



USAID
FROM THE AMERICAN PEOPLE

**MUNICIPAL HEATING
REFORM IN UKRAINE**

MUNICIPAL HEATING REFORM PROJECT (MHR)

INTERIM REPORT
ON THE STATUS OF CONSULTING SUPPORT WITHIN
THE PROJECT

January 2012

This document was produced for review by the United States Agency for International Development (USAID).
It was prepared by Law firm "JurEnergConsulting" within the USAID Municipal Heating Reform Project in Ukraine.

MUNICIPAL HEATING REFORM PROJECT (MHR)

INTERIM REPORT ON THE STATUS OF CONSULTING SUPPORT WITHIN THE PROJECT

ENERGY II IQC, TASK ORDER 9
Contract: EPP-I-00-03-00006-00

January 2012

This document was made possible through support provided by the U.S. Agency for International Development. The author's views expressed in this publication do not necessarily reflect the views of the United States Agency for International Development or the United States Government.

№	CONTENT	Page
1.	Report.....	4
2.	Annexes	
2.1.	Annex 1. Information about the draft Law of Ukraine “On Amendments to the Law of Ukraine “On Licensing of Certain Types of Economic Activities”.....	5
2.2.	Annex 2. Analysis of the Law of Ukraine “On Amendments to Certain Laws of Ukraine regarding the Procedure for Establishing Tariffs for Housing and Communal Services” and other regulatory legal acts regulating the issues of publishing decisions on establishing tariffs for housing and communal services.....	9
2.3.	Annex 3. Information about state registration of regulatory legal acts of the National Commission Performing State Regulation in the Communal Services Sphere and on its regulatory activities	13
2.4.	Annex 4. Presentation “State regulation in the sphere of heat supply, water supply and sanitation”.....	17
2.5.	Annex 4. Study “Legal framework for the establishment and operation of energy service companies in Ukraine”.....	33

REPORT

During the reporting period Law firm “JurEnergConsulting”, LLC has accomplished the following tasks:

1. Pursuant to sub-task 2.2 of the MHR Project working plan, we have prepared:

- comments and suggestions to the draft Law of Ukraine “On Amendments to the Law of Ukraine “On Licensing of Certain Types of Economic Activities” (on reforming of the system of licensing of economic activities) submitted by the Cabinet of Ministers of Ukraine for the review of the Verkhovna Rada of Ukraine (to be submitted to the specialized committee of the VRU);

- analysis of the Law of Ukraine “On Amendments to Certain Laws of Ukraine regarding the Procedure for Establishing Tariffs for Housing and Communal Services” (adopted by the VRU on 22.11.2011) and other regulatory legal acts regulating the issues of publishing decisions on establishing tariffs for housing and communal services;

- information about state registration of regulatory legal acts of the National Commission Performing State Regulation in the Communal Services Sphere and on its regulatory activities (prepared upon the request of the Department of strategic planning of the National Commission Performing State Regulation in the Communal Services Sphere);

- presentation “State regulation in the sphere of heat supply, water supply and sanitation” for the purpose of training of the staff of the National Commission Performing State Regulation in the Communal Services Sphere.

2. Pursuant to sub-task 6.3 of the MHR Project working plan, we have prepared the study “Legal framework for the establishment and operation of energy service companies in Ukraine”.

3. JurEnergConsulting specialists held a working meeting with the head of the Department of strategic planning of the National Commission Performing State Regulation in the Communal Services Sphere D. Arlachev and his deputy O. Korchmit concerning further co-operation according to the technical assistance plan. During the meeting the issues of legislative regulation in the sphere of housing and communal services, including heating and hot water supply, were discussed. During the meeting the procedural issues of the activities of the Commission were discussed, namely, the issue of regulatory activities of the Commission and state registration of its regulatory legal acts, concerning which the information was prepared and submitted to the Department.

Information

about the draft Law of Ukraine “On Amendments to the Law of Ukraine “On Licensing of Certain Types of Economic Activities”

On December 27, 2011 the Cabinet of Ministers of Ukraine registered the draft Law of Ukraine “On Amendments to the Law of Ukraine “On Licensing of Certain Types of Economic Activities” (reg. number 9654) in the Verkhovna Rada of Ukraine.

The draft law suggests amending the Law of Ukraine “On Licensing of Certain Types of Economic Activities” for the purpose of improving the system of licensing of economic activities.

The draft law defines the exclusive list of types of economic activities subject to licensing, states that licensing of a certain type of economic activities is introduced only in cases where such activities are associated with the use of limited natural resources and/ or may endanger human life or health, state security, environment and national interests.

Pursuant to article 7 of the draft law, the types of economic activities subject to licensing include:

transportation and supply of heat energy;

district water supply and sanitation.

Such type of activities in the sphere of heat supply as heat energy production is not included in the list of activities subject to licensing.

Please note that the provisions of the draft law on licensing in the sphere of heat supply do not fully take into account the norms of the Laws of Ukraine “On Natural Monopolies”, “On State Regulation in the Communal Services Sphere”, “On Heat Supply”, which cover the relations arising in the commodity markets of Ukraine, which are natural monopolies, and adjacent markets with the participation of natural monopolies.

Thus, the draft law does not take into account that the Law of Ukraine “On Natural Monopolies” envisages that the activities of the subjects of natural monopolies in the sphere of heat energy **transportation** and the following

activities of economic entities in adjacent markets are subject to regulation (including licensing):

production of heat energy in the amounts that exceed the level set by license conditions;

supply of heat energy.

In its turn, the Law of Ukraine “On Heat Supply” envisages that the following activities are subject to regulation including licensing:

heat energy production (except production of heat at CHPPs, atomic power plants and co-generation plants, power plants using non-conventional or renewable energy sources);

its transportation via main and local (distribution) heat networks;

heat energy supply in the amounts that exceed the level set by rules and conditions for performing economic activity (license conditions).

At the same time, the Law of Ukraine “On State Regulation in the Communal Services Sphere” envisages that the National Commission Performing State Regulation in the Communal Services Sphere performs:

licensing of economic activity on heat energy production (except production of heat at CHPPs, atomic power plants and co-generation plants, power plants using non-conventional or renewable energy sources);

its transportation via main and local (distribution) heat networks;

heat energy supply in the amounts that exceed the level set by rules and conditions for performing economic activity (license conditions).

The introduction of state regulation in the heat supply sphere is associated with the peculiarities of activities of the subjects of natural monopolies and economic entities that carry out activities in the adjacent markets, namely:

great social significance of their commodity products and services because these goods and services are consumed by all segments of the population, as well as enterprises, organizations and agencies;

consumers of goods and services of the subjects of natural monopolies are deprived of the right of choice of suppliers of these goods or services;

heat energy supply is performed through a connected network, i.e. pipelines.

Thus, state regulation (including licensing) of activities of the subjects of natural monopolies and adjacent markets in the sphere of heat supply is one of the means of state regulation of economic activities and is performed in order to protect the rights of consumers who use services of the subjects of natural monopolies and adjacent markets rather than limit competition in this sphere.

The right of consumers of commodity products and services to protect their rights is guaranteed by article 42 of the Constitution of Ukraine; consumer protection is declared in article 9 of the Law of Ukraine “On Natural Monopolies”.

Consumer protection is particularly important in the spheres where competition is inefficient or impossible due to the technological characteristics of production, nature of consumption of goods or services, i.e. in the spheres of activities of the subjects of natural monopolies and adjacent markets.

We should mention that state regulation stipulates control over the licensee’s activities regarding the level and structure of prices/ tariffs, volume of supply of commodity products in the market, incomes of the subjects of natural monopolies and adjacent markets, quality of their services etc., which also corresponds to the interests of consumers of goods or services.

Licensing of economic activities in the sphere of heat supply (production, transportation and supply of heat energy as separate activities) was launched in 2007.

The procedure for issuing licenses became transparent and public. The issues regarding the issuance, re-issuance, revocation of licenses were reviewed by the Licensing Commission established at the Ministry of Housing and Communal Services with the participation of applicants for licenses. The meetings of the Licensing Commission were open, the information about their conduct and adopted decisions was published on the web-site of the Ministry.

In 2010 the Verkhovna Rada of Ukraine adopted the Law of Ukraine “On the National Commission of Communal Services Market Regulation of Ukraine” (new name – “On State Regulation in the Communal Services Sphere”) stipulating the establishment of the special body of state regulation in the sphere of water, heat supply and sanitation – the National Commission of Communal Services Market Regulation of Ukraine (new name – the National Commission Performing State Regulation in the Communal Services Sphere).

On November 23, 2011 the National Commission Performing State Regulation in the Communal Services Sphere was established by Decree of the President of Ukraine № 1073/2011 and the Regulation on the Commission was approved.

According to article 4 of the Law of Ukraine “On State Regulation in the Communal Services Sphere”, the basic principles of activities of the Commission include the publicity, accessibility, transparency and openness of the procedure of state regulation; independence and predictability of state regulation of activity of subjects of natural monopolies and economic agents in adjacent markets for consumers and public; collegiality, independence and objectiveness in decision making; targeting of regulation, its focus on a specific subject of natural monopolies and economic agent in adjacent markets; protection of the rights of consumers of goods (services) in the market which is in state of natural monopoly and in adjacent markets in the sphere of heat supply and district water supply and sanitation; responsibility for adopted decisions and compensation of damage incurred to the subjects of natural monopolies and economic agents in adjacent markets.

Conclusion

Taking into account the premises, in terms of cancelling licensing in the sphere of supply of heat energy the specified draft law contravenes:

The Constitution of Ukraine,
the Law of Ukraine “On Natural Monopolies”,
the Law of Ukraine “On State Regulation in the Communal Services Sphere”,

the Law of Ukraine “On Heat Supply”,

as well as can result in violation of the rights of consumers of services of natural monopolies of economic entities on district water supply and sanitation, production, transportation and supply of heat energy, as well as in unpredictable effects and technological disasters.

Analysis of the Law of Ukraine “On Amendments to Certain Laws of Ukraine regarding the Procedure for Establishing Tariffs for Housing and Communal Services”

and other regulatory legal acts regulating the issues of publishing decisions on establishing tariffs for housing and communal services

On December 22, 2011 the Verkhovna Rada of Ukraine adopted Law of Ukraine “On Amendments to Certain Laws of Ukraine regarding the Procedure for Establishing Tariffs for Housing and Communal Services” № 4231-VI.

The Law sets forth that the Law of Ukraine “On the Principles of State Regulatory Policy in the Sphere of Economic Activities” does not apply to the regulatory activities associated with the adoption of the acts which set prices/ tariffs for housing and communal services.

Along with that the specified legislative act envisages the amendments to the Law of Ukraine “On Housing and Communal Services” prescribing that:

the procedure of informing customers about the list of housing and communal services, structure of prices/ tariffs, changes in prices/ tariffs with the justification of their necessity and about taking into account the position of territorial communities shall be developed and approved by the central body of executive power on housing and communal services;

in case of change in prices/ tariffs for housing and communal services, the supplier/ producer shall notify the customer with the reference to the respective bodies not less than 15 days prior to their entry into force.

The developers of the draft law explained the repeal of the Law of Ukraine “On the Principles of State Regulatory Policy in the Sphere of Economic Activities” in the sphere of housing and communal services by the need to shorten the time for making changes to tariffs for housing and communal services.

The Law of Ukraine “On the Principles of State Regulatory Policy in the Sphere of Economic Activities” prescribes a long and complicated procedure for the adoption of regulations (including on the adjustment of tariffs), which causes significant deterioration of the financial and economic situation of enterprises,

reducing payments for used energy resources due to the constant rise in prices for fuel and energy resources and increasing the minimum wage against unchanged tariffs for housing and communal services.

Thus, today the Law of Ukraine “On the Principles of State Regulatory Policy in the Sphere of Economic Activities” does not apply to the activities of the National Commission Performing State Regulation in the Communal Services Sphere, bodies of local self-government associated with the adoption of acts setting tariffs/prices for housing and communal services.

At the same time, please note that the adoption of the above mentioned legislative act does not exempt the state collegial regulatory body and bodies of local self-government from holding the procedure of publishing their decisions on the establishment of tariffs for housing and communal services.

I. The procedure for informing the customers about changes in tariffs, their structure, justification of the change in tariffs and for taking into account the position of territorial communities shall be regulated by the procedure developed and approved by the central body of executive power on housing and communal services rather than by the Law of Ukraine “On the Principles of State Regulatory Policy in the Sphere of Economic Activities”.

So the procedure for informing the customers and procedure for taking into account the position of territorial communities should be developed and approved by the Ministry of Regional Development, Construction, Housing and Communal Services.

II. According to the Law of Ukraine “On State Regulation in the Communal Services Sphere”, the basic principles of activities of the National Commission Performing State Regulation in the Communal Services Sphere include the publicity, accessibility, transparency and openness of the procedure of state regulation (including setting tariffs).

Please note that the Law of Ukraine “On Natural Monopolies” stipulates the transparency of activities of state collegial bodies (including the National Commission Performing State Regulation in the Communal Services Sphere):

the National Commission Performing State Regulation in the Communal Services Sphere is a collegial body, the decisions of which are adopted by the majority of votes in the form of resolutions and decrees;

the commission's decisions shall be taken at meetings held in the form of closed or open hearings. If the issues have great social significance, meetings shall be held in the form of open hearings attended by the representatives of the subjects of natural monopolies and economic entities operating in adjacent markets, associations of consumers and public;

the commission's decisions, which are regulatory acts under the law (except for decisions on setting tariffs), shall be developed, considered, adopted and published pursuant to the Law of Ukraine "On the Principles of State Regulatory Policy in the Sphere of Economic Activities";

the commission's meeting agenda shall be published on the official web-site of the commission not later than three working days before the meeting;

the commission's decisions and documents approved by the commission shall be published on the official web-site of the commission not later than in five working days after the meeting;

the commission shall co-operate with the organizations that represent consumers' interests, inform such organizations and consumers about activities of the subjects of natural monopolies and economic entities in adjacent markets.

Conclusion

1. The Law of Ukraine "On Amendments to Certain Laws of Ukraine regarding the Procedure for Establishing Tariffs for Housing and Communal Services" prescribes shorter terms for setting tariffs for housing and communal services, which will have positive impact on financial and economic activities of enterprises providing such services, but it limits the rights of consumers of housing and communal services.

2. The Law of Ukraine "On Amendments to Certain Laws of Ukraine regarding the Procedure for Establishing Tariffs for Housing and Communal Services" does not exempt the bodies of local self-government from publishing their decisions on setting tariffs for housing and communal services, although it shortens this procedure up to 15 days. The procedure for informing the customers about changes in tariffs shall be developed and approved by the Ministry of Regional Development, Construction, Housing and Communal Services.

3. The activities of the National Commission Performing State Regulation in the Communal Services Sphere associated with setting tariffs for communal

services is regulated by special legislative acts and, in terms of ensuring the participation of the public in the process of decision making, is based in the principles of transparency and openness.

Information about state registration of regulatory legal acts of the National Commission Performing State Regulation in the Communal Services Sphere and on its regulatory activities

On state registration of regulatory legal acts

According to article 15 of the Law of Ukraine “On Natural Monopolies”, the decisions of the National Commission Performing State Regulation in the Communal Services Sphere (hereinafter – the Commission), which are regulatory legal acts, are subject to obligatory state registration in accordance with the legislation, excluding the decisions on setting prices and tariffs (except for setting prices and tariffs for people).

State registration of regulatory legal acts of ministries, other central bodies of executive power and other state bodies shall be in accordance with Decree of the President of Ukraine dated October 3, 1992 № 493 “On State Registration of Legal Acts of Ministries and Other Bodies of Executive Power” and the Regulation on state registration of regulatory legal acts of ministries, other bodies of executive power approved by Resolution of the Cabinet of Ministers of Ukraine dated 28.12.1992 № 731 (*see attached*).

The procedure for submission of regulatory legal acts for state registration shall be subject to the Procedure for submission of regulatory legal acts for state registration to the Ministry of Justice of Ukraine and performing their state registration approved by the Ministry of Justice of Ukraine dated 12.04.2005 № 34/5 (*see attached*).

Brief information about the procedure for submission of regulatory legal acts for state registration

State registration of regulatory legal acts of the Commission shall be performed by the Ministry of Justice of Ukraine.

The regulatory legal acts adopted by the Commission in the form specified by law and according to the procedure established by the legislation, which contain the rules of law, are non-personified and intended for repeated use, regardless of the period of validity (permanent or limited to a certain time) and the nature of information that they contain, shall be submitted for state registration.

The regulatory legal acts of any kind shall be subject to state registration if they contain one or more norms that:

- affect the socio-economic, political, personal and other rights, freedoms and legit interests of citizens declared and guaranteed by the Constitution and laws of Ukraine, the Convention on Human Rights and Fundamental Freedoms of 1950 and its Protocols, the international treaties of Ukraine recognized mandatory by the Verkhovna Rada of Ukraine and acquis communautaire, as well as including the practice of the European Court of Human Rights, establish new or modify, supplement or cancel the administrative and legal mechanism of their implementation;
- have an inter-agency character, i.e. are binding for other ministries, bodies of executive power and local self-government, enterprises, institutions and organizations outside the scope of authority of the body that issued the regulatory legal act.

The regulatory legal act shall be submitted for state registration within five days after its adoption in three copies: the original and two copies of the preliminary document certified in accordance with the legislation, as well as the regulation approved it (instruction, procedure, etc.) and annexes to them.

State registration of the regulatory legal act shall be carried out within 15 working days after its submission to the body of state registration.

If necessary (the need to analyze the regulatory legal act involving experts, to study a large number of acts of current legislation etc.), these terms can be extended by the head of the state registration body not more than for 10 working days, which should reported to the body that sent the regulatory legal act for state registration.

If there are provisions, norms and orders applicable to other bodies, the regulatory legal act has to be agreed with the relevant interested bodies in the form stipulated by law.

The jointly issued regulatory legal act shall be submitted for state registration by the body, the signature of the first person of which is the first one on the act.

The following documents shall be submitted to the state registration body together with the regulatory legal act:

- justification of the grounds for issuing the regulatory legal act or some of its provisions;
- the details of the existing acts on this issue, information about the terms of adjusting them to the regulatory legal act submitted for state registration, as well as about the acts that become void due to the adoption of this act;

- a copy of the regulatory legal act that is subject to amendments or recognized void, in the control condition and a comparative table;

- details of the formal approval of the act with the interested bodies, regardless of whether such approval is required by law. In the case when ministries and other central bodies of executive power submit a regulatory legal act on the issues associated with the social and labor sphere for state registration, they shall also report on the position of the authorized representative of the national trade unions, their associations and authorized representative of the national associations of employers concerning this act and on the work conducted on consideration of their comments and suggestions. Thus, the necessity of considering these comments and suggestions shall be determined by ministries and other central bodies of executive power adopting this act (*for reference: the provision is applied mainly in setting tariffs for people*); an original and two copies of the decision of the State Committee for Entrepreneurship or its territorial body on the approval of the draft regulatory act;

- an original and two copies of the decision of the State Committee for Entrepreneurship or its territorial body on the approval of the draft regulatory act;

- a certificate of compliance of the regulatory legal act with aquis communautaire in the form specified in annex 1 to the Regulations of the Cabinet of Ministers of Ukraine approved by the Cabinet of Ministers of Ukraine dated 18 July 2007 N 950;

- conclusion of the Ministry of Justice on the conformity of the regulatory legal act with the Convention on Human Rights and Fundamental Freedoms and with the practice of the European Court of Human Rights.

On regulatory activities of the Commission

According to article 15 of the Law of Ukraine “On Natural Monopolies”, the Commission’s decisions, which are regulatory acts under the law (except for the decisions on setting tariffs) shall be developed, reviewed, adopted and published taking into account the requirements of the Law of Ukraine “On the Principles of State Regulatory Policy in the Sphere of Economic Activities”.

Pursuant to the Law of Ukraine “On the Principles of State Regulatory Policy in the Sphere of Economic Activities” dated 11 September 2003 №1160-IV, the features of the regulatory act include:

- 1) the act sets, amends or abolishes rules of law;
- 2) the act applies to an indefinite range of persons;
- 3) the act is applied repeatedly;

4) the act in whole or in part is aimed at legal regulation of economic relations, as well as administrative relations between regulatory bodies or other bodies of state power and economic entities.

Carrying out state regulatory policy shall include the following obligatory stages:

- planning activities on preparing draft regulatory acts;
- preparing draft regulatory acts and analyzing the regulatory impact of an act;
- publishing draft regulatory acts for the purpose of getting comments and suggestions from natural persons and legal entities, their associations, as well as open discussions of the issues associated with the regulatory activities with the participation of the public;
- adopting regulatory acts;
- official publication of regulatory acts;
- tracking of efficiency of regulatory acts;
- review of regulatory acts;
- systematization of regulatory acts;
- publication of information about the implementation of regulatory activities.

**STATE REGULATION IN THE SPHERE OF HEAT SUPPLY,
DISTRICT WATER SUPPLY AND SANITATION**

Regulation of activities of the subjects of natural monopolies in the sphere of heat supply, district water supply and sanitation

General provisions

The Constitution of Ukraine envisages the rights and obligations of the state to actively affect the life of the society, including the economic sphere. The immediate implementation of this task is assigned by the Constitution of Ukraine to the Cabinet of Ministers of Ukraine, and their principles are prescribed in the laws adopted by the Verkhovna Rada of Ukraine.

Accordingly the system of state regulation of economy is being formed, i.e. a set of institutions, forms, methods and other interests, with the help of which the state influences economic entities and market in order to create specific conditions for their functioning and to prevent social and economic problems of the society.

Laws and regulations create the necessary legal regime of guaranteeing public interests in the economy sphere. The legislation of Ukraine clearly distinguishes state interests and establishes the means for their support. Such regime is particularly important in the spheres where competition is inefficient or impossible due to the technological characteristics of production, i.e. in the spheres of activities of the **subjects of natural monopolies**.

The subjects of natural monopolies in the sphere of heat supply, district water supply and sanitation

The definition of the term “natural monopolies” is provided in the Law of Ukraine “On Natural Monopolies”:

Natural monopoly is the condition of a commodity market in which satisfaction of demand in this market is more effective when the competition is absent due to technological features of production (due to essential decrease of production costs per unit in proportion to increase of production amounts), while the goods (services) that are produced by the subjects of natural monopolies cannot be substituted by other goods (services) in consumption; therefore the demand in this market is less dependent on the change of price for these goods (services) than the demand for other goods (services) (hereinafter – goods).

The subjects of natural monopolies in the sphere of housing and communal services:

transportation of heat energy;

district water supply and sanitation.

Along with these markets, adjacent markets exist in the condition of natural monopoly.

Adjacent market is a commodity market which is not in the state of the natural monopoly, but for the subjects of which selling produced goods or using the goods of other agents is impossible without direct use of the goods produced (sold) by the subjects of natural monopolies.

Adjacent markets in the sphere of housing and communal services:

heat energy production (except when it is used only for internal production needs) in the amounts exceeding the level set by set by rules and conditions for performing business activity on heat energy production (license conditions);

heat energy supply.

State regulation

The subject and principles of state regulation

According to the Law of Ukraine “On Natural Monopolies”, the **subject** of regulation of activity of the subjects of natural monopolies includes:

- prices (tariffs) for the goods produced (sold) by the subjects of natural monopolies;
- access of consumers to the goods produced (sold) by the subjects of natural monopolies;
- other conditions of performing business activity in the cases envisaged by the legislation.

State regulation is based on the following **principles**:

- publicity and openness of regulation procedures;
- targeted regulation, its targeting to the specific subject of natural monopoly;
- self-sustainability of the subjects of natural monopolies;
- promoting the increase in the quality of goods and satisfaction of demand for them;
- ensuring consumer protection.

The means of regulatory impact on the activities of the subjects of natural monopolies and economic entities in adjacent markets in the communal services sphere

The National Commission Performing State Regulation in the Communal Services Sphere shall apply such tools of regulatory impact on the subjects of natural monopolies and economic entities in adjacent

markets in the sphere of heat supply, water supply and sanitation:

- 1) licensing of economic activities;
- 2) control over compliance with license conditions;
- 3) setting tariffs for communal services for the subjects of natural monopolies and economic entities in adjacent markets;
- 4) setting individual technological norms of drinking water use for the subjects of natural monopolies that perform activities in the sphere of district water supply and sanitation;
- 5) other methods stipulated by the current legislation of Ukraine.

Licensing of activities in the communal services sphere

The Law of Ukraine “On Licensing of Certain Types of Economic Activity” № 1775-III dated 01.06.2000 is the main regulatory legal act of Ukraine regulating the relations in the licensing sphere.

The Law envisages that:

license is a state standard document that certifies the right of the economic agent – licensee for performing the type of economic activity indicated in it during the definite term in compliance with license conditions.

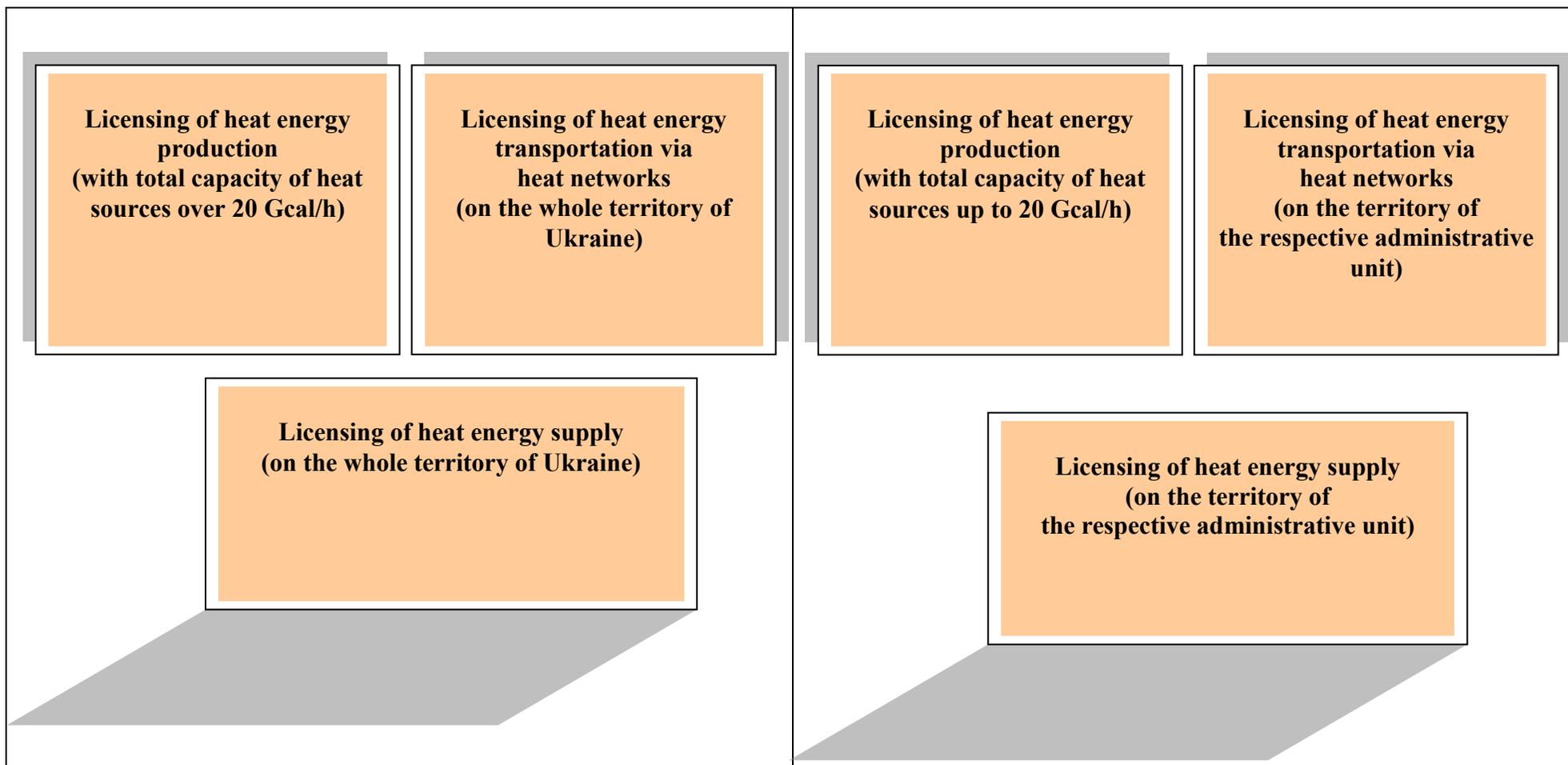
The main principles of state policy in the licensing sphere include:

- ensuring equal rights, legitimate interests of all economic entities;
- protection of rights, legitimate interests, life and health of citizens, environmental protection and ensuring safety of the state;
- establishing a unified procedure of licensing of economic activities in Ukraine and determining its peculiarities for certain types of economic activities due to the specifics of their proceedings in the laws that regulate the relations in the respective sphere, except as provided by section one of article 9 of this Law;
- establishing a uniform list of economic activities subject to licensing;
- the introduction of licensing of a particular type of economic activities in the case of insufficiency of other means of state regulation of economic activities defined by the respective law.

LICENSING OF ECONOMIC ACTIVITIES IN THE HEAT SUPPLY SPHERE

The National Commission Performing State Regulation in the Communal Services Sphere

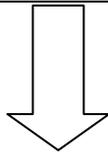
The Council of Ministers of the Autonomous Republic of Crimea, regional, Kyiv and Sevastopol city state administrations



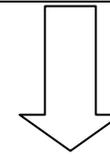
LICENSING OF ECONOMIC ACTIVITIES IN THE SPHERE OF WATER SUPPLY AND SANITATION

The National Commission Performing State Regulation in the Communal Services Sphere

The Council of Ministers of the Autonomous Republic of Crimea, regional, Kyiv and Sevastopol city state administrations



Licensing of activities of economic entities that provide (have intention to provide) the services of district water supply and sanitation to one hundred thousand and more natural persons or district water supply and sanitation systems are located on the territory of two and more oblasts, as well as enterprises with foreign investments



Licensing of activities on district water supply and sanitation of economic entities that carry them out within the respective administrative units

Regulation of prices and tariffs in the communal services sphere

The procedure of formation and establishment of tariffs for communal services for the subjects of natural monopolies and economic entities in adjacent markets is envisaged by the Law of Ukraine “On State Regulation in the Communal Services Sphere”.

The Law stipulates that:

tariffs for communal services are formed shall be formed by the subjects of natural monopolies and economic agents in adjacent markets according to procedures (methodologies) established by the National Commission Performing State Regulation in the Communal Services Sphere according to this Law;

tariffs for communal services of the subjects of natural monopolies and economic agents in adjacent markets shall ensure compensation of all commercially reasonable costs for their production including planned profit.

The regulation on setting tariffs with the deviation from a commercially reasonable level shall be approved by the Cabinet of Ministers of Ukraine.

Establishing tariffs for communal services in the amount which is lower than commercially reasonable costs for their production without appropriate compensation shall not be allowed and can be litigated.

The Law of Ukraine “On Heat Supply” sets the procedure of reducing the tariff established by the state regulatory bodies by the amount of improper used funds in the cases of:

- the use of funds by the economic entity in the heat supply sphere for purposes and/or in amounts that are not covered by the program of technical development and/or investment program;
- the use of funds by the economic entity in the heat supply sphere for purposes and/or in amounts that are not envisaged by the tariff structure.

TARIFF SETTING IN THE HEAT SUPPLY SPHERE

**The National Commission Performing State Regulation in
the Communal Services Sphere**

Bodies of local self-government

Setting tariffs for heat energy production with total capacity of heat sources over 20 Gcal/h, UAH/Gcal

Setting tariffs for heat energy transportation via heat networks on the whole territory of Ukraine, UAH/Gcal

Setting tariffs for heat energy production with total capacity of heat sources up to 20 Gcal/h, UAH/Gcal

Setting tariffs for heat energy transportation via heat networks on the territory of the respective administrative unit, UAH/Gcal

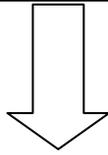
Setting tariffs for heat energy supply on the whole territory of Ukraine

Setting tariffs for heat energy supply on the territory of the respective administrative unit

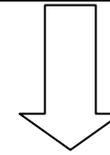
TARIFF SETTING IN THE WATER SUPPLY AND SANITATION SPHERE

The National Commission Performing State Regulation in the Communal Services Sphere

The Council of Ministers of the Autonomous Republic of Crimea, oblast, Kyiv and Sevastopol city state administrations



Setting tariffs for district water supply and sanitation services for economic entities, the licensing of activities of which is performed by the National Commission Performing State Regulation in the Communal Services Sphere



Setting tariffs for district water supply and sanitation services for economic entities, the licensing of activities of which is performed by the Council of Ministers of the Autonomous Republic of Crimea, oblast, Kyiv and Sevastopol city state administrations

Responsibility for violation of legislation in the sphere of communal services

The responsibility of economic entities and their officials for violation of legislation in the sphere of communal services is provided by the Code of Ukraine on Administrative Violations, the Laws of Ukraine “On Natural Monopolies”,

“On Heat Supply”, “On Drinking Water and Drinking Water Supply”, “On State Regulation in the Communal Services Sphere”.

Officials shall be subject to administrative fines established by the Code of Ukraine on Administrative Violations for untimely submission of information, non-fulfillment or untimely fulfillment of the decisions of the National Commission Performing State Regulation in the Communal Services Sphere by economic entities.

Economic entities shall be subject to administrative fines:

- untimely submission of information to regulatory bodies, non-fulfillment or untimely fulfillment of their decisions;
- infringement of license conditions;
- supply of heat energy, the parameters of which do not meet state standards, approved rates for heat energy, terms of the sales and purchase contract;
- supply of drinking water to consumers if it does not meet state standards for drinking water or permit for temporary deviation of the quality of drinking water from state standards or is dangerous for life and health of people due to violation of standards, norms and rules;
 - etc.

Openness of activities of the National Commission Performing State Regulation in the Communal Services Sphere

The Commission shall guarantee openness of its activities.

1. The meeting agenda of the commission shall be subject to publication on its official web-site at least three days

prior to the date of holding a meeting.

2. The decisions of the commission and documents approved by the commission shall be published on the official web-site of the commission not later than in five days from the day of holding a meeting.

3. The commission shall co-operate with organizations representing the interests of consumers, inform such organizations and consumers about the activities of the subjects of natural monopolies and economic entities carrying out activities in adjacent markets.

4. Consumers and any interested persons have the right to apply to the commission concerning the issues within its competence. The commission shall review such applications and provide response to applicants according to the established procedure.

5. The commission shall inform the public about the results of its work, publish legislative acts, data envisaged by the legislation and other information about its activities in the mass media including official editions.

6. The commission shall publish annual reports on the work of the commission on the official web-site not later than on April 1 of the year following the reporting year.

Regulatory activities of the National Commission Performing State Regulation in the Communal Services Sphere

The Commission's decisions, which are regulatory acts under the law (except for the decisions on setting tariffs) shall be developed, reviewed, adopted and published taking into account the requirements of the Law of Ukraine "On the Principles of State Regulatory Policy in the Sphere of Economic Activities".

The features of the regulatory act include:

the act sets, amends or abolishes rules of law;

the act applies to an indefinite range of persons;

the act is applied repeatedly;

the act in whole or in part is aimed at legal regulation of economic relations, as well as administrative relations between regulatory bodies or other bodies of state power and economic entities.

Carrying out state regulatory policy shall include the following obligatory stages:

- planning activities on preparing draft regulatory acts;**
- preparing draft regulatory acts and analyzing the regulatory impact of an act;**
- publishing draft regulatory acts for the purpose of getting comments and suggestions from natural persons and legal entities, their associations, as well as open discussions of the issues associated with the regulatory activities with the participation of the public;**
- adopting regulatory acts;**
- official publication of regulatory acts;**
- tracking of efficiency of regulatory acts;**
- review of regulatory acts;**
- systematization of regulatory acts;**
- publication of information about the implementation of regulatory activities.**

State registration of the decisions of the National Commission Performing State Regulation in the Communal Services Sphere

The decisions of the National Commission Performing State Regulation in the Communal Services Sphere (hereinafter – the Commission), which are regulatory legal acts, are subject to obligatory state registration in accordance with the legislation, excluding the decisions on setting prices and tariffs (except for setting prices and tariffs for people).

State registration of regulatory legal acts of the Commission shall be performed by the Ministry of Justice of Ukraine.

The regulatory legal acts adopted by the Commission in the form specified by law and according to the procedure established by the legislation, which contain the rules of law, are non-personified and intended for repeated use, regardless of the period of validity (permanent or limited to a certain time) and the nature of information that they contain, shall be submitted for state registration.

The regulatory legal acts of any kind shall be subject to state registration if they contain one or more norms that:

- affect the socio-economic, political, personal and other rights, freedoms and legit interests of citizens declared and guaranteed by the Constitution and laws of Ukraine, the Convention on Human Rights and Fundamental Freedoms of 1950 and its Protocols, the international treaties of Ukraine recognized mandatory by the Verkhovna Rada of Ukraine and acquis communautaire, as well as including the practice of the European Court of Human Rights, establish new or modify, supplement or cancel the administrative and legal mechanism of their implementation;

- have an inter-agency character, i.e. are binding for other ministries, bodies of executive power and local self-government, enterprises, institutions and organizations outside the scope of authority of the body that issued the regulatory legal act.

The regulatory legal act shall be submitted for state registration within five days after its adoption in three copies: the original and two copies of the preliminary document certified in accordance with the legislation, as well as the regulation approved it (instruction, procedure, etc.) and annexes to them.

State registration of the decisions of the National Commission Performing State Regulation in the Communal Services Sphere (continued)

State registration of the regulatory legal act shall be carried out within 15 working days; these terms can be extended by the head of the state registration body not more than for 10 working days.

The following documents shall be submitted to the state registration body together with the regulatory legal act:

- justification of the grounds for issuing the regulatory legal act or some of its provisions;
- the details of the existing acts on this issue, information about the terms of adjusting them to the regulatory legal act submitted for state registration, as well as about the acts that become void due to the adoption of this act;
- a copy of the regulatory legal act that is subject to amendments or recognized void, in the control condition and a comparative table;
- details of the formal approval of the act with the interested bodies, regardless of whether such approval is required by law. In the case when ministries and other central bodies of executive power submit a regulatory legal act on the issues associated with the social and labor sphere for state registration, they shall also report on the position of the authorized representative of the national trade unions, their associations and authorized representative of the national associations of employers concerning this act and on the work conducted on consideration of their comments and

suggestions. Thus, the necessity of considering these comments and suggestions shall be determined by ministries and other central bodies of executive power adopting this act (for reference: the provision is applied mainly in setting tariffs for people);

- **an original and two copies of the decision of the State Committee for Entrepreneurship or its territorial body on the approval of the draft regulatory act;**
- **a certificate of compliance of the regulatory legal act with aquis communautaire in the form specified in annex 1 to the Regulations of the Cabinet of Ministers of Ukraine approved by the Cabinet of Ministers of Ukraine dated 18 July 2007 N 950;**
- **conclusion of the Ministry of Justice on the conformity of the regulatory legal act with the Convention on Human Rights and Fundamental Freedoms and with the practice of the European Court of Human Rights.**

Annex 5

Legal framework for development and activity of energy service companies in Ukraine

I. General provisions and analysis of the program documents

Energy saving and energy efficiency are the priorities of the State Energy Policy of Ukraine today.

These principles are stipulated in several legal acts of Ukraine, in particular, in the Laws Of Ukraine “On Energy Saving”, “On Electricity”, “On Heat Supply”, “On Housing and Communal Services”, “On State Regulation of the Communal Services Market”, “On Combined Production of Heat and Power (Cogeneration) and Waste Energy Potential Use” and other.

However, today the state regulation in defined sphere and the level of normatively legal encouragement need to be essentially improved. The state support of creation and functioning of energy servicing companies (ESCOs) is one of the main important and topical issues in this context.

The state support of energy servicing companies (ESCOs)’ activity, implementing of the practice of energy performance contracts conclusion, regulating of the ESCOs’ activity regarding projects executing in budget and housing and communal sphere are among the priorities of state policy on energy efficiency refer to the Framework of state policy on efficient use of fuel and energy resources (energy efficiency), adopted by the Decision of National Safety and Defense Council of Ukraine “On State of Realization of the State Policy on Efficient Use of Fuel and Energy Resources” (put into force by Decree of the President of Ukraine N679/2008 from 28.07.2008 p.)

According to Law of Ukraine “On State Program on Reforming and Development of Housing and Communal Economy on 2009-2014years” #1869-IV from 24.06.2004, in order to archive the goal of the field reforming, it is necessary to solve the issues, in particular, regarding:

creation of conditions for reliable and safe housing and communal services provision on acceptable prices that stimulate energy saving;

renovation of production base of the field with consideration of new achievements of scientifically-technical progress, implementation of innovative model of housing and communal economy development;

increasing the efficiency of energy and other resources use, radical decreasing the energy intensity of production, increasing of energy efficiency of buildings, creating of incentives and conditions for the transition of economy on rational use and efficient energy resources usage;

stimulating of private entrepreneurial initiative in executing of tasks of housing fund and communal infrastructure development.

Refer to Energy Strategy of Ukraine on the period until 2030 year the factor of energy saving is one of the more important for energy strategy of Ukraine. The efficient functioning of national economy depends on its level.

Energy Strategy of Ukraine on the period until 2030 year, in particular, stipulates:

1. Putting the some provisions of legislation in the sphere of energy saving in accordance with economic situation, in particular, creating the conditions for stimulation of the subjects of economic activity for efficient use of energy resources.

The development of the draft changes to tax legislation in part of limitation of including the energy resources used by the subjects of economic activity into the total costs and establishment of the payment for the energy resources used over norms of unit costs of energy resources defines as the way of solving of this problem.

2. Improvement of the order of normalization of unit costs of energy resources – the adoption of new redaction of the Law of Ukraine “On Energy Saving” – the Law of Ukraine “On Energy Efficiency”.

3. Creation of system of new energy standards – the adoption of the new redaction of the Law of Ukraine “On Energy Saving” – the Law of Ukraine “On Energy Efficiency”.

4. Improvement of the system of state energy saving expertise – the adoption of the new redaction of the Law of Ukraine “On Energy Saving” – the Law of Ukraine “On Energy Efficiency”.

5. Establishment of the obligatory statistic reporting on energy resources use – the adoption of the new redaction of the Law of Ukraine “On Energy Saving” – the Law of Ukraine “On Energy Efficiency”.

6. Creation of single mechanism of state control in the sphere of energy saving and energy efficiency, without duplication of powers of authorized state bodies in these spheres – the adoption of the new redaction of the Law of Ukraine “On Energy Saving” – the Law of Ukraine “On Energy Efficiency”.

7. Establishment of adequate legal responsibility of legal entities, officials and citizens for ineffective usage of fuel and energy resources: preparation of changes to relevant articles of Code of Ukraine on administrative violations regarding increasing of fines for the violations in the sphere of energy saving; establishment of financial responsibility of legal entities for ineffective usage of fuel and energy resources.

8. Encouragement of transition to mass usage and replacement on up-to-date energy resources consumption meters. It is necessary to improve payments for resources consumed by consumers of housing and communal services conducted in accordance with defined norms that are higher than actual consumption of resources.

The adoption of the Law of Ukraine “On Commercial Measurement of Resources Transmitted via Networks” is a way of solving of this problem.

The Collegium of the Ministry of Energy and Coal Industry of Ukraine in its Decision #3 from 18.07.2011 “Update of Energy Strategy of Ukraine for the period until 2030 in the field of electricity and coal industry” stipulates that Energy Strategy of Ukraine as a prognostic document needs to be periodically improved.

Moreover, the changes in the economy and energy field of Ukraine that are directly and essentially affect prospects of the development of the fuel and energy complex took place since adoption of the Energy Strategy. Nowadays there are contradictions between Energy Strategy of Ukraine and last trends of development of the economy of Ukraine.

The world financial and economic crisis 2008-2010 years had negative impact on the economy of Ukraine. As a result, the energy and economic indicators were changed.

The prospects of demand on energy resources do not consider economic growth, the structure of economy and energy intensity. The state and the structure of economy are the main factors that define structure and volumes of consumption of fuel and energy resources (FER). The structure and the demand on necessary FER determine decisions regarding proportions of the development of the fields of state energy complex.

The changes determine necessity of update of Energy Strategy of Ukraine took place within last 5 years – the international obligations of Ukraine within the Energy Community regarding:

- adaptation of the legislation of Ukraine to the EU requirements on state regulation of energy field;
- putting the technical indicators of the activity of Joint energy system of Ukraine in accordance with the EU requirements;
- decreasing of emissions of solids, sulfur dioxide and nitric oxide according to the European norms.

Taking into consideration the world trends and defined changes, the Energy Strategy of Ukraine approved in 2006 has partially lost its former actuality.

Therefore the Collegium of the Ministry of energy and coal industry of Ukraine considers that the update of Energy Strategy of Ukraine is actual now, considering the challenges and risks of these days.

The Program of Economic Reforms for the period of 2010-2014 years “Wealth society, competitive economy, efficient state” stipulates the necessity of

update of the Energy Strategy of Ukraine for the period until 2030 year, in particular it is considered to define the rational state position regarding the volumes of energy production, economically reasonable level of electricity export, level of necessary integration in the EU; the correlation of nuclear, hydropower and heat electric generation, target level of ecological requirements and sources of financing of its execution; the development of national standards in the sphere of energy efficiency; implementation of the state system of monitoring of the state fuel and energy balance. In particular, the defined Decision of the Collegium of the Ministry of energy and coal industry of Ukraine approves the drafts of the Strategy of the development of electric and coal industry defined in the document “Update of the Energy Strategy of Ukraine for the period until 2030 year in electricity field”, with consideration of provided amendments and remarks and further incorporation of its as chapters into the draft of the updated Energy Strategy of Ukraine for the period until 2030 year.

On the instructions of the Cabinet of Ministers of Ukraine from 16.10.2010 # 56047/25/1-10, from 15.02.2011 # 7805/0/1-11 and in order to encourage the up-to-date update of the Energy Strategy of Ukraine for the period until 2030 year the Interindustry Work Group on the update of the Energy Strategy of Ukraine for the period until 2030 was established according to the Order of the Ministry of energy and coal industry of Ukraine #85 from 21.04.2011. Taking into consideration that nowadays the issues regarding establishment and functioning of the ESCOs are not defined in the Energy Strategy we consider that it is reasonable to develop the proposals on amendment of the Energy Strategy with the provisions on the state support for the establishment and activity of the ESCOs in Ukraine on the basis on the research of the legislation of Ukraine and EU legislation in this sphere.

The necessity of solving of the problems of energy saving and energy efficiency is stressed in the Program of economic reforms on 2010-2014 “Wealth society, competitive economy, efficient state”.

In particular, it stresses that there is irrational system of tax incentives in Ukraine that does not stimulate the innovative activity and energy efficiency.

In addition, the issues of energy efficiency of economy and defined internal issues of the development of electricity field are closely connected and it is impossible to solve it separately. Therefore the main goals of the reform are:

- Creation of efficient energy industry that could encourage the quantity and reliability of energy supplies on competitive prices that are necessary for the economic development;
- Increasing the unit energy efficiency of economy by means of price motivation of the consumers and implementing the energy saving technologies in the fields of energy production and transmission.

The Program also defines:

update of the Energy Strategy of Ukraine on the period until 2030 year including the definition of rational state position regarding volumes of energy production, economically reasonable level of electricity export, level of necessary integration in the EU; the correlation of nuclear, hydropower and heat electric generation; target level of ecological requirement and sources of financing of its execution; development of national standards in the sphere of energy efficiency; implementing of the state system of monitoring of the state fuel and energy balance;

development and implementation of the methodology of “stimulating price setting” that should encourage incentives for the increasing of energy efficiency, involvement of investments and fixed assets renovation;

creation of supplementary, nontariff incentives for the increasing of the energy efficiency:

- performance of the industrial Program of energy efficiency for 2010-2014 years;
- implementation of energy saving technologies in the fields of energy production and transmission;

- decreasing of expenditures and stimulation of resources and energy efficiency of suppliers and consumers by means of transition to the incentive model of tariffs setting.

In order to speed up the technical renovation and increase the resources and energy efficiency of the housing and communal economy it is necessary to:

- develop the mechanisms of public-private partnership in the sphere of HCE for the modernization of infrastructure;
- involve the financial resources of domestic and international financial organizations for the realization of the investment projects in the sphere of HCE and improve the system of local self-government borrowings for the realization of the projects of the modernization of housing and communal infrastructure (including the projects of energy savings in residential houses).

The State target economic program of energy efficiency and development of the sphere of renewable energy sources production and alternative types of fuel for 2010-2015 years approved by Decree of the Cabinet of Ministers of Ukraine #243 from 01.03.2010 p. Please pay attention that the special provisions devoted to the ESCOs activity are not included into this act of legislation.

II. General characteristic of Ukrainian legislation

Law of Ukraine “On energy saving” #74/94-BP from 01.07.1994 is the basic legislative act in the sphere of energy saving.

This Law stipulates the definitions, in particular, of such terms as “Energy efficient project”, “energy audit (energy assessment)”, “energy saving management”.

Energy efficient project – project aimed at decreasing of energy consumption: reconstruction of the networks and systems of supply, regulation and measurement of water, gas, heat and power consumption, modernization of building envelope and technologies of production processes.

Energy audit (energy assessment) – the definition of the efficiency of fuel and energy resources use and development of the recommendations regarding its improvement.

Energy saving management – system of management aimed at encouragement of rational usage of fuel and energy resources by consumers.

Please pay attention that the term “energy servicing company” is not included into this Law. The Law uses the common term “subjects of legal regulation of the relations in the sphere of energy saving” – legal and natural persons according to Article 5 of this Law – as a result of activity of which the following actions are conducted:

Realization of energy saving policy and actions regarding energy saving in all industries of domestic economy – industry, transport, construction, agricultural economy etc, social sphere and everyday life, and in the sphere of international cooperation;

exploration, processing, transportation, production, saving, usage of all types of fuel, heat and power, other resources of natural or artificial origin in part of use of fuel and energy resources;

conduction of energy audit;

production and supply of energy and energy consumptive equipment, machineries, mechanisms, constructive, building materials and other production, meters, control and regulation equipment for consumption of energy resources;

research, design, expert, specialized, installation, setting up, repairmen and other types of works and services connected with increasing of efficiency of use and economy of fuel and energy resources;

works connected with the development and use of renewable energy sources, secondary energy resources, processes of replacement of deficient types of fuel;

definition of priorities of ecologically clean energy and creation of new energy sources and types of fuel;

informational provision of domestic economy and people regarding the problems of energy saving and use of new sources of energy and types of fuel; creation of efficient systems of management and energy saving control units.

In accordance with Article 24¹ of defined Law the energy audit conducted in order to:

define the ways of rational use of fuel and energy resources, avoidance of unreasonable expenditures on energy saving actions conduction;

energy saving actions conduction and implementing of energy management;

establishment of reasonable volumes of fuel and energy resources consumption;

definition of correspondence of actual unit expenditures of fuel and energy resources with norms of unit expenditures established according to the order defined by the Cabinet of Ministers of Ukraine;

preparation of the conclusions on efficiency of fuel and energy resources use if the economic mechanism of energy saving covers these consumers.

Law should establish the order of conduction of energy audit. Nevertheless, now such Law still not approved. Draft Law “On energy audit” #3692-VI from 06.09.2011 submitted by People Deputy Pashynskiy S.V. is under consideration in the Verkhovna Rada of Ukraine. This Draft law transferred to the Committee in issues of the fuel and energy complex, nuclear energy and nuclear safety now for the improvement. According to Article 1 of this Draft Law the energy servicing (energy saving) company – an enterprise or an organization with the main activities such as conduction of energy audit, development and implementation of energy saving projects, including its financing by own funds or funds of third parties.

The term “energy servicing company” uses in Law of Ukraine “On combined production of heat and power (cogeneration) and waste energy potential use” #2509-IV from 05.04.2005 p., but there is no its definition in this Law.

According to Article 6 of defined Law the financing of projects development, purchase of technological equipment and constructions of cogeneration units conducted by own or credit funds of enterprises, partial use of funds of special accounts of techno parks, natural persons, including foreign investors, credits of energy servicing companies, and also by funds of relevant budgets.

The Joint Stock Company “Ukrainian Energy Saving Company (UkrESCO) is a first in Ukraine and CIS countries energy serving servicing company that conducts energy saving projects with involvement of EBRD funds. UkrESCO was established in 1998 according to the provisions of the Loan Agreement “Financing of Ukrainian ESCO” between Ukraine and the EBRD from 09.05.98 ratified by Law of Ukraine #648-XIV from 13.05.99p. According with this Loan Agreement Ukraine received target (for financing of energy saving projects on small and medium sized enterprises of Ukraine) the loan for 20 billion US dollars. This loan was efficiently used and funds were returned in total volume (with all interests and fees) to the EBRD. As a result the Ukraine receive additionally 20 billion US dollars. For the present moment the JSC “UkrESCO” continues implementation of energy saving projects, by means of financing by EBRD funds (excluding Ukrainian taxes and duties) within the performance of the Loan Agreement “Financing of Ukrainian ESCO (second phase) from 21.10.05 ratified by Law of Ukraine #3536-IV from 15.03.06.

Now the legal basis for the energy servicing companies’ activity in Ukraine consists mainly from the regulations, in particular:

- Order of NAER from 20.05.2010 #56 “On approving of Type Methodology “General requirements on organization and conduction of energy audit”;
- Temporary regulation about conduction of energy assessment and attestation of specialized organizations on the right of its conduction approved by Order of the State Energy Saving Committee of Ukraine #49 from 12.05.1997.

- Regulation about the order of organization of energy assessments approved by Order of the State Energy Saving Committee of Ukraine #27 from 09.04.1999.
- Order of organization and conduction of energy assessments of budgetary institutions, organizations and official enterprises approved by Order of the State Energy Saving Committee of Ukraine #78 from 15.09.1999.
- Order of NAER from 05.05.2009 #57 “On approving of the Agreement of cooperation between specialized organization certified by the NAER on the right of conduction of energy audit (energy assessment) and the Central group of energy audit of NAER”;
- List of the Training Centers of energy managers certified by the Ministry of education and science of Ukraine and educational activity regarding the conduction of advanced training of energy managers;
- Energy Audit and Energy Management Standards.

According to the Temporary Regulation about conduction of energy assessment and attestation of specialized organizations on the right of its conduction approved by Order of the State Energy Saving Committee of Ukraine #49 from 12.05.1997 energy assessment – one of the form of conduction of the state policy in the sphere of energy saving that connected with the provision of support to the enterprises, organizations and institutions (hereinafter – enterprises) in increasing of efficiency of fuel and energy resources use by means of technical assessments and development of the recommendations on implementation of organizational, legal, technical and technological energy saving actions, and provision of support in the development of scientifically reasonable norms and standards of unit expenditures of fuel and energy resources. Energy assessment conducted by specialized organizations on contractual basis upon the consent of management of the enterprises or the instruction of the NAER.

Energy assessment includes:

- Primary assessment of enterprise as a consumer of fuel and energy resources (FER), its main subdivisions and technological processes with use of energy that connected with conduction of calculation of energy consumption for each type of energy and provision of the recommendations regarding use of different types of tariffs, analysis of funds use, part of energy expenditures in prime costs of production;
- Creation of the map of the FER use, analysis of energy consumption in single technological processes, subdivisions and equipment;
- Assessment of efficiency of the FER use, analysis of its actual expenditures and comparison with acting norms and standards, development of the proposals regarding its decreasing;
- Formation of the list of ways and measures of the FER expenditures economy in the enterprise;
- Development of priority energy saving actions (with project feasibility study);
- Formation of technical report.

Energy assessment of enterprises regardless of subordination and form of ownership conducted by certified specialized organizations according to this Temporary Regulation.

Specialized organizations – enterprises and organizations certified by the NAER (now – the State Energy Efficiency and Energy Saving Agency of Ukraine) for its conduction with the main type of activity of the conduction of energy assessments defined by the bylaw of the enterprise.

The permit on the right of conduction of energy assessment provided to the specialized organization by the NAER is an act that certifies their professional features, and their conclusions are the one of the reasons for the review of the norms of unit fuel and energy resources expenditures on the assessed enterprises.

Energy assessment should be conducted in accordance with common methodology of energy management with use of special equipment that allows conducting of necessary measurements.

The employees of the specialized organizations should finish training and assessment of the knowledge of acting legal, managerial, instructive and normative documents in issues of efficient use of the fuel and energy resources, framework of energy assessment and management.

Conduction of the next attestation of the specialized organizations, training and assessment of knowledge of the specialists conducts once per three years.

The specialized organization shall include permanent employees certified for the performance of all complex of works defined in point 1.1 of this Regulation.

Training and assessment of knowledge of specialists conducted by the Institute of energy saving and energy management of National technical university of Ukraine “Kyiv polytechnic university” and regional training centers of energy managers in accordance with the program considered with NAER. The examination commission should include the specialists of the Central Group of Energy and Technological Audit and the State Energy Saving Inspection.

The specialists should have basic education in accordance with professional direction of the Ministry of education and science of Ukraine “Energy, electrical engineering and electro mechanics”. Assessment of knowledge is obligatory for all employees of the specialized organizations and enterprises involved in the performance of works defined in point 1.1 of this Regulation regardless of previous education and for those finished training in foreign consulting firms and other firms and educational institutions.

Specialized organization should use in its word equipment certified in accordance with the requirements of the State Standardization Committee of Ukraine.

For the purpose of certification, the specialized organization should provide the Central Group of energy audit NAER with the following documents:

- the application from the organization;
- the copy of the payment order regarding payment of registration fee;
- the bylaw of the organization (copy);
- the registration certificate (notary certified copy);
- the reference on structure of the organization;
- the accounting staff of permanent employees certified on the right of the performance of works defined in point 1.1 of this Regulation;
- the minute of the assessment of knowledge of specialists in accordance with point 1.6 of this Regulation;
- the reference on presence and state of equipment necessary for the conduction of supplementary measurements needed in process of electronic engineering assessment (according to point 1.9);
- programs and methodologies of performance of work (for the consideration).

The registration of specialized organizations received the right on conduction of energy assessments conducted in the register book. The agreement concerning the order of cooperation between this organization and the Central Group of energy audit NAER is concluded.

The Central Group of energy audit NAER provides oblast state administrations and territorial departments of the State Energy Saving Inspection with the information regarding certified organizations.

The order of provision, drawing up, issue and prolongation of the term of validity of the documents regarding the certification of the specialized organizations on the right of conduction of energy assessments (energy audit), single form of the certificate on the right for its conduction, and normative and legal requirements regarding its receive defined by Order of the State Energy Saving Committee of Ukraine #27 from 09.04.1999. It defines also the requirements, including moral, regarding organization, character and order of conducting of energy assessment in the enterprises, organizations and institutions.

This Regulation is obligatory for the specialized enterprises and organizations (hereinafter – specialized organizations) that are being certified or certified on the right for the conduction of energy assessments in accordance with Temporary Regulation on the order of conduction of energy assessment of the enterprises and attestation of the specialized organizations on the right for its conduction approved by Order of State Energy Saving Committee of Ukraine from 12.05.1997 #49 and registered in the Ministry of Justice of Ukraine 02.09.1997 #375/2179 and that conduct energy assessments in cases defined by acting legislation by means of source of finance defined by such legislation.

This Regulation is a recommendation for all other enterprises and organizations that conduct energy assessments on the initiative of the subjects of economic activity.

The energy assessments conducted by the specialists (hereinafter – energy auditors) that have relevant qualification. Energy auditor can be a person who has high technical education upon the professional direction of the Ministry of Education “Energy, electric engineering and electro mechanic”: an electric engineer, an electrician engineer, a heating engineer, an energetic engineer, automation engineer (according to the fields of domestic economy).

The legal framework of the activity of energy auditors is the Temporary Regulation on the order of conduction of energy assessment of the enterprises and attestation of the specialized organizations on the right of its conduction approved by Order of State Energy Saving Committee from 12.05.1997 and registered in the Ministry of Justice 02.09.1997 #375/22179, this Regulation and other normative acts.

Energy assessments of the enterprises conducted by the specialized organizations certified in accordance with the requirements of the Temporary Regulation on the order of conduction of energy assessment of enterprises and attestation of specialized organizations on the right of its conduction approved by Order of the State Energy Saving Committee from 12.05.1997 #49 registered in the

Ministry of Justice 02.09.1997 #375/2179 with consideration of the following peculiarities.

The application for the attestation of specialized organizations on the right of conduction of energy assessments should include that organization and energy auditors agree to follow all requirements of this Regulation and Temporary Regulation on the order of conduction of energy assessment of enterprises and attestation of specialized organizations on the right of its conduction approved by Order of the State Energy Saving Committee from 12.05.1997 #49 registered in the Ministry of Justice 02.09.1997 #375/2179, and also should include:

- types of technological equipment, types of consumers of energy resources, system of measurement and control for energy assessments conduction;
- industrial orientation;
- possibility of development of business plans of investment projects.

The application except of the head of the specialized organization should be signed by the energy auditors included to the staff of the organization or involved to this activity on contractual basis.

The package of documents provided for the right on conduction of energy assessments should also include:

- the copy of contracts (agreements) on conducting of energy assessment between the specialized organization and all energy auditors that have certain certificates of educational institutions;
- the reports on performed energy assessments of enterprises and in case of its absence – programs and methodologies of the performance of works (for the consideration);
- the list of equipment that can be used for the purpose of conduction of energy assessments with consideration of the requirements of appendix 1 to this Regulation.

The reasoned applications of relevant ministries and other central executive bodies can be added to the materials of the application for the right on conduction of energy assessments and used during the definition of its main specialization

regarding conduction of energy assessments and considered as one of the main arguments for the approving of positive decision of the Central Group of energy audit NAER.

The specialized organizations that received the certificate on the right of conduction of energy assessments shall:

- within 10 days provide the Central Group of energy audit NAER with conclusions regarding reasonability of changes in norms of unit expenditures of fuel and energy resources in case if the enterprises applied regarding its changes;

- provide customer of the works with the technical report in two copies upon the results of conduction of energy assessment in accordance with point 4.2 of the Temporary Regulation on the order of conduction of energy assessment of the enterprises and attestation of the specialized organizations on the right of its conduction refer to conditions of the agreement;

- provide the Central Group of energy audit NAER with annotated report on works performed within each calendar year not later than January 31 following the reported year. The annotated report should include information about enterprises, its subdivisions and technological units where the energy assessment was conducted, expected volumes of economy of fuel and energy resources according to the results of assessments;

- conduct the works of energy assessment in accordance with the requirements of active normative acts;

- for the purpose of summering and accumulating of positive experience of energy assessments twice per year – in April and October – provide the Central Group of energy audit NAER with the information regarding implementation of technical, economic and organizational actions during the conduction of energy assessments of type technological units and type consumers of energy resources. The Central Agency of energy assessments encourage accessibility of this information to all specialized organizations and other subjects of the sphere of energy saving.

Specialized organizations that obtained the permit on conduction of energy assessments are recommended to provide the Central Group of energy audit NAER, additionally with the annual annotated report, with methodological recommendations regarding conduction of energy assessment on the enterprises of relevant fields of domestic economy and type units or type consumers of energy resources used during the conduction of the energy assessment in actual year; in this case the specialized organization receives the incentives in part of the methodological encouragement of its activity.

The permanent provision of the employees of the specialized organization with normative and methodological literature and stable increasing of the qualification of the energy auditors in these issues including their participation in the work of specialized workshops, conferences etc is very important for the adequate level of performance by the specialized organization of the works connected with the review of the norms of unit expenditures of fuel and energy resources in the enterprises and their conduction of the expertise of indicators of the economy of fuel and energy resources during usage by these enterprises of economic mechanisms of stimulating.

In order to involve the special organizations to the process of development of business plans of the energy saving projects the staff of the special organization should include the specialists with high economic education that should be presented in the provided materials.

The positive conclusion of the Central Group of energy audit NAER added to the certificate on the right of conduction of the energy assessment (appendix 2) and it is the essential part of this certificate.

The positive conclusion of the Central Group of energy audit NAER is issued simultaneously with the certificate on the right of conduction of the energy assessment.

The drawing up of the report on the results of the energy assessment should be conducted in accordance with the requirements of point 4.2 of the Temporary Regulation about the order of conduction of the energy assessment of the

enterprises and attestation of the specialized organizations on the right of its conduction.

The report on the results of the energy assessment should be signed by the head of the specialized organization and by the all energy auditors that took part in the conduction of the energy assessment.

The Central Group of energy audit NAER approves the decision on issue of the certificate to the specialized organization on the right on conduction of energy assessment during its meeting. Not less than two thirds of the staff of the Central Group of energy audit NAER shall take part in such meeting.

The decision on issue to the specialized organization of the certificate on the right on conduction of energy assessment is approved if as a result of voting for issue of the certificate were presented more than two thirds votes from the total amount of the members of the Central Group of energy audit of the NAER.

If the specialized organization has only one energy auditor the decision regarding the issue of the certificate on the right on conduction of energy assessments should be approved by not less than two thirds from the total amount of the members of the Central Group of energy audit of the NAER.

The decision of the Central Group of energy audit of the NAER regarding the conclusion and the issue of the certificate shall be fixed in the minute of the meeting of the Central Group of energy audit of the NAER.

The certificate on the right on conduction of the energy assessments shall be signed by the head of the Central Group of energy audit of the NAER, by the executive secretary and stamped with official stamp of the NAER.

The certificate on the right on conduction of energy assessments issued to the specialized organization for the period of 3 years.

The approving by the Central Group of energy audit of the NAER of the decision on the prolongation of the term of validity of the certificate on the right on conduction of energy assessments to the specialized organization drawn up in form of the conclusion in accordance with appendix 3 to this Regulation and also in form of new certificate with the number in the following form: the number of

former certificate, slash, the number of the decision on right on conduction of energy assessments. For example, “ The Certificate #2/2” – this is the decision on the right to the specialized organization that had the certificate #2 on conduction of the energy assessment second time.

The Certificate on the right on conduction of energy assessments and the conclusion of the Central Group of energy audit of the NAER provided not less than in 10 working days after the decision about its issue.

The issue about cancelation of the certificate on the right on conduction of energy assessments shall be considered in the following cases:

- violations be the specialized organization of the requirements of the normative and legal acts on conduction of the energy assessments;
- termination of the activity of the specialized organization on conduction of energy assessments within one year;
- termination of the relations of the specialized organization with the energy auditors.

In the specialized organization does not fulfill the requirements of point 8 of this Regulation regarding permanent provision of its employees with normative and methodological literature and increasing of the qualification of the energy auditors the Central Group of energy audit of the NAER can terminate the activity of such organization connected with the conduction of the expertise of the economy of fuel and energy resources by the enterprises during the usage by these enterprises of the economic mechanisms of stimulation of energy saving.

Therefore, the requirements to the specialized organizations and its specialists stipulated by the regulations now. However, it does not correspond to the requirements of several Laws of Ukraine that regulate relations in the sphere of economic activity. In particular, according to Law of Ukraine “On permission system in the sphere of economic activity” #2806-IV from 06.09.2005 the document of permission character is a permit, a decision, a consideration, a certificate or other document that permission body shall provide subject of economic activity with in case of granting the right on conduction of certain

actions regarding conduction of economic activity or types of economic activity and / or without such document the subject of economic activity cannot conduct certain actions regarding conduction of economic activity or types of economic activity. In particular, in accordance with part 1 of the article 4 of this Law only laws that regulate the relations connected with obtain of the documents of permission character stipulate:

necessity of obtain of the document of permission character and its types;

relevant body authorized to issue a document of permission character;

if issue (reissue, issue of duplicate, cancelation) of the document of permission character is paid or free of charge;

term of issue or provision of the written notification on the refusal in issue of the document of permission character;

comprehensive list of the reasons for the refusal in issue, reissue, issue of the duplicate, cancellation of the document of permission character;

term of validity of the document of permission character or unlimited term of validity of such document;

list of documents of permission character in the sphere of economic activity.

Moreover, as mentioned above, in accordance with the Law of Ukraine “On energy saving” the order of conduction of energy audit stipulated by the Law.

Therefore, the legal status of the energy servicing companies shall be regulated by the Law.

Nowadays in accordance with the information presented on the official site of the State Energy Efficiency and Energy Saving Agency of Ukraine, there are 126 enterprises in the List of the enterprises certified on the right on conduction of energy audits.

Concerning energy performance contracts (agreements) please pay attention that the Civil and Economic Codes of Ukraine do not include special provisions devoted to such types of contracts (agreements). Therefore now these contracts are regulated by general provisions regarding contracts and by provisions

related to relevant type of contracts, in particular, concerning contractor's agreements and service agreements (in accordance with the subject of the relevant agreement concluded by energy servicing company).

In particular, according to Article 837 of the Civil Code of Ukraine in accordance with the contractor's agreement one part (contractor) shall on its own risk perform some work on the task of another part (customer), and customer shall receive and pay for the performed work.

The contractor's agreement can be concluded on production, processing, repair of the thing or on the performance of other work with transferring of the result of such work to the customer.

The contractor (subcontractor) shall obtain special permit for the performance of certain types of work defined by law.

According to Article 901 of the Civil Code of Ukraine in accordance with the service agreement one part (performer) shall on the task of other part (customer) render a service consumed in the process of conduction of certain action or conduction certain activity and a customer shall pay to a performer for such service if otherwise is not stipulated by the agreement.

Additionally, taking into consideration the experience of foreign countries, we think that the special requirements concerning the energy performance contracts should be regulated in legislation of Ukraine. Such requirements can be stipulated in basic legal act "On energy efficiency". For example, Federal law of Russian Federation from 23.11.2009 #261-Ф3 "On energy saving and on increasing of energy efficiency and on changes to some legal acts of Russian Federation" includes chapter 5 "Energy servicing agreements (contracts) and energy resources purchase, supply, transmission agreements that include conditions of energy servicing agreements (contracts)". In particular, this chapter includes the subject and essential conditions of these agreements.

III. Tax incentives for energy saving under special laws in the sphere of energy saving

The Law of Ukraine “On Energy Saving” №74/94-VR dated 01.07.1994 is a basic legislative act in Ukraine regulating the relationships in the sphere of energy saving.

According to Article 11 of the Law, the economic measures for energy saving provision include, inter alia, providing tax privileges to legal entities and natural persons in order to promote the development, introduction of patent inventions and use of energy saving technologies, equipment and materials.

Pursuant to Article 16 of the specified Law, encouraging energy saving is performed, namely, by means of granting tax privileges to enterprises – manufacturers of energy saving equipment, machinery and materials, instruments for metering, control and cost management of fuel and energy resources, to equipment manufacturers for use of alternative and renewable energy and alternative fuels; providing tax privileges to enterprises that use the equipment that runs on alternative and renewable energy, alternative fuels, setting the increased rates of depreciation of energy saving fixed assets. At the same time, the list of types of energy saving equipment subject to the increased rates of depreciation is established by the Cabinet of Ministers of Ukraine. The amounts of tax credit and other benefits are established under the laws of Ukraine.

The main areas of reforming of the housing and communal economy are identified in the National Program of Reforming and Development of Housing and Communal Economy for 2009-2014, as amended by Law of Ukraine № 1869-IV dated 24.06.2004. Energy saving in residential buildings is defined as one of the main issues which are essential for successful reforming of the housing and communal economy sphere. It stipulates that financing of the Program includes introducing a special regime of VAT taxation of housing and communal services and/ or heat supply services.

The use of tax mechanisms to encourage energy saving is stipulated by the Complex State Energy Saving Program of Ukraine approved by the Cabinet of Ministers of Ukraine on 5 February 1997, Resolution № 148. According to the above mentioned Program, creating favorable conditions for the development,

production and implementation of energy efficiency technologies, machines and equipment for the implementation of energy saving efforts should be based on effective pricing, tax and depreciation policies, concessional lending for the respective programs and projects at the expense of state funds, state financing of research and development work in the sphere of energy saving and increasing energy efficiency and targeted funding of certain projects. Paragraph 5.1 of this Program states that the objectives and functions of energy saving governance are prescribed in the Law of Ukraine “On Energy Saving” and exercised by means of the respective elements of governance including tax exemptions.

Tax incentives for energy saving efforts are stipulated by the Energy Strategy of Ukraine by 2030 approved by Instruction of the Cabinet of Ministers of Ukraine №145-r dated 15.03.2006.

In particular, the document envisages bringing certain provisions of the legislation on energy saving in line with the economic situation; namely, creating conditions for economic incentives for economic agents to increase energy efficiency of energy resources use. Resolving this problem requires drafting amendments to tax legislation with respect to restriction on assigning energy resources consumed by economic agents to gross costs and setting fees for overspending of energy above the rates of specific energy consumption.

It is envisaged that in view of the real state of economy of Ukraine the primary efforts on the implementation of economic energy efficiency mechanisms include:

- setting progressive rates of specific consumption of energy according to the procedure prescribed by law;
- introducing effective economic sanctions for inefficient use of energy resources (increased payment, taxes, fines);
- enhancing administrative responsibility for violations in the sphere of energy saving and energy efficiency.

After addressing these problems it is possible to apply economic incentives including cheap credits and exemption from taxation of part of income obtained

due to the implementation of energy efficiency and energy saving technologies. The document envisages amendments to the Law of Ukraine “On Taxation System” with regard to including the fee for overspending fuel and energy resources to the list of taxes and fees imposed on the territory of Ukraine.

Encouraging energy saving within the mechanism of value added tax collection

Paragraph 197.16 of article 197 of the TCU stipulates exempt of the following import operations in Ukraine from tax:

- 1) equipment that runs on renewable sources of energy, energy saving equipment and materials, instruments for metering, control and management of fuel and energy resources consumption, equipment and materials for producing alternative fuels or energy from renewable sources of energy (paragraph 197.16.1);
- 2) materials, machinery, components used for production (197.16.2):
 - machinery running on renewable sources of energy (197.16.2.1);
 - materials, raw materials, machinery and components which will be used for producing alternative fuels or energy from renewable sources of energy (197.16.2.2);
 - energy saving equipment and materials, products, the operation of which ensures savings and the efficient use of fuel and energy resources (197.16.2.3);
 - instruments for metering, control and management of fuel and energy resources consumption (197.16.2.4).

Operations on importing such goods into the customs territory of Ukraine is subject to tax exemption if such goods are used by a taxpayer for their own production and if identical goods with similar characteristics are not manufactured in Ukraine. The list of such goods with UCCFEA codes is established by the Cabinet of Ministers of Ukraine.

The list of energy saving materials, equipment, machinery and components that are exempted from import duty and the respective import operations are

exempted from levy of value added tax is established by the Cabinet of Ministers of Ukraine, Resolution №444 dated 14.05.2008.

According to the above mentioned Resolution of the CMU, economic agents that import into the customs territory of Ukraine energy saving materials, equipment, machinery and components (hereinafter – goods) that shall be exempted from import duties according to paragraphs “ch” and “shch” of section one of article 19 of the Law of Ukraine “On Single Customs Tariff” and perform the operations with import of such goods into the customs territory of Ukraine, which according to sub-paragraphs 197.16.2 and 197.16.1 of paragraph 197.16, article 197 of the Tax Code of Ukraine are exempted from levy of value added tax, submit to the Ministry of Economic Development and Trade:

- application for exemption from value added tax on goods that are planned to be imported into the customs territory of Ukraine and payment of an import duty providing the name of goods, their code according to the UCCFEA codes (if importation of complete objects is planned – indicating the names of such objects and their code according to the UCCFEA codes), the quantity and value;
- a duly certified copy of a foreign trade contract (agreement) for supply of goods or any other document which is the basis for importing goods into the customs territory of Ukraine;
- information about the forecast profit of an economic agent (indicating obligatory payments to the state budget);
 - conclusion of the state examination of compliance of the project, for which the goods are imported, with the requirements of regulations and normative technical documents in the sphere of energy saving indicating the name of goods, their code according to the UCCFEA codes (if importation of complete objects is planned – indicating the names of such objects and their code according to the UCCFEA codes);

- a document confirming the commitment of the economic agent to apply imported goods only for their own production with the respective justification and calculations;
- conclusion of the respective ministry or other central body of executive power stating that the goods with similar characteristics are not produced in Ukraine.

The Ministry of Economic Development and Trade prepares the draft decision of the Cabinet of Ministers of Ukraine on amending the list of goods including the suggestions of central bodies of executive power and submits it for review of the Cabinet of Ministers of Ukraine according to the established procedure.

During three years the economic agents that have imported goods in accordance with a duly approved list submit a monthly report in triplicate on the proper use of the goods before the 5th day of the month to the customs body registered the goods; two copies with a mark of acceptance of goods are sent by the customs authority monthly before the 13th day of the next period to the tax authority in the place of registration of the economic agent and the State Agency for Energy Efficiency and Energy Saving. The report form is developed and approved by the State Customs Service in agreement with the State Tax Service.

The customs authority in the place of registration of the economic agent and the State Agency for Energy Efficiency and Energy Saving perform control over the proper use of the imported goods according to the established procedure.

In the case of improper use of such goods the customs authority in the place of registration of the economic agent involving relevant central bodies of executive power take measures to recover outstanding amounts of import duty and value added tax according to the procedure and to the extent prescribed by law.

Thus, in accordance with paragraph 197.16 of article 197 of the TCU, violating the requirements of purposeful use of such goods, the taxpayer shall increase the tax liabilities after the tax period, which accounts for such violation, by the amount of value added tax that had to be paid for these operations at the

time of importation of such goods and pay the penalty accrued on such amount of tax based on 120 percent discount rate of the National Bank of Ukraine, which was effective on the date of payment of tax obligations, and for the period from the date of importation of such goods to the day of increase of tax obligation.

Please note that tax incentives for energy saving and energy efficiency efforts within the mechanism of VAT collection was also stipulated by the Law of Ukraine “On Value Added Tax” (hereinafter – the Law on VAT). In paragraph 5.18 of article 5 of the Law on VAT it was stipulated that the following “operations on importation of the goods into the customs territory of Ukraine are subject to tax exemption:

machinery running on renewable sources of energy, energy saving equipment and materials, instruments for metering, control and management of fuel and energy resources consumption, equipment and materials for producing alternative fuels except for biological fuels (hereinafter – the goods) provided that these goods are used by the taxpayers for their own production and identical goods with similar characteristics are not manufactured in Ukraine. The list of such goods is established by the Cabinet of Ministers of Ukraine;

materials, machinery and components used for manufacturing the machinery running on non-conventional and renewable sources of energy, producing alternative fuels except for biological fuels, energy saving equipment and materials, products, the operation of which ensures savings and the efficient use of fuel and energy resources, instruments for metering, control and management of fuel and energy resources consumption provided that identical goods with similar characteristics are not manufactured in Ukraine. The list and scope of such goods are established by the Cabinet of Ministers of Ukraine.

Violating the requirements of purposeful use of such goods, the taxpayer shall increase the tax liabilities after the tax period, which accounts for such violation, by the amount of value added tax that had to be paid for these operations at the time of importation of such goods and pay the penalty accrued according to the law”.

Encouraging energy saving within the mechanism of company income tax collection

Article 158 of the TCU envisages the peculiarities of taxation of company income obtained due to energy efficiency technologies implementation.

80 percent of company income obtained from the sale of the goods of own production in the customs territory of Ukraine is exempted from taxation according to the list established by the Cabinet of Ministers of Ukraine (will be specified by the CMU):

machinery running on renewable sources of energy;

materials, raw materials, machinery and components which will be used for producing energy from renewable sources of energy;

energy efficiency equipment and materials, products, the operation of which ensures savings and the efficient use of fuel and energy resources;

instruments for metering, control and management of fuel and energy resources consumption;

machinery for producing alternative fuels.

The payer has to provide separate accounting of profit or loss received from the sale of the goods specified in sub-paragraph one of this paragraph on the customs territory of Ukraine.

The amounts released in connection with the tax exemption provision are directed by the taxpayer to increase production according to the procedure prescribed by the Cabinet of Ministers of Ukraine.

In case of violation of the proper use of funds the taxpayer has to determine income not taxed in connection with the provision of tax exemption and to tax it in the current period, as well as pay a penalty for the respective period in the amount established by this Code.

50 percent of income obtained from the implementation of energy efficiency efforts and energy efficiency projects of the companies included in the State register of enterprises, institutions and organizations which perform the

development, implementation and use of energy efficiency efforts and energy efficiency projects is exempted from taxation.

The State register of enterprises, institutions and organizations which perform the development, implementation and use of energy efficiency efforts and energy efficiency projects include enterprises, institutions and organizations involved in sectorial energy efficiency programs and based on the results of the examination according to the procedure established by the central body of executive power on ensuring efficient use of energy resources, received the conclusion of such body about the compliance of energy efficiency efforts and energy efficiency projects that have been implemented or are in the process of development and implementation with the criteria of energy efficiency and are included in the sectorial energy efficiency programs.

The central body of executive power on ensuring efficient use of energy resources is charged with keeping the State register of enterprises, institutions and organizations which perform the development, implementation and use of energy efficiency efforts and energy efficiency projects. The procedure of inclusion of companies in the State register of enterprises, institutions and organizations which perform the development, implementation and use of energy efficiency efforts and energy efficiency projects is approved by the central body of executive power on ensuring efficient use of energy resources.

The procedure of preferential taxation of company income received due to the implementation and use of energy saving measures was introduced by the Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine on Promoting Energy Saving Measures” № 760-V dated 16.03.2007. This Law, in particular, amended article 7 of the Law of Ukraine “On Company Income Tax”, paragraph 7.21. This paragraph stipulated tax exemption for:

“7.21.1. Company income received from the sale of such types of goods on the territory of Ukraine according to the list established by the Cabinet of Ministers of Ukraine:

equipment running on non-conventional and renewable sources of energy;

energy saving equipment and materials, products, the operation of which ensures savings and the efficient use of fuel and energy resources;

instruments for metering, control and management of fuel and energy resources consumption;

machinery for producing alternative fuels.

The amounts of funds released in connection with the tax exemption provision are directed by the taxpayer to increase production. In case of violation of the proper use of funds the taxpayer has to determine income not taxed in connection with the provision of tax exemption and to tax it in the current period, as well as pay a penalty for the respective period in the amount established by the legislation of Ukraine.

7.21.2. Income of the companies included in the State register of enterprises, institutions and organizations which perform the development, implementation and use of energy efficiency efforts and energy efficiency projects cannot exceed 50 percent of the amount of income subject to taxation.

The State register of enterprises, institutions and organizations which perform the development, implementation and use of energy saving efforts and energy efficiency projects include enterprises, institutions and organizations involved in sectorial energy saving programs and received the conclusion based on the results of the examination held by the State Energy Saving Inspectorate about the compliance of energy saving efforts and energy efficiency projects that have been implemented or are in the process of development and implementation with the criteria of energy efficiency and are included in the sectorial energy saving programs.

The National Agency for Efficient Use of Energy Resources is charged with keeping the State register of enterprises, institutions and organizations which perform the development, implementation and use of energy saving efforts and energy efficiency projects. The procedure of inclusion of companies in the State register of enterprises, institutions and organizations which perform the development, implementation and use of energy saving efforts and energy

efficiency projects is approved by the National Agency for Efficient Use of Energy Resources.”

The procedure of inclusion of companies in the State register of enterprises, institutions and organizations which perform the development, implementation and use of energy efficiency efforts and energy efficiency projects is approved by Order of the National Agency for Efficient Use of Energy Resources №49 dated 01.04.2008.

According to this Order the legal entities that conduct development, implementation and use of energy saving actions and energy efficient projects and included to the industrial programs of energy saving and in accordance with the results of the expertise conducted by the bodies of the State Energy Saving Inspection (hereinafter – state expertise) received the conclusion on compliance of energy saving actions and energy efficient projects implemented or being developed or implemented with the criteria of energy saving can be included into the Register.

The Register is conducted in electronic form by the executive secretary of the Agency. The information from the Register is open for all users.

The National Agency of Ukraine in issues of encourage of efficient use of energy resources (now – the State Energy Efficiency and Energy Saving Agency of Ukraine) includes to the Register.

The main functions of the State Energy Efficiency and Energy Saving Agency during the conducting of the Register are the following:

- 1) preparation and adoption of the normative and methodological documents regarding the conduction of the Register;
- 2) consideration of the applications and documents provided by the legal entities in order to be included into the Register;
- 3) assessment of the provided documents and its transferring for the additionally assessment if necessary;
- 4) approving of the decision on including into the Register or on refusal;
- 5) including into the Register;

- 6) issue of the Certificate on including into the Register in accordance with defined sample (hereinafter – the Certificate) (appendix 2);
- 7) accounting of issued Certificates;
- 8) cancellation of issued Certificates;
- 9) rendering of consulting, informational services concerning issues of including into the Register;
- 10) control over the fulfillment by legal entities included into the Register of the requirements of the Law of Ukraine “ On changes to the legal acts of Ukraine regarding stimulating of energy saving actions”, and the conditions defined by this Order.

The list of the documents that shall be added to the application on including into the Register defined by the Order.

The decision on including into the Register or on refusal the NAER approves not less than within 30 days from the day of the registration of the documents. In case of necessity of additional assessment this term can be prolonged until 60 days; about the decision the applicant shall be informed in written form.

The decision of the NAER regarding the refusal in including into the Register may be approved because of the following reasons:

noncompliance of provided documents with the requirements of current legislation and this Order;

negative conclusion of the state energy saving expertise on compliance of energy saving actions and/or energy efficient projects implemented or being developed or implemented by the legal entity with the criteria of energy saving;

lack of the energy saving actions and energy efficient projects implemented or planned to be implemented in the industrial energy saving program;

industrial energy saving program that includes the energy saving actions and energy efficient projects of the legal entity is not considered with the NAER.

The applicant should be informed concerning the reasons of refusal in written form.

The legal entity has a right to go to court regarding approved decision.

In case of positive decision regarding including into the Register the NAER issues to the legal entity the Certificate and informs about it state tax bodies in accordance with the place of location of the legal entity within three working days after its issue.

The Public Corporation “Plant of transistors” was the first enterprise included into the State Register of the enterprises, institutions and organizations that conduct development, implementation and use of energy saving actions and energy efficient projects.

According to the information placed on the official site of the State Energy Efficiency and Energy Saving Agency of Ukraine the State Register of the enterprises, institutions and organizations that conduct development, implementation and use of energy saving actions and energy efficient projects includes the following enterprises:

#	Full Name of the legal entity	Place of Location of the Legal Entity	Register code	Title of the industrial energy saving program	Title of energy saving action and energy efficient project	# of the Certificate, date of issue and series №
1	2	3	4	5	6	7
1.	Public corporation “Plant of transistors”	69600, Zaporizk a obl., Zaporizh zha, Teplychn a street, 16.	31792555	The industrial program of energy efficiency and energy saving until 2017 the Ministry of industrial policy of Ukraine	Reconstruction of production of the silicon production for the solar energy	№#1, from 27.05.10, series ДР 000001

2.	Public company «Kvazar»	04136, Kyiv, Pivnichno-Syretska street, 3	14314038	The industrial program of energy efficiency and energy saving until 2017 the Ministry of industrial policy of Ukraine	Production of photoelectric solar transformers and photoelectric solar units	#2, from 10.02.11, series ДР 000002
----	-------------------------	---	----------	---	--	-------------------------------------

Pursuant to the given Procedure for inclusion in the Register, legal entities submit the respective applications to the State Agency for Energy Efficiency and Energy Saving (according to annex 3).

The application for inclusion to the Register is accompanied with:

- copies of statutory documents;
- conclusion of the state examination about the compliance of energy efficiency efforts and energy efficiency projects that have been implemented or are in the process of development and implementation with the criteria of energy saving;
- copy of the approved industrial energy efficiency program including energy efficiency efforts and energy efficiency projects of the legal entity certified by the respective body of executive power;
- calculations of expected losses of the state budget because of providing tax exemptions to the legal entity and proposals regarding the sources of their recovery;
- request of the ministry, other central body of executive power of the respective sector for the inclusion of the legal entity to the Register with confirmation of sources of recovery of income losses of the state budget.

According to article 22 of the Law of Ukraine “On Energy Saving” the state energy saving examination shall cover technological part of feasibility studies and construction projects of new construction and expansion (reconstruction, technical re-equipment, modernization) of existing facilities and enterprises with an annual consumption of fuel and energy of a thousand or more tons in terms of conventional fuel – by the decision of the owner in the case providing preferences (including tax exemptions) at the account of budget funds. Thus, according to article 24 of the indicated Law, a negative conclusion of the state energy saving examination is the basis for the improvement of projects and programs and elimination of defects in buildings, structures or engineering facilities in accordance with the conclusions of the examination. A positive conclusion of the state energy saving examination is the basis for satisfying the application of the consumer of energy resources with regard to receiving subsidies, tax exemptions, financial and credit privileges at the expense of energy saving fund.

The state energy saving examination is held according to the Provision on the state energy saving examination approved by Resolution of the Cabinet of Ministers of Ukraine dated 15 July 1998 №1094.

The development of industrial energy efficiency programs is stipulated by Instruction of the Cabinet of Ministers of Ukraine №1567-r dated 17.12.2008 “On Programs for Improving Energy Efficiency and Reducing Energy Resources Consumption”.

During the implementation of energy efficiency efforts and energy efficiency projects the taxpayer has to provide separate accounting of profit/ loss received from the implementation of such efforts and programs according to the procedure approved by the Cabinet of Ministers of Ukraine (will be specified by CMU).

The above-mentioned provisions shall be effective during 5 years from the moment of the first profit because of the improvement of energy efficiency of production.

Temporary measures of tax incentives for energy saving:

The final provisions of the TCU (chapter XX) specify temporary peculiarities of collecting certain taxes and fees.

In particular, in accordance with paragraph 15 of subsection 4 “The Peculiarities of Collecting Company Income Tax”, the following income is exempt from taxation temporarily, until 1 January 2020:

- income of manufacturers of biofuel received from the sale of biofuel;
- company income received from the activity on simultaneous production of electricity and heat energy and/or production of heat energy using biofuels;
- income of manufacturers of equipment and machinery specified by article 7 of the Law of Ukraine “On Alternative Types of Fuel” for production and reconstruction of technical means and vehicles including self-propelled agricultural machinery and power plants that consume biological fuels received from the sale of this equipment and machinery and equipment produced in Ukraine

Pursuant to paragraph 17 of this subsection, income of electricity energy companies (class 40.11 group 40 of CTEA DK 009:2005) from the sale of electricity produced from renewable types of energy is temporarily, for 10 years, exempt from taxation since 1 January 2011.

Taking into account the premises, the tax legislation of Ukraine, namely the Tax Code of Ukraine, which came into effect on 1 January 2011, provides a number of tax incentives for energy saving and energy efficiency measures. In particular, tax exemptions provided within the collection of company income tax, value added tax, land tax, fee in the form of target premium to the current tariff for electricity and heat energy. A number of exemptions are permanent, other ones – temporary.

The bodies of executive power, first of all, the Cabinet of Ministers of Ukraine and the State Agency for Energy Efficiency and Energy Saving of Ukraine

should develop a series of regulations aimed at implementing the provisions of the Tax Code of Ukraine, which provide tax incentives for energy saving including: the List of goods of own production, income from the sale of which on the customs territory of Ukraine shall be exempt from taxation (CMU); the Procedure of directing the amount of funds released in connection with the tax exemption provision by the taxpayer to increase production (CMU); the Procedure of the examination of energy efficiency (the State Agency for Energy Efficiency and Energy Saving of Ukraine), the Procedure of separate accounting of profit/ loss received from the implementation of energy saving efforts and energy saving projects (CMU).

As the above analysis shows the vast majority of tax incentives for energy saving and energy efficiency efforts are not a novel of the Tax Code of Ukraine. They were stipulated by the special tax laws of Ukraine regulating the mechanism of collection of certain taxes, in particular, the Laws of Ukraine “On Taxation of Company Income”, “On Value Added Tax”. Along with this, the wording of tax incentives in the TCU is slightly different from similar provisions of the special tax laws, which is emphasized in the report.

The fact of regulating the mechanism of collection of the fee in the form of target premium to the current tariff for electricity and heat energy is positive as by this time the given mechanism has been prescribed on the subordinate level – the Resolution of the Cabinet of Ministers of Ukraine.

Recognizing the need for tax incentives for the implementation of energy saving and energy efficiency in the economy of Ukraine, it should be noted that the sphere of buildings remained beyond the attention of the legislator. However, this sphere has significant potential to save energy and thus the state support of implementing energy saving and energy efficiency efforts in the sector of buildings is very important, especially in residential buildings, public buildings and buildings, in which the bodies of state power and local self-government are located. Introducing tax incentives for the implementation of energy saving and efficiency efforts in this sphere were suggested by the Project’s experts when

developing the draft Law of Ukraine “On Energy Efficiency of Buildings”. However, the Ministry of Finance of Ukraine did not support this initiative.

Preliminary conclusions:

The legislation of Ukraine stipulates the general framework of energy saving and energy efficiency. However, the concrete mechanisms defined by the legislation need to be improved. In particular, the legal status of energy servicing companies, the mechanism of use of energy performance contracts and issues of state support for the establishment and functioning of ESCOs in Ukraine need to be regulated by the Law. Moreover, taking into consideration the necessity of update of the Energy Strategy of Ukraine for the period until 2030 we consider that it is reasonable to develop the proposals regarding the amendment of the Energy Strategy with provisions on state support for the establishment and activity of ESCOs in Ukraine. The relevant drafting work shall follow the analysis of the EU requirements in this sphere, in particular, of the Directive 2006/32/EU from 05.04.2006 of the European Parliament and the Council “On energy end-use efficiency and energy services and repealing Council Directive 93/76/EEC” and the EU Member – states experience of its implementation.