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RUSSIA

New FSFM Order Reduces Listing Size Abroad

On July 9, 2008, the Federal Service for Financial Markets of the Russian Federation ("FSFM") published a new order reducing the percentage of equity securities that Russian companies can list and sell abroad. The new order, the final version of Order No. 08-17/pz-n (the "Order"),¹ follows soon after the Russian Government's adoption of the "Law on Foreign Investment in Companies with Strategic Significance for National Security and Defense" (the "Strategic Sectors Law") (*CIS Legal NewsWire*, June 15, 2008).

Effective July 19, 2008, Russian issuers engaged in large-scale extraction of oil, gas and

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UKRAINE

WTO Accession Facilitates Trade with Ukraine

On May 16, 2008, Ukraine became the 152nd member of the World Trade Organization (WTO). Joining the WTO will allow Ukraine to develop increased trade and investment ties with other WTO countries, particularly those in the European Union, trade with which currently constitutes more than 30% of Ukraine's foreign trade. Most of the legal acts required to conform Ukraine's regulatory regime to WTO requirements came into force either January 1, 2008, or upon Ukraine's WTO accession.

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KAZAKHSTAN

Draft Tax Code Simplifies Taxation in Kazakhstan

The draft of Kazakhstan's new Tax Code, expected to come into force January 1, 2009, has now been submitted to Parliament for discussion and approval. As noted in the previous edition of the *CIS Legal NewsWire*, the new Tax Code may introduce a number of significant changes.

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¹ Order No. 08-17/pz-n, dated April 15, 2008, "On the Introduction of Amendments in Regulation in respect of the Procedure on Placement and/or Listing of Securities of Russian Issuers Outside the Territory of the Russian Federation, approved by Order of the FSFM No. 06-5/pz-n, dated January 12, 2006".

metals can list a maximum of 5% of their shares on foreign stock exchanges. Issuers engaged in other strategic sectors (defined in the new Strategic Sectors Law) are limited to listing 25% of their shares abroad, with all other issuers limited to listing 30%.

The new thresholds significantly reduce the previous 35% threshold for securities permitted to be listed abroad, especially for oil, gas and certain types of mining companies. The 35% threshold became effective in April 2006² and was applied uniformly to all Russian companies undergoing initial public offerings or secondary placements outside of Russia. Prior to the 35% threshold, by order of the Federal Securities Commission, a 40% uniform threshold applied during the three-year period from April 2003 until April 2006.

Issuers who have outstanding securities listed for trading on foreign exchanges or who have received approval from the FSFM prior to the effective date of the Order for making a future placement abroad are not affected by the new limitations and will not need to repurchase their shares in the market or reduce the size of their planned offerings in order to meet the new thresholds. However, further future offerings by these issuers will need to comply with the new requirements and certain issuers may be prevented from placing additional securities abroad.

While the Order may contract the international market for Russian securities, it will not necessarily increase domestic investor demand for these securities or enable Russian companies operating in strategic sectors to attract additional capital in desired amounts or at an acceptable price. /I. Skidan, M. Sotnikova

² Order No. 06-42/pz-n, dated April 18, 2006, "On the Introduction of Amendments to the Regulations for the Issuance by the Federal Service for Financial Markets of Permits for the Placement and/or Trading of Emission Securities of Russian Issuers outside the Russian Federation, approved by Order of the FSFM No. 06-5/pz-n, dated January 12, 2006".

2005 Federal Concession Law Amended in Russia

State authorities frequently seek to partner with private investors on large infrastructure projects in Russia. Under current Russian law, public-private cooperation can take a number of different legal forms, with concession agreements being the likely wave of the future. Concession agreements are subject to RF Law No. 115-FZ "On Concession Agreements" (the "2005 Concession Law"), which came into effect on July 21, 2005.

Under the 2005 Concession Law, the investor concessionaire undertakes to construct and/or reconstruct property specified in the concession agreement at its own cost and expense. The right of ownership to the property belongs to the grantor of the concession (generally, the Russian Federation, its sub-divisions or a municipal agency). In return, the concessionaire receives the right to use or operate the property for a period of time in order to make a profit on its investment. Practical experience with the 2005 Concession Law since its implementation has shown that the law requires additional clarification. On June 30, 2008, RF Law No. 108-FZ "On Amendments to the Concession Law and Certain Laws and Acts" (the "2008 Amendments") was promulgated in response to this concern.

Effective July 2, 2008, new rules apply to public tender requirements, concession agreement terms, lease of land and related areas, the procedure for resolving disputes prior to referring them to arbitration, and certain other matters covered by the 2005 Concession Law. The rest of this article notes highlights from the 2008 Amendments.

Tenders

All information regarding a public tender must be published on the official Internet site designated for this purpose by the RF Government. Previously, this information could only be found on the website of the concession grantor involved in the tender. The purpose of this requirement is to make such information uniformly available and allow it to be updated easily as required. To the best of our knowledge, this official RF Government website has not been designated yet.

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Concession agreement terms

Concession agreements generally follow an officially published standard form. Although its provisions are not mandatory, the standard form is a useful guide to material contractual terms acceptable to the RF Government. The 2008 Amendments expand the list of material terms to include: (i) provision of security for the concessionaire's obligations (in the form of an irrevocable bank guarantee, a pledge over the concessionaire's deposit account and/or performance insurance), as well as the amount and terms of the security; and (ii) the amount, form, procedure and terms of the concession payments.

Concession fee

A concession fee may not be charged if (i) the concessionaire sells manufactured goods, performs work or renders services at regulated prices or rates (or charges a premium on tariffs) or (ii) if the grantor funds part of the cost of construction and/or reconstruction, utilization or operation of the concession property.

Lease of Land and Related Areas

The concessionaire's lease must include not only the land, but also the adjacent woods, water and related subsoil areas required for the construction or operation of the concession property. The lease term cannot exceed the term of the concession agreement.

The lease must be entered into within 60 days after the concession agreement is signed, except for seaports, where the lease must be entered into within 60 days after the registration of the seaport plot in the appropriate land register.

Termination of the concession agreement is grounds for termination of the lease.

Procedure for Resolving Disputes Prior to Arbitration

If a party fails to perform or improperly performs its concession obligations, the other party must submit a written demand for performance to occur within a reasonable period of time. A plea to amend or prematurely terminate the concession agreement may be brought only if the defaulting party's obligations have not been performed within the timeframe specified in the written demand for

performance. An arbitration court must reject a claim for amendment or early termination of the concession agreement if a petitioning party fails to comply with these requirements.

Enforcement of Concessionaire's Rights to the Property

Creditors have no right to attach or enforce judgments against the concessionaire's rights to exploit or use the property under the concession agreement (or against the property itself, which continues to be owned by the RF Government) in satisfaction of the concessionaire's unpaid debts. The 2008 Amendments are silent on the ability of the concessionaire's creditors to attach its rights to receive payments under the concession and other related agreements (implying that such security interests are possible, as long as they conform to the requirements of Russian law).

Conclusion

The 2008 Amendments clarify the law to encourage investors to enter into concession arrangements. Additional amendments may be expected as concession practice among private concessionaires and the RF Government develops further. /I. Skidan, A. Yatsko, A. Smirnova

Amended Federal Law Eliminates Auctions and Tenders for Development Rights to the Russian Continental Shelf

On April 29, 2008, the Federal Law "On the Continental Shelf of the Russian Federation" was amended to raise the qualifications that companies must meet to participate in the development of the Russian continental shelf. To obtain a continental shelf subsoil plot for exploration and extraction, a company must meet the following requirements: it must (i) be incorporated under Russian law, (ii) have at least five years of experience in continental shelf subsoil exploration in the Russian Federation, and (iii)

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be at least fifty percent controlled by the Russian Government, whether through the Russian Government's ownership of more than fifty percent of the charter capital directly or through direct or indirect control of more than fifty percent of the votes in the company. The new requirements are not retroactive and do not apply to companies who received subsoil rights prior to the April 2008 amendments to the Federal Law "On the Continental Shelf of the Russian Federation" coming into force.

Measures to tighten state control over exploration of the continental shelf are further developed in the most recent amendments to the Federal Law "On the Continental Shelf of the Russian Federation", which were signed into law by President Dmitry Medvedev on July 18, 2008. Under these latest amendments, the subsoil rights to the continental shelf of the Russian Federation will be granted to qualified companies without tenders or auctions being held.

The Russian Government can now handpick companies, although the choice is effectively limited to Gazprom and Rosneft, to explore the rich deposits of natural resources under the continental shelf. This allows the Russian Government to provide qualified companies with rights to these valuable deposits without their having to compete over the deposits at tenders and auctions. Abolishing the auction and tender system for state-controlled companies is logical because by paying an auction price for the right to develop deposits of natural resources under the continental shelf, state-owned companies are, in effect, just moving funds from one state pocket to another.

Certainly, the abolition of auctions and tenders for state-controlled companies results in the de facto state monopoly over the exploration of the continental shelf being more efficient. However, the extent to which a monopoly, whether state or private, could be more efficient when compared to a competition-driven industry remains to be seen. /A. Kalinov, E. Tonkov

Russian Government Introduces Transport Investment Rules

The Russian Government is developing a fourth type of special economic zone ("SEZ") to facilitate economic

development and create a more favorable investment and business climate in Russia. According to the Russian Transportation Minister, Mr. Igor Livitin, in an RIA Novosti article, creating a new SEZ would encourage the development of large transport hubs in the Russian regions, help to turn Russia into an international transport corridor for cargo from Asia, and increase cargo flows. It would also develop and expand opportunities for the regional aircraft repair industry, as well as support regional authorities in developing projects for ship repair and fish processing.

Federal Law No. 240-FZ, dated October 30, 2007, "On Making Amendments to Federal Law on Special Economic Zones in the Russian Federation" ("SEZ Law") created an additional type of SEZ - the Port SEZ. The draft amendments to the law were brought to the state Duma on August 21, 2008 and are going to be considered in the near future. On June 2, 2008, the Tender Committee of Russia's Ministry of Economic Development considered candidates for creating a Port SEZ. From 17 applicants, the Tender Committee selected two airports and one seaport: Emelyanovo Airport in Krasnoyarsk, Ulyanovsk-Vostochniy Airport in Ulyanovsk, and Sovetskaya Gavan seaport in the Khabarovsk Region. These Port SEZs will be established for 49 years with no right to an extension. Governmental decrees to establish the three Port SEZs are expected to be passed by the end of the year.

The Port SEZ establishes special terms for doing business and provides the following tax and customs privileges for residents:

1. the SEZ Law and Russian Tax Code exempt from VAT (zero rate) the performance of work or the provision of services by residents of the Port SEZ, provided that the work or services are performed in the Port SEZ; and
2. the Port SEZ will be a customs-free zone. According to this regime, customs duties are not payable on foreign goods placed and used in the Port SEZ, and Russian goods to be placed in the SEZ under the export customs regime are taxable, but exempt from export customs duties.

To become a resident of the Port SEZ, a commercial entity must meet two requirements: 1) it must be registered with the tax authorities in the Port SEZ; and 2) it must conclude an agreement with the Federal Agency For Management of Special Economic Zones ("FAMSEZ") on conducting business in these zones.

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To conclude an agreement with FAMSEZ, an investor should provide FAMSEZ with a preliminary letter indicating the activity it intends to carry out in the SEZ. Additionally, FAMSEZ requires an applicant to file a set of documents.

A resident is granted the right to use a land plot for its activity in the SEZ in accordance with a lease agreement which will allow the resident to register title to any infrastructure the resident builds on the land plot.

Under the SEZ Law, a resident must invest a minimum amount depending on the type of port: for seaports, a resident must invest at least €100 million in new infrastructure construction; for river ports and airports, a resident must invest at least €50 million in new infrastructure; for reconstruction of existing ports, at least €3 million; and for other port activities not related to infrastructure, from €68,000 to €900,000.

In addition, the SEZ Law prescribes a strictly limited list of activities that a resident may perform in the Port SEZ: loading and unloading services; warehousing and storage of goods, transportation and dispatch services; supply and tackle of ships or aircraft, including on-board supplies and equipping; repair, technical maintenance and modernization of sea and river ships, aircraft, and aviation technology, including aircraft engines and other components, etc.

According to Mr. Andrey Alpatov, chairman of FAMSEZ, a new tender will take place in the Fall, and probably several more Port SEZs will be established in Russia. Considering the strategic advantages of the transport component and Russia's geographic position as well as the potential of its coastal territories, establishment of the Port SEZ should attract greater investment in the transportation sector in Russia. /A. Gasparyan

Making Green with Green — Biofuels in Russia and Ukraine: Part I — Introducing Biofuels

As the price of oil continues to shatter records and environmental concerns continue to gain prominence, the demand for new and alternative energy sources has been

increasing. As a result, governments and investors around the world are turning to biofuels, among other alternative energy sources. Russia and Ukraine, with vast quantities of land, labor, resources, and with political regimes seemingly friendly to biofuels, could soon become major producers of biofuels. Former Russian President Vladimir Putin is stated to have announced at a meeting with the Minister of Agriculture, Alexei Gordeev, at the end of 2007, that: "We need to create favorable business conditions for promotion of biofuel production sites," and delegated to the Ministry for Agriculture to elaborate a system to stimulate the biofuel business in Russia. This article, the first in a series of three, introduces the topic of biofuels.

What are biofuels?

Biofuels are fuels created from agriculture, including from plant matter and animal fat. These "farmed" fuels can be used in cars, locomotives, tractors or airplanes and can be produced for both diesel and petrol engines, either in blends or as total substitutes. These sources of energy are considered by some to be as renewable as new crops and could, under certain circumstances, produce new fuel in perpetuity.

Ethanol, biodiesel, and the environment

Biofuels could be more environmentally friendly than conventional fuels. Controversy continues as to whether biofuels are actually "green". Some of the principal concerns are that forests are cleared for the growth of feedstock, that food prices may rise due to the diversion of land used for food production, and that there is a worldwide deficit of cultivation areas.

The best known biofuels are ethanol and variants of biodiesel. Ethanol can be produced from a variety of feedstocks, including corn, potatoes, wood, sugar cane and switchgrass. Because crops used for biofuels convert carbon dioxide to oxygen as part of their lifecycle, biofuels result in far fewer carbon emissions than conventional fuels. Ethanol can be used as a substitute for petrol and is already commonly used as a 10% blend in the United States in petrol. Beyond a 10% blend, a car must be built or modified to be ethanol compatible. Since the United States accounts for approximately one quarter of the world's fuel consumption and much of this consumption is for petrol rather than diesel, ethanol demand in the United States promises to be significant.

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Biodiesel is derived from biological sources (e.g. vegetable oils and/or animal fats) and can be used in diesel engine vehicles. For example, biodiesel from animal fats takes animal by-products from existing large farming operations and turns it into profitable fuel. Unlike in the United States, the European biofuels market leans more towards demand for biodiesel and the newer "renewable diesel" or "second generation biodiesel" variant, and the EU imports most of its biofuels.

Conditions for biofuels to succeed

The conditions must be right for any new technology, such as biofuels, to prosper. This includes business, legal and policy environments. While the specifics in the context of Russia and Ukraine will be discussed in future issues of the *CIS Legal NewsWire*, both of these countries have been turning in favor of biofuels. Furthermore, supply of biofuels has not kept pace with demand. China and India, which both have bioethanol fuel programs, have dramatically increased their consumption, with continuing growth suggesting increasing demand well into the future. While in the past low fuel prices have made biofuels economically unviable, sky-rocketing oil prices, new developments in the biotechnology sector and increased demand for "green" energy make a strong business argument for investment in biofuels.

Please see the next two issues of the *CIS Legal NewsWire* for details of the legal framework for biofuels in Russian and Ukraine (Part II) and investment opportunities/pitfalls and points to address from a legal perspective (Part III). /A.

Blomfield, F. Mucklow, J. Kogan

UKRAINE

WTO Accession Facilitates Trade with Ukraine

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This article summarizes the key legislative changes to market access for goods and services.

1. Market access for goods

The main impact of Ukraine's WTO accession should be the liberalization of Ukraine's international trade in goods

through the reduction and elimination of import and export tariffs and restrictions.

1.1. Export

Raw materials

Subject to a 30% export duty,¹ Ukrainian enterprises may now export raw materials - including certain metallurgical products, alloyed iron and non-ferrous scrap metal.² Export restrictions on precious metals and stones other than gold, silver, and diamonds have also been removed.

Agriculture

A number of changes have been implemented in the agricultural sector. One significant change is that the Ukrainian forest and fishing industries have lost their value-added tax (VAT) privileges, i.e. rates of 6% and 9% respectively, instead of the usual 20%. In addition, VAT receipts are now added to the Ukrainian state budget rather than returned to agricultural commodity producers in the form of a subsidy. Other changes include the following:

- over the next seven to ten years, Ukraine will gradually reduce its export duties on oilseeds (from 17% to 10%), live cattle (from 50% to 10%) and animal skins (from 30% to 20%);
- there are no longer any obligatory minimum export prices; and
- there are no longer any export restrictions on grain.

1.2. Import

Customs tariffs

Although customs tariffs have now been lowered, domestic producers still have the right to protection if the import of foreign products causes or threatens to cause them serious economic damage, via measures such as customs tariffs, safeguard measures, anti-dumping duties, and countervailing duties as in other countries. However, the overall trend is towards liberalization, as demonstrated by the following examples:

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¹ This rate is to be reduced in steps over five years.

² However, only appropriately licensed metallurgical processing enterprises are allowed to export such products.

- customs duties are now capped on imports of goods at “bound”³ rates of 0-50%. Some bindings involve reductions phased in over a period until 2013;
- average tariff bindings have decreased from 13.84% to 9.13% for agricultural products and 4.40% to 3.71% for industrial goods, although much higher tariffs remain in place on items including sugar (50%) and sunflower seed oil (30%);
- the tariff on imported trucks, buses and cars has been significantly reduced from 25% to 10%, effective May 16, 2008;
- effective 2009, Ukraine will introduce an import quota on raw cane sugar of 260,000 metric tons per annum, increasing to 267,000 metric tons by 2010. This quota will be administered on a first come, first served basis for three years after its introduction. Before Ukraine’s WTO accession, import of raw cane sugar was either prohibited or administered on an ad hoc basis.

Prices and fees

Controls on prices and fees are now to be applied on a non-discriminatory basis, and will take into account the interests of exporting WTO members other than Ukraine.

Examples of such measures include the following:

- the previously high registration fees for medicines, pesticides and agricultural chemicals have been drastically reduced (such products must be registered to be imported into Ukraine);⁴
- the fees for licenses to import and export alcoholic beverages and tobacco products have been substantially reduced to reflect the approximate cost of issuing such licenses, thereby removing an indirect source of competitive advantage for domestic producers;⁵ and
- all rail transportation fees are now applied on a non-discriminatory basis to both domestic and foreign operators.

³ “Bound” rates are those rates that have been negotiated in the WTO and agreed by the Ukrainian government prior to Ukraine’s WTO accession. As a result, they are difficult to raise.

⁴ Registration fees have been slashed from €1,000 to €100 for each medical form, and from €100 to €10 for each subsequent dose or package of medicine.

⁵ The fee for a license to import alcohol and tobacco has been reduced from US\$100,000 to US\$170.

Customs procedures

Customs procedures and license requirements are now simpler and more transparent for importers. Such simplifications include:

- introducing a single fee, levied at the border, covering all inspections (including customs inspections and the sanitary, veterinary, phytosanitary, radiological and environmental control of vehicles);
- eliminating minimum prices for any imported products;
- eliminating the requirement for an expert evaluation of import classifications by the Chamber of Commerce (before Ukraine’s WTO accession, such an evaluation was theoretically mandatory, but only enforced at the discretion of the customs authority for customs valuation purposes); and
- a new version of the Ukrainian Classification of Goods, which contains updated information for customs valuation purposes and conforms to the European Union Combined Nomenclature and Harmonized System 2002.

Currency control

Regulations relating to currency control and the terms of payment for goods and services are now simpler for cross-border transactions. Effective January 1, 2008, importers must obtain extension permits from the Ukrainian Economics Ministry for import prepayments for goods and services where delivery terms exceed 180 days, rather than 90 days as previously required. The previous limit made it more difficult for importers and exporters to plan deliveries on a long-term basis and meet payment obligations relating to importing goods and services.

Taxes

Imports from other WTO member states and domestically produced goods will now be subject to Ukrainian domestic taxes on a non-discriminatory basis. For example, Ukrainian milk and meat producers are no longer exempt from VAT, while Ukrainian car producers are no longer exempt from VAT, corporate profits tax (CPT), or import duties on imported spare parts.

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2. Market access for services

Ukraine has made specific commitments in all eleven "core" service sectors as defined by the WTO⁶ — including business services, communications services, construction and related engineering services, distribution services, education and environmental services, financial services (banking and insurance), health and social services, tourism and travel, recreational, cultural and sport services, and transport services. The remainder of this section focuses on those sectors of most interest to foreign investors as a result of Ukraine's WTO accession.

Banking

Ukraine now permits foreign banks to establish branches in Ukraine. Previously, foreign banks were only allowed to open representative offices. However, such branches must have a capitalization of at least €10 million on the date of their accreditation by the National Bank of Ukraine.

Insurance

Non-resident insurers have been granted limited direct access to the Ukrainian insurance market for five years after Ukraine's WTO accession. After that date, it is expected that licensed non-resident insurers will be granted full access to the Ukrainian insurance market.

Currently, non-resident insurers are only permitted to:

- provide reinsurance services;
- insure risks related to marine transportation, commercial aviation, space launches (including satellites) and freight (in certain circumstances), up to a limit of 75% of the value of each insured risk; and
- perform brokerage and agency operations for reinsurance of those insurable risks mentioned above.

Media

Foreign investors can now increase their presence in the Ukrainian media sector, since they are now permitted to contribute 35% (previously: 30%) of the capital into the charter funds of publishing companies. This restriction is set to end five years after Ukraine's WTO accession, after which foreign investors are expected to be able to wholly own publishing agencies. Moreover, there is now no

restriction whatsoever on the share of foreign capital in the charter funds of television and radio broadcasting companies.

Conclusion

Ukraine's WTO accession is a key component of Ukraine's continued integration into the global market. It is a very important signal for foreign investors and should provide them with greater incentives to invest in Ukraine, particularly in the agricultural, financial services and media sectors. */V. Dovhan*

Ukraine Relaxes Rules on Cross-Border Movement of Cash and Bank Metals

The National Bank of Ukraine (the "NBU") has recently relaxed both the rules on personally carrying cash and bank metals¹ across the border of Ukraine and the rules on sending money by post or international express mail. These amendments took effect July 27, 2008, when the Regulation on Movement of Cash and Bank Metals across the Customs Border of Ukraine (the "New Regulation") came into force, replacing the previous regulation (the "Old Regulation").

Cash

Besides permitting larger amounts of cash and bank metals to be brought into and out of Ukraine, the New Regulation lifts many import and export restrictions and establishes a simpler and clearer system of requirements. As a result, since July 27, 2008, individuals have been able to carry cash in an amount of up to €10,000 into and out of Ukraine without declaring it, and any larger amount upon submitting a written declaration to Ukrainian customs authorities. Official representatives of legal entities can also carry cash across the Ukrainian border in any amount after submitting a written declaration.

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⁶ http://www.wto.org/english/tratop_e/serv_e/serv_e.htm

¹ Gold, silver, platinum and metals of the platinum group in the form of bullion, powder and coins.

These aspects of the New Regulation represent a considerable liberalization, since according to the Old Regulation, only small amounts (generally, no more than US\$3,000) could be brought into or out of Ukraine without submitting a written declaration to Ukrainian customs authorities. To carry larger amounts (in general, more than US\$10,000 for individuals and US\$3,000 for legal entities) an NBU individual license or special permit was needed, the acquisition of which could take months.

The New Regulation also relaxes the requirement to confirm the source of money being carried across the Ukrainian border. As of July 27, 2008, individuals and official representatives of legal entities only need to confirm the source if they carry money in an amount exceeding €10,000, in which case they need to furnish the customs authorities with evidence of a bank account withdrawal for the funds over €10,000.

Postal Cash Transfers and Bank Metals

The New Regulation increases the amount of money individuals can send out of Ukraine by post or by international express mail from US\$100 to €300. In addition, the New Regulation increases the quantity of bank metals individuals may take out of Ukraine from 200 grams to 500 grams. It also prohibits any person (except for special representatives of Ukrainian banks) from carrying more than 500 grams of bank metals into Ukraine. Apart from this prohibitive measure, the New Regulation is a liberalizing one, which facilitates the cross-border movement of cash and bank metals to a significant extent. /R.Shulyar

KAZAKHSTAN

Draft Tax Code Simplifies Taxation in Kazakhstan

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According to statements made by officials of the Ministry of Finance the new draft Tax Code was developed with the objectives below:

- a. as far as possible, to consolidate all applicable norms and regulations into a single document, replacing the

existing subordinate regulations and explanatory letters from various authorities;

- b. to make the drafting clearer and less open to interpretation; and
- c. to reduce the total taxation burden on non-extractive industries, with the fiscal shortfall being recouped by increased taxation on the resource sector.

In the remainder of this article, we summarize the key reforms proposed in the new Tax Code.

Corporate Income Tax

- a. Payment in advance by small and medium-sized enterprises will be abolished. Payment in advance will be required only from major taxpayers who are "subject to monitoring,"¹ and from subsoil users.
- b. It will be possible to carry forward losses from business activities and the sale of certain fixed assets for up to 10 years.
- c. The rate of corporate income tax will be reduced. The rates have not yet been confirmed; however, recent news reports state that the rate will be reduced from the current 30% to 20% and further reduced to 15% by 2011.
- d. Taxpayers will be able to reduce their taxable income by any capital gain on shares and participating interests in other legal entities or consortia sold by such taxpayers, provided that less than 50% of the value of the charter capital or shares of the relevant legal entities or consortia is derived from assets of subsoil users.

Tax Concessions

The number of tax concessions available to investors will be reduced and the granting of investment concessions will be significantly revised. An investment contract with the government will no longer be required in order to enjoy investment concessions. All investors in certain specified industry sectors will be able to apply

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¹ These are the 400 taxpayers who have the largest aggregate annual income (without taking into account certain adjustments). The aggregate income is determined on the basis of the tax returns on corporate income tax for the year preceding the year of approval of the list of major taxpayers subject to monitoring. The list will be approved by the government and will be in effect for two years.

these tax concessions. These concessions permit the deduction from taxable income of the initial cost of industrial buildings and facilities (including during construction), as well as machinery and equipment, either in equal installments over a three-year period or as a lump sum upon incurring the cost. To apply the investment concessions, a taxpayer will have to maintain accounts for the relevant buildings and facilities separate from those for other fixed assets and not include the value of the relevant buildings and facilities in the value of the group.

VAT

- a. The rate will be reduced from the current 13% to 12%.
- b. The payable balance of VAT will be automatically refunded without a prior tax audit being required in the following cases: (i) major taxpayers that are subject to monitoring and registered as major taxpayers; (ii) taxpayers not found to have infringed any VAT rules during previous VAT audits; and (iii) taxpayers considered to present a low risk.
- c. Deferred payment of VAT on imports of goods for industrial processing, permitted under the current Tax Code, will only be preserved until 2012, after which the provision allowing for deferral will be deleted from the law.

Social Tax

A flat rate of social tax will be introduced, reported to be 11%.

Subsoil Use Taxation

- a. Subsoil users will pay the following special taxes and payments: (i) signing and commercial discovery bonuses; (ii) a production tax; (iii) a tax on excess profits; (iv) compensation of historical cost;² (v) the Republic of Kazakhstan's share of production (under production sharing agreements concluded before January 1, 2009); and (vi) export duty on oil.
- b. Most significantly, the general stabilization of tax regimes under subsoil use contracts will be cancelled, except in relation to production sharing

² This refers to compensation of the costs incurred by the state for prior exploration and development in a contract area (costs will include those incurred during Soviet times and since Kazakhstan's independence).

agreements concluded prior to January 1, 2009 which have passed a tax expert's examination, and subsoil use contracts approved by a legislative act of the Republic of Kazakhstan. In addition, the tax regime described in such contracts will be preserved only for the taxes for which the contract expressly provides for stability. Withholding tax must be paid by all subsoil users in accordance with the legislation in effect at the time the relevant obligation arises, regardless of any other regime established by the subsoil use contract.

- c. Royalties will be replaced with a mineral extraction tax. The tax will be assessed based on a valuation of the minerals produced at international market prices and at a percentage tax rate according to an ascending scale based on the quantity of minerals extracted. The rates for solid minerals will vary depending upon type.

Taxation of Derivatives

The new Tax Code will also contain provisions dealing with the determination of income under derivative instruments, in particular income under swaps and other hedging transactions. Income under swap transactions will be defined as any excess of receivables (payments received) over expenditure in the reporting period in question. In addition, the new Tax Code will provide that the losses from derivatives may be offset against income from derivatives, and if such losses cannot be offset in the same tax period, they may be carried forward for up to ten years. /Y. Pestereva

New Transfer Pricing Law Adopted in Kazakhstan

Recently adopted changes to Kazakhstan transfer pricing legislation will lead to stricter state control over commercial transactions once the new law enters into force, which is expected to be on January 1, 2009. The new law "On Transfer Pricing" (the "New Law") was signed by President Nazarbayev on July 5, 2008.

Since the current law, "On State Control of Transfer

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Pricing” (the “Current Law”) was introduced on January 5, 2001, over US\$3.2 billion worth of income has been understated or improperly reported by taxpayers, and US\$1.7 billion of additional taxes have subsequently been assessed, according to the Kazakhstan tax authorities.

The drafters of the New Law appear to be moving closer to the OECD Transfer Pricing Guidelines¹ by introducing the “arm’s length” principle. However, like the Current Law, the New Law will apply to transactions between unrelated as well as related parties.

The New Law eliminates the 10% safe harbor that was available to unrelated parties under the Current Law, which permitted a 10% deviation from the calculated market price. To some extent, the safe harbor is replaced by the concept of a range of market prices which will apply to both related and unrelated party transactions.

The New Law also introduces a special reporting regime for certain types of transactions that are subject to state control, which will most likely include sales of natural resources. The reporting regime includes requirements for standard documentation to justify a transaction price, and also business strategy analysis, functional and risk analysis, and other analyses relevant to the industry and the proposed transaction. As a result, this new reporting regime is much more onerous than the document retention requirement in place under the Current Law. The New Law also establishes a hierarchy of the sources of information that may be used to determine the market price of a transaction. In addition, two new methods of calculating market price have also been introduced, specifically, the “profit distribution method,” and the “net profit method,” which it is hoped will give taxpayers greater flexibility in justifying prices.

The Kazakhstan tax authorities are currently drafting supplementary regulations, which will include detailed instructions on the application of the New Law, a list of official sources of information, a list of tradable commodities, and a list of goods subject to state transfer pricing monitoring. These documents (except for the instructions) are expected to be approved by government resolutions by the end of 2008. /L. *Madieva*

¹ OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations

Significant Changes Proposed to Kazakhstan Competition Law

A new draft Competition Law presented to Kazakhstan’s Parliament for discussion on August 30, 2008, proposes significant changes to competition regulation in Kazakhstan. The proposed law is intended to replace two existing laws, namely, “On Unfair Competition” (adopted in 1998) and “On Competition and Limitation of Monopolistic Activity” (adopted in 2006). If adopted, the new law will come into effect at the beginning of 2009.

The most important points of the draft law include explicitly providing for extraterritoriality of Kazakhstan law if actions abroad might restrict competition in Kazakhstan and abolishing the requirement to obtain approval for inter-company reorganizations. The draft also attempts to restrict state participation in business by establishing certain limits. In particular, if the state’s share in a newly established company exceeds 50%, the formation of the company will be regulated by the antimonopoly authorities and will require their prior approval. Other innovations proposed in the draft law include strengthening the differentiation between a monopoly and a dominant entity and exemptions from liability for actively showing remorse following a breach of the law, such as compensating the persons harmed.

/S. *Nurgaziyeva*

RECENT DEVELOPMENTS

Chadbourne's Russia Practice Wins Awards from International Law Office, Acquisition Finance Magazine

October 1, 2008 — Chadbourne & Parke LLP's Russia Practice has recently been awarded the International Law Office (ILO) Client Choice Award for 2008. The Russia Practice has also been recognized by Acquisition Finance Magazine as Legal Advisor of the Year.

ILO, one of the largest online legal update services and online partner to the International Bar Association, recognized Chadbourne with its ILO Client Choice Award for Russia, based on over 1,500 assessments from corporate counsel worldwide. The award highlights firms that "stand apart for the excellent client care they provide and the quality of their service. The criteria for the awards focus on law firms' ability to add real value to their clients' business above and beyond the other players in the market," according to ILO. Specific criteria included: quality of legal advice; value for money; commercial awareness; effective communication; billing transparency; tailored fee structures; depth of team; response time; sharing of expertise; and use of technology.

Chadbourne also received the Legal Adviser of the Year (Russia) 2008 award from Acquisition Finance Magazine based on Acquisition Finance's annual survey of its readership of business backers, funders, advisers, entrepreneurs and executives.

Acquisition Finance is a UK-based magazine covering corporate finance, deals and trends in the UK, Europe and the United States. It provides transaction analysis and industry-related features.

"The Client Choice Awards are unique in that ILO only



approaches in-house counsel for nominations. As a result, it is a completely independent evaluation," said Laura M. Brank, Head of the Russia & CIS Practice. "We are very pleased to be honored by ILO and Acquisition Finance with these awards and are grateful to our clients for their continued confidence in us."

Chadbourne first established a presence in Russia nearly 20 years ago. It now has offices in Moscow and St. Petersburg and has more than 80 lawyers who are fluent in Russian. The Russia Practice provides advice in the areas of corporate and commercial transactions, mergers and acquisitions, corporate finance transactions, capital markets (including private placements and public offerings by local and foreign issuers), banking (both regulatory and transactional, including project finance), litigation and bankruptcy and private funds, in sectors including natural resources, energy, oil and gas, mining, real estate, communications and technology, pulp and paper, and transportation. It has worked on some of the largest M&A transactions in the Russian Federation, advised on the first IPO of a Russian company on foreign markets and advises on complex project and acquisition financings involving multiple jurisdictions.

Ukrainian President Viktor Yushchenko Speaks at Lunch at Chadbourne & Parke

Event Attracts High-Level Attendees From Government, Business and Media

September 23, 2008 — Chadbourne & Parke LLP hosted a luncheon on September 23 in honor of Ukraine President Viktor Yushchenko during a visit to New York to address the UN General Assembly on September 24.

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The luncheon, organized by The Atlantic Council of the United States, was held at Chadbourne's offices at 30 Rockefeller Plaza. Chadbourne is one of the largest international law firms with an office in Ukraine.

Chadbourne Managing Partner Charles K. O'Neill and Atlantic Council CEO Fred Kempe greeted the President upon his arrival. Attendees and invited guests included Georgette Mosbacher, Chief Executive Officer of Borghese; W. Bowman Cutter III, Managing Director of Warburg Pincus; Samir Sahgal, Director of International Operations of The Boeing Company; Joe Scarborough, co-host of "Morning Joe" on MSNBC; Robert Thomson, Editor-In-Chief of The Wall Street Journal; Chrystia Freeland, Managing Editor of The Financial Times; Oleh Shamshur, Ambassador of Ukraine to the United States; Jaroslawa Johnson, Managing Partner of Chadbourne's Kyiv office; and former New York Governor George Pataki, Counsel at Chadbourne.

President Yushchenko, a leading political figure in his country and the region, has been the President of Ukraine since 2005. Since then, he has steered Ukraine in a pro-Western and generally reformist path, and has moved Ukraine toward eventual EU and NATO memberships.

Chadbourne's Kyiv office has represented a wide range of clients since 1993, among them multinational, foreign and local companies in large transactions in a variety of industries, including banking, oil exploration and refining, telecommunications, insurance, project and trade finance, pharmaceuticals and consumer products. The office has handled 14 major banking deals in the past two years.

Jennifer Handz Elected to LLP Partnership and Will Relocate to Moscow

On July 28, 2008, Chadbourne & Parke LLP announced that Jennifer Handz was named an LLP partner in the Firm. Ms. Handz will relocate to Moscow from London later this year to assume new responsibilities.

Ms. Handz is a banking and finance specialist with a broad range of experience in project finance, secured and unsecured lending (including acquisition financing), equity financing and restructuring focusing on Russia and the CIS, as well as central and eastern Europe. She has represented lenders and borrowers on transactions in the property, telecommunications, oil and gas, municipal infrastructure, steel and manufacturing sectors. Ms. Handz was a partner in Chadbourne & Parke's multinational partnership in London. Prior to joining the Firm in 2006, she was a senior counsel with the European Bank for Reconstruction and Development in London. Ms. Handz received both an LL.B. and a B.Juris. from the University of Western Australia in 1985.

Kyiv Office Moves to New Location

Chadbourne's Kyiv office recently relocated to the Podil district of Kyiv. Effective September 22, 2008, the Kyiv office address is as follows:

25B Sahaydachnoho Street
Kyiv 04070
Ukraine
Tel: +380 (44) 461-7575
Fax: +380 (44) 461-7576

Selected Recent Deal Highlights

Chadbourne Represents PepsiCo Inc. in US\$1.4 Billion Deal to Buy 75.5% of Lebedyansky JSC, Russia's Leading Juice Company

Chadbourne represented PepsiCo and Pepsi Bottling Group in a deal for the companies to jointly acquire 75.5% control of Russia's leading branded juice company, JSC Lebedyansky. The deal is valued at US\$1.4 billion.

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RECENT DEVELOPMENTS

According to the terms of the transaction, PepsiCo purchased only the juice business of JSC Lebedyansky, while the water and baby food business were spun off, a complicated procedure under Russian law. The deal successfully closed in August 2008.

Working for Chadbourne on the deal were partners Konstantin Konstantinov and Laura Brank in Moscow and associates Olga Watson in London and Evgenia Gaysinskaya in Moscow.

Lebedyansky generates 85% of its revenues from juice. PepsiCo has doubled its investment in Russian snacks and is opening a second factory in Russia.

Chadbourne Acts for Marfin Popular Bank on its acquisition of a 50.04% stake in RosPromBank for €83 million

Chadbourne recently acted for Marfin Popular Bank Public Co Ltd (MPB) in the acquisition of the Russian Bank, OOO Rossisysky Promishlenny Bank (Rosprombank). The acquisition was completed following the transfer of 50.4% of the share capital of the Russian CJSC RPB Holding, parent company of the Russian Bank OOO Rossisysky Promishlenny Bank, for €83 million. Following the completion of the acquisition, MPB becomes the first Greek or Cypriot bank to acquire control of a bank in Russia. The acquisition is another strategic move towards further strengthening MPB's presence and providing banking and financial services in Southern Europe. Working for Chadbourne on the deal were London partner Charez Golvala, Moscow counsel Evgenia Korotkova, St. Petersburg counsel Konstantin Osipov and Alexander Kalinov, London associate Ghassan Shuhaibar, Moscow associates Julia Anoufrieva, Asiyat Kulterbaeva and Lyubov Paskar, and St. Petersburg associate Nonna Crane. The deal closed on September 3.

Chadbourne Represents Kinross Gold Corporation in Disposition of Russian Assets

Chadbourne recently represented Canada-based Kinross Gold Corporation, one of the world's most prominent mining companies, in the sale of Omsukchansk Mining and

Geological Company for US\$20 million plus an additional cash consideration and deferred payments depending on gold/silver production.

Working for Chadbourne on the deal were partner Laura Brank in Moscow and associate Olga Watson in London.

Chadbourne Represents VimpelCom in the Acquisition of 49% of Corbina Telecom for US\$404 Million

Chadbourne represented Vimpel-Communications (VimpelCom) in the purchase of 49% of Corbina Telecom (Cortec). The deal closed on June 11, 2008.

VimpelCom announced the deal on June 3 to purchase 49% of the shares of closed joint stock company Cortec from Inure Enterprises Ltd. for approximately US\$404 million. VimpelCom's wholly owned indirect subsidiary OOO EDN "Sovintel" already owns 51% of the shares of Corbina Telecom.

Working for Chadbourne on the deal were Moscow partners Laura Brank and Konstantin Konstantinov and Moscow associates Evgeniya Gaysinskaya and Steve deMontmollin.

Chadbourne Represented Wizz Air in Setting Up Ukraine's First Low-Cost Airline

Chadbourne represented Wizz Air, the largest Central and Eastern European based low-cost airline, in setting up its Ukrainian operations. Wizz Air Ukraine will be the first Ukraine low-cost airline. Chadbourne acts for Wizz Air in support of its current operations.

Wizz Air Ukraine started operating its initial network on July 11 with four Ukrainian domestic routes from its operating base at Kyiv Boryspil Airport to Lviv, Odessa, Simferopol and from Lviv to Simferopol. It has plans to quickly expand its operations by adding international routes and more domestic services, opening further operating bases in various regions in Ukraine.

Wizz Air Ukraine offers low fares and a convenient air travel experience. The airline operates brand new Airbus

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A320 aircraft configured with 180 leather seats.

Working on the deal for Chadbourne were Kyiv office managing partner Jaroslawa Johnson, senior associate Dmytro Fedoruk and associate Andriy Kirmach. In late May the Chadbourne team joined Wizz Air's management, Ukrainian government officials and press on an inaugural flight from Kyiv to Odessa.

Chadbourne Acts for China Datang Overseas Investment Company Limited on Hydropower Plant JV in Kazakhstan

Chadbourne recently acted for China Datang Overseas Investment Company Limited (Datang) in the formation of a Kazakhstan-China joint venture with TT Group LLP for the construction of two hydropower plants (17.9 megawatts and 18.9 megawatts) at the Koksus River in Kazakhstan. The plants are expected to come on line in 2009 or 2010. Working for Chadbourne on the deal were Almaty associates Sergei Vataev, Saule Nurgaziyeva and Mukhit Yeleuov.

Chadbourne advises on WiMAX Deal

Chadbourne advised Emiline Enterprises Ltd. ("Emiline") in connection with its subscriptions for a total of US\$120 million of preferred shares in Lythgoe Enterprises Ltd ("Lythgoe"). Contemporaneously we advised Lythgoe in connection with Lythgoe's acquisition of a 54% equity stake in Digesta International, Inc. ("Digesta"), the holding company for four Russian companies that hold licenses to provide WiMAX services in Russia, for US\$57 million. Lythgoe funded its acquisition of this 54% stake in Digesta by the sale of preference shares to Emiline mentioned above. The transaction closed on August 8, 2008. The deal marks another significant TMT transaction on which Chadbourne has advised this year, in addition to the VimpelCom transaction highlighted above and Golden Telecom's US\$4.2 billion acquisition by VimpelCom.

Expanding Russia & CIS Practice Gathers in Istanbul to Discuss Client Service

Over 70 attorneys from six Chadbourne offices gathered in Istanbul, Turkey on September 11-14 for the first-ever Russia & CIS Practice Retreat. The purpose of the retreat was to introduce new lawyers to the practice and to focus on improving client service across our network of offices.

The Russia & CIS Practice now includes offices in Moscow (est. 1990), Kyiv (2004), Almaty (2005) and St. Petersburg (2005). The practice also has a group of lawyers (most of whom are fluent in Russian) based in London who support exclusively the practice. Partners from London, New York and Warsaw also participated in the retreat.

Laura Brank, head of the Russia & CIS Practice, led discussions on how lawyers can work better across offices to share client knowledge and experience and to ensure the high level quality of service our clients have come to expect from us.

Charles O'Neill, the Firm's Managing Partner, discussed how other offices in the firm could continue to support the firm's growing Russia & CIS Practice and discussed client intake procedures.

Following presentations from each of the offices, attorneys were divided into working groups across the offices to discuss in small groups various issues relevant to our practice and our clients' business. A wrap-up session included presentations from each group with various suggestions for accomplishing our objectives.

RECENT DEVELOPMENTS

At the Podium

Strategic Sectors, London

Laura Brank spoke on “The Strategic Sectors Law and its Potential Impact on Foreign Investment in Russia” during the plenary session on foreign direct investment as part of the Russo-British Chamber of Commerce Business Summit from June 18-19 in London. Chadbourne was also a sponsor of the event. Ms. Brank’s previous presentation on the same topic, at the World Russian Forum in Washington, DC on May 19-20, was broadcast on C-SPAN, the U.S. cable television network dedicated to airing non-stop coverage of government proceedings and public affairs programming.

Financing Trade Operations, Moscow

Moscow finance counsel Dmitry Gubarev recently chaired a legal panel at the 2nd annual Russia & Eurasia Trade & Export Finance Forum in Moscow, organized by Global Trade Review, EMEA Finance, and Exporta. The event took place in the Hotel Baltshug Kempinski on September 9-10. The panel, which included representatives from prominent law firms operating in Moscow, discussed legal issues associated with financing trade operations in Russia.

Carbon Markets - How to Make Money and Stay Green, London

Chadbourne's London office hosted an event on carbon markets, followed by a cocktail reception, held in the London office on September 18. Recent years have seen a "carbon rush" spread across the world markets, whereby developers, investors, traders and various service providers have been searching for ways to profit from projects generating carbon credits and trading in carbon assets on various exchanges. This mini-conference aimed to discuss business opportunities arising from the climate change regimes. The speakers included developers, fund managers, policy makers and lenders. For more details of the conference, please see www.chadbourne.com/newsevents/eventdetail.aspx?event=691.

CIS LEGAL NEWSWIRE

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