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NAZALI ULUSLARARASI DANIŞMANLIK A.Ş.
19 Mayıs Cad. Dr. İsmet Öztürk Sok. No:3 Elit Residence Kat:19 Daire: 12 Şişli 34360 İSTANBUL
T:+90(212)380-0640
F:+90(212)217-1890
https://en.nazali.com

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NAZALI GLOBAL MAGAZINE

PREFACE

Dear Friends,

Although we all went through a difficult period of time, with all its sadness and fear for ourselves as well our beloved ones, the end is near and we have managed to overwin these uncertainties by being supportive to each other as friends, as colleagues, and above all, as one family.

Another important factor which contributed to successfully overwin the uncertain period is our clear mission, as derivative of our leaders' strong vision. As NAZALI® we managed to continue with provision of our dedicated services and supported our business partners with their growth in Turkey as well in the countries where we are present. We are very proud of our dedicated and qualitative professionals, with whom we achieve the business growth for our business partners under the NAZALI® umbrella.

After the successful release of the previous editions of NAZALI® GLOBAL MAGAZINE, we are very proud to release the third NAZALI® GLOBAL MAGAZINE as well. Like in the previous editions, this release also consists of articles with focus on legal and tax topics.

In this edition, differently than the previous ones, we decided to take the opportunity to introduce one professional per office/country. We believe that this approach will further strengthen the strong relationship between NAZALI® and its business partners.

We hope again for an enjoyable reading and look forward to your feedback and/or questions.

Meet you again in our next edition of NAZALI® GLOBAL MAGAZINE

Sincerely regards,
NAZALI® GLOBAL

UNITED KINGDOM

NAZALI – LONDON OFFICE

As part of NAZALI, our London office has become active in the United Kingdom since June 2019. Our London office started providing their professional services in June 2019 with a group of qualified and experienced individuals offering broad knowledge and services on Accounting, Tax and Legal, Compliance and Corporate Governance for clients locally and internationally. Our UK team exists of professionals having the right knowledge and experience in their field.

NAZALI UK is headed by the Managing Partner of the company Mr Ersin Nazali. He has a wide range of knowledge in several tax areas such as tax inspections, tax litigation, transfer pricing and tax free re-structing of companies.

In this edition, we proudly would like to introduce Mr. Oliur Rahman, being the Director at NAZALI Tax & Legal International.

Oliur Rahman is an experienced and a qualified professional with wide range of skills and more than ten years of experience gained through work. He joined NAZALI in February 2021 as a director to lead the London office. Oliur worked for various Accountancy firms in the UK gaining intensive skills and experience in Financial Accounting, Financial reporting, Taxation & Business Advisory. Oliur is a valued colleague and responsible for all limited company's accounts, tax return, tax advisory and meeting business owner, across a wide range of sectors, helping them to grow and develop their businesses. He is also responsible for providing training for junior colleagues. He specialises in UK Tax and Accounting including personal tax, corporation tax, UK GAAP, FRS102 and FRS105, tax efficient business structuring plan, business advice and tax planning for owner-managed businesses and limited company.

Oliur has previously completed his B. Com (H) and Master's degree in Accounting. After that, he completed B.A (H) in Professional Accounting in London South Bank University. He was a lecturer in Accountancy at Madan Mohan College, Sylhet in Bangladesh (1999 to 2001)

Oliur is MAAT, practicing licensed accountant and qualified ATT tax consultant. Also, he is expert of major accounting software including Xero, QuickBooks, VT transaction+ and VT accounts production. He is a QuickBooks online advance certified adviser.

Oliur feels privileged working at NAZALI where he works with a great team of professionals, has the work-life balance and sufficient freedom for personal development. Further, Oliur perceives being part of NAZALI as an opportunity to contribute his knowledge and experience in setting up and further developing the Tax and Accounting department of NAZALI London office.

Outside work Oliur has keen interest in sports, he enjoys playing Cricket and Chess. He also enjoys traveling and attending social events with family and friends.

E: oliur.rahman@nazali.com

T: +44(0) 2074 845060

CURRENT NEWS ABOUT UNITED KINGDOM

» Basis Period Changes for Simplified Tax Reporting

'Basis period' reform are changes from the 'current year basis' to 'tax year basis'. This is a part of simplifying the tax system. The overall objective of the proposal is to simplify the taxation of trading profits. The change aligns with the government's plans implementation of Making Tax Digital (MTD) for Income Tax. This will help reduce errors and ensure self-employed businesses to get their tax right first time. Also, it will allow self-employed people to spend less time doing tax admin and more time growing their business and creating jobs.

The proposal changes this to a 'tax year basis' with effect from 2023 to 2024, so that a business's profit or loss for a tax year is the profit or loss arising in the tax year itself, regardless of its accounting date. Currently tax year end in the UK is 5 April (or deems year end 31 March). There will be a transition period in 2022-2023 when all businesses require their basis period moved to the end of the tax year (5 April or 31 March) and overlap relief will be given;

» Making Tax Digital for Income Tax Has Been Delayed

MTD for ITSA has been delayed by one year. Government's plans to make it easier for individuals and businesses to get their tax right. Self-employed businesses and landlords with annual business or property income above £10,000 will need to follow the rules for MTD for Income Tax from their accounting period starting on or after April 6, 2024 (it was due to apply from the April 6, 2023). General partnerships will not be required to join MTD for ITSA until April 2025;

» NIC and Dividend tax rises 1.25%

On September 7, 2021, the UK prime minister announced a 1.25% rise in National Insurance Contributions (NICs) and dividend tax from April 6, 2022, aim to raise £36bn in the next three years. The 1.25% NIC rise in Class 1 primary and secondary, Class 1A, 1B, and Class 4 NICs from April 6, 2022. But Class 2 and 3 NIC will not be affected in this announcement. The rates of NICs will return to their lower rates on April 6, 2023, when a formal contribution to the health and social care levy of 1.25% commences. The levy will be a new tax and separate from NIC. This will also be paid by individuals who are working above the State Pension age (pensioners currently do not pay NIC).

Dividend tax rate will increase by 1.25% from April 2022. This change will affect directors and shareholders. This will also apply for S.455 tax where directors accounts are overdrawn.

» Coronavirus Job Retention Scheme Ended

Coronavirus Job Retention Scheme Ended on September 30, 2021. The deadline for Coronavirus Job Retention Scheme (CJRS) Claims for September 2021 must be submitted on or before October 14, 2021.

DIRECTORS OF A COMPANY AND THEIR DUTIES

Mr. Hayri Cengiz
Consultant Solicitor

ABSTRACT

Directors are the people who officially manage the daily operations of the company in the United Kingdom. The Companies Act 2006 regulates certain duties that the directors must follow for a lawful management of their company. It is essential for people who intend to become a director to know a brief of these duties.

Key words: Director, Duties of Directors, Company Management in England, Companies Act 2006, Promote the Success, Independent Judgement, Reasonable Care, Breach of Duty, Relief from Duty

INTRODUCTION

For the Companies House, the regulator of companies in the United Kingdom, a director of a company is probably the most essential person in the company. A director is formally registered under the name of the company and is the contact point of the Companies House for any issue and shows authority. The directors can be more than one and they carry all the day to day activities of the company. In short, being either a legal or real person, directors are the people who manage the company. The details of the directors are transparent to any viewer under the Companies House webpage, except for some extraordinary circumstances.

The Companies Act 2006 ("**Act**") regulates the rules on all kind of company matters in the United Kingdom. The Act is very detailed consisting of 47 Parts, 1300 Sections and 16 Schedules. Any director managing a company should be familiar with the terms of the regulator Companies House and the regulation The Companies Act 2006 on the daily management of the company.

According to the Act, the shareholders of a company and the directors of a company have separate duties and responsibilities. The shareholder of a company can be a director under a company, however, it is not essential. The important part to note is that the duties of the directors are higher than the shareholders.

DUTIES UNDER THE ACT

Under the Companies Act 2006, the 7 general duties of the director are listed and a brief description is provided in sections 171 to 177 for the duties of the directors under a company.

Duty to Act within Powers (S171)[1]

The directors are bound to practise their powers in accordance with the Articles of Association ("**AoA**") of the company, which should also be open to public on the Companies House website. The Act calls the AoA as the 'company's constitution'.

Most companies in the United Kingdom practise with the model AoA which sets the general rules for the company management and the board. Companies are free to create their own AoA by either changing the provisions of the model AoA or creating an AoA from scratch. Any change requires a good level of understanding of the Act for the provisions not to be in contradiction with the regulations, and should be done by lawyers.

It is advised that the directors go through the AoA of the company to build an understanding of their duties and power when running the company. The Act states that the directors must act in accordance with the company's constitution and only act within the powers conferred to them.

1 *https://www.legislation.gov.uk/ukpga/2006/46/section/171*

Duty to Promote the Success of the Company (S172)[2]

Although the term 'promote the success' sounds a bit ambiguous, and improving the business of a company seems to be a regular duty expected from a prudent director anyway; the Act puts the duty on the director by drawing a wide range for directors to consider when promoting the success of their company. The Act requires the director to act in a way he/she considers, in good faith, would be most likely to promote the success of the company for the benefit of its shareholders. The Act also states that, the directors must also consider the consequences of their decision, and the effects of these decisions to their employees, suppliers, customers and others. The impact of these decisions to the environment, the community and the reputation of the company are also stated by the Act to be considered. Therefore, it can be seen that the Act does not see it as a simple duty when saying 'promote the success' and asks the directors to consider numerous elements when managing the day to day operations of the company. This duty is clearly beyond a mere financial success.

Another essential point to know here is that since 2019, companies with more than 250 employees must provide explanation in their annual financial report on how their directors fulfilled this duty.

Duty to Exercise Independent Judgment (S173)[3]

Independent judgement is a very straightforward duty on the directors requiring them to use their sole discretion on the decision making in relation to their powers. A director must not act as an agent or a delegate of someone else, especially of the major shareholders. This does not of course prevent directors from taking advice from third parties, but it means that when giving the final decision, they should not imprudently follow an advice and use their own independent discretion. If there is more than one director, this duty separately relies on each director and one director cannot avoid responsibility by relying on the decision of another or the directors cannot agree to act in a certain way.

The Act also states that the directors acting in accordance with an agreement the company has signed or under the limitation of the AoA will not infringe this duty.

Duty to Exercise Reasonable Care, Skill and Diligence (S174)[4]

In short, this means that the director of a company should be competent to carry the duties with a reasonable amount of care, skill and diligence. It also means that every director appointed to the company has to show the reasonable amount of care to the daily management and decision making of the company and a director should not be appointed just for their name or reputation.

The minimum standard of care is expected from directors while practising their duties and it is only expected for them to act as a reasonable businessperson. However, if the director is someone with specialist knowledge such as an accountant or a solicitor, the expectations also increase and higher level of care and diligence is expected from such directors.

Although it is not expressly stated in the Act, an important duty of the directors under this clause is to follow the annual financial statements of the company and keeping the records of any decision.

Duty to Avoid Conflict of Interest (S175)[5]

When managing their businesses, a very important aspect stated by the Act is that the directors must not in any case act within their own personal interest. The Act has regulated three separate duties on this, which the first

2 *https://www.legislation.gov.uk/ukpga/2006/46/section/172*
3 *https://www.legislation.gov.uk/ukpga/2006/46/section/173*
4 *https://www.legislation.gov.uk/ukpga/2006/46/section/174*
5 *https://www.legislation.gov.uk/ukpga/2006/46/section/175*

is to avoid a situation where their personal interest has a conflict with the interest of the company. The Act clearly states that any direct or indirect interest of the directors falls under this scope and directors should be very careful for either actual or possible conflicts.

In a large company management, conflict of interests may become inevitable and, in these cases, the director's duty is to act loyal to the company and disclose any direct and indirect conflict to other board members and act in accordance. The other directors have the right to decide on a potential solution for the conflict by either accepting or rejecting it. The other board members must be careful the follow the provisions of the AoA on this decision making as, their consent is only possible if it is permitted under the AoA.

Duty not to Accept Benefit from Third Parties (S176)[6]

The Act puts an extra duty on the directors not accept any kind of benefit from third parties that may affect their impartiality and objective decision making. The limits for this is that the benefit should directly or indirectly in relation to them being a director. In addition, if the gift does not arise any doubt of a potential conflict of interest, then the Act notes the gift does not infringe this duty.

In practise, there may be situations where it is difficult for the directors to decide if the gift is in relation to their work or directors may see the amount of gift too small to fall under scope. To prevent any uncertainty, it is advised that the companies have a gift and hospitality policy to draw the lines.

Duty to Declare Interest in Proposed Transaction and Arrangements (S177)[7]

Duty to declare any interest in transactions can be read together with duty to avoid any conflict. If it appears to be that the director will have any kind of interest in a transaction or arrangement of the company, the director should disclose this to other board members. This can be a notice in writing or a declaration made in a board meeting.

BREACH AND RELIEF

The Act further regulates the consequences of any breach of the duties in S171 to S177 and notes that the company, as the entity which suffers from the breach, has rights to take action against the director in breach.[8] One or more shareholders also have the right to make a claim against the director in breach, if they are in belief that they have personal financial loss.

By considering the results of the breach, there are numerous options for the company can take from merely just removing the director from office to taking criminal action against the director. In general practise, the claim only covers claims for financial loss and damage, returning company property and injunctions against the director.

As a relief from any breach of the director, there are 3 possible ways for the director to come clear of any claim.[9] If they are authorised under the AoA, the non-breaching directors can authorise the action of the director in breach. In addition, the shareholders of the company can ratify the breach of the director with a general assembly resolution. When the shareholders ratify the breach, the company loses its rights to take legal action. Finally, the director can ask for a relief from the court by proving that his action was honest and reasonable in those circumstances.

CONCLUSION

The Act and the AoA puts high level of duties on directors, which may become alarming for people who intend to become directors of a company in the United Kingdom. However, the regulations are there to remind the directors how valuable their work is towards the society and in brief, there are two humanly qualities expected from a director; honesty and reasonableness. An honest, reasonable and prudent businessperson who has a basic level of understanding of the Act and the AoA can successfully manage a business as a director. It is only advised that they stay in contact with a lawyer and have a professional accountant for any kind of commercial and corporate issue to stay on the safe side.

6 *https://www.legislation.gov.uk/ukpga/2006/46/section/176*
7 *https://www.legislation.gov.uk/ukpga/2006/46/section/177*
8 *https://www.legislation.gov.uk/ukpga/2006/46/section/178*
9 *https://www.legislation.gov.uk/ukpga/2006/46/section/180*

SETTING UP A BUSINESS IN THE UK

Miss Gizem Dogan
Accounts & Tax Assistant

ABSTRACT

In this article, the different types of businesses will be discussed as well as the benefits of having one of the three popular business types in the UK.

Key words: Limited Company, Sole Trader, Partnership, Business, Benefits, UK, International, Individuals, Advantages.

INTRODUCTION

There are three common ways of doing business in the UK, these are known as sole trader, partnership, and limited company. Setting up a business depends on the type of work that is delivered because this will also affect how you pay tax and receive funding. All business types will be discussed in this article.

SOLE TRADER

Sole Traders[1] are responsible for running their business as an individual as well as being self-employed. Therefore, this means keeping track of all business profits and losses. All business profits can be kept if tax is paid on them.

Some responsibilities for being a sole trader includes, keeping records of the business's sales and expenses, complete a self-assessment tax return every year. Income tax[2] would need to be paid on profits earned along with Class 2 and Class 4 National Insurance tax. Sole traders pay tax at 20%, 40% or 45%, and NIC Class 4 is 9% and 2% depending on their level of taxable income. International individuals will need to obtain a national insurance number to set up a business in the UK.

If the company is within a construction industry and working as a subcontractor or contractor, the sole trader would need to register with Her Majesty's Revenue and Custom (HMRC) for the Construction Industry Scheme (CIS).

The advantages and disadvantages of being a Sole Trader are as follows;[3]

- Advantages are:
- Immediate effect;
- No registration for companies' house is necessary;
- Complete control over finances (no other partners to share profit with);
- Less paperwork;
- Fewer responsibilities on Tax;
- Flexibility.

Disadvantages are:

- Unlimited liability (personal assets could be at risk if any outstanding debt);
- Responsibility over the business (having finances and the job itself to work around).
- Sole Traders with a taxable turnover of £85,000 per year would need to be registered for VAT[4]. This is for the purpose of reclaiming the VAT if goods are sold to another VAT registered business.

PARTNERSHIP

A partnership is a formal agreement by two or more people, to manage and operate a business and share its profits. There must be partnership agreement in place, and this consist of each partners capital contributions, duties as partners, sharing and assignment of profits and losses, acceptance of certain liabilities and dispute resolution.

Partners will share the business's profits and each partner's tax amount will depend on their share of profit. All partners pay income tax at 20%, 40% or 45%, and NIC Class 2 and Class 4 is 9% and 2% depending on each partners share of profit and level of taxable income.

Registering the partnership for Self-Assessment with Her Majesty's Revenue and Customs (HMRC) is mandatory. This would have to be done by the 'nominated partner' who is willing to be responsible for sending the partnership tax returns. Other partners in the business will need to register separately for their own self-assessment tax returns. Penalty could be charged if not registered by 5 October in the business's second tax year.

The advantages and disadvantages of being in a partnership business are as following[5].

Advantages are:

- Simple to get started;
- Having different experiences, skills, and knowledge to share with partners;
- Decision making is easier with partners;
- More partners, means more capital.

Disadvantages are:

- Unlimited liability;
- Differences and conflicts between partners;
- Decision making can also be difficult with partners;
- Profit sharing with other partners
- Companies with a taxable turnover of £85,000 a year would need to be registered for VAT. This is for the purpose of reclaiming the VAT if goods are sold to another VAT registered business.

LIMITED COMPANY

Limited companies differ from partnerships or sole trader businesses. When looking into a Limited Company business Limited by shares and Limited by guarantee must be considered.

Limited companies, being limited by shares, are legally separate from the people who run the business, it is designed for businesses that make a profit. It has separate finances from personal finances, also profits can be kept after tax is paid on it as well as having shares and shareholders.

On the other hand, Limited companies, being limited by guarantees do not seek for profit but aim to re-invest the profit back to the business.

In order to create a Limited Company, there are a number of points to follow, these are[6];

- Checking if a Limited Company is the right business to set up with the following points;
- Choosing a name for the business;
- Must appoint a company director and a company secretary (not always necessary);
- Deciding on whether to go for Limited by Shares or Limited by Guarantee
- Identify people with significant control over the company (anyone with voting rights or more than 25% of the shares);
- Prepare a memorandum of association and articles of association;
- Check what documents that need to be kept;

1 *https://www.gov.uk/set-up-sole-trader*
2 *https://startups.co.uk/tax/self-employed-sole-trader-tax/*
3 *https://www.bbc.co.uk/bitesize/guides/zpx7gdm/revision/3*
4 *https://www.gov.uk/vat-registration?step-by-step-nav=01ff8dbd-886a-4dbb-872c-d2092b31b2cf*
5 *https://www.bbc.co.uk/bitesize/guides/zpx7gdm/revision/4*
6 *https://www.gov.uk/limited-company-formation/memorandum-and-articles-of-association?step-by-step-nav=37e-4c035-b25c-4289-b85c-c6d36d11a763*

- Register the company for a Standard Industrial Classification (SIC) code[7], this identifies what type of business the company does.

Keeping accounting records are mandatory for a limited company, failure to do so will result in a £3,000 fine by HMRC or be disqualified as a company director. Consequences of being disqualified as a company director is conviction; imprisonment for up to two years or a fine, or both depending on the level of criminal activity carried out. The disqualified director will not be able to act as a director or manager within this period, this can be up to 15 years.

Yearly accounts must be published onto Companies House. Consequences for not doing so are fines, according to the time passed after the deadline. Penalties for up to 1 month is £150, 1 to 3 months is £375, 3-6 months is £750, and more than 6 months is £1,500.

The records that need to be kept include, all money received and spent by the Limited Company which includes all grants and payments received from coronavirus support schemes, details of assets owned by the Limited Company as well as debts the company owes or is owed and the stock the company owns at the end of the financial year.

Records of the money spent by the Limited Company, i.e., receipts, petty cash books, orders, and delivery notes as well as invoices, contracts, sales books, bank statements and other correspondence will need to be kept as information is used for annual accounts and company tax returns. All records need to be kept for minimum six years.

There are more benefits on setting up a Limited Company rather than the other two businesses mentioned[8].

Advantages are:

- Limited Companies are more tax efficient with also dividend advantage as they are taxed at a lower rate;
- 19% corporation tax on profits (from 2023 it will be 25%) as opposed to the 20%-45% income tax that Sole Traders have to pay on their profits;
- Limited liability where the company directors or shareholders are responsible for the debts of their business;
- Professional status with Companies' House
- Company pension schemes, contributing to a pension can bring significant tax advantages as it is treated as an allowable business expense;

Disadvantages are:

- Unlike a Sole Trader, Limited Companies are more complicated to set-up
- A cost to set up the company
- Monthly records need to be kept for filing accounts
- Accountancy and professional fees (these are necessary to avoid penalties from Her Majesty's Revenue and Customs and Companies House);
- More paperwork and legal requirements

Companies with a taxable turnover of £85,000 a year would need to be registered for VAT[9]. This is for the purpose of reclaiming the VAT if goods are sold to another VAT registered business.

CONCLUSION

Individuals can choose their business structures according to the nature of their business or circumstances. The three popular business structures are as mentioned above. However, Limited Company businesses are more in demand as there are more advantages that individuals can take advantage of.

7 *https://www.gov.uk/running-a-limited-company/company-and-accounting-records?step-by-step-nav=37e-4c035-b25c-4289-b85c-c6d36d11a763*

8 *https://www.rapidformations.co.uk/blog/limited-company-advantages/*

9 *https://www.gov.uk/vat-registration?step-by-step-nav=01ff8dbd-886a-4dbb-872c-d2092b31b2cf*

There are many different aspects to consider before doing business in the UK, there are also other business structures such as LLP, franchise, corporative, community interest company, etc.

DIRECTOR'S LOAN ACCOUNT, INTEREST AND S.455 TAX

Mr. Oliur Rahman
Director

ABSTRACT

This article explains Director's Loan Account (DLA), s.455 penalty tax and consequences.

Key words: DLA, Participator, Interest, S.455 Tax, Credit Balance, Debit Balance, Overdrawn, Written-Off, Consequences and Mitigate.

INTRODUCTION

This article explains DLA, interest, s.455 penalty tax and what the consequences are for the company and the directors/participators in the UK. Also, how to mitigate the overdrawn DLA is explained.

DIRECTOR'S LOAN ACCOUNT (DLA)[1]

A director's loan is when a director (or other close family members) gets money from the company, other than a salary, dividend or a loan repayment.

Sometimes a director lends money to the company, as a way of start-up costs or as supportive when a company is in cash-flow needs. As a result, the director becomes one of the company's creditors. When the company is borrowing more money from its director(s) than it lending to him, then the director account is in credit.

There are also occasions where the director(s) borrow money from the company, as a way of cash draw for personal use and to pay unexpected bills or even for personal expenses. In case the director(s) borrow more than lending to the company, then the DLA will be overdrawn.

In other words, the DLA is where a track is kept of all the money the director either borrows from or lends to the company.

Another important thing to mention is that any borrowings of the director(s) from the company needs to be paid back. It is not allowed that director(s) use company's money as an emergency personal funds, as there is a risk of potential penalty tax (s.455 tax) for this. Besides that, any creditor and/or shareholder will become concerned when the DLA is overdrawn for a longer period of time.

INTEREST ON DIRECTOR'S LOAN

Credit balance on DLA

Director(s) can charge interest to the company on the credit balance of the DLA. This interest is deductible expenses for the company, When the company is paying interest to the director(s) who is an individual, the company is required to deduct basic rate income tax (currently 20%) at source and pay over to HMRC. Note that, this is a taxable income for the director(s),and needs to be declared on his self-assessment tax return. Individual directors will receive credit for income tax deducted at source in their personal tax computation as usual, which is deducted from the tax liability at the end of the tax computation.

Overdrawn or debit balance on DLA

The company can charge interest on a director's loan if its overdrawn. The company will receive interest from the individual, net of basic rate tax at 20% at source. However, if the interest charged is same as the market rate or equal to the HMRC official rate then no benefit in kind will arise for the director. However, if no interest has been charged or interest rate is below the HMRC official rate, then benefit in kind will arise for the director. This means that the director will be taxed on the benefit and reported to director self-assessment tax return. The company needs to submit P11D to HMRC to report this loan benefit and Class 1A NIC on benefit which will also be payable by the company at 13.8% (from 2022 at 15.05%). There is no benefit in kind if loan amount does not exceed of £10,000.

In both cases, interest payment to or interest receipt from an individual, the company must account for income tax on a quarterly basis using a CT61 quarterly return based on amounts of tax suffered and deducted at source in the quarter. The CT61 return and any tax is due 14 days following the end of the return period, which are 31 March, 30 June, 30 September and 31 December.

S.455 TAX[2]

CTA 2010, S.455 is a tax charge on the company, to prevent a director who is a participator (or any other participator in a close company) of close companies from using those companies as an extension to their own private banking facilities without paying any tax. When directors/participators borrow from the company, then they should consider a few things very carefully; company's affordability to lend money, company's cashflows situation and tax consequences for the company and director.

When the DLA is overdrawn and not paid within nine month and one day of the company's year-end then the company needs to pay penalty tax at 32.5% on outstanding balance at that time in accordance with S.455 tax. This rate will even increase to 33.75% in 2022. The S.455 tax should be paid along with the company's corporation tax, which is nine-months and one day after the company's financial year end.

S.455 tax will be re-paid by HMRC when the director repays the loan or the company has written-off the loan. In such cases, the paid tax can be claimed back by the company, which will be paid out after nine months and one day after the company's accounting period when the repayment or write-off of the loan took place. This is a lengthy and long process; therefore, the director's loan accounts (DLA) should always be in credit or at least at zero.

There is an anti-avoidance rule exist when a director is paying-off the loan just before the nine-month one day to avoid the s.455 penalty tax and take another loan within 30 days of repaying the loan. This is known as 'bed and breakfasting'. The repayment of S.455 tax will be restricted when loans totalling £5,000 or more are repaid and borrowed again within 30 days of the repayment. In effect, any repayments within 30-days period are treated as a repayment of the subsequent loan, not the original loan.

Furthermore, if the amount of the outstanding loan before repayment is at least £15,000 and there is an arrangement or an intention at the time of the repayment to draw further loan from the company, regardless of when those further loan are drawn. The repayment of S.455 tax will also be restricted, even when the further amounts are borrowed later than 30 days after the repayment.

The 30-day rule does not apply to a repayment of loan which is made out of income i.e. paid out a bonus or a dividend by the close company which will be subject to income tax.

Write off the loan[3]

If a company writes-off or releases a loan to a participator or director, the company will receive a repayment of the S.455 tax. The director/participator will be treated as receiving a dividend equal to the amount of the loan written-off or release. An individual will pay any tax via self-assessment, depending on their taxable income and marginal rate. Current dividend tax rate is 7.5%, 32.5% and 38.1% (from 2022 the rate will increase to 8.75%, 33.75% and 39.35%). Writing-off the loan is not an allowable deduction for corporation tax purposes. Where the participator or associate is an employee or director, the loan release or write-off is treated as earnings from employment for National Insurance Contribution (NIC) purposes and becomes subject to Class1 NIC, this means that the employee pays 12% or 2% (in 2022 this becomes 13.25% or 3.25%) of the amount released or written-off, depending on the level of income. The company pays Class 1 NIC at 13.8% (in 2022 this becomes

1 *https://www.gov.uk/directors-loans*

2 *Tolley® Exam Training-CTA advance Technical OMB*

3 *https://www.accaglobal.com/uk/en/technical-activities/uk-tech/in-practice/2021/may/10-things-directors-loan-account.html*

15.05%). The NIC paid by the company is a deductible expense for the company.

Loans that are excluded from S.455 charge[3]

Loans made in the ordinary course of business of the company are excluded from the s.455 tax charge.

There is also an exclusion for debts incurred in the supply of goods or services in the ordinary course of the trade unless the credit period exceeds 6 months or is longer than normal given to customers.

There is an exclusion for loans of no more than £15,000 made to a full-time director or employee, who does not have a material interest in the company.

A material interest is more than 5% of the ordinary share capital, or entitlement to more than 5% of the company's assets on a winding-up. When calculating this 5%, we must also take account of holdings owned by his associates.

CONSEQUENCES FOR THE COMPANY

The main consequences for the company which is below;

- If the loan is over £10,000 than the company is required to submit a P11D by 6 July, if later HMRC will charge late filling penalty. Interest needs to be calculated on the average or stick method;
- The company needs to pay NIC1A at 13.8% (in 2022 at 15.05%) on this loan benefit, which is reported to P11D and also, when the loan is written off.
- The company needs to pay S.455 tax at 32.5% (in 2022 at 33.75%) with corporation tax, which is 9-months and 1 day after company's financial year end;
- Director loan's requires reporting to corporation tax return's supplementary page CT600A, even if it is paid before 9-month 1 day but relief for S.455 tax can be claimed on this form;
- The company is required to account for income tax and submit CT61 on a quarterly basis when interest is paid to and/or received from an individual director.

CONSEQUENCES FOR THE DIRECTOR / PARTICIPATOR[4]

The main consequences for the director or participator which is below;

- If the DLA is in excess of £10,000 then it is treated as an employment-related loan, so the director/participator needs to be included in the benefit equal to P11D, in their personal self-assessment tax return;
- If the loan is released or written-off, then it is treated as dividend received by the participator, so dividend tax needs to be paid via self-assessments;
- Also, the loan release or writing-off is treated as earnings from employment for NIC purposes and is subject to Class1 NIC. So, the director/employee will pay 12% or 2% (in 2022 this becomes13.25% or 3.25%) of the amount released or written off depending on the level of their employment income.

CONCLUSION

This is a short summary to consider how to mitigate the overdrawn DLA:

- by paying bonus – the bonus becomes deductible for the company which need to pay employer NIC. The director pays income tax and NIC;
- by declaring dividend – the dividend is paid to all the shareholders and required dividend tax is paid on the self-assessments;
- by repaying the director's loan within nine months and one day after the company's financial year end. However, care is needed in relation to 'bed and breakfasting' anti-avoidance rule;
- by writing-off the loan – the write-off is treated as dividend received by the participator and subject to income tax, but it's not deductible for the company. However, the write-off is treated as earnings from employment for NIC purposes. It will be subject to Class1NIC (employer and employee);
- Taking out director's loans only when there are no other options available and necessary;
- Trying to borrow less than £10,000, so no benefit in kind will arise;
- Ascertaining that the DLA is not overdrawn for a long period of time;
- Being careful with illegal dividend, by ascertaining that the company made profit or has enough retained profits before declaring dividends;
- **Do nothing!!** The DLA simply be left outstanding and pay S.455 tax at 32.5% (in 2022 at 33.75%) and Class 1A NIC at 13.8% (in 2022 at 15.05%). (**It should not be an option**).

4 *https://www.rossmartin.co.uk/companies/checklists/489-directors-loan-account-toolkit#at-a-glance*

NAZALI GLOBAL MAGAZINE

NETHERLANDS

NAZALI – AMSTERDAM OFFICE

As part of NAZALI, our Amsterdam office has become active in the Netherlands since October 2020.

With its professional team, NAZALI Netherlands offers a comprehensive blend of services in the field of: Tax, Legal, Accounting, Compliance, Corporate Governance, Customs and Immigration.

Our Dutch team exists of professionals having the right knowledge and experience in their field of scope, knowing theDutch legislation as well its applicability in the daily business activities.

As from this 3rd edition of the Nazali Global Magazine we will introduce one of our professionals to you.

In this edition, we proudly would like to introduce Ms. Yuni Irawati Swart, being the **Accounting Officer** at NAZALI Tax & Legal International.

Yuni is a versatile and valued colleague, with experience of almost 20 years. Yuni is specialized in international accounting and served many international companies. Yuni is knowledgeable in applying several accounting principles (e.g. Dutch GAAP, IFRS, Fund Administration) in her daily practice.

Throughout Yuni's valuable career, she gained knowledge and experience in roles such as Fund Accountant, Trust Accountant and Financial Controller. This allowed Yuni to develop great skills in technical Financial Accounting, Financial Reporting, Controlling, Asset Management and Corporate Governance.

Yuni feels privileged working at NAZALI where she works with a great team of professionals and has sufficient freedom for personal development. Further, Yuni perceives being part of NAZALI as an opportunity to contribute her knowledge and experience in setting up and further developing the financial department of NAZALI Amsterdam office.

Next to the daily business activities, Yuni is also involved in several accounting projects or assignments, making each day different than the previous one. The tasks of Yuni exists, amongst others, of (i) taking care of the accounting responsibilities of clients, (ii) updating the general ledgers and trial balances of the client files, (iii) processing the payroll administration, (iv) assisting the client with audits processes, (v) fund administration, (v) preparatory work for quarterly VAT-filing and (vi) acting as a primary contact for clients and ensure account administration complies with the local law.

Yuni has set goals to develop herself professionally, which also includes further taking courses to sharpen her skills. Although the work-life balance is always a challenge, she feels that NAZALI gives her sufficient space to achieve her goals.

Outside work Yuni enjoys doing Indonesian traditional dance with a group of friends, where she can express herself in joyful and cultural artistic way of dancing with Indonesian traditional music.

In spare times, Yuni likes to go to Musicals, Opera's and Live Music or Concerts.

E: oliur.rahman@nazali.com

T: +31 (0)20 799 5630

CURRENT NEWS ABOUT NETHERLANDS

- As of January 1, 2022, the Dutch Chamber of Commerce will protect all data that is included in the Trade Register as the residential address of entrepreneurs and directors;
- As of October 1, 2021, Invest International is officially 'in business'. Invest International will support companies active in the Netherlands with the international financing of innovative solutions that contribute to the realization of the Sustainable Development Goals. The company is a Joint Venture of the Dutch State (51%) and Development Bank FMO (49%);
- The Netherlands is allocating an extra 95 million euros to help low- and middle-income countries in the fight against the corona virus. The new funds come on top of the existing Dutch contribution of 147 million euros to the international initiative;
- The Benelux countries - Belgium, the Netherlands and Luxembourg - and the Baltic states - Estonia, Latvia and Lithuania - officially launched their Convention on the Automatic Mutual Recognition of Higher Education Diplomas on September 27, 2021;
- Horeca entrepreneurs affected by the night closure can receive a subsidy for the fixed costs in the fourth quarter of 2021. The Dutch cabinet is allocating 180 million euros for the compensation;
- The Dutch government will submit a proposal to further tighten the generic restriction on interest deductions (earning stripping measure) by reducing the deduction percentage from 30% to 20% of the fiscal EBITDA. This will ensure a more equal tax treatment of equity and debt;
- The EU has updated its blacklist of tax havens. The list momentarily includes 12 countries that the EU says are "uncooperative" in tax matters. But the list is not getting longer, but shorter. Of the 12 countries on the blacklist, three will be removed: the Seychelles, Dominica and Anguilla. The British Virgin Islands, has already been taken off the list some time ago.
- Outgoing Minister of Finance Wopke Hoekstra had shares in a letterbox company in the British Virgin Islands. This was revealed by revelations in the Pandora Papers. The opposition wants the outgoing minister to give an explanation in the Lower House as soon as possible;
- Bankruptcies worldwide will rise by 15% in 2022. In the Netherlands this is even 34% increase. In absolute numbers, however, it is not so bad in the Netherlands (from 1,790 euros in 2021 to 2,400 euros in 2022). Due to the government's support packages, the number of bankruptcies in the corona crisis reached an all-time low;
- Zombie companies are the current trend where unhealthy companies are kept alive by 'free money', thanks to the extremely low interest rates and the buyback programs of the central banks. On top of that came the corona support from the government;
- The NBA (Koninklijke Nederlandse Beroepsorganisatie van Accountants) Continuity Working Group publishes guide on continuity assessment (Continuity Guide/Going Concern), intended to support accountants in assessing the continuity of companies.

DUTCH TAX PLAN 2022: DIRECT TAXES

Mr. Parham Rahimzadeh
Tax Associate

ABSTRACT

On 22 September 2022; the third Tuesday of September the Dutch Budget Day Plan for 2022 was introduced by the government. This Budget Day Plan also consists out of the Tax plan 2022. In this plan new legislations and amendments have been added with regard to Direct taxed like the Corporate Income Tax Act and the Dividend Withholding Tax act. These amendments and legislations concern new CIT rates, ATAD2 legislation, mismatches in transfer pricing, CFC measures and loss offset rules.

Key words: CFC, Reversed Hybrid Mismatch, Carry Forward, Dutch Tax Plan 2022, Arm's Length Principle

INTRODUCTION

During the Dutch Budget Day 2022, on the third Tuesday of September, the Dutch parliament presented its Tax Plan 2022. Because the Netherlands currently has a caretaker government, there have not been many new or major decisions and changes with regard to taxes. This year there are mainly small(er) changes, which will improve the tax system. In particular, improvements are being made to the existing taxes in the areas of housing, work, green initiatives and business start-ups. This makes the Tax Plan 2022 package a lot smaller in policy terms than previous years, which is appropriate for the caretaker status of this government.

The tax plan does contain some interesting amendments that can have an effect-on-effect companies. These are predominantly amendments made in the Dutch Corporate Income Tax Act ("CITA").

In this article I will briefly discuss the following subjects: (i) CITA tax rates, (ii) the new reversed hybrid mismatch measure, (iii) the mismatches in price adjustments, (iv) the restrictions of advance tax deductions for Corporate Income Tax purposes (Sofina), (v) the order of loss offset in the case of CFC measure and finally (vi) the new loss offset rules in the CITA, followed by a conclusion.

CORPORATE INCOME TAX RATES 2022

The below table shows current applicable CITA rates and the CITA rates becoming applicable in 2022.

	2021	2022
Disc 1	15%	15%
Disc 2	25%	25%
Disc limit	€ 245.000	€ 395.000
Profit fiscal year	€ 1.000.000	€ 1.000.000
Total taxation	€ 225.000	€ 150.000

Currently the tax rates in 2021 are a 15% tax rate on profit up to an amount of €245.000 . After that amount tax rate on profit is 25%. In 2022 the disc limit of disc 1 will increase; meaning that up to an amount of €395.000 profit will be charged with 15% and after that amount if will get charged with 25%. This is a beneficial development for companies that are subject under the CITA as it will effectively slightly lower their corporate income tax burden. For instance when a BV has a profit of €1 million at year end, then it is effectively taxed €225.000. Whereas if the same BV would make that profit in 2022 will effectively be taxed €150.000.

REVERSED HYBRID MISMATCH

Starting per January 1, 2022, the legislation regarding reversed hybrid mismatch situations shall be implemented in the CITA[1], DWTA[2] and the WHTA[3]. Hybrid mismatch regulation stems from the Anti-Tax Avoidance 2 (ATAD2) EU legislation. A Hybrid mismatch concerns situations in which different jurisdictions classify an entity differently, where one jurisdiction classifies a company as transparent while another considers the same company as non-transparent with different fiscal treatment as result. Hybrid mismatches allow companies to deduct a payment (e.g. interest) from their taxes in one country without it being taxed in another, or deduct one payment in multiple countries. The reverse-hybrid measure aims to tackle the hybrid mismatch at the source by making the hybrid entity subject to tax[4]. Effectively, a reverse hybrid entity will become subject to Dutch corporate income tax only to the extent that the profit is attributable to related participants that qualify the entity as non-transparent. The general rule is that a deduction in one country may not lead to an exemption in another country.

A common situation in which a reverse hybrid mismatch can occur is the infamous CV/BV structure and it's tax implications in the Dutch CITA. In these structures a Dutch CV is often held by US companies. The CV in turn holds the shares in a BV. For US legislation the CV is non-transparent and for Dutch legislation the CV is transparent and therefore not subjected to the CITA. To elaborate:

- When BV would distribute a benefit to CV, from a Dutch perspective the BV would distribute these benefits to the US shareholders of CV and attributes these benefits to the US shareholders.
- But from an US scop,e BV is distributing these benefits to CV. And therefore the US attributes these benefits to CV and not to the US shareholders.
- CV is not established in the U.S. and therefore is not subject to the tax there.
- If BV makes a payment to CV, the above leads to the fact that - by applying the current hybrid mismatch measures in the CITA- that the payment made by BV is excluded from deduction because it is a so-called deduction without inclusion in the tax base of the receiver (CV).

With the new reversed hybrid mismatch regulation the CV as the receiver will get applied the reversed hybrid mismatch tax measure in which the Netherlands classifies the CV to be non-transparent and therefore independently liable to tax. As a result, CV's profits are integrally taxed in the Netherlands. However, to the extent that the CV's profits accrue to participants that are resident in a State that the CV considers transparent, a deduction will be granted for this when determining the CV's profit.

MISMATCHES IN PRICE ADJUSTMENTS

In addition, separate from the Tax Plan 2022, another bill has been sent to the House of Representatives to address mismatches to be implemented from January 1, 2022. Within a group of companies (transactions between related entities), business dealings with each other must be just as professional as independent parties would do under comparable circumstances (also known as the business principle (In Dutch: "het zakelijkheidsbeginsel")[5]. This is required on the basis of the arm's length principle. But because countries apply that principle differently or not at all, differences ('mismatches') may arise in international situations, resulting either in part of the profits of a group not being taxed anywhere, being taxed lower or a situation of double non-taxation". In such a situation, the measures in the proposal limit the downward adjustment of the profit taxable in the Netherlands at the taxpayer's expense. This measure is intended to neutralize transfer pricing

1 *Dutch Corporate Income Tax Act*

2 *Dutch Dividend Withholding tax Act*

3 *Dutch Withholding Tax Act*

4 *Rijksoverheid. (2021, 22 september). Memorie van toelichting wetsvoorstel Wet implementatie belastingplichtmaatregel uit de tweede EU-richtlijn antibelastingontwijking.*

5 *Ministerie van Algemene Zaken. (2021, 22 september). Wetsvoorstel Wet tegengaan mismatches bij toepassing zakelijkheidsbeginsel. Kamerstuk | Rijksoverheid.nl. https://www.rijksoverheid.nl/documenten/kamerstukken/2021/09/21/wetsvoorstel-wet-tegengaan-mismatches-bij-toepassing-zakelijkheidsbeginsel*

differences and to avoid situations in which double non-taxation may occur.

For example if a BV does not pay an interest to a related entity - in this situation the related entity is A Co that is established in EU country 1 ("EU1") - in regard to a loan with 0% interest, but BV does have the right to deduct an at Arm's length interest rate of 5%. And in EU1 there is not a corresponding adjustment of 5% interest income at the level of A Co for taxation purposes, then BV will be denied the right to deduct the 5% (unpaid) interest in its CIT to neutralize the tax benefit that arises in such a situation for BV.

RESTRICTIONS OF ADVANCE TAX DEDUCTIONS FOR CORPORATE INCOME TAX PURPOSES (SOFINA)

It has been proposed to limit the possibilities for taxpayers to offset dividend tax and tax on games of chance (advance levy) against corporate income tax as of January 1, 2022, after the Sofina case[6].

Under the main rule of the proposed measure, the set-off of withholding taxes will be limited to the amount of corporate income tax payable before the set-off of withholding taxes has been taken into account . This applies to all entities subject to CIT.

Under current Dutch legislation, both portfolio shareholders resident in the Netherlands and portfolio shareholders resident abroad pay dividend tax on profit distributions by Dutch-based entities. Portfolio shareholders resident in the Netherlands who are liable for CIT (taxpayers) can always offset the dividend withholding tax against CIT, so that on balance they only pay CIT on the portfolio dividend. If they are loss-making or otherwise do not owe CIT, the taxpayers get a full refund of the dividend tax levied. Foreign loss-making portfolio shareholders (foreign entities), on the other hand, do not have this option. This legislation neutralizes the fiscal benefit that portfolio shareholders resident in the Netherlands currently have compared to the foreign portfolio shareholders. In other words, the Dutch portfolio shareholders will lose these benefits.

In short, under the proposed measures, the crediting of withholding taxes will only be limited with respect to taxpayers who:

- Are not in a position where CIT is due because those taxpayers are loss-making or entitled to statutory deductions or double taxation relief; or
- Are in a position to pay CIT, but the amount they have to pay is lower than the amount of withholding taxes levied; and
- Pay gambling tax because a game of chance has been won as part of the company's activities; or
- Hold an equity interest of less than 5% in an entity established in the Netherlands that is liable to withhold dividend tax. Also if the dividend withholding tax exemption is not applied to an interest of 5% or more of the taxpayer in an entity established in the Netherlands which is liable to withhold dividend tax is liable to withhold dividend tax, there may be dividend tax levied of which the set-off is limited in time.

THE ORDER OF LOSS OFFSET IN THE CASE OF CFC MEASURE

CFC legislation (CFC stands for Controlled Foreign Company) is tax legislation aimed at preventing Dutch taxpayers from having their income deposited in letterbox companies abroad, particularly in tax havens. It is anti-abuse legislation, particularly in the area of corporate income tax. CFC legislation taxes this income on the shareholder, even if no dividend has been paid.

The current Dutch CFC legislation is laid down in art. 13a of the VPB 1969 Act. Pursuant to art. 13a VPB 1969, a taxpayer is, under certain circumstances, required to annually value its interest in a subsidiary at fair value (revaluation obligation). As a result, the result of the subsidiary will be subject to corporate income tax of the parent company before any profit distributions have taken place or any disposal benefit has been realized, and both the rate and deferral benefit associated with the use of a CFC will be lost. From January 1, 2022, a new measure is implemented[7]. This new measure establishes a mandatory foreign profit tax credit sequence for a CFC entity. Until now, you could choose what part of the tax was settled in one year and what part you wanted to defer to future years. The measure starting January 1, 2022, dictates in what order foreign profits taxes can be offset, if the parent company has more than one CFC. The measure entails a mandatory order to set off the foreign taxes by first setting off the lowest amount, followed by the increasing amounts. If the amounts to be set off are identical, both amounts should be considered for a proportionate amount.

NEW CITA LOSS OFFSET RULES IN THE CITA

Starting from January 1, 2022[8], new los offset rules apply in the CITA for companies. There will be a broadening that means that losses can be carried forward indefinitely. In addition, a restriction will be introduced whereby losses are only fully deductible up to an amount of € 1 million. To the extent that a loss exceeds the amount of € 1 million, only 50% of the loss is deductible. The backward loss relief is limited to the previous year. The limitation for losses above an amount of € 1 million also applies to the backward loss relief. The amendments apply to losses from financial years commencing on or after January 1, 2013, to the extent that these losses are set off against taxable profits from financial years commencing on or after January 1, 2022.

CONCLUSION

Even though at first glance it may not seem as though there are very big changes to the Dutch tax system this year. The changes with respect to Dutch direct taxes are significant and do carry substantial changes with it. The reversed hybrid now fully dismantles the benefits that were once present with structures like the CV/BV structure. The measure to combat mismatches in regard to price adjustments will force international groups to reconsider their 0% loans that they have with their Dutch entities. The new meausures due to the Sofina Case will impact Dutch residents that once has a fiscal benefit. And the new rules for the carry forward loss will require a significant tax asset management by a group's treasury department. We can imagine that these new meausures and amendments are a lot to take in. Therefore we are glad to be of assistance.

6 *Ministerie van Algemene Zaken. (2021, september 20). Memorie van toelichting Belastingplan 2022. Kamerstuk, Chapter 13, page 19 | Rijksoverheid.nl. https://www.rijksoverheid.nl/documenten/kamerstukken/2021/09/21/memorie-van-toelichting-belastingplan-2022*

7 *Staatssecretaris van Financiën. (2021, september 20). Wijziging van enkele belastingwetten en enige andere wetten (Overige fiscale maatregelen 2022) Memorie van toelichting. Kamerstuk, Chapter 8, page 20 | Rijksoverheid.nl.*

8 *Rozendal, A. (2021, 4 October). Verliesverrekening in de Vennootschapsbelasting. Navigator.nl. https://www.navigator.nl/thema/1090/verliesverrekening-in-de-vennootschapsbelasting#:%7E:text=Vanaf%201%20januari%202022%20worden,1%20miljoen%20volledig%20verrekenbaar%20zijn.*

LEGISLATIVE PROPOSAL MODERNIZING PUBLIC LIMITED LAW AND BALANCING THE GENDER RATIO IN LARGE COMPANIES

Mrs. Demet Karatay Yeşilöz
Legal Counsel and Director Holland Desk

ABSTRACT

The Preliminary Bill Modernizing NV Law and making the ratio between the number of men and women in large companies more balanced contains proposals to adjust NV law in line with simplification and flexibility of the Flex BV Act which entered into force on 1 October 2012. This Bill aims to remove the restrictive and/or ineffective rules and to reduce the administrative burdens. The new regulation also gives shareholders of the NV more room to shape the structure of their company as they wish and desire and fulfill the needs of the national and international practices. Another aim of this Bill is to make the ratio between the number of men and women at the top of large companies more balanced as proposed by the EU directive in 2012.

Key words: Flex-BV, NV Law, Share Capital, Foreign Currency, 10% Limit, Decision-Making, Meeting, Definition Shares, Annual Accounts, Growth Quota and Appropriate & Ambitious targets.

INTRODUCTION

In 2012, an EU directive proposal was published to improve the male-female ratio among non-executive directors of large listed companies. In the selection of non-executive directors, a preferential policy should be followed until the target of 40% for members of the under-represented gender or of 33,33% for executive and non-executive directors combined is achieved. This target had to be achieved by 1 January 2020 at the latest. (Directive proposal on improving the gender ratio among non-executive directors of listed companies and related measures, Brussels 14-11-2012 COM(2012) 614, 2012/0299 COD).

The preliminary bill modernizing NV law and making the ratio between the number of men and women in large companies more balanced aims to modernize NV law and adapt it to the needs of users. In addition, the aim is to make the ratio between the number of men and women at the top of large companies more balanced. This is to be achieved by making it mandatory for large public and private companies to formulate appropriate and ambitious target figures for the management board, the supervisory board and subtop. That is why large listed companies must make concrete plans to implement them and be transparent about the process. In addition, the male-female ratio in the supervisory board of listed companies must be at least one third of the number of men and one third of the number of women. Otherwise, the appointment will be considered as invalid. Finally, the bill contains proposals to adjust NV law in line with the simplification and flexibility of BV law in 2012.

The following principles underlie the preliminary bill modernizing NV law:

The legislator wants to achieve the following with this: (i) apply less mandatory and more regulatory law; (ii) give shareholders more freedom to shape the company as they see fit and desire with sufficient safeguards for the interests of other parties (particularly minority shareholders) (iii) remove rules that are unnecessarily restrictive or ineffective, (iv) reduce administrative burdens, (v) ensure balanced creditor protection, (vi) remove legal uncertainty, (vii) meet the needs of contemporary national and international practice; and finally (viii) link up with developments in neighboring countries and the European Union.

For the reasons mentioned above, the Bill contains the following simplifications regarding the NV Law:

NO OBLIGATION TO RECORD SHARE CAPITAL IN THE ARTICLES OF ASSOCIATION

The current article 2:67 paragraph 1 of the Dutch Civil Code obliges NVs to state the amount of the authorized capital in the articles of association. The authorized capital is an amount stated in the articles of association, above which no issue of shares can take place. In practice, the simplification and flexibility of BV law showed that the mandatory inclusion of a share capital leads to costs in the form of amendments to the articles of association, whereby it is not clear what necessary purpose the mandatory share capital serves. The same considerations apply to the NV. Aditionally, Article 3 under c of Directive (EU)2017/1132 of the European Parliament of the Council of 14 June 2017 on certain aspects of company law (codification), L 169/46 (hereinafter: the Directive) permits the NV not to have registered capital. Article 2:67 of the Dutch Civil Code will be amended into 'The articles of association may state the amount of the share capital. The articles of association state the nominal amount of the shares.' However, the obligation to record share capital in the articles of association will be deleted. In addition, the increase in the minimum capital by order in council and the transitional law will also be cancelled. A minimum capital of EUR 45,000 will still apply.[1]

THE AUTHORIZED, ISSUED AND PAID-UP CAPITAL AND THE NOMINAL AMOUNT OF THE SHARES MAY BE DENOMINATED IN A FOREIGN CURRENCY

Pursuant to Section 2:67(2) of the Dutch Civil Code, it is possible to denominate the authorized, issued and paid-up capital and the nominal amount of shares in a foreign currency. The option is limited to one foreign currency. It is not allowed to use two different currencies.

SHAREHOLDERS OF CERTAIN DESIGNATION CAN BE DESIGNATED AS A BODY OF THE COMPANY WITHOUT CREATING A NEW CLASS OF SHARES

By also including holders of shares of a specific designation under the term 'organic', it becomes possible to designate holders of specific shares, which are indicated, for example, with letters or numbers, as an authorized body without a new class of shares having to be created for this purpose. It is therefore also possible to give shares a certain right by means of a numbering system for one class of shares.

DEFINITION OF SHARES UPDATED

The definition is being amended due to the expiry of the mandatory share capital (see article 2:67 paragraph 1). It is proposed to determine that shares are the parts into which the authorized capital or, if the company has no authorized capital, the issued capital is divided. Because the issued capital can be increased without an amendment to the articles of association, the words "in the articles of association" are deleted[2]. This definition differs from the definition of shares in Article 190 for the BV which is based on the possibility of shares without voting rights.

THE PAYMENT OF THE FORMATION COSTS CAN BE INCLUDED IN THE DEED OF INCORPORATION

In line with the Flex BV it is proposed that the founders may commit the company to pay costs related to the incorporation. To this end, the first sentence of Article 2:93 paragraph 4 of the DCC is amended as 'The founders can only commit the company in the deed of incorporation by issuing shares, accepting payments thereon, appointing directors, appointing supervisory directors and paying costs related to the incorporation and performing legal acts as referred to in Article 94

1 *Internetconsultation draft Explanatory Memorandum Amendment of Book 2 of the Dutch Civil Code in connection with the modernization of the law on public limited companies and the balancing of the ratio between the number of men and women on the management board and supervisory board of large public limited liability companies and private limited companies, 15 April 2020, p.21.*

2 *İbid, p. 23.*

paragraph 1.' This means that the payment of the formation costs can be included in the deed of incorporation. Separate confirmation of the formation costs by the board is then no longer necessary[3].

THE VOTING RIGHT TO A PLEDGEE OR USUFRUCTUARY CAN BE GRANTED AT A LATER DATE

As with the simplification and flexibility of BV law, it has now been proposed to grant the voting right to the usufructuary at a later date by means of the written agreement. The usufructuary can only exercise a voting right granted after the creation of the usufruct after the company has recognized the legal act or the agreement has been served on it in accordance with the provisions of Article 2:88(3) of the Dutch Civil Code.

THE 10% LIMIT ON SHARE BUYBACKS WILL BE ABOLISHED

The 10% limit for share buybacks as laid down in article 2:89a paragraph 1 under b of the DCC will be abolished. With the entry into force of the Act of May 29, 2008 to implementation of Directive 2006/68/EC of the European Parliament and of the Council of the European Union of 6 September 2006 (OJEU 2006, L 264) amending Directive 77/91/EEC on the formation, maintenance and amendment of public limited liability companies of their capital[4] the 10% limit for the purchase of own shares has been abolished[5]. The company may only pledge its own shares or depositary receipts for such shares if the shares to be pledged are fully paid up and the general meeting has approved the pledge agreement[6].

DECISION-MAKING OUTSIDE A MEETING IS SIMPLIFIED

- It is no longer necessary for a provision on decision-making outside a meeting to be explicitly included in the articles of association. It is sufficient that all persons entitled to attend meetings agree to this manner of decision-making.
- Decision-making outside a meeting is possible if a collaboration of the company certificates of shares has been issued. The prohibition in NV Law here will be abolished.
- The unanimity of votes is no longer required for decision-making outside a meeting.
- It will be possible in the articles of association to designate a place outside the Netherlands for the general meeting.
- It will be easier to hold the general meeting at a place other than the place of residence of the NV or the place mentioned in the articles of association.
- The holding or resolution of the general meeting is mandatory at least once every financial year during each financial year at least one general meeting is held or a decision is taken at least once in accordance with article 101 paragraph 5 or article 128 paragraph 1[7].

THE ADOPTION OF THE ANNUAL ACCOUNTS IS SIMPLIFIED

If all shareholders are also directors or supervisory directors of the company, the signing of the annual accounts by all directors and supervisory directors also counts as adoption of the annual accounts, provided that all persons entitled to attend meetings have agreed with this simplified decision-making in accordance with the proposed 128 paragraph 1 (see explanation part N). The articles of association may exclude this manner of adoption. This avoids unnecessary formalities. In article 2:108 of the Dutch Civil Code it is proposed

3 *İbid, p.24-25 and Parliamentary Papers II, 2006–2007 session, 31 058, no. 3, p. 60.*

4 *Official Gazette 2008, 195.*

5 *Parliamentary Papers II, 2007/2008 session, 31 220, no. 3, p. 2.*

6 *Internetconsultation draft Explanatory Memorandum Amendment of Book 2 of the Dutch Civil Code in connection with the modernization of the law on public limited companies and the balancing of the ratio between the number of men and women on the management board and supervisory board of large public limited liability companies and private limited companies, p.24.*

7 *İbid, p. 27.*

for the NV that during each financial year at least one general meeting is held or at least once a resolution is passed in accordance with article 101 paragraph 5 or article 128 paragraph 1. This amendment clarifies that the regulation for decision-making outside a meeting also applies to the mandatory annual general meeting.

SHAREHOLDER DECISION-MAKING IS EASED

The proposed 2:128 paragraph 1 provides for this purpose that decision-making by shareholders can take place in a manner other than in a meeting, provided that all persons entitled to attend meetings have consented to this manner of decision-making. Consent to the manner of decision-making can take place electronically, unless the articles of association provide otherwise. In addition, a statutory regulation is no longer required to be able to take decisions outside the meeting. The unanimity requirement for decision-making will also be abolished. Finally, decision-making is also possible outside a meeting if there are other persons entitled to attend meetings. However, a valid decision-making process requires that all persons entitled to attend meetings have agreed to the manner of decision-making. This prevents minority shareholders and other persons entitled to attend meetings being confronted against their will with decision-making by the majority shareholder(s) without consultation having taken place in a general meeting.

According to the proposed paragraph 2 of this article, the decision-making must take place in writing outside a meeting, because otherwise it would be unclear what the voting result is and who is entitled to determine it. Consent can be obtained electronically.

SER-Advice

The Social Economic Council (the SER) issued its advice on 20 September 2019 and argued for specific measures aimed at promoting diversity and inclusion at the top of the business community. The main aim of the measures is to promote the advancement of women and to accelerate the growth of the share of women at the top of the corporate sector and recommended a measure for listed companies to introduce a 'growth quota' of 30% m/f for these companies for the Supervisory Board. If an appointment does not contribute to a representation of at least 30 percent m/f to impose a sanction. The second measure focuses on the broad group of approximately 5000 companies and to work towards a proportional m/f distribution by obliging these companies to draw up appropriate and ambitious target figures for their Executive Board, Supervisory Board and sub-top. Finally, these companies must report annually on the self-imposed target figure, the m/f composition of the Executive Board, Supervisory Board and the sub-top, and on the measures they take to achieve the target. On 7 February 2020, in its response to the SER advice, the Dutch cabinet announced that it would introduce a statutory regulation in the Civil Code to increase diversity of women and men at the top of the Dutch business community. The Preliminary Bill Modernizing NV Law and making the ratio between the number of men and women in large companies more balanced was introduced on 15 April 2020 for internetconcultation. After completion of the consultation period for the preliminary draft bill Modernizing NV Law and making the ratio between the number of men and women in large companies more balanced, the bill on making the composition of the management board and supervisory board in large companies more balanced was submitted to the House of Representatives on 4 November 2020[8]. As a result, the proposed regulation to modernize NV law will be included in a separate bill.

INTRODUCING GROWTH QUOTA

The growth quota is regulated in article 2:142b of the Dutch Civil Code. Article 2:142 b, paragraph 1 limits the scope of the pro-

8 *House of Representatives of the States General, Session Year 2020-2021, Parliamentary Paper 35 628, no.2, bill of 4 November 2020 to amend Book 2 of the Civil Code in connection with making the ratio between the number of men and women in the Netherlands more balanced. the management board and the supervisory board of large public and private limited companies. See also Explanatory Memorandum, House of Representatives of the States General, Session Year 2020-2021, Parliamentary Paper 35 628, no.2, 4 November 2020 to amend Book 2 of the Civil Code in connection with making the ratio between the number of men and women more balanced women on the management and supervisory boards of large public and private companies.*

vision to companies with a Dutch stock exchange listing and affiliated with a company whose shares or depositary receipts for shares are admitted to trading on a regulated market as referred to in article 1:1 of the Financial Supervision Act in the Netherlands. Paragraph 2 regulates the growth quota. This means that at least one third of the number of members must contain men and at least one third of the number of members must be women. An appointment of a person who does not contribute to a more balanced relationship between men and women on the supervisory board is contrary to the law and therefore null and void (Article 2:14 paragraph 1 of the Dutch Civil Code). Based on article 2:214b, paragraph 3, the growth quota applies mutatis mutandis to executive and non-executive directors in a one-tier board model. The growth quota does not apply to directors or supervisory directors who have been appointed by the Enterprise Section in an inquiry procedure (paragraph 4). However, from the point of view of legal certainty and in order to protect third parties who deal with the company, the nullity does not affect the legal validity of the decision-making of the supervisory board (paragraph 5)[9].

APPROPRIATE AND AMBITIOUS TARGETS FOR LARGE COMPANIES

The bill on making the composition of the management board and supervisory board in large companies more balanced contains an obligation for large companies (NV and BV) to set appropriate and ambitious targets in the form of a target to increase the ratio between the number of men and women on the board and to make the supervisory board more balanced, as well as the ratio in the sub-top to be determined by the company. Large companies are also required to draw up a plan to achieve these goals. Finally, large companies are obliged to report on the number of men and women who are members of the management board and the supervisory board at the end of the financial year, as well as the categories of employees in managerial positions to be determined by the company, the goals in the form of a target, the plan to achieve these goals and if one or more goals have not been achieved, the reasons for this[10].

The Bill on making the composition of the management board and supervisory board in large companies more balanced will be evaluated after 5 years and will expire after 8 years if no extension is decided.

CONCLUSION

The Dutch legislator aims to simplify the NV law. In order to achieve this, the legislator wants to meet the current wishes of the NV companies by among others, (i) no longer obligating to record share capital in the articles of association, (ii) to make possible to issue the nominal amount of the shares in a foreign currency, (iii) to exit the 10% limit of the shares buybacks, and (iv) easening the decision-making.

The Flex BV Act has made a positive contribution to simplifying regulations. It is expected that the simplification of NV law will also make a positive contribution to NV companies to give more substance and direction to their companies. Practice will have to show whether the expected reduction in burdens for NVs is accomplished and whether it has been sufficient. It is not yet known when the Legislative Proposal Modernizing Public Limited Law and Balancing the Gender Ratio in Large Companies will come into effect and whether any amendments will be made. We'll have to wait until more information about this comes and see what the developments regarding this bill will be in the future.

Although the preliminary draft included both the modernization of the NV law and a more balanced male and female ratio at the top, it was later decided to split the subjects and to submit a separate bill for a more balanced male and female ratio at the top. Because the business community had failed to achieve the objectives of more balanced gender relations in top positions, the legislator wanted to make an arrangement in Book 2 of the Civil Code without incurring delays. With this, the legislator aims to achieve the goals for a more balanced male and female ratio at the top by introducing the growth quota and forces large companies to draw up a plan for appropriate and ambitious targets to increase the ratio between the number of men and women on the board more balanced. The large companies must also account for themselves by reporting annually to the SER. The bill on making the composition of the management board and supervisory board in large companies more balanced was approved by the Senate on 28 November 2021 and is likely to enter into force on 1 January 2022[11].

9 *House of Representatives, session year 2020-2021, Parliamentary Paper 35 628, no. 3, explanatory memorandum regarding amendments to Book 2 of the Dutch Civil Code in connection with making the ratio between the number of men and women on the board and the board of directors more balanced. supervisory directors of large public and private companies, page 25. See also, Memorandum of Reply, 8 April 2021, Senate, session 2020-2021, 35 628, C, p.7.*

10 *Ibid, pages 26-27.*

11 *See also https://www.eerstekamer.nl/nieuws/20210928/eerste_kamer_steunt_evenwichtiger*

REPORTING STANDARD REQUIREMENTS UNDER DUTCH LAW

Ms. Yuni Irawati Swart
Accounting Officer

ABSTRACT

Under Dutch law legal entities in the Netherlands may prepare their financial report based on Dutch GAAP or IFRS. Further under Dutch law, exemptions are granted for entities or companies with certain size category. The option to choose using Dutch GAAP or IFRS depend on the company size, the type of company, the consolidation and/or group requirements. The exemptions can be granted in relation to presentation, publication and auditing of the management board report and annual accounts. IFRS has become globally favourable for multinational companies, for its simplicity, consistency, and comparability. IFRS sets the standard globally and allow a company or business to become part of the global economy in the most efficient way when it comes to financial reporting. From time to time there has been some changing from Dutch GAAP to IFRS standards, to keep up with global requirements, where there have been some merged between these accounting standards.

Key words: Dutch Civil Code Book 2 title 9, Dutch GAAP, IFRS, Financial Statements, Annual Accounts, Annual Report, Companies size criteria, Exemptions.

INTRODUCTION

At the end of financial year, legal entities compile their annual financial statements to share company financial information to its stakeholders. The information contains mainly the company's finance and business affairs for the period of reporting year (previous year). The basic objective of financial statements is to present financial position, performance in the past and changes in financial positions that are necessary for shareholders and investors.

This annual financial statement is a part of an Annual Report which has a broader scope and includes a report from the Management Board, details about plans and new businesses. The report is required for the public, for a public company (listed and non-listed) and for Tax Authority, for the purpose of the income tax calculation. The report is prepared in a structured way to be easily understood by the investors, the shareholders and by all whom need relevant information from it.

DUTCH GAAP AND IFRS

For reporting purposes, the Dutch legal entities are required to apply the sets of standards in accordance with Book 2 of the Dutch Civil Code, title 9 (DCC Book 2, title 9). DCC Book 2, title 9 contains and regulates the provisions relating to annual reporting and auditing. This title 9 applies to legal entities such as public limited liability companies (NVs), private limited liability companies (BVs) and limited or general partnerships (CVs). Further it provides possibilities for the Dutch legal entities to choose using Dutch GAAP or IFRS for them to prepare their financial statements.

Dutch GAAP (*General Accepted Accounting Principles*) is a common set of accounting principles, standards, framework, and procedures of the Dutch accounting issued and published by the Dutch Accounting Standards Board (DASB). These commonly accepted ways to record and to report accounting information are meant to improve the clarity, consistency, and comparability in issuing the financial information. This makes it easier for investors to analyse and extract useful information from the company's financial statements[1].

IFRS (*International Financial Reporting Standards*) is the standards issued by International Accounting Standards Board (IASB). IFRS used in the preparation of the financial statements, to make them consistent, transparent, and easily comparable around the world. IFRS is important for transparency and trust in the global financial markets and for the companies that list their shares on them[2].

IFRS originated in the European Union with the intention of making business affairs and accounts accessible across the continent. IFRS is currently used over 140 countries, including all the nations in the European Union (IFRS-EU) as well as Canada, India, Russia, South Korea, South Africa, and Chile[3] [4]. IFRS in Europe or EU-IFRS, is adopted by the European Union. When IFRS was just implemented, Dutch GAAP and IFRS were merged fast, as the DASB was rapidly implementing IFRS standards and interpretations into its own guidelines. That made the number of differences between IFRS and Dutch GAAP declined significantly in the beginning. Then at later stage it had changed again, where the DASB guidelines were no longer applicable to listed companies. The DASB guidelines were at that time only focused to unlisted companies. In the recent past years, there have been other updates and changes which created key differences in applying either IFRS or Dutch GAAP. [5] Therefore, it is always good to keep updated in the development of similarities and differences between these two reporting standards.

Under Dutch law as prescribed in DCC Book 2 title 9, Dutch entities may choose either according to Dutch GAAP or IFRS in preparing their financial statements. In the notes of the financial statements should be disclosed which accounting standards are used. The option to choose using Dutch GAAP or IFRS depend on the company size, the type of company, the consolidation and/or group requirements. However, there are cases when a company is obliged to prepare their financial statements in IFRS, for example when the company size is categorized as large, while for small and medium companies, IFRS considered as a voluntary option.

STANDALONE AND CONSOLIDATED FINANCIAL STATEMENTS

The consolidated financial statements can be prepared in accordance with IFRS[6]. A company may prepare the standalone financial statements using IFRS standards, if there are no consolidated financial statements are prepared. In another situation, if there are consolidated financial statements in accordance with IFRS are prepared and available, the company can also choose to prepare its standalone financial statements using IFRS as well. According to IFRS, the company can apply the similar accounting principles in the standalone financial statements as applied in the consolidated financial statements, except for the valuation of participations over which the entity has control. These participations are valued at net asset value. The company will then state the net asset value in accordance with the IFRS accounting principles that have been applied in the consolidated financial statements. Thus, the shareholders' equity in the standalone financial statements can still be reconciled to the equity in the consolidated financial statements.

A company can choose to present goodwill relating to these participations separately (under the intangible fixed assets) or as part of the interest in the participation (under the financial fixed assets) on the balance sheet in the standalone financial statements[7].

EXEMPTION FOR DUTCH GAAP

1 *https://www.investopedia.com/terms/g/gaap.asp*
2 *https://www.investopedia.com/terms/i/ifrs.asp#understanding-ifrs*
3 *https://www.investopedia.com/terms/i/ifrs.asp#understanding-ifrs*
4 *KPMG, IFRS compared to Dutch GAAP: An overview, February 2019.*
5 *KPMG, IFRS compared to Dutch GAAP: An overview, February 2019.*
6 *DCC Book 2, title 9, article 362.*
7 *Mazars, Dutch GAAP versus IFRS, January 2021.*

Further, for companies choosing Dutch GAAP, DCC book 2, title 9 provides exemption for companies with certain size category. The exemptions relate to presentation, publication and auditing of the management board report and annual accounts. In the Netherlands, the size of a company can be measured with three following criteria:

1. Revenue
2. Asset size
3. Number of employees

It starts with a micro size category, this category applies to a company with revenue below EUR 350K, has assets below EUR 700K and number of employees below 10. A company can be categorized as a small company if the revenue reaches up to EUR 6MIO, has assets below EUR 12MIO and total number of employees not more than 50. A large company has more than EUR 20MIO revenue, assets more than EUR 40MIO and employs more than 250 staffs. Between those mentioned numbers for small and large categories, a company called a medium type[8] [9].

The criteria as mentioned above can be summarized in a table as follows:

Criterion	Micro	Small	Medium	Large
Assets	< € 350.000	€ 350.000 - € 6 mio	€ 6 mio - € 20 mio	> € 20 mio
Turnover	< € 700.000	€ 700.000 - € 12 mio	€ 12 mio - € 40 mio	> € 40 mio
Employees	< 10	10 - 50	50 - 250	> 250

Micro, small and medium-sized companies may take advantage of certain exemptions if they do not prepare financial statements in accordance with IFRS. The following table are the summary of a set of provisions required for micro, small, medium sized and large companies. References to the below table remarks are as follows:[10]

- Exempted means that full exemption from the provisions available;
- Partly exempted means that partial exemption from the provisions is available;
- Fully comply means full compliance with the provisions is required.

	Micro	Small	Medium	Large
Preparation				
Balance Sheet	Partly exempted	Partly exempted	Fully comply	Fully comply
Statement of Income	Partly exempted	Partly exempted	Partly exempted	Fully comply
Notes	Exempted	Partly exempted	Partly exempted	Fully comply
Management Board report	Exempted	Exempted	Fully comply	Fully comply
Other information	Exempted	Exempted	Fully comply	Fully comply
Publication				
Balance Sheet	Partly exempted	Partly exempted	Partly exempted	Fully comply
Statement of Income	Exempted	Exempted	Partly exempted	Fully comply
Notes	Exempted	Partly exempted	Partly exempted	Fully comply
Management Board report	Exempted	Exempted	Fully comply	Fully comply
Other information	Exempted	Exempted	Partly exempted	Fully comply
Audit requirement				
Compulsory audit	Exempted	Exempted	Fully comply	Fully comply

CONCLUSION

There is a significant increase in applying IFRS for a company which is part of a group of multinational company, thus not only relevant to Dutch public companies. A change requiring the use of IFRS from Dutch GAAP is more and more under consideration.

The main reasons that a company may change from Dutch GAAP to IFRS including:

Simplicity, IFRS uses one international language that all can understand, in this way it provides businesses to stay competitive and relevant to enter or stay in the global market;

Consistency, which is as important as comparability. With IFRS, a one set of global standards is needed and followed by all, therefore it creates consistency and comparability;

Global business trend, business is becoming more and more global rather than strictly domestic as business keeps growing and expanding. This global set of standards will allow a company or business to become part of the global economy in the most efficient way when it comes to financial reporting.

Having said the above, some consideration needs to be taken because some exemptions apply for certain type companies when they use Dutch GAAP on their account preparation. Therefore, companies need to check the advantage and disadvantage in choosing the accounting standard, unless it is obligatory.

As mentioned earlier, throughout the years Dutch GAAP and IFRS have been through some update and changes. At first, they had the tendency to move in the same direction, and then at later stage the DASB guidelines was only applicable for unlisted companies.

The trend of the last couple of years, however, is that there was a re-merger between Dutch GAAP and IFRS. There are some guidelines for companies under Dutch GAAP, where they can have option to choose the guidelines model under IFRS. One of the examples is IFRS 16 with regard to the Leases. This means that companies subject to Dutch GAAP are allowed to apply for IFRS 16, effectively from an annual reporting period as from 1 January 2019. These companies are then allowed to book an Expected Credit Loss (ECL) on their Leases, and book it as a loss in the profit and loss.

8 *DCC Book 2, Title 9, article 396 and 397.*

9 *https://www.kvk.nl/english/filing/what-do-the-financial-statements-comprise/*

10 *Mazars, Dutch GAAP versus IFRS, January 2021.*

NAZALI – MOSCOW OFFICE

In Moscow, NAZALI has signed up a promising team of players from prominent Russia-based law firms. Our associates have a wide-range expertise and knowledge of the local market, which is combined with all the advantages of the Head of Russia Partner thorough knowledge of the Turkish business major industries.

NAZALI Moscow team has credible experience and ample expertise to meet the legal needs of companies doing business in Russia. NAZALI Moscow office is also providing comprehensive legal support for international clients anticipating investments in Russia or expanding their presence, both inbound and outbound.

In this edition, we proudly would like to introduce Ms. Ekaterina Ekimova, the Senior Associate at NAZALI Moscow Office.

Ekaterina Ekimova graduated from the Law School of M.V. Lomonosov Moscow State University, one of the leading and oldest Law Schools of Russia, which was established on January 25, 1755.

Ekaterina Ekimova is an expert in legal due diligence and litigation. She worked as merger & acquisition and litigation lawyer for 10 years in leading Russian law firm. She has considerable knowledge in corporate law and litigation.

Ekaterina performed numerous due diligence and merger and acquisition projects including due diligence of airports located in Moscow, due diligence of the properties constructed within the scope of 2014 Sochi Olympic Games. She also performed due diligence of oil mining company, which later was acquired by state oil company. Ekaterina performed acquisition of the branch of the foreign bank by Russian company, acquisition of local air company by state aviation corporation.

Ekaterina represented leading Russian manufacturer, hotel chains, minority shareholder of a prominent corporation, leading Russian retail group in Russian courts.

Now in NAZALI Ekaterina advises Turkish construction companies within the scope of the Russian contract law, compliance matters and dispute resolution.

Ekaterina fluently speaks French.

Ekaterina's personal interests include Nordic Walking, long-term study of felinology and the care of cats, the study of the peculiarities of their behaviour and interaction. Ekaterina also devotes her free time to reading classical literature.

E: ekaterina.ekimova@nazali.com

T: +7 (495) 198 18 80

CURRENT NEWS ABOUT RUSSIA

» Carbon tax might be introduced in Russia

The Russian government considers the possibility to introduce a new carbon tax. The key goal of this initiative is to avoid Russian exporters paying carbon tax to the EU countries. The government is planning to develop national carbon legislation, agree on the offset of carbon tax paid in Russia within the framework of the EU Carbon Border Adjustment Mechanism and make it comfortable for the Russian business. Working groups with the participation of business representatives will be created in the near future. The development of the mechanism is expected to take 1–1.5 years;

» News in personal taxation

According to the main directions of tax policy for 2022, foreign tax residents (individuals spending less than 183 days per year in Russia) who work remotely for a Russia-based company may be required to pay Personal Income Tax in Russia. According to the current legislation, no PIT is due in such situations.

Another initiative should result into increased control over gains at bookmakers. As of now, the bookmakers shall act as the tax agents and withhold PIT only if the amount of gain exceeds 15 thousand roubles. For the gains below the said amount individuals shall pay PIT on their own. The Ministry of Finance suggests imposing the responsibility to withhold PIT on the bookmakers for any gains irrespectively of the amount.

At the same time, there should be amendments that would enable the employers to compensate their employees working on a remote basis for expenses related to equipment and materials necessary in order to organize remote workplace. Such compensations should not be assessed to PIT, provided they do not exceed a threshold to be established.

» Corrected VAT reverse charge mechanism

Starting from October 01, 2021, Russian companies and individual entrepreneurs are required to act as VAT tax agents in a larger number of cases when purchasing goods, works and services from foreign companies. Before Russia-based companies and individual entrepreneurs were liable to act as VAT tax agents only if (i) they acquired goods, works and services from foreign companies that had no tax registration in Russia at all; or (ii) they acted as intermediaries when selling goods (works, services, property rights) of foreign companies without tax registration in Russia.

According to new rules, VAT shall be withheld and remitted to the Russian budget by applying a reverse charge mechanism by Russian companies and individual entrepreneurs, even if the foreign company selling goods, works and services is tax registered in Russia for the following reasons: (i) bank account opened with a Russian bank; (ii) real estate or vehicles located in Russia; (iii) subdivision created in Russia, provided this subdivision does not participate in the sale.

» New measures for IT-industries

Russian government approved a road map of additional support measures aimed at the development of IT-industries. The action plan pursues several goals including increasing demand for domestic IT solutions, ensuring accelerated digital transformation of economic and social sectors, creating comfortable conditions for doing IT business in Russia.

The road map includes 62 systemic and specific measures. They should result into creating equal conditions of doing business in Russia for international and Russian IT companies, stimulating the implementation of Russian solutions in the activities of domestic companies as well as supporting exports and promoting Russian IT solutions in foreign markets.

» Increased key rate

The Bank of Russia increased the key rate from 6.5% to 6.75% as of September 13, 2021.

» CIT rate might be increased

The Ministry of Finance of Russia discusses the possibility to increase corporate income tax rate by 5-10 % (up to 25-30%) for the companies that paid out more dividends than invested in the previous five years. For the moment, the industries that might be concerned by this innovation have not been determined yet.

» New special economic zone in Kuril Islands

Following a working visit to Sakhalin region, the Russian Prime Minister asked the competent ministries to prepare and submit to the Government of Russia until September 01, 2021, their consolidated proposals regarding the creation of a special economic zone with a preferential regime on the territory of the Kuril Islands, providing the most competitive conditions for doing business, including:

(i) exemption from corporate income tax, VAT, corporate property tax, land tax, transport tax for a certain period;

(ii) customs procedure of a free customs zone;

(iii) reduced rates of social security charges of 7.6% for a certain period.

The new regime will not apply to intermediary activities, manufacturing of excisable goods, extraction and (or) processing of hydrocarbons and catch of valuable aquatic biological resources.

» No withholding tax on interest paid by Russian PE of a foreign company

The Ministry of Finance issued Guidance Letter No.03-08-13/62064 dated 03.08.2021 providing for clarifications with respect to withholding tax on interest paid by Russian PE of a foreign company under a loan agreement with a foreign lender.

At present, no withholding tax is due on interest paid by Russian PE of a foreign company since as per art. 309-1-3 of the Russian Tax Code only interest paid to foreign companies under debt obligations of Russian legal entities shall be regarded as income from Russian source assessed to withholding tax.

However, with the entry into force of the amendments to the said article of the Tax Code as from January 01, 2022, interest income paid by Russian PE of a foreign company will be treated as Russian-source income provided the related debt obligation is connected with the activities of this PE in Russia and subject to withholding tax at 20% domestic rate, unless reduced under an applicable double tax treaty.

NAZALI GLOBAL MAGAZINE

INTRAGROUP LOANS IN RUSSIA

Mrs. Svetlana Shashkova
Senior Tax Associate

ABSTRACT

Loans constitute a commonly used instrument of intragroup financing. They offer flexibility in terms of duration and remuneration that the parties are free to agree upon. As opposed to contributions into equity, the loan agreements do not require compliance with strict corporate regulation. Hence, implementation of the loan agreements is far less formalized and time-consuming.

However, when opting for intragroup loans, the parties should not disregard Russian specifics and restrictions in the fields of currency control and taxation. These elements are of importance when deciding on the structure of intragroup debt financing and its eventual implications.

Key words: Loan Agreement, Interest Taxation, Interest Deductibility, Currency Control Regulation, Repatriation Requirement, Debt to Equity Swap, Offset.

INTRODUCTION

This article is focused on intragroup debt financing involving legal entities only. Loans to/from individuals will remain beyond the scope of our analysis.

Russian civil law does not provide for any restrictions as to the right of Russia-based legal entities to enter into loan agreements with other legal entities irrespective of their status as Russian or foreign entities as well as related and non-related parties.

Loan agreements between legal entities shall be executed in a written form. The parties are free to agree on the loan amount, interest calculation method, duration and terms and conditions of loan principal repayment.

Main restrictions relating to intragroup loans arise out of currency control and tax regulations.

Considering that currency control and tax requirements differ depending on the status of Russian legal entities acting as the borrowers or the lenders under the loan agreements, the below analysis will be distinguished for inward and outward loans.

INWARD LOANS

Currency control requirements

Currency control rules ensure control over ruble and foreign currency transactions between Russian residents and non-residents and prevent the outflow of capital from the Russian territory.

Loans between Russia-based companies, considered as Russian residents for currency control purposes, can be made in rubles only[1]. At the same time, since such loans are not recognized as "currency operations", they are beyond the scope of currency control regulation.

Loans extended by foreign companies of the group, qualifying as currency non-residents, to Russian companies can be nominated and paid both in rubles and in a foreign currency.

Loan agreements between residents and non-residents are subject to the prior registration with a Russian bank, if the loan amount equals or exceeds 3 million rubles or its equivalent in a foreign currency[2]. Registration is the responsibility of the resident party.

In order to register a loan agreement, the resident party shall provide the following documents to the Russian bank: (i) a loan agreement or an extract thereof that contains information sufficient for the registration (including details of the parties, loan amount, date and number of the loan agreement, etc.); (ii) other information that may be requested by the bank[3].

Upon completion of the registration formalities, a unique registration code is provided to the resident party in respect of the registered loan agreement. Registration procedure shall be completed and the unique registration code notified to the resident party within 2 (two) business days from the date of receipt by the bank of necessary documents and information[4].

In relation to a registered loan agreement, a resident party shall provide the bank with the supporting documents that evidence, inter alia, its performance, termination, change of the parties or change of its value, including the change of an interest rate, together with a supporting documents' certificate drawn according to a pre-established form[5]. Supporting documents may include documents used by the resident in accordance with legal, accounting and customary rules (i.e. addenda, offset and/or assignment agreements, etc.).

Under Russian Federal Law No. 173-FZ dated 10 December 2003 "On Currency Regulation and Currency Control" (the "Currency Control Law"), the "use of rubles and/or foreign currency as a means of payment" between a resident and a non-resident is qualified as a "currency operation" and, as such, is subject to currency control, which is exercised by a Russian account bank of the resident party[6].

Therefore, for any further debiting or crediting operations under the registered loan agreement the resident party will be liable to notify the unique registration code to the bank. For debiting operations, payment instructions and documents related to the transaction shall also be provided[7].

If a loan agreement's value is lower than 3 million rubles, the above registration requirements do not apply. In such cases a resident party shall provide the bank with the documents that serve as the basis for the transaction (i.e. loan agreement) and enable the bank to identify the code of the executed transaction[8].

If the value of a loan agreement does not exceed 200 thousand rubles or its equivalent in a foreign currency, the resident is only required to inform the bank of the code and type of the executed transaction[9].

Tax implications

<u>VAT</u>

Any loans, both inward and outward, extended in monetary form as well as interest accrued thereon shall not be subject to Russian VAT[10].

<u>Taxation of the interest income</u>

Provision and repayment of loan principal are neutral for the corporate income tax purposes.

Interest income paid by Russian borrowers to Russian lenders is exempt from any withholdings at the borrower's level and assessed to Russian corporate income tax at 20% rate with the lenders[11].

Interest income paid by Russian borrowers to foreign lenders is qualified as Russian source income for the latter and subject to withholding tax levied at 20% domestic rate, unless

1 *Art. 9 of the Currency Control Law*

2 *Art. 4.1.5, 4.2 and Chapter 5 of Instruction of the Central Bank of Russia No. 181-I dated 16.08.2017 ("Instruction No. 181-I")*

3 *Art. 5.6 of Instruction No. 181-I*

4 *Art. 5.5 of Instruction No. 181-I*

5 *Chapter 8 of Instruction No. 181-I*

6 *Art. 1-1-9(b) of the Currency Control Law*

7 *Art. 2.10, 2.22 of Instruction No. 181-I*

8 *Art. 1.2, 2.1 of Instruction 181-I*

9 *Art. 2.7 of Instruction 181-I*

10 *Art. 149-3-15 of the Tax Code*

11 *Art. 284-1 of the Tax Code*

otherwise stipulated by an applicable double tax treaty (the "DTT")[12]. Double tax treaties generally provide for (i) withholding tax exemption or (ii) lower rates of withholding tax to be retained in Russia, being the country of the interest origin. Eventual application of Russian "thin capitalization" rules may alter withholding taxation of interest (see below).

In order to benefit from the DTT provisions, a foreign lender shall provide a Russian borrower with a tax residency certificate issued by an authorized state authority, to be legalized by an apostil and translated into Russian.

The interest recipient shall also procure the Russian borrower with an evidence that it is considered as a beneficial owner of the received interest income.

It is worth mentioning that the Russian tax authorities have not still elaborated any consistent and clear position with respect to the treatment of the beneficial owner status of the foreign income recipient. All official clarification letters remain very general and refer mainly to the formal criteria of beneficial owner status without paying regard to any specifics of particular types of activities. For instance, beneficial ownership of foreign companies of multinational groups vested with holding and financing activities may be not so easy to prove, since Russian tax authorities tend to scrutinize such activities for the marks of "conduit" or "paper" companies and to reject the applicability of DTT benefits, if such marks can be identified.

The list of documents which may justify the beneficial owner status of a foreign recipient of income is not explicitly stated by Russian law. Based on current practice, such documents should confirm (i) corporate independence of the foreign entity and (ii) its financial self – sufficiency. They should also evidence that the foreign company has the respective assets and personnel and conducts real economic activities.

As of January 01, 2021, Russia started application of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (known, in international practice, as the "Multilateral Instrument" or "MLI") with a large number of jurisdictions. In this respect, the principal purpose test (PPT) will be implemented when deciding whether DTT benefits should be granted (with a small number of countries Russia will also apply simplified limitation of benefits provision). Under the PPT, the benefits arising out of a DTT shall not be granted, if the application of such benefits was one of the main objectives of any structure or transaction. Considering existing position of the Russian tax authorities and available court practice grounded on similar understanding when assessing the right of a foreign recipient of income to apply DTT, the changes due to PPT implementation are unlikely to be revolutionary, but they may still be sensitive.

In 2020 Russia revised DTTs with Cyprus, Malta, Luxembourg. As a result of the amendments, instead of exoneration, 15% withholding tax is now due on outbound payments of interest from Russia to the abovementioned countries. Renegotiations of the DTT with the Netherlands did not reach a positive outcome and Russia unilaterally denunciated the said treaty, which will cease its application from January 01, 2022. Therefore, Russia-sourced interest income paid out to the Dutch resident companies will be assessed to withholding tax at the domestic rate of 20%. It is likely that similar revisions await the DTTs with Switzerland, Singapore and Hongkong.

Deductibility of interest expenses by the Russian borrower

According to the Russian Tax Code, interest paid under a loan agreement is recognized for the borrower as a deductible expense for the corporate income tax purposes.

However, deductibility of interest paid under intragroup loans may be limited by application of the thin capitalization rules and/or transfer pricing regulation.

Russian thin capitalization rules apply to controlled debts if these debts exceed the net equity of a Russian borrower more than three times. A "controlled debt" is defined by Russian tax law as:

(i) either a debt towards a foreign company which has a direct or indirect participation of more than 25% in the Russian borrower;

(ii) or a debt towards a company (whether a Russian-based or foreign-based) that is deemed to be a related party of the foreign company specified in paragraph (i) above;

(iii) or any debt guaranteed by a foreign company specified in paragraph (i) above and/or by a company specified in paragraph (ii) above[13].

The thin capitalization rules will apply only if the following criteria are simultaneously met: (i) the existence of the controlled debt and (ii) the non-compliance of these debts with 3:1 debt-to-equity ratio.

If a Russian borrower falls under the application of the thin capitalization limits, a special formula is to be used to determine the maximum deductible amount of interest out of the total interest amount incurred by the Russian borrower (the total amount of accrued interests / the capitalization ratio; where the capitalization ratio is the amount of the unsettled controlled debt / the amount of the total equity of the Russian borrower X % of participation of the lender in the Russian borrower, and the result to be divided by three). The excess amount of interests will be treated as distributed dividends and will not be deductible for the corporate income tax purposes. In case of requalification in dividends, withholding tax shall be calculated based on DTT rates, if applicable.

It should be also noted that the calculation of the Russian thin capitalization's thresholds shall be made with regard to the actual controlled debt of the borrower (the "effective borrowing position") for the specific period. In order to calculate the maximum interest amount: (a) all controlled debts shall be aggregated and (b) the calculation shall be made at the end of each reporting period (quarter) discretely with no further adjustments at the end of the year.

Transfer pricing

The Russian tax legislation provides for specific transfer pricing regulation applicable to the transactions recognized as controlled ones in Russia. The arm's-length level of the remuneration paid under such controlled transactions shall be guaranteed and justified by the transfer pricing documentation prepared by the taxpayer and a transfer pricing notification must be filed to the Russian tax authorities on an annual basis.

The cross-border transactions between related parties are deemed as controlled transactions, provided that the annual turnover between the same related parties exceeds the set threshold of 60 million rubles. Domestic transactions between Russian related parties may qualify as controlled transactions and be subject to transfer pricing regulation, if their value exceeds 1 billion rubles. However, domestic transactions are no longer subject to control, except when the parties to a transaction are subject to different tax treatment in Russia. It should be noted that only the interest accrued under the loan agreements (and not the loan principal repayable) counts for determination of the annual threshold[14].

The "related parties" concept includes, in the first instance, the companies belonging to the same group, held directly or indirectly by the same shareholder(s) at more than 25% in their authorized capital. However, the definition of the "related parties" under the Russian law is not exhaustive. The parties may be recognized as related under the court decision when "the specifics of relations between them may affect the conditions and/or results of the transactions entered into by such parties, and/or the financial results of their activities or the activities of parties that they represent"[15].

The Russian transfer pricing legislation provides for certain specific "safe-harbor" corridors for the interest to be considered arm's-length. They differ depending on the loan currency and the method of interest calcula-

12 *Art. 284-2-1 of the Tax Code*

13 *Art. 269-2, 269-3 of the Tax Code*

14 *Art. 105-14 of the Tax Code*

15 *Art. 105.1 of the Tax Code*

tion[16]. If the interest under the loan falls within the said corridor, the taxpayer may prepare a simplified transfer pricing documentation demonstrating that the actual applicable interest rate corresponds to the established "safe harbor" thresholds. Second way (to be explored if interest rate exceeds "safe-harbor" upper threshold) is to justify the "arm's length" character of the interest rate in the transfer pricing policy of the Russian borrower.

Current trends

Over the last years Russian subsidiaries of multinational companies have often faced refusals by the Russian tax authorities to acknowledge the deductibility of interest paid under intragroup loans. The tax inspectorates automatically perceive the payment of interest under the loans received from the foreign companies within the same group as a method of aggressive tax optimization and intentional withdrawal of profit from taxation in Russia without analyzing the background and the specifics of each particular case. It is even more upsetting that Russian courts tend to support the said approach[17].

Russian business communities await from the Federal Tax Service official clarifications on taxation of cross-border loans with a formulation of "clear and unambiguous criteria" when such loans should be deemed economically justified and, thus, allowing the deductibility of interest for profit tax purpose.

Alternative termination of obligations

Depending on various economic factors, Russian borrowers might be unable to duly perform their obligations under the loan agreements. Under such circumstances, the parties might consider alternative methods of the borrower's obligations termination, including commonly used options of debt forgiveness by the lender or debt to equity swaps.

In case of debt release, the amount of loan principal and accrued but unpaid interest will be included in the Russian borrower's corporate income tax basis. By exception to this rule, loan principal forgiven by a shareholder having at least 50% share in the authorized capital of the borrower or the borrower's subsidiary held at least 50% by the latter will be tax neutral for the borrower[18]. Interest amount will remain nevertheless taxable in any case.

Loan amount and accrued interest can be eventually offset against contributions of the lender to the authorized capital or additional capital (known as contribution to the assets) of the Russian borrower. Offset of the principal amount will be tax neutral for the parties while offset of accrued interest will be assimilated to effective interest payment and subject to corporate income tax/withholding tax. Should the lender be a foreign entity, the Russian borrower shall act as a tax agent, calculate withholding tax and pay it to the budget, correspondingly reducing the income of the foreign company received in non-monetary form (amount that can be offset)[19].

OUTWARD LOANS

Currency control requirements

In addition to currency control requirements applicable to both inward and outward loans between residents and non-residents, Russian lenders under outward loan agreements shall ensure the repayment to their Russian bank accounts of the amounts in rubles or in a foreign currency due from non-residents in accordance with the terms of the loan agreements (the "repatriation requirement")[20]. Liability for violation of repatriation requirement is very important.

In this respect, while registering outward loan agreements with the Russian banks Russian residents shall also provide information regarding the terms of the loan repayment and expected terms of money repatriation[21].

16 *Art. 269-1.1, 269-1.2 of the Tax Code*
17 *Ruling of the Arbitration Court of the city of Moscow No. A40-251161/15-20-2117 dated 24.10.2016*
18 *Art. 251-11 of the Tax Code*
19 *Art. 310-1 of the Tax Code, Letter of the Ministry of Finance of Russia No. 03-03-06/1/77351 dated 29.10.2018.*
20 Art. 19-1.1-3 of the Currency Control Law
21 *Art. 5.6 of Instruction No. 181-I*

Tax implications

Interest income received by the Russian lender under an outward loan agreement from Russia-based or foreign borrowers is subject to the Russian corporate income tax at a general rate of 20%[22].

If interest is paid by a foreign borrower and withholding tax was retained in the country the borrower's residence, such a withholding tax may be offset against the amount of corporate income tax due in Russia subject to the following terms and conditions: (i) the amount of withholding tax levied in a foreign country complies with the provisions of an applicable double tax treaty (if any); and (ii) the Russian lender is able to produce a confirmation of effective payment of withholding tax issued by the foreign borrower acting as a tax agent (the confirmation being valid during the year when it is provided to the Russian corporate income tax payer). The amount of offset is limited to the amount corporate income tax due in Russia[23].

Where an outward loan agreement is not recognized as a "controlled transaction" falling under the Russian transfer pricing regulations, any interest rate agreed between the parties will be considered "arm's-length". Interest free loans will also be possible.

Vice versa, if an outward loan agreement is regarded as a "controlled transaction" and falls under the Russian transfer pricing requirements, there are two possible approaches to justification of "arm's-length" character of an applicable interest rate as described above.

Alternative termination of obligations

Due account taken of the repatriation requirement imposed on the Russian residents by the currency control regulation, they shall ensure that the loans provided to non-residents are effectively repaid to their Russian bank accounts within the time limits stipulated in the relevant loan agreements.

This is generally construed as a prohibition of any other alternative mechanisms of terminating the obligations under the outward loan agreements (including debt write-offs, debt to equity swaps, offsets, etc.), subject to an exception expressly provided by the Currency Control Law, whereby a resident is exempt from the repatriation requirement, if there is a set-off of the obligations under two reciprocal loan agreements between a resident and a non-resident, provided that the resident received a loan from the non-resident to its account with a Russian bank[24].

CONCLUSION

With the legislative changes of the last years and the current approaches of the Russian tax authorities, intragroup loan financing requires from the parties careful planning and documentation for the following reasons:

(i) The Russian residents shall not disregard currency control regulation with respect to transactions with the non-residents and, especially, the repatriation requirement applicable to outward loans. Timely performance of loan repayment obligations by the foreign borrowers or extension of the loan term and submission to the bank of the relevant addenda are essential;

(ii) Revision of the DTTs between Russia and low tax jurisdictions traditionally used for setting up holding and financing companies of multinational groups increased tax costs associated to interest income under loan agreements. We await further DTTs' revision with other jurisdictions;

(iii) Entry into force of the MLI is likely to complicate the applicability of relevant DTTs. Burden of bringing evidence and properly document eligibility of the parties to DTTs' benefits will increase;

(iv) Russian taxpayers shall be prepared to prove the economically justified character of interest expenses as well as absence of tax basis erosion intent when paying out interest to foreign lenders within the same group.

22 *Art. 284-1 of the Tax Code*
23 *Art. 311-3 of the Tax Code*
24 *Art. 19-2-9 of the Currency Control Law*

MANDATORY LABELING OF GOODS: A WAY TO COMBAT COUNTERFEIT PRODUCTS OR INCREASE THE ADMINISTRATIVE BURDEN ON BUSINESS

Mrs. Ekaterina Ekimova
Senior Associate

ABSTRACT

Since 2019, the Government of the Russian Federation has been implementing mandatory labeling requirements for various categories of goods. The article analyzes the consequences of the new legislative regulation for business in Russia.

Key words: Mandatory Labeling of Goods, Administrative Responsibility, Restriction of Competition

INTRODUCTION

For more than two years, the requirements for mandatory labeling of consumer goods with unique identification means (barcodes) have been in force in Russia. The purpose of the new legislative requirements is a ban on the import, sale and even storage within the Russian Federation of unlabeled goods that are currently recognized as counterfeit by Russian legislation.

PRODUCT LABELING AS A MEANS OF CONSUMER PROTECTION

For all importers, sellers and manufacturers, the labeling of goods is a prerequisite for the circulation of the good on the territory of Russia and for its sale[1]. The purpose of introducing mandatory labeling is to significantly reduce the number of counterfeit products and improve the quality level. For the consumer, labeling is a guarantee of the safety of the product, a confirmation that the product meets the established regulatory requirements.

First of all, consumer goods are subject to mandatory labeling. Currently, categories of goods such as tobacco products, footwear products, perfumes, photographic goods, tires, textiles, fur products, medicines and dairy products are subject to labeling[2]. In the future, the Government of the Russian Federation intends to expand this list. The exception is goods intended for samples at international exhibitions and fairs, as well as other goods not intended for sale. Such goods are not subject to labeling.

Labeling ensures the legality of the appearance of a specific unit of goods on the market by applying a unique machine-readable identifier code to product, which, in turn, automatically records information about the product in the system of the supervisory authority.

There is also a possibility that labeling will have a significant impact on the system of evidence in court disputes with consumers. Accordingly, within the scope of disputes regarding the proper quality of the goods received by the consumer, the courts are highly likely will attach great importance to the presence of labeling on the disputed good. After all, under the new legislative regulation, the absence of labeling automatically means that the product is counterfeit. In other words, any party, except for the consumers, importer, manufacturer, or seller, which puts products for sale without labeling will be held responsible.

REQUIREMENTS FOR MANDATORY LABELING OF GOODS

As mentioned above, the obligation to label goods is imposed on parties who are engaged in the import of goods, their production, wholesale or retail trade. Therefore, the labeling actually applies to all parties of business community.

To carry out labeling, the company shall be registered in the state information system of monitoring the circulation of goods "Honest Sign". At the same time, it is necessary to conclude a contract with the operator of this system for the provision of services of the provision of labeling codes. The cost of one labeling code is 50 kopecks (0.01 euro) without VAT[3]. However, it should be borne in mind that the labeling shall be applied with respect to each unit of the product. Despite the low cost of codes, in fact, labeling of consumer goods leads to a significant increase of the costs of manufacturing companies and sellers.

In case goods to be imported fall under the labelling requirement, it is necessary to ensure that barcodes are applied before the goods cross the border, or on the territory of the country of import of the goods, but under the control of customs authorities.

LABELING AS A MEANS OF STATE CONTROL OVER BUSINESS AND RESTRICTION OF COMPETITION

In fact, labeling allows state authorities, in particular customs and tax authorities, to establish total control "over the destiny" of goods within Russia. Accordingly, the circulation of any product can be traced from the moment of its production or import into Russia to the moment of disposal or purchase by the end consumer.

In addition, it is obvious that labeling will increase budget revenues through the regular purchase of barcodes. Also, due to labeling, the level of information interaction between state bodies will increase, customs and tax authorities will have access to a large amount of information regarding the activities of companies.

However, the first effect of the mandatory labeling requirement was an increase in the cost of goods for consumers. For manufacturers and importers, labeling has already turned into additional monetary and time costs due to introduction of automated accounting of goods, the purchase and installation of special equipment for applying and scanning codes, and training of personnel.

Additional business expenses arise not only when the product is put into circulation, but also at the stage of its storage. So, if the label of any product, including those stored in a warehouse, is torn, fades or is lost, it is not allowed to print a new one of the same label, it is necessary to re-label the product, which means a new unique code shall be assigned, accordingly, manufacturer, importer or seller shall pay for new code for the second time. So re-labeling is time-consuming and costly procedure. As it can be understood, even if a product is not put into circulation, the manufacturer (supplier) will bear the costs of labeling it.

Also, labeling complicates the procedures of disposal of goods due to damage, non-delivery since the goods are controlled at all stages of their existence. The positive effect of such control can be the prevention of illegal write-off of the company's working capital.

Nevertheless, the burden on business related with the requirements of product labelling may lead in the near future to a redistribution of the market towards the products of large companies, a decrease in competition and an increase in prices. For example, costs due to labeling requirements may affect adversely small companies. As a result, for small and medium-sized businesses, the labeling requirement is more like a "barrier" for entering the market and successful entrepreneurship. It should also be recognized that labeling can lead to a decrease of imported products in Russia, since it will become an additional barrier for investors during entrance to the Russian market.

According to the legislation, production and sale of goods subject to labelling without labelling is subject to administrative fine in the amount up to 300,000 rubles (about 3,500 euros). Although the fines are not so high as to destroy the business, the confiscation of unlabeled products can be a particularly painful consequence of the new rules.

1 *Federal Law dated 28.12.2009 No. 381-FZ "On the basics of state regulation of trade activity in the Russian Federation", art. 2*

2 *Decree of the Government of the Russian Federation dated 28.04.2018 No. 792-r*

3 *Resolution of the Government of the Russian Federation dated 08.05.2019 No. 577*

CONCLUSION

Initially, the requirement for mandatory labeling was intended to combat counterfeit goods and was a means of protecting the rights of consumers. In practice, the labeling procedure has provided customs and tax authorities with extremely wide access to the operational activities of companies. At the same time, labeling became an additional expense for the companies themselves and led to an increase in the cost of products. However, in my opinion mandatory labeling requirement shall be exercised solely for purpose of the protection of the consumer rights. Access to the operation of the companies due to such regulation shall be restricted with the purpose of the protection of the consumer rights. Small and mid-sized companies shall be supported and exempt from the labeling charges, hereby small companies shall not face unfair competition. Taking into consideration all above mentioned consequences, hopefully mandatory labeling will be improved in near future in the favor of the protection of the consumer rights.

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In this edition, we are proud to introduce you to Mrs. Amina Tebbai, Legal Consultant at the firm. With 17 years of experience in Business law, and a hybrid background (law, tax and accounting), Amina is a specialist in contract law, labour and corporate law.

Throughout her professional career, Amina has always offered legal interface services on behalf of clients, providing them with the necessary support for the conduct of their business.

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Amina continues to improve her learning, taking further training courses, which allows her to continually update her technical knowledge.

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Outside of work, Amina enjoys practicing YOGA and cooking. The practice of these two hobbies allows Amina to forge her character and personality.

In her free time, Amina participates and helps to organize social association events.

E: amina.tebbai@nazali.com

T: +212 (0) 522 78 65 33

CURRENT NEWS ABOUT MOROCCO

» Dahir n ° 1-21-24 of February 22, 2021, promulgating the law n° 15-18 relating to collaborative financing. This legal framework will allow the mobilization of new sources of financing for the benefit of small businesses, associations and other project leaders which cannot take benefit from a bank loan.

The law n° 15-18 will provide support for the actions of civil society, with "the financing of projects with a strong social impact".

It requires financing companies that will be approved:

- To join a professional association that Bank Al-Maghrib (BAM) and the Moroccan stock market Authority (AMMC) must approve by its Statutes;

- To pay an annual fee, calculated based on the volume of funding collected, with expected late increases;

- To appoint an auditor for three consecutive years;

- Submit an annual report to the Ministry of finance

The law also provides for the establishment of an electronic platform allowing project leaders to be put in touch with contributors. Prior to the constitution of each electronic platform, an assent must be requested from the Higher Council of Ulema on the draft legislation for the management of said platform.

The Central Bank and the BAM and AMMC will jointly publish the terms of the financing contracts to be concluded with the project leader.

The law limits the accumulation of contributions from an individual to 250,000 per campaign and 500,000 DH per year and per project;

» Decree No. 2-20-675 of January 22, 2021, amending and supplementing Decree No. 2-18-378 of July 25, 2018) on telemedicine. Interested practitioners are required to submit a file including, among other things, an authorization to process personal data;

» Decree n° 2-21-642 of August 31, 2021, taken in application of articles 32 and 35 of law n° 13-21 relating to the licit uses of cannabis, and which states that the State's supervision of the National Agency for the regulation of activities relating to cannabis, hereinafter referred to as the "Agency", shall be exercised by the governmental authority in charge of the interior, subject to the powers and attributions devolved to the governmental authority in charge of finance by the laws and regulations applicable to public institutions. Similarly, this decree details the members of the board of directors of this agency and that the representatives of the government authorities must have the rank of secretary general of their department or, failing that, at least the rank of director of central administrations;

» Decree n° 2-21-640 of August 25, 2021, modifying and completing decree n° 2-15-447 of March 16, 2016, decree n° 2-15-447 of March 16, 2016, taken for the application of law n°131-13 relating to the practice of medicine;

Under the decree, foreign doctors will henceforth be allowed to practice medicine in Morocco.

Therefore, foreign doctors will have to apply for registration on the rolls of the order of doctors to the regional council of doctors of the place of the professional premises where they intend to practice.

The written request must be drawn up in accordance with the model of the national order and be accompanied by the list of documents provided for by the said decree.

» Decree n° 2-21-641 of August 25, 2021, relating to the composition and functioning of the modalities of operation of the commission for monitoring the practice of medicine by foreigners in Morocco.

The decree fixes the functions of the commission members and the rules for their appointment.

About the functions, the commission will be in charge, among other things, of:

- the following-up of the practice of medicine by foreigners, and their integration into the national health system;

- making any proposal to facilitate their residence in Morocco by the public authorities;

- publishing each year a list of foreign doctors residing in Morocco.

» The new law n° 19-20 provides that the joined-stock companies called "Société anonyme" that make public offering should seek in their article of association a gender balance in their boards of directors or boards of surveillance. Their boards of directors or boards of surveillance should be composed of at least 40% of each gender.

The new law n° 19-20 also created a new form of company called Simplified joint-stock company (Société par actions simplifiée), in which shareholders bear losses only up to the amount of their contributions constituted in shares.

The simplified joint-stock company capital is divided into negotiable shares representing contributions in cash or in kind. However, the company may issue inalienable shares resulting from industrial contributions also.

This new company, that can be settled by only one shareholder (natural or legal person) who can freely set the amount of the share capital, is more flexible than the other existing companies, especially in terms of management.

The simplified joint-stock company is managed by one or more natural or legal persons. It is represented in respect of third parties by a president appointed under the conditions laid down in the AOA;

» Decree No 2.21.708 on the public register of beneficial owners of companies created in Morocco and of legal entities was adopted by the Government Council.

This decree, issued pursuant to the provisions of Act 43.05 on the fight against money laundering, as amended and supplemented by Act 12.18, sets out the procedures for keeping the said register and the data it must contain, the undertakings of the persons declared, as well as the conditions for accessing the centralized information the Arabic text of the said decree was published in the Official Gazette No. 7024;

» Decree No ° 2-20-950 of July 26, 2021, taken for the application of the articles 2-544 and 7-544 of the law No° 15-95 forming commercial code. Completes the legal framework governing domiciliation in Morocco.

The domiciliation of companies in Morocco was governed by law No° 89-17 promulgated by the Dahir no 1-18-110 of the January 9, 2019, which was published at Bulletin Official in Arabic no° 6745 of the January 21, 2019, and the Bulletin Official in French under the No 6788 of the June 20, 2019.

This law has amended and supplemented Law No. 15-95 forming the Commercial Code by setting up a legal structure for relations between the domiciled and the domiciliary.

In the same perspective, this decree No ° 2-20-950 of July 26, 2021, came to fix the model of the

domiciliation contract and the content of the declaration that natural or legal persons wishing to exercise a domiciliation activity are required to make.

ATTACHMENT AND SALE PROCEDURES OF TANGIBLE MOVABLE PROPERTY IN OHADA AND MOROCCAN LEGISLATIONS

Mrs. Amina TEBBAI
Legal Consultant

Mr. Demba Mamadou DIARRA
Senior Legal Consultant

ABSTRACT

The purpose of an attachment and sale procedure is for a creditor to have its receivables paid by seizing and selling its debtor's assets. Both OHADA and Moroccan legislations provides specific rules for such procedure. These legislations have in common certain points but differs on others. This article aims to treat main divergence and convergence of these two important African legislations.

Key Words: Ohada Law, Moroccan Law, Debt, Attachment, Sale, Debtor, Creditor, Tangible Movable Property, Amicable Sale, Public Auction.

INTRODUCTION

The attachment-sale is an enforcement process that consists of the attachment and sale of property belonging to the defaulting party, individual or company, to pay-off the creditor who has obtained a legally enforceable act (a court decision, notarial act, etc.).

In OHADA law[1], this procedure is governed by the Uniform Act relating to the Organization of simplified recovery procedures and enforcement procedures (the "Uniform Act") in its articles 91 to 152.

The attachment and sale as governed by the Uniform Act is inspired by the attachment and sale procedure in French law which replaced the old attachment and execution procedure in France with the adoption of the law of July 9, 1991[2].

In Morocco, the attachment and sale procedure is currently known, under the code of civil procedure (the "Code of Civil Procedure") in its articles 459 and following, under the name of attachment and execution and is distinguished, on certain points, from the attachment and sale procedure as governed by the OHADA Uniform Act.

This article proposes to deal with the main points of convergence and divergence between Moroccan law and OHADA law on the attachment and the sale of tangible movable property.

If for their implementation the Moroccan and OHADA legislations have in common the need for the creditor to obtain a writ of execution, the basis of any attachment-sale or attachment-execution procedure, we will see that the Uniform Act compared to the Code of Procedure Moroccan Civil enacts a more increased formalism at the expense the bailiff or the enforcement agent, as much regarding the operations of attachment as those of the sale.

The Uniform Act also differs from the Moroccan Code of Civil Procedure by the possibility that it offers the debtor to organize an amicable sale of the attached tangible and movable property.

ATTACHMENT PROCEDURES IN OHADA AND MOROCCAN LAW

The Uniform Act and the Moroccan Code of Civil Procedure have both as basis to the attachment-sale or attachment-execution procedures, the obtention of a writ of execution by the creditor followed by the regular notification of a such writ of execution to the debtor (A) before the execution of the formalisms related to the attachment procedures (B).

A) Convergence on the need to obtain an enforceable writ:

Obtaining a writ of execution is necessary for the initiation of any attachment-sale or attachment-execution procedure.

Indeed, article 91 of the Uniform Act provides that "*Any creditor in possession of a writ of execution in proof of a debt, certain and due for immediate payment, shall after the service of a summons to pay, proceed with the attachment and sale of any tangible and movable property belonging to his debtor in order to recover the debt from the proceeds of the sale whether or not the said property is in the hands of the debtor. Any creditor who fulfills the above conditions may join the attachment process by way of an opposition*".

The Moroccan Civil Procedure Code provides in its article 438 that "*No attachment of movable or immovable property is carried out except by virtue of a writ of execution and for certain and due for immediate payment; if the debt due is not a sum in money, it is suspended, after the attachment, of all subsequent proceedings, until the assessment has been made*".

A writ of execution is a legal act that allows the forced execution of a claim on a defaulting debtor.

The Uniform Act enumerates in its article 33 the list of writs of execution under which an attachment and sale procedure can be initiated against a defaulting debtor, namely:

1. court decisions bearing the executory formula and decisions which are immediately enforceable;
2. foreign acts and court decisions as well as arbitral awards which have been granted exequatur in a ruling which is final in the state in which the writs are invoked;
3. conciliation reports signed by the judge and the parties;
4. notarial deeds bearing the executory formula;
5. decisions recognized as court decisions by the national law of each state Party.

In Morocco, the initiation of a attachment and execution procedure also requires the obtaining of an enforceable title bearing the enforceable formula referred to in article 433 of the Code of Civil Procedure, unlike the conservatory attachment procedure[3] which can be executed on the basis of a simple authorization of the judge.

Once the writ of execution has been obtained, the creditor can attach the debtor's property in purpose to sale them.

This attachment and sale procedure follows a strict formalism, especially when dealing with OHADA law.

B) Formalisms relating to the attachment procedures

In OHADA law, when a creditor has a writ of execution stating a certain and due for immediate payment debt, he may, after service of a prior summons to pay, proceed with the attachment of his debtor's property in order to proceed with their sale. However, the attachment can only be carried out eight (8) days after the service of the above-mentioned summons to pay.

The purpose of the prior summons to pay is on the one hand to remind the debtor of the debt that exists against him and on the other hand to give him a last chance to pay before the creditor's attach his property.

This attachment can be made in the hands of the debtor himself or in those of a third party who has property belonging to the debtor.

Also, the Uniform Act offers the possibility to any other creditor fulfilling the conditions referred to in its article 91 to join the attachment operations by way of opposition. In this case,

1 *OHADA means in French "Organization for the Harmonization of Business Law in Africa". It is an organization that brings together 17 African countries, namely: Benin, Burkina Faso, Cameroon, Comoros, Republic of Congo, Democratic Republic of Congo, Côte D'Ivoire, Gabon, Guinea, Guinea Bissau, Equatorial Guinea, Mali, Niger, The Central African Republic, Senegal, Chad, and- Togo. All these countries entered into an international treaty called the treaty of Port-Louis, which has been establish on October 17th, 1993, to create a harmonized business legislation called OHADA.*

2 *Loi n° 91-650 du 9 juillet 1991 portant réforme des procédures civiles d'exécution en France.*

3 *It consists in making the property of a debtor unavailable for himself in order to keep them for the benefit of the creditor.*

the new creditor can extend the attachment to other properties of the debtor.

The prior summons to pay, which contains the choice of domicile, must be served in the form of a bailiff's writ, and must contain, on pain of nullity, certain mandatory information, namely:

a reference of the writ of execution by virtue of which the attachment exercise was carried out, with a separate detailed account of all the sums payable by way of the principal, costs and accrued interest, as well as an indication of the interest rate.

a summons to pay the debt within eight (8) days, failing which it shall be recovered by the forced sale of his movable property. The command must be served on anyone or at home, it cannot be served at the elected domicile[4].

The summons to pay may be endorsed in the instrument bearing notification of the writ of execution[5].

The attachment procedure thus places on the bailiff or the enforcement agent a duty of extreme vigilance when drawing up the act of attachment.

In Morocco, prior to the attachment of the debtor's property, the enforcement agent notifies the debtor of the decision he is responsible for executing. He gives him formal notice to pay immediately or to make his intentions known within a period not exceeding ten (10) days from the date of the presentation of the request for execution[6].

If the debtor refuses to pay or declares himself unable to do so, the enforcement agent proceeds with the attachment of the debtor's property.

For this purpose, the enforcement agent proceeds, by means of holding the minutes of the attachment, to the verification and enumeration of the property attached.

If there are jewelry or precious objects, the minutes contain, as far as possible, their description and an estimate of their value. If the property attached is a business, the minutes contain the description and estimate of the tangible elements of such business and the enforcement agent must have the minutes transcribed in the commercial register, to be valid in respect of the intangible elements of the said attached business.

In OHADA law as well as in Moroccan law, the attached property is immediately made unavailable to the debtor who cannot alienate them, even if he may be debtor and custodian of the attached property.

SALE PROCEDURES IN OHADA AND MOROCCO LAW

Unlike the Moroccan law, the OHADA law provides for an amicable sale (A) prior a to public auction which exists in both the legislations (B).

A) Amicable sale: a feature of OHADA law

In OHADA law, the auction is preceded by the possibility offered to the debtor to proceed himself to the amicable sale of the attached property within a period of one (1) month.

This period starts from the establishment by the bailiff or the enforcement agent of an act of attachment which must, on pain of nullity, contain numerous mandatory information, which varies according to whether the attached property is in the hands of the debtor himself[7] or those of a third party[8], or whether the attachment was made in the presence or not of the debtor or the third party.

4 *Article 92 of the Uniform Act relating to the Organization of simplified recovery procedures and enforcement procedures of OHADA.*

5 *Article 94 of the Uniform Act relating to the Organization of simplified recovery procedures and enforcement procedures of OHADA.*

6 *Article 440 of the Moroccan Code of Civil Procedure*

7 *Article 100 of the Uniform Act relating to the Organization of simplified recovery procedures and enforcement procedures of OHADA.*

8 *Article 105 of the Uniform Act relating to the Organization of simplified recovery procedures and enforcement procedures of OHADA.*

The amicable sale is interesting for the debtor because it gives him discretion that an auction does not offer and allows him to sell his property at the best price agreed with a buyer.

From the creditor's point of view, this additional period of one month will have the main effect of delaying the recovery of his debt.

The Moroccan Code of Civil Procedure does not provide for an amicable sale by the debtor of his attached property.

The debtor's assets may be auctioned directly after the expiration of the period provided for in Article 440.

B) Auction of the attached tangible movable property

Under OHADA law, at the end of the one-month period given to the debtor to proceed with the amicable sale of his property, a forced sale of said property may be carried out within 15 days from the publication of the auction.

This publicity is made by the bailiff or by the enforcement agent in the form of posters indicating the place, the day, the time, and the nature of the attached property. The posters are posted at the town hall of the domicile or the place where the debtor lives, at the neighboring market and all other appropriate places as well as at the place of the sale if it takes place in another place. The sale can also be published through the written or spoken press.

The bailiff or the enforcement agent must inform the debtor by registered letter with acknowledgment of receipt or by any means in written, of the sale, at least ten days before the date set.

The sale is carried out at public auction, by a judicial officer authorized by the national law of each state party (auctioneer, bailiff, etc.), either at the place where the attached property is located, or in a room, a public market whose geographical location is the most appropriate to solicit competition at a lower cost[9].

The adjudication of attached property is made to the highest bidder after three auctions.

The price is payable in cash, failing which, the object is resold at the auction of the adjudicator[10].

The auction ends when the price of the property sold is sufficient for the payment of the amount of the causes of the attachment and oppositions, in principle, interest and costs[11].

After the sale, the minutes of the sale will be drawn up containing the description of the property sold, the amount and the names and surnames of the adjudicators[12].

In Morocco, at the expiration of the 10-day period provided for in Article 440, the debtor's property is attached in accordance with Articles 455 and 456 of the Code of Civil Procedure.

After the attached property has been verified by the enforcement agent, they are sold at the public auction, in the best interests of the debtor.

The auction takes place at the expiration of a period of eight days from the day of the attachment, unless the creditor and the debtor agree to set another deadline or if the change of the deadline is necessary to avoid the risks of a significant depreciation or to avoid custody costs out of proportion to the value of the property[13].

The auction takes place at the nearest public market or wherever they are deemed to produce the best result. The date and place of the auction are made known to the public by all

9 *Article 120 of the Uniform Act relating to the Organization of simplified recovery procedures and enforcement procedures of OHADA.*

10 *Article 125 of the Uniform Act relating to the Organization of simplified recovery procedures and enforcement procedures of OHADA.*

11 *Article 126 of the Uniform Act relating to the Organization of simplified recovery procedures and enforcement procedures of OHADA.*

12 *Article 127 of the Uniform Act relating to the Organization of simplified recovery procedures and enforcement procedures of OHADA.*

13 *Article 462 of the Moroccan Code of Civil Procedure.*

means of publicity in relation to the size of the attachment[14].

Except the cash which is handed over to the enforcement agent, the animals and objects attached may be left in the custody of the debtor if the creditor consents thereto or if another way of proceeding is likely to result in, high fees; they can also be entrusted to a guard after verification if necessary. The custodian, who may be the debtor himself, on pain of replacement and damages, is forbidden to use or benefit from the animals or objects attached, unless he is authorized by the parties.

The property is awarded to the highest bidder and are only delivered against cash payment.

CONCLUSION

In OHADA law as well as in Moroccan law, the aim pursued by the attachment and sale and attachment and execution procedures is the recovery by the creditor of his claims on the proceeds from the sale of the property belonging to the debtor. However, these procedures respond to a formalism which can be very strict, and which tries to strike a balance between the discretion sought by the debtor and the prompt payment pursued by the creditor.

The absence of the amicable sale procedure in Moroccan law allows to the rapid forced payment of the creditor. Under OHADA law, the creditor must wait during a month (for the amicable sale), before being able to proceed with the forced sale of the attached property.

14 *Article 463 of the Uniform Act relating to the Organization of simplified recovery procedures and enforcement procedures of OHADA.*

NEW TAX REFORM IN MOROCCO: ORIENTATIONS, OBJECTIVES AND METHODS TO BE USED

Ms. Zineb OUHBI
Tax Manager

Mr. Hatim ED-DEGHOUGHY
Senior Tax Consultant

ABSTRACT

Although the Moroccan tax law has undergone many reforms since the 1980s, the coronavirus crisis has highlighted the limits of the Moroccan tax system, mainly on the social level.

In this context, the framework law n° 69-19 relating to the tax reform was "prepared in application of the High Royal Guidelines and on the basis of the recommendations of the National Taxation Conference, held in May 2019", as indicated in the press release from the spokesperson for the Royal Palace.

As part of this reform, which will be implemented over the next five (5) years, the Kingdom has fixed priorities like territorial development, consolidation of user confidence, and attract more and more international investors.

Also, the said new tax reform will be armed by several advantages for investors as like, for example, simplification of tax procedures, reorganization of tax rates, etc.

Key words: Tax Reform, Incentives, Harmonization of Tax Rules, Restructuring of Business Groups, Framework Law n° 69-19.

INTRODUCTION

Recently adopted by the Council of Ministers chaired by His Majesty the King of Morocco, the draft framework law on tax reform is ready to begin its legislative course to enter into force.

This tax reform is characterized by 10 flagship and priority themes which are planned to be implemented within 5 years. In what follows, we will discuss the priorities to be taken into consideration within the framework of this tax reform, the fundamental objectives to be achieved, the implementation methods and the effective date of this framework law.

PRIORITIES TO CONSIDER[1]

In order to update the country's tax policy, the Moroccan state has set the following priorities:

- The incentive for productive investments, which bring added value and quality jobs creation. The desired goal is to make Morocco a real investment hub and at the same time ensure the employability of the active and trained population;
- Territorial development and consolidation of spatial justice to boost the establishment of advanced regionalization as the optimal political choice;
- Reducing geographic and social inequalities;
- Openness to international best practices as a benchmark with other developed countries in order to achieve the aforementioned flagship orientations;
- The efficiency and effectiveness of the tax administration and the consolidation of user confidence.

FUNDAMENTAL OBJECTIVES TO BE ACHIEVED WITHIN THE FRAMEWORK OF THIS TAX REFORM[2]

On the basis of the aforementioned key priorities, this reform aims to achieve fundamental objectives which are detailed as follows:

- Strengthening the State and local authorities' contribution in the financing of economic and social development policies;
- The decrease in the tax burden on taxpayers as the contribution base is broadened;
- Consecration of the tax neutrality principle in matters of VAT through the inclusion of activities which are to date considered outside the scope of VAT, such as agriculture;
- The convergence of preferential regimes with the international norms and standards, and the good tax practices such as OECD standards and European Union best practices;
- Consecration of tax provisions with the law's general rules and the accounting rules in force;
- Encouraging businesses to consolidate their national and international competitiveness;
- The mobilization of savings and their orientation towards productive sectors;
- The gradual implementation of the principle of the individuals' global income's taxation;
- The rationalization of tax incentives according to their socio-economic impact and with regard to the priorities provided for by the framework law;
- Taxes simplification and rationalization for local authorities. Indeed, the new tax reform aims to reduce the number of local taxes, which are currently 17 such as housing tax and hunting license tax, and to make the local taxation more adequate and unified;
- Integration of the informal sector into the structured economy through:
  - The establishment of a simplified and accessible tax system;
  - The development and implementation of an awareness and support program.
- Simplification and adaptation of the tax regime applicable to local activities generating modest income;
- Strengthening the mechanisms for combating tax fraud and tax evasion;
- The convergence of local government tax rules and their harmonization with those governing state taxation, as well as the grouping of taxes relating to economic activities and those relating to real estate.

IMPLEMENTATION METHODS[3]

The objectives and priority measures implementation will be deployed through the following mechanisms:

- Consecration of the tax neutrality principle, particularly with regard to VAT, being subject to the maintenance of the basic products exemption, which include, in our opinion, those considered by the Moroccan Tax Code as first necessity products, like flour, sugar, butter.
  - This consecration of neutrality will be done through:
  - Enlargement of the scope of VAT neutrality to integrate other activities which were previously not concerned by this tax;
  - Reduction in the number of VAT rates. It should be recalled that the VAT rates in force are 7% (pharmaceutical products, school supplies and canned sardines, etc.), 10% (lawyers and notaries fees, bank operations, etc.), 14% (transport operations and electrical energy, etc.). The 20% rate is the common rate applied for activities / operations to which the other

1 *Article 2 of the framework law n ° 69-19 on tax reform, official bulletin n ° 7010 - 25 Hija 1442 (5-8-2021)*

2 *ibid, article 3*

3 *ibid, article 4*

rates are not applicable;

- Generalization of the right for VAT reimbursement, which is a mechanism allowing companies with VAT credits and which obey certain rules to request a refund through the tax administration.

- Gradual convergence towards a unified corporate tax rate, in particular for industrial activities;

- Gradual decrease of the minimum contribution rates by continuously reducing the rate in order to ultimately remove the minimum contribution;

- Establishment of incentives to promote the development of innovative companies, in particular start-ups and support structures (incubators and accelerators) and aggregators of auto-entrepreneurs;

- Reorganization of the income tax rates' progressive scale applicable to natural persons and the broadening of this tax's base. In this way, a certain tax fairness is sought through the relief of the middle class, who generally has salaries as main income, and which can be taxed up to 38%.

- Adaptation and improvement of the single professional contribution regime to accelerate the informal sector's integration;

- Compliance with the rules of good governance in respect of international taxation by virtue of conventional agreements;

- Convergence of the rates provided for by the preferential regimes, applicable to service and industrial acceleration zones, towards a unified rate;

- Improvement of the contribution, in terms of CIT, of public establishments and enterprises, and of companies exercising regulated activities or in a situation of monopoly or oligopoly, for which the State intends to increase the annual tax rate.

- Guarantee of taxpayers' rights, and those of the administration, particularly in the context of tax litigation;

- Institution of an appropriate tax regime favoring the restructuring of business groups in order to improve their competitiveness and governance;

- Provide appropriate tax measures to:

  - Develop the cultural sector;

  - Promote the social economy;

  - Protect the environment, in particular through the introduction of a carbon tax.

DATE OF EFFECT[4]

The Moroccan State undertakes to:

- Enact the texts necessary for the implementation of the planned measures within 5 years from the framework law's date of entry into force

- Enact, from the said date, the texts necessary for the implementation of the other measures provided for by the framework law N ° 69-19, in a progressive manner.

CONCLUSION

Long awaited, the framework law on tax reform was passed two months before the end of El Othmani government's mandate. It will certainly represent one of the biggest projects inherited by the new government which is currently being formed on the basis of the legislative elections of September 08, 2021's results, and of which the businessman Aziz Akhannouch has been appointed the leader.

Achieving the objectives of this tax reform will therefore depend on the tenacity of the members of the new government. The goal would be to allow Morocco to have a fiscal policy that is more consistent with its status as an African economic power, but which is also fair and efficient, promoting the creation of added value and the reduction of inequalities, and which would ease the pressure on certain taxpayers, in particular employees.

4 *ibid, article 19*

UKRAINE

NAZALI – KYIV OFFICE

NAZALI Kyiv office was established in August 2020.

Having its team assembled from the top-tier market practitioners, NAZALI Kyiv provides its clients with professional expertise in Tax, Corporate, Commercial, Construction, Energy, and Employment fields in consulting and dispute resolution.

In this edition of the Nazali Global Magazine, we would like to introduce one of our legal experts – Mr. Maksym Kuzmenko, Attorney-at-Law at Kyiv office of the NAZALI Tax & Legal International.

Maksym has 6 years of legal experience with a primary focus in domestic litigation and international arbitration. Maksym represented clients in commercial, civil, and administrative domestic courts of all the instances. Maksym also has a unique experience of successful representation of the clients "in the field" in arbitration proceedings and enforcement of obtained awards in multiple jurisdictions.

During his legal career, Maksym consulted clients on the matters of corporate and commercial law, customs regulations, bankruptcy, employment, and intellectual property issues.

To keep his legal knowledge up to date, Maksym monitors Ukrainian court practice and international arbitration cases and gathers relevant decisions on a daily basis. This helps him to keep his skills sharp and promptly navigate his clients through the legal intricacies.

During the day-to-day business activity, Maksym is involved in multiple tasks and projects like (i) drafting legal documents according to the clients' requests, (ii) assessment of prospects of judicial and arbitral proceedings, (iii) consulting the clients on various matters of civil and commercial law, (iv) representing client's interest before local and state authorities and (v) drawing legal solutions based on clients' needs.

In his personal life, Maksym loves hiking in the mountain regions of different countries while getting to know new cultures and traditions.

During spare time Maksym enjoys reading, gym, and off-road cycling.

E: Vladyslav.Kupriienko@nazali.com

T: +380 (44) 390 94 77

CURRENT NEWS ABOUT UKRAINE

- On 7 August 2021, the law of Ukraine "On Industrial Parks" was amended with the aim to attract investment in the industrial sector of the economy by introducing incentives in industrial parks. New incentives include procedures and types of compensation of the investments for their participants;

- The obligation of all legal entities to update and confirm the information on the ultimate beneficial owners and disclose the ownership structure, in accordance with the Law "On the Preventing and Counteracting to Legalization of Proceeds from Crime, Financing, of Terrorism and Financing of Proliferation of Weapons of Mass Destruction", which was due to 10 October 2021 extended to additional nine months;

- Ukraine is the first country in the world where digital passports in smartphones have legally obtained the same force as paper and plastic documents. This innovation is one of the steps towards Ukraine's entry into the "paperless" regime;

- On 15 September 2021, the State Inspectorate of Architecture and Urban Planning (DIAM) started its operation. The new body substituted the State Architectural and Construction Control Inspectorate which previously oversaw the construction sector in Ukraine;

- On September 1, tax amnesty has begun in Ukraine which will last for one year. During this period individuals may voluntarily declare assets purchased in any period before 1 January 2021 for funds that were not previously declared and from which taxes were not paid;

- Ukraine and Qatar have signed amendments to the double tax treaty. Protocol between the Government of Ukraine and the Government of the State of Qatar provides for the extension of provisions relating to mutual agreement procedure, exchange of information and prevents the abuse of tax benefits if the main purpose of a transaction is to obtain such benefits;

- The form of a notification on participation in a multinational enterprise (MNE) group and its preparation procedure have been updated by the Order of Ministry of Finance of Ukraine. Now it is not necessary to specify data on the amount of total consolidated income of an MNE group. The requirement to provide information on the exchange rate used by the taxpayer when converting the reporting currency into euro is also excluded.

DIIA CITY: NEW LEGAL REGIME FOR IT INDUSTRY IN UKRAINE

Mr. Serhiy Mosiyevych
Junior Associate

ABSTRACT

In this article you will find the overview of a new Ukrainian legal and economic regime for IT industry players: its key features, requirements for potential residents, new types of contracts and special tax conditions.

Key words: Ukraine, Special Economic Zone, Diia City, IT, Gig-contract, Gig-specialist.

INTRODUCTION

In autumn 2020, the President of Ukraine announced the creation of the project "Diia City" ("**DC**"). The project is intended to build a special legal and economic zone for the creative industry, in which the Ukrainian high-tech sector would be able to fully realize its potential and make Ukrainian IT business competitive in the international arena[1]. In August 2021, the new law "On Stimulating the Development of the Digital Economy in Ukraine" No. 4303[2] (the "**Law**") was signed by the President and came into force.

By implementing such legal regime, Ukraine pursues the following goals:

- attraction of investments;
- development of digital infrastructure;
- attraction of talented workers from around the world;
- stimulation of the domestic innovative products creation (startups and product companies).

GENERAL PRINCIPALS

The Law establishes the basic principles of operation of this act, which should promote increased stability and will be considered by national and foreign courts while resolving possible disputes, for instance:

1. freedom of activity - all DC residents have the right to conduct business independently.
2. non-interference - non-interference of the state in the activities of the DC residents, if such activities are carried out within the legislation of Ukraine.
3. presumption of legality DC residents' actions - interpretation of the applicable legislation in favor of DC residents, in case the law or another normative legal act provides for ambiguous interpretation of DC residents' rights and obligations.
4. stability - the state guarantees the preservation of the DC legal regime and stability of its conditions within 25 years from the date of the first resident entry in DC Register (electronic register that contains information about legal entities that have or had the status of the DC resident).
5. the formal nature of the procedure for acquiring the status of the DC resident - the absence of requirements for obtaining special permits, licensing or implementation of state supervision (control) measures for the submission and consideration of applications for the DC resident status.

1 *2021 in Ukraine will become the beginning of the creation of a digital state.* https://kharkivoda.gov.ua/news/105342

2 *Law of Ukraine "On Stimulating the Development of the Digital Economy in Ukraine".* https://zakon.rada.gov.ua/laws/show/1667-20#Text

6. voluntary participation in the DC - non-allowability of direct or indirect compulsion to obtain the status of the DC resident.[3]

HOW TO BECOME A DC RESIDENT?

To become a DC resident, a legal entity should be: (i) registered under the legislation of Ukraine; (ii) meet the criteria set by the special legislation on DC, (iii) included in the DC Register and (iv) report on compliance with the applicable criteria for every three months while being the DC resident.

The companies engaged in the following "digital" activities can be DC residents:

- computer programming, informatization consulting, computer equipment management activities;
- developing of computer games and other software;
- providing software products, including computer games, online games and providing web services for the distribution of software applications;
- educational activities in the field of information technology, including the provision of higher, professional higher and vocational education in such areas as computer science, information systems and technologies, computer engineering, cybersecurity, data science;
- data processing and related activities, other than the provision of data processing and hosting infrastructure and hosting services, and web portal activities;
- research and experimental development of natural and technical sciences in relation to information and communication technologies;
- conducting marketing campaigns and providing advertising services using software developed with the participation of the DC resident, on the Internet and /or on users' devices;
- activities for the organization of e-sports competitions, e-sports teams, specialized computer centers and / or clubs designed for e-sports competitions, as well as studios for broadcasting e-sports competitions;
- activities of a service provider related to the circulation of virtual assets;
- ensuring cybersecurity of information and communication systems, software products and information processed in them;
- activities for design (construction), research, testing of technologies, devices and systems of robotics with the use of computerized control systems ("**Digital Activities**").

The criteria for obtaining the status of the DC resident for existing Ukrainan companies are as follows:

i. performing one or more Digital Activities, as defined in the DC resident charter or by the information in the register of legal entities;
ii. the amount of income from the Digital Activities received in the first three calendar months following the calendar month in which the legal entity acquired the status of the DC resident is not less than 90 percent of its total income for such period, and the amount of income from the Digital Activities received in each calendar year of being the DC resident, is not less than 90 percent of the total income of the legal entity for the same period;
iii. the average number of employees and gig- specialists at the end of each calendar month, starting from the month when the status of the DC resident has been obtained, should be at least nine people;
iv. the amount of the average monthly re-

3 *Art. 2, p. 4 of the Law of Ukraine "On Stimulating the Development of the Digital Economy in Ukraine".*

muneration of the DC resident employees and gig specialists, starting from the month when the status of the DC resident has been obtained, is not less than the equivalent of EUR 1,200 ;

v. absence of "negative" criteria.[4]

GIG - CONTRACT

Introduction of a new concept of "Gig - contract" (**"GC"**) is a special form of involving specialists, which combines the features of an employment and a services contract. In other words, it is a system of work when professionals are not hired, but are invited to the specific projects, where they perform tasks within specified timeframes. Such form allows to preserve the flexibility of civil law relations, eliminates the risk of the reclassification of the relations as labor ones, and provides social guarantees to the professionals.

INTELLECTUAL PROPERTY RIGHTS

DC regime eliminates certain inaccuracies regarding the intellectual property rights to computer programs created by IT specialists. According to the Law, the property rights to computer programs and databases should belong to the employer or a customer, unless agreed otherwise in an agreement.[5]

FEATURES OF AGREEMENTS REGULATION

The Law introduces the possibility of signing non-compete agreements (**"NCA"**). It is a contract under which the specialist undertakes to refrain from competing against the DC, is repayable and is made in writing. The contract must specify: the term of the obligation, the territory of distribution, an exhaustive list of competing activities and / or persons, material benefits that the specialist receives in return for the obligation to refrain from competing.

The Law also allows the DC residents to sign a non-disclosure agreement ("NDA") between with its employees. that the NDA can be repayable or not repayable. The NDA has to specify the term and define the information which is covered by such NDA.

In case of violation of the terms stipulated in the abovementioned agreements by an IT specialist, the latter will have to pay a predetermined amount of fine and compensate the damegas to the DC resident, if any.

ELEMENTS OF ENGLISH LAW IN UKRAINIAN LEGISLATION

The Law introduces the following concepts of English law and international corporate law:

- **Convertible loan.** An investor providing a loan to a project company (startup) may be able to return upon its request the invested funds in the form of a share in the charter capital of the company;

- **Option agreement**. The Law allows to enter into option agreements that should contain certain mandatory provisions regarding the shares of in the charter capital of the DC resident;

- A tool such as **Liquidation Preferences** provides preferences for creditors and the members of the DC resident in the event of its termination or other circumstances;

- **Liquidated Damages**. It is compensation provided by an agreement to which the DC resident is a party, or an agreement regarding the share in the authorized capital of the DC resident, which may require one party to pay the other party a compensation of expenses incurred by such party or a third party in connection with the performance or non-performance under such agreement, or circumstances that are not related to the breach of obligations by the party that undertakes such obligations, including costs incurred in connection with the inability to perform the obligation or perform certain actions;

- **Warranties & Indemnities** provide protection to investors through the institution of compensation for losses, if the state of the company was not as promised, and some defects were not reported to the investor before the agreement.

- It will mean the possibility of establishing compensation in favor of the party that relied on false assurances and the possibility to oblige the other party to pay compensation in the event of occurrence of the circumstances stipulated by the agreement which are not related to breaching of obligations.

- Such compensation shall be paid regardless of the intent and fault of the person who undertakes to pay the compensation.

- **Outsource management.** The management functions are performed by a separate management firm, which can be, for instance, a professional development team, it will help the investors, startups, incubators to perform more comfortable control on the management processes.

SPECIAL TAX CONDITIONS

Specific taxation regime for the DC residents will be implemented after the Draft Law No. 5376[6] will be adopted and will enter into force. Currently, this draft law has passed the first reading and is being prepared for the second (final) reading. The Draft Law No. 5376 introduces the following tax regime:

<u>Labor taxes</u>

1. 5% personal income tax (in comparison with 18% under a general basis).

2. 2% single social security tax (in comparison with 22% under a general basis).

3. 1.5% military tax.

<u>Taxes on the company and its members</u>

1. 9% on "withdrawn capital" or 18% on profit (the object of taxation is chosen at the discretion of the company).

2. 0% on the income of an individual received as dividends if they were not distributed for two or more years.

<u>To stimulate "angel investments"</u>

1. tax allowance (from personal income tax) on the amount of investment in Ukrainian startups.

2. 0% on the income of an individual from the sale of shares in a startup if it's owned for more than a year.

CONCLUSION

Diia City is not another law for IT professionals, it is a complex of instruments for changes in all Ukraine economy. It is a huge attraction instrument for investors. If you have an IT business or want to create an IT startup in Ukraine, the DC is the best place where your company should be registered. The state-guaranteed most-favored-nation regime, flexible conditions of employment, the possibility of implementation of the features of English contract law and best corporate practices, as well as reduced taxation will help successfully work in Ukraine and be highly competitive worldwide.

4 *"Negative" criteria mean certain restrictions towards potential DC residents such as: to be registered under the laws of Ukraine; not to be a non-commercial organisation; not to be owned by a Russian resident; not to undergo liquidation or bankruptcy procedures; not be involved in gambling activities and others.*

5 *Art. 429 of the Civil Code of Ukraine.*

6 *Draf Law of Ukraine "On Amendments to the Tax Code of Ukraine regarding Stimulation of Development of Digital Economy in Ukraine"*http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=71663

EVERYTHING YOU NEED TO KNOW ABOUT LEGALIZATION OF CRYPTO ASSETS IN UKRAINE

Mr. Maksym Kuzmenko
Legal Associate

Mr. Bogdan Nykytiuk
Legal Associate

ABSTRACT

In this article you will find the relevant data on the current virtual assets' regulatory status in Ukraine, legislative proposals for legal recognition and taxation of cryptocurrencies transactions, prospects for the development of the Ukrainian virtual assets market regulation, maintenance of its transparency and efficiency and enhancement of economic climate.

Key words: Ukraine, Virtual Assets, Cryptocurrencies, Taxation, Permit, Regulation.

INTRODUCTION

On 8 September 2021, Ukrainian Parliament adopted the draft Law No. 3637 "On Virtual Assets" (the "**Draft Law**"), which introduces a basic regulation regarding all virtual assets in Ukraine[1]. The Draft Law allows both Ukrainian and non-resident companies to provide its crypto-related services under the Ukrainian law. The Draft Law is to be signed by the President of Ukraine and will enter into force once the respective amendments to the Tax Code of Ukraine regarding taxation of transactions with virtual assets take effect.

The Draft Law establishes only general provisions regarding virtual assets' ownership, conduct of business activity related to virtual assets, their circulation, and liabilities.

The Draft Law does not contain a term "crypto asset" but introduces the term "virtual asset" (the "**VA**") which shall cover any type of crypto asset. Under the Draft Law, a virtual asset means a set of electronic data which has certain value and exists in the system of virtual assets circulation[2].

GENERAL LEGAL FRAMEWORK

The crucial thing is that the Draft Law defines a VA as just an asset and stipulates that it cannot be used as an instrument of payment or be exchanged for other assets, goods or services[3]. The Draft Law introduces two types of VA - secured and unsecured virtual assets[4].

A secured VA means an asset which is secured by fiat currency, securities or any type of offline asset and certifies property or non-property rights, inter alia, right of claim on other objects[5]. This type of assets may include stable coins (namely USDT, BUSD etc.), liquidity provider tokens and securities.

The Draft Law also sets forth the following special terms in respect of secured VAs:[6]

1. In case the Ukrainian legislation prescribes special terms in respect of the form or essential terms of transaction regarding VA's security, such special terms shall be met during transaction towards secured VAs;

2. Limitations in respect of circulation of certain assets shall extend to the respective VAs secured by such assets.

Unsecured VAs include all other types of cryptocurrencies and crypto-based assets, namely non-stable coins (Bitcoin, Ethereum etc.), non-fungible tokens etc.

In accordance with the Draft Law, ownership of VA means a right of free possession, management, and usage of VA and the respective key to such VA.

A person is an owner of a certain VA if he/she possesses a key to the VA. In terms of crypto assets, it means that the right of ownership is substantiated by possession of a certain online or hardware wallet. Exception to this rule applies where (1) key to VA or certain VA is transferred to a third party for storage purposes; (2) VA is transferred to a third party pursuant to the law or under the court order and (3) VA has been obtained by a third party by illegal means[7].

The Draft Law guarantees participants of VA market certain basic rights: freedom of transaction, the right to receive full information from providers of VA-related services, proper quality of services related to VA circulation, personal data protection and court protection of VA rights.

Apart from the basic rights, the Draft Law also grants participants the right to freely determine VA prices and to open and use bank accounts for VA-related transactions[8].

It is worth noting that the Draft Law shall enter into force on the date of introduction of amendments to the Tax Code of Ukraine on taxation peculiarities of transactions with virtual assets.

RULES FOR PROVIDERS OF VA-RELATED SERVICES

The Draft Law introduces regulation for commercial services related to secured and unsecured virtual assets. Companies will be entitled to provide the following types of VA-related services[9]:

- storage and management of VAs;
- exchange of VAs (for another VAs or fiat funds);
- transfer of VAs;
- intermediary services related to VAs (including initial cryptocurrency offering or sale of Vas).

Any company intending to provide the aforesaid services shall obtain permit in the State Register of Providers of VA-Related Services (the "**Register**"). Should the company intend to provide several types of the mentioned services, it shall obtain a specific permit for each type of services rendered.

Detailed requirements for the respective permitted procedures will be introduced by the new state body which shall be created within 6 months from the date of the entry into force of the Draft Law (the "**State Body**")[10].

The Draft Law sets major criteria for companies intending to be providers of VA-related services (the "**Provider**")[11]:

- executives and founders of an applicant shall have an impeccable reputation as required by AML compliance rules and anti-terrorism laws;
- an applicant shall disclose its ownership structure and ultimate beneficiary owners;
- an applicant shall develop and implement internal procedures of financial monitoring and other rules regarding AML and anti-terrorism procedures;
- an applicant shall develop and implement rules of personal data processing.

The State Body shall decide on the received applications within 30 calendar days[12].

1 *Online card of the draft Law "On Virtual Assets", https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=69110*
2 *Article 1 paragraph 1 of the draft Law of Ukraine "On Virtual Assets".*
3 *Article 4 paragraph 7 of the draft Law of Ukraine "On Virtual Assets".*
4 *Article 4 paragraph 1 of the draft Law of Ukraine "On Virtual Assets".*
5 *Article 1 paragraph 4 of the draft Law of Ukraine "On Virtual Assets".*
6 *Article 8 of the draft Law of Ukraine "On Virtual Assets".*
7 *Article 6 paragraph 3 of the draft Law of Ukraine "On Virtual Assets".*
8 *Article 9 paragraphs 4 and 7 of the draft Law of Ukraine "On Virtual Assets".*
9 *Articles 10, 11, 12 and 13 of the draft Law of Ukraine "On Virtual Assets".*
10 *Article 16 of the draft Law of Ukraine "On Virtual Assets".*
11 *Article 17 paragraph 6 of the draft Law of Ukraine "On Virtual Assets".*
12 *Article 20 paragraph 8 of the draft Law of Ukraine "On Virtual Assets".*

In case of successful registration, the applicant receives a permit to conduct the respective VA-related service for 1 year[13].

The Provider shall notify the State Body of any changes to the data contained in the Register within 10 business days from the date of such changes[14].

The important thing to remember is that the permit obtained by the Provider may be cancelled in case the Provider committed two violations within one calendar year. Although the Draft Law shall not specify the nature of said violations, it is fair to assume that it implies violations related to VA, AML and anti-terrorism regulations as well as regulations regarding personal data processing.

LIABILITY

The Draft Law shall establish financial liability of Provides for certain violations of the Ukrainian laws, namely[15]:

- Provision of VA-related services without respective permit – entails a penalty of UAH 34,000 – 85,000 (circa USD 1,300 – 3,300);
- Provision of VA-related services other than those for which the permit is obtained – entails a penalty of UAH 17,000 – 85,000 (circa USD 650 – 3,300);
- Submission of an information known to be inaccurate or unreliable attached to the application for a permit – entails a penalty of UAH 17,000 – 34,000 (circa USD 650 – 3,300);
- Late notification of the State Body of changes to the data contained in the Register – entails a penalty up to UAH 17,000 (circa USD 1,300);
- Failure to submit the comprehensive report on VA-related services – entails a penalty up to UAH 34,000 (circa USD 1,300);
- Late compliance or failure to comply with decision of the State Body – entails a penalty of UAH 17,000 – 85,000 (circa USD 650 – 3,300);
- Failure to comply with requirements for initial VA offering – entails a penalty of UAH 17,000 – 85,000 (circa USD 650 – 3,300).

The said penalties shall apply to violations committed after the expiration of three months from the date of introduction of the Register[16].

TAXATION OF CRYPTOCURRENCIES TRANSACTIONS

In recent years, the Ukrainian tax authorities in their individual clarification letters took the unequivocal position in this regard – cryptocurrencies transactions are treated as the business activity and any income from such transactions must therefore be taxed with 18% personal income tax and 1,5% military levy.

Notwithstanding the above, such straightforward approach is not reflected in the relevant court practice; the total amount of court decisions with reference to the word "cryptocurrency" in their texts are a little over 100[17], whereas most of them relate to criminal or commercial litigation and only a few are tax disputes with regulatory authorities. Such insignificant number of court proceedings shows that the position of the tax authorities is rather idle in this respect and cryptocurrencies transactions may in fact be treated as part of shadow economy in Ukraine.

In terms of legislative initiatives, the latest draft law[18] submitted to the Ukrainian Parliament for consideration on amendments to the Tax Code of Ukraine regarding taxation of transactions with crypto assets sets forth the following taxation rules:

- income from cryptocurrency transactions, defined as the positive difference between the income received by the taxpayer from the sale of cryptocurrencies and the costs associated with their acquisition and/or creation, shall be imposed with 18% corporate income tax (for enterprises);
- for individuals, investment income from the sale of cryptocurrencies shall be imposed with 5% personal income tax (for a period of 5 years);
- sale of cryptocurrencies as well as intermediary services related to the creation and circulation of VAs shall be considered as non-taxable with the Ukrainian VAT.

FURTHER LEGISLATIVE WORK

Considering that the Draft Law shall establish only general provisions regarding transactions with VAs, detailed regulations as well as oversight of the VA market shall be exercised by the State Body, the National Bank of Ukraine and the National Securities and Stock Market Commission of Ukraine.

The State Body will be responsible for future policymaking, normative work, control over VA circulation, rulemaking for providers of VA-related services, defense of rights of VA market participants, imposition of penalties and oversight of participants' compliance with AML and anti-terrorism rules, and consider cases of violation of VA-related legislation and also issue penal notices and charge penalties if necessary.

CONCLUSION

In the face of the worldwide emerging virtual assets market, Ukraine is becoming one of the first states to adopt clear and precise legislation. Transparent regulation of virtual assets would allow potential players to compete in the Ukrainian market without prejudice to the judicial remedy for offences against their ownership rights on virtual assets. The entry into force of the Draft Law and introduction of the corresponding amendments to the Tax Code of Ukraine are also expected to enhance the investment climate by strengthening confidence of domestic and foreign investors due to the introduction of unified rules for the circulation of virtual assets in Ukraine, reduce the share of the shadow economy associated with investments in virtual assets, and help create the necessary and yet quite sufficient prerequisites for attraction of additional revenues to the State Budget of Ukraine.

13 *Article 20 paragraph 8 of the draft Law of Ukraine "On Virtual Assets".*

14 *Article 20 paragraph 15 of the draft Law of Ukraine "On Virtual Assets".*

15 *Article 24 paragraph 1 of the draft Law of Ukraine "On Virtual Assets".*

16 *Paragraph 2 of the Chapter 6 of the draft Law of Ukraine "On Virtual Assets".*

17 *According to the Ukrainian Unified State Register of Court Decisions: https://reyestr.court.gov.ua/.*

18 *Online card of the draft Law "On Amendments to the Tax Code of Ukraine and other laws of Ukraine on taxation of transactions with crypto assets", http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=67423*

İSTANBUL OFFICE

9 Mayıs Cad. Dr. İsmet Öztürk Sok.
Elit Residence Kat: 4-10-19-29
Şişli 34360 İstanbul, Türkiye

LONDON OFFICE

Golden Cross House
8 Duncannon St, Charing Cross
London WC2N 4JF, UK

AMSTERDAM OFFICE

Singel 250
1016 AB Amsterdam
The Netherlands

MOSCOW OFFICE

Empire Tower, Presnenskaya nab. 6
str. 2, floor: 47 office: 4727
Moscow, Russia

CASABLANCA OFFICE

Les Alizés Bureau No:102, 1er Etage,
Lotissement La Colline II, No:33
Sidi Maarouf Casablanca, Morocco

KYIV OFFICE

Silver Breeze Business centre 1v,
Pavla Tychyny Av., Office 434
Kyiv, Ukraine 02152.

EN NAZALI
Tax & Legal