conduct certain commercial activity;

(3) Seizure of property; and

(4) Liquidation of the legal entity.

The penalties provisioned in clauses (1) and (3) may be imposed in addition to those provided in clauses (2) and (4).

Nota Bene

The new section of the Criminal Code of Ukraine (section V-II A) establishing the crimes in the sphere of official activities of the private legal entities and professional activities related to the rendering of public services shall become effective on 01 January 2009. This section supplements the Criminal Code of Ukraine by establishing certain new offences ("criminalizes" the violations), among other, the corrupt practices of individuals.

Please, do not hesitate to contact us for any further information on the topic of this Newsletter or to address you other legal service needs.

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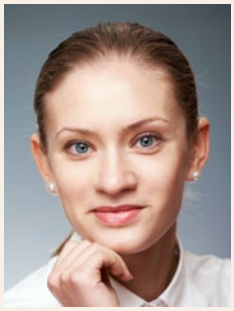

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