

Poland, Portugal, the Russian Federation, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syria, Tajikistan, Turkey, Turkmenistan, the United Arab Emirates, The United Kingdom, the United States of America, Uzbekistan, Vietnam, Yemen, and Yugoslavia.

Ukraine also signed the *Treaty on Partnership and Cooperation* between Ukraine and the European Union in 1994.

On 16 May 2008, Ukraine became a member country of the World Trade Organization.

3. ESTABLISHING A LEGAL PRESENCE

Ukrainian legislation provides for a large variety of potential investment and business vehicles, all of which can be grouped into the following two principal categories: corporate and contractual. Corporate investment and business vehicles encompass the variety of business legal entities through which investors may do business in Ukraine. Contractual investment vehicles encompass joint venture agreements, joint cooperation agreements, and other agreements of a similar nature. In addition, Ukrainian legislation provides for special investment vehicles for portfolio, institutional, and/or private investors.

3.1 Companies

The basic rules governing various issues concerning the establishment, maintenance and liquidation of business legal entities in Ukraine are provided in the *Civil Code of Ukraine* (the *Civil Code*) and the *Commercial Code of Ukraine* (the *Commercial Code*), both adopted on 16 January 2003, and effective from 1 January 2004. Apart from the *Civil Code* and the *Commercial Code*, the *Law of Ukraine “On Companies”* (the *Company Law*) dated 19 September 1991, as amended, and the newly adopted *Law of Ukraine on Joint Stock Companies* (the *JSC Law*), dated 17 September 2008, govern various issues related to establishing, maintaining and liquidating companies in Ukraine. The *Law of Ukraine “On the State Registration of Legal Entities and Individual Entrepreneurs”* became effective on 1 July 2004.

Under the *Civil Code*, legal entities, which carry out entrepreneurial activities in order to earn profits, must be established in the form of companies. The following

types of companies may be established in Ukraine: company with full liability; company with combined liability; company with additional liability; limited liability company; and joint stock company. Of these, the most common vehicles for conducting business activities in Ukraine are joint stock companies (JSCs) and limited liability companies (LLCs), both of which embody the concept of limited liability for investors.

On 17 September 2008, the Ukrainian Parliament passed the *JSC Law*, which becomes effective on 30 April 2009. The *JSC Law* establishes a two-year transitional period, during which all JSCs must bring their charters and internal regulations into compliance with the requirements of the *JSC Law* and, if their shares exist in documentary form, change the form of the issuance of their shares into electronic form. As of 30 April 2009: (a) all new JSCs must be established in accordance with the *JSC Law*; and (b) if, after 30 April 2009, a shareholders' meeting of a JSC, established before 30 April 2009, adopts a decision on changes of the JSC's charter capital, denomination of shares or issuance of securities, then such JSC must bring its activities into compliance with the *JSC Law* and amend its charter and other internal regulations accordingly.

3.1.1 Joint Stock Companies

JSCs are very similar in form and operation to US corporations, German *AGs*, and/or French *sociétés anonymes (SAs)*. A JSC is a company whose charter capital is divided into shares of equal par value. Shareholders of a JSC are liable for the latter's obligations only to the extent of their respective equity contributions to its charter capital.

Set forth below is a brief overview of the main provisions of the *JSC Law*.

JSCs may exist in the form of either a public or a private company (the rough equivalents of open and closed JSCs existed under the former legislation). The number of shareholders in a private JSC may not be more than 100. The first issuance of shares upon the establishment of either a public or a private JSC must be made exclusively by means of a private placement of shares among the founders of the JSC.

A public JSC may issue additional shares by means of public and private placements of shares. Further, a public JSC is obliged to list its shares on at least one of the Ukrainian

stock exchanges and to permanently maintain such listing. A private JSC may issue additional shares only by means of a private placement of shares. If a shareholders' meeting of a private JSC adopts a decision to carry out a public placement of its shares, then the charter of such JSC must be amended; in particular, the type of such JSC must be changed from private to public. The change of a JSC's type from private to public and *vice versa* is not considered to be as a transformation of the JSC.

Sales and purchases of all the shares of a public JSC listed on a Ukrainian stock exchange may be concluded only through such stock exchange. The shares of a private JSC may not be purchased/sold through a stock exchange, except for a sale through a stock exchange auction.

A JSC may be established either by a single founder or by a group of founders. At the same time, the following statutory restrictions apply to the establishment and operation of a JSC: (a) a wholly-owned subsidiary in the legal form of a JSC may not be established by another wholly-owned subsidiary (either foreign or Ukrainian); (b) effective from 30 April 2009, a JSC may not have among its shareholders only legal entity-shareholders, which are wholly-owned by the same person; and (c) a subsidiary in the legal form of a JSC, which is wholly-owned by a foreign company, may not own land in Ukraine under the current version of the *Land Code of Ukraine* (the *Land Code*). A minimum capitalization of 1,250 times the officially established minimum monthly salary as of the date of the formation of the JSC is required to establish a JSC (*i.e.*, as of 1 January 2009, UAH756,250 or approximately US\$98,214¹/ EUR76,389²; starting from 1 April 2009, UAH781,250 or approximately US\$101,461/ EUR78,914; starting from 1 July 2009, UAH787,500 or approximately US\$102,273/ EUR79,546; starting from 1 October 2009, UAH812,500 or approximately US\$105,520/ EUR82,071, from 1 December 2009, UAH836,250 or approximately US\$108,604/ EUR84,470).

An issuance of shares by both a private and a public JSC should be registered with the Ukrainian State Commission on Securities and the Stock Market (the *Securities Commission*) by means of the registration of a report on the results of the placement of the shares and the issuance of a certificate on the registration of the shares issuance. In addition, the public placement of shares involves the registration of the offering prospectus with the Securities Commission, and the disclosure of information from

1 An exchange rate of UAH7.7 per USD1 is taken for these calculations.

2 An exchange rate of UAH9.9 per EUR1 is taken for these calculations.

the offering prospectus. In the event that a JSC fails officially to register any issuance of its shares with the Securities Commission, any and all of the share purchase agreements entered into with respect to such share issuance, as well as with respect to any subsequent share issuances, will be deemed ineffective.

The shareholders' meeting is the highest governing body and is responsible for policy decisions of the JSC. Shareholders' voting rights are based on the principle of "one share one vote", except for cases of cumulative voting. Shareholders' meetings require a quorum of at least 60% of all voting shares for the proper convocation of the shareholders' meeting (as opposed to 60%+1 share pursuant to the *Company Law*). The period for issuing a prior notice for convening the shareholders' meeting and communicating the agenda thereof is only 30 days (as opposed to 45 days pursuant to the *Company Law*). The requirement to publish such a notice in the press applies only to those JSCs where the number of shareholders is above 1,000. Further, the *JSC Law* provides that (a) JSCs (both public and private), which have 25 shareholders or less, may approve shareholders' decisions by polling, as opposed to voting in person at the shareholders' meeting; and (b) a wholly-owned JSC is exempt from the requirement to convene and hold shareholders' meetings; instead, the powers vested in the shareholders' meetings are to be performed by the sole shareholder.

According to the *JSC Law*, a supermajority vote, consisting of $\frac{3}{4}$ of the total number of votes of all shareholders of the JSC, is required to pass resolutions on: (a) amendments to the charter; (b) cancellations of "treasury shares" (shares bought out by the JSC); (c) changes of the JSC's type; (d) placements of shares; (e) increases /decreases of the charter capital; and (f) terminations and spin-offs, save for some cases stipulated by law. In addition, the charter of a private JSC may establish an additional list of matters, which require a supermajority vote or even a unanimous vote, save for some cases stipulated by law. All other resolutions may be adopted by a simple majority of the votes of those shareholders registered for the relevant meeting and holding shareholders allowing them to cast their votes regarding certain issues, except for the cases when the *JSC Law* establishes otherwise.

The *JSC Law* provides for cumulative voting, which is as a new voting mechanism in the Ukrainian legislation. Cumulative voting must be used for the appointment of the members of the supervisory council and/or the audit commission. Depending on the type of the JSC and the number of its shareholders, the use of cumulative voting is either mandatory or voluntary.

The requirement to appoint a supervisory council applies to a JSC which has 10 or more shareholders (as opposed more than 50 shareholders pursuant to the *Company Law*). According to the *JSC Law*, any individual, even not a shareholder, may be elected as the member of the supervisory council. The supervisory council represents the interests of the shareholders between the shareholders' meetings and it exercises control over the JSC's management to the extent indicated by the JSC's charter. Members of the supervisory council of a JSC may not be members of its management or of its audit commission. The *JSC Law* establishes a list of questions, which fall under the exclusive competence of the supervisory council. The supervisory council may establish permanent or temporarily committees and elect a corporate secretary, who shall be responsible for the JSC's relationships with its shareholders and/or investors.

The management of the JSC's day-to-day business activities may take either of two forms: a "management board" (collective management) or a "director" (individual management). The management generally reports to the shareholders' meeting, as well as to the supervisory council.

According to the new rules of the *JSC Law*, a JSC with less than 100 shareholders should establish an auditor's position (or elect an audit commission) and a JSC with more than 100 shareholders must elect an audit commission. The corporate secretary and the members of the other bodies of the JSC may not be elected as members of the audit commission (the auditor). The audit commission may be elected either for carrying out a special audit of the financial-and-commercial activity of the JSC or for a definite term. Any individuals, i.e., not only the shareholders of the JSC, may be elected as members of the audit commission.

One of the new features of the *JSC Law* is that, depending on the correlation between the market value of a particular asset or service, which is the subject matter of a particular transaction, and the total assets of the JSC, certain (*i.e.*, material) transactions will require approval by either the supervisory council or the shareholders' meeting. Additionally, transactions with "*interested parties*" will also require approval by either the supervisory council or the shareholders' meeting. Another new feature is that a shareholder, who has voted at the shareholders' meeting against certain issues that were adopted, will be entitled to request the mandatory buy-out of its shares by the JSC.

Both private and public JSCs are subject to “regular” and “special” reporting and publication requirements. “Regular Information” consists of the annual and quarterly³ reporting of information on the results of the JSC’s financial and business activities. “Special Information” is information about any actions, which may influence the financial or business activities of the issuer and lead to a significant change in the value of its securities. In addition, the *JSC Law* has established the following publication requirements: (a) a purchaser of a significant shareholding in a JSC (10% or more) must notify the JSC in advance about its intention in writing and must disclose its intention in the official press; and (b) a person, who has acquired a controlling shareholding in a JSC (50% or more), must make an offer to all of the other shareholders to purchase their shares at a price not less than the market price, and must notify the Securities Commission and each of the stock exchanges where the JSC has listed its shares about such offer.

3.1.2 Limited Liability Companies

The legal nature of an LLC is similar to that of a German *GmbH* and/or a French *société à responsabilité limitée (SARL)*. Investors in the LLC, *i.e.*, its interest-holders or participants, are liable for the LLC’s commitments only to the extent of their capital contributions to its charter capital. Their participatory (*i.e.*, ownership) interests in the LLC are expressed in the form of the respective percentages of the LLC’s charter capital owned by them. Participatory interests in an LLC do not qualify as “securities” for purposes of the applicable Ukrainian legislation and, therefore, are not subject to registration with the Securities Commission.

Similar to a JSC, an LLC may be established either by a single founder or by a group of founders. Ukrainian law imposes certain restrictions on the establishment and operations of an LLC. In particular, (a) a wholly-owned subsidiary in the legal form of an LLC (the same as with a JSC) may not be established by another wholly-owned subsidiary (either foreign or Ukrainian); (b) an individual or a legal entity (either foreign or Ukrainian) may not be the sole founder of and/or the sole participant in more than one LLC in Ukraine; (c) a subsidiary in the legal form of an LLC (the same as with a JSC), which is wholly-owned by a foreign company, may not own land in Ukraine under the current version of the *Land Code*; and (d) the maximum

3 An obligation to submit quarterly information rests on a limited number of JSCs, in particular, on those which are at least 25% state-owned, on those issuers which had carried out a public offering of bonds, *etc.*

number of founders/participants of an LLC may not exceed 10 legal entities or individuals. Those LLCs which are established by less than 10 founders, and later expand to more than 10 participants, are subject to a mandatory reorganization into a JSC within one year. Failure to comply with this reorganization requirement or decrease the number of the participants to 10 may result in court termination of an LLC.

There are no legal restrictions on how the participatory interests of an LLC may be distributed; this issue remains entirely within the discretion of the founders of the LLC. A minimum capitalization of 100 times the officially established minimum monthly salary as of the date of the formation of the LLC is required to establish an LLC (*i.e.*, as of 1 January 2009, UAH60,500 or approximately US\$7,857/ EUR6,111; starting from 1 April 2009, UAH62,500 or approximately US\$8,117/ EUR6,313; starting from 1 July 2009, UAH63,000 or approximately US\$8,182/ EUR6,364, starting from 1 October 2009, UAH65,000 or approximately US\$8,442/ EUR6,566; starting from 1 December 2009, UAH66,900 or approximately US\$8,688/ EUR6,758).

The participants' assembly consists of the participants (*i.e.*, the interest-holders) of the LLC. Each participant has the number of votes proportionate to the percentage of its interest in the LLC's charter capital. Meetings of the participants' assembly require a quorum of more than 60% of the votes. Resolutions are approved by a simple majority of the votes present at a duly convened meeting of the participants' assembly; however, the following three resolutions require the approval of a simple majority of the votes of all of the participants (and not only the votes of those participants present at the meeting of the participants' assembly): the amendment of the charter; the determination of the principal activities of the LLC; and the expulsion of a participant from the LLC.

Under the applicable legislation, the management of an LLC may take either of two forms: a "directorate" (collective management) or a "director" (individual management). The form of the LLC's management and the number of its members may be decided at the discretion of the participants as specified in the LLC's charter. The directorate/director is responsible for the day-to-day operations of the LLC. The director or the directorate's members are appointed and removed by the participants' assembly.

The audit commission, consisting of the elected participants or their representatives, exercises control over the financial and economic activities of the management of the LLC. The role and functions of the LLC's audit commission are similar to those of the audit commission of a JSC. There must be at least three members of the audit commission of an LLC.

In choosing between an LLC and a closed JSC in establishing a wholly-owned subsidiary, an LLC appears to be more popular than a closed JSC, due to the various establishment and operations considerations discussed above. Generally speaking, the main general corporate benefit of an LLC in comparison with a JSC is that the procedure for the establishment and the operations of an LLC is significantly less burdensome and time-consuming, since there is no legal requirement that an LLC must issue shares or perform the procedural steps required in connection with the issuance of securities (*e.g.*, the establishment and maintenance of a securities register, *etc.*). The absence of shares in an LLC makes this form of legal entity more mobile and flexible when it is necessary for the participants of the LLC to change (increase or decrease) the charter capital of the company.

Still, a JSC may be preferable if it is expected that new owners may be added to the company at a higher company valuation. Whereas, in an LLC, a participatory interest is bought at its nominal value, a JSC, until 30 April 2009, may sell its shares at any price higher than the nominal value and, starting from 30 April 2009, may sell its shares only at the market price, except for some cases established by law. In this way, a JSC can raise financing through newly-issued shares at a higher valuation without all of the shareholders being required to contribute in proportion to their shareholdings. If such financing is planned in the mid-term, a JSC, while more burdensome overall, may be a preferable option to first founding a company as an LLC, and then re-organizing it as a JSC, a procedure which may take up to one year.

3.1.3 Representative Offices/Branches

Ukrainian legislation provides that representative offices are deemed to be structural divisions of an enterprise, albeit located in localities different from the locality of the headquarters of such enterprise. "Branches" do not technically exist in Ukraine, but representative offices are their closest equivalent. Representative offices do not enjoy the status of a separate legal entity. This type of such structural division must act on the basis of regulations adopted by the corresponding governing body of its founding enterprise. The manager of a representative office must act on the basis of a special power of attorney issued by the management of his/her founding enterprise.

The establishment in Ukraine of a representative office of a Ukrainian legal entity does not require a separate registration. Rather, the Ukrainian legal entity simply needs to notify the appropriate registration authority of the opening of its representative office. The registration authority will then enter such additional information into the existing registration card of the legal entity.

A foreign legal entity may establish its representative office in Ukraine in order to carry out marketing, promotional, and other auxiliary functions on behalf of the foreign legal entity. It is less clear whether a foreign legal entity may also conduct a trade or business through a representative office, although “commercial” representative offices (in effect, the equivalent of “branches” in most other countries) are quite common in Ukraine. The recent practice has been to permit a representative office to carry out a wide range of commercial activities (including the signing of contracts and the implementation of import, export, and other transactions). Normally, such practices result in the creation of a permanent establishment of such foreign companies in Ukraine for purposes of the Ukrainian corporate income tax legislation and, thus, the commercial representative office’s activities become taxable in Ukraine (whereas, generally speaking, the activities of a representative office are non-taxable).

Representative offices of foreign legal entities must be registered with the Ministry of Economy of Ukraine. A one-time registration fee in the amount of US\$2,500 is payable. The current Ukrainian legislation fails to provide any guidance on the procedure to be followed by a foreign business entity in order to open a branch in Ukraine. As a result, in practice, foreign legal entities do not carry out their business activities in Ukraine through branches, but rather through either their (commercial) representative offices registered as permanent establishments, or their wholly-owned Ukrainian subsidiaries, which are usually established in the form of LLCs.

3.2 Joint Venture/Cooperation Agreements

Contractual investment vehicles are represented in Ukraine by a variety of agreements on joint business activities. The most common type of such agreements is the joint activity agreement, whereby the parties thereto combine their funds, know-how, business reputation, and/or publicity into their joint operations. Such contractual joint ventures must maintain separate accounting records and must establish separate bank accounts for their joint operations. Any income generated by the participants in such contractual joint ventures from their engaging in such joint operations is

also taxed separately from their respective incomes generated from their principal business activities. Both domestic and foreign investors may carry out investment activities on the basis of joint activity agreements. Joint activity agreements between foreign investors and their Ukrainian partners must be registered in the manner established by the Cabinet of Ministers of Ukraine.

3.3 Investment Funds/Mutual Funds

The *Law of Ukraine “On Collective Investment Institutions (Unit and Corporate Investment Funds)”* dated 15 March 2001, as amended, (the *Investment Funds Law*), provides for specific legal vehicles to be established and maintained for the purpose of conducting portfolio investment activity. The *Investment Funds Law* provides that such specialized investment vehicles may be established in both unit and corporate forms. However, a corporate investment fund may be established only in the form of an open JSC. Nonetheless, since, as of 30 April 2009, open JSCs will no longer exist, it is most likely that the *Investment Funds Law* will be amended in this part.

The *Investment Funds Law* provides that an investment fund may be either open, closed, or a cross between the two (an “interval” investment fund). An investment fund is deemed to be open to the extent that it remains legally liable at all times to purchase back the securities issued by such fund from any investor holding such securities at any given moment. Correspondingly, an investment fund is deemed to be closed to the extent that it does not remain legally liable to purchase back the securities issued by such fund from any investor holding such securities at any given moment. An “interval” investment fund remains liable to purchase back the securities issued by such fund from any investor holding such securities at least once per year. The *Investment Funds Law* prohibits open and “interval” investment funds from paying dividends to their investors.

Any investment fund may be established either for a fixed period of time, or for an indefinite period of time. Closed investment funds may be established only for a fixed period of time.

Investment funds may be of either the diversified type or the non-diversified type. Investment funds of the diversified type are required to comply with a number of rigid thresholds and restrictions on their investment activity for the diversification of risks associated with portfolio investment activity, while non-diversified investment funds are not subject to such thresholds and/or restrictions.

The *Investment Funds Law* provides that venture investment funds may be established by legal entities and individuals, provided that the minimum purchase of securities in such fund must be in an amount which is equivalent of not less than 1,500 minimum monthly salary (*i.e.*, as of 1 January 2009, UAH907,500 or approximately US\$117,857/ EUR91,667; starting from 1 April 2009, UAH937,500 or approximately US\$121,753/ EUR94,697; starting from 1 July 2009, UAH945,000 or approximately US\$122,727/ EUR95,454, starting from 1 October 2009, UAH975,000 or approximately US\$126,623/ EUR98,485; starting from 1 December 2009, UAH1,003,500 or approximately US\$130,325/ EUR101,364). Such venture investment funds enjoy the status of non-diversified closed investment fund, which carry out only private (closed) placements of securities.

According to the *Investment Funds Law*, every investment fund is obliged to hire a specialist company to manage its assets (the asset management company). Essentially, such an asset management company will perform the functions of the management board of the investment fund to the extent that the investment fund takes the form of a corporate investment fund.

An asset management company may not begin operating on the market until such time as it obtains “a license to carry out professional activity on the capital market.” Such a license is issued by the Securities Commission. An asset management company may not, however, apply for such a license on its own behalf. Any such application may be made only by the self-regulated organization (such as the Ukrainian Association of Investment Business), of which the asset management company is a member.

Investment funds are authorized to replace their current asset management companies with the latter’s competitors. Corporate investment funds are authorized to do so at any given moment and for any reason upon the decision of their supervisory councils as approved by the general meeting of shareholders. Unit investment funds may substitute their asset management companies with the latter’s competitors only under the specific circumstances listed in the *Investment Funds Law*.

The *Investment Funds Law* provides that, apart from the asset management company (which performs the functions of the management board for corporate investment funds), the only other governing bodies of a corporate investment fund are: the general meeting of shareholders and the supervisory council (*i.e.*, the board of directors). The only governing body of a unit investment fund is the supervisory council (*i.e.*, the board of directors).

Corporate investment funds issue shares to their investors. Unit investment funds issue investment certificates to their investors. The issuer of the former will be the corporate investment fund itself, while the issuer of the latter will be the unit investment fund's asset management company. Both instruments are subject to mandatory registration with the Securities Commission.

Investment funds are expressly prohibited from having more than 20% of their portfolio investments in securities issued by foreign issuers. Investment funds are also expressly prohibited from investing in foreign securities, which are not listed on at least one internationally recognized stock exchange and/or over-the-counter securities trading system, the list of which is designated by the Securities Commission.

Investment funds are entitled to Ukrainian income tax benefits. Funds attracted from investors, income derived from transactions with their assets, and dividend/interest payments accumulated by the investment funds' portfolio assets remain non-taxable at the level of the investment fund.

Corporate investment funds terminate their activities by means of their reorganization (merger, acquisition, split-off or transformation) and/or liquidation. A corporate investment fund is obliged to commence liquidation proceedings in the event that the net value of its assets decreases to a level below the value of its charter capital; or its supervisory council fails to engage the services of an asset management company for three consecutive months. A unit investment fund is subject to liquidation in the event that: it fails to engage the services of an asset management company; the relevant period of its activity expires; or the license of the custodian of its investment certificates is revoked and the investment fund fails to secure the services of an alternative custodian within 30 business days after the date of such event. Mergers and accessions of the unit investment funds may be made only in the case when they are of the same type and form, and they are managed by one asset management company and upon the agreement of all of the participants. Spin-offs, split-offs and transformations of the unit investment funds are expressly prohibited.

Investment funds remain under the following disclosure obligations: to make full disclosure of their activities to the Securities Commission and to have the information specified by the Securities Commission published for the public at large in the official publications of the Securities Commission.