

THE NBU INTRODUCES AN ENTIRELY NEW LEGAL FRAMEWORK FOR THE REGISTRATION OF FOREIGN INVESTMENTS

As we have previously advised, from 24 November 2009 until 1 January 2011 foreign investments in Ukraine:

- are subject to mandatory state registration; and
- if are made in monetary form, must be made only through Ukrainian investment accounts and in Ukrainian currency.

Under the relevant law¹, it was the obligation of the National Bank of Ukraine ("**NBU**") to determine the procedure for the state registration of foreign investment made in monetary form - a procedure that did not previously exist.

On 23 December 2009 the NBU issued a long awaited Resolution "On Settling the Matters of Making of and Registration of Foreign Investments" No. 762 ("**Resolution 762**") effective from 15 March 2010, pursuant to which, *inter alia*:

- (1) The Regulation for the State Registration by the National Bank of Ukraine of Foreign Investments ("**Regulation on FIR**") was adopted;
- (2) amendments to the regulation governing trade in foreign currency were introduced; and
- (3) amendments to the regulation governing the procedure of making foreign investments were introduced.

Below we would like to address the most important provisions enacted by Resolution 762.

Registration of Foreign Investments

Under the Regulation on FIR, to register an investment the investor, or its representative, must submit an application to the relevant territorial department of the NBU within 30 calendar days from the date on which an investment is made. The following documents must be attached to the application (either originals or notarized copies):

- (1) documents showing that an applicant has due authorisation to make the application (if applicable);
- (2) the investment agreement(s);
- (3) statutory documents of the Ukrainian entity, which is the object of the investment(s) (if applicable).

In addition, a reference given by a Ukrainian bank to confirm that the investment was made from the investment account must be attached.

A notarized translation of documents made in any language other than Ukrainian or Russian must be provided.

The NBU will have up to 10 business days upon submission of the above documents to register an investment. The NBU may also request additional documents from an applicant. In such a case, the deadline for the registration may be extended by up to 5 business days calculated from the date on which the NBU receives the requested documents.

If the registration is performed successfully, the NBU will issue a ***notice on the state registration of a foreign investment***.

The NBU may reject an application for registration, if it believes that an incomplete set of documents has been submitted or if any false information is given. The NBU must notify the applicant about such a rejection within 5 business days from when the relevant resolution is made.

Please note that the Regulation on FIR is applicable to foreign investments made on or after 24 November 2009 and only in monetary form. Investments made between 24 November 2009 and 15 March 2010 must be registered by 14 April 2010 at latest.

Trade in Foreign Currency

The NBU has substantially modified the list of documents that are required for the purchasing of foreign currency under transactions related to the foreign investments such as:

- (1) repatriation of investments, including portfolio investments, and the proceeds from such investments;
- (2) transactions involving internal sovereign bonds of Ukraine;
- (3) repatriation of proceeds from any joint activity performed in Ukraine;
- (4) repatriation of funds placed in an investment deposit account with Ukrainian bank; and
- (5) repatriation of any amounts which were not used for making an investment, but were sold by the foreign investor in the interbank currency market of Ukraine.

Ukrainian banks will be entitled to purchase foreign currency for their clients to perform any of the above transactions no sooner than the fifth day from the date on which the relevant monies in local currency were credited to the special transit account of the bank.

To purchase foreign currency to repatriate a foreign investment the bank must be provided with, inter alia, the following documents:

- (1) an application;
- (2) an investment agreement and documentary evidence of its fulfilment;
- (3) documents confirming the amount payable to the foreign investor;
- (4) a document confirming the state of registration of the foreign investment and [X] number of copies;
- (5) confirmation the investment has been made (unless such investment was made more than 5 years prior to its repatriation);
- (6) statutory documents of Ukrainian recipient of the investment (if applicable);
- (7) a confirmation of the tax authority that Ukrainian withholding tax has been paid by the foreign investor (unless the servicing bank acts as a tax agent of such a foreign investor, or the sale price of the investment object equals the purchase price paid by such a foreign investor);

(8) a copy of the agreement pursuant to which the object of the investment was transferred from one foreign investor to another without making settlements in Ukraine (if applicable).

Please note the following:

- the above regulation does not provide for any exceptions for investments made prior to 24 November 2009 - from one side such investments were not subject to mandatory registration, but from the other side such registration may not be performed now under the Regulation on FIR;
- item (8) above may be satisfied by an indirect approval by the NBU of transactions made by the foreign investors outside of Ukraine with respect to Ukrainian assets.

Foreign Investments Regime

Making foreign investments. From the date that Resolution 762 comes into force, all types of foreign investments in monetary form may only be made

(1) by a money transfer in Ukrainian currency; and

(2) via special investment accounts opened with Ukrainian banks, which will be used for the accumulation of foreign currency for further conversion into Ukrainian currency and for the purpose of investing. Only foreign currency belonging to the 1st group of the NBU classifier (i.e. hard currency) may be credited to such investment accounts.

The same procedure will apply to portfolio investments.

In other words, direct money transfers from abroad to the accounts of Ukrainian entities, including the accounts of securities traders, will no longer qualify as foreign investments.

Repatriation of foreign investments. Under Resolution 762 a foreign investor may repatriate its investments and any proceeds from such investments in one of the following ways:

(1) a money transfer in foreign currency from a current account of a Ukrainian entity to a foreign account of the foreign investor;

(2) a money transfer in Ukrainian currency from a current account of a Ukrainian entity to the investment account of the foreign investor;

(3) a money transfer in foreign currency from the investment account of the investor to a foreign account of the foreign investor;

(4) a money transfer in Ukrainian currency from the investment account of the investor to the investment account of another foreign investor;

(5) a money transfer in Ukrainian currency from the investment deposit to the investment account of the foreign investor.

As from 24 November 2009 a monetary foreign investment may be made only through investment accounts, the earlier existing option of settlements via the accounts of securities traders was excluded.

Pursuant to Resolution 762 the term "direct investment" was abolished, and the term "portfolio investment" was modified to mean "purchasing of securities of Ukrainian issuers and their derivatives on the securities market (save for the purchasing of 10 per cent and more of the shares of a company)".

¹Law of Ukraine "On the Introduction of Amendments to Certain Laws of Ukraine Aimed at Overcoming the Negative Consequences of the Financial Crisis" No. 1533 dated 23 June 2009.

Please do not hesitate to contact us should you have any questions on the above.

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