

Ukraine

BAKER & MCKENZIE

Conducting Business in Ukraine



2009

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May 2009

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PREFACE

Baker & McKenzie provides sophisticated legal advice and services to the world's most dynamic global enterprises, and has done so for almost 60 years.

With a network of more than 3,900 locally qualified, internationally experienced lawyers in 69 offices across 39 countries, we have the knowledge and resources to deliver the broad scope of quality services required to respond effectively to both international and local needs - consistently, with confidence and with sensitivity for cultural, social and legal differences.

Active in the USSR and the Commonwealth of Independent States (CIS) for over 40 years, with offices in Almaty, Baku, Kyiv, Moscow and St. Petersburg, we now have one of the largest legal practices in the CIS, offering expertise (in close cooperation with our offices worldwide) on all aspects of investment in the region including corporate law, banking and finance, securities and capital markets, venture capital, competition law, tax and customs, real estate and construction, labor and employment, intellectual property, and dispute resolution.

The first international law firm to open an office in Kyiv, we currently advise over 550 multinational companies, financial institutions, and large Ukrainian enterprises throughout the country.

Since gaining independence in 1991, Ukraine has adopted new legislation at a rapid pace. It remains a country in transition, and its legal system continues to develop. *Conducting Business in Ukraine* has been prepared as a general guide for companies operating in or considering investment into Ukraine. It is intended to present an overview of the key aspects of the Ukrainian legal system and the regulation of business activities in this country.

The information contained in this guide is current as of the date below. We will be happy to provide you with updates on the material contained in this guide, or to provide you with further information regarding a specific industry or area of Ukrainian law in which you may have a particular interest.

1. UKRAINE - AN OVERVIEW

1.1 Geography and Topography

Ukraine is located in Eastern Europe and covers a land area of 603,700 sq. kilometers, making it the second largest country in Europe after Russia. It borders the Russian Federation to the east, Belarus to the north, Poland, Slovakia, Hungary, and Romania to the west, and the Black Sea and the Sea of Azov to the south.

1.2 Population

The population of Ukraine is approximately 46.01 million (as of 1 June 2008), with a population density of 77 people per sq. kilometer. Approximately 77.8% of the population are ethnic Ukrainians and 17.3% ethnic Russians. The remaining 4.9% of the population includes ethnic Poles, Jews, Bulgarians, Tatars, Hungarians, Romanians, Greeks, and other nationalities.

1.3 Government, Political and Legal Systems

Ukraine follows a civil law system, under which the *Constitution of Ukraine* (the *Constitution*) provides the framework for its legislative system. The principal body of legislation consists of laws adopted by the Verkhovna Rada (Parliament) of Ukraine and international agreements of Ukraine duly ratified or acceded to by the Verkhovna Rada. Laws are implemented through various normative acts, which are adopted by the relevant government bodies (*i.e.*, the President, the Cabinet of Ministers, Ministries, and State Committees).

The current *Constitution* was adopted on 28 June 1996, and heralded a new period in the development of the Ukrainian legislative system. The *Constitution* established general guidelines for national policy and established a foundation for the development of a democratic state. Apart from its political significance, the *Constitution* has enormous value as a legislative act. The provisions of the *Constitution* are norms of direct application, which entitle any individual to seek the protection of his/her rights within the judicial system. In general, all laws and normative acts are adopted on the basis of, and in strict compliance with, the *Constitution*. The *Constitution* itself mandates the preparation and implementation of a comprehensive program of legislative developments by providing for the adoption of more than 30 new laws and, as deemed necessary, amendments of existing laws.

The legal system of Ukraine contains three major layers of normative acts: the *Constitution*; laws adopted by the Verkhovna Rada and international agreements of Ukraine duly ratified or acceded to by the Verkhovna Rada; and other normative acts. The Verkhovna Rada ratifies or accedes to international agreements in the form of laws of Ukraine.

Pursuant to the *Constitution*, Ukraine has three branches of state power: the legislative branch, represented by the Verkhovna Rada; the executive branch, represented by the Cabinet of Ministers of Ukraine (the Cabinet of Ministers) and headed by the Prime Minister; and the judicial branch, represented by a multilevel system of courts, with the Supreme Court of Ukraine at the highest level. In addition, there is the Constitutional Court of Ukraine, which is the only body authorized to exercise control over compliance with the *Constitution* and the laws of Ukraine, its international agreements, and acts of the President, the Cabinet of Ministers, and other governmental agencies.

The President is the head of state and the commander-in-chief of the armed forces, and has certain authority over the executive branch. Presidential elections are held every five years.

Under Constitutional reforms dated 8 December 2004, adopted by the Verkhovna Rada during the course of the Orange Revolution and entering into force on 1 January 2006, the distribution of executive powers among the President and the Cabinet of Ministers of Ukraine was shifted in favour of the Cabinet of Ministers of Ukraine. Some of the key Constitutional rights of the President (*e.g.*, the right to appoint the Prime Minister pending approval by the Verkhovna Rada) have been transferred to the Verkhovna Rada. The Constitutional reform transformed Ukraine's political system from presidential-parliamentary republic to parliamentary-presidential republic.

Under the amended *Constitution* the President, *inter alia*, has the right:

- to sign bills (*i.e.*, proposed legislative acts adopted by the Verkhovna Rada) into law;
- to nominate the Minister of Defense and the Minister of Foreign Affairs for their approval by the Verkhovna Rada;
- to appoint (and to dismiss) the General Prosecutor of Ukraine (pending the approval of the Verkhovna Rada);

- to veto bills (*i.e.*, proposed legislative acts adopted by the Verkhovna Rada) and return them to the Verkhovna Rada for amendment;
- to dissolve the Verkhovna Rada if a majority coalition is not formed within 30 days from the date of its first meeting after an election; and
- to establish courts in accordance with the procedures established by law.

The Verkhovna Rada is the supreme legislative body in Ukraine, with the power to adopt laws and resolutions, and to approve candidates for the Prime Minister, ministers and several other senior government officers. The Verkhovna Rada is comprised of 450 deputies, elected for five-year terms. Under the amended *Constitution* effective from March 2006, Parliamentary elections will be held completely by party lists (*i.e.*, under proportional representation). In previous years, half of the body was elected under proportional representation, and the other half was elected directly and individually by a majority vote in each voting district.

The Cabinet of Ministers lead by the Prime Minister is the highest body within the executive branch. The parties which win places in the Verkhovna Rada are required to form a majority coalition within 30 days from the date of the first meeting of the newly-elected Parliament or from the date of dissolution of any previous coalition. If a coalition is not formed within this period, the President has the right to dissolve the Parliament and to call for an extraordinary parliamentary election.

If a majority coalition is formed, it will have the right to nominate a person for the position of the Prime Minister. The President will then introduce the candidate nominated by the majority coalition for appointment by a majority vote in the Verkhovna Rada. The approved Prime Minister will have the right to nominate members of the Cabinet of Ministers for the Parliament's approval, with the exception of the Minister of Defense and the Minister of Foreign Affairs, which can be nominated only by the President.

In Ukraine, a bill becomes a law once it gains a majority (226 deputies) of the votes in the Verkhovna Rada (except for certain types of laws requiring a supermajority of 300 votes), and is signed into law by the President. The Cabinet of Ministers implements laws once they are adopted. The various Ministries, State Committees, and other authorized bodies of the executive branch are responsible for the direct implementation of the resolutions passed by the Cabinet of Ministers.

The court system, consisting of the courts of general jurisdiction and the Constitutional Court of Ukraine, exercises independent judicial power in Ukraine. The Supreme Court of Ukraine is the highest judicial body within the system of the courts of general jurisdiction.

The courts of general jurisdiction are responsible for civil, criminal, and administrative cases. In accordance with the *Constitution* (and the current legislation), the courts of general jurisdiction have the following four-tier structure:

- the Supreme Court of Ukraine, consisting of five specialized chambers;
- the supreme specialized courts (commercial and administrative), and the Cassation Court of Ukraine;
- the appellate courts and the Appellate Court of Ukraine; and
- the local courts.

1.4 Economy

Ukraine benefits from a consumer market of approximately 46.01 million people, and enjoys an opportune geographical location, a mild climate, a rich natural resource base, a highly educated labor force, a well-developed transport infrastructure, and a well-developed tradition of scientific research and development. Despite the fact that Ukraine has experienced steady economic growth over the past five years, the country faced serious challenges in sustaining the negative consequences of the world economic crisis and remains in need of investment in all sectors of industry, with many industrial plants unable to meet current consumer demand.

Export restrictions have been significantly reduced on various categories of products following independence from the Soviet Union, with the core export categories including ferrous and non-ferrous metals and metal products; chemical products; fertilizers; plastics and rubber; agricultural products and foodstuffs; engineering goods; various types of machinery and equipment (including various types of transport vehicles); textiles; and a wide variety of raw materials.

The Ukrainian financial sector has undergone substantial changes and improvements in the past several years with an effective regulatory framework being progressively created and a modern financial system, based on market principles, steadily emerging. However, like in other economies, Ukrainian financial sector is experiencing the

negative effects of the world financial crisis. The National Bank of Ukraine and the government are implementing a number of measures in order to fight the negative consequences of the world financial crisis. Such measures, *inter alia*, include recapitalization of Ukrainian banks, limitation of the outflow of capital from Ukraine and facilitation of the performance of debt obligations by Ukrainian borrowers.

In 1996, shortly after the adoption of the new Constitution, the NBU successfully launched the new Ukrainian currency, the Hryvnia (UAH). The NBU's most significant achievement to date has been the stabilization of Ukraine's currency through its adherence to a tight monetary policy between 1995-1998.

1.5 Foreign Relations

Since gaining independence in 1991, Ukraine is currently party to more than 400 multilateral treaties and over 2,000 bilateral agreements. Among others, Ukraine is a constituent member of the United Nations and various other multilateral organizations, including the IMF, IBRD, IFC, MIGA, EBRD, BSTDB, EIB, OSCE, and the Council of Europe. In 2008 Ukraine joined WTO. Ukraine also cooperates with the OECD, the European Union and NATO. Ukraine has stated its intention to ultimately join the European Union and NATO within the next decade. To this end, Ukraine has signed and ratified the *Treaty on Partnership and Cooperation* with the EU and the *Cooperation Agreement* with NATO, both of which are now in force.

Ukraine has also ratified the *Agreement on the Common Economic Space* (CES). The CES establishes a free-trade zone among Ukraine, Russia, Belarus, and Kazakhstan to promote the strengthening of economic cooperation among these member-states.

1.6 Regional Structure

Ukraine is a unitary state divided into 24 oblasts (regions), the Autonomous Republic of Crimea, and the cities of Kyiv and Sevastopol (each of which is deemed a separate administrative unit). Every oblast and each of the cities of Kyiv and Sevastopol has a governor, who is appointed by the President. The Autonomous Republic of Crimea has its own constitution, Verkhovna Rada (Parliament), and government, but remains subordinate to the central Government of Ukraine. It is anticipated that major administrative and territorial reforms will take place in Ukraine in the medium-term.

2. FOREIGN INVESTMENT IN UKRAINE

Ukrainian legislation provides that (with some few exceptions) foreign investors are authorized to carry out their investment activities in Ukraine on the same basis as Ukrainian domestic investors. This relates to the types of investments, the available investment vehicles, and the investment targets.

2.1 Laws on Foreign Investment

The *Law of Ukraine “On Investment Activity”*, adopted on 18 September 1991, establishes the general principles for investment activity on the territory of Ukraine, irrespective of the nationality of the investor. The particularities of making foreign investments in Ukraine are regulated by the *Law of Ukraine “On the Regime of Foreign Investment”* (the *Foreign Investment Law*), adopted on 19 March 1996.

Under the *Foreign Investment Law*, the term “foreign investment” refers to all forms of value invested by foreign investors into objects of investment activity in accordance with the applicable Ukrainian legislation for purposes of obtaining profits or achieving social effects. Pursuant to the *Commercial Code of Ukraine* (the *Commercial Code*), adopted on 16 January 2003, and the *Foreign Investment Law*, any Ukrainian company will qualify as an “enterprise with foreign investment” if foreign investments in its charter fund amount to at least 10%.

Foreign investors are entitled to certain privileges and guarantees under the *Foreign Investment Law*, provided that their investments have been duly registered with the appropriate local state authorities. Such privileges and guarantees include, *inter alia*, the following:

- **Protection Against Changes in Legislation:** foreign investors are guaranteed protection against changes in the foreign investment legislation for a period of ten years, although certain changes in other areas of Ukrainian legislation and their implementation have, in fact, limited the applicability of the above guarantee to changes in Ukrainian legislation on matters relating to nationalization, expropriation, and similar matters;
- **Protection Against Nationalization:** foreign investments may not be nationalized. State bodies may not expropriate foreign investments, with

the exception of emergency measures (such as national disasters, accidents, epidemics, *etc.*) and then only on the basis of decisions of bodies authorized to that effect by the Cabinet of Ministers of Ukraine;

- **Guarantee for Compensation and Reimbursement of Losses:** foreign investors have the right to be reimbursed for their losses, including lost profits and moral damages incurred as a result of the action, the failure to act, or the improper performance on the part of state or municipal bodies of Ukraine or their officials with regard to their obligations owed to foreign investors or enterprises with foreign investment as required by law. All expenses and losses of foreign investors must be reimbursed at the current market rate and/or on the basis of a well-founded valuation certified by an independent auditor or auditing firm;
- **Guarantee in the Event of the Termination of Investment Activity:** foreign investors are guaranteed the right to remit their revenues and to withdraw their investments from Ukraine free from export duties within six months from the termination of their investment activity; and
- **Guarantee of Repatriation of Profits:** after the payment of taxes, duties, and other mandatory payments, foreign investors are guaranteed the right to the unimpeded and immediate transfer abroad of all profits and other proceeds in foreign currency legally earned as a result of their investment activity (subject to applicable currency exchange regulations).

The *Foreign Investment Law* also extends certain privileges to “enterprises with foreign investments”. The latter are exempted from paying import duties on their foreign investors’ in-kind contributions to their charter funds (except for goods for sale or goods provided for such enterprises’ own consumption). However, in the event that the corresponding assets are sold or otherwise disposed by such enterprises within three years from the date of their respective contributions to their charter funds (including in the event of the termination of the activities of such enterprises), or the foreign investor sells its stake in the enterprise to a resident so that the enterprise loses its status of an “enterprise with foreign investments” within the three year period, then the enterprises will be required to pay the applicable import duty in full on the aggregate value of the alienated assets.

Two categories of restrictions apply to foreign investment activity in Ukraine. The first relates to general restrictions on investment activity, which are applied both to foreign and domestic investors. Pursuant to the applicable Ukrainian legislation, certain types of business activity may be pursued only by state-owned enterprises (*e.g.*, the rocketry industry, the production of bio-ethanol, banknotes, blank forms of securities certificates, *etc.*).

The second category relates to certain restrictions applicable only to foreign investors. Principally, such restrictions represent the legally established threshold on the maximum permissible percentage of foreign investment in the charter fund of a Ukrainian enterprise doing business in a particular industry. The number of such restricted industries is extremely limited and is expected to decrease even further. For instance, such restrictions currently apply to the publishing business. Certain indirect limitations apply to banking and auditing activities. In addition, foreign citizens and legal entities are prohibited from owning agricultural land in Ukraine, and are authorized to own only land designated for non-agricultural use, under the current version of the *Land Code of Ukraine*.

2.2 Investment and Registration Procedure

A foreign investor may make a cash contribution to a Ukrainian legal entity either through special investment accounts opened by the foreign investor with a Ukrainian commercial bank or by transferring funds from abroad directly to the bank account of its Ukrainian subsidiary.

Foreign investors also may make an investment deposit at a Ukrainian commercial bank. An investment deposit consists of the funds, which a foreign investor, pursuant to a deposit agreement, puts into a deposit account at a Ukrainian commercial bank in order to receive interest. Such a deposit agreement must be in writing and must be concluded for a term of not less than one year. In addition, a deposit agreement must provide that it may not be terminated early at the initiative of the foreign investor. The general rule that foreign investments must be made only in convertible foreign currency also applies.

Generally, investors have the following options when making both portfolio and direct investments in Ukraine:

- to transfer funds in foreign currency from abroad to a bank account of a resident in Ukraine (in the case of portfolio investments, this would be a bank account of a licensed Ukrainian securities trader);
- to open an investment bank account in Ukraine and to transfer funds in foreign currency from abroad to this investment account;
- to transfer funds in foreign currency from an investment account opened at a Ukrainian commercial bank to a bank account of a Ukrainian resident (in the case of portfolio investments, this would be a bank account of a licensed Ukrainian securities trader);
- to convert funds in foreign currency kept in an investment account at a Ukrainian commercial bank into Ukrainian currency for further direct investment (this applies only to direct investment); and
- to transfer funds in Ukrainian currency received as profits, interest, and other proceeds from investment activity in Ukraine from an investment account to an account of a resident (in the case of portfolio investment, this would be a bank account of a licensed Ukrainian securities trader).

Foreign investors are not required to obtain an individual license of the National Bank of Ukraine for using funds in foreign currency as a means of payment in Ukraine when transferring funds in foreign currency from their investment accounts opened with Ukrainian commercial banks to bank accounts of Ukrainian residents as payment for objects of investment.

Foreign investors are entitled to certain privileges and guarantees under the *Foreign Investment Law*, provided that their investments have been duly registered with the appropriate state authorities. Depending on where the foreign investment activity may be deemed to be economically concentrated, the foreign investment should be registered with the regional (oblast) state administration, the state administration of the Cities of Kyiv or Sevastopol, or the government of the Autonomous Republic of Crimea. The registration of a foreign investment must be effected in the course of three business days following the submission of the required set of registration documents. The procedure for the registration of a foreign investment is established by the Resolution of the Cabinet of Ministers “*On the Procedure for the State Registration of Foreign Investment*” dated 7 August 1996, as amended.

In order for a foreign investment to be registered, an investor or its authorized representative is required to submit the following documents to the relevant registration body: an informational notification of the foreign investment confirmed by the local state tax administration; documents certifying the form of the foreign investment (*e.g.*, copies of the constituent documents of the Ukrainian company into which the foreign investment is made, a copy of a joint activity agreement, a concession agreement); documents evidencing the value of the foreign investment; and documents evidencing the payment of the state registration fee.

The registration of a foreign investment may be denied only in the event of the violation of the established registration procedure. The denial of the registration of a foreign investment must be documented in written form and must specify the reasons for such denial. The denial may be challenged in court.

2.3 Divestiture

The *Foreign Investment Law* provides that, in the event of the termination of its investment activity, a foreign investor has the right, within six months from the date of the termination of such activity, to recover its investment in-kind or in the currency of the investment in the amount of the actual contribution (taking into account any possible reduction of the charter fund), without the payment of any fees or duties. A foreign investor has the right to recover the benefits from its investments in cash or in-kind on the basis of the actual market value of the investment at the moment of the termination of the investment activity, unless otherwise stipulated by the applicable Ukrainian legislation or international agreements to which Ukraine is a party.

2.4 Investment Incentives

All enterprises with foreign investment are taxed on their profits on a par with other Ukrainian domestic enterprises, with the exception of certain state guarantees for foreign investments (see Section 2.1 above), and the duty-free import of in-kind contributions to charter funds of enterprises with foreign investment (see Section 2.1 above). The *Foreign Investment Law* also contemplates the possibility of the establishment of a priority regime with respect to certain projects with the participation of foreign investors, which will be implemented pursuant to state programs promoting key sectors of the economy, the social sphere, and territories.

In addition, the current Ukrainian legislation provides for the establishment of free economic zones. The legal status of foreign investments into such zones is regulated by separate legislation on free economic zones, under which foreign investors may be granted additional privileges and benefits.

2.5 Dispute Resolution

In the event of a dispute arising with respect to a foreign investment, a foreign investor may seek recourse through a number of institutions. As a general matter, the *Foreign Investment Law* provides that a dispute arising between a foreign investor and the state of Ukraine must be settled in the Ukrainian courts, unless otherwise provided by international treaties, while all other disputes involving a foreign investor must be settled in the Ukrainian courts or in courts of arbitration (including international arbitration courts).

Furthermore, the *Law of Ukraine "On Foreign Economic Activity"* (the *LFEA*), adopted on 16 April 1991, allows the parties to a commercial dispute to select a forum for its resolution. In accordance with Article 38 of the *LFEA*, disputes between parties regarding foreign economic activity may be resolved by the Ukrainian courts, the International Commercial Arbitration Court or the Maritime Arbitration Commission of the Chamber of Commerce and Industry of Ukraine, or by other dispute resolution bodies chosen by the parties to the dispute. In addition, the *Law of Ukraine On the International Commercial Arbitration Court* (the *Law On International Arbitration*), adopted on 24 February 1994, specifically provides that both foreign investors and Ukrainian enterprises with foreign investment have the right to resolve disputes between themselves and third parties in international commercial arbitration courts.

2.6 Investment Treaties

Ukraine is currently a signatory to *Treaties On the Mutual Protection of Foreign Investments* with various countries, including:

Albania, Argentina, Armenia, Austria, Azerbaijan, Belarus, the Belgium - Luxembourg Economic Union, Bosnia and Herzegovina, Brunei, Bulgaria, Canada, Chile, China, Croatia, Cuba, the Czech Republic, Denmark, Egypt, Estonia, Finland, France, Gambia, Georgia, Germany, Greece, Hungary, India, Indonesia, Iran, Israel, Italy, Jordan, Kazakhstan, Korea, Kuwait, Kyrgyzstan, Latvia, Lebanon, Libya, Lithuania, Macedonia, Moldova, Mongolia, Morocco, the Netherlands, Oman, Panama,

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.

4. TAXATION

4.1 General

The general principles of the Ukrainian tax system, as well as the taxes and duties (mandatory payments) which may be levied in Ukraine, are defined in the *Law of Ukraine “On the Taxation System”* (the *Tax System Law*). The *Tax System Law* stipulates that tax rates, tax exemptions, and procedures and mechanisms for tax assessments and payments may not be introduced or changed by legislative acts other than special tax laws. In addition, any changes or amendments with regard to the determination of tax rates, tax exemptions, and procedures and mechanisms for their assessment and payment may be introduced into the tax legislation not less than six months before the beginning of a new budget year, and should take effect at the beginning of such new budget year.

The *Tax System Law* provides for the categories of taxes that may be levied in Ukraine. There are two categories of taxes in Ukraine: state-wide and local. State-wide taxes and duties are established by the Verkhovna Rada and are levied throughout the entire territory of Ukraine. Local taxes and duties (mandatory payments), and the mechanisms and procedures for their assessment and payment, are established by local village or city councils in accordance with, and within the maximum rates established by, the laws of Ukraine.

With the adoption of the *Law of Ukraine “On the Procedure for the Settlement of Obligations of Taxpayers to the Budgets and the State Special Purpose Funds”* (the *Tax Procedure Law*), uniform rules were established for, *inter alia*, filing tax returns and the settlement of tax liabilities; a statutory period of limitations of three years for the payment of tax liabilities; the rates and procedure for calculating penalty interest for late tax payments and penalties for the violation of tax rules; and the administrative procedure for appealing the assessment of tax deficiencies.

4.2 Corporate Income Tax

The *Law of Ukraine “On the Taxation of Enterprise Profits”* (the *Corporate Income Tax Law*), as restated and amended, is the principal law governing the income tax liabilities of corporate taxpayers in Ukraine.

The following persons and entities are subject to the Corporate Income Tax:

- resident business entities, state, public, and other types of enterprises, institutions, and organizations which generate profits from their activity, both within and outside of the territory of Ukraine;
- foreign legal entities which derive profits from Ukrainian sources (with the exception of diplomatic establishments and other organizations enjoying immunity from taxation);
- branches, divisions, and other separate units of the taxpayers identified above which are not legal entities and which are located in a territorial community other than the territorial community of such taxpayer; and
- permanent establishments of foreign entities, which such foreign entities may acquire either through their fixed place of business in Ukraine or through a Ukrainian resident entity.

The *Corporate Income Tax Law* has established the basic Corporate Income Tax rate at 25%. The corporate income tax is levied on “profits,” which are considered to be equal to the adjusted gross income of the taxpayer in any given reporting period less all allowable expenses and depreciation allowances. “Gross income” is defined as the aggregate income received (accrued) by a taxpayer both within and outside of the territory of Ukraine in monetary, in-kind, or non-material forms from all of its activities carried out in Ukraine and abroad during the reporting period.

Under the *Corporate Income Tax Law*, all reasonable business expenses of the corporate taxpayer are allowed as deductions. However certain deductions are expressly limited or prohibited by law:

- expenses which are not related to the business activities of the Ukrainian corporate taxpayer are non-deductible;
- expenses incurred in connection with the acquisition of land plots are neither deductible nor subject to depreciation allowances, except where land is acquired together with a building or other real estate object located on it;
- according to a “transfer pricing” restriction certain types of payments to affiliated persons in excess of arm’s length are non-deductible;
- according to an “earning stripping” restriction interest on a shareholder loan is non-deductible under certain conditions; and

- according to a “tax haven deductibility” restriction only 85% of the sum transferred by the taxpayer to foreign entity located in a tax haven jurisdiction is deductible.

4.3 Taxation of Foreign Entities

The *Corporate Income Tax Law* establishes the following general principles with respect to the taxation of foreign legal entities:

- foreign legal entities will be taxed in Ukraine on their profits derived from their commercial activities undertaken on the territory of Ukraine through a permanent establishment; and
- income derived from sources within the territory of Ukraine by foreign entities which are not engaged in commercial activities on the territory of Ukraine through a permanent establishment will be taxed at the time of the remittance of such income to such foreign entities or their authorized representatives, and such taxes will be withheld from the sums remitted.

The *Corporate Income Tax Law* provides that a foreign entity is liable for the payment of corporate income tax with respect to all “Ukrainian-source” income. Article 13.1 of the *Corporate Income Tax Law* provides for a non-exhaustive list of the types of income, which are, *per se*, deemed to constitute Ukrainian source income, including, *inter alia*: interest payments, dividends, royalties, lease payments, proceeds from real estate sales on the territory of Ukraine, profits from securities transactions, profits from joint activity agreements or long-term agreements, broker or agency fees, and other kinds of income derived by a foreign entity from its business activity on the territory of Ukraine.

However, the *Corporate Income Tax Law* provides that the income of a foreign entity received in the form of a payment or other kind of compensation for the value of goods (works or services supplied from abroad by a foreign entity (or its permanent establishment) to a resident shall not constitute Ukrainian-source income.

The *Corporate Income Tax Law* provides for a withholding tax rate of 15% to be withheld by a resident entity or by the permanent establishment of a foreign entity from the amount of any Ukrainian-source income, if and when such foreign entity’s Ukrainian-source income is remitted to such foreign entity or its authorized

representative by a resident taxpayer or by the permanent establishment of such foreign entity unless an applicable bilateral double taxation treaty provides relief with respect to such withholding.

Dividends received by a foreign entity shareholder/owner of corporate rights from its shareholding/ownership rights in a resident legal entity are subject to withholding tax at the rate of 15%, unless a bilateral double taxation treaty provides otherwise.

4.4 Double Taxation Treaties

Ukraine is a party to more than 60 bilateral double taxation treaties with the following countries as of January 2009:

Table 1: Double Taxation Treaties

Country:	Signature Date:	Ratification Date:	Date of Entry Into Force
Algeria	4 Dec 2002	5 Jun 2003	1 Jul 2004
Armenia	14 May 1996	13 Sep 1996	19 Nov 1996
Austria	16 Oct 1997	17 Mar 1999	20 May 1999
Azerbaijan	30 July 1999	2 Mar 2000	3 July 2000
Belarus	24 Dec 1993	20 Dec 1994	30 Jan 1995
Belgium	20 May 1996	29 Oct 1996	25 Feb 1999
Brazil	16 Jan 2002	4 Jul 2002	24 Apr 2006
Bulgaria	20 Nov 1995	23 Apr 1996	3 Oct 1997
Canada	4 Mar 1996	12 Jul 1996	22 Aug 1996
China	14 Dec 1995	12 Jul 1996	18 Oct 1996
Croatia	10 Sep 1996	17 Mar 1999	1 Jun 1999
The Czech Republic	30 Jun 1997	17 Mar 1999	20 Apr 1999
Cuba	27 Mar 2003	20 Nov 2003	
Cyprus*	29 Oct 1982	26 Aug 1983	26 Aug 1983
Denmark	5 Mar 1996	12 Jul 1996	21 Aug 1996
Egypt	29 Mar 1997	17 Mar 1999	27 Feb 2002
Estonia	10 May 1996	13 Sep 1996	24 Dec 1996

Country:	Signature Date:	Ratification Date:	Date of Entry Into Force
Finland	14 Oct 1994	6 Oct 1995	14 Feb 1998
France	30 Jan 1997	3 Mar 1998	1 Nov 1999
Georgia	14 Feb 1997	17 Mar 1999	1 Apr 1999
Germany	3 Jul 1995	22 Nov 1995	4 Oct 1996
Greece	6 Nov 2000	29 May 2001	26 Sep 2003
Hungary	19 May 1995	23 Apr 1996	24 Jun 1996
Iceland	8 Nov 2006	03 Sep 2008	03 Sep 2008
India	7 Apr 1999	20 Sep 2001	31 Oct 2001
Indonesia	11 Apr 1996	29 Oct 1996	9 Nov 1998
Iran	22 May 1996	6 Dec 1996	21 Jul 2001
Israel	20 Nov 2003	16 Mar 2006	20 Apr 2006
Italy	26 Feb 1997	17 Mar 1999	25 Feb 2003
Japan*	18 Jan 1986	14 Mar 1988	14 Jun 1988
Jordan	30 Nov 2005	03 Sep 2008	23 Oct 2008
Kazakhstan	9 Jul 1996	15 Nov 1996	14 Apr 1997
Korea	29 Sept 1999	2 Feb 2002	19 Mar 2002
Kuwait	20 Jan 2003	19 Jun 2003	22 Feb 2004
Kyrgyzstan	16 Oct 1997	17 Mar 1997	1 May 1999
Latvia	21 Nov 1995	12 Jul 1996	21 Nov 1996
Lebanon	22 Apr 2002	19 Jun 2003	9 Sep 2003
Lithuania	23 Sep 1996	9 Dec 1997	25 Dec 1997
Luxembourg	6 Sep 1996		
Macedonia	2 Mar 1998	5 Nov 1998	23 Nov 1998
Malaysia*	31 Jul 1987	1 Jul 1988	1 Jul 1988
Moldova	29 Aug 1995	23 Apr 1996	27 May 1996
Mongolia*	19 May 1978	1 Jan 1979	1 Jan 1979
Mongolia	1 Jul 2002	6 Mar 2003	
The Netherlands	24 Oct 1995	12 Jul 1996	2 Nov 1996
Norway	7 Mar 1996	12 Jun 1996	18 Sep 1996
Poland	12 Jan 1993	24 Mar 1994	24 Mar 1994
Portugal	9 Feb 2000	22 Mar 2001	11 Mar 2002
Romania	29 Mar 1996	21 Oct 1997	17 Nov 1997
The Russian Federation	8 Feb 1995	16 Oct 1995	3 Aug 1999
The Slovak Republic	23 Jan 1996	12 Jun 1996	22 Nov 1996
Slovenia	23 Apr 2003	21 Mar 2007	25 Apr 2007

Country:	Signature Date:	Ratification Date:	Date of Entry Into Force:
South Africa	28 Aug 2003	4 Feb 2004	23 Dec 2004
Spain*	1 Mar 1985	7 Aug 1986	7 Aug 1986
Sweden	15 Aug 1995	23 Apr 1996	4 Jun 1996
Switzerland	30 Oct 2000	10 Jan 2001	26 Feb 2002
Syria	5 Jun 2003	4 Feb 2004	4 May 2004
Thailand	10 Mar 2004	23 Sep 2004	24 Nov 2004
Tajikistan	7 Sep 2002	5 May 2003	1 Jun 2003
Turkey	27 Nov 1996	16 Jan 1998	29 Apr 1998
Turkmenistan	29 Jan 1998	17 Mar 1999	21 Oct 1999
The United Arab Emirates	22 Jan 2003	19 Jun 2003	9 Mar 2004
The United Kingdom	10 Feb 1993	10 Aug 1993	11 Aug 1993
The United States of America	4 Mar 1994	26 May 1995	5 Jun 2000
Uzbekistan	10 Nov 1994	2 Jun 1995	25 Jul 1995
Vietnam	8 Apr 1996	29 Oct 1996	19 Nov 1996
Yugoslavia (Serbia and Montenegro)	22 Mar 2001	4 Oct 2001	29 Nov 2001

*Treaties of the former Soviet Union, to which Ukraine is a party as a legal successor. Treaties with Cyprus, Libya and Pakistan are expected to be signed in 2009.

4.5 Taxation of Permanent Establishments

As mentioned above, for the purposes of the *Corporate Income Tax Law*, permanent establishments of foreign entities are deemed to be independent (of such foreign entities) as taxpayers in Ukraine. Under Article 1.17 of the *Corporate Income Tax Law*, a “permanent establishment of a foreign entity” in Ukraine is created (i) through a fixed place of business through which the business activities of such foreign entity are either fully or partially conducted in Ukraine or (ii) through an agent, commissioner or other resident entity acting in a similar capacity. The concept of a “permanent establishment” under the *Corporate Income Tax Law* is similar to the definition adopted in the majority of the bilateral double taxation treaties to which Ukraine is a party, although the definition under the *Corporate Income Tax Law* is somewhat broader.

The *Corporate Income Tax Law* provides that income derived by a foreign entity which conducts its business activities in Ukraine through a permanent establishment, is subject to taxation at the general tax rate, which is currently 25%.

4.6 Value Added Tax

The *Law of Ukraine “On the Value Added Tax”*, as amended (the *VAT Law*), is the principal law governing VAT in Ukraine. In accordance with Article 2 of the *VAT Law*, any Ukrainian or non-Ukrainian legal entity will be required to pay VAT, if, *inter alia*, that entity:

- has sold goods (or provided works or services) subject to VAT during the last 12 calendar months with an aggregate value in excess of UAH300,000 (approximately US\$38,961);
- imports (ships) goods and concomitant services into the customs territory of Ukraine; or
- supplies goods (services) on the customs territory of Ukraine via global or local computer networks.

The *VAT Law* identifies a list of transactions subject to VAT, which includes, *inter alia*, the following:

- the sale of goods (or the provision of services) on and within the customs territory of Ukraine;
- the import of goods into the customs territory of Ukraine;
- the export of goods outside the customs territory of Ukraine; and
- the provision of services by foreign persons to VAT registered payers.

Transactions, which do not constitute taxable events subject to VAT, include, *inter alia*:

- the issuance, placement, and cash sale of securities;
- the interest or commission element of lease payments pursuant to a financial lease agreement in a maximum amount which is not more than double the refinancing rate of the NBU;
- the transfer of pledged property pursuant to a loan agreement and its return to the pledgor after the expiry of such agreement; and
- the provision of insurance and re-insurance services.

The *VAT Law* provides for a tax rate of 20% of the contractual value of the relevant goods (services), but not less than the arm's length value thereof (which value, in connection with the importation of goods into Ukraine, includes any excise duty, import duty, and other tax or payment required by the applicable Ukrainian legislation). A 0% tax rate is provided by the *VAT Law* for the export of goods and concomitant services.

4.7 Personal Income Tax

4.7.1 Introduction

Issues of personal income taxation are principally regulated by the *Law of Ukraine "On Tax On Profits of Individuals"* (the *PIT Law*), dated 22 May 2003, as amended. The *PIT Law* became effective from 1 January 2004, and has replaced the Decree of the Cabinet of Ministers of Ukraine "*On the Personal Income Tax*," which remained the paramount legislative act in the field of personal income taxation for more than ten years. The *PIT Law* has introduced a number of significant changes and amendments to the taxation of individuals, including tax rates; rules and principles of tax residency qualification and taxable income determination; tax administration; favorable tax credit rules; and others.

4.7.2 Tax Rates

Effective from 1 January 2007, the 15% flat tax rate applies to almost all income received by a resident individual in Ukraine, regardless of the source of income. Special rules, however, are applied or will be applied to the taxation of, *inter alia*, bank deposits (which will become subject to income tax at the rate of 5% commencing 1 January 2010); prizes (except for the state lottery), which are subject to income tax at the double rate, *i.e.*, 30%; real estate (subject to tax at a rate of 0%, 1%, or 5% of the appraisal value of the real estate depending on the size of the real estate and the number of real estate sale transactions over a year); and Ukrainian source income received by foreign individuals (subject to tax at the double rate, *i.e.*, 30%, with the exception of certain types of Ukrainian source income, namely, interest, dividends, and royalties).

Special rules of taxation are established for transactions with immovable and movable property, inherited property, securities, and other specific items.

4.7.3 Tax Residency

The concept of the determination of tax residency, which is incorporated into the *PIT Law*, is now very similar to that of most bilateral double taxation treaties drafted on the basis of the *OECD Model Tax Convention*.

Specifically, unlike the prior Ukrainian legislation, which linked the taxable status of a foreign individual solely to his/her physical presence in Ukraine during more than 183 days in a tax (calendar) year, the *PIT Law* lays down a number of other conditions (*e.g.*, domicile, center of vital interests, citizenship, *etc.*), under which a foreign individual may be treated as a tax resident in Ukraine.

To be more precise, pursuant to the *PIT Law*, the following criteria are used to determine the resident status of a person:

- a tax resident of Ukraine is an individual who has a permanent residence in Ukraine;
- if an individual has a permanent residence in more than one country, he/she will be a tax resident in that country, with which he/she has closer personal or economic ties (*e.g.*, his/her center of vital interests). The *PIT Law* specifically outlines that the place of the permanent residence of the members of an individual's family or the place of an individual's registration as a business entity (as a subject of entrepreneurial activity) will be a sufficient (but not an exclusive) condition for determining the location of the center of vital interests of such individual;
- if it is impossible to determine the country in which the individual has his/her center of vital interests, or if the individual does not have a permanent residence in any country, then the individual will be considered a Ukrainian tax resident if he/she is present in Ukraine for at least 183 days of the tax period (including days of arrival and departure);
- if it is impossible to determine tax residency on the basis of the above provisions, then the individual will be a tax resident of Ukraine if he/she is a Ukrainian citizen;
- the *PIT Law* stipulates that an individual's own identification of his/her principal place of residence on the territory of Ukraine according to the

procedure established by the *PIT Law*, or the registration of an individual as a self-employed person in Ukraine, will constitute a sufficient basis for identifying such individual as a tax resident of Ukraine; and

- a person who fails to qualify as a Ukrainian tax resident will be considered a “non-resident” for purposes of the *PIT Law*.

The latter criterion of “one’s own identification,” as well as the variety of the criteria in and of themselves, combined with the absence of clear guidance, might create situations where an individual is treated as being a tax resident in several jurisdictions simultaneously. Moreover, the above set of criteria makes it difficult in practice to identify the solely correct criterion when several of them can be easily applied. The latter circumstances can also raise a conflict between two residences. Certainly, in the majority of cases, the rules of the effective double tax treaties may be applied to solve such residency conflicts.

4.7.4 Taxable Income

Ukrainian residents are taxed on their aggregate worldwide income. Non-resident individuals are taxed only on all income derived from sources within Ukraine, non-resident individuals are not eligible for certain exemptions or deductions available to residents.

The *PIT Law* provides for a list of items specifically included in the gross income of either a resident or a non-resident individual. These include, *inter alia*: gifts; insurance payments and premiums; rental income; fringe benefits (including the cost of received property, food, assistance of home servants, expense reimbursements, amounts of financial aid, *etc.*); amounts of punitive (*vs.* actual) damages received; forgiven debts and obligations; interest and dividend income; investment income; and inheritances.

At the same time, a number of items are specifically excluded from the taxable income of both residents and non-resident individuals. Apart from such excluded items, the *PIT Law* allows an individual resident taxpayer to claim as non-taxable deductions certain expenses made during the taxable year, provided that such expenses can be confirmed by the relevant documents. In particular, an individual resident taxpayer will be able to claim a deduction for, *inter alia*, the following: a part of the interest payments made under a loan secured by a mortgage, provided that the loan is used to finance the purchase or construction of the taxpayer’s

principal home (pending); charitable contributions of not less than 2%, but not more than 5%, of the taxpayer's annual taxable income; a certain amount of expenses paid to educational institutions for receiving professional or higher education; and a certain amount of expenses paid to health institutions for personal medical needs.

The *PIT Law* also allows certain categories of taxpayers to reduce their respective incomes by an amount of the so-called "social tax benefit."

Taxes paid by a resident taxpayer outside Ukraine may be taken as credits against Ukrainian taxes due, in the event that the taxpayer provides a written acknowledgment from the foreign tax authority that such foreign taxes have, in fact, been paid. However, the total of such foreign tax credits may not exceed the amount of the Ukrainian personal income tax due.

4.7.5 Tax Administration

The general rule of the *PIT Law* is that it is the duty of the payer of source income *i.e.*, "tax agents" in the parlance of the *PIT Law*, to charge, collect, and remit personal income tax to the Government. Thus, employers are deemed to be tax agents with respect to the personal income tax due on the wages and salaries payable to their employees.

If income is received from payers who are not regarded by the *PIT Law* as tax agents, then the recipients will be obligated to file an annual tax return for the year in which such income is received. A tax return may also be filed voluntarily if a tax resident, otherwise not required to file a tax return, wishes to claim the applicable tax credits.

Sums due for personal income taxes must be paid within 30 calendar days after the issuance of the relevant tax invoice by the taxpayer's local tax office. Personal income taxes are payable in the local Ukrainian currency.

4.8 Payroll Taxes

Employees in Ukraine (who are deemed insured by virtue of their employment) are guaranteed social security and pension benefits. Employers are liable by law to make the relevant mandatory payroll-based contributions in respect of insured employees to the appropriate state funds. Such contributions are not deducted from the employees' salaries, but must be paid by the employer in addition to their salaries.

The following mandatory payroll taxes, payable at the following percentages of the employees' salaries, are generally applicable to all entities (employers) in respect of their insured employees at such general rates:

Pension Insurance	33.2%
Temporary Disability, Birth, and Burial Insurance	1.4%
Unemployment Insurance	1.6%
Industrial Accident and Professional Disease Disability Insurance	From 0.56% to 13.5%*
Total:	From 36.76% to 49.7%

*The actual rate depends on the “trauma risk level” of the industry sector in which the employer operates.

The taxable basis for the above payroll taxes is set to be fifteen times the statutory “cost of living for a labor-capable person”. In turn, the statutory cost of living for such persons is UAH669 as of 1 January 2009.

As a result, effective as of 1 January 2009, the “maximum” taxable base is UAH10,035 (approximately US\$1,303). Any portion of the taxable base in excess of the “maximum” taxable base is exempt from taxation for the purposes of mandatory state social insurance. All payroll taxes must be paid by wire transfer to the appropriate accounts at the same time as the employer withdraws funds from a bank to pay salaries to its employees.

In addition, the employer is required to withhold the following payroll taxes from the employee's salary:

Pension Insurance	2.0%
Temporary Disability, Birth, and Burial Insurance	0.5% or 1.0%*
Unemployment Insurance	0.6% **
Total:	From 3.1% to 3.6%

* 0.5% will apply if the employee's monthly salary does not exceed the “cost of living for a labor-capable person” in the relevant period, and 1.0% will apply if the employee's monthly salary exceeds this threshold;

** Does not apply with respect to foreign employees who are temporarily employed in Ukraine.

Regardless of its organizational form, each company is required to hire “handicapped,” *i.e.*, disabled, individuals. The number of such handicapped persons must constitute at least 4% of the total work force of the company. In cases where the organization employs between 8 and 25 individuals, at least one handicapped person must be employed. Employers failing to comply with the above rules are liable for annual penalties. The penalty is calculated as the average annual salary of the employees of that company multiplied by the number of disabled persons that should have been hired.

4.9 Land Tax

The *Law of Ukraine “On the Payment for Land”*, as amended (the *Land Tax Law*), was adopted in 1992. Pursuant to the *Land Tax Law*, payments for land are established in the form of a land tax or a land lease payment, which is determined on the basis of an assessment of the value of the land. The owner of the land (other than the state) is required to pay the land tax. Under a land lease agreement, the lessee must pay a rent payment, but is not responsible for the payment of the land tax.

Under the *Land Tax Law*, for example, the land tax for the land within the cities is established at the level of 1 per cent per annum of the “pecuniary (monetary) valuation” of land. This tax is paid on a monthly basis at 1/12 of the annual tax.

The pecuniary valuation of land is carried out by the State Committee of Ukraine on Land Resources in accordance with the method adopted by the Cabinet of Ministers of Ukraine. This method accounts for various factors including, but not limited to, the location of a particular plot of land, the purpose for which the land is to be used *etc.*

The pecuniary valuation of a particular plot of land is carried out only once. For each of the following years the original valuation is adjusted by a coefficient of indexation, which is established for the relevant year in accordance with the procedure adopted by the Cabinet of Ministers of Ukraine.

4.10 Excise Duty

The excise duty is an indirect tax on some goods (products), which are defined by law as being excisable. The excise duty is included in the value of the excisable goods and is payable by:

- subjects of entrepreneurial activity, their branches, divisions, or other separate units, which are: the producers of goods (products) on the customs territory of Ukraine (including those produced in accordance with tolling mechanisms), which are subject to the excise duty at “fixed” excise duty rates; and customers, on whose instructions a third party produces goods (products) in accordance with a tolling mechanism, which goods (products) are subject to the excise duty at the rates fixed as a percentage of the turnover of such goods (products);
- non-residents producing excisable goods (products) on the customs territory of Ukraine, either directly or through a permanent establishment;
- any other subject of entrepreneurial activity and any other legal entities, their branches, divisions, or other separate units, which import excisable goods into the customs territory of Ukraine;
- individuals (both Ukrainian and foreign), who transport excisable goods (products) into, or who ship excisable goods (products) from outside of, the customs territory of Ukraine; and
- legal entities and individuals, which acquire excisable goods (products) (or the right to possess, use, or dispose of them) from a tax agent (which is defined as an enterprise with foreign investment, whose rights to exemption from certain taxes are confirmed by a (commercial) court, and who is responsible for computing and levying the excise duty on excise duty payors).

The list of goods (products) subject to the excise duty is established by the Verkhovna Rada. The rates of excise duty on such excisable goods (products) are primarily established as a fixed rate per item. The list of excisable goods (products) includes, *inter alia*, alcoholic beverages, beer, tobacco and tobacco products, cars, and petrol and diesel fuel.

The excise duty is calculated on the basis of the following: a fixed rate applied to the sales turnover; and a firm price per item sold. Goods exported for foreign currency are not subject to the excise duty.

4.11 Tax Controversies

Under the applicable Ukrainian legislation, a tax audit may be carried out in the form of either: a chamber audit, a scheduled on-site audit, or an unscheduled on-site audit. The chamber tax audit is conducted by the tax auditors in the tax office on the basis of the tax returns and other mandatory filings of the taxpayer related to the computation of the latter's tax liability. A "scheduled" on-site tax audit of a taxpayer is carried out only if and when such audit is scheduled in the so-called "plan of works" of the relevant tax office. An "unscheduled" on-site tax audit, in contrast to a "scheduled" one, is not pre-planned and is conducted upon the occurrence of any of the statutory defined events e.g., where the taxpayer fails to file a tax return.

The expected periodicity, *i.e.*, frequency of tax audits, depends on the type of the tax audit in question. A chamber tax audit may be carried out by the Ukrainian tax authorities on a discretionary basis. A "scheduled" on-site tax audit may not be carried out more often than once during the course of a calendar year. An "un-scheduled" on-site tax audit may be conducted only upon the occurrence of one or more of the statutory defined events. In any eventuality, each taxpayer is likely to be audited at least once every three years, which corresponds to the applicable statute of limitations.

The general rule is that the Ukrainian tax authorities can exercise their authority to issue an assessment of a taxpayer's liability with respect to a tax return only within a period of 1,095 days following: (a) the final statutory date for filing for the tax return, or (b) the date of the actual filing, of the tax return, whichever is later. After the expiration of this period of limitations, the taxpayer may not be assessed additional taxes, tax penalties, or late payment interest with respect to such past due tax liability.

A tax audit starts with a review of the correctness of the tax returns filed by the taxpayer and how they reconcile with the taxpayer's tax ledgers. Based on their findings, the tax auditors usually proceed with an in-depth study of the taxpayer's commercial documentation. As a matter of law, a taxpayer may be denied otherwise deductible expenditures if they have not been properly documented.

For the purposes of inquiring into a tax return, the auditing tax officer may require the taxpayer to produce documents or information, which are in the taxpayer's possession or within its power to secure, and which may be reasonably required to

establish whether the tax return is incorrect or incomplete. The applicable tax law does not expressly extend the Ukrainian tax authorities' rights of access to information which is stored electronically, rather than in documentary form. Ukrainian tax authorities in certain circumstances may conduct an unscheduled on-site tax audit of a taxpayer on the basis of information obtained from a third party. Among the exceptions is the information subject to legal privilege.

Ukrainian tax authorities may also address foreign tax authorities with a request to assist in obtaining of documents and information from third parties located in their own foreign jurisdiction. Such documents and information may be requested from foreign tax authorities pursuant to an applicable double tax treaty.

Penalties for the failure of a taxpayer (a) to file, or to file timely, a tax return; (b) to pay, or pay timely, taxes; (c) to comply with other tax obligations, can be generally divided into two broad categories: tax (administrative) penalties and criminal penalties. Tax penalties are imposed by the Ukrainian tax authorities and may be appealed by a taxpayer either: (a) to a higher level tax office in accordance with the administrative appeal procedure; or (b) to an administrative court in the course of tax litigation. Criminal penalties are imposed by the criminal courts in cases of tax evasion in "significant" amounts.

Under the applicable Ukrainian law, the Ukrainian tax authorities may not enforce collection of outstanding taxes, tax penalties, and/or penalty interest omitting preliminary procedure of agreeing tax obligations with a tax payer, without a court decision.

5. CURRENCY REGULATIONS

5.1 General

The principal act of legislation in Ukraine in the area of currency regulation is the Decree of the Cabinet of Ministers of Ukraine "*On the System of Currency Regulation and Currency Control*" (the *Currency Decree*), dated 19 February 1993. In its implementation of the *Currency Decree*, the National Bank of Ukraine (the NBU) has adopted a large number of regulations and instructions.

5.2 Status of National Currency

The Ukrainian national currency is Hryvnia (UAH), introduced in September 1996. The *Currency Decree* provides that UAH is the only lawful means of payment on the territory of Ukraine, and that it is acceptable without any limitations in the settlement of any obligations.

5.3 Use of Foreign Currency within Ukraine

The *Currency Decree* sets forth the general rule that any use of foreign currency on the territory of Ukraine, as a means of payment or as an object of a pledge, may legally be carried out only pursuant to an individual license of the NBU.

The foregoing rule does not apply to foreign currency transfers performed within Ukraine by a Ukrainian commercial bank or financial institution possessing a general license of the NBU for the carrying out of currency transactions.

5.4 Transfer of Foreign Currency from Ukraine Abroad

The *Currency Decree* sets forth the general rule that any transfer abroad of foreign currency from Ukraine requires an individual license of the NBU, subject to an exhaustive list of exemptions provided in the *Currency Decree*. Such exemptions include:

- transfer of foreign currency abroad by a Ukrainian resident individual within the limit determined by the NBU;
- transfer of foreign currency abroad by a Ukrainian resident or non-resident individual, within the limit of the amount previously imported into Ukraine by such resident or non-resident on a legal basis;
- payment in foreign currency abroad by a Ukrainian resident (legal entity or individual) in discharge of a contractual obligation in such foreign currency to a non-resident in settlement for goods, services, works, intellectual property rights, or other property rights acquired or received by such resident from such non-resident (*N.B.*: an acquisition of securities or other “currency valuables” does not fall within this exemption);

- payment of interest under a loan or income earned (*e.g.*, dividends) from a foreign investment in foreign currency abroad;
- repatriation from Ukraine abroad of the amount of a foreign investment in foreign currency previously made in Ukraine upon the termination of the relevant investment activity; and
- payment in foreign currency abroad to the European Organization for the Safety of Air Navigation as a fee for the services on aircraft navigation.

5.5 Other Licensable Transactions

Under the *Currency Decree*, an individual license of the NBU is required, *inter alia*, for:

- repatriation and transfer of funds in Hryvnia into Ukraine, if in excess of the amounts in Hryvnia which have been transferred abroad on legal grounds;
- depositing funds in foreign currency and other “currency valuables” (*e.g.*, securities, banking metals, *etc.*) in an account or on deposit outside Ukraine (except, *inter alia*, the opening by a duly licensed Ukrainian commercial bank of a correspondent account with a foreign bank, and the opening by a Ukrainian resident individual of a bank account with a foreign bank for the duration of such individual’s stay abroad); and
- investing abroad, including transferring foreign currency abroad in connection with acquisition of assets and securities.

In addition, receipt of a foreign currency loan by a Ukrainian resident (including a Ukrainian commercial bank) from a non-resident is subject to the registration of such loan with the NBU.

Finally, under Ukrainian law resident legal entities and individual entrepreneurs are required, upon opening a foreign bank account, to notify the NBU regarding such an account within three days from the date on which such account is opened. This requirement does not extend to the opening of correspondent accounts by Ukrainian banks, opening of a foreign bank account by a Ukrainian resident individual for the duration of its stay abroad and by the entities which enjoy diplomatic immunity and privileges.

5.6 Settlements under Export and Import Contracts

Ukrainian legislation requires that a Ukrainian resident's proceeds in foreign currency under an export contract must be collected on such resident's own bank account within 180 days from the date of the customs clearance of the exported goods. Similarly, the current Ukrainian legislation requires that goods prepaid by a Ukrainian resident, pursuant to an import contract concluded with a non-resident, must be imported and cleared through the Ukrainian customs within same 180-day term from the date on which such resident's prepayment was made.

This 180-day period may be prolonged only pursuant to a conclusion issued by the Ministry of Economy of Ukraine.

A resident's failure to comply with this 180-day requirement may result in the imposition on such resident of a 0.3% fine of the amount due under the contract for each day of delay in receiving the foreign currency proceeds or the imported goods. Under Ukrainian legislation, the total amount of the accrued fine is limited to the amount of the non-received proceeds or the value of the non-delivered goods, as the case may be. Finally, the calculation of such 180-day period is suspended if the resident files a claim in court or arbitral tribunal for the collection of overdue foreign currency proceeds from a non-resident party or delivery of goods.

5.7 Purchase of Foreign Currency

A resident Ukrainian legal entity or individual entrepreneur may acquire non-cash foreign currency in Ukraine only through a duly licensed Ukrainian commercial bank or non-bank financial institution which received a general license from the NBU, and only in a limited number of cases and subject to its submission to such bank or non-bank financial institution of various documents confirming the legitimacy of the purchase. Instances in which such a purchase will be permitted include, *inter alia*, the need for such resident to discharge its payment obligation to a non-resident in connection with:

- purchase of goods or services from such non-resident;
- repayment of a loan extended by such non-resident and/or the payment of interest thereon;
- payment of dividends or other income earned as a result of such non-resident's investment; and

- any currency transaction, for which the NBU has issued an individual license.

5.8 Trade in Foreign Currency

Trade in foreign currency on the territory of Ukraine may be carried out only by or through Ukrainian commercial banks and licensed financial institutions, and only on the inter-bank currency market of Ukraine.

5.9 Payments for Services Rendered by Non-Residents

On 30 December 2003, the NBU adopted Resolution No. 597 “*On the Remittance of Funds in National and Foreign Currency to Non-Residents under Certain Operations*” (the *Remittance Resolution*). The *Remittance Resolution* is aimed at restricting the remittance of funds from Ukraine as, *inter alia*, payment for works and/or services provided by non-residents on “commercially unreasonable” terms and at making such a remittance of funds more transparent.

If the aggregate amount of such service payments as specified in the preceding paragraph would exceed, in respect of each respective agreement or each foreign payee, EUR100,000 or its equivalent, the payer would be required to obtain, prior to the making of any such payment, either (a) an act of price evaluation (the Price Evaluation Act) issued by the State Information and Analytical Center for the Monitoring of the External Commodities Markets (the External Markets Monitoring Center), confirming that such payment does not exceed the “fair market price” for such works or services, or (b) an individual approval of the NBU for the making of such payment, if the External Markets Monitoring Center has refused to issue the Price Evaluation Act. The NBU approval cannot be issued if a Price Evaluation Act has been obtained in respect of the payment and indicates that the amount of such payment exceeds the applicable “fair market price.”

The *Remittance Resolution* does not apply to, *inter alia*, financial, transport and communications services rendered by a non-resident service provider, as long as the resident-recipient possesses a license allowing it to engage in the relevant business activity, and the payments made under the loan registration certificates and individual licenses issued by the NBU.

6. CUSTOMS REGULATIONS

6.1 General

The general principles of customs procedures in Ukraine are defined, and the movement of goods across the customs border of Ukraine as well as the procedures for customs clearance, control and other related issues are regulated by, the *Customs Code of Ukraine* (the *Customs Code*), dated 11 July 2002. In addition to the *Customs Code*, the applicable Ukrainian legislation on customs also includes the *Law of Ukraine “On Customs Tariffs of Ukraine”*, dated 5 April 2001, the *Law of Ukraine “On the Unified Customs Tariff”*, dated 5 February 1992, and other relevant acts.

6.2 Customs Regimes

The *Customs Code* provides that goods may be moved across the customs borders of Ukraine for the purposes of: import and export; re-import and re-export; transit through the territory of Ukraine; temporary import into the territory of Ukraine or temporary export out of the territory of Ukraine; customs warehouse; special customs zone; customs-free trade store; processing of the goods on the customs territory of Ukraine; processing of the goods outside the customs territory of Ukraine; destruction of the goods; and abandonment of the goods for the benefit of the state.

Goods moved across the customs borders of Ukraine must be supported by proper documentation and require declaring by either an importer/exporter of the goods or a licensed customs broker to the relevant customs authorities.

6.2.1 Import/Export

The *Customs Code* establishes two separate regimes, import and export.

The *Customs Code* defines the import regime as permitting goods and other products to move across the customs border of Ukraine upon their compliance with the following formalities: payment of customs duties, VAT, excise tax and customs fees (if applicable); submission of appropriate documents for the import/export of such goods; and observance of tariff and non-tariff requirements and other relevant restrictions in accordance with the applicable Ukrainian legislation. All goods imported under the auspices of the import regime may be used without any limitations on the territory of Ukraine.

6.2.2 Re-import/Re-export

The *Customs Code* provides that re-import and re-export are new customs regimes, whereby goods originating from Ukraine or a foreign country, which are taken out of or into the customs area of Ukraine for a period established under the applicable Ukrainian legislation, are exempt from numerous requirements which are otherwise applicable to the export and import regimes.

6.2.3 Transit Regime

Goods and other products may be moved across the territory of Ukraine under the transit regime, provided that all of the applicable customs fees are paid and the appropriate documents are submitted to the customs authorities. The *Customs Code* provides that the following additional mandatory conditions must be satisfied for the purposes of goods in transit:

- products (goods) under the transit regime must not be utilized on the territory of Ukraine for any purpose whatsoever;
- in certain cases, a special permit may be required to move products (goods) under the transit regime, and/or such products (goods) may be required to be moved only by a specific route; and
- products (goods) under the transit regime must be delivered to the ultimate customs within a certain pre-defined period of time.

6.2.4 Temporary Import/Export Regime

Under the *Customs Code*, goods that are imported to or exported from Ukraine on a temporary basis are exempt from import/export duties, provided that such goods are imported/exported for a period that does not exceed one year, and that they are exported/imported back prior to the expiration of the term of the temporary import/export in the same condition in which they were imported/exported (*e.g.*, without having been in any way processed or reconstructed) except for natural wear and tear. The maximum one-year term may be extended in certain cases by a written application of the person concerned.

6.2.5 Customs Warehouse

Under the customs warehouse regime, products (goods) may be stored under customs control for a specific period of time prior to their subsequent import or export without paying any import taxes and charges, providing that they comply with the relevant non-tariff measures or other restrictions.

6.2.6 Special Customs Zone

The special customs zone regime applies to products which are imported to or exported from the special economic zones throughout the territory of Ukraine. Under this regime, no tariff or non-tariff measures should apply unless otherwise stipulated by law.

6.2.7 Customs-Free Trade Store

Under the customs free trade store regime, goods and their supplements that are not intended for consumption on the customs territory of Ukraine are permitted to be sold without the payment of any import taxes or customs duties or the application of any tariff or non-tariff measures, provided that such goods are sold within special areas under customs control, such as points of admission on the customs border of Ukraine intended for international connections, and other relevant areas.

6.2.8 Processing on the Customs Territory of Ukraine

Under the regime of processing on the customs territory of Ukraine, goods originating from other countries may be processed on the territory of Ukraine without the application of any tariff or non-tariff measures to such goods, provided that such goods will be exported outside the customs territory of Ukraine.

6.2.9 Processing Outside the Customs Territory of Ukraine

Under the regime of processing outside the customs territory of Ukraine, goods which are not subject to any restrictions for circulation within Ukraine may be taken out of Ukraine without the application of any tariff or non-tariff measures to such goods, provided that such goods will be imported back into Ukraine.

6.2.10 Destruction

Destruction is the customs regime whereby goods brought into the customs territory of Ukraine are subject to the destruction under customs control, or must be abandoned in favor of the state, without the payment of any import taxes or the application of any tariff or non-tariff measures.

6.2.11 Abandonment of Goods for the Benefit of the State

Under the regime of abandonment of goods for the benefit of the state, the owner of the goods may abandon the goods in favor of the state without the payment of any import taxes or the application of any tariff or non-tariff measures. The owner cannot receive any benefit from such abandonment.

6.3 Customs Duties

Ukrainian customs legislation establishes three levels of rates for the payment of customs duties in respect of imported products.

A preferential rate of customs duties (as well as an exemption from the payment thereof) is applied to: products originating from countries with which Ukraine has entered into a customs union; products originating from countries with which Ukraine has created special customs zones; or upon the establishment of a special “preferential” customs regime pursuant to an international agreement of Ukraine.

Reduced rates of customs duties are applied to goods originating from countries and economic unions which have been granted most-favored nation treatment in Ukraine.

Customs duties are payable in full in respect of all other goods and products not covered in the two categories described above.

Export duties are levied only with respect to certain limited categories of products (*e.g.*, livestock, raw hides *etc.*).

6.4 VAT and Excise Taxes

Please refer to Sections 4.6 and 4.10 above for a discussion of VAT and excise taxes payable in Ukraine. Currently no VAT is charged on goods exported outside Ukraine (*i.e.*, the rate is 0%).

6.5 Customs Fees

In addition to customs duties, customs fees for carrying out the customs clearance of goods are currently levied on all goods, the value of which exceeds US\$100.

A customs fee of US\$5 is levied on goods valued between US\$100 and US\$1,000; for goods valued over US\$1,000 customs fees are levied at the rate of 0.2% of the customs value of such goods, but not more than US\$1,000.

6.6 Export Regulations

Goods exported outside the territory of Ukraine may be subject to: licensing and quotas; export taxes (export duties, customs fees, export VAT); pricing restrictions; and/or contract registrations.

7. PROPERTY RIGHTS

7.1 General

In contrast to the former system of state and collective ownership of property of the Soviet era, the *Civil Code of Ukraine*, dated 16 January 2003, specifically recognized and honored private ownership and listed individuals and legal entities to own property in Ukraine.

Under Article 26 of the *Constitution*, foreign citizens enjoy the same rights and freedoms and bear the same responsibilities as Ukrainian citizens, including property rights. According to the *Civil Code of Ukraine*, foreign citizens and legal entities are entitled to own property in Ukraine, unless otherwise provided for in the international treaties of Ukraine or other Ukrainian laws. The Ukrainian courts ensure protection of property rights in accordance with the applicable Ukrainian laws.

Property rights to real estate property (ownership, lease rights, servitudes, *etc.*) are subject to state registration according to the procedure established by the *Law of Ukraine “On State Registration of Rights to Real Estate Property and their Encumbrances”*, dated 1 July 2004. The above Law provides for the establishment of a single unified information register of rights to land plots and buildings (capital structures) as well as their encumbrances. Once enforced, it will replace the numerous property rights registers that currently exist.

7.2 Lease of Real Estate Objects

The lease of real estate (with the exception of land) in Ukraine is governed by the *Civil Code of Ukraine*, the *Law of Ukraine “On Financial Leasing”* (the *Leasing Law*), dated 16 December 1997, the *Law of Ukraine “On the Lease of State and Municipal Property”* (the *State Property Lease Law*), dated 10 April 1992, as amended, as well as other laws and regulations.

The *Civil Code* contains general provisions governing the lease of movable and immovable property. In particular, according to Article 793 of the *Civil Code*, the lease of a building (or other capital structure) or part thereof must be concluded in writing, and must be notarized and registered by the state if entered into for a period of three years or longer.

According to the Decree of the Cabinet of Ministers of Ukraine “*On State Duty*”, parties to a lease agreement must pay a state duty for the notarization of a lease agreement to the amount of 0.01% of the contract price of a lease agreement for a building or other capital structure (instead of the formerly applied 1%) which is capped at 50 “*non-taxable minimums*” of individuals’ income (currently, UAH850 or approximately USD110), and 0.01% of the land appraisal for a land lease agreement.

The *Leasing Law* governs in detail various issues of financial leasing and defines the essential elements of a leasing agreement. Under the *Leasing Law*, land and other natural resources, as well as unified property complexes of companies and their separate divisions (workshops) may not be the object of leasing.

The *State Property Lease Law* primarily governs the lease of state and municipal property. However, the provisions of the *State Property Lease Law* may also apply to the lease of private property, unless otherwise expressly provided for by a lease agreement or by applicable laws.

7.3 Land Ownership

The *Constitution of Ukraine* has established two forms of land ownership: public and private. Public property consists of state property and municipal property. The principal law governing land issues in Ukraine is the *Land Code of Ukraine* (the *Land Code*), which entered into force on 1 January 2002. The *Land Code* applies to all types of land in Ukraine; it governs the legal relations of Ukrainian and foreign individuals and legal entities, state-owned companies, Ukrainian state and municipal authorities, and foreign states and international organizations, in the area of the ownership, use and disposition of land in Ukraine. The *Land Code* clearly distinguishes between agricultural and non-agricultural land, and establishes specific legal treatment for each type of land.

The *Land Code* provides for the following types of rights to land in Ukraine: ownership; perpetual/indefinite use; short-term lease; long-term lease; servitudes (easements); superficies; and emphyteusis.

The *Land Code* expressly states that there are three types of land ownership in Ukraine: private, municipal, and state. Subject to certain limitations, Ukrainian individuals and legal entities are no longer restricted in the ownership, use, or disposition of land. According to the *Land Code*, state or municipal land must be sold to individuals and legal entities exclusively on a competitive basis (auction), except when the purchaser of the land plot is the owner of the construction located on this land plot and some other cases.

Foreign individuals, legal entities and foreign states are allowed to own, use and dispose of certain non-agricultural land in Ukraine, but are explicitly prohibited from owning agricultural land. Foreign legal entities may own only non-agricultural land: within the city limits, if they purchase buildings or structures or land plots for construction purposes; and beyond the city limits, if they purchase buildings or structures. State or municipal land may, however, be sold to a foreign legal entity if it establishes and registers its permanent establishment in the form of a commercial representative office in Ukraine. The sale of state owned non-agricultural land to a foreign legal entity may be made by the Cabinet of Ministers of Ukraine, subject to the prior approval of such sale by the Verkhovna Rada of Ukraine (Supreme Council of Ukraine). And municipal non-agricultural land may be sold to a foreign legal entity by the relevant municipal authorities, subject to the prior approval of such sale by the Cabinet of Ministers of Ukraine.

The *Land Code* appears not to grant the right to own any land in Ukraine to Ukrainian companies with 100% foreign investment. It stipulates that only those Ukrainian legal entities which have been founded by Ukrainian individuals or legal entities and joint ventures may own land in Ukraine. However, the *Land Code* does not contain any similar restrictions with respect to the lease of land by Ukrainian legal entities with 100% foreign investment (for more details please see 7.4 below). Since this discrepancy appears to be an anomaly, it is expected that respective amendments to the *Land Code* will be adopted to rectify this defect.

The right to perpetual use of land may now be granted only to (i) state- and municipally-owned companies, (ii) public organizations of disabled people, their legal entities, unions, institutions and organizations, and (iii) to the religious organizations (only for construction and maintenance of religious and auxiliary facilities).

Individuals or their heirs who owned land plots in Ukraine before 15 May 1992 (the date on which the previous version of the *Land Code* took effect) have no right to receive such land plots back into their ownership. Therefore, no restitution of land ownership will be carried out, based on historical land use rights.

The *Land Code* contains a number of transitional provisions which postpone or limit the application of certain its provisions until a future date (the Transitional Provisions). One of the most important of these states that until the laws “*On the Land Market*” and “*On the State Land Cadastre*” enter into force, agricultural land may not be re-sold, alienated, or otherwise disposed of (unless such alienation occurs as a result of inheritance or withdrawal of land for public purposes); individuals or legal entities may not contribute the right to a land share to the charter capital of a legal entity; and the designated use of such land may not be changed. This moratorium may be overridden by the Constitutional Court of Ukraine upon submission of the President of Ukraine. The *Land Code* does not contain any similar restrictions with respect to non-agricultural land.

It is anticipated that the new law “*On the Land Market*” will establish a detailed procedure of alienation of private, state and municipal lands. According to the existing draft law, such alienation should, as a rule, be carried out through tender. The above draft law also sets forth tender procedures, requirements for the terms and conditions of sale and purchase agreements, etc. The future law “*On State Land Cadastre*” will be

aimed at providing legal ground for, and improvement of, the system of the state land cadastre containing information on the size and designated use of land plots, their owners, encumbrances, as well as other features of land plots.

7.4 Land Leases

The *Land Code* contains a number of general provisions with respect to land leases. In particular, it provides that a land lease is the contractual, limited-in-time possession and use of a land plot for a lessee's commercial and other activities, which is granted for compensation. All Ukrainian and foreign individuals and legal entities, foreign states, and international organizations may lease land in Ukraine. The Land Code provides for the two types of land lease: short-term (up to five years) and long-term (up to 50 years). The *Land Code* establishes the right of a lessee to sublease a land plot, subject to the lessor's consent. The term "lessors of land plots" is defined to include only land owners or their authorized representatives.

More specifically land lease relations are governed by the *Law of Ukraine "On Land Lease"* (the *Land Lease Law*), dated 6 October 1998, which in more detail governs the issues of land lease agreements and land rent payments.

According to the *Land Lease Law*, land lease agreements must be executed in writing, must contain a set of essential terms and must be supplemented by several mandatory annexes, *inter alia*, the plan (scheme) of the land plot. The essential terms of any land lease agreement are the following: the subject matter of the lease (its location and size); the term of the agreement; the amount of the rent and terms and means of payment; the purposes of the lease and designated purpose of the land plot; the terms of maintenance of the leased object; the terms and conditions for the transfer of a land plot by the lessor to the lessee; the terms for the return of the land plot by the lessee to the lessor; all existing restrictions and encumbrances; the risk of damage or loss; the terms on pledge of the leasehold rights and their contribution to the charter capital of a legal entity and liability. A land lease agreement should be registered with the state authorities.

The procedure for the lease of state and municipal lands is set forth in the *Land Code* and the *Land Lease Law*. Currently, state or municipal lands can be leased out pursuant to the decision of the respective local council and exclusively on a competitive basis (auction), except when the lessee of the land plot is the owner of the construction located on this land plot and in some other cases. Recently passed *Law of Ukraine "On*

Prevention of Negative Impact of the Global Financial Crisis” foresees the possibility of waiver of the auction requirement in cases of lease of the land plots for developing of affordable residential construction. The procedure of holding the auctions has been adopted by the Cabinet of Ministers, but was immediately terminated by the President and submitted for consideration to the Constitutional Court. As a result, there is no effective procedure today and auctions on land lease rights mostly are not performed.

7.5 Third Party Rights

The *Land Code* recognizes certain rights of third parties over a land plot within the concepts of “servitudes” (easements) and “good-neighborliness”. The *Land Code* contains detailed descriptions of various types of servitudes, their application, and the procedures for their establishment and termination.

Under the concept of “good-neighborliness,” land owners and land users are obliged to use the land in a manner that will cause the least possible inconvenience and discomfort to the landowners and land users of neighboring land plots (in particular, in terms of shading, smoke, odor nuisances and noise pollution).

8. PRIVATIZATION

8.1 General Background

In 1992, Ukraine embarked on a mass privatization program which combined both voucher privatization by citizens and limited cash privatization. In March 1992, the Verkhovna Rada enacted two major pieces of legislation on privatization, one covering large scale privatization, *i.e.*, the Law “*On the Privatization of the Property of State Owned Enterprises*” (the *Privatization Law*), and the other covering the privatization of small-scale enterprises, the Law “*On the Privatization of the Property of Small State-Owned Enterprises*” (the *Law on Small Privatization*). These two laws established the basic principles of privatization: the possible objects of and participants in privatization; the role of the state authorities in the privatization of state property; the general characteristics of the methods and procedures for privatization; and various other principles.

The specific objectives, quotas, and methods of privatization for each year are outlined in the state privatization programs adopted by the Verkhovna Rada. In addition, various aspects of the privatization process are regulated by resolutions of the Verkhovna Rada, resolutions and decrees of the Cabinet of Ministers, decrees of the President, and orders of the State Property Fund of Ukraine (the SPF).

In 2000, the Verkhovna Rada adopted the *Law “On the State Privatization Program”* approving the state privatization program for the years 2000 through 2002 (the 2000 Privatization Program). The *2000 Privatization Program* sets forth the objectives and priorities for privatization, and provided a detailed procedure for the privatization of different kinds of state property for the following three years. Although since 2004 numerous drafts of the new privatization program have been submitted to the Verkhovna Rada, none of them has ever been approved. For instance, the draft *Law “On the State Privatization Program for the years 2009 - 2013”* has been recently voted down by the Verkhovna Rada in its last third reading. Hence, the *2000 Privatization Program* is effective today and will continue to remain in full force and effect in 2009 and thereafter, until such time as a new state privatization program is adopted.

8.2 Objects of Privatization

Under the *Privatization Law*, the following state-owned assets are subject to privatization:

- assets, production facilities, and structural units of an enterprise that constitute an integrated property complex;
- unfinished construction sites;
- state-owned shares in enterprises; and
- land under objects subject to privatization.

The *2000 Privatization Program* divides all state-owned assets into six groups. Group A includes small enterprises and their structural units, which have been sub-divided into separate enterprises having up to 100 employees, or over 100 employees if the value of the fixed assets is not sufficient to form an open joint stock company (*i.e.*, during 1 January 2008 - 31 March 2008 it will be UAH643,750 (approximately US\$127,475 or EUR86,993); during 1 April 2008 - 30 September 2008 it will be UAH656,250 (approximately US\$129,950 or EUR88,682); during 1 October 2008 - 30 November 2008 it will be UAH681,250 (approximately US\$134,900 or

EUR92,060); and with effect on 1 December 2008, it will be UAH756,250 (approximately US\$149,752 or EUR102,195). Group B includes enterprises with more than 100 employees and fixed assets sufficient to establish an open joint stock company (OJSC). Group G covers integrated property complexes, monopolies and companies of strategic importance. Group D covers unfinished construction sites and objects of mothballed construction. Group E includes state-owned shares in private enterprises of any legal organizational form and the last Group J covers social objects regardless of their value.

The privatization of property complexes of the monopolists on certain markets, military-industrial establishments which require conservation, companies whose privatization is carried out with the attraction of foreign investments and other objects referred to Group G, should be carried out upon the agreement with the Cabinet of Ministers of Ukraine.

8.3 Participants in Privatization

Under the *Privatization Law*, foreign individuals and legal entities may participate in the privatization process, along with Ukrainian citizens and legal entities. Foreign investors may pay for the privatization objects they intend to purchase in any freely convertible foreign currency rather than in local currency.

The *Privatization Law* stipulates that joint ventures and foreign investors which are legal entities must submit a declaration of the origin of the funds which they intend to use as consideration for the property being privatized, regardless of the value of the purchase.

The *2000 Privatization Program* contains a number of restrictions with respect to potential purchasers of shares of OJSCs that enjoy a monopoly position in the national market for the relevant products, or that are of strategic significance to the national economy and/or security. In such cases, only a majority stake in such an OJSC may be offered for privatization and, if the relevant OJSC operates in any of the fields of energy, metallurgy, the oil and chemical industry, radio-electronics, aviation, or machine building, then such majority stake may be acquired only by an “industrial investor.” The latter is defined as a national or foreign investor or a consortium of investors with demonstrated interest in maintaining the relevant market share of the OJSC that during not less than three years produces similar

products or consumes the products of such an OJSC in its main production as its main raw materials, or which produces products which are consumed by such an OJSC in its main production, or which has maintained direct control over such OJSC for at least one year. The 2000 Privatization Program specifically provides that an “offshore entity,” *i.e.*, a legal entity established in a tax haven jurisdiction, may not qualify as an industrial investor.

8.4 Methods of Privatization

Under the *Privatization Law*, state-owned property may be privatized through the sale of state property at auctions, or through a tender or a buy-out of the state property under alternative privatization plans. Shares offered for sale through a tender may be sold only in one block in the quantity stipulated by the privatization plan.

An “open tender” is defined as a method of privatization which is applied to the competitive sale of blocks of shares of OJSCs carried out with the participation of financial advisers authorized by the SPF. The authorized adviser may be either a resident or a non-resident legal entity. The authorized adviser is responsible for the preparation of the tender documentation, the initial evaluation of the block of shares to be sold, and the organization of marketing campaigns.

Large blocks of shares (*i.e.*, more than 25%) in OJSCs with a turnover exceeding UAH100 million for the previous reporting year, or with a balance sheet value of fixed assets exceeding UAH100 million, are normally offered for sale through an open tender. Only one block of shares at a time of a particular OJSC may be offered for sale through an open tender. Proposals to buy a portion of the tendered block of shares are not acceptable.

The SPF may organize the tender for the sale of shares in OJSC in the form of an open auction. In such a case, the winner is determined on the basis of the auction held in accordance with the procedure established by the privatization regulations.

There are additional requirements for the sale of shares in “strategic enterprises.” If an enterprise which is to be sold through an auction or a tender or at a stock exchange is identified as “strategic,” the bidders must prepare and submit to the privatization authorities additional disclosure documentation determined by the SPF and the Antimonopoly Committee of Ukraine (the AMC). If the stake to be

acquired in a strategic enterprise exceeds 25% or is otherwise deemed to grant controlling powers in the highest management body of the enterprise, then the approval of the AMC must be obtained prior to the purchase.

The *2000 Privatization Program* provides that the state may (but is not obliged to) retain 25% or 50% (depending on the category of the enterprise undergoing privatization) of the outstanding shares plus one share of every OJSC created on the basis of state-owned monopolies or strategic enterprises. Such a shareholding will ensure that the state will retain the right to control the decision-making process at the shareholders' meeting (the highest governing body of a joint stock company), either by the exercise of a veto or by outright majority ownership of the shares, with regard to the following issues: the amendment of the charter of the joint stock company; the termination of its activities; the creation or termination of a subsidiary, branch, or representative office of the joint stock company; the participation of the joint stock company in other enterprises and associations; and any pledge, lease, sale, or any other alienation of its assets, the balance value of which exceeds 25% of the charter fund of the joint stock company.

The lists of enterprises to be sold through auctions, tenders and buyouts must be approved by the SPF with respect to state-owned property, by the Parliament of the Autonomous Republic of Crimea with respect to property of Crimea, and by local councils of deputies with respect to municipal property. The list of objects covered by Group G, which privatization is supposed to be carried out with the attraction of foreign investments, should be approved by the Verkhovna Rada upon submission of the Government of Ukraine.

Title to privatized property is evidenced by the sale and purchase agreement entered into by the purchaser and the corresponding privatization authority. The sale and purchase agreement must be executed in written form and certified by a notary.

8.5 Investment Obligations

The *Privatization Law* also provides for investment obligations where the investor acquires an entire integrated property complex. Such possible investment obligations include:

- Implementation of know-how and new technologies;
- Preservation of employment;
- Adherence to antimonopoly regulations;
- Preservation of the range and amounts of the goods produced;
- Implementation of anti-pollution measures;
- Commitment of direct investments in addition to the purchase price payment;
- Taking measures aimed at the social well-being of personnel; and
- Repayment of debts.

The parties to the privatization process may agree upon other investment obligations.

The period for the fulfillment of such investment obligations may not exceed five years. Any transfer of shares (property) which are subject to investment obligations must be approved by the state privatization authorities and is generally prohibited until the investment obligations are performed in full. If the state privatization authority approves such a transfer of shares (property), the investment obligations must be assumed by the new owner of the shares (property) in question.

8.6 Privatization Developments, Results and Prospects for 2009

Notwithstanding the ambitious agenda for full-scale privatization embodied in each of the state privatization programs, until recently an effective program for the systematic large-scale transfer of state-owned assets to private entities and/or individuals had not been implemented in Ukraine.

Although the Ukrainian Government began to transform state enterprises into joint stock companies within the scope of the “corporatization” process, and to sell

minority stakes through auctions and competitive tenders, most enterprises privatized during 1993-1996 were small and medium-sized businesses involved in the areas of retail trade, food service, construction, and other service-related activities. This so-called “small privatization” is practically complete in Ukraine. A significant number of privatized enterprises have been privatized by their workers’ collectives through the buy-out mechanism.

As of the end of 1998, Ukraine began to implement a new stage of privatization, offering for tender both blocking (*i.e.*, 25%) and majority (*i.e.*, 50% and more) stakes in its “blue chip” companies.

According to Resolution of the Cabinet of Ministers No. 1517-p “*On Approval of List of Companies and Holdings, in which State Shareholdings (Interestholdings) are subject to sale, and State Enterprises, Holdings and Open Joint-Stock Companies, which are to be Prepared for the Sale in 2009*”, dated 3 December 2008, the privatization of a number of state-controlled companies was scheduled for 2009, including Ukrtelecom, a telecommunication monopoly, and Odesa Portside Plant, a large chemical enterprise.

9. COMPETITION LAW

9.1 General

On 18 January 2001, the Verkhovna Rada adopted the Law of Ukraine “*On the Protection of Economic Competition*,” which became effective on 2 March 2002 (the *Competition Law*). In 2005 the *Competition Law* was amended adding a new requirement regarding the transactions subject to the prior approval of the Antimonopoly Committee of Ukraine (the AMC).

The *Competition Law*, inter alia, defines and sets forth the principal features of (i) anti-competitive concerted actions of business entities; (ii) abuse of monopoly (dominant) position on the market; and (iii) restrictive and discriminatory activities by business entities and their associations.

The *Competition Law* also describes the transactions which require the prior approval of the AMC, subject to the satisfaction of certain thresholds.

9.2 Transactions Subject to Prior AMC Approval

Pursuant to Article 22 of the *Competition Law*, the following transactions may be subject to prior AMC approval: (i) mergers or consolidations of business entities; (ii) the acquisition of direct or indirect control over a business entity; (iii) the establishment of a business entity by two or more business entities that will engage in business activities independently over a prolonged period, provided that such establishment does not result in the coordination of the competitive conduct among business entities that established such business entity, or between the business entities and the newly established business entity; and (iv) the direct or indirect acquisition of, obtaining the ownership of, or management over the shares (participatory interests) of a business entity, if such acquisition results in the obtaining or the exceeding of 25% or 50% of the voting rights of the target business entity.

The foregoing types of transactions will be subject to prior AMC approval:

- If the aggregate asset value or the aggregate sales volume of all of the participants to the transaction (the Participants) for the previous fiscal year exceeds the UAH equivalent of EUR12 million (calculated on a worldwide basis) at the exchange rate of the NBU as of the last day of the previous fiscal year, provided that:
 - the aggregate asset value or the aggregate sales volume of at least two of the Participants (calculated on a worldwide basis) exceeds the UAH equivalent of EUR1 million at the NBU exchange rate as of the last day of the previous fiscal year; and
 - the aggregate asset value or the aggregate sales volume of at least one Participant on the territory of Ukraine exceeds the UAH equivalent of EUR1 million at the NBU exchange rate as of the last day of the previous fiscal year.
- Or (irrespective of the aggregate asset value or the aggregate sales volume of the Participants), if the market share of any Participant or the combined market share of the Participants in Ukraine exceeds 35 percent of the market, on which the transaction takes place, and/or the adjacent markets.

For the purposes of the calculation of the foregoing thresholds, the definition of the 'Participant' includes; not only the actual merging, consolidating, establishing or acquiring business entity, but also all of the business entities associated with such entity by relation of control.

9.3 Special Approval

The *Competition Law* provides that the Cabinet of Ministers may grant its approval to the carrying out of certain transactions under special circumstances, even if the AMC has refused to grant its prior approval to such transaction on the grounds that such transaction may cause the emergence of a monopoly in a given market, or may materially restrict competition in a given market or in a substantial part thereof. Such special circumstances are limited to cases where the positive effects of the transaction will have a greater impact on the public interest than its negative effects. However, the Cabinet of Ministers must refuse to grant such approval if the restriction of competition would threaten the existence of the market economy in Ukraine.

9.4 Exemptions

The Competition Law establishes a list of transactions that are specifically exempt from the prior AMC approval requirement, as follows:

- the acquisition of shares (participatory interests) of a business entity by a person (entity) whose principal business is the performance of financial or securities operations, provided that such acquisition has been undertaken with the purpose of the subsequent resale of the shares and such person does not vote on any governing body of the business entity. Such transactions may be carried out without the prior approval of the AMC, subject to the resale of such shares (participatory interests) within one year after their purchase;
- transactions between business entities associated by relations of control are not subject to prior AMC approval, provided that the relations of control were initially established in accordance with the requirements of the Ukrainian antimonopoly legislation; and
- the acquisition of control over a business entity or a division thereof, including the right to manage and to administer the property of such business entity, by an appointed receiver in bankruptcy proceedings or by a state official does not require prior AMC approval.

9.5 Liability

The *Competition Law* provides that the AMC is authorized to consider cases on the violation of the legislation governing the protection of economic competition, and to render decisions in such cases, including, *inter alia*:

- recognizing the fact of the violation of the legislation on the protection of economic competition;
- terminating the violation of the legislation on the protection of economic competition;
- eliminating the consequences of the violation of the legislation on the protection of economic competition;
- compelling state authorities, local self-governing authorities, and administrative management authorities to cancel or amend their decisions or to terminate agreements constituting anti-competitive actions of such authorities;
- recognizing a business entity as holding a monopoly (dominant) position in a given market;
- splitting up a business entity holding a monopoly (dominant) position in a given market;
- imposing penalties (in the amount of up to 10% of the Participants' group turnover for the preceding fiscal year); and
- blocking securities on securities accounts.

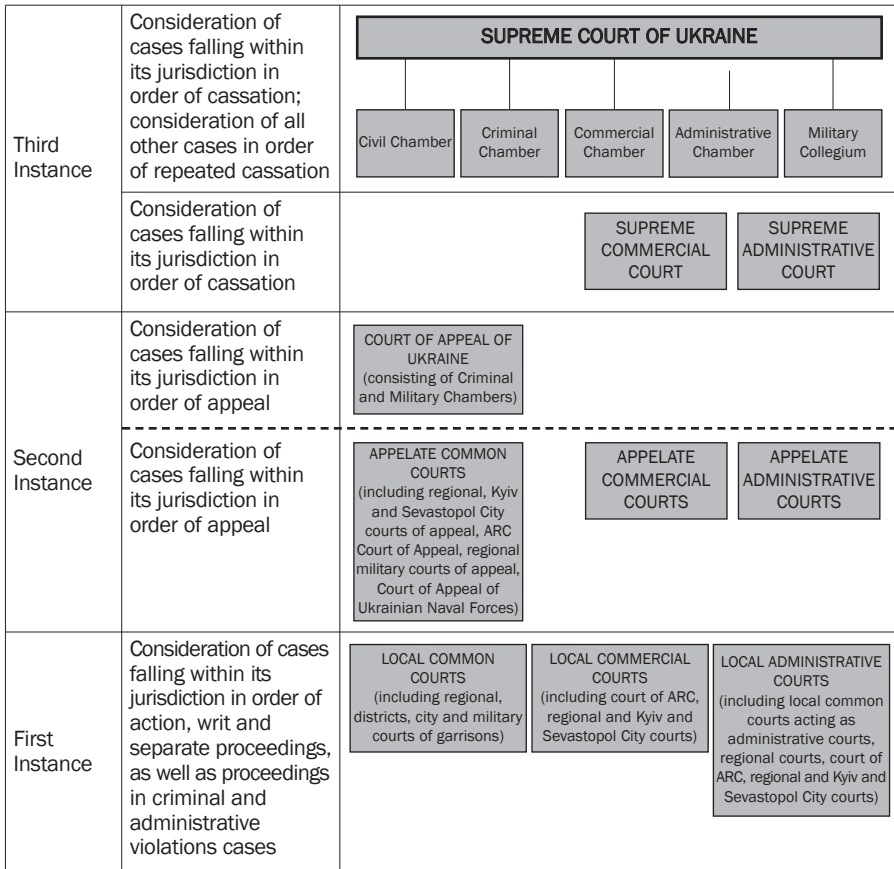
10. DISPUTE RESOLUTION

10.1 Introduction

A foreign or Ukrainian legal entity or individual entrepreneur may apply to an appropriate Ukrainian court, or to an appropriate arbitration tribunal or institution within or outside of Ukraine, for the resolution of disputes.

In Ukraine, the courts of general jurisdiction are organized according to the principles of territoriality and specialization and include: local courts; appellate courts and the Court of Appeal of Ukraine; Supreme Specialized Courts; and the Supreme Court of Ukraine, as shown in Diagram 1, below.

Diagram 1: The Ukrainian Court System



Local courts consist of common courts (including military courts) and specialized courts (*i.e.*, commercial and administrative courts). Local common courts adjudicate civil and criminal cases as well as actions for administrative violations. Local commercial courts exercise jurisdiction over disputes arising out of commercial relations, while local administrative courts administer justice in disputes connected with legal relations in the area of state government and municipalities.

The appellate instance courts are comprised of the relevant appellate courts and the Court of Appeal of Ukraine, which reviews decisions of the local common courts in the limited cases provided for by the applicable procedural rules.

Cassation supervision is carried out by the relevant Superior Courts of special jurisdiction. Also, in certain cases identified by the applicable procedural rules, the cassation review of the decisions of the lower courts is accomplished by the Supreme Court of Ukraine.

Since Ukraine is a civil law country, the exercise of judicial power is based solely on the application of statutes. Court decisions do not constitute binding precedents, although decisions by the Supreme Court of Ukraine and the Supreme Commercial Court are summarized, in order to introduce uniformity to the interpretation and application of the applicable legislation, and are followed by the lower courts on a quasi-mandatory basis.

10.2 Commercial Litigation in Ukraine

For the resolution of business-related disputes, a foreign or Ukrainian legal entity or individual entrepreneur may apply to an appropriate Ukrainian court or to an appropriate arbitration tribunal or institution within or outside of Ukraine. A legal entity's/individual's right to apply to a Ukrainian court may not be waived by contract, even by an arbitration agreement between the parties. If an arbitration agreement exists between the parties, the party objecting to the review of the dispute by a Ukrainian court must raise such objection in the relevant court proceeding before making any submission on the merits of the dispute; otherwise, the court will accept jurisdiction and will proceed to review the dispute and to render a judgment.

Currently, specialized commercial courts exist within the system of courts of general jurisdiction (*i.e.*, “*hospodarski sudy*” or “commercial courts”). As a general rule, any business-related dispute between business entities (including individual entrepreneurs)

will be reviewed by the commercial court having jurisdiction over location of the respondent, according to the rules set forth by the *Commercial Procedural Code* (the *Commercial Procedural Code*), dated 6 November 1991. It should be noted however, that all corporate disputes between a company and its participant (shareholder) as well as all disputes between the founders (shareholders) of the company shall be considered by the commercial court having jurisdiction over location of the company. Such disputes will be reviewed by the commercial courts even in the event when the party thereto is an individual (rather than a legal entity or an individual entrepreneur). In all other cases involving individuals, such commercial cases will be adjudicated in the local common courts under the rules of the *Civil Procedural Code*, dated 18 March 2004. As a rule, a commercial court will not accept jurisdiction over a dispute between a foreign respondent and a foreign claimant, neither of whom has real estate property which is the subject of the dispute or a registered presence in Ukraine. In general, there are no limitations (including monetary limits) on the jurisdiction of the commercial courts, other than specialization and territorial factors.

The *Law of Ukraine "On International Private Law"*, dated 23 June 2005, comparing to the Commercial and Civil Procedural Codes, envisages more wide opportunities for consideration of the cases where foreign person is involved by Ukrainian courts. For example, a Ukrainian court may take for its consideration cases with foreign participant, provided that parties concluded an agreement on the Ukrainian court jurisdiction earlier; or the damages, which are subject of the dispute, when caused on the territory of Ukraine; or act or event, which is the ground for litigation took place on the territory of Ukraine etc., this Law also foresees the list of disputes over which Ukrainian courts have exclusive jurisdiction.

Despite the fact that the *Law of Ukraine "On International Private Law"* provides that a Ukrainian court may consider cases with foreign participant if parties concluded an agreement on the Ukrainian court jurisdiction, this provision is currently not applying by the Ukrainian commercial courts and, respectively such cases are generally not accepted for the considerations for the following reasons. Neither the effective *Commercial Procedural Code*, nor any other act regulating commercial court proceedings, provides for possibility to choose the court at the agreement of the parties. Legislative provisions also do not oblige commercial courts to refuse consideration of the statement claim if the parties agreed to consider particular case in other jurisdiction. The abovementioned provision apparently was adopted in order to make Ukrainian law consistent with the *Hague Convention on Choice of Court Agreements* of 30 June 2005.

However, as Ukraine has not ratified this Convention so far and, respectively, has not accordingly amended the procedural legislation, the provision on the possibility to agree on the competent court was not realized in practice, at least within commercial proceedings. At the same time, *the Civil Procedural Code* allows the parties to agree on the competent local civil court to consider particular dispute, except for the disputes which shall be considered under the rules of exclusive jurisdiction.

Under the *Commercial Procedural Code*, the court venue is determined following the territorial principle. As a general rule, disputes are adjudicated by the commercial court at the place of location of the defendant. Cases for the conclusion, modification, termination or recognition as null and void of agreements are considered by the court at the location of the debtor party to such agreement (i.e., the party under obligation to provide the services, to transfer property, etc.).

The exclusive venue for disputes involving title to property, the illegal use of property, or the removal of obstacles to use property is established by the court at the place of the location of such property. The Kyiv City Commercial Court exclusive venue is established for disputes arising out of transportation agreements by the court at the location of the transportation organization and where the defendant is a central government authority, or a certain state secret is involved.

In the commercial proceedings, the plaintiff may seek issuance of the injunction relief before the commencement of the court proceedings or during consideration of the case by the competent court. In its request for the injunction relief the plaintiff may ask the court to impose one or several measures, such as, e.g., arrest or funds or other assets of the defendant or ordering the defendant or third parties to refrain from certain actions.

Recently adopted amendments to the Commercial Procedural Code prohibit application of injunctive relief involving:

- (i) prohibition on holding the general shareholders meetings or other meetings of the owners of a commercial enterprise and on issuance of decisions at these meetings;
- (ii) prohibition on providing the register of privileged shares or information about the shareholders or other owners of a commercial enterprise by the shares issuer, the registrar, the keeper, or the depositary for the purpose of holding general shareholders meetings of the commercial enterprise;

- (iii) prohibition on participating in the general shareholders meetings by the shareholders or by other owners of the commercial enterprise, or on establishing the legal capacity of the general shareholders meetings or other meetings of the owners of a commercial enterprise.

Such amendments were enacted in order to improve consideration of corporate disputes by the commercial courts and to protect the rights of the shareholders and other owners of commercial enterprises to govern their enterprises and to prevent unlawful corporate takeovers.

10.3 Commercial Arbitration

A business-related dispute between a foreign legal entity or individual entrepreneur and a Ukrainian legal entity or individual entrepreneur may be referred, by the agreement of the parties, for settlement by either an ad hoc or an institutional arbitration, either within or outside of Ukraine. A business-related dispute involving only Ukrainian parties may be referred to either an ad hoc or an institutional arbitration only on the territory of Ukraine and is not subject to international commercial arbitration. At the same time disputes of Ukrainian legal entity with foreign investments between themselves, their participants, as well as their disputes with other Ukrainian entities may be referred to international commercial arbitration.

In view of clarifications on court practice regarding corporate disputes recently adopted by the Supreme Commercial Court and the Supreme Court of Ukraine, prohibiting the shareholders' (participants') of Ukrainian companies, irrespectively of their nationality, from settlement of corporate disputes related to such companies by means of international commercial arbitration, there is a risk that the local Ukrainian courts may reject to grant party's requests on recognition and enforcement of such arbitral awards in Ukraine.

Currently, there are two well-established bodies of institutional arbitration in Ukraine: the International Commercial Arbitration Court of the Chamber of Commerce and Industry of Ukraine, and the Maritime Arbitration Commission of the Chamber of Commerce and Industry of Ukraine.

10.4 Enforcement of Foreign Court Judgments

Foreign court judgments will normally not be recognized or enforced in Ukraine in the absence of an international agreement, or unless Ukraine and the country in which the judgment was made have agreed ad hoc on the reciprocal enforcement of their judgments. Ukraine has agreements on the reciprocal enforcement of foreign judgments with several countries, mostly members of the former Soviet Union and/or Soviet Block.

A foreign judgment will not be enforced in Ukraine if it is determined that: foreign judgment did not come into force; and or Ukrainian courts or other Ukrainian authorities possess exclusive jurisdiction over such disputes; and/or a Ukrainian court has rendered a judgment or is currently considering a dispute in the same matter between the same parties and such consideration had started before opening of the proceedings by the foreign court; and/or the established term for applying for enforcement of a foreign judgment expired; and/or under Ukrainian legislation a disputed matter is not subject to a court's consideration. Ukrainian courts will also not recognize a foreign judgment against a party which was not given an opportunity to participate in the proceedings due to improper notification, if the enforcement of such judgment would threaten the interests of Ukraine or in other cases prescribed in international treaties and Ukrainian legislation.

10.5 Enforcement of Foreign Arbitration Awards

Foreign arbitration awards are, in general, easier to enforce in Ukraine than foreign court judgments, since Ukraine is a member of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards.

A foreign arbitration award should be recognized as binding and enforced upon the filing by a party of an appropriate motion with the competent Ukrainian court, unless the losing party proves the existence of any of the following grounds established by the applicable Ukrainian legislation for the denial of the recognition and enforcement of the foreign arbitration award:

- the agreement to arbitrate is invalid under the chosen law;
- one of the parties, while entering into the arbitration agreement, was legally incapable;

- the losing party was not duly notified of the appointment of the arbitrator or the conduct of the arbitration proceedings;
- the losing party could not submit its explanations for valid reasons;
- the arbitration award was rendered on an issue outside the scope of the arbitration agreement;
- the arbitration panel or procedure did not comply with the arbitration agreement; or
- the arbitration award did not enter into force in, or was annulled or its execution was suspended by the court of, the country, according to the laws of which such arbitration award was rendered.

Similarly, a foreign or local arbitration award may be unenforceable in Ukraine if a Ukrainian court determines that: the object of the dispute cannot be subject to arbitration under Ukrainian legislation; or the recognition and enforcement of such arbitral award contradicts the public order of Ukraine.

11. CAPITAL MARKETS

11.1 General

The debt and equity securities markets in Ukraine are regulated by several laws, as well as by regulations and resolutions issued by the State Commission on Securities and the Stock Market of Ukraine (the Securities Commission). The principal legislation in this area includes the *Civil Code of Ukraine*; the *Commercial Code of Ukraine*; the *Law of Ukraine “On Securities and the Stock Market,”* dated 23 February 2006; the *Law of Ukraine “On Companies,”* dated 19 September 1991; the *Law of Ukraine “On Joint Stock Companies,”* dated 17 September 2008; the *Law of Ukraine “On the State Regulation of the Securities Market in Ukraine,”* dated 30 October 1996; the *Law of Ukraine “On the National Depository System and Specifics of the Electronic Circulation of Securities in Ukraine,”* dated 10 December 1997; the *Law of Ukraine “On the Circulation of Promissory Notes in Ukraine,”* dated 5 April 2001; the *Law of Ukraine “On Mortgage,”* dated 5 June 2003; the *Law of Ukraine “On Mortgage Lending, Transactions with Consolidated Mortgage Debt and Mortgage-Backed Certificates,”* dated 19 June 2003, and the *Law of Ukraine “On Mortgage-Backed Bonds,”* dated 22 December 2005.

11.2 Types and Forms of Securities

Ukrainian legislation recognizes the following categories of securities: equity securities such as shares of capital stock and investment certificates; debt securities such as state bonds of Ukraine, municipal bonds, corporate bonds, treasury bills, deposit certificates, promissory notes and bills of exchange; mortgage-backed securities such as mortgage-backed bonds, mortgage-backed certificates, mortgage receipts (“*zastavni*”), certificates of funds of operations with real estate (“*certyfikaty fondiv operatsiy s neruhomistyu*”); privatization securities; derivative securities; and commodity-related securities (documents acknowledging the receipt of goods for shipment such as bills of lading).

Ukrainian issuers may issue securities in registered (nominative) form, bearer form and order form, as well as in documentary (certificated) form and non-documentary (book-entry or electronic) form. The transfer of ownership rights to registered securities in documentary form is effected by means of assignment. Ownership rights to bearer securities issued in documentary form are transferred as of the moment of the physical transfer (delivery) of the securities to a new owner. Ownership rights to the securities in documentary form, wherever bearer or registered, are confirmed by such securities’ certificate.

The transfer of ownership rights to both bearer and registered securities in documentary form, if such securities have been immobilized, as well as to the registered securities originally issued in non-documentary form is effected from the moment of crediting such securities to new owner’s securities account maintained with a securities custodian. Ownership rights to such securities are evidenced by an excerpt from the custodian’s registration system.

11.3 Securities Commission

The Securities Commission is the state agency authorized to determine and implement a uniform state policy in the area of the development and operation of the securities market in Ukraine, and to monitor the compliance of Ukrainian and foreign entities and individuals with legislation governing the securities market. The Securities Commission is subordinate to the President of Ukraine and is accountable to the Verkhovna Rada. The Securities Commission has been granted broad powers with respect to the formation of the overall legislative framework for the operation and development of Ukraine’s securities market, as well as registration, licensing and enforcement powers.

11.4 Registrars

The registration of ownership rights to registered securities issued in documentary form may be performed by either an issuer of registered securities which has obtained a permit (the Registrar License) from the Securities Commission for the maintenance of a register of owners of registered securities (only if contemplated by the issuer's charter and provided that the total number of owners of such securities issued does not exceed 150), or an independent registrar which has obtained the Registrar License. An issuer is required to engage the services of an independent registrar if the total number of owners of the issuer's nominative securities exceeds 150.

State bodies cannot be founders of or participants in a registrar. An issuer may not be a direct or indirect founder or participant of the registrar which is maintaining such issuer's register. Similarly, neither a registrar nor its participants may have a direct or indirect shareholding in the issuer whose register is maintained by such registrar. Finally, an issuer maintaining its own register or a registrar may not be owned by more than 10 per cent by a professional participant in the securities market, *i.e.*, registrar, securities trader, securities custodian or depository.

11.5 Depository System

Ukrainian legislation establishes the National Depository System, consisting of two levels, the higher level and lower level.

The higher level comprises the National Depository of Ukraine and depositories. The National Depository of Ukraine is an open joint stock company with the state of Ukraine being its majority shareholder, authorized to carry out certain regulatory functions with respect to the Ukrainian stock market. A depository is a legal entity organized in the form of an open joint stock company and engaged exclusively in depository activities with securities. A depository should have at least 10 shareholders that are custodians and none of such custodians should have a share of more than 25% of such depository's capital. A depository is authorized to keep global certificates in respect of the issuance of non-documentary (book-entry) securities by Ukrainian issuers, to maintain accounts for custodians of securities, and to carry out clearing and settlement activities in respect of transactions with securities.

The lower level comprises custodians of securities and registrars of owners of registered securities. Under Ukrainian law the license of the Securities Commission for the

performance of depositary activities of a custodian (the Custody License) may be issued either to a licensed Ukrainian securities trader or a Ukrainian commercial bank which written permit of the National Bank of Ukraine (the NBU) provides for the depositary activity and which holds a securities trader license from the Securities Commission. A Ukrainian securities custodian may provide custody services to its clients only pursuant to an agreement for the opening of an account in securities which model is approved by the Securities Commission. A securities registrar must be a legal entity which has corporate capacity to act as securities registrar and has obtained the Registrar License. A Ukrainian securities registrar is permitted to maintain the register of an issuer of securities only based on the relevant agreement between them which model is approved by the Securities Commission.

11.6 Securities Traders

Licenses to conduct activities as a securities trader may be granted to companies (the charter capital of which is formed entirely of monetary funds) engaged exclusively in securities trading activities and banks. Securities traders may be licensed by the Securities Commission to perform any or all of the following activities in respect of securities: broker activities (transacting with securities in its own name or in the name of the client but at the expense of the client), dealer activities (transacting with securities in its own name and at its own expense for the purpose of subsequent resale), underwriting (placement (subscription or sale) of securities at the instruction, in the name and at the expense of the client) and securities management activities (transacting with securities for a fee in its own name but for the benefit and in the interests of a third person).

A securities trader is not permitted to hold a share in another securities trader which exceeds 10 per cent. In line with this requirement, the Securities Commission is entitled to refuse to issue the securities trader license to both the company which is 10 per cent owned by a securities trader and the company holding more than 10 per cent share in a securities trader.

11.7 Stock Exchanges

Securities are traded in Ukraine on several stock exchanges and on the over-the-counter electronic market trading system, the PFTS. While on the exchanges, the volumes

remain low and trading is limited to a handful of companies, trading activities are increasingly conducted through the PFTS. In 2006 the PFTS established a subsidiary - the PFTS Stock Exchange, which was licensed by the Securities Commission as a stock exchange in 2007.

At the current time, the secondary market for securities in Ukraine is highly volatile and its liquidity is inconsistent. The demand for any specific security varies greatly on any given day, as does the “spread” between the “bid” and “offer” prices for such a security.

11.8 State Securities

The Ministry of Finance of Ukraine, acting upon the authorization of the Cabinet of Ministers of Ukraine, may issue bonds to finance domestic or external state debt.

State bonds can be issued either in documentary (certificated) or non-documentary forms being evidenced, in relation to the latter, by book-entries at the NBU. State bonds can be either in registered or bearer form. Foreign entities and individuals are permitted to invest in domestic state bonds through Ukrainian custodians that are clients of the NBU as depository of state securities.

Since 2000, Ukraine has carried out a number of issuances of its foreign state bonds (known as Eurobonds, denominated in Euros and in US dollars) in the international capital markets. These bonds are currently being actively traded in the international capital markets.

12. EMPLOYMENT

12.1 Legislation

The *Code of Laws on Labor of Ukraine* (the *Labor Code*) dated 10 December 1971, as amended, is the principal, but not the sole, legislative act governing employment relationships in Ukraine. The Labor Code applies to all Ukrainian and foreign enterprises, institutions, and organizations, irrespective of their ownership form, type, or area of activity, and to all individuals employing labor in Ukraine.

Article 3 of the *Labor Code* provides that employment relationships between enterprises with foreign investment (as well as representative offices of foreign legal entities) and their employees on the territory of Ukraine are governed by the applicable

Ukrainian legislation. Thus, all employers (both foreign and Ukrainian) must comply with the provisions of the *Labor Code*, which apply regardless of whether the employee is a foreign or a Ukrainian national. The employment guarantees and the social security benefits granted to employees of both foreign companies and Ukrainian companies with foreign investment are the same as those granted to employees of other Ukrainian companies.

12.2 Labor Agreements and Labor Contracts

Conceptually, both local and foreign legal entities may engage individuals in Ukraine pursuant to either employment agreements (or labor contracts, where appropriate) concluded in accordance with the *Labor Code*, or so-called “civil law contracts” concluded in accordance with the *Civil Code* (e.g., an independent consultant agreement). In the latter case, the individual should obtain registration as an entrepreneur with the relevant local tax office prior to signing the civil law contract.

As a rule, employment agreements must be concluded for an unlimited period. However, in a few specified circumstances, the *Labor Code* allows for an employment agreement to be concluded for:

- A limited period agreed upon by the parties, or
- The period required to complete a given amount of work.

Article 23 of the *Labor Code* provides that an employment agreement may be concluded for a limited (i.e., definite) term only if the nature of the employee’s work or “the employee’s interests” make it impossible to establish an employment relationship for an unlimited term. However, this provision affects only employment agreements, and it is not applicable to labor contracts.

Ukrainian law distinguishes between a “labor (employment) agreement” and a “labor contract.” A “labor contract” is a specific form of a written “employment agreement”. Although it is usual for an employment agreement to be concluded in writing by the parties, the absence of a written employment agreement does not prevent an employment relationship from being established. In such a situation, i.e., where a written employment agreement does not exist, the parties are bound by an implied employment agreement, and the relevant provisions of the *Labor Code* strictly regulate the employment relationship.

In contrast, in a labor contract, the resolution of certain issues (including the term of the contract and any additional grounds for the termination of the employment relationship) may be determined by the parties and may deviate from the requirements of the *Labor Code*. Article 9 of the *Labor Code*, however, provides that the provisions of a labor contract may not deprive an employee of the rights and benefits, which are guaranteed by the labor laws of Ukraine. A labor contract may be used only if it is expressly authorized by law, *e.g.*, with the CEO (as opposed to all other employees) of a company, and it must always be executed in writing.

Pursuant to Article 21 of the *Labor Code*, the parties to a labor contract have discretionary powers to determine the term of such contract. Other provisions, which the parties may agree upon in a labor contract, include:

- the rights, obligations, and liabilities of the parties, including the terms of their material liability;
- the remuneration and organization of the employee's labor; and
- the grounds for termination, including early termination.

Thus, the principal advantage of a labor contract (as opposed to an employment agreement) is the discretion which the parties to a labor contract may exercise in respect of the terms and conditions of the employment and the grounds for termination, in contrast with the rigid requirements of the *Labor Code*. On the other hand, the principal disadvantage of a labor contract is that, unlike an employment agreement, it may be concluded only if it is expressly authorized by law.

12.3 Equal Job Opportunities

Article 2 of the *Labor Code* guarantees equal employment opportunities to all Ukrainian citizens, irrespective of their background, race, nationality, gender, language, social position, political or religious affiliation, profession, place of residence, or other factors.

Article 22 of the *Labor Code* forbids any unjustified denial of employment. Any direct or indirect deprivation of rights, or the granting of any direct or indirect advantages, within the term of employment on the grounds specified above, is unacceptable.

Article 25 of the *Labor Code* prohibits an employer, while concluding an employment agreement with a prospective employee, from requiring any additional documentation not specified in the *Labor Code*.

Similar, but more specific, provisions are found in Article 17 of the *Law "On Providing Equal Rights and Opportunities for Females and Males,"* which came into effect on 1 January 2006. The employers are prohibited from advertising job vacancies exclusively to males or females, or from requiring, while concluding an employment agreement with a prospective employee, any data regarding his/her private life or family planning. Collective agreements must contain certain measures on providing equal rights and opportunities for females and males and must specify the terms of fulfillment thereof.

12.4 Labor Books

Every employee working for more than five days in an enterprise must have his or her employment noted in his or her labor book. The labor book contains information about the employee and his or her past and current employment, as well as certain other information relating to the employee's work history. The labor book is vital in establishing the right of an employee to state-provided pension and other benefits. The *Labor Code* prohibits the entering of information on disciplinary punishments into an employee's labor book.

12.5 Probationary Period

An employer has the right to establish a three-month probationary period for a newly-hired employee. For unskilled and low skilled employees, the duration of the probationary period may not exceed one month. The imposition of a probationary period must be specifically provided for in the labor agreement or the labor contract, as well as in the order on the hiring of the employee issued by the employee's managing director. During the probationary period, the employer may dismiss the employee at any time if the employer determines that the employee does not meet the criteria established for the job position for which he/she was hired. However, there are restrictions on the dismissal of certain categories of women, which effectively makes probation for these employees senseless.

12.6 Minimum Wage

Wages may not be lower than the officially established minimum monthly salary under the applicable Ukrainian legislation. The amount of the minimum monthly salary is subject to frequent indexation. The minimum monthly salary is currently (starting from 1 January 2009) - UAH605 (approximately US\$71 or EUR60); starting from 1 April 2009 it will be UAH625 (approximately US\$74 or EUR62); starting from 1 July 2009 - 630 UAH (approximately US\$75 or EUR62); from 1 October 2009 - UAH650 (approximately US\$76 or EUR65); and with effect from 1 December 2009 it will be UAH669 (approximately US\$79 or EUR67). The amount of the officially established minimum monthly salary is periodically adjusted by the Verkhovna Rada (Parliament) to reflect increases in the cost of living.

12.7 Work Week

The regular work week is a maximum of 40 hours. Any time worked in excess of 40 hours per week is classified as overtime, and may only be required in extraordinary circumstances. The *Labor Code* limits the total amount of overtime in one year to 120 hours, and an employee may not be required to work more than four hours of overtime during two consecutive days. Minors, pregnant women, and women with children under the age of three may not be required to work any overtime. Overtime must be paid at the rate of 200% of the regular hourly rate. Depending on the nature of the work, it is possible to provide for variable working hours which allow the working of overtime by employees (without extra pay, but with extra vacation) within the maximum time limits described above.

12.8 Holidays and Vacations

There are ten official holidays in Ukraine. Employees may be required to work on an official holiday only in extraordinary circumstances. Employees in Ukraine are entitled to annual paid vacation of a minimum of 24 calendar days (to include weekends during the vacation period but excluding official holidays). Certain categories of employees are entitled to additional paid vacation.

12.9 Sick Leave

The system of sick leave in Ukraine requires an employee to submit a medical certificate only after his/her recovery, *i.e.*, on his/her first working day after the employee's absence. Sick leave compensation is covered by the Ukrainian State Social Security Fund, which is funded by the employer's contributions made as a percentage of its employees' aggregate salaries.

12.10 Maternity Leave

Paid maternity leave is required for a minimum of 70 calendar days prior to the birth, and for an additional 56 calendar days (or 70 calendar days in the event of multiple births) after the birth. The employee may take additional unpaid leave until the child reaches three years of age. During the entire period of paid and unpaid leave, the employee retains the right to return to her job, with the full leave period included in calculating the employee's length of service.

12.11 Termination of Employment and Job Protection

The procedure for terminating a labor agreement or a labor contract is governed by Article 36 through 45 of the *Labor Code*.

Pursuant to Article 40 of the *Labor Code*, an employer may terminate a labor agreement before its expiration only in a limited number of cases, including, but not limited to: staff redundancy; the employee's systematic failure to fulfill his or her employment duties; the employee's insufficient qualifications or deteriorating health condition; the employee's unjustified absence from the workplace for more than three consecutive hours during one working day; and a number of others. In contrast, Article 36 of the *Labor Code* provides that a labor contract (as opposed to a labor agreement) may also be terminated for any grounds specified in the contract.

Ukrainian law prohibits the dismissal of pregnant women, women who have children below the age of three (or, in special circumstances supported by medical evidence, below the age of six), and single mothers who have disabled children or children below the age of 14. Pursuant to Article 184 of the *Labor Code*, this rule does not apply in the event of the dissolution of an enterprise, or if the woman was on a fixed-term contract which expired. However, in these two cases, the employer is obliged to find alternative employment for employees who fall into this category.

Under the *Labor Code*, the dismissal of an employee, who is a trade union member, requires, in certain circumstances, the prior consent of his/her trade union. In such cases, the consent of the relevant trade union should be requested prior to the termination.

12.12 Collective Agreements

Articles 11 and 12 of the *Labor Code* require legal entities operating in Ukraine and employing labor to conclude collective agreements with the relevant bodies of the trade unions representing the interests of the employees or, if there are no such trade union bodies in existence, with the elected representatives of the employees who have been authorized by their fellow employees to sign and negotiate such collective agreement with the employer. Similar provisions are found in Articles 2 and 3 of the *Law of Ukraine “On Collective Agreements and Arrangements,”* which came into effect on 31 July 1993.

12.13 Remuneration in Foreign Currency

Pursuant to the Decree of the Cabinet of Ministers of Ukraine “*On the System of Currency Regulation and Currency Control*” dated 19 February 1995, as amended, all employers, both resident and non-resident, are required to remunerate employees who are deemed to be Ukrainian “residents” exclusively in Ukrainian currency.

12.14 Work Permits

Article 8 of the *Labor Code* provides for equal employment opportunities for foreign nationals working in Ukraine. This Article provides that the employment relationships of foreign nationals, who are working for Ukrainian companies or organizations, are governed by the law of the employing party (*i.e.*, Ukraine) and international agreements. In the event that an international agreement, to which Ukraine is a party, establishes rules different from those established by the applicable Ukrainian labor legislation, then the provisions of such international agreement will take precedence.

The Resolution of the Cabinet of Ministers of Ukraine “*On the Procedure for the Issuance of Work Permits to Foreign Citizens and Stateless Persons*” dated 1 November 1999 (the *Work Permit Resolution*), provides that, as a general rule, any foreign national intending to be employed in Ukraine must, before his/her commencement of such employment, apply for and obtain a work permit, unless otherwise provided by an applicable international agreement of Ukraine.

To date, Ukraine has not entered into any international agreement with any foreign country providing for the employment of nationals of such foreign country in Ukraine without a work permit. Although Ukraine is a party to certain international agreements on labor law issues with a number of CIS countries, none of these agreements allows a foreign national to work without a work permit in Ukraine.

Under the *Work Permit Resolution*, work permits are issued to foreign nationals by the relevant Ukrainian employment center, provided that: there are no qualified Ukrainian nationals in the relevant area who are suitable for the position in question; or there are significant grounds for the employment of such foreign nationals as specialists. It should be noted that the applicable Ukrainian legislation does not provide a definition of the term “significant grounds.” At the same time, a document outlining such grounds should be filed, together with other required documents, with the relevant employment center. Presumably, the education and expertise of the foreign national in the relevant area will be taken into account in evaluating whether or not to issue a work permit to such foreign national employee.

The *Work Permit Resolution* also covers foreign employees, who are sent by their foreign employer to Ukraine to carry out certain work (or to render certain services) pursuant to a contract concluded between a Ukrainian legal entity and such foreign employer (*i.e.*, on a secondment basis).

Work permits are usually issued for up to one year at a time. Work permits may be prolonged any number of times; in order to obtain such prolongations, the employer must apply to the relevant employment center one month prior to the expiration of the existing work permit. Use of foreign labor without an appropriate work permit may subject the employer to a fine in the amount of up to 20 times the statutory minimum monthly salary (approximately \$1423 at the current exchange rate) per each illegally hired foreign employee.

12.15 Personal Data

A draft law, consistent with the relevant legislation of the European Union, had been passed by the Parliament and then, after the Presidents comments, has been rejected. However, various existing statutes, including the Civil Code and the Labor Code, contain separate provisions that apply to protection of personal information and privacy.

13. INTELLECTUAL PROPERTY

13.1 General

Ukrainian intellectual property legislation affords protection, *inter alia*, to: copyright and neighboring rights; trademarks and service marks; trade names; inventions; utility models; industrial designs; trade secrets; plant and animal varieties; appellations of origin; layouts of integrated circuits; and technical improvements. In addition, implementing regulations have been adopted, and amendments have been made, with respect to the applicable civil, administrative, and criminal legislation, in order to allow the more effective and adequate enforcement of intellectual property rights in Ukraine.

The above mentioned intellectual property rights are, *inter alia*, regulated by the following laws of Ukraine:

- the *Civil Code of Ukraine* (the *Civil Code*);
- the *Criminal Code of Ukraine* (the *Criminal Code*);
- the *Customs Code of Ukraine* (the *Customs Code*);
- the *Civil Procedural Code of Ukraine* (the *Civil Procedural Code*);
- the *Commercial Procedural Code of Ukraine* (the *Commercial Procedural Code*);
- the *Administrative Infringements Code of Ukraine* (the *Administrative Infringements Code*);
- the *Law of Ukraine “On Copyright and Neighboring Rights”* (the *Copyright Law*) dated 23 December 1993;
- the *Law of Ukraine “On the Distribution of Copies of Audiovisual Works and Phonograms”* dated 7 December 2000;
- the *Law of Ukraine “On the Protection of Rights in Trademarks and Service Marks”* (the *Trademark Law*) dated 15 December 1993;
- the *Law of Ukraine “On the Protection of Rights in Inventions and Utility Models”* (the *Inventions Law*) dated 15 December 1993;

- the *Law of Ukraine “On the Protection of Rights in Industrial Designs”* (the *Industrial Designs Law*) dated 15 December 1993;
- the *Law of Ukraine “On the Protection of Rights in Appellations of Origin”* dated 17 June 1999;
- the *Law of Ukraine “On the Protection of Plant Varieties”* dated 21 April 1993;
- the *Law of Ukraine “On the Protection of Rights in the Layouts of Integrated Circuits”* dated 5 November 1997;
- the *Law of Ukraine “On the State Regulation of Activities in the Sphere of Transfer of Technology”* dated 14 September 2006;
- the *Law of Ukraine “On Information”* dated 2 October 1992; and
- the *Law of Ukraine “On Protection Against Unfair Competition”* dated 7 June 1996.

Ukraine has yet to implement specific legislation on the protection of the rights of performers or recording and broadcasting organizations, or on such novel matters as the registration and maintenance of Internet domain names or the protection of computer programs. On the other hand, under the *Treaty “On Partnership and Cooperation”* concluded between the European Union and Ukraine, Ukraine has agreed to implement certain EU directives in the area of intellectual property rights and to accede to a number of international agreements.

13.2 State Intellectual Property Department

The functions of the Ukrainian Patent and Trademark Office are vested in the State Intellectual Property Department of the Ministry of Education and Science of Ukraine (the Department). The Department is responsible for the following: carrying out the examination of industrial property applications; maintaining a system for the search and examination of industrial property applications; and granting patents and certificates on industrial property objects, as well as certificates with respect to copyright objects. The Department also certifies patent/trademark agents and maintains registries of patents, trademarks, and other intellectual property objects, as well as of certified patent agents.

13.3 International Conventions

Ukraine is a party, *inter alia*, to the following treaties in the field of intellectual property:

- the 1883 *Paris Convention for the Protection of Industrial Property* (the *Paris Convention*);
- the 1886 *Berne Convention for the Protection of Literary and Artistic Works*;
- the 1891 *Madrid Agreement Concerning the International Registration of Marks* (the *Madrid Agreement*);
- the 1952 *Universal Convention on Copyright*;
- the 1957 *Nice Agreement Concerning the International Classification of Goods and Services*;
- the 1961 *International Convention for the Protection of New Varieties of Plants*;
- the 1967 *Convention Establishing the World Intellectual Property Organization* (“*WIPO*”);
- the 1970 *Patent Cooperation Treaty*;
- the 1977 *Budapest Treaty on the International Recognition of Deposits of Microorganisms for the Purposes of Patent Protection*;
- the 1989 *Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks* (the *Madrid Protocol*); and
- the 1994 *Trademark Law Treaty*.

Ukraine has also signed a number of bilateral treaties on the protection of intellectual property and a number of multinational agreements on intellectual property matters, within the framework of the Commonwealth of Independent States. Moreover, Ukraine became the 152nd member of the World Trade Organization (“*WTO*”) on May 16, 2008. Thus, Ukraine is now subject to the requirements of the Agreement of the World Trade Organization on Trade Related Aspects of Intellectual Property Rights (the *TRIPS Agreement*).

13.4 Registration of Industrial Property Rights

Ukraine is a “first to file” rather than a “first to use” jurisdiction. As a result, in order to protect those industrial property rights, which are subject to mandatory registration in Ukraine, it is important to file a formal application with the Department for the registration of the relevant object of industrial property.

13.5 Trademark Protection

The current Ukrainian legislation affords protection to two types of trademarks and service marks:

- Marks registered with the Department pursuant to the *Trademark Law*; and
- Trademarks and trade names, which are not registered with the Department, but which enjoy protection pursuant to international agreements to which Ukraine is a party.

Trademarks pending registration enjoy temporary protection until the relevant registration certificates are granted. The Department issues registration certificates for a term of ten years from the filing date. At the request of the owner of the mark, and upon payment of the required extension fee, trademark registrations may be extended an indefinite number of times for additional ten-year periods.

As a member of the Madrid Union, Ukraine honors international trademark registrations extended to the territory of Ukraine, under both the *Madrid Agreement* and the *Madrid Protocol*.

The *Law of Ukraine “On the Introduction of Changes and Amendments to Legislative Acts of Ukraine on the Legal Protection of Intellectual Property”* (the *2003 IP Law*) dated 22 May 2003 introduced a number of important changes to Ukrainian intellectual property legislation. Among them is the inclusion of the provisions on the protection of “well-known trademarks”. Under the revised law, well-known trademarks are protected in Ukraine under the provisions of Article 6 of the *Paris Convention* and the amended *Trademark Law*, based on the recognition of a trademark as being “well-known” by the Chamber of Appeal of the Department or a court. A well-known trademark must be treated in the same way as if an application for its registration in Ukraine had been made on the date on which the Chamber of Appeal of the Department or the court made the decision that it was “well-known”.

It should be noted that in accordance with the *Civil Code*, a trademark assignment agreement is subject to obligatory registration with the Department, while the registration of a trademark license or sub-license agreement is at the discretion of the parties to such agreement.

The *2003 IP Law* has also brought significant changes to the opposition and cancellation procedures setting more severe sanctions for the violation of intellectual property rights, and extending the authority of the courts in applying measures directed at removing infringing products from all trade channels.

Under the *2003 IP Law*, any third person may file an opposition against a pending application to the examining authority if the trademark to be registered does not meet the requirements of registrability. Such opposition can be filed until a final decision on the respective application is taken by the examining authority. The results of the examination of the opposition must be reflected in the decision issued on the relevant application by the Department.

As a result of such revisions of the opposition procedure, the applicant now has an opportunity to file an opposition against a conflicting application, whereas, under the previous law, the applicant could only oppose a decision of the examining authority on the applicant's own application. However, the applicant now has less time to file an opposition against a decision of the examining authority on the applicant's own application, which is two months after the date of the receipt of the decision. Further more, the Chamber of Appeal of the Department will now consider oppositions within two months, instead of four months, as was previously the case. This term may be extended at the applicant's request, but by no longer than two months. The term for opposing a decision of the Chamber of Appeal of the Department before the court has also been reduced to two months, instead of six months, as was previously the case.

Ukrainian intellectual property legislation and the *2003 IP Law* in particular now extend the scope of infringement of trademark owner's rights to include the storage of goods bearing a registered trademark for the purpose of sale or the offering for sale, and/or the importation and exportation of goods bearing this sign. Thus, trademark owners now have the necessary tools to sue distributors and importers or exporters who violate their rights.

13.6 Patent Protection of Inventions and Utility Models

Ukraine follows the principle of universal novelty in granting patents. This means that an invention must be completely original worldwide within the relevant area of science and technology. Inventions are required to meet each of the following requirements, in order to be granted patent protection:

- novelty;
- non-obviousness; and
- utility.

The *Inventions Law* provides for a 12-month grace period for any public disclosure of information concerning an invention either by the inventor or by any third person who directly or indirectly obtains such information from the inventor.

A patent may be issued for an invention in the name of the inventor, his/her employer, or his/her legal successors. As a general rule, an inventor is entitled to patent his/her own invention, unless the *Inventions Law* provides otherwise. In all cases, the inventor is entitled to retain the rights of authorship in his/her invention indefinitely.

An invention made by an employee during the period of his/her employment and in relation to his/her working functions should be patented in the name of the employer, to the extent that such invention is made within the scope of the employee's working functions, pursuant to the direct instructions of the employer, or with the use of the expertise, know-how, trade secrets, and/or equipment of the employer. Employers and employees are authorized to provide different conditions for the patenting of inventions under the employment agreements concluded between them.

Patents are granted to inventions for 20 years from the priority date. Patents for inventions in the area of medicine and related areas may be further extended for a maximum period of five years. The term of patent validity is conditional upon the payment of annual maintenance fees.

13.7 Copyright

The *Copyright Law* protects published, as well as unpublished, works of authorship. The works may be of a scientific, literary, or artistic nature. They are protected regardless of their volume, purpose or genre, as well as their scientific, literary, or artistic value.

The *Copyright Law* does not require fixation as a mandatory condition for copyright protection. It grants protection to any work of authorship, regardless of the manner of its expression. As a result, a protected work may exist in oral and/or written form.

The *Copyright Law* protects works of science, literature and arts (copyright) and grants protection to rights of performers, phonograms producers and broadcasting organizations (neighboring rights). Copyright protection arises by virtue of the creation of a work of art without any registration requirements.

The *Copyright Law* also grants protection to separate parts of works of authorship, which may exist independently from the main work (including the original name of the work). For the purposes of the *Copyright Law*, such parts are deemed to be separate works of authorship. Additionally, the *Copyright Law* also affords special protection to compute software. Computer software, as an object of copyright protection, falls under the category of written literary works of authorship.

The *Copyright Law* distinguishes between, and provides protection for, both the proprietary and the non-proprietary rights of the author. The non-proprietary rights in copyright are protected indefinitely. The proprietary rights in copyright are granted for the author's lifetime, plus an additional 70-year period following his/her death.

13.8 Enforcement of Intellectual Property Rights

13.8.1 Criminal Liability

Under Ukrainian law, any action under the *Criminal Code*, as amended on 12 February 2006 by the *Law "On the Introduction of Changes to the Criminal Code with Regard to the Protection of Intellectual Property"* (the 2006 IP Criminal Amendments), may only be initiated against an individual before the common courts. Under the *Criminal Code*, intellectual property infringement is criminally punishable if it has caused substantial, extensive or very extensive damage to the rights owner.

Criminal sanctions are based on the non-taxable minimum monthly income (currently UAH17, *i.e.*, US\$2.2 or EUR1.7). However, the gradation of damage is calculated on the basis of the tax social privilege, which currently amounts to UAH302.50, *i.e.*, US\$39.2 or EUR29.6.

According to the footnote to Article 176 of the Criminal Code, which stipulates criminal liability for infringements of copyright and neighboring rights, the damage is:

- substantial if it amounts to more than 20 times the tax social privilege (currently UAH6050, *i.e.*, US\$785.7 or EUR592.5);
- extensive if it amounts to more than 200 times the tax social privilege (currently UAH60,500, *i.e.*, US\$7,857 or EUR5,925.5); and
- very extensive if it amounts to more than 1000 times the tax social privilege (currently UAH302,500, *i.e.*, US\$39,285.7 or EUR29,627.8).

The same gradation applies to industrial property (Article 177 of the *Criminal Code*) and to individualization devices, *i.e.*, trademarks, trade names and appellations of origin (Article 229 of the *Criminal Code*).

Under the *Criminal Code* as amended by the *2006 IP Criminal Amendments*, in the event that an infringement of intellectual property regulations causes **substantial damage**, then the following sanctions apply:

- a fine of 200 to 1,000 times the non-taxable minimum monthly income (*i.e.*, currently UAH3,400 - 17,000 or approximately US\$441.5 - US\$2,207.8 or EUR333 - EUR1,665); or correctional labor for a term of up to two years; or imprisonment for the same term together with seizure of all infringing products, equipment and materials intended for the manufacture of such products. The criminal(s) may be prohibited from occupying certain positions or engaging in certain activities at the discretion of the court.

If the above acts are committed repeatedly, by a group of people, are premeditated, or cause **extensive damage**, the sanctions are as follows:

- a fine of 1,000 to 2,000 times the non-taxable minimum monthly income (*i.e.*, currently UAH17,000 - UAH34,000 or approximately US\$2,207.8 - US\$4,415.6 or EUR1,665- EUR3,330); or correctional labor for a term of up to two years; or imprisonment for a term of up to five years,

together with seizure of all infringing products, equipment, and materials intended for the manufacture of such products. The criminal(s) may be prohibited from occupying certain positions or engaging in certain activities at the discretion of the court.

If the above acts are committed by an official abusing his position or by an organized group, or **particularly extensive damage**, the sanctions are as follows:

- a fine of 2,000 to 3,000 times the non-taxable minimum monthly income (*i.e.*, currently UAH34,000 - UAH51,000 or approximately US\$4,415.6 - US\$6,623.4 or EUR3,330- EUR4,995.1); or imprisonment for three to six years, together with seizure of all infringing products, equipment, and materials intended for the manufacture of such products. The criminal(s) may be prohibited from occupying certain positions or engaging in certain activities at the discretion of the court.

13.8.2 Customs Control

Further to the appropriate provisions of the *Customs Code*, the Cabinet of Ministers has developed a procedure for the registration of goods containing intellectual property objects by the owner of such intellectual property rights with the appropriate customs authorities, in accordance with its Resolution No. 622 “*On the Approval of the Procedure of Registration of Intellectual Property Rights Objects in the Customs Register*”, dated April 13, 2007, which replaced its former Resolution No. 412 “*On the Approval of the Regulation on the Procedure for the Registration and Shipment of Goods Containing Intellectual Property Objects Across the Customs Border of Ukraine*,” dated 28 April 2001.

In practice, in order to prevent the import or export of goods infringing its intellectual property rights, the owner of such intellectual property rights (or its representative) is entitled to file a petition with the State Customs Service (Customs) on registration of respective intellectual property rights objects with the Customs Register and seek the introduction of customs controls. This can be either a petition in relation to a particular shipment of goods, or a more general request for Customs to be alert for goods infringing the specified intellectual property rights, and to stop all such infringing goods from crossing the customs border of Ukraine.

Important changes to the *Customs Code* were introduced by the *Law on Amendments to the Customs Code of Ukraine (Regarding the Protection of Intellectual Property Rights during the Transfer of Goods via the Customs Border of Ukraine)* No. 359-V dated November 16, 2006 (the *2006 Customs IP Amendments*).

In fact, the *2006 Customs IP Amendments* are a restatement of the section of the *Customs Code* which deals with customs procedures relating to intellectual property with several important new provisions:

- customs officers are now authorized to block goods *ex officio* if they have grounds to believe that the goods may violate the intellectual property rights of an organization or individual. The owner of the intellectual property rights must then file a petition to Customs. If the rights owner files the petition in time the goods cannot be cleared through customs until a court resolves the issue. If the rights owner fails to file the petition in time, the goods are cleared through customs and admitted to the territory of Ukraine;
- in the latter case the rights owner has to provide a pledge or other equivalent guarantee covering the service fee of the customs warehouse and the damages which the person importing the goods may seek from Customs;
- the *Customs Code* now has an explicit provision that the procedures relating to the protection of intellectual property do not apply to goods sent via regular or express mail, transit goods, or goods imported to Ukraine by individuals for their private needs; and
- goods which are not cleared through customs on arrival in Ukraine may no longer be exported.

13.8.3 Intellectual Property Inspectors

Intellectual property inspectors were intended to be an important tool for the purposes of protecting the interests of right owners. Their existence was stipulated by Resolution of the Cabinet of Ministers of Ukraine No. 674 dated 17 May 2002 “*On the State Inspector in the Sphere of the Intellectual Property*”. However, in practice the functions of the state inspectors were limited to controlling sales of pirate cassettes, CDs and DVDs.

Resolution of the Cabinet of Ministers of Ukraine No. 711 dated 24 May 2006 is aimed at improving the current situation. It broadens the powers of the inspector and introduces a number of new methods of control:

- the inspector is now entitled to control not only the legitimacy of the production and distribution of IP objects, but also the legitimacy of use of such objects; and
- the inspector may now conduct scheduled and unscheduled inspections during which he is entitled to seize objects of intellectual property or any material data mediums which contain these objects for a term of up to 30 days.

The inspector has a right to access every original document confirming the legitimacy of use of the intellectual property object as well as the right to access the premises where the documents are placed or stored.

14. BANKRUPTCY ISSUES

14.1 General

Ukraine's first *Law on Bankruptcy* was adopted on 14 May 1992. On 30 June 1999, this Law was significantly amended and restated, and now exists as the *Law "On Re-establishing the Solvency of Debtors or the Recognition of Debtors' Bankruptcy"* (the *Bankruptcy Law*). The Bankruptcy Law came into effect on 1 January 2000.

The *Bankruptcy Law* and certain other Ukrainian legislation establish a number of fundamental principles, which must be borne in mind when doing deals with potential Ukrainian debtors (Debtors).

14.2 Debtors Exempt from Bankruptcy

Under the applicable Ukrainian legislation, the following Debtors have absolute or limited immunity from bankruptcy procedures:

- (1) state enterprises, which fall under the category "*kazenne pidpryyemstvo*;"
- (2) municipal enterprises, which were exempted from the application of the *Bankruptcy Law* by the relevant decision of the local self-governing body;

- (3) mining companies, in which the state holds at least 25 per cent of the shares, until 1 January 2010;
- (4) enterprises of the fuel and energy sector of Ukraine, which have been included into the register of enterprises undergoing a debt recovery procedure; and
- (5) former companies of the State Joint Stock Company “Ukrudprom”, which have been privatized in accordance with the Law of Ukraine “*On Specific Features of Privatisation of Enterprises of the State Joint Stock Company “Ukrudprom”*” dated 9 April 2004. A moratorium, effective until May 2009, is introduced, *inter alia*, on the institution of property administration procedure (an initial bankruptcy proceedings stage) against any of the former State Joint Stock Company “Ukrudprom” companies.

14.3 Specifics of Bankruptcy Proceedings for Certain Categories of Debtors

Bankruptcy proceedings for certain categories of Debtors have important specific features, as compared with the generally applicable bankruptcy regime. Such categories of Debtors include banks, insurance companies, securities traders, issuers or managing companies of the mortgage certificates, managers of the utility (construction financing) funds, managers of real property operation funds, city-forming (giant) enterprises, enterprises with dangerous production facilities (*e.g.*, chemical, coal, nuclear, or metal producers, which have been recognized as dangerous manufacturers by a decision of the Cabinet of Ministers of Ukraine), agricultural producers, farms, private (individual) entrepreneurs, missing debtors and the debtors liquidated by their owners. Specific features of the bankruptcy proceedings for such enterprises include special terms and conditions of the bankruptcy proceedings, a special list of priorities for the satisfaction of creditors’ claims, extension of the term of the bankruptcy hearings, special sale procedures, and restrictions on the attachment of the Debtor’s assets.

14.4 Initiation of Bankruptcy Proceedings

A bankruptcy petition may be brought to a Ukrainian commercial court (“*hospodarsky sud*”) at the place of the Debtor by any creditor (other than a fully-secured creditor), the Debtor itself, the State Tax Administration and certain other state agencies

acting as the creditors. A creditor may be any individual or business entity, which possesses an incontestable claim against the Debtor in an amount of not less than 300 individual monthly minimum salaries (starting from 1 January 2009 - UAH605, which amounts to US\$78.57; from 1 April 2009 - UAH625, which amounts to US\$81.17; from 1 July 2009 - UAH630, which amounts to US\$81.82; from 1 October 2009 - UAH650, which amounts to US\$84.42; from 1 December 2009 - UAH669, which amounts to US\$86.88), and whose claim was not satisfied within three months after the expiration of the established term for its initial satisfaction.

In principle, there are two ways in which a creditor may participate in bankruptcy proceedings: a creditor may either bring the bankruptcy petition itself or, if another party has already initiated the bankruptcy proceedings, it may join such proceedings by way of filing a participation petition.

Once the bankruptcy proceedings have been triggered, any creditor (except a fully-secured creditor) may within 1 month from the formal publication in one of the state official newspapers (“Golos Ukrainy” or “Uriadovy Kurier”) of the commencement of the bankruptcy proceedings against the Debtor, may submit a participation petition substantiating its claims against the Debtor. Claims submitted after the expiration of the period established for their submission will not be considered and their debts will be deemed extinguished.

A creditor, whose claims are fully-secured by collateral, is deemed to be a secured creditor, and as a matter of law, may not initiate bankruptcy proceedings. If a secured creditor considers that its claims are not fully-secured, or if the collateral has been lost/absent, then it can initiate bankruptcy proceedings/participate as a creditor with respect to the unsecured part of its claims or of all its claims.

14.5 Stages of Bankruptcy Proceedings

Under Article 4 of the Bankruptcy Law, the judicial bankruptcy proceedings in Ukraine include the following stages:

- (1) special proceedings for the disposal of the Debtor’s assets (the assets management proceedings);
- (2) amicable settlement;
- (3) solvency renewal (sanation) proceedings; and
- (4) liquidation proceedings.

Under the assets management proceedings, the Ukrainian commercial court will appoint a bankruptcy trustee (*rozporядnyk mayna*), who will supervise and approve the disposal of the Debtor's assets. The court may impose a moratorium on the discharge of any of the claims of the Debtor's creditors, which have arisen before the date of the initiation of the bankruptcy proceedings. This moratorium may last until the completion of the liquidation of the Debtor.

A bankruptcy trustee is an individual, who is registered as a private entrepreneur, and is licensed to act as the manager of the Debtor's assets, the solvency renewal trustee and the liquidator at the respective stage of the bankruptcy proceedings.

In the assets management proceedings, which may last about three months from the day of commencement of the bankruptcy proceedings, the bankruptcy trustee identifies the creditors, prepares the Register of the Creditors and the Amounts Claimed from the Debtor for further approval by the court, organizes the general meeting of the Debtor's creditors, which in turn, appoints the creditors' committee (the "Committee").

Upon election of the Committee, the committee is entitled to initiate the solvency renewal proceedings and/or the liquidation proceedings against the Debtor, to agree on the terms and conditions of the solvency renewal plan and to apply to the court for its approval, to provide the court with the candidates for the appointment of the solvency renewal trustee and the liquidator, as well as to apply for their replacement, to agree on the terms and conditions of the amicable agreement and to apply to the court for its approval, and to decide on other practical issues of the bankruptcy proceedings.

The creditors participating in the General Meeting of the Creditors or in the meetings of the Committee have the votes in the amount which is determined on the pro rata basis of their respective claims, and they make their decisions by the majority of the votes.

The solvency renewal proceedings may be introduced by the court as the next stage of the bankruptcy proceedings for the period of twelve months on the basis of the relevant request made by the Committee. The period of the solvency renewal proceedings may be extended by the court for the additional six months period upon request of the Committee, the solvency renewal trustee or the investors.

By the ruling on the introduction of the solvency renewal proceedings the court appoints the solvency renewal trustee, who will act as the head of the Debtor. For the period of the solvency renewal proceedings the other managing bodies of the Debtor are not able to exercise their statutory powers.

The solvency renewal trustee ought to prepare the solvency renewal plan and provide it to the Committee for approval within three months from the day of the court ruling on appointment of the trustee. If the Debtor is the state owned company with the share of the state not less than 50%, the solvency renewal plan is subject to approval by the state authority supervising the disposal of this property.

The solvency renewal plan may include corporate restructuring of the Debtor, sale of its assets, recovery of the receivables, debt restructuring, restructuring of assets, sale or cancellation of the debt and the other means of renewal of the Debtor's solvency.

Upon approval of the solvency renewal plan by the Committee, the solvency renewal trustee ought to submit it to the court for the consideration and the final approval. If the solvency renewal trustee fails to provide the solvency renewal plan to the court for approval within six months from the day of commencement of the solvency renewal proceedings, the court may recognize the Debtor as the bankrupt and introduce the liquidation proceedings as the final stage of the bankruptcy proceedings.

The court may also introduce the liquidation proceedings with the relevant ruling, if the Debtor has failed to restore its solvency in accordance with the solvency renewal plan, on the basis of the Committee's request.

It should be noted that the Committee may ask the court for introduction of the liquidation proceedings after the assets management proceedings omitting the solvency renewal proceedings.

By the ruling on the introduction of the liquidation proceedings the court appoints the liquidator, who will act as the head of the Debtor. For the period of the liquidation proceedings the other managing bodies of the Debtor are not able to exercise their statutory powers.

In the liquidation proceedings the liquidator ought to determine the liquidation value of the Debtor's assets, to sell these assets and to pay off the debt to the creditors in accordance with the priority list for the satisfaction of the creditors' claims as established by the law.

Upon completion of the liquidation proceedings, the liquidator prepares the report, as well as the liquidation balance sheet of the Debtor, and provides them to the court for the consideration and approval. Based on the results of the liquidation proceedings the court may approve the report and the liquidation balance sheet of the Debtor, dissolve the debtor and terminate the bankruptcy proceedings.

According to the Bankruptcy Law, the term of liquidation proceedings amounts to twelve months from the day of commencement, but it may be extended by the court for the additional six months period.

At any stage of the bankruptcy proceedings the creditors and the Debtor may enter into an amicable agreement with a view to restructuring and/or cancellation of the debt. The first priority debt, except the debt secured by a pledge (mortgage), cannot be cancelled or restructured, and the debt arising from the mandatory pension and social security contributions cannot be cancelled by the amicable agreement.

The parties of the amicable agreement may agree on the transfer of the debt to third parties or the transfer of the Debtor's assets or the corporate rights in the Debtor to its creditors in exchange for the cancellation of the debt.

The amicable agreement is subject to approval by the court and becomes effective from the day of the relevant court decision. By the ruling on approval of the amicable agreement the court terminates the bankruptcy proceedings.

It should be noted that the amicable agreement may be invalidated by the court on the legal grounds provided by the Civil Law of Ukraine. In case of invalidation of the amicable agreement, the court may reinstate the bankruptcy proceedings against the Debtor.

The creditors may apply to the court for the termination of the amicable agreement in case of non-performance of this agreement by the Debtor with regard to not less than one third of the total amount of the debt. The termination of the amicable agreement for the specific creditor or creditors will not result in the termination of the agreement for the rest of the creditors, and reinstatement of the bankruptcy proceedings.

14.6 Priority of Claims

Amounts received from the sale of the bankrupt's assets will be used to pay the claims of its creditors and others in the following order:

(1) *Claims of the First Priority:*

- claims of creditors secured by a pledge (mortgage) of the bankrupt's assets (up to the value of the relevant collateral);
- the payment of termination allowance to the bankrupt's employees, and repayment of any loan received by the bankrupt for the purpose of the payment of such termination allowances;
- claims of the Individual Deposit Guarantee Fund for the amounts paid by the Fund to the creditors of the insolvent bank;
- claims of the creditors under insurance agreements; and
- expenditures associated with the conduct of the bankruptcy proceedings and the expenses of the liquidators;

(2) *Claims of the Second Priority:*

- liabilities to the bankrupt's employees (other than those included as the first and fifth priority claims listed hereby);
- liabilities arising from the infliction of harm to the life or health of an individual, by means of capitalization of the respective payments, *inter alia*, to the Employment Injuries and Occupational Diseases Insurance Social Fund regarding the employees, insured in this fund;
- liabilities relating to the mandatory pension and social security contributions; and
- claims of individuals arising from their property or funds having been deposited with the bankrupt (if the bankrupt is a trust company ("*dovirche tovarystvo*"), a bank or other "credit-financial institution," or any other business entity attracting the assets of individual depositors);

(3) *Claims of the Third Priority:*

- local and state taxes and other mandatory payments; and
- claims of the State Reserve Fund;

(4) *Claims of the Fourth Priority:*

claims of creditors not secured by a pledge (mortgage) of the bankrupt's assets (other than the claims of the fifth priority and the sixth priority), including claims which have arisen during the assets management proceedings or the solvency renewal proceedings;

(5) *Claims of the Fifth Priority:*

claims for the "repayment of the bankrupt's employees' contributions to the charter fund" of the bankrupt; and

(6) *Claims of the Sixth Priority:*

"all other claims."

Claims with a higher priority must be satisfied in full before any lower ranking claims may be paid. In the event that the cash proceeds from the sale of the property are insufficient to satisfy all claims with equal priority, then all claims with the same priority are to be satisfied pro-rata. Claims not paid due to the insufficiency of funds shall be deemed extinguished. Any assets remaining after the satisfaction of the claims of the creditors and the employees are to be distributed to the "owners" of the Debtor (*i.e.*, its shareholders or holders of its participatory interests), if the court decides to dissolve the Debtor. The court is not able to dissolve the Debtor, if the remaining assets of the Debtor exceed the amount of assets which is required by the law for the establishment of the relevant legal entity.

Note that Ukrainian legislation establishes a special order of priority of satisfaction of creditors' claims for certain categories of debtors (including banks).

14.7 Criminal Liability

Under the *Criminal Code of Ukraine*:

- (1) an intentional concealment by an individual-participant/shareholder or by an owner of a subject of entrepreneurial activity, as well as by an

- officer of a subject of entrepreneurial activity, of the sustainable financial insolvency of such subject by means of the filing of untrue information, if such activity has caused substantial material damages (US\$1,103.89) to a creditor or the state, is punishable with a monetary penalty from 2,000 to 3,000 monthly non-taxable incomes of individuals (currently UAH34,000 - 51,000, which amounts approximately to US\$4,415.58 - 6,623.38), or with imprisonment for a term of up to 2 years with the deprivation of the right to occupy certain positions or to conduct certain activities for a period up to 3 years;
- (2) the willful making of an untrue statement (verbal or in writing) by a company's official about its financial incapability to meet the claims of its creditors and its obligations to make budget contributions, if such activity has caused substantial material damages (US\$1,103.89) to a creditor or the state, is punishable with a monetary penalty from 750 to 2,000 monthly non-taxable incomes of individuals (currently UAH12,750 - 34,000, which amounts approximately to US\$1,655.84 - 4,415.58), or with imprisonment for a term of up to 3 years;
- (3) "letting bankruptcy," *i.e.*, the intentional activity, with mercantile motives or other personal interests, or in the interest of third parties, of the owner or corporate official of an enterprise, which has caused the sustainable financial incapability of such enterprise, if such activity has caused substantial material damages (US\$1,103.89), is punishable with a monetary penalty from 500 to 800 monthly non-taxable incomes of individuals (currently UAH8,500 - 13,600, which amounts approximately to US\$1,103.89 - 1,766.23), (with the deprivation of the right to conduct certain activities for a period of up to 3 years); and
- (4) an intentional concealment of property or information about the property, or about transfers of the property, of an insolvent company by its owners or corporate officials, which resulted in significant damages (US\$1,103.89), is punishable with a monetary penalty from 100 to 500 monthly non-taxable incomes of individuals (currently UAH1,700 - 8,500, which amounts approximately to US\$220.78 - 1,103.89), or with imprisonment for a term of up to 3 months with the deprivation of the right to occupy certain positions or to conduct certain activities for a period of up to 3 years.

15. CONSUMER PROTECTION AND PRODUCT LIABILITY

15.1 General

The principal legislative act in Ukraine in the area of consumer protection and product liability is the *Law of Ukraine “On the Protection of Consumer Rights”* (the *Consumer Rights Law*), dated 12 May 1991, amended on 1 December 2005. The core principles of the Consumer Rights Law have been further affirmed by the new *Civil Code* and the new *Commercial Code* effective from 1 January 2004.

Under the *Consumer Rights Law*, manufacturers of goods, providers of services, and merchants have an obligation to furnish consumers with goods and/or services, which comply with the established quality standards, the terms of the agreement with the consumer, and the information about the goods/services, which is publicized by the manufacturer/provider/merchant.

Pursuant to the *Consumer Rights Law*, manufacturers of goods must ensure the safe use of the goods for the duration of the service life period established by law or by the agreement with the consumer or, in the absence of any relevant provisions, for a period of ten years.

Furthermore, the *Consumer Rights Law* requires that a manufacturer of goods must ensure the availability of maintenance services for the goods during the relevant periods of time. It also sets forth the obligations of manufacturers (merchants) towards consumers with respect to the replacement of defective goods and warranty repairs.

15.2 Liability for Damage Caused by Defective Goods (Services)

Under the applicable Ukrainian legislation, damages which are incurred by a consumer with regard to his/her life, health, or property by a manufacturer’s (provider’s) goods (services) must be indemnified in full by the person who inflicted the damages. The right to claim damages, including “moral damages,” a concept similar to “emotional pain and suffering” in Western jurisdictions, is vested in every damaged consumer, regardless of whether such consumer had concluded a contract with the manufacturer

(provider, merchant). This right is deemed valid for the duration of the service life of the specific product or, if the service life of the product is unidentified, for ten years from the date of the manufacture of the goods (production of the works, rendering of services). The only exceptions to the above rule are cases where damages were inflicted due to the fault of the consumer or were caused by force-majeure.

15.3 Liability for Violation of Consumer Rights

The applicable Ukrainian legislation provides for civil, administrative, and criminal liability for the violation of a consumer's rights. The scope of penalties envisioned by the *Consumer Rights Law* for the violation of consumer rights ranges from 1% to 500% of the cost of the goods manufactured or sold, or the services rendered. The *Consumer Rights Law* also provides a fine for the violation of consumer rights in the amount of 2 to 100 non-taxable minimum monthly incomes (currently UAH17), *i.e.*, UAH34 up to UAH1700 (approximately US\$4 - US\$220 or EUR3 - EUR172). Meanwhile, the Code of Ukraine on Administrative Offenses provides a fine for the relevant offenses in the amount of 1 to 18 non-taxable minimum monthly incomes, *i.e.*, UAH17 - UAH306 (approximately US\$2 - US\$39 or EUR2 - EUR36). At the same time, under the Criminal Code of Ukraine, the maximum penalties for criminal offenses in the area of consumer protection are 200 non-taxable minimum monthly incomes, *i.e.*, currently UAH3,400 (approximately US\$442 or EUR344) or two years of correctional labor.

15.4 Control Over the Quality of Food Products

The *Law of Ukraine "On the Quality and Safety of Food Products and Food Raw Materials"* (the *Law*), dated 23 December 1997, sets forth for producers, suppliers, and sellers of food products requirements for the development, production, import, supply, storage, transportation, sale, usage, consumption, and utilization of food products and raw materials.

On 24 October 2002, the Verkhovna Rada (Parliament) introduced changes to the *Law* (the *Amended Law*), which modified the above requirements. The *Amended Law* no longer applies to tobacco products or to food products containing genetically modified components.

15.4.1 Quality Assurance

Under the *Amended Law*, all food products (except food products produced for personal consumption), un-processed food materials, and related materials may not be produced in or imported into Ukraine, or supplied for sale, sold, or otherwise used, before their quality and safety have been proven by means of the appropriate documents. These documents are:

- a declaration of conformity issued by the producer for every consignment of food products, food raw materials, and related materials; or, alternatively,
- a certificate of compliance or a certificate of acceptance of a foreign certificate issued by the State Center for Standardization, Metrology, and Certification, for food products produced in Ukraine or outside Ukraine and intended for sale on the domestic market or for domestically-produced food products to be exported from Ukraine;
- a positive conclusion of the State Sanitary-Epidemiological Examination Body (the SSEE), a state registration certificate, or a hygiene certificate;
- veterinary documents for food products of animal origin; and
- a certificate of quality and a quarantine permit for grain, fruit, and vegetables.

Prior to the enactment of the *Amended Law*, all food products had been subject to mandatory certification with authorities accredited by the State Committee on Standardization, Metrology, and Certification, but the *Amended Law* takes a more flexible approach. The conformity of food products with the applicable quality requirements may now be ascertained either by a declaration of compliance, a certificate of compliance, or a certificate of acceptance of a foreign certificate.

15.4.2 State Products Examination

Under the *Law of Ukraine “On Ensuring the Sanitary and Epidemiological Well-Being of the Population,”* dated 24 February 1994, all food products are subject to the following regular mandatory examinations carried out by the State Sanitary and Epidemiological Service:

- (i) quarterly examinations, including the sampling and subsequent testing of products for the microbiological index;

- (ii) semi-annual examinations, including the sampling and subsequent testing of the products for toxic elements, pesticides, and radionuclide; and
- (iii) annual examinations of those products, with respect to which certificates of compliance of the product were issued. Such annual examinations are concluded in the authorized laboratories of the authority, which issued the certificates of compliance of the product.

In addition, under the *Law of Ukraine On the Quality and Safety of Food Products and Food Raw Materials*, dated 23 December 1997 all producers of food products must obtain a sanitary exploitation permit for each of its food production units. This permit is issued to legal entities producing/trading food products by the relevant main sanitary doctor.

15.4.3 State Registration of Food Products

Under the *Amended Law*, all special and new food products are subject to mandatory state registration. Special food products - dietetic, medicinal, and illness-preventing food products, biologically active food supplements, and food products designated for children, sportsmen, *etc.* - must be entered into the State Register of Special Food Products. New food products - those food products developed or imported into Ukraine for the first time, or produced using new technologies or components - must be recorded in the Register of Conclusions of the SSEE. Producers and/or suppliers must obtain the conclusion of the SSEE before introducing into the market new food products, food raw materials, or related materials. The procedure for the state registration of food products and the amount of the payment for such registration was established by the Resolution of the Cabinet of Ministers, dated 26 July 2006.

15.4.4 Labeling Requirements

The *Amended Law* establishes additional requirements for the labeling of food products. Such labeling must be in Ukrainian and convey the required information in a manner intelligible for consumers. Under the *Amended Law*, such labeling should indicate all components, including the presence of genetically modified components or additives, if any, as well as the country of origin of imported products packaged in Ukraine. The labeling of a food product must also caution certain groups of consumers (such as children, pregnant women, the elderly, sportsmen, and those suffering from illnesses) of the potential adverse effects of the product.

The *Amended Law* provides that the description of special symbols used in labeling and the definition of a particular food product so as to cause it to belong to a certain category of special food products, such as dietetic or those designated for children, must be carried out in the manner provided by the Cabinet of Ministers.

15.4.5 Hazard Analysis and Critical Control Point System

Under the *Amended Law*, subjects of entrepreneurial activity (defined as individuals and legal entities which engage in the development, production, transportation, storage, import, sale, usage, and/or utilization of food products and food raw materials), are obliged to take measures with respect to the stage-by-stage implementation of the international system of food products quality assurance “Hazard Analysis and Critical Control Point” (the HACCP) at their respective enterprises. The terms and conditions of such stage-by-stage implementation will be governed by the Ukrainian legislation to be adopted in relation to particular categories of food products.

16. INDUSTRY REGULATION

16.1 Banking

16.1.1 The Ukrainian Banking Sector

The Ukrainian banking sector has a two-tier structure made up of the National bank of Ukraine (the “NBU”) and commercial banks of various types and forms of ownership. The banks act in accordance with the *Constitution of Ukraine*, the *Civil Code of Ukraine*; the *Commercial Code of Ukraine*, the *Law of Ukraine “On the National Bank of Ukraine”* dated 20 May 1999 (the *National Bank Law*), the *Law of Ukraine “On Banks and Banking Activity”* dated 7 December 2000 (the *Banking Law*), and the *Law of Ukraine “On Financial Services and the State Regulation of the Markets of Financial Services”* dated 12 July 2001, Ukrainian legislation on joint stock companies and other business entities, as well as the NBU regulations and their respective constituent documents.

16.1.2 The Role of the National Bank of Ukraine and Monetary Policy

The NBU is the central bank of Ukraine. Established in 1991 and governed by the *Constitution of Ukraine* and the *National Bank Law*, the NBU is a specialized state institution with the principal objective of ensuring the external and internal stability of the national currency and possessing broad regulatory and supervisory functions in the banking sector. The NBU is empowered to develop and conduct monetary policy, organize banking settlements and the foreign exchange system, ensure stability of the monetary, financial and banking systems of Ukraine, and protect the interests of commercial bank depositors.

The principal governing bodies of the NBU are the Council and the Board. The Council, the highest governing body of the NBU, consists of 15 members, seven of whom are appointed by Parliament and seven of whom are appointed by the President. The Chairman of the NBU (nominated by the President and appointed by Parliament for a five-year term) acts *ex officio* as the fifteenth member of the Council. The Council is charged, in particular, with developing the principles of Ukraine's monetary policy and has the right to veto the Board's decisions if they contravene such principles. The Board, which is comprised of the Chairman, his or her deputies and other members of the Board, is responsible for implementing Ukraine's monetary and other policies in the banking sector and generally managing the activity of the NBU.

The NBU is charged with implementing monetary policy. Currently, the NBU implements monetary policy through instruments such as mandatory reserve requirements for banks, interest rates, refinancing of commercial banks, deposit operations, and reverse repo operations. The main channel for the release of funds into circulation is the foreign currency market. With signs of the economy beginning to stabilize after the financial crisis in 1998 and the ensuing economic instability in the region, the NBU reduced the discount rate from 45% at the beginning of 2000 to 12.5% by the end of 2001, and 7% in December 2002. Since then, the NBU has gradually increased the discount rate to 9.5% (effective as of 10 August 2005) and then decreased to 8.5% (effective as of 10 June 2006), and then decreased to 8% (effective as of 1 June 2007). As of 1 January 2008, due to macroeconomic and monetary indicators, the discount rate was raised to 10% and as of 30 April 2008 it was raised again to 12%.

Since 1 March 2004, the NBU has been separately determining interest rates on overnight unsecured loans (10.5% as of 1 November 2006), increased to 25% (effective as of 25 December 2008) and overnight loans secured by state securities (9.5% as of 1 November 2006), increased to 22% (effective as of 25 December 2008) and setting separate interest rates on deposits from banks placed with the NBU for various terms. For example, as of 1 November 2006, the interest rates for 14 day and 30 day deposits were 0.5% and 1% respectively. Since 2007 the NBU ceased to set the latter interest and started determining interest rates on depositary certificates. For example, as of 31 December 2008, the interest rates for 5 day and 14 day certificates were 12% and 25% respectively.

The main goal of the NBU's monetary policy in 2009, as declared by the NBU, was to maintain the stability of hryvnia in order to achieve the main strategic goals, such as sustainment of stable and balanced economic growth, raise of employment, real incomes and life standards in Ukraine.

16.1.3 Commercial Banks

The current Ukrainian legislation distinguishes between “universal” (general) commercial banks and “specialized” commercial banks, with the latter including savings, investment, mortgage, and settlement (clearing) banks.

On 4 October 2006, new amendments to the *Banking Law* came into effect, whereby the minimum statutory capital requirement for all new banks at the moment of registration is established at EUR10 million. This rule will apply to the banks that are established after the law came into effect. In addition, the law provides that banks should be established only in the form of an open joint stock company or cooperative bank (*i.e.*, it will not be permitted to establish banks in the form of a closed joint stock company or limited liability company). The banks established as closed joint stock companies or limited liability companies are obliged to be reorganized into open joint stock companies within three (3) years after the entry into force of the amendments to the *Banking Law*. However, the NBU suggested that all banks, which did not yet comply with this regulatory requirement, should be reorganized into public joint stock companies according to the new law “*On Joint Stock Companies*”, which would become effective after 29 April 2009.

The regulatory capital (*i.e.*, the sum of principal (core) capital and additional capital) cannot be less than the minimum statutory capital requirement and the minimum regulatory capital requirements established by the NBU. From 1 May 2004,

the NBU calculates the minimum regulatory capital requirement in an amount equivalent to the Euro amounts set forth by the Banking Regulation Instruction. As of 1 January 2007, the minimum regulatory capital requirements for newly established banks (those that have been in existence for less than one year) are UAH36.1 million (EUR5 million) for nationwide banks, UAH21.7 million (EUR3 million) for regional banks and UAH7.2 million (EUR1 million) for cooperative banks. The requirements for “existing” banks (*i.e.*, which existed before January 2006) are UAH59.5 million (EUR8 million) for national wide banks, UAH37.2 million (EUR5 million) for regional banks and UAH11.2 million (EUR1.5 million) for cooperative banks. Since 3 October 2008 this regulatory capital requirements schedule is no longer effective. As of 11 October 2008, the minimum regulatory capital requirement for banks is UAH74.1 million (EUR10 million). Banks whose regulatory capital by 10 October 2008 was less than EUR10 million must increase it accordingly: (i) banks with more than EUR8 million regulatory capital must increase it to EUR9 million by 1 July 2009 and then must increase it further to EUR10 million by 1 July 2010; (ii) banks with less than EUR8 million regulatory capital must increase it to EUR7 million by 1 January 2010 and then must increase it further to EUR8,5 million by 1 January 2011 and then finally must increase it to EUR10 million by 1 January 2012.

16.1.4 Banks with Foreign Participation and Branches of Foreign Banks

A foreign bank may establish its presence in Ukraine through a representative office (with no right to conduct banking business) and/or a Ukrainian commercial subsidiary bank. On 16 November 2006, Verkhovna Rada passed the *Law of Ukraine “On Amendments to Law of Ukraine “On Banks and Banking Activity”* (the *Amended Banking Law*) relating to the possibility for foreign banks to open branches in Ukraine. As of 16 May 2008, the *Amended Banking Law* entered into effect.

Foreign participation in a Ukrainian commercial bank is not limited (albeit previously Ukrainian legislation established a threshold of 35% of the charter capital); however the prior permission of the NBU is required for the establishment of a commercial bank with foreign participation, or for the “conversion” of an existing commercial bank into a bank with foreign participation. Notwithstanding that the applicable legislation does not limit the allowed participation in the charter capital of a commercial bank to any maximum threshold (unlike the previously established threshold of 35% of the charter capital), the permission of the NBU is still required for a Ukrainian

or foreign legal entity, or for an individual, to directly or indirectly own, hold, or control various thresholds of a commercial bank's charter capital or voting rights in its governing body, *i.e.*, 10% or more, 25% or more, 50% or more, or 75% or more. At each threshold, a new permission of the NBU must be obtained.

16.1.5 Banking Operations

A commercial bank carries out its banking activities pursuant to a banking license issued by the NBU. A banking license permits a bank to: attract funds (deposits) from legal entities and individuals; open, maintain, and carry out transactions with current accounts of clients and correspondent banks; and place its attracted funds in its own name, on its own terms, and at its own risk. Only a duly licensed commercial bank may carry out all of the foregoing, which are referred to by the applicable legislation as "exclusive banking operations."

In addition, a banking license will, by default, enable a bank to conduct the following transactions, without any need to obtain a separate NBU permit:

- transactions with "currency valuables" (except those transactions for which an individual license of the NBU is required in accordance with applicable Ukrainian currency regulations);
- the issuance of securities;
- the sale-purchase of securities pursuant to a client's authorization;
- transactions with securities (including underwriting) conducted in the bank's own name;
- the issuance of monetary guarantees and third party suretyships;
- factoring;
- leasing;
- the provision of safekeeping services (but not including the custody of securities);
- the issuance, purchase-sale and servicing of checks, promissory notes, and other negotiable payment instruments;
- the issuance of banking payment cards and the conducting of operations with such cards; and

- the rendering of consulting and information services related to banking operations.

A duly licensed commercial bank will also be permitted to carry out the following transactions, but only subject to a separate NBU permit:

- investment in other legal entities or in shares issued by other legal entities;
- the issuance, placement, organization of circulation and redemption of monetary lotteries;
- the transportation of currency valuables and cash collection;
- transacting on a client's or on the bank's own behalf with money market instruments, foreign exchange and interest based instruments, financial futures and options;
- conducting trust operations with funds and securities of legal entities and individuals; and
- conducting securities registration and depository activities.

16.1.6 Loan Provisioning

Banks must meet mandatory requirements to cover net loan risks and review those provisions on a monthly basis. Some loan products, such as so-called “budget loans”, real-estate backed leasing transactions, subordinated loans, uncommitted off-balance sheet credit lines and funds in foreign currency transferred to the NBU under direct repo transactions, do not require any provisions. With effect from 10 April 2007, Ukrainian legislation sets forth separate provisioning requirements for loans in the national or in the foreign currencies as well as for certain consumer loans.

Other loans are classified into five major categories to which, with effect from 28 December 2008, the following provisioning requirements are applied: standard loans (1% provisioning requirement, or 50% for loans in foreign currency to borrowers, who have no foreign currency earnings), loans on watch list (5% or 100% for loans in foreign currency to borrowers, who have no foreign currency earnings) substandard loans (20% or 100% for loans in foreign currency to borrowers, who have no foreign currency earnings), doubtful loans (50% or 100% for loans in foreign currency to borrowers, who have no foreign currency earnings) and bad loans (100%). Provisioning requirements applicable to consumer loans are: 2 per cent for standard loans, 10 per cent for loans on watch, 40 per cent for substandard loans, 80 per cent for doubtful loans and 100 per cent for bad loans.

16.1.7 Competition

As of 1 January 2009, 197 commercial banks were registered in Ukraine, out of which 184 banks were granted licenses by the NBU to perform banking transactions. As of 1 December 2008, the total net assets of all commercial banks in Ukraine amounted to UAH850.6 billion (approximately US\$110.5 billion/EUR83.4 billion), their credit portfolio (including interbank loans) amounted to UAH728.0 billion (approximately US\$94.5 billion/EUR71.4 billion), including UAH428.5 billion of corporate loans and UAH249.6 billion of retail loans; their balance capital amounted to UAH100.3 billion (approximately US\$13 billion/EUR10.2 billion), corporate deposits and current accounts amounted to UAH132.4 billion (approximately US\$17.2 billion/EUR13.5 billion) and retail deposits and current accounts amounted to UAH204.2 billion (approximately US\$26.6 billion/EUR20.8 billion).

According to the NBU, during the thirteen months ended 1 October 2008, the statutory capital of Ukrainian banks having licenses to perform banking operations increased by 71.1%, amounting to UAH60.3 billion as at 1 October 2008, (compared to a 37.4 per cent. increase in statutory capital during previous eight months in 2007). During the nine months ended 1 October 2008, the total assets and total liabilities of Ukrainian banks having licenses to perform banking operations increased by 26% and 25.2%, respectively (compared to increases of 76.2 per cent. and 77.4 per cent., respectively, in 2007). The regulatory capital of Ukrainian banks increased by 50.1% during the eleven months ended 1 December 2008, amounting to UAH107.4 billion (the NBU data does not specify whether this figure refers to all banks or only those licensed to perform banking transactions).

In 2009, commercial banks operating in Ukraine are divided by the NBU into four groups according to their regulatory capital and size of assets as at 30 December 2008. In particular, 18 major banks with total assets of more than UAH14.0 billion were classified in the first group. 20 banks with total assets ranging from UAH4 billion to UAH14.0 billion were classified in the second group, 24 banks with total assets ranging from UAH1.5 billion to UAH4 billion were classified in the third group and 120 banks with total assets of less than UAH1.5 billion were classified in the fourth group. As at 1 October 2008, two of the largest banks in Ukraine, namely the Ukrainian Export-Import Bank (Ukreximbank) and the State Savings Bank of Ukraine (Oschadsbank), are state-owned and have approximately 10.6 per cent of the Ukrainian banking sector's total assets. As of 1 December 2008, 50 banks in Ukraine had some foreign capital of which 18 were fully foreign owned. Banks with

foreign capital comprise over 46% of the total statutory capital of banks in Ukraine, as at 1 October 2008. According to NBU information, there are no plans to limit the amount of foreign capital in the Ukrainian banking sector.

No single bank currently has a dominant position in any banking business in Ukraine. The level of concentration in the Ukrainian banking industry (measured using the Herfindahl-Hirschman index) is similar to the levels in the United Kingdom or France.

Ukraine was badly affected by the world financial crisis. The NBU has restricted foreign currency lending in the fourth quarter of 2008 and introduced tighter foreign currency loan provisioning requirements, which would apparently lead to decline in foreign currency lending transactions in 2009. The average annual lending rate of Ukrainian commercial banks as at 29 January 2009 was 28.6 per cent for loans in hryvnia and 11.6 per cent for loans in foreign currency, according to NBU statistics.

16.1.8 Consumer Protection

In 2007 the NBU adopted regulations on mandatory disclosure to individual customers of the essential information relating to consumer loans by Ukrainian commercial banks. According to the NBU Regulation *“Rules Governing Disclosure of Consumer Information by Ukrainian Banks, Related to Consumer Loans Terms and Over all Cost of Credit”*, approved by NBU Resolution No.168 dated 10 May 2007, all banks are required to disclose the effective rate of interest under loans granted to individual consumers in the text of the loan agreement. Also, banks are required to obtain a written confirmation from the consumer stating that he/she has received all the information from the bank relating to the terms and conditions of the loan and, specifically, the costs of the loan to the consumer.

Additionally, on 12 December 2008 Parliament passed the Law of Ukraine No 661/VI *“On Prohibition for Banks to Change the Conditions of Loan and Deposit Agreements Unilaterally”*, whereby the banks now are not allowed to amend and change unilaterally the essential conditions of loan agreements and deposit agreements concluded with their corporate and individual clients. If the agreement contains such clause, then this clause is regarded as void *ab initio*. This measure was introduced by Verkhovna Rada in order to calm down the reaction of the banks to the world financial crises. However, it is unlikely to have a significant impact on the market, because it applies only to those agreements, which will be concluded after new law became effective.

16.2 Insurance

16.2.1 Regulatory Framework

Insurance services in Ukraine are governed, *inter alia*, by:

- (i) the *Law of Ukraine “On Insurance,”* dated 7 March 1996, as restated on 4 October 2001 (the *Insurance Law*);
- (ii) order of the State Commission for the Regulation of the Financial Services Markets of Ukraine No. 4934 “*On the Approval of the Regulation for Entering Data Regarding Legal Entities Seeking Insurer (Reinsurer) Status into the State Registrar of Financial Institutions*” dated 22 November 2005;
- (iii) order of the State Commission for the Regulation of the Financial Services Markets of Ukraine No. 40 “*On the Approval of the Conditions for the Licensing of Insurance Activity*” dated 28 August 2003;
- (iv) regulation of the Cabinet of Ministers of Ukraine No. 1523 “*On the Procedure for the Activity of Insurance Intermediaries*” dated 18 December 1996;
- (v) regulation of the Cabinet of Ministers of Ukraine No. 124 “*On the Approval of the Procedure and Requirements for Reinsurance with a Non-Resident Insurer (Reinsurer)*” dated 4 February 2004; and
- (vi) the *Law of Ukraine On the Prevention of, and the Counteraction to the Legalization of, Money Laundering* dated 28 November 2002, as amended.

16.2.2 Regulation of Activity of an Insurance Company

The State Commission for the Regulation of the Financial Services Markets of Ukraine (the “Regulator”) is the specialized state agency responsible for the regulation and control of the insurance business in Ukraine. The Regulator is authorized to issue licenses to insurance companies as well as to adopt specific insurance regulations. The Regulator is also authorized to carry out on-site inspections and document examinations of insurance companies. Finally, the Regulator may demand an additional annual audit of the financial statements of an insurance company, to be conducted by an auditor appointed by the Regulator at the cost of the insurance company.

Insurance companies are obliged to submit quarterly and annual reports to the Regulator. In addition, insurance companies are obliged to prepare and publish their annual financial statements and consolidated reports. The accuracy of these reports must be confirmed by an independent auditor.

The *Insurance Law* also regulates reinsurance. When the cost of insuring a single object exceeds 10% of the sum of paid charter capital and formed free reserves and insurance reserves, the insurance company is obliged to conclude a reinsurance agreement.

An insurance premium may only be paid in hryvnia. Upon agreement of the parties the financial obligations of the life insurance agreement may be determined in a foreign currency. Insurance benefits are to be paid in the currency stated in the insurance agreement.

16.2.3 Registration of an Insurance Company

A Ukrainian legal entity must undergo the following registration procedures in order to be qualified to carry out insurance activity:

- (a) state registration and various post-registration formalities to allow it to qualify as a local legal entity (subsidiary);
- (b) registration with the State Register of Financial Institutions, which confirms its status of a financial institution; and
- (c) receipt of an insurance license, either for life insurance services or general (non-life) insurance services.

16.2.4 State Registration

Under the *Insurance Law*, foreign insurers are not allowed to conduct direct insurance activity in the Ukrainian market except for:

- (a) insurance of risks related to overseas transporting, commercial aviation, launching of spaceships and freight (including freight of satellites), transit insurance contracts providing coverage against risks relating to cargo in transit and/or transport by which the cargo is transferred, and/or any liability arisen as a result of such cargo transportation;
- (b) reinsurance;

- (c) intermediary services in the form of agency or brokerage operations for reinsurance of risks explicitly mentioned in paragraph (a) above; and
- (d) auxiliary insurance services such as, for example, consulting, actuarial risks assessment and satisfaction of claims.

Only a Ukrainian legal entity in the form of a joint-stock company (open or closed), a general partnership, a limited partnership, or an additional responsibility company may become an insurer in Ukraine.

The *Insurance Law* requires that an insurer must be established by, and must exist with, at least three shareholders (participants). Ukrainian and foreign legal entities and individuals may be shareholders of an insurance company.

Only legal entities with an insurance license may use the words “insurer”, “insurance company” and “insurance organization” in their name.

Insurance companies which provide life insurance are prohibited from providing any other types of insurance, except for:

- (a) re-insurance of life insurance;
- (b) financial activities connected with the accumulation, investment, and management of insurance reserves (asset management);
- (c) crediting the insured individuals; and
- (d) the performance of any operations aimed at satisfying its own business needs.

The charter capital (fund) of an insurer must be paid in cash, with the exception that 25 per cent may be paid by state securities at par value. The statutory minimum for the charter capital of an insurer must be equal to the UAH equivalent of EUR1,000,000.00 for an insurance company not issuing life insurance, and the UAH equivalent of EUR1,500,000.00 for a life insurer. The total amount paid by an insurance company to the charter capital of any other Ukrainian insurer must not exceed 30% of its own charter capital (fund), and 10% of the charter capital per a particular insurer. However, this requirement does not apply to the insurer who provides services different from life insurance and contributes to the charter capital of the insurer who provides life insurance services.

16.2.5 Registration as a Financial Institution

In order to obtain and maintain the status of financial institution a company must file an application for registration with the State Register of Financial Institutions and comply with the following requirements:

- (a) the company's paid-in charter capital must be equal to or exceed the UAH equivalent of EUR1,000,000 (calculated in accordance with the exchange rate of the NBU on the date of its application) for an insurance company, or EUR1,500,000 for a life insurance company;
- (b) the company must have the required number of qualified insurance professionals, office premises, and software, hardware, and communication facilities installed therein.
- (c) the company must present a business plan of its insurance activity for not less than three years.

16.2.6 Insurance License

In order to obtain and maintain an insurance license a financial institution must comply with the following requirements in addition to the requirements discussed above.

A financial institution must adopt and register its insurance conditions (containing a description of all of its insurance products) and any amendments thereto with the Regulator.

The actuary of an insurance company must have (i) a university degree; (ii) at least three years actuarial work experience for a life insurance company; (iii) a special qualification certificate issued by the Regulator; and (iv) a document proving successful completion of the professional exams according to the American or British examinations systems.

The General Manager and Chief Accountant of a company must have advanced professional skills and a good business reputation, in particular:

- (i) the General Manager (or Deputy General Manager) must hold a university (or equivalent) degree in law or economics and have at least five years relevant work experience;

- (ii) the Chief Accountant must hold a university degree in economics and have at least two years relevant work experience;
- (iii) both the General Manager and Chief Accountant must (a) complete the appropriate professional skills enhancement courses organized by the Regulator; (b) not have been the senior manager or chief accountant of a financial institution declared bankrupt or subjected to compulsory liquidation over the previous last five years; and (c) not have any standing conviction for a deliberate crime, including crimes in commercial or administrative spheres.

In order to obtain a license an insurance company must submit to the Regulator the following documents:

- (i) copies of statutory documents and the state registration certificate;
- (ii) a bank or auditor certificate confirming the amount of paid charter capital;
- (iii) a certificate on the financial condition of the insurance company certified by an auditor, where the insurance company is created as a general partnership or limited partnership, an additional liability company or a joint-stock company;
- (iv) insurance conditions;
- (v) a study of the feasibility of the planned insurance or reinsurance activity; and
- (vi) information regarding the participants of the insurance company, the head of the executive body and its deputies; a copy of the diploma in economics of the chief accountant plus information on respective certificates in cases provided by the Regulator.

The Regulator is obliged to decide upon the application of the insurance company within 30 days of obtaining all the necessary documents. In the event that changes are made to the documents submitted to the Regulator, the insurance company must inform the Regulator of such changes within 10 days.

16.2.7 Insurance Agents and Brokers

There are two types of insurance intermediary in Ukraine: (i) agents; and (ii) insurance and reinsurance brokers.

A broker is a representative of an insured entity and may not engage in any activity other than brokerage. Brokerage activities are very narrowly defined in Ukraine and do not include the provision of any services on behalf of and/or in favor of an insurance company.

According to Ukrainian law a broker must have a brokerage agreement with an insured rather than with an insurance company. Moreover, a conservative interpretation of existing Ukrainian law suggests that a broker may not enter into an agreement with an insurance company.

Ukrainian law also states that a broker must receive its fee from an insured rather than from an insurance company.

This conclusion has been confirmed by the Regulator. On at least one occasion a Ukrainian broker has been penalized by the Ministry of Finance of Ukraine for receiving fees and bonus payments from an insurance company.

More importantly, according to Ukrainian law the sale of the insurance products of one company must not constitute more than 35% of a broker's activity. In other words a broker must sell the insurance products of at least three insurance companies. In practice, this restriction will inevitably limit the ability of an insurance broker to sell a significant amount of an insurance company's products in Ukraine.

Insurance agents are individuals or legal entities acting on behalf of, and under the authorization of, an insurance company. They carry out a portion of the insurance company's activities including, in particular, concluding insurance contracts, obtaining insurance premiums and performing functions in connection with insurance payments and reimbursements. Insurance agents are representatives of an insurance company and act in its interests for fees based on the relevant agency agreement with an insurance company.

In Ukraine non-resident insurance and reinsurance brokers may provide their services related to concluding insurance agreements with non-resident insurance companies either independently or through their permanent representative offices in Ukraine.

A non-resident insurance or reinsurance broker which provides its services without permanent representative office in Ukraine must notify in writing the Regulator about its intention to conduct business in Ukraine, and the Regulator, will then publish such information on its official web-site and printed mass media.

16.3 Communications

16.3.1 Regulatory Framework

Significant changes have been introduced into the regulatory framework of the Ukrainian telecommunications sector following independence in 1991. These changes have greatly facilitated the process of adjusting domestic legislation to fundamental principles adopted by the European Union. As a result, the Ukrainian regulatory framework now provides for the separation of the regulatory and operational activities of the Ukrainian telecommunications administration.

As a first step toward its transformation into a traditional regulatory body, the former Ministry of Communications of Ukraine (now the Ministry of Transportation and Communications of Ukraine (the MTC)) created several umbrella organizations to take over its previous operational functions. Consequently, all organizations involved in the planning, building and operating of public telecommunications networks in Ukraine were merged into Open Joint Stock Company “Ukrtelecom” (Ukrtelecom). In 2000, the Verkhovna Rada initiated the privatization of Ukrtelecom, which enjoys a monopolist position on the Ukrainian telecommunications market for local fixed-line telephone communications and services for use of non-switched circuits.

The *Law of Ukraine “On Communications”* (the *Communications Law*) dated 16 May 1995 was adopted by the Verkhovna Rada to provide the legal, economic and organizational frameworks for enterprises, associations and governmental authorities, which were part of the telecommunications and/or postal communications networks in Ukraine.

The *Law of Ukraine “On Telecommunications”* (the *Telecommunications Law*) dated 18 November 2003 repealed the Communications Law.

The *Telecommunications Law* establishes the competence of the Ukrainian state authorities in regulating telecommunications activities, and determines the legal status of telecommunications operators, providers, and consumers of telecommunications services. The *Telecommunications Law* also regulates various issues, including: access to the telecommunications market; the interconnection of the telecommunications networks; right of way; privacy of subscribers and telecommunications; authorizations; pricing policy; and methods of settlement. The scope of application of the *Telecommunications Law* extends to fixed-line and mobile telephone communications; the maintenance and exploitation of on-air and cable broadcasting and television

networks; and the leasing of electronic communications channels and communications services based on the Internet protocol (IP-telephony). The regulatory regime of the Telecommunications Law does not apply to those telecommunications networks which do not interact with the Public Switched Telecommunications Networks (PSTN), except for the use of such networks in a state of emergency or war.

Notably, the *Telecommunications Law* does not require abolishing charges for incoming calls for all kinds of telephone communications as it was previously prescribed by the *Communications Law*. However, after its adoption Ukrainian telecommunications operators have continued to abstain from levying charges for incoming calls on subscribers.

16.3.2 National Regulatory Authority

Until the adoption of the *Telecommunications Law*, the MTC was the governmental authority in charge of the Ukrainian telecommunications sector. However, the *Telecommunications Law* provided for the establishment (from 1 January 2005) of another state regulatory body, the National Commission for Communications Regulation (the NCCR), which has now assumed responsibility for: registration and licensing issues; the allocation of radio frequencies and numbering resources; tariff regulation; the regulation of interconnection agreements; and the resolution of disputes in relation with the interconnection agreements.

16.3.3 Radio Frequency Resource

On 1 June 2000, the Verkhovna Rada adopted the *Law of Ukraine "On the Radio Frequency Resource of Ukraine"* (the *Radio Frequencies Law*). The *Radio Frequencies Law* provides comprehensive rules for the allocation, assignment, interrelation and use of radio frequencies in Ukraine, as well as the licensing of users of radio frequencies and other related issues. In addition, Decision of the NCCR No. 911 "On Approval of the Procedure for Auctions and Tenders for Obtaining the Licenses for the Use of Radio Frequency Resource of Ukraine" dated 6 September 2007 sets forth a detailed procedure of auctions and tenders for the issuance of radio frequencies licenses for specific bandwidths.

The *Telecommunications Law* and *Radio Frequencies Law* prescribe obtaining a license for the use of radio frequencies in order to conduct telecommunication activities, which require use of radio frequencies. For this purpose the prospective licensee must file an application with the NCCR, submit a set of documents, and following the decision of the NCCR to grant the license it must pay the fee for issuance of the license. In addition, starting from the date of issuance the license and regardless whether the radio frequencies are actually used or not by the licensee, the monthly fee in the amount established by the Cabinet of Ministers of Ukraine is to be paid for the use of radio frequencies. Failure to pay the monthly fee for six months leads to revocation of the respective license without any compensation.

16.3.4 Numbering Resource

Until 1 January 2005, the allocation of numbering resources was provided free of charge to telecommunications operators. Currently, according to Resolution No. 1147 of the Cabinet of Ministers of Ukraine “*On the Approval of the Amount of Payment for the Allocation of Numbering Resources and the Payment Procedure*” dated 27 December 2008, Ukrainian telecommunications operators have to pay state fees for the allocation of telephone numbering resources, depending on the types of services to be provided and the coverage area.

Telecommunications operators are required to pay the established fee for the allocation of the numbering resources within 30 days after receiving a decision on such allocation. Failure to pay the fee may result in the revocation of the relevant decision to allocate a share of the numbering resources.

The allocation of short telephone numbers for emergency services and for not-for-profit social services will remain free of charge.

16.3.5 Licensing System

The *Telecommunications Law* provides for the licensing of the following types of telecommunications activities:

- provision of local/inter-city/international fixed-line telephone communications services, with the right of maintenance and exploitation of telecommunications networks and leasing of electronic communications channels;

- provision of local/inter-city/international fixed-line telephone communications services using wireless access to the telecommunications network, with the right of maintenance and leasing of electronic communications channels;
- provision of mobile telephone communications services, with the right of maintenance and exploitation of telecommunications networks and leasing of electronic communications channels;
- provision of services on maintenance and exploitation of telecommunication networks, on-air and cable broadcasting and television networks; and
- leasing of local/inter-city/international electronic communications channels.

In order to obtain the telecommunications license the statutory documents of the prospective licensee must foresee possibility to engage in the respective telecommunications activities.

In the event that it was decided to limit the number of telecommunication licenses, licenses are to be granted on a competitive basis. The number, terms, and conditions for obtaining such licenses are to be established and published in the mass media. Thereafter, licenses will be registered and lists of licenses granted will be published.

16.3.6 Networks Interconnection and Settlements Between the Telecommunications Operators

According to the *Telecommunications Law* interconnection of the telecommunications networks is conducted under the interconnection agreements concluded between the operators, and the binding conditions for such agreements are set out by the NCCR.

The procedure for telecommunication networks interconnection (with respect to PSTN only) as well as the binding conditions for interconnection agreements were determined by Decision of the NCCR No. 155 “*On the Adoption of the Rules of Public Telecommunication Networks Interconnection*” dated 8 December 2005.

Settlement rates for the access to the networks of the operators, which enjoy monopolistic position on the telecommunications market, are subject to determining by the NCCR. Thus, such kinds of the rates were adopted by Decision of the NCCR No. 351 *“On the Adoption of the Procedure for the Settlements Between the Telecommunications Operators for Services of the Access to the Telecommunications Networks While Providing Telephone Communication Services”* dated 6 September 2006. This Decision sets out the rates for the access to the networks of the operators, which enjoy monopolistic position, depending on the kind of telephone communication service (local/inter-city communication) and kind of access service (transit and termination of the traffic).

Settlement rates for the access to the networks of other operators (non-monopolists) are not subject to the state regulation and are provided for in the respective interconnection agreements between such operators.

16.3.7 ISP Services

At present, Internet service provider (ISP) services are not subject to a licensing regime in Ukraine.

However, following the adoption of Resolution No. 132 of the State Committee for Communications and Informatization of Ukraine *“On the Adoption of the Licensing Conditions for the Conducting Business Activity in Telecommunications Area for Provision of Local/Inter-City/International Fixed-Line Telephone Communications with the Right of Maintenance and Exploitation of Telecommunications Networks and Leasing of Electronic Communications Channels”* on 17 June 2004, the licensing regime established by the *Telecommunications Law* was extended to the provision of telecommunication services via the Internet (IP Telephony). Thus, an interested party wishing to provide IP Telephony services is now required to obtain an intercity or international telecommunications license pursuant to the same procedures established for acquiring the ordinary telecommunications licenses. In case the prospective licensee intends to use only IP Telephony technologies for rendering the telecommunication services, the payment for issuance of the license will amount to 6% of the fee established for the issuance of the ordinary telecommunications license.

16.4 Electronic Commerce and Information Technologies

16.4.1 Electronic Commerce

On 22 May 2003, the Verkhovna Rada adopted two laws aimed at facilitating the development of electronic commerce: the *Law of Ukraine “On Electronic Digital Signature”* (the *Digital Signature Law*) and the *Law of Ukraine “On Electronic Documents and the Circulation of Electronic Documents”* (the *Electronic Documents Law*).

The *Digital Signature Law* contains provisions governing the legal status of electronic signatures, the requirements for cryptographic key certification, the provision of relevant related services, and the recognition of foreign cryptographic key certificates.

Under the *Digital Signature Law*, electronic signatures may be used by individuals and legal entities for the identification of the signatory of the respective document and the confirmation of the integrity of any kind of data stored in digital form. The legal effect of a digital signature depends on the type of the relevant key certificate, which is issued by the provider of the certification services and confirms the identity of the public key owner. In this respect, it is important to distinguish:

- qualified key certificates issued by duly accredited certification centers and enjoying certain evidentiary presumptions; and
- key certificates issued by non-accredited certification centers.

The *Digital Signature Law* recognizes a digital signature as having the same legal effect as a handwritten signature or a seal attached to a paper document, provided that such digital signature (i) is based on an unexpired qualified key certificate, (ii) is made by reliable (certified) digital signatures software and (iii) the private key of the signatory corresponds to the one, indicated in certificate. However, a digital signature may not be deemed invalid solely on the grounds that it has electronic form and is not based on a qualified key certificate.

State authorities, local self-government bodies, state institutions and state enterprises, are allowed to use only qualified key certificates. Other legal entities and natural persons may use unqualified key certificates or even utilize digital signatures carrying

no certificates at all. In the latter case, the parties to the electronic transaction are required contractually to agree on the allocation of the risks arising out of the use of uncertified digital signatures.

The *Electronic Documents Law* sets forth provisions governing the legal status of electronic documents. The electronic form of such documents may not serve as the basis for denying these documents legal effect or rendering them inadmissible as evidence. Electronic documents may be used for a variety of purposes, including the formation of contracts and payments. However, under the *Electronic Documents Law*, electronic documents may not be used as original documents certifying bequests.

The general principles concerning electronic contracting are set forth in the new *Civil Code*. The *Civil Code* indicates that a contract qualifies as being entered into in writing if the parties' will is expressed by means of teletype, electronic or other type of technical device for communication. The *Civil Code* further allows using digital signatures in cases envisaged by the law, civil legislation or pursuant to a written agreement of the parties, containing specimens of the appropriate analog of the personal signature.

16.4.1.1 E-Banking

Unlike in other areas, electronic signatures, as well as electronic documents, had already been in use in Ukrainian banking practice for several years prior to the adoption of the new *Civil Code*, the *Digital Signature Law*, and the *Electronic Documents Law*. The use of electronic signatures and electronic documents for banking purposes was governed by the *Law of Ukraine On Payment Systems and Money Transfer in Ukraine* (the *Payment Systems Law*), dated 5 April 2001, which had a definition of an "electronic digital signature" as a block of data received through the cryptographic transformation of the contents of an electronic document which enabled the confirmation of its integrity and the identification of the person who signed it. However, according to the *Law of Ukraine On the Introduction of Amendments to the Payment Systems Law* dated 6 October 2004, the provisions regulating the use of the "electronic digital signatures" were excluded from the *Payment Systems Law* and now the regulation of the "electronic digital signature" is based on the *Digital Signature Law*, and the *Electronic Documents Law* described above as well as a number of regulations.

The applicable regulations of the National Bank of Ukraine (the NBU), which are based on the *Payment Systems Law*, authorize the transmission of electronic notices between a client and a bank in encrypted form, including electronic payment instructions certified by electronic digital signatures (*i.e.*, the “client-bank” system).

16.4.2 The Internet and Domain Names

Thus far, Ukrainian legislation has seen little intervention by the Ukrainian Government in issues governing the Internet in Ukraine. Internet activities in Ukraine (including various Internet-based industries), have been developing on the basis of Ukraine’s general laws and regulations governing “off-line” or real-world life and business. However, numerous changes have taken place in this area, particularly following the entering into force of the *Law On Telecommunications* (the *Telecommunications Law*) on 23 December 2003 and the *Civil Code* on 1 January 2004.

The *Telecommunications Law* defines “domain” as a part of a hierarchic system of names incorporated in Internet Addresses; a unique identifying name, which is served by a group of server domain names and administered centrally.

16.4.2.1 Protection of Intellectual Property Rights in Domain Names

On 10 April 2008, the Verkhovna Rada adopted the *Law of Ukraine “On the Introduction of Amendments to Certain Laws of Ukraine on Intellectual Property Issues in order to Fulfill Requirements on Accession of Ukraine to the WTO”* (the *Amendments Law*). The *Amendments Law* purports to enhance the applicability of some provisions of existing intellectual property laws to the Internet. Most importantly, the *Amendments Law* amends the *Law of Ukraine On the Protection of Rights in Trademarks and Service Marks* (the *Trademark Law*) in order to address, the issue of protecting the rights of trademark owners in connection with the use of trademarks in domain names.

The *Trademark Law* defines a “domain name” as the name which is used for addressing computers and resources over the Internet. The exclusive rights of a registered trademark owner now include the use of its trademark over the Internet, and under amendments introduced by the *Amendments Law*, the use of a trademark in the domain name without permission of the trademark owner shall constitute violation of the trademark owner rights.

It should also be noted that an administrative procedure of protection for trademark owners is reflected in the “Policy of the .UA Domain”, which is currently used for administering the Ukrainian country code Top Level Domain name or .UA Domain. In order to obtain a second-level domain name (*e.g.*, www.companyname.ua), it is necessary to present a trademark registration certificate for the identical name. However, this requirement does not extend to third-level domain names (such as www.companyname.com.ua or www.companyname.kiev.ua), which remain susceptible to abusive registration.

16.4.2.2 Administration of the Ukrainian ccTLD System

A number of organizational and legislative developments indicate the Ukrainian Government’s increased awareness of the issues related to the Internet in Ukraine. In particular, on 13 November 2002, the State Committee for Communications and Informatization of Ukraine (the Committee) announced the establishment of the Ukrainian Net Information Center (UANIC). The purpose of UANIC is to administer and to service the Ukrainian ccTLD system, as well as to adopt rules for the designation of the domain .UA. While this organization was founded by the Committee and by various associations of Internet service providers, the officials of the State Security Service of Ukraine (Ukraine’s intelligence and counterintelligence agency) also participated in the decision to establish UANIC. On 22 July 2003, the Cabinet of Ministers issued Order No. 447-p, “*On the Administration of the .UA Domain*,” which officially recognized UANIC’s powers to administer Ukrainian ccTLDs.

Administered by a Ukrainian limited liability company, “Hostmaster,” since the Ukrainian ccTLD. “UA” began functioning in January 1993, all matters involving the registration and maintenance of domain names have been largely self-regulated by various public associations and Internet service providers.

16.4.2.3 Domain Name Dispute Resolution

The Internet Association of Ukraine has also established the Court of Arbitration for the resolution of various Internet-related disputes, including those related to domain names.

The Court of Arbitration, which is a typical third-party arbitration court, *i.e.*, not a state court, is presently the only specialized institution in this area in Ukraine. Domain name disputes may be referred to the Court of Arbitration by the mutual consent of the parties. The Court of Arbitration aims to help the parties reach

amicable agreements, and keeps confidential the subject matter of the dispute. Pursuant to the applicable Ukrainian legislation, decisions rendered by the Court of Arbitration are binding on the parties. Regularly, domain name related disputes are also heard by courts of general jurisdiction in Ukraine. In this case, no previous consent of the parties to direct the case to a specific court is required (if compared to the Court of Arbitration), and any interested party, which believes that its rights are violated, can turn to a court of general jurisdiction, provided the jurisdictional issues are complied with. The grounds for such domain name related disputes are usually trademark infringement and noncompliance with the “Policy of the .UA Domain”.

16.4.3 Software Development and Protection

16.4.3.1 Protection of Rights in Software

In Ukraine, software is protected under the *Law of Ukraine “On Copyright and Neighboring Rights”* (the *Copyright Law*), dated 23 December 1993, as a literary work of authorship. Copyright protection extends both to operational systems and applications, expressed in source and/or object codes.

For purposes of the *Copyright Law*, “software” is defined as a selection of instructions, expressed in words, numbers, codes, schemes, symbols, or any other means of expression, comprehensible by a computer.

Copying of a computer program without charge is permitted if one copy is made by the lawful user of the computer program for archival purposes, or for serving as a replacement of a lawfully acquired copy in case of loss or damage.

The free modification of a computer program is permitted for (i) attaining compatibility with the user’s equipment and (ii) for correction of appreciable errors, unless otherwise provided by the agreement between the parties.

The free reverse engineering of a computer program is permitted with the intention of receiving the information necessary for attaining the compatibility of an independently-created computer program with other computer programs, provided that the following conditions are met:

- the act of reverse engineering is carried out by the lawful owner of a copy of the computer program;

- the information necessary for attaining such compatibility is not known to the person specified above from other sources prior to the act of reverse engineering;
- the reverse engineering is limited only to those elements of the computer program which are necessary for attaining compatibility; and
- the information obtained in the process of the reverse engineering (i) is used only for attaining the compatibility of the program with other software and (ii) can not be transferred to a third party, except for the purposes of attaining the compatibility with other programs; (iii) cannot be used for the development of the other software, similar to the decompiled one or (iv) for committing any other infringement.

16.4.3.2 Protection of Rights in Databases

Database rights are also protected under the *Copyright Law*. Pursuant to the *Copyright Law*, “databases” are defined as collections of works, data, or any other independent information, selected and arranged as a result of creative work, integral parts of which can be accessed by means of special search engines.

Any database is afforded copyright protection if it is the result of creative work in the selection and assembling of its contents, subject to the condition that no violation of any copyright in the constituent works has taken place during the creation of the database.

Pursuant to the *Law of Ukraine “On Distribution of Copies of Audio and Visual Works, Phonograms, Videograms, Computer Programs and Databases”* No. 1587-I, dated 23 March 2000, the databases distributed on the territory of Ukraine on CDs and DVDs are subject to labeling (marking with control labels).

Illegal reproduction and/or distribution of the databases and software may lead to civil, administrative and criminal liability under the applicable Ukrainian law.

16.4.3.3 Protection of Rights in Layouts of Integrated Circuits

Rights in layouts of integrated circuits are protected under the *Law of Ukraine “On the Protection of Rights in the Layouts of Integrated Circuits”* (the *Layouts Law*), dated 5 November 1997.

The *Layouts Law* defines a “layout of integrated circuits” (the Layout Design) as a three-dimensional pattern of the aggregate of an integrated circuit’s elements fixed in a tangible medium.

Rights in a Layout Design arise upon the registration of the Layout Design with the State Intellectual Property Department of Ukraine. The originality of the Layout Design is a prerequisite for its registration.

A Layout Design is presumed to be original if: it is not created by means of the direct reproduction of another Layout Design; it was not known in the field of microelectronics prior to the date of the application for its registration or prior to the date of its first use; and it is characterized by new qualities, differentiating it from other Layout Designs. Any Layout Design submitted for registration is presumed to be original unless sufficient evidence to the contrary is provided.

The rights in a Layout Design include:

- the right to use the Layout Design;
- the right to preclude other parties from using the Layout Design;
- the right to assign rights in the Layout Design to another person; and
- the right to license the use of the Layout Design to another person.

An assignment of rights in, and a license of the use of, a Layout Design are valid if they are concluded in writing and signed by the parties. Rights in a Layout Design are evidenced by a certificate of registration of the Layout Design issued by the patent and trademark authority of Ukraine. This certificate is valid for ten years starting from the date of the application for the registration of the Layout Design, or from the date of its first use.

As a general rule, the author of a Layout Design is entitled to register it. However, in the event that a Layout Design is created by the author in connection with the performance of the author’s employment duties and/or under a specific assignment from the author’s employer, then the right to register the Layout Design rests with the employer, unless the employment agreement provides otherwise. Irrespective of the above, the author retains the right of authorship, which right remains inalienable.

16.4.3.4 Protection of Information in Information and Telecommunication Systems

The protection of information in automated databases is subject to the *Law of Ukraine "On the Protection of Information in Information and Telecommunication Systems"* (the *IT Systems Law*), 5 July 1994. The IT System Law establishes the principles for the regulation of relations between the parties involved in the processing of information in information and telecommunication systems (the IT systems) and the use of such information by third parties. It also provides for the protection of the rights of the owners of the information processed in information and telecommunication systems.

The *IT Systems Law* defines "information and telecommunication systems" as "the set of technical" and program means, functioning as a single whole, designed for the processing and exchanging of data. Information in IT systems and data processing software is subject to protection regardless of the means of expression of the information.

The *IT Systems Law* requires that access to the information in the information and telecommunications systems be subject to rules established by the owner of the processed information.

16.4.3.5 Outsourcing of Software Development

Although the outsourcing of software development has seen rapid development over the past decade, Ukrainian legislation does not currently provide specific legal rules on the outsourcing of software development.

Having regard for certain legal constraints related to the claiming of copyright in developed software products under the applicable Ukrainian legislation (see above), outsourcing of software development projects must be properly structured from a legal standpoint before being implemented in practice.

At the present time, the most widespread business model used by foreign companies for the outsourcing to Ukraine of software development is the establishment of a local Ukrainian subsidiary or a special-purpose company to retain local programmers (as either employees or independent contractors) and coordinate their work. Such local company is required to ensure that all intellectual property rights in the software products developed by such programmers are properly transferred to it from the individual programmers. Thereafter, the corresponding

scope of the intellectual property rights must be further transferred from the local company to its foreign parent pursuant to a written assignment agreement between them.

Alternatively, foreign companies may enter into corresponding outsourcing agreements with independent Ukrainian companies or directly with individual programmers. These types of arrangements, however, must be crafted with precision in order to ensure full and effective transfer of intellectual property rights.

16.4.3.6 Software Register

Over the past few years Ukraine has been subject to considerable international scrutiny on the issues of copyright protection. These have related principally to the protection of copyright and neighboring rights in compact disc (CD) manufacturing which, in turn, has related to the protection of rights in audio and video works and in software products. Ukraine has taken various legislative and practical measures to restore order in the protection of copyright in the above sensitive areas, with particular attention to the protection of copyright in software.

In particular, a special program on the protection of rights in software and on counteracting piracy has been set out under the Resolution No. 247-r of the Cabinet of Ministers of Ukraine, the *“Concept of the Legalization of Software and Fighting Its Illegal Use,”* dated 15 May 2002. On the basis of the above resolution, on 8 January 2003 the Ministry of Education and Science of Ukraine (the Government agency responsible for protecting intellectual property rights in the country) adopted the Regulations *“On the Register of Manufacturers and Distributors of Software”* as approved by Order No. 8 (the Regulations).

In accordance with the Regulations, effective from 1 March 2003, a state authority (the Authority) designated by the State Intellectual Property Department of Ukraine (the structural unit of the Ministry of Education and Science of Ukraine controlling intellectual property issues and the equivalent of a national Patent and Trademark Office) will be charged with maintaining the Register of Manufacturers and Distributors of Software (the Register).

The Register will serve a dual purpose: protecting the intellectual property rights of legitimate software providers, and publicizing information on such providers to potential customers. In particular, such customers will include state authorities interested in purchasing software under government contracts. The information

stored in the Register will be made available through its publication and the maintenance of permanent web pages. The Register may be accessed by central and local state authorities, legal entities, and individuals.

Any business entity, whether domestic or foreign, which manufactures and/or distributes software (the Entity) may, on a voluntary basis, submit a set of required data or documents for their inclusion into the Register. Those Entities which distribute software on CDs will be obliged to present a copy of the software license for manufacturing or importing CDs granted by the holder of the copyright in the relevant software. If the Entity does not manufacture or import such CDs, it will be obliged to submit a copy of such a license and a document evidencing the legal transfer of the ownership of the CDs from the manufacturer or the importer.

The Authority will have one calendar month to consider an application for entry into the Register and may request that the applicant supplement all missing or incomplete materials. The Regulations do not provide for the Authority's charging a fee for its services, nor do they mention the possibility of the denial of an application for entry. After a decision to enter the information is made, the Entity may obtain an official certificate evidencing its listing in the Register.

16.4.3.7 Encryption Technology

Currently, the *Law of Ukraine "On the Licensing of Certain Types of Entrepreneurial Activity"* as amended (the *Licensing Law*), provides that the development, production, importation, exploitation, and use of encryption technologies be subject to the licensing regime. Licenses are issued by the State Service for Special Communication and Information Protection of Ukraine (the State Service) for a term of five years. Licenses may be renewed upon their expiration.

Licenses are granted to "business entities," which are defined in the *Licensing Law* as duly registered legal entities engaged in business activities irrespective of their organizational forms or forms of ownership.

Qualification requirements to the business entities for provision of the business activity in the area of encryption, as well as the kinds of activities which may be provided in the area of encryption that is subject to licensing and peculiarities of the licensing in the area of encryption are determined by the respective regulations

of the State Service. Under the applicable Ukrainian legislation, encryption technologies may qualify as dual-purpose goods/technologies and certain restrictions may apply to their importation into or exportation from Ukraine.

In addition to above, Section 8 of the Regulation “*On the Procedure for the Encryption Protection of Information in Ukraine*” approved by the Decree No. 505/98 of the President of Ukraine of 22 May 1998, provides that all encryption systems which are to be used for purposes of transmitting confidential information must be certified. This relates both to domestically produced and imported encryption systems. Obtaining the respective certification clearance is a pre-requisite for the importation of any such encryption system/technology onto the territory of Ukraine.

16.4.4 Licensing Requirements in the Area of Information Technologies

Pursuant to the *Licensing Law*, the following activities in the field of information technologies are subject to mandatory licensing:

- the development, production, and sale of technologies for the interception of information;
- the development, production, use, examination, importation, and exportation of encryption technologies, the provision of services in the area of encryption, and the sale of encryption technologies; and
- the development, production and servicing of technical means for the protection of information, and the provision of services in the area of the technical protection of information.

A business entity engaging in any of the above-specified activities is required, upon the receipt of the appropriate license, to adhere to certain technical, organizational, and other relevant requirements set forth in regulations adopted by the State Security Service of Ukraine and the State Service for Special Communication and Information Protection of Ukraine. The failure to comply with such requirements may lead to the cancellation of the license for the specific activity.

16.5 Power

16.5.1 Introduction

Until the reform of the Ukrainian power sector, initiated with the adoption of the Decree No. 244/94 of the President of Ukraine “*On Measures Regarding the Market Transformation of the Power Sector of Ukraine*” dated 21 May 1994, the Ukrainian power sector was in exclusive state ownership. It operated through integrated utility companies responsible for generation, transmission and distribution, and was administered accordingly. Another significant reform of this sector was implemented by Decree No. 282/95 of the President of Ukraine “*On the Structural Reconstruction of the Power Sector of Ukraine*” dated 4 April 1995.

In accordance with the Decree No.1573/99 of the President of Ukraine “*On Changes in the Structure of the Central Executive Authorities,*” dated 15 December 1999, the Ministry of Energy of Ukraine, the State Department on Issues of Electrical Energy of Ukraine, the State Department of the Oil, Gas, and Oil-Processing Industry of Ukraine, and the State Department On Issues of Nuclear Energy of Ukraine were liquidated, and the Ministry of Fuel and Energy of Ukraine assumed their respective functions. As a result, the Ministry of Fuel and Energy of Ukraine is currently the principal managing body of the Ukrainian power sector which until 2 November 2006 acted on the basis of Decree No. 598/2000 of the President of Ukraine “*On the Ministry of Fuel and Energy of Ukraine*” and was also responsible for implementing state policy in the coal sector. However, on 2 November 2006, the Cabinet of Ministers Resolution No. 1540 “*On the Ministry of Fuel and Energy of Ukraine*” approved a new Regulation on the Ministry of Fuel and Energy of Ukraine. The Ministry of the Coal Industry of Ukraine was established on the same date. It succeeds the Ministry of Fuel and Energy of Ukraine in the coal sector and is responsible for implementing state policy in this sector. The Ministry of the Coal Industry acts on the basis of the Cabinet of Ministers Resolution No. 1527 “*On Approval of the Regulation on the Ministry of the Coal Industry of Ukraine*” dated 2 November 2006.

The National Electricity Regulatory Commission of Ukraine (the “NERC”) is the principal body that regulates the activity of utility companies in the electricity and gas sectors in Ukraine. Currently, the activity of the NERC is based on Decree No. 335/98 of the President of Ukraine “*On Issues of the National Electricity Regulatory Commission of Ukraine*” adopted on 21 April 1998. However the draft law proposal relating to the status and activity of the NERC currently awaits hearings in Verkhovna Rada of Ukraine.

All electricity generation stations and plants in Ukraine, as well as their respective transmission and distribution networks, constitute the Unified Energy System of Ukraine (UES). These facilities, which ensure the integrity of UES and provide for its operational and technological management as well as the management of the trunk and interstate transmission lines, are excluded from potential privatization.

The national transmission grid remains under the control of the state-owned company “Ukrenergo,” which is responsible for centralized dispatch management (operational and technological) in the power sector.

Despite various setbacks in its legislative regulation, Ukraine’s power sector presents attractive privatization opportunities with respect to thermal power generation stations and regional electricity distribution companies. There are also possibilities for the greenfield development of new power production facilities, or the purchase or sale of existing facilities by strategic investors.

16.5.2 Distribution

The distribution of electricity in Ukraine is carried out by 27 regional distributors (“*oblenergos*”), which purchase electricity on the wholesale electricity market from the state company “Energoynok.” These distributors sell electricity to consumers in their respective regions at a regulated retail tariff. Each regional power distributor controls the regional transmission network for lines of less than 220kV. In addition, a number of companies are licensed to distribute energy at a non-regulated retail tariff.

16.5.3 Wholesale Electricity Market

Currently, the model upon which the wholesale electricity market operates in Ukraine is the so called “Single Buyer Model”. Under this model, a specialized legal entity purchases all bulk electricity generated by the electricity generating companies and simultaneously is the sole wholesale seller of the electricity to power distribution companies. The purchase and sale of electricity in the wholesale electricity market is carried out in accordance with the Market Rules approved by the NERC.

To ensure the organizational functioning of the wholesale electricity market, the wholesale electricity market members (*i.e.*, electricity generating and distribution companies) and the wholesale electricity supplier entered into the Wholesale Electricity Market Members Agreement approved by the NERC.

On 16 November 2002, the Cabinet of Ministers adopted Resolution No. 1789 “*On the Approval of the Concept of the Operation and Development of the Wholesale Electricity Market of Ukraine*” (the “WEM Concept”). The WEM Concept provides for the gradual liberalization of the wholesale electricity market with the intention of creating a full-scale competitive market operating through a system of bilateral contracts between producers, suppliers and end consumers of electricity. The Concept establishes phased in transition from the Single Buyer Model to the model of bilateral contracts and a balancing market. Such an approach is in compliance with the recently adopted EU Directives on Electricity⁴ and Gas⁵ which provide for the full opening of the market to end consumers by July 2007. The Concept aims at greater efficiency in the generation, transportation, distribution and supply of electricity, independent regulation of the power sector, the development of competition and the possibility of integration into the EU power market.

To enhance competition, the construction of new power generating facilities must be based on a tender and/or licensing procedure under European Union legislation; the exportation, importation and transit of electric power must be performed under non-discriminatory procedures in accordance with EU energy legislation; and suppliers of electric power must be provided with fair market conditions.

The Concept calls for the adoption of necessary amendments to current legislation including: the Electricity Law; legislation on natural monopolies; company profit tax; VAT; the budget; customs; and construction. The Concept also calls for the adoption of new legislation, including legislation on state regulation in the power sector. In the future, the operation of the electricity market will be governed by the proposed Rules for Functioning of the Bilateral Contracts and *Codes of the Main and Distribution Networks*, which are intended to integrate relevant organizational, technological, and technical provisions.

On 28 November 2007 the Cabinet of Ministers of Ukraine by its Resolution No. 1056-r approved the Plan of measures (the “Plan”) related to implementation of the WEM Concept. The Plan specifies the measures that need to be taken by the responsible bodies within the years of 2008-2014 to ensure transition from the Single

4 Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC

5 Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC

Buyer Model to the model of the bilateral contracts and balancing market. The listed measures need to be taken in three stages. At the first stage, which comprises the period of the years 2008-2009, the responsible bodies will need to develop certain normative acts, rules and methodologies based on which the bilateral contracts will be gradually introduced. Within the year of 2010, *i.e.*, at the second stage, the NERC, the Ministry of Fuel and Energy of Ukraine and state company “Energorynok” are responsible for implementation of the special mechanism for balancing the volumes of the electricity sales having in place the centralized load schedules. At the third stage, within the years of 2011 - 2014, the market members should make their own load schedules and the responsible bodies should ensure establishment of the electricity stock exchange. Under the Plan, it is foreseen that during the year of 2014, the bilateral contracts and balancing market should start to operate.

16.5.4 Privatization

The privatization of power companies in Ukraine began in earnest in 1995. Privatization covered both power generation companies (*i.e.*, only thermal power generation companies), and power distribution companies.

In an attempt to reduce Ukraine’s considerable external debt, privatization of power companies was initiated at the end of 1999. The Decree of the President of Ukraine No. 944/99, “On Certain Issues Concerning Privatization of Objects of the Electricity Sector” dated 2 August 1999, provided for the sale of controlling stakes in power distribution companies and blocking stakes in power generation companies through tenders. Subsequently, controlling shareholdings in almost half of all Ukrainian power distribution companies were sold to private investors, with one quarter of all power distribution companies now in 100% private ownership.

Further privatization in the electricity sector of Ukraine was promoted by the Presidential Decree No. 1169/2001 “*On Additional Measures for Reforming the Electricity Sector*,” of 3 December 2001. Accordingly, in 2002, controlling shareholding packages (*i.e.*, more than 50%) of 12 power distribution companies, and blocking shareholding packages (*i.e.*, more than 25%) of seven power distribution companies were identified to be sold through open tenders.

The outstanding indebtedness of nine of these power distribution companies was one of the obstacles to be resolved prior to the privatization tenders. On 31 July 2002, the Cabinet of Ministers approved unified conditions for holding tenders on the sale

of blocks of shares of these power distribution companies. These conditions stipulate a number of qualifying criteria (aimed at ensuring the stability of the power industry), to be met by potential bidders. Privatization of the power sector has since stalled however, although a revised state privatization policy is anticipated pending approval in the Verkhovna Rada.

The Cabinet of Ministers of Ukraine adopted Resolution No. 794 “*On Creation of National Joint Stock Company ‘Energy Company of Ukraine’*” dated 22 June 2004 (the Resolution). According to the Resolution, state-owned blocks of shares in 19 regional energy distribution companies were to be transferred to the charter fund of the new National Joint Stock Company “Energy Company of Ukraine.” These blocks of shares varied from 25% plus 1 share to 75% of shares of the 19 regional energy distribution companies.

The transfer of the state-owned blocks of shares in energy distribution companies to the charter fund of the newly created National Joint Stock Company “Energy Company of Ukraine” effectively meant keeping these shares in state ownership under one umbrella.

16.5.5 The Electricity Law

The legal framework for regulation of the generation, transmission, distribution and supply of electricity in Ukraine is governed by the *Law of Ukraine “On Electricity”* (the *Electricity Law*) dated 17 October 1997, which came into force on 20 November 1997.

The objectives of the Electricity Law include the following:

- to provide protection of consumers’ rights and interests;
- to provide for the reliable and stable functioning of UES;
- to ensure the creation of conditions for the secure operation of energy objects; and
- to promote the development of competitive relations in the electricity market in Ukraine.

In addition to the *Electricity Law*, a number of presidential decrees, government resolutions and other normative acts regulate the generation, transportation, distribution and supply of electricity in Ukraine. A number of new legislative initiatives in this sector are currently under consideration by the Verkhovna Rada.

16.6 Natural Resources, Mining, and Oil & Gas Exploration

16.6.1 General

The principal legislative acts governing mining and oil and gas exploration activities in Ukraine are the *Code of Ukraine On the Subsurface* (the *Subsurface Code*), and the *Laws of Ukraine On Oil and Gas, On Production Sharing Agreements, On Mining in Ukraine, On the Exclusive (Maritime) Economic Zone of Ukraine, and On Pipeline Transportation*, among others.

The *Subsurface Code* defines the subsurface as “that part of the earth’s crust underlying the land surface and the reservoirs’ bottom and stretching to the depths accessible for geological survey and development.” The subsurface is the exclusive property of the people of Ukraine and may only be granted for use to Ukrainian and foreign legal entities and individuals.

16.6.2 Licenses and Permits

Business entities and/or individuals seeking to engage in the mining of minerals on the territory of Ukraine must follow the established procedure for obtaining the necessary licenses and permits. This procedure depends on whether a company plans to commence the development of an unexplored mineral deposit or an explored one. In the former case, such company must obtain a license for the exploration of mineral deposits under the *Law of Ukraine “On Licensing of Certain Entrepreneurial Activities”* (the *Licensing Law*), dated 1 June 2000, and must undertake exploration activities bearing all associated expenses. In the latter case, where a deposit has already been explored and registered in the State Fund of Mineral Reserves of Ukraine by the Ministry of Environmental Protection of Ukraine, the company in question will be obliged to reimburse the state for the completed geological survey of the territory by purchasing a so-called “geological information package”. The price of this geological information package is calculated on the basis of numerous coefficients and may vary, depending on the composition of the particular deposit.

Due to the amendments introduced to the Licensing Law in 2006, a separate license is also required for mining of deposits of state importance, which are included into the State Fund of Mineral Reserves of Ukraine.

Separate licenses are required for the extraction and production of precious metals, and precious and semi-precious stones.

As of the end of 2008⁶, subsurface use rights are granted in the form of a special permit (license), which can be issued for the following types of activities:

- geological survey of mineral deposits, including the scientific and industrial development of deposits (for up to five years), geological survey of oil and gas fields, including industrial development in onshore and exclusive economic (maritime) zone (for up to 10 years);
- extraction of minerals (for up to 20 years); extraction of oil and gas in onshore and exclusive economic (maritime) zone (for up to 30 years);
- geological survey of oil and gas deposits, including the scientific and industrial development of hydrocarbons with further extraction of oil and gas (for the validity terms of special permits for geological survey and extraction, but for no more than 20 years for land activity and 30 years for onshore and exclusive economic (maritime) zone activity);
- construction and use of underground facilities unrelated to minerals extraction (for up to 20 years);
- construction and use of underground oil or gas storage facilities (for up to 50 years); and
- other types of subsoil use (for up to 10 years).

The applicable legislation provides that subsurface use rights are, as a rule, to be granted on a competitive basis, i.e., through tenders or auctions. Nonetheless, a bidder who has explored the mineral deposits at its own cost and wishing to undertake the extraction of the explored mineral deposits may obtain the required permit without competitive bidding.

A subsurface user is not authorized to bestow, sell or otherwise transfer the rights granted by a permit. Transfer of such rights to charter capital of legal entities (even created by such subsurface user), or their transfer into joint activity are also prohibited.

⁶ Please note that the Cabinet of Ministers of Ukraine has not yet adopted respective ruling, regulating procedure of granting of special permits in 2009.

The conditions for the use of natural resources must be set forth in an agreement between the winner of the tender or auction and the authorized governmental agency. The winner of the tender or auction must launch exploration operations within two years after the issuance of the special permit (180 days for the exploration of oil and gas deposits.)

16.6.3 Payments for Subsurface Use

Without prejudice to any other taxes and/or fees payable under the applicable Ukrainian legislation, Article 28 of the *Subsurface Code* provides for the payment of the following dues for subsurface use:

- subsurface use payments;
- fees for exploration work performed at the expense of the state budget;
- fees for the issuance of special permits (licenses); and
- excise duty.

Under the *Subsurface Code*, subsurface use payments (payments) may be levied as single or regular payments, which are determined on the basis of the relevant ecological and economic calculations. In particular, the payment due for the conducting of exploration works will depend on the economic and geographical conditions and the size of the particular subsurface area; the type of minerals; the duration of the works; the degree of completion of the geological survey of the territory; and the degree of risk.

The payment due for the extraction of minerals will be calculated on the basis of the geological features of the deposits and the condition of their development. The payment due for subsurface use within the continental shelf and the exclusive marine economic area will be determined depending on the territory area, the sea depth, and the purpose of the intended subsurface use. The payment due for subsurface use unrelated to mineral extraction, including the construction and use of underground facilities, will depend on the size of the particular subsurface area, its utility characteristics, and the ecological safety of its development.

16.6.4 Production Sharing Agreements

In most cases, if engaged in mining activities through a Ukrainian company with foreign investment, the investor will fall under the general requirements of the applicable Ukrainian legislation. On balance, the applicable Ukrainian legislation envisages certain incentives for foreign investors which undertake mining activities directly pursuant to agreements on the sharing of the output of such activities (the Production Sharing Agreement, the PSA, or PSAs).

The basic legal requirements with respect to PSAs are set forth in the *Law of Ukraine "On Production Sharing Agreements"* (the *PSA Law*), dated 14 September 1999. Under the PSA Law, the Cabinet of Ministers (together with the relevant local authorities, acting on behalf of the state, and the foreign investor(s)) may enter into a PSA whereby the foreign investor agrees to undertake certain mining activities at its own expense, and is entitled to reimbursement of its expenses and to a certain share of the relevant output. If entered into with a number of foreign investors, such a PSA should provide for the joint and several liability of each investor.

Foreign investors are selected by tender, announced by the Cabinet of Ministers, and held by the Special Inter-Agency Commission. If the minerals contained in a deposit are below the established threshold, then the Cabinet of Ministers, together with the relevant local authorities, may decide to enter into the PSA without such a tender.

The PSA may be concluded for a period agreed to by the parties; however, such period may not exceed 50 years.

The list of mineral deposits which may be developed under PSAs is approved by the Cabinet of Ministers. At the same time, the investor may apply to the Cabinet of Ministers or to the Special Inter-Agency Commission to include any newly discovered mineral deposits in such list.

Products explored or extracted under a PSA should be distributed between the state and the investor. Until such distribution, the state retains the ownership of the relevant products as prescribed by the PSA. The investor gains ownership rights to the cost recovery and the profit portion of the products at the moment of the distribution of the production. The outstanding portion of the products remains state owned.

The cost recovered portion of the extracted products may not exceed 70% of the total quarterly production until the investor has recouped its investment.

The investor is free to use and dispose of a portion of the extracted products owned under the PSA and which is not subject to license or quota requirements. The investor may be obliged to sell its share of the extracted product within Ukraine only if it is expressly required by the PSA. Any other limitations on the investor's rights are not permitted, unless expressly specified in the PSA.

The title to the assets created or acquired by the investor for performing its obligations under the PSA is transferred to the state on the date when the value of such assets is completely covered by the cost recovery portion of the products, or whenever the PSA is terminated. However, the investor enjoys a pre-emptive right to further use such assets.

The rights and obligations under the PSA may be assigned by the investor to a third party only with the prior consent of the state, and only if such third party possesses sufficient financial and technical capacity and experience in PSA activities. The state is deemed to have consented to the assignment if it fails to provide the investor with its answer within 90 days after the date of the investor's request.

The investor enjoys the following incentives for the duration of the PSA:

- the investor may pay certain taxes and other mandatory payments in kind, rather than in cash, as provided by the PSA;
- the investor and its subcontractors are exempt from licensing and quota requirements when importing the equipment necessary for their performance under the PSA; the same applies when such equipment is shipped out of Ukraine upon the termination of the PSA; such equipment is also not subject to the value added tax (VAT) or customs duties (with the exception of customs fees);
- any product obtained by the investor is subject to VAT when sold within Ukraine, but it is not subject to any VAT, other tax or customs duties when exported out of Ukraine;
- depreciation rates, other than those provided by the applicable legislation, may be established in the PSA;
- profits received under the PSA are exempt from the profit repatriation tax;

- funds received under the PSA are exempt from any restrictions on conversion into Ukrainian or foreign currency, and may be repatriated abroad under the terms and conditions of the PSA; any requirements for the mandatory sale of foreign currency are not applicable to such funds; and
- forcible withdrawals of funds from bank accounts opened in Ukraine by the investor in order to finance its operations under the PSA are not permitted.

Additionally, investors are provided with certain other tax advantages. The law also indemnifies investors against adverse changes in Ukrainian law.

16.6.5 Pipeline Transportation

The pipeline transportation system of Ukraine consists of a trunk pipeline transportation system and an industrial pipeline transportation system.

The trunk pipeline transportation system is of paramount importance to the national economy and security, and is run by the state. The state-run trunk pipeline transportation companies are not subject to privatization or any other actions leading to private use of such enterprises.

The title to industrial pipeline transportation facilities may be transferred as provided by the applicable Ukrainian legislation.

The following activities are subject to licensing:

- transportation of oil and oil products by a trunk pipeline;
- transportation of natural and oil gas by pipeline, as well as its distribution;
- supply of natural gas; and
- storage of natural gas in amounts that exceed the threshold determined by the licensing condition.

Licenses are issued by the National Energy Regulation Commission of Ukraine.

Finally, activities connected with construction, maintenance and usage of trunk or industrial pipelines are conducted on the basis of a license and are subject to mandatory certification.

16.7 Pharmaceuticals

16.7.1 General

The production and circulation of pharmaceuticals and medicinal products in Ukraine is subject to strict control. The Law of Ukraine “*On Medicinal Products*” (the *Medicinal Products Law*), dated 4 April 1996, is the principal legislative act setting forth the basic requirements for the development, registration, production, quality control and distribution of medicinal products in Ukraine. In addition, the Law of Ukraine “*On the Circulation in Ukraine of Narcotic Substances, Psychotropic Substances, their Analogies, and Precursors*” (the *Narcotic Substances Law*), dated 15 February 1995, sets forth the conditions for the production and circulation of narcotic substances in Ukraine.

The specific regulatory authority for medicinal products is vested with the Ministry of Health of Ukraine (the Ministry of Health) and a number of governmental agencies empowered by it.

16.7.2 Scope of Applicability

As defined in Article 2 of the *Medicinal Products Law*, “medicinal products” are “substances or combinations of substances of natural, synthetic, or biotechnological origin used for preventing pregnancy or for preventing, diagnosing, and treating human diseases, or for modifying the state and functions of the organism. “The above definition includes active substances; ready-prepared medicinal products (pharmaceuticals); homeopathic products; products used for the detection and removal of pathogens or vermin; cosmetic products with medicinal properties; and medical food supplements.

16.7.3 Registration and Marketing of Medicinal Products

Under the *Medicinal Products Law*, medicinal products may be used in Ukraine only after their official state registration (*i.e.*, marketing authorization). The above rule exempts from the mandatory registration regime those medicinal products which are prepared in pharmacies in accordance with medical prescriptions for individual patients or in accordance with orders placed by healthcare institutions, provided that such medicinal products are prepared from active and auxiliary substances allowed for use in Ukraine. Official state registration involves a three-step procedure consisting of pre-clinical research, clinical trials, and the filing of an application for the registration with the Ministry of Health.

16.7.4 Pre-Clinical Research

Ukrainian legislation prescribes the conducting of pre-clinical research (including chemical, physical, biological, microbiological, pharmacological, toxicological and other scientific studies) by specialized research establishments in order to determine the specific activity and safety of a given medicinal product. The detailed requirements for the conduct of such pre-clinical studies are determined by the Ministry of Health under Order No. 441 *“On the Approval of the Procedure for Conducting the Pre-Clinical Research of Medicinal Products, the Procedure of Determination of the Establishments that Can Conduct Pre-Clinical Research of Medicinal Products”* dated 1 November 2001.

16.7.5 Clinical Trials

Under the *Medicinal Products Law*, a medicinal product may be admitted for clinical trials provided that its pre-clinical research brings positive results, and the expected benefits of the medicinal product’s use significantly outweigh the risks of side effects. Clinical trials are conducted by specialized medical institutions determined by the Ministry of Health. The program of trials is subject to the mandatory assessment of its ethical, moral and legal aspects, by Central Commission. Procedures for clinical trials are set forth in the *“Procedure of the Conducting of Clinical Trials of Medicinal Products and the Examination of Materials on Clinical Trials and Model Regulation on the Ethics Commission”* approved by Order No. 66 of the Ministry of Health on 13 February 2006.

The purpose of clinical trials is to determine the safety of a given medicinal product, its therapeutic effectiveness, optimal dosage, short-term, long-term and side-effects, and, after registration and market entry, its therapeutic significance, the strategy for its further use, the incidence of side reactions, and its action when combined with other medicinal products.

The application for clinical trials must be accompanied by the medical product’s general product information, the results of its pre-clinical research, specimen of medicinal products, and outline of the clinical trial program. The applicant is required to obtain insurance policies to cover the lives and health of patients (volunteers) before the commencement of the clinical trials.

The Ministry of Health will order the clinical trials to be halted in cases of danger to the health and life of a patient or volunteer, the ineffectiveness of a medicinal product, or a breach of any ethical norms.

16.7.6 Registration Application

The state registration of a medicinal product requires the filing of an application with the Ministry of Health according to the provisions of the *Medicinal Products Law*, further detailed in Resolution No. 376 of the Cabinet of Ministers “*On the Approval of the Procedure for the State Registration (Re-Registration) of a Medicinal Product and the Amounts of Fees for the State Registration (Re-Registration) of a Medicinal Product*” (the Registration Resolution) dated 26 May 2005.

A registration application must contain information on the applicant and the medicinal product, specifying *inter alia*: its indications and contraindications; dosage; sale conditions; storage and packaging; GMP certificate (if any) and registration in other countries, *etc.* In addition, the application must be accompanied by reports on: the pre-clinical research and the clinical trials of the medicinal product; the pharmacopoeia description or information on quality control methods; a description of the production technology; samples of the medicinal product and its packaging; and a receipt evidencing payment of the registration fee. Materials submitted are examined by the State Pharmacological Center (the Center) and the relevant division of the Ministry of Health.

In addition, if an application for the registration of a generic is submitted, the application should include materials that confirm the generic’s therapeutic equivalence with the referent product defined by the Ministry of Health pursuant to the recommendation of the World Health Organization. In the course of its examination of the application materials, the Center can request an examination of the production facilities, if the Center deems this to be necessary. After its examination of the materials, the Center will rule on the effectiveness, safety, and quality of the medicinal product, on the basis of which the Ministry of Health will either grant or refuse the product registration.

Experts should not be involved in any activity that might give rise to a conflict of interest while those experts are simultaneously involved in the evaluation of a medicinal product.

The registration will be refused if the effectiveness and quality of the given medicinal product are not proven. A refusal to grant registration may be appealed in accordance with Ukrainian law.

If a registration is granted, the Ministry of Health will issue a registration certificate for a term of up to five years. Information on a medicinal product will be entered into the State Register of Medicinal Products. The Ministry of Health may later prohibit, fully or temporarily, the use of the registered medicinal product if the product displays previously unknown dangerous effects.

Throughout the term of the validity of the registration certificate, the certificate holder will be responsible for the quality of the medicinal product and must report any proposed change of the product registration materials to the Ministry of Health, stating the reasons for the change and its effect on the product.

16.7.7 Re-Registration

Following expiry of the registration certificate, the medicinal product may be allowed for further use in Ukraine, provided that it is re-registered under the same procedure as the initial registration. An application for re-registration must be submitted no earlier than a year and no later than 90 calendar days before the expiry date of the previous registration certificate.

16.7.8 Registration Fees and Other Costs

Fees for the official state registration or re-registration of medicinal products are set in Euros, and vary from EUR5 to EUR100 per product. In addition, applicants are required to pay the cost for examination of the medicinal product, which is charged separately.

16.7.9 Licensing Requirements

The *Law of Ukraine “On the Licensing of Certain Types of Economic Activity”* (the *Licensing Law*), dated 1 June 2000, provides for the mandatory licensing of the production and the wholesale and retail sale of medicinal products, as well as the handling of narcotic and psychotropic substances and precursors. In addition, a licensing requirement exists for the processing of, and the production of medications from, donor blood and its components.

Detailed licensing requirements are set forth in the *“Licensing Conditions for Conducting the Economic Activity of the Production, Wholesale and Retail Sale of Medicinal Products”* (the *Licensing Conditions*), approved by Joint Order No. 3/8 of the State Committee of Ukraine on Regulatory Policy and Entrepreneurship and the Ministry of Health dated 12 January 2001.

Obtaining a license requires the filing of an application with the relevant department of the Ministry of Health (the Department). The application must be accompanied by a number of documents listed in the *Licensing Law* and the relevant regulations. The Department will issue the license after a maximum of a ten business days period of examining the application documents, provided that the applicant has complied with all of the licensing conditions. The license holder is required to pay the license fee. Each standalone sub-division of the license holder must have on its premises a copy of the license certified by the Department.

The licensing conditions include both general conditions, established by the legislation on entrepreneurship, consumer protection, trade, healthcare, and medicinal products, and special conditions as to the production, the wholesale and retail sale of medicinal products, as well as to the qualifications of the personnel employed at these activities.

The license holder is required to re-register the license in the case of changes to its name or residence or the licensed activities. An application for re-registration must be filed within a period of ten business days after the relevant changes take place.

The *Licensing Law* provides for at least a three-year term of validity of a license. During this term, the license holder will be subject to control by various state authorities as to its compliance with the licensing conditions. The failure to comply with the licensing conditions may lead to the revocation of the license.

16.7.10 Certification

Under the *Medicinal Products Law* and the Licensing Conditions, a given medicinal product may be admitted for sale in Ukraine only if its quality is certified by its producer. Such a certificate of quality confirms the compliance of each series of the medicinal product with the requirements set during its state registration.

Under Order No. 436 of the Ministry of Health “*Instruction on the Procedure for the Control of the Quality of Medicinal Products During Wholesale and Retail Sale*” dated 30 October 2001, certain types of medicinal products must be additionally certified by laboratories authorized by the State Inspection for the Control of the Quality of Medicinal Products. Such laboratories issue conclusions on the quality of the medicinal product after testing samples of such product. This requirement applies, among others, to narcotic and psychotropic substances and precursors, radiographic contrast media, and medicinal products used for narcosis.

16.7.11 Import and Export of Medicinal Products

Medical substances may be imported into Ukraine only upon their proper registration with the Ukrainian state authorities, and upon receipt of the quality certificates from the producers of such medicinal products. Exceptions to that rule are: the import of medicinal products to Ukraine for the purpose of conducting pre-clinical research and clinical trials: for their state registration; for exhibitions, conferences, and other similar purposes without the right of distribution of such medicinal products; and for use by individual patients. In addition, unregistered medicinal products may be imported into Ukraine in the event of a natural disaster, catastrophe, or an epidemic. Any importation of unregistered medicinal products requires a special permit of the Ministry of Health. The import of unregistered medicinal products is regulated by Order No. 143 of the Ministry of Health “*On the Procedure of Import of Unregistered Medicinal Products on the Territory of Ukraine*,” dated 15 May 1997.

16.7.12 Labeling

The labeling of medicinal products is regulated by Article 12 of the *Medicinal Products Law*, which requires that the following information appear on the label and the outer and inner packaging of the medicinal products: the name of the medicinal product; the name and address of the manufacturer; the registration number; the series number; the consumption method; the dosage of the active ingredient in each product unit; the number of units per package; the consumption term; the storage conditions; and the possible restrictions on the product administration.

In addition, all medicinal products in circulation must be accompanied by an appropriate instruction containing information required by Article 12 of the *Medicinal Products Law*.

As a rule, all labels of medical products distributed in the territory of Ukraine must be in Ukrainian, although, under certain circumstances, the Ministry of Health will accept Russian language labels.

16.7.13 Advertising

Pursuant to the *Law of Ukraine “On Advertising”* (the *Advertising Law*) dated 3 July 1996, any advertising of medicinal products on the territory of Ukraine may be carried out provided that: the medicinal products in question have been registered in Ukraine; and the respective medicinal products are over-the-counter products.

Generally, the use of language in advertising must comply with the applicable Ukrainian language laws. As to trademarks, they must be used in the same form in which they are granted legal protection by the applicable legislation, including Article 6 of the *Paris Convention for the Protection of Industrial Property*, dated 20 March 1883. This provision effectively allows foreign-language trademarks to be used in their original languages.

According to the *Advertising Law*, advertisements of medicinal products may not contain, *inter alia*: comparisons to other medicinal products intended to enhance the advertising effect; references to actual cases of successful application; recommendations or references to the recommendations of medical professionals, scientists or medical establishments; thank-you letters or narratives by individuals; or images and/or names of popular personalities, movie, TV or cartoon characters, or reputed organizations. In addition, advertisements of medicinal products may not feature physicians or people resembling physicians. Any advertising of medicinal products is prohibited if it implies that: there is no need to consult a doctor if the medicinal product in question is consumed; the eventual medical effect of the product is guaranteed; and/or the medicinal product in question is generally accepted as a food or cosmetic product or other consumable product.

Certain other restrictions apply when placing advertisements on television, radio, in the printed media, over the telephone, and other electronic means of communications. Advertising on the Internet must comply with the general legislative provisions governing the types of information allowed for dissemination.

Order No. 177 of the Ministry of Health “*On the Approval of Legislative Acts Governing the Advertising of Medicinal Products*” dated 10 June 1997, establishes additional requirements to advertising medicinal products when targeting minors and/or professional medical specialists/establishments.

The contents of prospective advertisements of medicinal products for minors must be approved by the Ministry of Health on the basis of the expert conclusion of the Pharmacological Committee of the Ministry of Health.

Advertisements of medicinal products targeting medical professionals and/or medical establishments must be founded on scientific data and contain full, accurate, and clear professional information. It is forbidden to overestimate the positive effects of the medicinal products in question.

Advertisements of prescription medicinal products targeting medical professionals and/or medical establishments may only be placed in special printed media for medical and pharmaceutical professionals.

16.7.14 Distribution of Medicinal Products

Under the *Medicinal Products Law*, medicinal products in Ukraine may be sold either pursuant to a doctor's prescription or over-the-counter. The Ministry of Health's approval is necessary before a medicinal product may be sold over the counter.

The retail sale of medicinal products is subject to various legislative provisions on entrepreneurship, consumer protection, trading rules, sanitary and epidemic control, and so on. Under the Licensing Conditions and Resolution No. 1570 of the Cabinet of Ministers "*On Adoption of Rules of Sale of Medicinal Products in Pharmacies*," dated 17 November 2004, medicinal products may be sold only through pharmacies with the appropriate retail license. The owners of such pharmacies must ensure the availability of the minimal mandatory assortment of medicinal products and the proper conditions for their storage, production, and sale.

16.7.15 State Regulation of Prices of Medicinal Products

Certain types of medicinal products, both imported and domestically produced, are subject to price regulation by the Cabinet of Ministers. Local state authorities are also authorized to establish the marginal levels of retail markups on medicinal products.

16.7.16 Taxation

In Ukraine, the sale of medicinal products is (with certain exceptions) currently free of value added tax (VAT).

16.7.17 Registration of Medical Devices

The state registration of a medical devices requires the filing of an application with the State Service of Medical Devices (the Medical Devices Service) according to the provisions of the Resolution No. 1497 of the Cabinet of Ministers "*On the Approval of the Procedure for the State Registration of a Medical Devices*" dated 9 November 2004.

A registration application must contain information on the applicant and the medical device, the manufacturer (if other than the applicant), safety, *etc.* In addition, the instruction on medical device usage, the Certificate of Origin and the Certificate of Conformity must be provided, as well as a sample label or marking for the medical device, and some other documents. A new standard on labeling of medical devices is in effect from 1 February 2008.

The Medical Devices' Service has 90 days to consider the application. Then the Medical Devices' Service issues to the applicant a letter of referral for a further step - the expert examination. Additional documents may be requested from the applicant in course of the expert examination.

Once the document with the conclusions of the expert examination is obtained, the Medical Devices' Service will appoint trials of the medical device. Only after such trials will be conducted, the Medical Devices' Service will decide on registration of a medical device (which may be for a term of up to 5 years).

If registration is granted, the Medical Devices' Service will issue a registration certificate for a term of up to five years.

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