

Legal Environment for Foreign Investment in Belarus

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When compared to other countries of the former socialist block, Belarus market as an investment environment remains a terra incognita for most international businesses. Belarus so far is not a leader in the global investment rankings. Foreign investors operating in the country do complain about frequently changing laws, complicated taxation system, burdensome requirements related to reporting, price formation and salaries establishment, high penalties levied by numerous government authorities even for minor violations or mistakes committed in the course of business activities. However, we often note that even prudent investors sometimes demonstrate legal illiteracy or carelessness which prevent them from taking full advantage from benefits to investors offered by Belarusian laws, and avoid unnecessary expenditures and losses.

As a lawyer, I would agree that the major problem of the system is, naturally, its immaturity and instability. However, I also must give a credit to our lawmakers which have realised the importance of offering competitive and predictable legal environment to foreign investors, and now work hard on perfection of Belarus investment laws.

The cornerstone of Belarus investment legislation is the Investment Code adopted in 2001. Most regulations related to foreign investments, previously dispersed over many laws, decrees, ministerial resolutions, were consolidated in this legal act. The new Code contained major privileges and exemptions granted to both foreign and domestic investors, regulated provision of government support to investment projects and introduced new tools facilitating investment activity like concessions and direct investment agreements with the Republic of Belarus.

Other legal acts of utmost importance to the business of foreign investors in Belarus are several edicts and decrees of the President of Belarus, especially the following:

- Edict of the President of the Republic of Belarus # 262 dated 09 June 2005 on

Certain Matters Related to Operation of the Free Economic Zones on the Territory of the Republic of Belarus unified the investment regime in the six free economic zones established over the last 13 years in the major cities of Belarus. First of all, the same tax and customs duties exemptions (which previously could vary from zone to zone) were established for all export-oriented business in the free economic zones. Also, a minimal investment threshold for obtaining zone residency of USD 1 million was introduced, and borders of each free economic zone were confirmed.

- Decree of the President of the Republic of Belarus # 12 dated 22 September 2005 on High Technologies Park. This legal act was adopted with the purpose of creating a harbor (some 50 hectar large area in the eastern suburbs of Minsk, the national capital) with special legal regime promote development of software engineering businesses. The Decree granted significant corporate and personal income tax, import VAT and customs duties exemptions to the Park residents, as well as certain privileges related to labor migration, currency exchange, lease, and allocation of land plots. The High Technologies Park is now a very attractive destination for foreign investors in IT-business; its community now counts many world-famous brands.
- Edict of the President of the Republic of Belarus # 667 dated 27 December 2007 on Separation and Allocation of Land Plots improved procedure of obtaining land plots for implementation of investment projects by domestic and foreign businesses. Pursuant to the Edict, land can be granted to foreign investors for lease based on the results of the special auctions. Procedure introduced by the Edict is more transparent and straightforward then the one which existed previously.

Substantial incentives for investment activity in small towns are provided by the Decree of the President # 1 dated 28 January 2008 on Promoting Production and Sale of Goods. According

to Decree # 1, any company created after 01 April 2008 and operating in a town with population less than 50 000 people enjoys several material privileges for five years after incorporation. Such privileges include exemption from profit tax and some other duties in case of realisation of goods of own production, several other taxes and duties, as well as from mandatory sale of foreign currency. Furthermore, Decree # 1 provides that companies in small towns in which foreign capital exceeds USD 20 thousands are not affected by negative changes in laws, including changes of number and rates of taxes, and operate under laws effective as of the date of incorporation for five years after creation.

In the past few years, it became a common practice of the government to issue special Decrees to regulate status of specific large scale investment projects, especially in the area of real estate and construction. These Decrees, as a rule, provided about the same set of privileges and exemptions to the international developers venturing in Belarus related to importation VAT and customs duties, engagement of foreign labor force, allocation of land plots, approval of construction projects and designs.

The recently issued Decree # 10 of 06 August 2009 on Creation of Additional Incentives for Investment Activity in the Republic of Belarus has systematised this practice. This legal act further promotes direct investment agreements between the Republic of Belarus and investors by simplifying the procedure of conclusion of such agreements and specifying requirements concerning its terms and conditions. The agreement should, inter alia, contain provisions on the object and amount of investment, period of the project, liability of the parties, compensation of damages caused by unlawful actions of government officials, dispute resolution (which may be referred to a foreign court or international arbitral tribunal).

Investors acting on the grounds of investment agreements are provided with certain privileges and exemptions, which include allocation of land for lease

without conducting an auction, exemption from customs duties and VAT with regard to goods imported for needs of the investment project, as well as exemption from duties for recruiting foreign labor. In order to facilitate implementation of long term construction projects the Decree also provides that investors may commence construction stipulated by the investment projects and simultaneously complete production of construction designs for specific stages of the project (which was not possible before).

The Decree will come into force in the beginning of November 2009; it does not apply to investment agreements concluded prior to that date.

Belarus is a party to a number of international agreements related to promotion and protection of foreign investors' business in the country, especially:

- International Convention on Settlement of Investment Disputes between States and Nationals of Other States of 1965
- Convention Establishing the Multilateral Investment Guarantee Agency of 1985
- New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958
- Bilateral double tax treaties with close to 60 countries
- Bilateral agreements on investments protection and promotion with countries that are Belarus' major trade partners

In mid-2008 Belarus declared an ambitious three year privatisation plan, according to which over 500 state-owned companies should be transformed into joint stock companies whose shares may be sold to foreign investors. Also, state-owned shares in close to 150 joint stock companies were put up for sale as well. Belarus long-awaited privatisation campaign stirred interest among the foreign investors, many of which are now eyeing targets in various industries of the national economy.

Legal framework for privatisation in Belarus is based on the following legal acts:

- Law on Divestment and Privatisation of State Property in the Republic of Belarus dated 19 January 1993
- Decree of the President of the Republic of Belarus # 3 dated 20 March 1998 on Divestment and Privatisation of State

Property in the Republic of Belarus

- Edict of the President of the Republic of Belarus # 575 dated 14 September 2006 on Procedure of Disposal of State Property
- several regulations concerning disposal of state property adopted by the State Property Committee (the national privatisation authority) and the Council of Ministers (the national government).

Belarus effective privatisation laws are criticised both by the experts and by the business community (domestic and international) for being outdated and inconsistent, not able to ensure a prompt, transparent, and effective privatisation of state property. Belarusian government has been quite successful recently in direct sales of telecom and several industrial companies to foreign investors, but some privatisation auctions produced unsatisfactory results for the bidders. The main reasons could be lack of transparency in privatisation procedure and considerably high expectations on behalf of the government regarding the purchase price and investment commitments to be undertaken by the foreign buyers.

However, Belarusian government is willing to reform the system: following recommendations given by the International Monetary Fund, it is planning in the near future to adopt a new privatisation law and establish a new Privatisation Agency to replace the currently existing State Property Fund. The new law is expected to eliminate unnecessary bureaucracy and establish more flexible privatisation procedures. The Agency should be granted a wider scope of powers related to disposal of the state property than the State Property Fund currently has.

At present, state-owned stock in the existing open joint-stock companies may be acquired under the following procedure.

Sale of shares in the companies owned by the Republic requires a respective decision of the President. Shares of the companies which are former enterprises of republican property are sold by the State Property Fund, and shares in the former municipal enterprises are sold by the municipal authorities.

Belarusian laws provide for several procedures of selling state-owned shares. The main ones are privatisation contests and auctions. Sale by other ways is possible, for example, if the President decides so in particular case.

Privatisation contest as one of the most commonly used privatisation procedures may be briefly described as follows.

The selling authority determines the initial price and other material conditions of the contest, and publishes a respective advertisement in republican mass-media at least 30 days prior to the date of the contest.

Bidders are to make a down payment in the amount declared by the selling authority and are provided for review with some target's documents, including last annual balance sheet, prospectus, and drafts of share purchase agreement and other agreements which should be concluded with the winner of the contest.

Potential investors submit the bids in sealed envelopes; if selling authority deems it necessary, additional documents and information may be requested. At an official meeting envelopes are opened, and decision on the winner should be made (under general rule, right after the envelopes are opened). Bidders should be notified of the decision within two days after it is made, and then share purchase agreement and related agreements are signed by the selling government authority and the investor.

Some of the major shortcomings in the procedure, as noted by foreign investors, is very limited information exchange. Bidders are not expressly provided by law with opportunity to carry out full legal, financial, or other due diligence of the targets. The timeframe for the procedure is not regulated by law either, but we have seen cases when it was so tight that investors had very scarce opportunity to establish what they were actually bidding for and what was the market price of the shares and how strong was the target's development potential.

Belarus investment and privatisation laws are undergoing a complicated reform which in the neighbouring countries was accomplished many years ago. Some say that "the train is already gone" and the country lost the opportunity to run the privatisation campaign before massive adverse changes in the global economy. On the other hand, Belarusian government has a unique opportunity to learn from mistakes made in the course of privatisation by other young market economies in the region, and attract investors who are especially interested in unexplored markets with high potential.