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**COMPENDIUM 2014**



ARZINGER (prior to March 2009, Arzinger & Partners Ukraine) is one of the leading independent legal experts in Ukraine. The firm was founded in Kyiv in 2002 by two Ukrainian lawyers, Sergey Shklyar (currently the firm's Senior Partner) and Timur Bondaryev (now Managing Partner). A German lawyer, Wolfram Rehbock (now Senior Partner), joined the team in 2002. The firm has a team of 57 seasoned legal professionals led by 6 partners.

Arzinger & Partners Ukraine has become the network's largest and most dynamic office. Every year since 2002 our business has grown dramatically, annually doubling both revenue and the number of lawyers we employ. In 2007, Arzinger was one of the first Ukrainian legal firms to open a second office in Lviv – the heart of Western Ukraine. In September 2010 Arzinger opened its office in Odesa. Attorneys of the South Ukrainian Branch will represent interests of clients in Odesa, Mykolaiv, Kherson, Zaporizhzhya regions and AR Crimea. Today, the Arzinger team consists of 92 employees.

To sustain solid growth, in January 2009 the firm launched a new strategy, which includes: change of status to an independent local firm; development of and expansion into new markets and practice areas; and joining international associations of independent law firms. In line with our new strategy we have created a number of new posts, in order to make the practice more efficient. These include positions in Knowledge Management, IT, HR and Communications.

The firm specialises in M & A, Corporate Law, Real Estate and Construction, Antitrust and Competition, Litigation and Arbitration, IPR, Tax, Banking & Finance, PPP, Public Procurement, Employment, Administrative Law, Capital Markets and IPOs. We serve clients operating in financial services, energy, real estate, pharmaceuticals, food & beverages, telecommunications, retail, aerospace, agriculture, and the infrastructure & transport industries.

The firm has built close working relationships with high-profile law firms in Germany, Austria, the United Kingdom, the United States, Russia, and many other jurisdictions. As a result, our clients have access to global legal services of unsurpassed quality. These relationships have developed and proved invaluable over many years, but they are non-exclusive: accordingly, Arzinger is able to work on any transaction - in coordination with the client - with those law firms which we consider to have the most appropriate expertise.

## → Real Estate Law

In accordance with the legislation of Ukraine the term "real estate" is defined as land plots and the property located on land plots which cannot be relocated without its depreciation or changing its purpose.

A land plot is a part of the earth's surface with fixed boundaries, exact location and the defined rights attributed to it. The freehold (ownership) covers, within the boundaries of a land plot, the surface (soil) layer and water bodies, forests and perennial plantations located on such land plot, unless otherwise provided by law and provided that it does not affect third parties' rights, as well as the space above and beneath the surface for the height and depth necessary for construction of buildings.

Based on the above definition, to qualify for real estate, the property (if other than land) should have a foundation and should be inseparably attached to a land plot, so that it cannot be removed from a land plot without its depreciation or changing its purpose.

The following types of property do not fall within the category of real estate as they do not meet all the requisite qualifications: temporary constructions, small architectural forms, stationary outdoor advertising, the so-called "Finnish constructions", wagons used for temporary residence (hotels, inns) and for other purpose (restaurants, entertainment establishments, etc.). At the same time, an integrated property complex of an enterprise is treated as being equivalent to real estate. As for the construction in progress, its disposal as a real estate property can be carried out upon registration of title to such construction in progress in accordance with the legislation of Ukraine.

### **Rights to Real Estate**

In Ukraine, a building and the underlying land plot enjoy a separate legal treatment. The Ukrainian legislation defines the following types of rights to real estate:

■ IN RESPECT OF A LAND PLOT: ownership (private, state and communal), lease, permanent use, emphytheusis, superficies, and servitude (easement);

■ IN RESPECT OF OTHER REAL ESTATE: ownership (private, state and communal), lease, right of operational management, right of full economic use, and servitude (easement).

*The right of ownership* to a land plot includes the right to own, use and dispose of a land plot. Land lease is a contract-based possession and use of a land plot required by a lessee for conducting commercial and other activities for a defined period and in consideration for an agreed payment. A leased land plot can be further sublet by a lessee to a third party upon prior consent of a landlord.

*The right of permanent use of land* is the right to possess and use the land plot being in state or communal ownership without limitation of the term of use. The following entities are currently entitled to have the right of permanent use of a land plot: (1) enterprises, institutions and organizations being in state or communal ownership; (2) Ukrainian non-profit organizations of disabled persons, their enterprises, institutions and organizations; and (3) religious organizations of Ukraine, whose charters (regulations) are registered in the established order. These can use land plots under the right of permanent use solely for the construction and servicing of religious or other buildings necessary for supporting their activities.

*An easement (land servitude)* is the right of an owner or a user of a land plot to use third party's land plot either for free or on a chargeable basis for pass, laying out cables, electricity transmission lines etc. Land servitudes can be either permanent or temporary. The existence of an easement does not entail the seizure of a land plot or termination of owner's title to it.

*Emphytheusis* is the right to use a third party's land plot for agricultural purposes, while *superficies* means the right to use a third party's land plot for construction purposes. *Emphytheusis* and *superficies* are rarely applied in practice.

In contrast to ownership and lease which are applicable to both land and other real estate, the right of operational management and the right of the full economic use are normally related to buildings and constructions.

*The right of operational management* of state property may be granted to state and municipal institutions and organizations, which do not conduct commercial activity; for instance, ministries, local state administrations, government agencies, etc. An organization or institution which holds real estate property on the right of operational management is not entitled to dispose of it with the intention of gaining any profits. The respective ministry or department, acting on behalf of the state or local community, exercises control over the use of the granted property and they may withdraw the property from the operational management if it is used in breach of its designated purpose.

*The right of the full economic use* is defined the Commercial Code as the right of an entity that possesses, uses and disposes of the property assigned to it by the owner (or its authorized

representative), with the limited authority to dispose of certain types of the property with the owner's prior consent only. The right of the full economic management is provided to the state-owned or municipal enterprises for the purposes of their commercial activities. The owner of the property exercises direct or indirect (i.e., through its authorized representative) control over the use and management of the property without interference in the day-to-day business activities of the enterprise.

### **Registration of Property Rights to Real Estate**

Since the beginning of 2013, a new system of registration of real estate rights has been enacted in Ukraine. The essence of the reform lies in the introduction of a unified State Register of Property Rights to Real Estate and their Encumbrances, which contains records on all registrable rights to real estate and their encumbrances, and replaces the former multiple registers with fragmented information on property title. Most of the data contained in the register are not publicly accessible, with only title or interest holders and authorized bodies being entitled to access.

The State Register is maintained by Ukrderzreestr subordinated to the Ministry of Justice. State registrars of Ukrderzreestr are exclusively allowed to register the title to newly-created property. Notaries perform functions of state registrars while certifying a property deed, which allows simultaneous conclusion of an agreement and registration of the respective title.

Under the Ukrainian legislation the following rights and encumbrances are subject to compulsory registration: right of ownership, right of use, easement (servitude), emphyteusis, superficies, right of economic use and operational management, lease, right of permanent use of land, mortgage, trust management as well as other property rights, tax lien and other real estate encumbrances.

The right of ownership to a real property or a land plot arises upon its state registration with the State Register. At the same time, since the corporeal rights (such as lease or mortgage) are derived from the ownership title, registration of the ownership title precedes registration of such proprietary rights. The state registration of all rights to land is carried out after the state registration of land with the State Land Cadaster. All the property rights to real estate duly registered with previous registers (before 2013) and those, which had not to be mandatory registered under the previous legislation, remain valid.

### **The Principle "Land Follows the Property"**

The past years saw the general trend toward the gradual implementation of the principle "Land Follows the Property". In pursuance of the above principle, the amendments have been adopted to both the Civil Code and the Land Code to the effect that the indication of the cadaster number

and the total area of a land plot are qualified as the material term and condition of an agreement for alienation of a building located on such land plot (except for multifamily apartment buildings).

The principle “Land Follows the Property” is further supported by the amendments introduced to the Civil Code, the Land Code as well as the Law “On Land Lease”, which can be summarized as follows. In case of acquisition of title to a building, a freehold or leasehold of the owner of such building in respect of the underlying land plot terminates. The freehold of the land plot or part of it underlying the property passes to an acquirer without change of its designated use. Where the underlying land plot is not a freehold, but is rather in use (lease), the new owner acquires such right of land use in the same scope and on the same terms and conditions as available to the former land user (lessee). Where an acquirer is not entitled to own land under Ukrainian law, it acquires the right of land lease instead.

Despite certain promising signs of the “automatic” transfer of land following the property, the above principle does not work properly yet. As before, the parties would have to comply with the ordinary formalities and procedures to execute the transfer of title to land.

### **Restrictions on Foreign Ownership to Land**

In accordance with the legislation of Ukraine, foreign legal entities, foreign citizens and joint ventures with foreign participation may purchase and lease buildings, constructions and their parts as well as lease both agricultural and non-agricultural land plots equally to Ukrainian citizens and legal entities without foreign participation. However, they may purchase land plots only according to the procedure and with limitations set out by the Land Code.

Foreign individuals, foreign entities and foreign states are prohibited from acquiring agricultural land into private ownership. As far as non-agricultural land is concerned, foreign citizens and stateless persons are entitled to purchase non-agricultural land plots within residential areas without limitations and non-agricultural land plots outside residential areas only if such persons own real estate located on such land plots.

Foreign entities and joint ventures may only acquire land into ownership (i) within residential areas if they acquire real estate and for construction of the property involved in the commercial activities; or (ii) outside residential areas if they purchase real estate.

State or communal land may be sold to a foreign legal entity provided also it establishes and registers its permanent establishment in the form of a commercial representative office in Ukraine. State-owned non-agricultural land is sold by the Cabinet of Ministers of Ukraine, subject to the prior approval of such sale by the Ukrainian Parliament. Communal non-agricultural land is sold by the relevant municipal authorities, subject to the prior approval of such sale by the Cabinet of Ministers of Ukraine. The legislative guidance on the procedure for

the obtaining of approval of the Cabinet of Ministers is lacking. In practice, the obtaining of such approval appears lengthy and complicated.

Those state-owned lands underlying the property which is subject to privatization may be sold to foreign legal entities by a state privatization body upon approval of the Ukrainian parliament. Communal land plots may be sold to foreign legal entities by respective local councils upon consent of the Cabinet of Ministers of Ukraine.

Please note that any land plot which is in state or communal ownership as well as the rights to it (lease, superficies and emphyteusis) should be sold on a competitive basis (at a land auction) subject to the extended list of exceptions. For example, when a land plot is underlying building owned by an individual or a legal entity, or a land plot is granted for subsoil use and special water use pursuant to a special permit (license), etc.

The Land Code does not specifically provide that enterprises with 100% foreign investment may purchase state-owned or communally-owned land plots. Under the conservative interpretation of this gap, enterprises with 100% foreign investments are not thus entitled to own any land plot, including private land plots.

From the effective risk management perspective, investors are often recommended to consider a “two-tier” structure. Under this structure, which has become quite common in Ukraine, a “first-tier” Ukrainian subsidiary company is created, whether (i) fully owned by a foreign legal entity or a foreign natural person, or (ii) jointly owned by foreign and Ukrainian legal entities or natural persons. The “first-tier” subsidiary company would then establish a “second-tier” Ukrainian subsidiary company. Because the “second-tier” entity will directly involve a Ukrainian founder(s) only, it will not qualify for a foreign legal entity or a joint venture under the Land Code of Ukraine and, consequently, it will not be subject to the above restrictions while acquiring land in Ukraine.

When structuring acquisition transaction, the following important requirement should also be considered. The Civil Code expressly prohibits the establishment of the consecutive chain of two sole shareholder companies, i.e. a sole shareholder company cannot found another sole shareholder subsidiary company. Therefore, the “first-tier” subsidiary must be founded by at least two shareholders to enable the establishment of the “second-tier” legal entity with a sole participant. Alternatively, the “second-tier” subsidiary company must be founded by at least two participants, if the “first-tier” subsidiary company has a sole participant.

### **Land Moratorium**

An important factor preventing the development of the land market in Ukraine is the temporary moratorium on alienation of agricultural land plots. Firstly introduced in 2001 the moratorium was initially planned to remain in force for five years – considered a reasonable period in order

to properly prepare a legislative and institutional framework essential for the establishment of a well-governed land market. However, it has been extended several times and at the end of 2012 the members of Parliament voted for the yet another extension – this time the moratorium is set to remain in force until the adoption of the law on agricultural land turnover, but not earlier than January 1, 2016.

According to the wording of the governmental draft Law “On Agricultural Land Turnover” it is likely that foreign investors will not be allowed to directly invest in Ukrainian agricultural land, thus the only available option will be lease.

### **Acquisition of real estate**

There are two forms of real estate acquisition: a direct purchase of real estate (“asset deal”) or acquisition of shares in the company holding real estate (“share deal”). In choosing the preferable form of real estate acquisition, the following advantages and disadvantages of each option should be considered.

The main advantage of an asset deal is that the purchaser acquires a specific asset and it does not succeed to any debts and liabilities of the seller. Additionally, the registration of the property title is carried out simultaneously with the conclusion of the respective agreement.

The *disadvantages* of an asset deal are:

- It is necessary to re-register the right of ownership to the real estate property;
- The date of transfer of the right of ownership is postponed till registration of the respective right with the relevant state register;
- Increased transactional costs (state notary fees and payment to the State Pension Fund, does not apply in the case of land sale) amount to 1% + 1%;
- In the case of the sale of a real estate property which is built on a leased land plot, a land lease agreement will not be automatically assigned to the new owner of such real estate property. Upon transfer, a land lease agreement should be concluded with the new owner; The purchase price is subject to VAT (save for the sale-purchase of land which is not subject to VAT);
- Ukrainian law is applicable to the agreement as the property is located in Ukraine;
- In the event of sale of a land plot, construction documents and other permits for construction activities on a land plot may not be automatically transferred to the new owner. Respective documents should be re-registered for the new owner;
- Limitations for foreign capital in respect of land relations.

The *advantages* of a share deal are:

- A relatively fast procedure for registration of documents necessary for transfer of ownership to a participatory interest (share);
- VAT does not apply;
- An offshore exit is possible;
- A foreign governing law and foreign arbitration may be considered;
- It is not necessary to re-register the right of ownership to the real estate property;
- No limitations for acquisition by foreign investors;
- Land lease agreements, licenses, building permits, project documentation and licensing documentation for an investment project remain in force and do not need to be re-executed;
- Relatively low transaction costs.

The *disadvantages* of a share deal are:

- All the liabilities and debts of the target company are transferred to the purchaser;
- Acquisition may require a prior permit from the Antimonopoly Committee of Ukraine.

## → Labour Law

The Ukrainian legislation deals with employees in general, making no distinctions based on their positions (with some minor exceptions). The Labour Code of Ukraine dd. 10.12.1971 is the principal legislative act governing employment relations in Ukraine. However, a number of its provisions are elaborated in the subordinate legislative acts. The specification of working conditions, remuneration and social privileges are commonly left to collective bargaining agreements provided that the agreements do not limit the guarantees established for employees, by law. The following defines some principal requirements vis-à-vis labour relations, established by the Labour Code and other legislative acts.

### Working Hours

Working hours may not exceed 40 hours per week. For certain categories of employees, the working week is established at the level of 36 or 24 hours and for some categories irregular working hours are allowed. Overtime work is allowed by the legislation only in exceptional cases and may not exceed four hours within two days on the row or 120 hours per annum and is compensated at double rates.

## Time Off

Employees are allowed to have breaks for resting and taking meals which last up to two hours. The breaks are not included into the working time. By a five-day working week employees have two days-off, and by a six-day working week – one day-off. The usual day-off is Sunday.

If a public holiday or a free day concurs with a day-off, the day-off is postponed to the next working day after such public holiday or a free day. In general, no work shall be done on days-off. It is allowed in exceptional cases that single employees work on such days. Work on public holidays is allowed in exceptional cases according to the legislation.

Work on public holidays is remunerated in double amount. Upon request of an employee he/she can also get another day-off. Work on days-off is remunerated either in double amount or by giving another day-off (mutual consent is required).

## Vacation and Holidays

Statutory paid annual vacation is 24 calendar days. For certain categories of employees the law provides for a longer vacation period or additional vacations, including social one. In case of dismissal of an employee he/she receives a monetary compensation for all unused days of the annual vacation and the additional vacation for employees with children. There are some additional vacation types in Ukraine:

- additional annual vacation for work under arduous and harmful work conditions;
- additional annual vacation for special work nature;
- additional study vacation;
- research leave;
- maternity leave;
- childcare leave up to three years of age;
- adoption leave;
- additional vacation for employees with children;
- unpaid vacations.

## Salaries and Wages

The salary amount should be established by an individual employment agreement with an employee. The minimum monthly salary for unqualified labour may be no less than the threshold established by the labour legislation (currently UAH 1147.00). The minimum salary does not include any additional payments, benefits, bonuses or compensation payments. The salary is subject to personal income tax that is presently levied at the rate of 15% (17% with respect to excess amount of a threshold of 10 minimum monthly wages). Salaries are paid in Ukrainian currency at least twice a month.

## **Guarantees and compensation payments**

The labour legislation stipulates cases in which employees are entitled to salary even if they did not perform their work under the labour agreement – guarantee payments. Such payments are provided for employees in elective offices, donors, employees sent to qualification courses during working hours and some other categories.

Compensation payments are such remunerating expenses of an employee, which are connected to performance of the labour duties (in case of transfer, assignment to work in another region, business trips, amortization of tools owned by an employee for needs of an enterprise etc.).

## **Pension and Social Insurance**

The employer is required to make obligatory payments to the State Pension Fund on behalf of employees. The rate of the unified social security contribution is between 36,76% and 49,7 % of an employee's remuneration (depending on the class of the occupational hazard). Any other social insurance (voluntary) is left to the employer's consideration.

## **Employment of foreigners**

Foreign nationals may be employed by Ukrainian employers subject to prior obtaining of the Ukrainian work permit according to the procedure, established by legislation. A work permit is issued as a rule for one year and is subject to renewal.

## **Disabled persons**

The current legislation of Ukraine provides a quota of work places for disabled persons in the amount of 4% of the average number of employees per annum or, if there are 8-25 employees, in the amount of one work place.

## **Activity of trade unions**

Citizens of Ukraine are entitled to participate in professional unions in order to protect their labour, social and economic rights and interests. A trade union is a voluntary, non-profitable non-governmental organization of citizens united by mutual interests by the nature of their professional (labour) activity (study). Trade unions are established in order to represent, exercise and protect labour, social and economic rights and interests of their members and can have a status of primary, local, district, regional, republican, or all-Ukrainian. Foreign citizens and stateless persons are not allowed to establish trade unions, but are entitled to join them, if this is provided by their statutes.

## **Collective Bargaining Agreements**

A collective bargaining agreement is concluded in order to regulate production, labour, social and economic relations and to coordinate interests of employees, owners and their authorized bodies. In a newly established enterprise a collective bargaining agreement shall be concluded upon initiative of one of the parties within 3 months after registration of the enterprise and shall be preceded by collective bargaining negotiations, in which both parties of the collective bargaining agreement shall participate.

There is no liability for lack of collective bargaining agreements, only for avoiding negotiations as to their conclusion. A collective bargaining agreement signed by the parties is subject to a notifying registration by the local state authorities. Any changes or amendments to a collective bargaining agreement shall be registered pursuant to the procedure for registration of collective bargaining agreements.

## **Labour agreements**

Under a labour agreement the employee obliges to work as provided by the agreement with adherence to the internal labour policy, and the employer obliges to pay the employee for the work and to ensure labour conditions necessary for work and as provided by the labour legislation, collective agreement and agreement of the parties.

It is not obligatory in Ukraine to conclude labour agreements in writing, except for some categories of employees (minors, work under some special conditions etc.) and in case if an employee insists on concluding the labour agreement in writing.

Terms of labour agreements which make the position of employees worse compared to the current legislation are null and void. Even though an employee may agree to such conditions, they may not be applied. A labour agreement may be concluded for an unlimited period of time, fixed-term or concluded for the period of execution of certain works. The laws of Ukraine prohibit unreasonable refuse in conclusion of a labour agreement (employment).

## **Labour contract**

A labour contract is a special labour agreement form for certain categories of employees where its validity term, rights and obligations of the parties (including material liability), financial conditions and organization of the employee's work, contract termination terms, including early termination, may be stipulated pursuant to the parties' agreement. Contracts are to be made in writing.

The laws of Ukraine directly stipulate the exact list of employees with whom the labour contracts may be concluded, for example scientists, employees of collective agricultural enterprise, directors of companies, policemen, teachers etc.

If the current legislation does not stipulate any possibility for contract conclusion in the respective case, the owner and the employee are not entitled to conclude the contract even upon their mutual consent.

### **Documents to be provided for employment**

At conclusion of a labour agreement the future employee shall provide the following documents:

- passport or any other ID;
- labour book;
- a document on education (in cases provided by the legislation);
- a health status certificate (in cases provided by the legislation for workers on heavy, harmful and hazardous jobs and annually for persons younger than 21);
- military registration document;
- a copy of the individual tax number (for taxation purposes in regard to employee's salary);
- a copy of the social insurance card;
- copies of child birth certificates (if the employee is entitled to child care privileges and guarantees).

The Labour Code prohibits to require provision of documents which are not stipulated by the legislation as well as of information on employee's party membership or nationality, domicile or temporary residence registration etc. Refusal in employment due to non-submission of documents not provided by the legislation is deemed to be unreasoned and is prohibited.

### **Employment order**

After agreement on work conditions with a potential employee, employment application submission, and in some cases conclusion of a labour agreement or contract in writing, an employment order shall be issued.

There is a standard approved form of the employment order, but in practice another more simple form of the order is used. The employment order is signed by the executive officer or any other authorized person. The employee reviews and signs the order. On the basis of the order an entry is made in the labour book.

The labour agreement is deemed to be concluded also if there is no order but the employee has been actually admitted to work. Besides, if there is no employment order, the fact of the labour relations between the employer and the employee can be established by the court.

## **Employer's actions before employee's admission to work**

Before admission to work pursuant to the labour agreement the owner (an authorized body):

- explains to the employee his/her rights and obligations and informs his/her on work conditions, any harmful or hazardous production factors at the work place and possible consequences for the health, his/her rights and privileges for work remuneration according to conditions set out by the legislation and the collective agreement;
- provides to the employee for reviewing the internal labour regulations and the collective agreement;
- assigns the employee with a work place and provides all tools and accessories necessary for work;
- instructs the employee on safety and fire safety rules.

## **Probation period by employment**

In order to determine whether the employee complies with the work at the beginning of his/her employment, a probation period is established for the employee upon agreement of the parties.

- persons under 18;
- young employees after graduation from career scientific-educational institutions;
- young professionals after graduation from higher educational institutions;
- persons retired from military or alternative (non-military) service;
- disabled persons sent to work pursuant to recommendations of a medical and social expert examination;
- seasonal and temporary workers;
- workers in case of employment in other region or transfer to other enterprise, institution, organization, transfer to other position within the same enterprise;
- in other cases, provided by the legislation.

There is no need to record information on employee's probation period in the labour book. During the probation period the employee has all the rights and all the obligations provided by the labour legislation. The only exception is an additional reason for dismissal of the employee as such who did not pass the probation period.

Duration of a probation period cannot exceed:

- one month – for workers (at this, in order to define the term “worker” the Occupational classification shall be used);
- three months – for any other employee categories;
- six months – in certain cases upon agreement with the trade union committee.

## Change of essential working conditions

According to the Ukrainian legislation in case of changes in production and labour organization it is possible to change the essential work conditions (system and amount of payments, privileges, work regime, establishment or cancellation of part-time work, professions overlapping, change of categories or name of positions etc). In such situation the employer shall provide respective employees with a two months prior notice before the changes come into force. If the previous essential work conditions cannot be preserved and the employee does not agree to continue work under the new conditions, the labour agreement shall be terminated.

## Termination

Generally, employment relations, established for a definite period of time terminate after the employment term has expired. Employment relations, established for indefinite period, may be terminated by employee at any time by giving two weeks prior notice. Employers may terminate employment only in limited circumstances enumerated by the Labour Code. The labour legislation of Ukraine provides following reasons for termination of a labour agreement:

- agreement of the parties;
- end of the labour agreement term, except for cases when labour relations actually continue and neither party demands their termination;
- call or enrolment to military service, assignment to alternative service;
- transfer of the employee upon his/her consent to another enterprise or to an elective office;
- refusal of the employee to be transferred to work in other region together with an enterprise as well as refusal to continue work due to change of the essential work conditions;
- coming into force of judgment pursuant to which the employee is sentenced to imprisonment or any other punishment excluding possibility to continue work;
- reasons as provided by the labour contract;
- determination of employee's inconsistency with work within the probation period;
- upon employee' initiative;
- upon employer' initiative:
  - change in production and work organization, including liquidation, reorganization, bankruptcy or conversion of the enterprise, decrease of the personnel number or the staff
  - determined employee's inconsistency with position or work due to insufficient qualification or health condition hindering continuance of such work
  - systematic non-performance of duties stipulated by the labour agreement or the internal labour order without reasonable excuse if disciplinary penalties have been previously imposed on the employee
  - truancy (including absence from work for more than 3 hours within business day) without a reasonable excuse
  - nonappearance at work during four months on the row due to temporary disability, except for maternity leave, if the legislation does not stipulate longer period of work

(position) preservation for certain illnesses. If an employee has lost its ability to work because of a labour injury or a professional illness, his/her place of work (position) shall be preserved for the period of rehabilitation or assessment of disablement

- reinstatement at work of the employee who previously performed this work
- appearance at work under alcohol, drugs or toxic influence
- stealing at work place (including petty theft) of employer's property determined by the court - decision which came into force or resolution of a body authorized to impose administrative penalties or apply measures of public influence
- single gross violation of labour relations by the director of an enterprise, institution, organization of any ownership form, his/her deputy, head accountant of an enterprise, institution, organization, his/her deputy, or officials of the customs service, state tax inspections with special ranks and officials of the state supervision and auditing service and bodies of the state price control
- wrongful acts of directors of enterprises, institutions, organizations which caused delay in payment or payment of lower amounts of salary compared to minimal wage as stipulated by the legislation
- wrongful actions of the employee working with monetary values or merchandise if such actions lead to loss of employer's trust
- immoral actions of educational personnel inconsistent with such work
- employment under subordination to an immediate relative in violation of the requirements of the Law of Ukraine "On Basic Principles of Preventing and Fighting Corruption".

It is prohibited to dismiss certain categories of employees such as pregnant women, women with children under the age of three and single mothers with children under the age of 14 or with disabled children, except some cases regarding the companies' liquidation with the obligatory subsequent employment. An employee is entitled to receive a one-month severance payment (or more, if provided for in the collective agreement) when dismissed upon the initiative of the employer for particular reasons.

### **Suspension from work**

In certain cases the employer is entitled to suspend the employee from work:

- if the employee appears at work under influence of alcohol, drugs or toxins;
- if the employee refuses or avoids obligatory medical examination, training, instructions and attestation in labour protection and fire safety;
- in other cases stipulated by the legislation.

Suspension means that during a certain period of time the employee is not admitted to work which he/she is obliged to perform under the labour agreement. At this, labour relations and the labour agreement shall not be terminated.

After the end of the suspension term the employee may be admitted to work, transferred to another work, brought to a disciplinary liability or dismissed. Members of the executive body of a company may be at any time suspended from performance of their duties if statutory documents of the company do not stipulate reasons for their suspension. A suspension of executive body members (including head of the executive body) is not subject to labour law but the civil (corporate) law. In this case, it means revocation of management powers which is a form of protection of corporate rights of owners and is not a suspension of an employee in the meaning of the Labour Code.

Suspension of an executive body member is possible only for a certain period of time and does not result in termination of labour relations. Dismissal of an executive body member who was suspended from performance of duties shall be carried out pursuant to the labour legislation.

### **Consequences of termination of a labour agreement**

On the day of employee's dismissal the employer is obliged to return the duly filled out labour book and to pay the employee off. In case of employee's dismissal he/she receives monetary compensation for all not used days of the annual vacation or the additional vacation for employees with children.

In case the employee did not work on the day of dismissal, such payments shall be made not later than on the next working day after the dismissed employee claimed the payment. In case there was no payment within stated terms due to the fault of the employer and if there is no dispute as to the amount of payments, the employer is obliged to pay the employee his/her average salary for the whole period of such delay up to the day of the settlement.

### **Necessity to agree dismissal with a trade union**

In the following cases the labour agreement with the employee may be terminated only upon prior agreement with the trade union member where the employee is a member:

- change in production and work organization, except for cases of company's liquidation;
- determined inconsistency with the position held or work performed due to insufficient qualification or health condition hindering continuance of such work;
- systematic non-performance of duties under labour agreement or internal labour order without reasonable excuse if the employee has already been brought to liability in form of disciplinary penalty or measures of public influence;
- truancy (including absence from work during more than 3 hours within working day) without a reasonable excuse;
- absence from work during more than four months on the row due to temporary disability, except for maternity leave, if the legislation does not provide a longer term for the work place (position) preservation in case of a specific disease;

- appearance at work under influence of alcohol, drugs or toxins;
- wrongful actions of employees working directly with money or merchandise, if such actions cause loss of employer's trust towards an employee;
- immoral actions committed by education personnel inconsistent with work.

The legislation may provide for other cases of labour agreement termination upon initiative of the employer without consent of the respective trade union body as well. If the primary trade union organization does not have an elective body, the termination of the labour agreement shall be agreed by a representative of the trade union authorized to represent interests of the trade union members.

The dismissal consent of the trade union is valid only if the employee is dismissed due to reasons stated in the employer's application. If the trade union consented to dismissal due to other reasons, the consent shall be invalid.

## → Corporate Law & Foreign Investment

Corporate legislation of Ukraine is a quite voluminous block of regulatory legal acts including codified ones. Corporate regulations contained therein are main tools for regulation of activity of different business entities in the sphere of corporate relations. Corporate law is also distinguished by a great number of regulations contained in companies' internal documents. The pyramid of corporate regulations as laid out by their legal effect may be described as follows:

- law;
- bylaws;
- charter or articles of association;
- shareholders' agreement;
- shareholders' (general meetings') decisions;
- decisions of executive bodies.

This classification is closely connected to the second one which enables us to reveal the idea of such subdivision.

By the method of legal regulation corporate provisions can be divided as follows:

- imperative (regulations of a strict, imperious and categorical nature disallowing any deviations in the regulated behavior); and
- dispositive (regulations of an autonomous nature enabling the parties (shareholders) to independently agree upon issues related to disposition of subjective rights and obligations or to use a reserve rule in some particular cases).

Imperative provisions establish explicit rules, and dispositive ones enable the parties (shareholders) to settle certain issues individually. By definition dispositive regulations differ through such phrases as “unless otherwise provided by the charter”, “unless constituent documents provide for...” etc. The current corporate legislation of Ukraine as compared with the same in many other countries is to a greater degree imperative.

For instance, shareholders of a limited liability company (including foreign investors) are often interested in extending the list of issues which can be resolved unanimously by a qualified majority of votes. The current legislation disallows this. Neither may the foreign investors enter into a shareholders agreement regulated by foreign law or have the corporate conflicts resolved by foreign courts, as according to the recommendations of the highest courts of Ukraine the corporate governance in Ukrainian companies shall be regulated by the imperative provisions of Ukrainian laws.

In many countries lawmakers stipulate more flexible regulations for the issues of corporate governance (first of all, this refers to companies shares of which are not listed at stock exchanges – LLC, Private JSC etc.) With the development of corporate legislation it is expected that many of the regulations will be replaced by dispositive ones and many of the issues will be resolved by shareholders/stockholders independently (according to their needs and goals). Currently, this perspective is already reflected in the Law of Ukraine “On Joint Stock Companies” dated 17 September 2008 No 514-VI (hereinafter – the “JSC Law”). Respective changes are anticipated in the currently elaborated draft Law on limited liability companies as well.

### **Business companies types**

Pursuant to Art. 4 of the Law of Ukraine “On Business Companies” dated 19 September 1991 No 1576 – XII (hereinafter – the “Business Companies’ Law”) the following types of business companies are envisaged in Ukraine:

- joint stock company;
- additional liability company;
- limited liability company;
- full company (full liability company);
- limited partnership.

**JOINT STOCK COMPANY** – type of a business company with the authorized capital divided into specified number of stock of equal nominal value and which is liable for company’s obligations only with company’s property. There are two types of JSCs: private JSC and public JSC.

**LIMITED LIABILITY COMPANY** – a company having its charter capital divided into shares the value of which is determined by constitutional documents. Shareholders of a limited liability company are liable for obligations of such company only within the value of their shares.

**ADDITIONAL LIABILITY COMPANY** – a company with authorized capital divided into shares the value of which is determined by constitutional documents. Its shareholders are liable for its debt in the value of their shares in the charter capital, unless it is insufficient in which case – also with their private property in the amount equal for all in proportion to their shares.

**FULL LIABILITY COMPANY** – type of a business company all shareholders in which carry out joint entrepreneurial activity and are jointly and severally liable for company's debts with all its property. The share of each shareholder is determined in articles of association.

**LIMITED PARTNERSHIP** – a form of partnership in which there is one or more limited partners (owners) in addition to general partners with full liability.

There is no categorically best or categorically worst form for a company. Depending on economic activity or tax regimes any company's form is the same (except for some specific activity types, activities such as securities trade, pawn shops, banking etc., types of organizational legal forms available for which are limited by the legislation).

The difference between companies is mostly internal: managing procedure, relations and liability of founders, company's authorized capital and its formation procedure etc. The most common company's form is a limited liability company. Private JSCs and private companies are also quite popular. In all cases liability of founders (shareholders, stockholders) is limited. All these forms will be discussed in detail in the following chapters of the book. The choice between an LLC and a private JSC should be made based on the following criteria:

- The minimum authorized capital of an LLC is currently not determined, for private JSC it amounts to 1250 minimum wages (about 138500 Euro);
- The number of shareholders in an LLC is pursuant to the newest changes in the legislation from 1 to 100, in private JSC - also from 1 to 100 (more than 100 stockholders are permitted only for a public JSC);
- Relation between corporate rights and equity capital of the company: LLC's shareholders are entitled to withdraw from the company at any time and take their shares from the charter capital (calculated as assets minus liabilities at the withdrawal date). Moreover, LLC's shareholders shall have preemptive right on purchasing shares from another shareholder, who has decided to sell its shares, on terms and conditions proposed to the third parties in the amount proportional to its part in the charter capital of the company. There is no withdrawal from JSC but stockholders are entitled to sell their stock. However, the shareholders in a private JSC also have the right of first refusal regarding the shares sold if it is provided by the charter of such private JCS.

■ **Publicity:** there are lesser requirements to an LLC than to a private JSC. In its turn, a private JSC is less public and requirements to information disclosure and financial statements are less strict compared to a public JSC.

Therefore, such organizational legal form as LLC is more suitable for purposes of establishing a daughter enterprise in Ukraine with no local shareholder. If a joint venture is established, it is better to choose a private JSC as legal form which does not provide for a withdrawal of stockholders (which will prevent loss of company's liquidity in case a stockholder with 50% of stocks decides to withdraw) and gives more flexible company's management tools. Further we describe main regulatory norms regarding these two types of legal entities.

### **General Regulation on Limited Liability Companies**

The activity of an LLC is regulated by the Civil and Business Codes of Ukraine, the Law on Business Companies, the Law on State Registration of legal entities and private entrepreneurs, and the Law on Limited Liability Companies. For sure these laws cannot cover all corporate matters taking into account the scope of corporate activity and its modernization, that is why more and more new problems arise on practice. In order to improve the legal background a number of bills on limited liability companies has been elaborated, the most innovative of which is the bill by the Commercial Law Center of Ukraine (bill No 2011-1). The bill envisages the following positive amendments:

- reducing the quorum of the general meeting to 50+1% of shareholders' votes;
- the possibility to establish a supervisory body (Board);
- the possibility to dismiss management on the basis of the removal from office (which is not allowed today). Also, it is proposed to remove the limits of the material liability for the management of the company for the harmful actions which resulted in losses for the company and its shareholders (now such liability is limited to the amount of one employee's salary);
- derivative actions – rights of the shareholders to sue the management of the limited liability company for the losses caused by its unlawful actions – which is currently not envisaged for the limited liability companies. This possibility is crucial for the minority shareholders in case illegal acts of the management are supported by the controlling shareholders.
- the special way for the disposal of shares in family business;
- possibility for the shareholders to enter into agreements between themselves on the matters of corporate governance;
- approval to enter into related-party or major transactions;
- rules for the exclusion of shareholders which actions work against the company.

The bill on Limited Liability Companies not only introduces new mechanisms but also improves the current ones. Changes will be made in future and now let us have a look at the current regulation of the LLC activity.

A Limited Liability Company (hereinafter LLC) is a type of a business company the charter capital of which is divided into shares. Value of shares is determined by the charter (a constitutional document of such company). Furthermore, pursuant to Art.50 of the Business Companies' Law the LLC shall have max. 100 members and pursuant to Art.141 of the Civil Code of Ukraine LLC is not allowed to have another Business Company with a sole shareholder a single shareholder. Neither may one shareholder own 100% participatory interests in more than one LLC in Ukraine. In order to register Business Company incorporator or an authorized person shall provide a certain package of documents to the State Registrar which includes information on the beneficial owners of the companies – founders. Notably this information is requested at the stage of incorporation only and is not required when a new participant enters into already existing company.

LLC has a two-level management system: highest body – general shareholders' meeting; executive body – collegial body (board of directors, management board) or sole body (director). Supervision bodies could be established at LLC's own discretion. The supervision body is the very body through which shareholders could exercise their rights to participate in the management of company's affairs in addition to general meetings. In practice, some difficulties arise during registration of the charter of companies that wish to establish supervision bodies as legislation prescribes only a limited number of management bodies. However, the mentioned bill on LLC envisages such possibility which will certainly improve activity of the limited liability companies in Ukraine.

The highest LLC's body – shareholders' meeting consists of shareholders or representatives appointed by them. Pursuant to Art. 60 of the Business Companies' Law an LLC's shareholders' meeting has a quorum, if shareholders (their representatives) holding together over 60% of votes are present at the meeting.

Part 2 Art. 98 of the Civil Code of Ukraine dated 16 January 2003 No 435-IV (hereinafter – the "Civil Code of Ukraine") contains a dispositive provision according to which "... decisions of a general meeting are made by simple majority of votes of present shareholders, if otherwise is not provided by constitutional documents or the law." At the same time, the Civil Code of Ukraine envisages a qualified majority of votes, if legal entities (irrespective of their organizational legal form) make decisions on concept issues (amendments to the charter, major deeds, company's liquidation). Provisions determining a quorum are imperative and cannot be changed in the charter upon agreement of the parties. The issue of voting rules in a LLC is a debating point, and it is advisable to settle it in the LLC's charter (as the court practice shows that in particular LLC's charter provisions on qualified majority of votes for decision-making are decisive for courts to declare major deeds null and void). At this, there shall be a differentiation between matters for which the law requires a qualified majority of votes and matters for which there is no such law requirement. The first ones are governed by provisions of the law and they are imperative; quorum for such matters cannot be changed. As to the second ones, there is no unambiguous position, that is why quorum change for such matters always bears risks for such

provisions to be declared null and void and that matters in questions will be made subject to legislative quorum (decision-making by a simple majority of votes).

A limited liability company has a body responsible for the management of its activity and accountable to the general shareholders' meeting. Members of the company's executive body can also be appointed other than from the shareholders' pool of the company (Art. 145 of the Civil Code of Ukraine). It means that not only company's shareholders can become members of the company's executive body. The LLC's executive body can be a collegial (management board, board of directors) or a sole body (director). Management board is headed by the General Director (Art. 62 the Business Companies' Law).

According to the general rule in Ukrainian legislation the rights of LLC's executive bodies are established based on the residual principle: the competence of a director includes all issues not falling into the competence of the general shareholders' meeting. At this, rights of executive bodies to dispose of LLC's property and conclude any other deeds are limited by the Civil Code of Ukraine and the Business Companies' Law only in part of determination of major company's activity areas and conclusion of major deeds. This creates a huge legal loophole which allows an experienced manager to strip a company of almost all liquid assets in a very short period of time. Cases are known when owners were left only with constitutional documents and empty bank accounts.

There are many schemes for asset stripping: sale of assets in exchange for depreciated bonds or issuance securities, transfer of assets to charter capitals of shell-companies, obtaining loans with pledge of liquid assets with consequent non-repayment of such loans, deals with bills, asset lease with purchase rights, alienation of intellectual property rights (invention, industry samples), sale of trademarks and many others. Court practice shows that if a director did not exceed its powers by such deeds there are hardly any chances to get the stolen assets back. This leads to the only right conclusion: executive bodies shall be limited in their powers in addition to restrictions provided by the legislation. On the one hand, charter can be used for these purposes and information on set limitations can be registered with the Unified State Register, on the other hand there shall be effective control over director's activity ("better safe than sorry").

Dispositive provision of Part 3 Art. 145 of the Civil Code of Ukraine stipulates that the competence of the LLC's executive body, procedure for decision making and acting on behalf of the company are determined by the Civil Code of Ukraine, other laws and the company's charter. In addition thereto, pursuant to Part 4 of the same article the company's charter and the law include other issues to the exclusive competence of the general meeting in addition to such mentioned in this article of the Civil Code of Ukraine. Therefore, if LLC's charter includes the resolution of all serious issues into the exclusive competence of the general shareholders' meeting, the executive body will have no legal grounds for asset stripping. It is important not to go too far: if the director has to obtain approval of the general shareholders' meeting on any matter, the company will just not be able to work.

Pursuant to Art. 63 of the Business Companies' Law activity of the management board (director) is supervised by an audit commission established by the general shareholders' meeting out of their members in the number provided in constitutional document but not less than 3 persons. An audit commission audits the activity of the management board (director) upon instruction of the meeting, its own initiative or upon requests of company's shareholders. In practice it is often impossible to establish the audit commission due to the restrictions mentioned above, at the same time, the responsibility for non-compliance with these rules is not established.

### **General Regulation on Joint Stock Companies**

Definition of a joint stock company (hereinafter - JSC) is set out in several legislative acts, for instance, in Par. 1 Art. 3 of the JSC Law, Art. 152 of the Civil Code of Ukraine, Part 2 Art. 80 of the Economic Code of Ukraine dated 16 January 2003 No 436-IV.

A joint stock company is a business entity with the authorized capital divided into a specified number of stock of equal nominal value representing the corporate rights, which are certified by the stock. A joint stock company is liable for its obligations with all its property. Stockholders are not liable for company's obligations and shall incur the risks of losses associated with a joint stock company's activity only within the limit of the block of stock they own.

There are two types of joint stock companies – public and private ones. The major difference between these types lies in following: the number of stockholders in a private JSC shall not exceed 100 persons; a public JSC is entitled to public and private stock offerings and a private JSC is entitled to private stock offerings only. A minimum authorized capital of a JSC shall amount to 1250 minimum wages based on the minimum wage in effect at the date of establishment (registration) of a JSC.

The corporate governance in joint stock companies is performed by the shareholders' general meeting as the highest management body, the director (or board of directors) as the executive body, and the supervisory board and audit commission (or a single auditor), which are entitled to supervise and exercise control over director's activity. At that formation of supervisory board and appointment of members thereto in the joint stock companies with less than 10 shareholders is not mandatory.

A JSC is obliged to convene a general stockholders' meeting on an annual basis (annual general meeting). The quorum of the general meeting shall be determined by the registration committee at the time of completion of the stockholders' registration. The general meeting has a quorum, if stockholders (their representatives) who jointly hold not less than 60 per cent of the voting stock were registered to attend the meeting. One voting stock gives a stockholder one vote for making a decision on each of the issues brought to vote at the general meeting, except for cumulative voting. Stockholders – owners of privileged stock of the company are also entitled to vote (on some issues as provided by the law).

Decisions are made by a simple majority of votes of stockholders registered to attend the general meeting and holding stock with the vote right for such issues, except for some cases as provided by the legislation.

Notably, the JSC's charter may set out a higher number of votes necessary for decision-making on the issues of the agenda or provide other issues decisions on which shall be made with  $\frac{3}{4}$  of votes of the stockholders' overall number, except for issues regarding early termination of powers of JSC's officials; legal actions against officials of company's governing bodies about the reimbursement of losses inflicted by the JSC; legal actions in case of violation of legislative requirements by concluding a major deal.

The general meeting is not entitled to decide on issues not included into the agenda, at this, the voting is held regarding all issues of the agenda brought to voting. Ballot papers may be used for voting on the agenda items of a general meeting. A company that made a public offering or a company with over 100 stockholders owning ordinary stock shall carry out its voting only by ballot papers. The supervisory board of a JSC is a body responsible for the protection of stockholders' rights and, within competence as determined by the charter and the legislation, for supervision and regulation of the activity of company's executive body.

Joint stock companies with 10 or more stockholders holding ordinary stock are obliged to establish the supervisory board. In joint stock companies with 9 or less stockholders holding ordinary stock, if there is no supervisory board, its powers shall be executed by the general meeting. In such a case powers of the supervisory board as to the arrangement and conduct of the general meeting as provided by the legislation shall be executed by the executive body of the company, if otherwise is not provided by the charter.

The procedure for the activity, payment of remuneration and liability of the members of the supervisory board is defined by the legislation, the company's charter, the provision on the supervisory board of the JSC and a civil or an employment agreement (contract) to be entered into with a member of the supervisory board. Such an agreement (contract) shall be signed on behalf of the JSC by the head of the executive body or any other person authorized by the general meeting on the terms approved by the general meeting. The civil agreement may be concluded on either payable or a free basis.

The competence of the supervisory board includes decisions as provided by the legislation (see below), the JSC charter and issues delegated to the competence of the supervisory board by the general meeting. Issues falling into exclusive competence of the supervisory board of a JSC cannot be resolved by any other bodies, except for the general meeting (with some exceptions).

Within its exclusive competence the Supervisory board is entitled to make a decision on ordinary or extraordinary general meetings upon request of stockholders or the executive body; to elect the head and members of the executive body or terminate its/their powers; to elect the

company's auditor and specify the terms of the contract to be entered into, establish the amount of its fee; to decide on the conclusion of major deals in cases as provided by the legislation.

The executive body is responsible for management of the day-to-day activity of a JSC. Its competence includes deciding on all issues related to the management of company's daily activity, except issues which fall into the exclusive competence of the general meeting or the supervisory board.

The executive body shall be accountable to the general meeting and the supervisory board and shall arrange the implementation of their decisions. The executive body shall act on behalf of the company within the limits established by the joint stock company's charter and the law. The executive body may be collegial (board, directorate, etc.) or sole (director, general director etc.) In order to audit the financial and economic activity of a JSC the general meeting may elect the audit commission (the auditor).

A company with up to 100 holders of ordinary stock is entitled to introduce a position of an auditor or to elect the audit commission, whereas companies with more than 100 holders of ordinary stock are entitled to elect the audit commission only.

The audit commission (auditor) shall be entitled to make propositions to the agenda of the general meeting and request convocation of an extraordinary general meeting. Members of the audit commission (auditor) shall be entitled to attend the general meeting, and participate in the discussion of the agenda with a deliberative vote. Members of the audit commission (auditor) shall be entitled to participate in the meetings of the supervisory board and the executive body, if this is provided by the company's charter or the by-laws.

### **General overview of foreign investments regulations**

The Law "On Investment Activity" dated 18 September 1991 No 1560-XII is a frame for all forms and types of investment activity. It contains all main principles for conduction of investment activity in Ukraine. Investment activity is defined as activity on exercise of investment which can be carried out with own or borrowed funds, budget appropriations in form of monetary funds, securities, real estate and movable property, intellectual property rights, know-how etc. Therefore, almost any activity connected to investment of capital in order to gain profit is investment activity.

The Law provides some guaranties for subjects of investment activity– guarantee of preservation of initial contractual terms by change of legislation worsening situation of such subjects, protection from interference of state agencies and officials, right for compensation of losses incurred due to acts of state bodies, guaranties for investment protection, including, in case of their expropriation. A great number of norms of the Law of Ukraine "On Regime of Foreign Investment" dated 19 March 1996 No 93/96-BP double provisions of the Law of Ukraine "On

Investment Activity” changing them just a little. It provides more detailed description of procedure and terms for compensation of losses, guaranty for inalterability of the legislative regulation.

Provisions of the Law “On Regime of Foreign Investment” stipulating procedure for the registration of foreign investments have regulative character. The procedure for the registration of foreign investments was specified in the respective Regulations of the Ukrainian Cabinet of Ministers in March 2013.

According to the said procedure the registration authorities (the Council of Ministers of Crimea, regional administrations, Kyiv, and Sevastopol city administrations) shall register the investment within 7 days following application submitted by the foreign investor for foreign investment registration after the actual investment or change of the investment owner. The undoubted advantage is the legal formalization of the possibility to register a change of the investment owner (re-register the investment for the new owner following, for example, the sale of corporate rights in Ukrainian company). However, if we take the investment re-registration procedure formally, the next owners of an unregistered investment will actually not be able to register it (as the investment re-registration procedure primarily means cancelling the previous owner’s investment registration and the following registration of the new owner’s investment).

Foreign investments in Ukraine are subject to state registration. Although this registration is not mandatory, it is highly advisable, since according to the Law of Ukraine “On Regime of Foreign Investment in Ukraine” only registered investment is protected by Ukrainian laws.

Not registered foreign investments do not entitle to allowances and guaranties provided by this law. For instance, property imported to Ukraine as contribution of foreign investor to the charter capital of a company with foreign investment (except for goods for sale or own consumption) is free from customs duty. At this, custom authorities allow import of such property to the territory of Ukraine based on a promissory note issued by the company with delay of payment for not more than 30 calendar days as of date of the execution of the import customs declaration. The promissory note shall be paid and the import duty is not collected if within such delay of payment respective property has been booked to the balance of the company and the tax authority at the location of the company made a record about it on the promissory note.

## → Corporate Tax Law

### **Taxpayers**

Resident companies are taxed at their worldwide income. Nonresident entities are taxed at their business or trade income derived in the territory of Ukraine via permanent establishments or other non-business (passive) Ukrainian sourced income.

## Corporate income tax base

Taxable income is calculated by deduction of allowable expenses, depreciation and amortization from gross income.

## Corporate income tax rate

The general corporate income tax rate is 21% for year 2012. The rate will be gradually reduced to 19% since 2013 and to 16% since 2014.

## Taxation of dividends

Dividends distributed by the Ukrainian company are subject to an advanced corporate income tax (ACIT) at the rate of 21% accrued on a gross basis and paid at the distributing company's cost. The paid ACIT can be carried forward for indefinite period and ultimately be set off against future corporate income tax liabilities of the Ukrainian company.

## Taxation of capital gain

Capital gains are taxed as regular income at the standard rate.

## Participation exemption

Dividends received from nonresident are exempt from the Ukrainian tax in case the Ukrainian dividends recipient holds at least 20% of the company distributing dividends.

## Incentives

Certain business sectors are entitled to zero corporate income tax rate for 10 years starting from January 1, 2011. Among the covered industries are:

- 3,4 and 5 star hotels;
- Renewable energy industry;
- Consumer goods industry;
- Shipbuilding and aircraft construction industries;
- Production of agricultural equipment.

Zero corporate income tax rate is also available since January 1, 2011 up to January 1, 2016 for small business meeting specific requirements as regards to the amount of annual proceeds, quantity of employed individuals, business field etc.

## Special regimes

■ **FIXED AGRICULTURAL TAX.** Agriculture companies may qualify for a favorable tax regime in case revenue from realization of agriculture goods of own production constitute not less than 75% of total annual revenue. Fixed agricultural taxpayers are exempt from corporate income tax and some other taxes.

■ **UNIFIED TAX.** Unified tax is a simplified tax regime set forth for small and/or medium business depending on their annual revenue, quantity of employed individuals and type of business. Companies enjoying unified tax regime are exempt from corporate income tax and some other taxes.

## Losses

The carry forward of tax losses may be done indefinitely. Loss carryback is restricted.

## Anti-avoidance rules

■ **TRANSFER PRICING.** Transfer pricing rule applies to barter transactions, transactions with nonresidents, entities that are not corporate income tax payers at the regular rate of 21% (including nonresidents). Arm's length principle is deemed to be observed in case the contractual price varies from the market price for less than 20%. New transfer pricing rules based on OECD transfer pricing principles are expected to come into effect as of January 1, 2013.

■ **DEDUCTION RESTRICTIONS.** There the following deduction restrictions in Ukraine:

- Consulting, marketing and advertisement services purchased from nonresident may be deducted in amount not exceeding 4% of the prior year proceeds;
- Royalties paid to a nonresidents may be deducted in amount not exceeding 4% of the prior year proceeds; and may not be deducted if paid to an offshore company or to company that is not the beneficial owner or with respect to intellectual property rights to which primarily emerged in Ukraine;
- Engineering services purchased from a nonresident may be deducted in amount not exceeding 5% of customs value of imported equipment imported; and may not be deducted if purchased from an offshore company;
- Expenses resulted from purchases from an offshore company may be deducted in amount of 85%.

■ **THIN CAPITALIZATION RULES.** There are no statutory developed thin capitalization rules in Ukraine. However, there are certain restrictions on deductibility of interest paid under loan agreement with nonresident (entity related to such nonresident) that holds 50% or more in the Ukrainian borrower. In such case interest may be deducted in amount of the borrower's interest income plus 50% of non-interest income less deductible expenses.

## **Withholding tax**

Withholding tax applies to Ukrainian source income paid to nonresident by the resident of Ukraine or permanent establishment of nonresident. The general withholding tax rate is 15% unless a lower rate is set forth by the relevant double tax treaty. Other tax rates set forth for specific types of income. Withholding tax applies to dividends, interest, royalty, capital gains, lease payments, investment income, agency and commission fees, freight, engineering and advertisement fees, insurance premiums etc.

## **VALUE ADDED TAX**

### **Taxable transactions**

The supply of goods and services in the customs territory of Ukraine, import and export of goods are subject to VAT. Supply of specific goods and services are exempt from VAT, including, but not limited to supply of baby food and goods, some educational services, medical and healthcare products etc. The following transactions are not subject to VAT (the list is not exhaustive):

- Issue, placement and sale (redemption) of securities;
- Insurance, coinsurance and reinsurance services;
- Reorganization of legal entities etc.

### **Value added tax rate**

The regular VAT rate amounts to 20% and will be reduced to 17% since January 1, 2014. Export transactions are taxed at a zero rate.

### **Registration**

Compulsory VAT registration is set forth for resident companies and individuals or nonresident permanent establishments whose volume of VATable transaction for the last 12 months exceeds UAH 300 000 (approx. Euro 30 500). In case the above criteria are not met an entity may apply for VAT registration voluntary.

### **Incentives**

The supply of goods and services in specific industries are temporarily exempt from VAT:

- Supply of equipment and machinery related to alternative fuel - until January 1, 2019;
- Import of goods and supply of R&D results related to aircraft construction industry - until January 1, 2016;
- Publishing and paper production activity - until January 1, 2015 etc.

## INDIVIDUAL TAXATION

### Taxpayers

Resident individuals are taxed on their worldwide income and nonresidents on their Ukrainian source income.

### Residency

Tax residency is determined applying the following tests that should be used in the order of preference:

- An individual is deemed to be a Ukrainian tax resident if he or she resides in Ukraine;
- If an individual also resides in another country, he or she is deemed to be a resident of Ukraine if a permanent place of residence is in Ukraine;
- If an individual has a permanent place of residence also in a foreign country he or she is deemed to be a resident of Ukraine in case having more close economic and personal ties in Ukraine;
- In case it is not possible to determine the residency applying the above criteria an individual is deemed to be tax resident of Ukraine if he or she stays in Ukraine more than 183 days during a calendar year.

### Personal income tax rate

The personal income tax rate is slightly progressive and amounts to:

- 15% with respect to income up to 10 minimum wages applies to monthly income up to a threshold of 10 minimum monthly wages (UAH 11 470 in 2013, approx. Euro 1 0420);
  - 17% with respect to excess amount of a threshold of 10 minimum monthly wages.
- Other rates are applicable to specific types of income.

### Unified tax

Unified tax is a simplified tax regime set forth for three groups of individual entrepreneurs depending on their annual revenue, quantity of employed individuals and type of business. Individual entrepreneurs enjoying unified tax regime are exempt from personal income tax and some other taxes.