

### REGULATION OF FOREIGN INVESTMENT ISSUES



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On 01.03.2010 the Ministry of Justice of Ukraine has registered the Resolution of the National bank of Ukraine (hereinafter – the NBU) “On Regulation of issues as to effectuation and registration of foreign investment” as of 23.12.2009 N762 (hereinafter Resolution N762), passed as enforcement of the Law of Ukraine “On amendments to certain laws of Ukraine in order to overcome negative influence of the financial crisis” as of 23.06.2009 N1533-VI.

This Law being in effect as of 24.11.2009 introduced essential amendments to the procedure of foreign investment in Ukraine, in particular, it stipulated:

- obligatory state registration of foreign investment, including in monetary form;
- foreign investment in Ukraine in monetary form is possible only in national currency of Ukraine;
- foreign investment in Ukraine in monetary form is possible only through investment accounts opened in authorized banks of Ukraine.

In spite that mentioned legal requirements have come into force, respective regulatory legal basis of the NBU was not provided which makes practical application of the law more difficult. Some explanations of the new procedure for foreign

investment have been provided by the BU in its letter as of 10.12.2009 N13-215/7968-22877 but it did not solve the problem with lacking of regulatory control.

The Regulation N762 stipulates:

- 1) the Provision on procedure for state registration of foreign investment by the National bank of Ukraine (hereinafter – Provision on investment registration);
- 2) Amendments to the Provision on procedure for foreign investment in Ukraine, approved by the Resolution of the National bank of Ukraine as of 10.08.2005 N280 (hereinafter – Provision N280);
- 3) Amendments to the Provision on procedure and terms for foreign currency trade, approved by the Resolution of the National bank of Ukraine as of 10.08.2005 N281 (hereinafter – Provision N281).

The procedure envisaged by the Provision on foreign investment registration shall be applied only to registration of foreign investment in monetary form. The state registration of foreign investment is confirmed by a notice of the territorial NBU administration.

For registration of a foreign investment a document set shall be submitted to the territorial NBU administration according to the location of investment object (if the investment is in form of investment contribution – according to the location of the respective bank) which is not different to the document set required for registration of foreign investments according to the Resolution of the Cabinet of Ministers as of September 7, 1996 N928. At the same time, the territorial NBU administration

is entitled to require submission of additional documents as to the foreign investment the list of which is not stipulated. Free interpretation of this provision by the employees of the territorial NBU administration can make the registration of foreign investment in praxis more complicated.

According to the Provision on foreign investment registration the foreign investor or a person authorized by it shall submit within 30 days after investment effectuation an application on registration of the foreign investment. If the foreign investment has been effectuated after 24.11.2009, the 30-days term begins as of the date of coming into force of Resolution N762.

Despite the fact that registration of foreign investment is obligatory, liability for non-registration is not provided. It can be assumed that negative consequences in such case for foreign investor can arise at repatriation of the foreign investment. In addition, taking into account problems in connection with exchange rate differences and the fact that in some cases foreign investor has to legalize documents, 30-days term seems to be too short.

Amendments to Provision N280 and Provision N281 introduced by Resolution N762 have brought these Provisions into compliance with the law and specified the mechanism of investment in Ukraine and investment return.

So, the definition of a “portfolio investment” in Provision N280 has been changed. Now, if foreign investor purchases shares of a company in amount exceeding 10 percent of the company’s charter capital on the stock market, it is not considered to be a portfolio investment. It is also stipulated that sale by a foreign investor of the investment object – company’s shares (or payment of dividends for them to the foreign investor) in amount of less than 10 percent of the company’s charter capital, shall be considered as return of portfolio investment (and/or income on foreign investment), irrespectively of number and type of transactions on purchasing of such shares by the foreign investor.

Besides, definition of a “direct investment” has been excluded from Provision N280. Now all investments, except for portfolio investments, shall be called “foreign investment” and regulated according to the standard procedure.

In addition, Provision N280 has been brought into compliance with legislative requirements as to

effectuation of foreign investment in monetary form only through investment accounts and in national currency of Ukraine. Respectively, all norms allowing transfer of the currency directly to the resident’s current account, including for conduction of joint activity, have been excluded.

It is also stipulated that foreign investors are entitled to open deposit accounts in the authorized banks only in UAH by means of transfer of monetary funds from the investment account.

Par. 3.1. of Provision N280 stipulating procedure for investment repatriation has been also changed. In particular, repatriation of investment in foreign currency to the account of the foreign investor in the foreign bank does not depend on the fact whether the money have been previously transferred by the foreign investor from the investment account or directly from the account in the foreign bank.

As positive moment making the requirements to investor less strict is exclusion of par. 3.8. from Provision 280 which provided that the foreign investor for investment repatriation shall submit a copy of a tax certificate on payment of profit (income) tax or a legalized certificate on residence. Now such certificate shall be submitted only in some cases provided by Provision N281. In particular, it is not required to submit such certificate if the sale price of the investment object does not exceed its purchase price or if the authorized bank is the tax agent for the investment transaction of the foreign investor.

Positive is also exclusion of the requirement as to obligatory use of a security broker’s account for transactions on effectuation/return of portfolio investments.

Provision N762 introduces new version of par.2 chapter 3 section II Provision N281 which stipulates the list of documents necessary for purchase and exchange of foreign currency for return of foreign investment and income gained by foreign investors out of investment activity in Ukraine. Positive is that it is specified which document shall be submitted in what case.

The most negative moment of the new legal act is that now in case of purchase of foreign currency for investment return authorized banks are obliged to credit funds in UAH to separate analytical account and are entitled to transfer them for purchase of foreign currency not earlier than on 5th calendar day after crediting of funds to this account. It is

clear that in this way the NBU tries to prevent simultaneous rush access of speculative investors to interbank currency market in case of exceptional depreciation of the national currency, but this provision worsens the situation of all investors, including those making real investments into Ukrainian economy.

On the other hand, possibility to conduct settlements abroad between non-residents for investment objects in Ukraine, as it comes out based on the analysis of the norms of par. 2 Provision N281, shall contribute to investment attractiveness of Ukrainian objects as it decreases risks of foreign investors and simplifies the procedure of purchase and alienation of such assets.

Certainly, the regulation by Provision N762 of some opened issues which arouse after passing of the Law of Ukraine “On amendments to certain laws of Ukraine in order to overcome negative influence of the financial crisis” is, indeed, a positive moment which will allow to achieve more certainty in issues of foreign investment.

But there are also some additional complications for investors which will not help to increase the interest to invest into Ukraine.

For example, if previously in case of investment in foreign currency through purchase of corporate rights the exchange rate fluctuation did not influence the amount of the authorized charter capital of the company – object of investment and the exchange rate difference at the currency sale the Company added to income or wrote off, after passing the law and the new procedure the situation has changed. Amount of the charter capital to be paid by the foreign investor can be estimated only at the date of the currency sale by the foreign investor and transfer of the amount in UAH to the account of the company – investment object.

Therefore, additional restrictions on foreign investment stipulated by the law increase cost of foreign investors for business conduction in Ukraine as well as increase currency risk of investors by instability of the national currency.

At the same time, taking into account that according to Transitional Provisions of the Law such restrictions shall cease to be in force as of January 1, 2011, we hope that the National bank of Ukraine manages to introduce respective amendments to its bylaws in time.