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CIS AND CENTRAL EUROPE LEGAL NEWSWIRE

December 27, 2004

RUSSIA

Russia Endorses Kyoto Protocol

After seven years of uncertainty regarding the Russian Federation's ("RF") position on the Kyoto Protocol (the "Protocol"), RF President Vladimir Putin endorsed the first binding global agreement to reduce greenhouse-gas emissions on November 4, 2004. The RF's ratification of the Protocol, named after an ancient city in Japan where the emissions targets were established, triggered its entry into force among its signatories. The RF's approval of the Protocol was key to its realization following rejection by the United States and Australia. The Protocol required ratification by at least 55 of the 186 parties to the United Nations Framework Convention on Climate Change (the organization responsible for developing an international

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UKRAINE

Sweeping Changes to Rules Regulating Foreign Investments and Reparation of Investments in Ukraine

The National Bank of Ukraine (the "NBU") has recently issued two sweeping new resolutions (collectively, the "Resolutions") concerning the procedure for making foreign investments into Ukraine, as well as repatriating such investments and any related profits, dividends or other income. The new Resolutions introduce significant changes to the legislative framework for foreign investments in Ukraine, designed in large part to bring foreign investment transactions "on-shore." In general, the Resolutions require foreign investors to carry out investment

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POLAND

New Developments on Listing of Foreign Companies in Poland

Several key changes have been introduced into Polish securities legislation in 2004, arising from certain legal obligations connected to Poland's accession to the European Union (the "EU") and aimed at integrating Poland's securities market with other European markets. The main goals of these changes have been, among others, to establish the legal framework for offering foreign securities in Poland and to facilitate the admission of securities traded on other European regulated markets into public trading in Poland.

The recent changes to Polish legislation were incorporated into the Securities Law by an

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response to the greenhouse gas levels), including by developed countries and countries in transition to a market economy (the "Annex I Parties") representing at least 55% of global emissions as of 1990. As a result of such requirement, although over 100 countries had signed the pact to reduce global warming by cutting greenhouse gas emissions, without the RF's support, the Protocol would not have had a chance to come into force.

Benefit to the RF for Endorsement

Under the Protocol, the Annex I Parties must reduce their emissions of six greenhouse gases to 5.2% below 1990 levels between 2008 and 2012, with varying specific targets based on the particular country. The RF was responsible for 17% of global carbon dioxide emissions in 1990 and at the current time, the RF has already achieved a reduction of 30% below the 1990 level due to the collapse of Soviet-era industries in the 1990s. Thus, compliance with the Protocol should be quite manageable since the RF had already met its terms before the Protocol was approved. In fact, supporters hope that the Protocol's implementation will provide an opportunity for the RF to attract significant investment to modernize its energy sector.

Ratification of the Protocol may financially benefit the RF in two ways. First, the RF may engage in trading carbon credits, selling its unused entitlements to emit carbon dioxide to other developed countries whose emissions exceed their allowances. Second, the Protocol's system for earning carbon credits will give European countries an incentive to invest in the RF energy sector to both modernize and reduce wasteful consumption. Developed countries may achieve part of their Kyoto commitment by investing in emissions reduction projects in other developed countries, which may prove a more efficient way of earning carbon credits than attempting to reduce emissions from lower levels in their home markets.

Ratification may also benefit the RF politically. President Putin had promised to put ratification of the Protocol on the fast track if the European Union would support the RF's 11-year endeavor to join the World Trade Organization.

Likely Impact

Throughout the internal debate in the RF regarding its position on the Protocol, some detractors vociferously

opposed ratification, maintaining that such an agreement would suppress economic growth. Opponents of the Protocol have argued that the expansion of the RF economy will naturally lead to a corresponding proliferation in the emission of carbon dioxide, one of the main gases targeted for reduction, and that limiting such emissions would force the economy to contract. However, according to some sources, the RF gross domestic product (GDP) would have to grow by as much as 9 to 10 percent per year before it would reach the Protocol quotas by 2010. As a comparison, the RF's GDP was 7.3% in 2003, and reached only 4.7% in 2002. The year 2000 represented the only year during which the RF's GDP reached 10%. Between 2000 and 2003, the RF's average GDP growth was 6.78%. Other international experts also speculate that there is little risk of the RF exceeding the Protocol's emission quotas.

Detractors of the Protocol also find support among the Russian scientific community, who point out the lack of evidence linking greenhouse gas emissions to climate change and maintain that the Protocol would have no perceptible effect on the global climate. However, other scientists argue that the Protocol was not intended to solve the greenhouse emissions problems completely, but rather, was meant to represent an initial step in the direction of addressing global warming and more importantly, the ability of the international community to attain mutual cooperation in curbing carbon dioxide emissions. By agreeing to sign on to the Protocol, the RF should benefit financially through increased investment into its energy sector and the sale of carbon credits to other nations, as well as politically. */S. Reizner*

Russian Duma to Consider Draft Law on Toll Roads

The RF Government is expected to submit an important draft law on toll roads to the State Duma shortly (the "Draft Law"). The Draft Law attempts to put in place a general framework for the construction, operation and financing of toll roads, and represents a starting point for regulation of toll roads in the RF. The Draft Law would introduce commercial principles with respect to the construction and operation of roads.

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Scope of the Draft Law

The Draft Law addresses a number of issues, including:

- the competence of state authorities (federal, regional) and municipalities with respect to the regulation of toll roads;
- the procedures for granting rights to construct and operate toll roads;
- tariff levels and the distribution of proceeds from the operation of a toll road;
- the rights and obligations of a toll road owner and operator and the principal terms of the contract between them;
- forms of financing and state support for toll road projects;
- land issues; and
- the registration of rights to toll roads.

The Draft Law provides that a toll road may be established through: (i) the construction of a new road (or completing an unfinished road); or (ii) the renovation of an existing road. Under the Draft Law, an already existing road may be converted into a toll road only if the existing road requires renovation and if an alternative free road will be made available.

The Draft Law distinguishes among federal, regional and municipal toll roads, depending on which level of government owns the road. A toll road may also be privately owned. Notably, the Draft Law does not lay out specific criteria for determining whether a road will be in state (federal or regional) ownership or municipal or private ownership, which will require further clarification.

Regulation of Toll Roads

Under the Draft Law, the following issues fall within the competence of the federal authorities:

- formulating state policy on toll roads;
- adopting legislation on federal toll roads;
- regulating construction and servicing of toll roads;
- financing the construction of federal toll roads;
- establishing categories of users exempt from paying toll road fees;
- establishing requirements with respect to the operation of toll roads; and
- maintaining the toll road registers.

Regional authorities have competence over decisions on the construction and financing of regional toll roads. Municipal authorities, in turn, have authority over the construction of municipal toll roads and the financing of municipal toll roads.

Operating a Toll Road

Pursuant to the Draft Law, the operation of a toll road may remain in the hands of its owner or be granted to a private operator, selected through a competitive procedure. In the latter case, the operation of the toll road shall be based on a contract between the government (owner) and a private entity (operator). The Draft Law attempts to make concession-type arrangements possible, including build-operate-transfer projects, between the state and the private operator of a toll road. It should be noted, however, that a law on concessions has not been adopted in Russia yet, thus the operation of this principle in practice is not clear.

Sources of Funding and State Support

The Draft Law provides that sources of funding of a toll road project may include budgets of all levels of government, other state funds (including regional road funds), and financing from local and foreign legal entities and international financial institutions.

The state may support a toll road project by providing loans from budget funds, investment from budget funds, state and municipal guaranties, tax credits, and land use privileges. The Draft Law further provides that state or municipal guarantees would be available only to operators co-financing the construction of the toll road.

Tariffs

Tariffs are to be established by the operator of a toll road, but may not exceed limits established by the owner of the road (i. e., the government). When setting the tariff, factors such as the payoff period for the project, the acceptability of the tariff to users, and the return on investment for operators must be taken into consideration.

The tariff may vary depending on the length of the route and the type of vehicle. Such varied tariffs must be set by the operator on the basis of a unified method for calculating toll road tariffs, which is to be approved by federal authorities.

In general, the Draft Law is an important step forward in the development of the Russian road sector. Its adoption could speed up the implementation of several pilot toll road projects currently under consideration, such as the Moscow-St. Petersburg project and even the Moscow-Domodovo project. /I. Glotin, A. Globina

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Liability for Currency Law Violations Toughened

On October 1, 2004, amendments (the "Amendments") to Article 15.25 of the RF Code on Administrative Offences (the "CAO")¹ entered into force. Article 15.25 establishes administrative liability for violations of currency law requirements. The Amendments both expand the list of currency law violations subject to administrative liability and increase the penalties imposed for such violations.

Article 15.25 provides that conducting currency operations which are forbidden by law, as well as conducting currency operations in violation of the Ruble reserve requirement or requirement on the use of a special account², may trigger a fine on a legal entity or an individual, as applicable. The Amendments sharply increase the minimum amount of such fine, from 10% to 75% of the amount of the currency operation. Similarly, the minimum fine for a violation by a Russian resident of currency law requirements related to the repatriation of funds into Russia was increased from 10% to 75% of the amount of funds not repatriated into Russia. The maximum fine for all of the above violations remains unchanged at 100%.

The Amendments also introduce penalties for several types of currency law violations which previously were not subject to fines. For example, a legal entity or individual may be fined for failing to follow the proper procedures for opening a bank account outside of Russia. In addition, a legal entity may be subject to fines for violating the requirements with respect to the mandatory sale of a portion of foreign currency proceeds. Such violation may now trigger the imposition of a fine on a legal entity in an amount ranging from 75% to 100% of the amount of foreign currency proceeds which were subject to mandatory sale but not sold. /A. Kelina

New Chapter of Tax Code Establishes Ceilings on State Duties

A new chapter of the RF Tax Code, which will streamline

various taxes and state duties, will take effect on January 1, 2005. The new chapter, Chapter 25.3, summarizes and puts in order numerous rules and regulations on the payment of state duties, fees and levies adopted in Russia since the early 1990s. As a result of the introduction of Chapter 25.3 of the RF Tax Code, more than twenty federal laws will be cancelled and amended. Chapter 25.3 replaces the outdated Law "On State Duty", dated December 9, 1991, as amended, which was one of the "oldest" laws of the new Russia.

One of the most notable changes contained in Chapter 25.3 concerns the maximum allowable amounts for certain state duties. For example, while arbitration court fees (i.e., the state duty payable to state arbitration courts) is currently limited to a maximum amount of 1,000 times the minimum monthly wage (currently 100,000 Rubles, or approximately US \$3,500), the new Article 333.21 of the RF Tax Code directly limits the maximum amount of court fees to 100,000 Rubles regardless of any future changes in the statutory amount of the minimum monthly wage.

Furthermore, while currently no limit is placed on the court fee payable for submission of a lawsuit to the courts of common jurisdiction (currently 1.5% of the amount under dispute) or for notaries' fees for certification/attestation of a contract (currently 1.5% of the amount of transaction), the new Chapter 25.3 will limit both state duties to a maximum of 20,000 Rubles (approximately US \$700) (see the October 11, 2004 issue of the CIS & Central Europe Legal Newswire for a more detailed discussion of the recent decrease in notaries' fees). /S. Volfson

Tax Authorities Fight "Russian-Style" Hostile Takeovers

On October 26, 2004, the Russian Federal Tax Service (the "Tax Service") issued Letter No. 09-0-10/4223 (the "Letter"), designed to counteract hostile takeovers through illegal means. Throughout the Russian "corporate wars" of recent years, one of the most "effective" methods of seizing control

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¹ The Amendments were adopted as part of RF Law No. 118-FZ "On Introducing Amendments to the Russian Federation Code on Administrative Offences and the Russian Federation Customs Code," dated August 20, 2004.

² For a review of the new currency law, please see the February 12, 2004 CIS and Central Europe Legal Newswire.

over a Russian joint stock company has been to replace the target company's management. This was often accomplished by a "parallel" shareholders' decision, which challenged the authority of the lawful management and ultimately led to the registration of changes in the Unified State Register of Legal Entities (the "Unified Register") held by the territorial tax authorities, indicating the name of the target company's new General Director.

Specifically, Tax Service representatives were entering changes to the Unified Register on the basis of an application from the new General Director requesting to amend the names of the company's management held in the Unified Register. In many cases, the new General Director's application was falsified, which led to numerous disputes between the "new" and "old" management, and in the worst case, even physical battles at the company facilities.

In issuing the Letter, the Tax Service attempted to put an end to such abuses by requiring that any application from a company requesting to change the name of its General Director must be signed not by the new General Director, but by the previous General Director of the company. Only physical obstacles (e.g., death or incapacity) preventing the previous General Director from signing such an application, or a court decision directly specifying the name of the lawful General Director of the company, is precluded from the new rule.

Whether or not this new requirement will be effective in reducing corporate management battles is not yet clear, however, it should close one area of wide-spread abuse. It is advisable for companies to review the terms of the General Director's employment contract to ensure that the contract provides an obligation on the part of the General Director to "certify" the authority of newly appointed management. */S. Volfson*

Mandatory Foreign Currency Conversion Rate Decreased

On November 26, 2004, the Board of Directors of the RF Central Bank (the "CBR") approved a decision to establish a new rate for the mandatory conversion into Rubles of foreign currency proceeds received by Russian legal entities. The new rate is equal to 10%, 15% below the previous rate, and will be

applicable from the date of the official publication of the decision of the CBR's Board of Directors.

As discussed in the June 20, 2004 CIS and Central Europe Legal Newswire, the CBR is authorized to establish the percentage of the foreign currency proceeds subject to mandatory conversion, up to a maximum amount of 30%, in accordance with the new RF Law "On Currency Regulation and Currency Control," which became effective in June, 2004 (the "New Currency Control Law"). In its Instruction No. 111-I of March 30, 2004, the CBR had set the mandatory conversion rate of foreign currency proceeds at 25%.

The decrease falls within the general goal of the New Currency Control Law to reduce the excessive requirements of the currency control regime in the Russian Federation. */A. Kelina*

UKRAINE

Sweeping Changes to Rules Regulating Foreign Investments and Reparation of Investments in Ukraine

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activities in Ukraine through Ukrainian bank accounts and using Hryvnia, the Ukrainian currency. The Resolutions immediately affect settlements for transactions related to the purchase or sale of securities issued by Ukrainian entities ("Ukrainian Securities") (such as shares in Ukrainian stock companies) where one or both parties are non-residents.

The first enactment, Resolution No. 482, regarding foreign investment regulations and the repatriation of profits, income and other funds obtained from investment activities in Ukraine, took effect on November 12, 2004 ("Resolution No. 482"). Resolution No. 323, on amendments to the rules for conducting transactions on the Interbank currency market of Ukraine, took effect on September 18, 2004 ("Resolution No. 323"), and establishes, among other things, the procedure for Ukrainian residents to purchase foreign currency for the purpose of making payments abroad to non-residents.

Requirement for Non-Residents to Open Ukrainian Bank Accounts

Under Resolution No. 482, foreign investors may now conduct investment activity in Ukraine (either in Hryvnia or in foreign

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currency) only through bank accounts opened with a Ukrainian bank. This requirement is applicable to both foreign legal entities and foreign individuals. Individuals may also deposit foreign currency in cash into such bank accounts upon producing evidence of the legitimate source of such cash (e.g., a customs declaration).

Conversion Requirement

Resolution No. 482 also requires investments to be effectuated in Hryvnia. Conversion into Hryvnia is carried out by the foreign investor's Ukrainian bank, which sells the foreign currency on the Ukrainian interbank currency market and deposits the proceeds into the foreign investor's Hryvnia bank account.

Only so-called "joint (investment) activity agreements," which are purely contractual joint ventures between foreign investors and Ukrainian companies in which a legal entity is not created, are exempt from the foregoing requirement.

Sale of a Foreign Investment/Other Divestment

Similarly, Resolution No. 482 introduces a stringent requirement that settlements related to a foreign investment may take place only in Hryvnia. When purchasing an investment from a non-resident, a buyer (whether a resident or a non-resident) must always transfer the purchase price from its Hryvnia bank account to the seller's Hryvnia bank account. Exemptions from this rule mainly relate to NBU-licensed transfers of foreign currency abroad.

Notably, the new procedures also apply to transactions conducted between non-residents involving Ukrainian Securities where settlement occurs in foreign currency outside of Ukraine, such that the settlements are brought on-shore and are made in Hryvnia.

Repatriation of Profits

Under Resolution No. 482, profits received by a foreign investor from its investment activity in Ukraine may be transferred abroad if the foreign investor provides, among other documents, evidence (in the form of a certificate from the Ukrainian tax authorities) that it has paid all applicable withholding taxes and other applicable charges on those amounts. Alternatively, the foreign investor may provide a legalized statement (e.g., a residency certificate) indicating the foreign investor's entitlement to relief under a double tax treaty between Ukraine and the investor's country of origin.

Pricing Ukrainian Securities and other Investment Objects

A foreign investor seeking to repatriate proceeds from the sale or other divestment of Ukrainian Securities or the cash value of an in-kind investment must provide a valuation act, issued by a licensed Ukrainian appraiser, indicating the corresponding market value.

Further, Resolution No. 482 and Resolution No. 323 allow for the repatriation of the cash value of an in-kind investment (instead of the in-kind investment itself) only if such arrangement is contemplated by an applicable treaty entered into between Ukraine and the foreign investor's country of origin (such as a treaty on the mutual protection of investments).

Expanded Authority of the NBU

Resolution No. 323 allows the NBU to suspend a bank's purchase of foreign currency on behalf of its clients and/or to suspend or terminate a bank's license to purchase foreign currency if the NBU has justifiable cause to suspect that the transactions at issue are carried out without an "apparently lawful goal" or are subject to financial monitoring in accordance with legislation on money laundering. This assessment is made based on an analysis of certain statistical data which commercial banks must provide to the NBU.

Conclusion

Clearly, Resolution No. 482 and Resolution No. 323, if applied strictly as written, will significantly affect the foreign investment regime in Ukraine. Foreign investors investing in Ukraine will need to ensure that sellers provide them with the necessary documentation to repatriate their investment and/or associated profits. Foreign investors who already have investments in Ukraine should review these new requirements to determine whether they have sufficient documentation to comply with the new rules concerning repatriation. Finally, foreign investors in the process of structuring acquisitions in Ukraine, and in particular, acquisitions of shares in Ukrainian companies or any other Ukrainian Securities, may need to reconsider these structures if an off-shore settlement mechanism in foreign currency is currently contemplated. *O. Soshenko, A. Mycyk*

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NBU Moves to Support Banks

The National Bank of Ukraine (the "NBU") has moved to counter potential negative reaction in the banking and financial system in the aftermath of the failed presidential elections on November 21, which was marked in some regions of Ukraine by a stronger than usual demand for hard currency and an accelerated rate of bank deposit withdrawals. Although the banking system has remained stable, a number of second and third-tier banks experienced temporary difficulties meeting demands for cash.

NBU Resolution No. 576 "On Temporary Measures Concerning the Operation of Banks" ("Resolution No. 576"), dated November 30, 2004, which took effect on the same date and is to remain in effect until at least the end of the year, provides for the following measures.

Boosting Bank Liquidity. Resolution No. 576 widens the access of banks, particularly smaller banks, to liquidity, by easing lending terms for banks unable to raise money on the market (e.g., by relaxing security deposit requirements).

Restricting Lending. Banks have been directed to keep the overall size of their loan portfolio at levels existing on November 30, 2004. Resolution No. 576 also bans the issuance of new certificates of deposit.

Limiting Access to Foreign Currency. Banks are currently allowed to sell clients foreign currency in an amount equivalent to no more than US\$ 1,000 in cash or US\$ 50,000 by bank transfer in a single transaction, with larger amounts requiring the approval of an authorized bank officer.

Restrictions on Cash and Deposit Withdrawals. The right of individuals and companies to make early withdrawals from time deposits, allowed in the past subject only to the loss of accrued interest, has now been suspended. Cash withdrawals by companies from current accounts have been limited to a maximum of 80,000 Hryvnia (approximately US\$ 15,000) per month, except for the payment of salaries and similar expenses. Banks have further been advised to set ATM withdrawal limits at 1,500 Hryvnia (approximately US\$ 300) a day. These restrictions concern only the withdrawal of cash from bank accounts and do not affect the ability of businesses or individuals to make payments in any amount by wire transfer.

Funds Transfers. Banks may now carry out funds transfers only within the limits of the available balances in the payer's

account at the time the bank accepts the payment order, a step apparently designed to prevent account overdrafts and consequently expansion of credit. Furthermore, Resolution No. 576 requires that funds be transferred to the payee's account the day after the payment order is made, a departure from the usual practice of completing transfers on the same day.

Foreign Trade Contracts. The NBU has instructed banks to step up monitoring over clients' compliance with the statutory 90-day time limit for repatriating export proceeds. Banks have also been recommended to limit purchases of foreign currency to clients whose import contracts provide for deferred payment for imported goods or services or for payment by a letter of credit.

While the strict legality of all the measures adopted by the NBU in Resolution No. 576 may be questionable, they appear to have been universally welcomed by the Ukrainian banking community. /V. Fedichin

Justice Ministry Obtains New Powers to Vet Regulations

The Cabinet of Ministers of Ukraine has amended the procedure by which the Ministry of Justice of Ukraine registers normative acts issued by governmental agencies. In accordance with the "Procedure on the State Registration of Normative Acts of Ministries and other Executive Power Agencies," adopted by Decree No. 731 of the Cabinet of Ministers of Ukraine on December 28, 1992 (the "Registration Procedure Decree"), regulations issued by governmental agencies are subject to review and registration by the Ministry of Justice. The Ministry of Justice has the right to deny registration of a regulation that, in its view, fails to comply with the laws or the Constitution of Ukraine.

The changes introduced by the Registration Procedure Decree are aimed at limiting the ability of governmental agencies to regulate matters reserved to parliament. In particular, under the changes, a regulation that fails to specify the date and number of its Ministry of Justice registration will have no legal effect. In addition, any recommendations made by the Ministry of Justice concerning a regulation whose registration has been denied will now be mandatory for the agency

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issuing the regulation, and registration will be denied again if the revised regulation does not reflect these recommendations. In general, the amendments are a welcome development in that they are aimed at strengthening the separation of powers between the legislative and executive branches of the government. /V. Fedichin

Tax Authorities Clarify VAT Rules for Imports

The State Tax Administration of Ukraine (the "STA") has issued interpretative letter No. 8312/6/15-2415-8, dated September 21, 2004 (the "Letter"), clarifying the procedures for calculating value added tax ("VAT") in respect of imported goods. Under the Law of Ukraine "On Value Added Tax," dated 1997 (the "VAT Law"), for purposes of determining a taxpayer's overall VAT liability for a particular tax period, VAT paid by a taxpayer on imported goods (i.e., VAT paid to suppliers, or "input" VAT) may be deducted from the taxpayer's output VAT (VAT the taxpayer collects from purchasers of its own output supplies), provided that the cost of the imported goods is deductible (or depreciable) for corporate profits tax purposes. The Letter sets out the STA's interpretation of the circumstances under which amounts paid as import VAT may be applied to reduce overall VAT liability. First, the Letter states that import VAT amounts paid may offset output VAT amounts owed by an importer in a tax period only to the extent that the cost of the imported goods is deductible (or depreciable) for corporate profits tax purposes in the same tax period. Secondly, the Letter indicates that if the value of imported goods is reduced subsequent to their import into Ukraine (e.g., due to discovered defects), the amount by which overall VAT liability may be reduced should be decreased correspondingly.

In general, the interpretation does not seem to be entirely consistent with the VAT Law, which does not condition the determination of VAT liability on compliance with any particular time periods or fluctuations in the value of goods. The Letter, therefore, has the potential to generate more tax disputes. /Y. Deyneko, V. Fedichin

Procedure for Disciplining Financial Institutions Changed

The State Committee of Ukraine for the Regulation of the Financial Services Market (the "Committee") has issued Order No. 2384, dated September 17, 2004, introducing a regulation "On the Use of Remedial Measures by the State Committee of Ukraine for the Regulation of the Financial Services Market" (the "Regulation"). The Regulation came into effect on October 24, 2004, replacing a previous version from 2003. Many of the procedures to be followed by the Committee in investigating violations (e.g., failure to file accounts on time, violations of anti-money-laundering legislation) committed by a financial services provider (e.g., banks and insurance companies), as well as the sanctions which the Committee may impose, remain the same. Generally, the sanctions range from issuing an order to correct a violation and fines to revoking a license and liquidating a service provider. Sanctions may be imposed following an investigation by officers of the Committee and an administrative hearing.

The Regulation also introduces several changes. Specifically, the time period for completing an investigation and reaching a decision to impose sanctions is extended from 10 to 30 days, with further extension for an additional two months where justified by special circumstances. A service provider accused of a violation has the right to participate in the administrative hearing, conduct its defense and appeal the decision to a higher office within the Committee or in court. The Regulation also lengthens the time period for appealing a decision from 10 to 15 days. In addition, under the current procedure, the Committee may now launch an investigation based on information regarding a violation from a broader range of sources (e.g., on the basis of a newspaper or television report), increasing its ability to detect violations. /A. Chernov, V. Fedichin

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Regulations Implementing Electronic Signatures Law Adopted

The Cabinet of Ministers of Ukraine has adopted two regulations implementing provisions of the 2003 Law of Ukraine "On Electronic Digital Signatures" (the "Electronic Signature Law"). The first regulation, "On the Central Certification Authority," adopted by the Cabinet of Ministers in Resolution No. 1451 of October 28, 2004, names the Ministry of Transport and Communication of Ukraine as the Central Certification Authority, which under the Electronic Signature Law is responsible for issuing enhanced key certificates to local certification centers and key certification centers. Key certification centers are entities authorized to issue key certificates, which provide a means of authenticating the user of the key and the key's validity. Enhanced key certificates employ stricter security features.

The second regulation, "On the Establishment of Procedures for the Use of Electronic Digital Signatures by Governmental Agencies, Local Self-Governance Bodies, State-Owned Enterprises, Institutions and Organizations," adopted by Resolution No. 1452 of the Cabinet of Ministers of Ukraine, dated October 28, 2004, sets forth a legal framework for governmental agencies, state-owned companies and other state organizations to use digital signatures. According to this regulation, state organizations may use an electronic signature only when the state agency responsible for chirographical protection of information has reliable means for certifying the electronic signature. Further, state organizations may only use an electronic signature in transactions with individuals and legal entities who possess enhanced open key certificates. Finally, state organizations may not use electronic signature in transactions exceeding one million Hryvnias (about US \$185,000) or to execute documents that, under the Electronic Signature Law, may not have electronic documents as originals. /R. Ostapenko, V. Fedichin

Licensing Conditions Introduced for IP Telephony Operators

On June 17, 2004, the State Committee of Ukraine on Communication and Information (the "State Communications Committee"), approved Order No. 132 outlining new licensing conditions for international, intercity and local stationary telephone communications services (the "Licensing Conditions"), which were developed on the basis of the new Law of Ukraine "On Telecommunications" (the "Telecoms Law"), enacted in 2003. The Licensing Conditions close the gap in the regulatory framework applicable to telecommunication services, which, for a number of years, was unclear with regard to Intellectual Property ("IP") telephony providers.

Below we provide a brief history of the development of the legal regulations for IP telephony services in Ukraine, followed by a discussion of the new regulatory framework as outlined in the Telecoms Law and the Licensing Conditions.

Background

Under prior licensing laws, IP telephony services were not subject to mandatory licensing. Consequently, IP telephony operators provided services without being licensed to do so, leading to charges of unfair competition by both traditional telecommunications operators and certain state authorities, including the State Communications Committee.

In an effort to solve this problem, in May 2001, the Cabinet of Ministers of Ukraine established a state duty for obtaining a license to provide international and intercity telecommunication services by means of IP telephony technologies, thereby providing an economic basis for providers to obtain a license. In 2002, major Ukrainian telecommunication operators began limiting the access of companies providing international telecommunications services (in particular, by means of IP telephony) without an appropriate license to connect to the local operators' telecommunications networks. Later that year, issuance of licenses to IP telephony operators was suspended pending the enactment of the Telecoms Law and the privatization of

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the state-owned telephone monopoly, Ukrtelekom. Meanwhile, those who had already obtained licenses faced another problem, namely the obligation to follow licensing conditions that had not yet been drafted by the State Communications Committee. Nonetheless, IP telephony operators continued conducting business.

In June 2003, the Antimonopoly Committee of Ukraine ruled that the State Communications Committee's prohibition of IP telephony activity without a license was a limitation on competition in the telecommunications service market. As a result, IP telephony operators were temporarily permitted to provide such services without a corresponding license, pending the enactment of appropriate licensing conditions.

The Telecoms Law, introduced in 2003, finally provided clear requirements for obtaining a license to provide IP telephony services. The Licensing Conditions set forth the requirements to which IP telephony providers must adhere in order to maintain a license, completing the regulatory framework.

IP Telephony Licensing Conditions

It is noteworthy that although the Telecoms Law and the Licensing Conditions refer specifically to IP telephony services, neither enactment defines this service. The Telecoms Law, however, includes the term "voice telephony," which is defined as the "exchange of voice information in real time by means of telecommunication networks" and is quite similar in concept to IP telephony (but lacking any reference to the Internet).

Under the Telecoms Law, to obtain a license an operator (a legal entity or an individual entrepreneur) must submit the following documents to the State Communications Committee (or after January 1, 2005, to the National Commission on Issues of Regulation of Communication ("NCRC")): (1) an application; (2) a duly notarized copy of its State Registration Certificate or Notice from the State Statistics Committee of Ukraine; (3) notarized copies of its foundation documents; (4) certified or notarized documents confirming the right of ownership or use (lease) of premises for the planned activity; (5) a plan on the establishment and exploitation of the telecommunications network; and (6) documents certifying its financial capability and the availability of personnel to carry out the licensed activities. A license should be issued within 30 days of receipt of these documents (or in exceptional cases, within 60 days). Licenses are granted for a minimum of five years, with the State Communications Committee/NCRC setting the exact duration of each license.

The state duty for obtaining a license to provide IP telephony services, which was recently established by the Cabinet of Ministers, is considerably lower than that for other stationary telecommunication services. This duty is calculated at 6% of the license payment for analogous services by non-IP telephony providers, which currently equals approximately US \$100,000 for international and US \$3,800 for intercity telecommunications operators.

The Licensing Conditions establish general requirements applicable to all operators of telecommunication services, as well as particular requirements for IP telephony operators. In general, all telephone service providers must adhere to certain professional, organizational, and technological requirements. For example, at least 30% of a telecommunication operator's staff must have completed a basic higher education and at least one year of relevant practical experience. In addition, a telecommunication operator must provide appropriate telecommunication service 24 hours a day (except for breaks to conduct preventive work and repair, which must be coordinated with other operators connected in the same system), maintain confidentiality regarding customers' information, and follow the prescribed procedure for routing traffic.

In addition, IP telephony operators in particular must: (1) carry out IP telephony operations in accordance with effective telecommunications technical regulations and quality standards; (2) fulfill the NCRC's requirements for connecting their telecommunication facilities to interconnection points; (3) ensure the transfer of voice information via telecommunication networks in real (quasi-real) time; and (4) warn their consumers about the difference in quality between communication via IP telephony in comparison to traditional telecommunications means.

In general, the Licensing Conditions are expected to benefit IP telephony operators by providing them with a clear legal basis for providing telecommunications services. In addition, the existence of a regulatory framework should benefit consumers by ensuring state control and regulation over the provision of IP telephony services, hopefully guaranteeing adherence to quality standards and economically beneficial conditions for users. /A. Ryzhova, R. Ostapenko

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New Rule for Payments Under Guarantees in Favor of Foreign Creditors

NBU Resolution No. 323, discussed above, also establishes a new rule with respect to foreign currency payments made by a Ukrainian guarantor (or surety) under a guarantee (or suretyship) provided in favor of a foreign creditor to secure the obligations of a Ukrainian debtor (e.g., in connection with a loan agreement in foreign currency from a non-resident lender). Under the new rule, payments by the guarantor must be effectuated from the same bank that acts as the Ukrainian borrower's servicing bank with respect to the foreign currency loan.

By way of background, a Ukrainian entity who borrows foreign currency from a non-resident lender is required to register the foreign currency loan with the NBU (for which it receives a registration certificate) and to designate a Ukrainian servicing bank, which monitors the flow of payments under the loan. If the borrower changes its servicing bank at any time throughout the life of the loan, the loan registration certificate must also be amended to reflect such change.

Under the new rules, if a guarantor is called upon to pay under the terms of its guarantee, the guarantor must open a bank account with the borrower's servicing bank to effectuate any payments thereunder. Since opening a bank account can be a time-consuming process, it is recommended that creditors require the guarantor to open such an account as one of the conditions precedent to disbursement of the loan.

This new rule may be regarded as a positive change, as it brings some clarity to the process by which payments under a guarantee may be effectuated. From the perspective of currency control, the new rule is logical as the borrower's servicing bank is required to monitor all amounts received by the borrower from the foreign lender and all payments made by the borrower to the lender. Thus, when a guarantor makes a payment under a guarantee, the servicing bank would be able to verify whether the amount to be paid corresponds with the amounts received by the borrower. Also, previously it was unclear whether an NBU license would be required to effectuate payments under a guarantee. Resolution No. 323 seems to indicate that a license will not be required, provided

that the guarantor maintains a bank account with the servicing bank and provides all documents required under the interbank currency rules for the purchase of foreign currency to effectuate a payment under a guarantee. /O. Soshenko

BELARUS

Belarusian Civil Code and Investment Code Revised

In early 2005, amendments to two of the basic codified normative acts of the Republic of Belarus ("Belarus") - the Civil Code and the Investment Code - will enter into force. Both sets of amendments are likely to be of interest to foreign investors conducting, or contemplating conducting, business in Belarus.

Amendments to the Civil Code

The Amendments to the Civil Code primarily revise Chapter 53, regulating franchising agreements (the "Civil Code Amendments"). The Civil Code Amendments will enter into force on February 27, 2005. The concept of a "franchise agreement" has existed in Belarusian law since 1998. However, the relevant legislation stipulates that a franchising agreement can be concluded only in situations contemplated by law. Consequently, the use of this sort of contractual arrangement has been practically impossible for Belarusian entrepreneurs, since Belarusian law previously has not provided for any instances in which a franchising agreement may be used.

By providing clear regulations on franchising agreements, the Civil Code Amendments will remove this limitation. The Civil Code Amendments provide that under a franchising agreement, one party (holding the rights) may provide the other party (the user) with a set of exclusive rights for a definite or indefinite time period, including the right to use the rights holder's firm name and confidential information (including production secrets and know-how), as well as other exclusive rights (such as trademarks, service marks, etc.) provided for in the franchising agreement governing the entrepreneurial activity.

The Civil Code Amendments also establish special demands regarding the form of a franchising agreement to be

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concluded between a rights holder and a user. In particular, a franchising agreement must be concluded in written form and registered with the National Center for Intellectual Property, the patent authority for Belarus.

Notably, the norms provided in the Civil Code Amendments regulating the obligations of the parties, the responsibilities under the agreement, and other franchising questions often have an imperative character. Consequently, parties are generally deprived of the right to set forth their own separate conditions, negatively affecting the overall attractiveness of the franchising agreement. On the other hand, the Civil Code Amendments confirm entrepreneurs' rights to conduct franchising activity. This development is certainly positive, inasmuch as it will allow franchising schemes to be used for the development of small and medium-sized businesses in Belarus.

Amendments to the Investment Code

The amendments to the Investment Code enter into force on January 1, 2005 (the "Investment Code Amendments"). In general, the Investment Code Amendments are aimed at simplifying and clarifying certain matters related to foreign investment.

First, the Investment Code Amendments abolish the strict regulations regarding the legal form in which a commercial organization involving foreign investment can be established. Now, such organizations, just like enterprises founded with local capital, can carry out their activities in the legal form of a full partnership, special partnership, limited liability company, double liability company, joint stock company (open or closed), production cooperative, unitary enterprise, or agricultural enterprise.

Second, the Investment Code Amendments clarify the procedure by which a commercial organization involving foreign investment may be established. Namely, the Investment Code Amendments provide that a commercial organization may be deemed to operate with foreign investment not only as a result of its establishment as such, but also as a result of a foreign investor's acquisition of a participatory interest in the charter capital of an established commercial organization equal to at least US\$ 20,000.

Third, the Investment Code Amendments establish rules which equalize foreign credits received by the Belarus State as a borrower with those that have been provided to the Belarus State under a guarantee from the Belarus government. These regulations should allow purchases of imported materials and equipment made on credit to be exempt from taxes and custom

duties, as are purchases made on credit under a state guarantee.

In general, by simplifying the rules regulating foreign investment in Belarus and extending certain tax privileges to foreign investors, the Investment Code Amendments should increase the country's ability to attract foreign capital. / *Yu. Shuba (Borovtsov & Salei)*

POLAND

New Developments on Listing of Foreign Companies in Poland

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amendment dated March 12, 2004 (the "Securities Law Amendment"), as well as a new regulation of the Council of Ministers, dated August 11, 2004, setting forth the specific requirements for an offering prospectus and its summary (the "Prospectus Regulation"). The mechanisms contained in the Securities Law Amendment and Prospectus Regulation reflect the principles contained in relevant EU directives, in particular Directive 2001/34/EC of the European Parliament and the European Council, dated May 28, 2001, on the admission of securities to an official stock exchange and the information to be published on those securities (the "EU Directive").

The new rules for listing foreign companies on the Polish securities market have already been tested in practice. Within the first six months of Poland's accession into the EU, several companies have successfully obtained listings of their shares on Polish exchanges, among them Hungarian-based BorsodChem and US-based Ivax. Numerous other foreign issuers are currently seeking a Polish listing.

Mutual Recognition of Prospectuses

Generally, a foreign issuer's securities are admitted into public trading (which allows the issuer to apply for a listing on a Polish securities market such as the Warsaw Stock Exchange) when consent is received from the Polish Securities and Exchange Commission (the "PSEC"). The Securities Law Amendment introduces the concept of mutual recognition of prospectuses, provided for in Articles 38-39 of the EU Directive, which exempts certain issuers from the requirement to seek such consent. Specifically, the new provisions apply principally to foreign issuers which are: (i) undertaking steps to have their securities listed on other European securities markets concurrently with seeking a Polish listing; or (ii) seeking a Polish listing shortly after having

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been listed in another EU jurisdiction. The Securities Law Amendment provides that consent from the PSEC is not required for an issuer with a registered office in an EU member state to introduce securities into public trading in Poland if a prospectus has been prepared, filed with, and approved by, the applicable listing authority in order to list such company's securities on an official regulated market in an EU member state. Similarly, consent of the PSEC is not required to introduce securities into public trading in Poland if the issuer's securities are already listed on an official regulated market in an EU member state, provided that such official listing occurred no more than three months earlier. In the above circumstances, a foreign issuer's securities are admitted into public trading when the PSEC receives a notification indicating that the relevant conditions (specified in the Securities Law Amendment) have been met, based on a prospectus published by the company abroad.

The Securities Law Amendment does not apply to foreign issuers whose shares have been listed in one of more EU member states for more than three months and who have not issued any offering prospectuses during such period.

Abbreviated Prospectuses

The Prospectus Regulation, in turn, aims to facilitate the admission into public trading in Poland of securities which are traded on other European regulated markets but have not recently been covered by a prospectus approved by a listing authority in another EU jurisdiction. The Prospectus Regulation simplifies the legal requirements for such issuers in connection with the preparation of a Polish prospectus, allowing foreign issuers which have their shares listed on an official regulated market in an EU member state to prepare an abbreviated prospectus. The scope of the permissible abbreviations for a Polish prospectus depends on several factors, such as:

- (i) the length of time during which the securities of the issuer seeking a Polish listing have been listed abroad (certain exemptions from information disclosure requirements are available only if the foreign issuer has been listed abroad for at least 18 months);
- (ii) the type of securities to be introduced into public trading under the prospectus (the ability of foreign issuers to take advantage of certain provisions of the Prospectus Regulation is contingent on whether the securities are offered in Poland or introduced into public trading in the absence of an offering, and whether the offered securities are newly-issued or existing securities); and
- (iii) the character of the offering to be implemented in Poland

(certain limitations on prospectus disclosures by companies listed in other EU jurisdictions apply only if the Polish offering is addressed to qualified institutional buyers).

The introduction of the Securities Law Amendment and the Prospectus Regulation governing the admission of foreign securities into public trading in Poland mark the beginning of the Polish securities market's integration into the securities markets of other EU member states. The PSEC is currently preparing another substantial revision of the Securities Law, which in particular is expected to develop the concept of a single passport in respect to securities listings. It is expected that further harmonization of the Polish securities regulations with EU standards, along with changes to the organization of the Polish securities market and the increasing supply of funds from Polish financial institutions available for investment in equities traded in Poland, will make the Polish securities market a recognized center for securities trading in this part of Europe. /K. Jelenski, D. Dixon

CIS AND CENTRAL EUROPE LEGAL NEWSWIRE

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