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**Review of the new law on subsoil and subsoil use**

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**Dear Ladies and Gentlemen,**

**We are sending you a piece of significant information that we hope might be extremely beneficial to your company.**

The draft law combines the principles of the Law of the RK in effect on "Subsoil and Subsoil use" of January 27, 1996 (further the Law on Subsoil) and the Law of the RK on "Oil" of June 28, 1995 (further the Law on Oil), and involves the provisions and requirements of certain governmental resolutions and other delegated legislation.

It is worth noting that one of the principles of the legislation on subsoil use is the "creation of favorable conditions for raising investments in the subsoil use operations sector". Although, in fact, the law toughens the conditions of carrying out operations on subsoil use, introduces certain provisions, which, quite the contrary, worsen the investment attractiveness of the mineral resources sector of Kazakhstan. On the other hand the project involves provisions that explain many matters on the application of law in practice.

We would like to point out some specific features of the proposed draft law.

### **1. Definitions and related provisions**

The draft law introduces two certain terms: "focusing on the rights to carry out operations on subsoil use" and "focusing on the rights provided by contract". The latter term is new and relates to "joint users of the license for subsoil use", which are related under Article 27 of the draft law to subsoil users (i.e. several Subcontractors) working under the same contract.

The draft law proposes to include in the Law the definitions of, and provisions on, the operating state agencies, which control the operations on subsoil use and their functions. These agencies are the Inter-Agency Committee on Issues of Exercising by the State of its Pre-emptive Right, the Central Committee for Exploration and Production (CCE) of Mineral Resources, and the Commission of Experts on Subsoil Use Issues. Except for the common definitions of "exploration and production", it is proposed to introduce more detailed definitions of the particular stages the subsoil use operations involve – "appraisal program", "prospecting works", "production testing", "test production", "pilot well program", and "commercial production". Also, detailed definitions and provisions concerning the project documentation are proposed to be introduced into the new law, namely: project of test production, project of appraisal program, project of test production, project of prospecting works, project of production testing, project of field development, and the initial field development plan.

### **2. Provisions on the pre-emptive right of the state**

There is a new Article in the draft law called "Pre-emptive right of the Republic of Kazakhstan in the field of operations on subsoil use". The Article involves provisions of the effective law on subsoil use and the pre-emptive right of the state to:

- Extraction of mineral resources, and
- Acquiring the right of subsoil use, participating interest (shares) in a subsoil user's business or legal entity that directly or indirectly influences the decision-making process of the subsoil user.

We also would like to note that the draft law has **material changes** in the pre-emptive right of the state to acquiring the right to subsoil use operations or participating interest (shares) in the subsoil user or the entity that influences the decision-making of the subsoil user.

Foremost, we bring your attention the fact that such **PRE-EMPTIVE RIGHT NOW APPLIES TO ANY KINDS OF TRANSACTIONS!** Article 71 of the Law on subsoil use in effect points out that the pre-emptive right shall apply in case of alienation by a subsoil user of its license for subsoil use or participating interest (shares) in a subsoil user or entity that influences its decision-making process, and herewith any kinds of transactions are contemplated. Meanwhile, the indication that the state shall exercise its right for subsoil use on the terms and conditions that are not worse than those offered by other buyer's means that **Article 71 of the Law on subsoil is applicable only to transactions on purchase/sale.** Article 12 of the draft Law explicitly sets forth that the pre-emptive right of the state apply to cases, when the right to subsoil use or a participating interest (shareholding) in the subsoil user or the entity that influences the decision-making of such subsoil user are **alienated on a gratis and non-gratis grounds.**

New Article 13 is introduced in the Law that governs the procedure for exercising by the state of its pre-emptive right. According to the article, the pre-emptive right is applicable to the following entities:

- Entities, which alienates their right for subsoil use;
- Entities that transfer their right to subsoil use or a facility related to such right in the authorized capital of a legal entity;
- Entities that alienate facilities, which relate to the right to subsoil use.

Such facilities that relate to the right to subsoil use involve:

- A) Participating interest (stake) in a subsoil user;
- B) Participating interest (stake) in a legal entity that:
  - Carries out the principal activities related to subsoil use in Kazakhstan (even the draft law does not provide what exactly is contemplated under “principal activities related to subsoil use”), and
  - Has the possibility to directly or indirectly define the decisions of a subsoil user or influence such decisions.

It was noted above that the state has the pre-emptive right with regard to any gratis or non-gratis transaction related to alienation of the right to subsoil use or any above-mentioned facility related to such right.

The draft law provides for the following procedures for exercising the pre-emptive right:

- 1) Submission of the relevant application to the Competent body;
- 2) The Competent body submits the application and relevant materials attached for consideration to the Inter-agency Committee (IAC) within 30 business days;
- 3) IAC reviews all the material within 20 business days, and:
  - In the event of deciding to acquire the alienated facility, the IAC shall submit the minutes of the meeting with the decision taken to the public agency or national company that are authorized to acquire the alienated facility on behalf of the state. Furthermore, the public agency or national company authorized to acquire the alienated facility on behalf of the state shall make a decision within 15 business days to acquire or refuse to acquire it. We would like to point out that despite the positive decision of the IAC, the public agency or national company can make a decision to refuse to acquire the alienated facility. If a decision is made to acquire the alienated facility, the public agency or national company

shall complete the transaction not later than six (6) months from the time of making such a decision.

- In the event of refusing to acquire the alienated facility, the IAC shall submit the minutes of the meeting with its decision to the Competent body.

The same as in the law in effect, the draft law provides that the state exercises its pre-emptive right on the terms and conditions that are not worse than those offered by other buyers. In the case of gratis transactions, the acquisition by the state of the right to subsoil use or the related facility will be effected at a market price, to be defined in accordance with the laws on appraisal activities. The Law on Appraisal Activities gives a definition of “market value”, stating that this is the most probable price, at which a facility can be alienated in the conditions of competition, providing that the parties act without coercion and in their own interests, and have full information on the facility.

Thus, we can make a conclusion that when exercising the pre-emptive right on a gratis transaction, the state will make payment to the party that alienates the facility. If so, the state will exercise its right to the price, to be defined on the basis of competitive prices for the facility so alienated, which the other concerned parties could offer. On the other hand, it is unclear, how the valuation process will be conducted, if the right of the subsoil use or associated facilities are transferred under the gratis transaction as part of assets. Also, it is unclear, how the valuation would be made, if the gratis transaction is carried out outside Kazakhstan, when the alienated party is a foreign subsoil user or foreign participant of a foreign subsoil user?

### **3. Changes in the conditions of requisition of mineral resources**

In Article 15 concerning the right of the state to the requisition of mineral resources the draft law proposes some **changes in the terms of requisition**. There is two aspects that were changed:

- 1) Entities, to which the requisition can be made.

If under the current Law on Subsoil in effect the requisition shall be made to **every** subsoil user, then now under the draft law to **any** subsoil user. I.e. when applying the draft law in practice, there is a risk that the Government may make a decision on the requisition to, for example, only a certain subsoil user or certain subsoil users. The wording of the new norm sets forth that the requisition shall not obligatorily be made to national companies or facilities, with which subsoil users have relevant relations.

- 2) Payment of compensation to a subsoil user for requisition of minerals resources.

In the current law on subsoil in effect, the compensation for mineral resources is provided at the world market prices. The draft law provides that the compensation shall be paid at prices in effect for the last month before the requisition. It is not specified what prices should be taken as the basis, the prices of the domestic or world market?

### **4. Extension of the functions of the Commission of Experts and grounds for getting authorization from the Competent Body**

Article 22 of the draft law sets forth the functions of the Commission of Experts on Subsoil Use Issues. We should pay special attention to the fact that **now there are more cases**, when the Commission of Experts gives proposals to the Competent Body as to issue or refuse to issue the relevant authorizations for subsoil use. Except for cases specified in Article 14 of the

current Law in effect, the Commission of Experts now considers applications for the issue of authorization in the following cases:

- 1) Transfer in pledge of a participating interest (stake) in a legal entity that has the relevant right for subsoil use;
- 2) Participation in public auction on selling of:
  - The right to subsoil use (its part), participating interest (stake) in a subsoil user, in the event of charging, including when in pledge, such right to subsoil use (its part), participating interest (stake) in the subsoil user;
  - Bankruptcy assets, which involve the right to subsoil use (its part), participating interest (stake) in a subsoil users, when carrying out the bankruptcy procedures;
- 3) Acquiring by the pledge' of the pledged right to subsoil use (its part), participating interest (stake) in the subsoil user, in the event of announcement of the bids as failed on selling the pledged right of subsoil use (its part), participating interest (stake) in a subsoil user;
- 4) Acquiring of the right to a shareholding in a subsoil user, as a result of increase in the authorized capital, in the event of admitting a new participant in the legal entity;
- 5) Initial public offering on the organized securities market of stocks of a subsoil user and legal entities that have participating interests (stakes) in legal entities – subsoil users;
- 6) The right to the initial public offering on the organized securities market of stocks of such legal entities issued as a follow-on offering.

The question is still open how the legal norm will operate with regard to the follow-on offering by foreign joint stock companies, which have a subsidiary-subsoil user in Kazakhstan?

#### **5. Changes in the guarantee of the right to subsoil use**

Article on **guarantee of the right to subsoil use also underwent considerable changes** (Article 28 of the draft law). Firstly, the draft law sets forth that the changes in the law shall not apply to subsoil users, if such changes “directly worsen **the results of commercial activities** of subsoil user”. The draft law does not contain the following norms:

- What is the result of commercial activities?
- Who will define this result – a subsoil user itself or jointly with the competent body, by engaging some financial experts?
- How will this result be defined – under some agreement, opinion, by the decision of a certain public agency or by court decision?
- How will the fact of any worsening be defined, by which parameters?

Secondly, the draft law establishes that **the tax regime**, which is specified in the contract of subsoil use, **can be retained** within the entire term of the contract validity, **if the contract is approved by a separate law**. Thus, we can conclude that:

- Earlier concluded contracts of subsoil use, with regard to which the principle of the tax regime stability is operating currently, and
- Contracts concluded since 2004, with regard to which the general tax regime with no stability provided operates
- Contracts concluded after coming into effect of the new tax code and new law on subsoil

can have a stable tax regime, if such contract is approved by a separate law of the RK. On the other hand, the practical implementation of the given condition, namely the approval of the contract by a separate law, is unfeasible without strong political support. It is evident that the

stability will concern those contracts with the participation of national companies, which have a greater chance to get the needed law on approval of particular contracts of subsoil use from Parliament.

## **6. Innovations in the governing of transfer of the right to subsoil use**

The Issues of **transfer of the right to subsoil use also have new rules.**

The heading of the new Article 34 of the draft law is called “Transfer of the right to subsoil use and associated rights”. It is known that under the current Law on Subsoil in effect one might contest the application of certain norms (for example paragraph 10 of Article 14) regarding the transfer of a participating interest (stocks) in a subsoil user, including the transfer into the authorized capital, since the right to subsoil use means the rights of the Contractor, a party under the Contract of subsoil use, but not the rights of its participants (shareholders) etc. The new draft law refers such rights of the participants, shareholders, and pledge’s to the category of “rights associated with the right to subsoil use”. However, despite the relatively clear and comprehensible, from the legal point of view, heading of Article 34 of the draft law, paragraph 1 of Article 34 of the draft law lists cases of transferring the rights to subsoil use. Paragraph 2 of Article 34 of the draft law, proceeding from literal interpretation of the definition of the right of ownership, is applied only to the transfer of the right to subsoil use itself, not associated rights. It is incorrect to legally specify that the right to subsoil use is transferred by alienation of a participating interest or stake in a subsoil user. The same can be said with regard to other so-called by the law-makers “ways” of transferring the right to subsoil use.

The draft law provides for **additional cases, when the authorization of a Competent body is required.** Besides those specified in the current Law in effect (Article 14), the authorization of the Competent body is required in the below cases:

- Recourse of the right to subsoil use, participating interest (stake) in a subsoil user, including those pledged (i.e., for example, this norm can be applied in the event, when any third person recourses the right to subsoil use under the court decision in order to liquidate debts and other liabilities of the subsoil user. But, to exercise such a decision of the court the authorization of a competent body is required. The draft law provides for the procedure of recourse, described in Article 39);
- Emergence of the right to a share in a subsoil user, as a result of increase in the authorized capital in the event of admittance of a new participant in the legal entity (i.e. the given norm shall not apply to JSC and parent companies of the subsoil user);
- The initial public offering of stocks of a subsoil user on the organized securities market and legal entities that have participating interests (stakes) in legal entities – subsoil users, including the initial public offering on the organized securities market of stocks of such legal entities issued as a follow-on offering;
- Transfer in pledge of a participating interest (stake) in a subsoil user (earlier, the authorization was required only for the pledge of the right to subsoil use);
- The transfer of the right to subsoil use or of a participating interest (stake) in subsoil use as succession in the event of reorganization of the subsoil user or participant (shareholder) of the subsoil user (Article 36 of the draft law).

The draft law **defines more specific cases, when the authorization of a competent body is not required.** Such cases involve:

- 1) Transactions on alienation of stocks and or derivative securities of a subsoil user, which are traded on the organized securities market;

- 2) Transferring in whole or in part the right to subsoil use or participating interest (stake) in a subsoil user in favor of a 100 per cent subsidiary;
- 3) Transferring, wholly in whole or in part the right to subsoil use or participating interest (stake) in a subsoil user between legal entities that are 100 per cent affiliated companies. The draft law points out that 100 per cent affiliated companies are those, 100 per cent of the shareholding (a 100% stake) of which directly or indirectly is held by one entity.

Also, Article 35 of the draft law **describes the procedure for getting an authorization** from the competent body. Namely, the draft law describes in detail the following:

- Procedure for applying to the Competent body;
- Data, to be obligatorily specified in the application;
- The term for consideration of the application and relevant materials attached **is extended from the currently effective 45-day period to 65 business days;**
- The conditions are set forth, and if they are met, the competent body shall issue the relevant authorization. One of the conditions is the incompliance of:
  - A) The applicant with the requirements set to subsoil users and claimants to the right to subsoil use;
  - B) Application produced with the requirement set forth in the draft law.

It is clear that in case of revealing such incompliance, the competent body has to return the application without consideration and give a chance to the applicant to amend the document as necessary and again produce the application for consideration. However, the draft law does not describe what the competent body shall do in such case – to return the application and any materials attached or to reject to issue the authorization.

**The draft law also contains a provision on a two year moratorium for the transfer of the right to subsoil use, but takes into consideration the amendments** with regard to exceptional cases. Thus, the moratorium shall apply to the following cases:

- Charging the right to use subsoil. Under the current law in effect, the moratorium is not applied only to the pledged right to subsoil use. The draft law provides for the wider range of possibilities of non-applying the moratorium.
- Reorganization of the subsoil user. Besides reorganization, the current law in effect points out also winding-up of the subsoil user.

### **7. Termination of the right of subsoil user**

A new article is introduced concerning the termination of the right to subsoil use (Article 38 of the draft law). Among evident **grounds for termination of the right to subsoil use (termination of the contract), the winding-up of the subsoil user is also specified.** When applying this article, certain risks are likely for the subsoil users in the case of reorganization by way of affiliation, merger or division, which provide for winding-up of one of the legal entities being reorganized.

### **8. Changes in the terms of conducting the bids for the right to use subsoil**

**The terms of conducting the bids** for the right to use subsoil are also changed.

- 1) The draft law describes in many details the procedure for conducting the bids and the content of the bid application.

2) The term between the date of announcement of the terms of bids and date of beginning to summarize the results of bids is amended from 3 months as in the current law in effect to 4 months as in the draft law. The term for summarizing the results of bids reduced from 2 months as in the current law in effect to 15 days as in the draft law.

3) The list of criteria, by which the successful bidder has to be selected, is reduced. Now there are only criteria proposed by the draft law:

- Amount of subscription bonus, and
- Amount of deductions to budget for the social sector development.

4) Under the current law in effect, in the event of recognition of the bids as failed, the conducting of repeated bids is provided for. The draft law provides also for the possibility of changing the bids documentation and conducting repeated bids. And in the event of the repeated bids with only one bidder, the Competent Body may conclude a contract with this bidder through direct negotiations.

5) The draft law contains an article about the recognition of the bids as invalid. Article 45 of the current law in effect specifies only cases, when a contract can be recognized as invalid. We would like to note that besides the provisions of Article 45 of the current Law on Subsoil in effect, the draft law now specifies that the designedly false information that affected the decision on selecting the successful bidder also involves “the change in composition of the participants or shareholders of the legal entity that was recognized the successful bidder before the date of entering into the relevant contract”. In other words, if LLP “X” becomes the successful bidder, and, for example, upon expiry of some period of time after conducting the bids one of the participants (founders) of this LLP “X” sells its share in LLP “X”, such change in composition of the participants the Competent Body shall recognize as misleading information that affected the decision on selecting the successful bidder. In the given wording of the draft law there is a contradiction, since the falsity of any data supposes that the bidder knows about the discrepancy of some data to real facts as of the time of submission of the bid application, and deliberately and knowingly fills in and leaves such data in the application. With such characteristics of “misleading information” the change in composition of the participants (shareholders) of the successful bidders after the ending of the bids, i.e. in the future, cannot be regarded as misleading information!

### **9. Changes in the control over the granting of the right to subsoil use through direct negotiations**

Some provisions concerning the granting of the right to subsoil use through direct negotiations are now brought out into a separate article. We would put a special emphasis on the fact that the law-maker provides for the following provision in the draft law:

“In the event of the bidder’s disagreement with the terms proposed by the competent body, the competent body shall make a decision to refuse to grant the right to subsoil use through direct negotiations, whereas the bidder that discovered and made an appraisal of the deposit shall lose its pre-emptive right to enter into the contract of production, and further the given area (areas) are offered by the competent body for bids”.

I.e. we have that the state in that the person of the competent body can dictate unilaterally the terms and conditions of the contract. Moreover, the draft law does not explicitly and clearly specify, in the case of disagreement with exactly what conditions the Competent Body can refuse to conclude the contract for production.

Nevertheless, the draft law provides that in case of refusal by the Competent Body to conclude the contract for production, the bidder will be refunded its expenses borne in connection with the contract of exploration and production of the given area and commercial discovery. Such expenses will be refunded by the new successful bidder for the given area within the term, to be not exceeding 5 years from the date of conclusion of the contract for production.

### **10. Changes in the contracts of subsoil use**

With regard to contracts of subsoil use, we would like to note the following provisions of the draft law on subsoil:

- 1) Among the types of contracts of subsoil use **there is no product sharing agreement**. I.e. from the time of taking effect for the draft law the product sharing agreement as a type of contract for subsoil use will not exist and be concluded;
- 2) It is obvious that on each type of the subsoil use there will be one's own model contract;
- 3) In a contract, the mandatory condition will be the obligation of the subsoil user to ensure **the equal conditions and compensation** for labor to Kazakhstani personnel, compared to that of engaged expatriate personnel, including personnel engaged for subcontracting works. I.e. the **obligation is applicable** not only to the subsoil users, but **its subcontractors as well**. The violation of this obligation either by a subsoil user, or its subcontractor can entail the termination of the contract of subsoil use. It is possible that the Competent Body will require to include the given obligation in earlier concluded contracts of subsoil use and those currently in effect, in the event of making any amendments to them (for example, those related to the extension of the term of exploration, changes in the contracted area etc.).
- 4) The draft law provides that one of the terms and conditions of the contract is **penalties for failure to fulfill the contractual obligations with regard to payments of non-tax nature**. Thus, for the failure to fulfill the obligations, for example on, financing the training of Kazakhstani personnel or development of social infrastructure (and other similar obligations), the subsoil user shall pay the penalty. The RK Code on administrative violations also provides for the responsibility for failure to fulfill the contract obligations (Article 264). I.e. for violation of financial terms of the contract, the subsoil user can be brought to two kinds of responsibility – civil responsibility and administrative responsibility. The draft law does not take into consideration the fact that the target indications and expenses are laid as a basis of obligations in the project documents, working program, annual working program, and other documents. The market conditions change constantly with ups and downs. Many conditions and target indications planned by a subsoil user do not depend on it, but market and terms offered by suppliers of goods and services. In such case, if at the beginning of the year some financial expenses are planned, and within the year they turn out to be less (for example, the supplier of equipment delayed the delivery and the obligations of the subsoil user are thus extended to the next year), then the subsoil user will bear risks of liability to the state. Such risk of liability involves not only penalties, but possible withdrawal of the contract as well.
- 5) The contract provides for the condition, such as the **right** of the parties to the contract (subsoil user and Competent Body) to change the terms and conditions of the contract with the purpose of retaining a balance of economic interests of the parties, reached as of the date of conclusion of the contract. Herewith, the draft law does not provide how this balance will be defined as of the date of conclusion of the contract and what parameters will

be used as a basis for that. In connection with above, we suppose that every subsoil user in its own interests and to avoid any ambiguities and risks has to stipulate in its contract the provisions on the parameters in cases if the balance of economic interests of the parties would change. For example, the volumes of domestic and export supplies of mineral resources, the cost of mineral resources etc. can be specified as the parameters of balance of the economic interests of the parties.

6) The current law on subsoil in effect provides for harmonization of the contract working program simultaneously with the contract analysis. The draft law sets forth that the contract shall be concluded **on the basis of an approved working program** and project documents. I.e. all project documents and programs shall be approved before development of the draft contract of subsoil use.

7) **The number of mandatory approvals and examinations of the contracts has reduced** from the current 7 to 4. The draft law provides for going through three examinations (legal, economic, and environmental ones) and getting one approval from the body for exploration and use of subsoil. The draft law excludes examination for health and sanitary issues, mining and tax issues (that is likely the result of abrogation of the tax stability regime). **The term of conduction of examinations, to the contrary, increased** from one month to two months.

8) The draft law **provides a list of all project documents**, on the basis of which the operations on subsoil use will be carried out. The draft law contains the description of the said documents, procedure and the term of their reviewing and approval. In particular, the new law will contain provisions on the projects of prospecting works, appraisal program, production testing, commercial production and test, and initial field development plans.

9) **The terms of payment of the subscription bonus are also changed**. The draft law on subsoil contains provisions on the payment of the subscription bonus by stages:

- 50% shall be paid by the successful bidder within a month after announcement of the bid results;
- The other 50% shall be paid within a month after registration of the contract.

If the successful bidder fails to pay the first half of the subscription bonus, it will lose its right to conclude the contract. The competent body **may** annul the decision and conduct the bids again. The draft law also provides that in the event of failure to conclude the contract within the established time limits through the successful bidder's fault, the subscription bonus will not be refunded. Nothing is said in the draft law as to whether the subscription bonus will be refunded or not, paid by the successful bidder, in the event the contract is not concluded through the fault of a relevant public agency (for example, when the process of getting approvals and examinations is delayed, or any delays in conducting negotiations in connection with job shuffles of public servants etc.). It is also unclear, whether the paid subscription bonus will be refunded (like other tax and financial payments under the contract) in the event of recognition of the contract as invalid. Under the Civil Code of the RK, in the event of recognition of the contract as invalid, the parties shall return to the original state of matters and refund to each other any amounts received on the transaction. However, taking into consideration the zeal of public servants to share the public interests, the practical application of the civil code norms to such cases raised doubts.

10) The draft law **provides for particular time limits for entering into the contracts** of exploration, to be 18 months, and the contract of production, to be 24 months from the date

of announcement of the successful bidder and date of signing the minutes of the direct negotiations (in case of granting the right to subsoil use through direct negotiations).

11) **The provisions on the term of validity of the contracts are now changed** in the draft law:

- With regard to the contracts of exploration, only a six-year period is provided. Prolongation can be possible only in the event of commercial discovery and only for a period required for its appraisal. Thus, the current right of the subsoil users provided by the current law in effect to prolong twice the period of exploration for two years is now excluded in the draft law;
- With regard to contracts of production, there is no fixed term set. The term of validity of the contract of production now depends on the approved project of operations on production.

12) Article 70 of the draft law on subsoil now contains **the changed grounds for termination of the contracts of subsoil use**. Under the said Article, there are only three grounds for termination of the contract before time:

- Violation of obligations under the contract, Working Program, or project documents, made two or more times;
- Failure to comply with the provisions on the pre-emptive right of the state in the event of alienation of the right to subsoil use or any associated rights;
- Expiry of the contract term (the given item of the draft law was incorrectly included by the law-maker into the paragraph concerning the contract termination before time).

We would like to note one more thing that compared to the current Law on Subsoil in effect (Article 45-2), the new law entitles the Competent Body to terminate the contract if any violation of the contract, working program, or project documents are made. The current law in effect gives such right only in the event of a material breach of obligations, which are provided only by the contract or work program. Also, the current law on subsoil does not specify the number of violations and what violation can be deemed material. Thus, compared to the current law, the draft law contains tougher terms for subsoil users. Any violation by it of the contract, Working Program, plan of works can serve as a ground for the Competent Body to terminate the contract unilaterally.

The draft law also provides for the subsoil user's right to:

- Terminate the contract before time in accordance with the judicial procedure, or
- Refuse to fulfill the contract unilaterally.

A subsoil user can exercise such rights, if there are the grounds set in the contract. It is obvious that such grounds will be specified in a standard form contract, or should be specified by parties in the contract itself. If such grounds are not provided in the contract, this means that the subsoil user will not be capable to exercise such rights. On the other hand, the question is still open whether a subsoil user will be capable to use grounds provided for in the Civil Code of the RK for termination of the contract before time or not? The contract and draft law on subsoil does not contain (or cannot contain in accordance with the draft law):

- References to the grounds, provided not only by the contract, but civil code as well; and
- The draft law itself does not specify any obligations of the Competent Body or other public agencies that relate to fulfillment of the contract. Accordingly, once there are

no obligations, this means that there will be no violations of such obligations by the other party to the contract.

It is also unclear in the draft law, whether the breach of a balance of the economic interests of the party to the contract can be considered as the ground for the subsoil user to terminate it unilaterally or not? Whether the subsoil user is entitled, when terminating the contract on its own initiative, to claim damages or loss of profit to the Competent Body?

Thus, the draft law limits the possibilities for a subsoil user to terminate the contract unilaterally or to refuse to fulfill it, as well as limits the exercising of the subsoil user's rights in practice.

13) A new article (71) is introduced in the draft law, providing for the right of the Competent Body to revive the validity of the terminated contract. The grounds for revival of the contract can be:

- Invalidation of data, on the basis of which the Competent Body took a decision to terminate the contract (including the absence of documents, certifying the fulfillment of contractual obligations on reasonable grounds)
- Ascertaining and confirmation of reasons not depending on the will of the subsoil user, as a result of which the subsoil user failed to fulfill or fulfilled improperly the contractual obligations.

The draft law establishes the procedure and time limits for exercising by the Competent body of the right to revive the terminated contract.

### **11. Added obligations of the subsoil users**

The draft law amended the rights and obligations of the subsoil user with an obligation to develop and use high technologies, new businesses, processing enterprises, and pipelines, and to build and use infrastructure facilities. Such obligations have to be fulfilled by the subsoil user in accordance with provisions of the contract of subsoil use. Accordingly, if there are no such provisions in the contract (we mean those contracts concluded in the nineties), thus there are no relevant obligations of the subsoil user.

The draft law has an article, describing the obligation of a subsoil user to provide a temporary shut-down of the field in the event of suspension of the operations on subsoil use. Herewith, the law does not provide in what cases and on whose initiative the suspension of the operations on subsoil use can be made.

### **12. Disposal of trunk pipeline.**

A new article is introduced in the law that governs the questions of possession, use and disposal of a trunk pipeline. The draft law refers the pipeline and the rights associated with it to strategic facilities, namely:

- Trunk pipeline;
- Participating interests (stakes) of the persons, this can directly or indirectly define or influence the decisions of legal entities, the owners of trunk pipelines.

Such strategic facilities are of social and economic importance for the state, and transactions with them can affect the condition of national security. In connection with this, any transactions on encumbrance or alienation of the said facilities shall be carried out with approval of the

government. The state shall have the pre-emptive right to the other party to transaction in case of alienation of such facilities.

### **13. Issues of decommissioning of fields**

The new law contains an article, which describes in detail the provisions on decommissioning of fields. The draft law provides for provisions on mandatory development of the project of abandonment or temporary shut-down of wells at a field, for which there is the relevant license. The draft law shall be:

- Agreed and approved by 5 public agencies (controlling in the field of environment, survey and use of subsoil, industrial safety, administration of land resources, sanitary & epidemiological service)
- Approved by the subsoil user.

Some provisions on the decommissioning fund earlier existing in the legislative acts are also included in the draft law, namely:

- Using a banking deposit account for the purpose of creation of the decommissioning fund, and
- Using the means of the fund with permission of the competent body, which has an agreement with the public agency for survey and use of subsoil.

Any other provisions on the decommissioning fund (procedure, due dates for, and the amount of, deductions to the fund) shall be specified in the contract.

Thus, the new law on subsoil contains a number of material innovations and amendments to it. But some questions as to the future application of the new draft law and other statutory acts are still open. It is obvious that a lot of issues and problems will arise in practice, related to the further holding and application of the effective licenses and contracts of subsoil use, issued and concluded since the nineties.