GIDE

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newsletter

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IN THIS ISSUE:

DOING BUSINESS

Paying for Import - Back to Business

On 30 October 2014 the NBU adopted a welcome decision No.685 to abolish restrictions on payments in foreign currency for imported goods. The suspension was introduced in August 2014 and was due to expire on 2 December 2014. At last, under a pressure of business, the NBU cleared path for payments under import transactions in which foreign goods do not cross Ukrainian border as well as import agreements pursuant to which the goods have been cleared by customs into Ukraine over 180 days ago.

The Regulation No.685, however, has a sting: it has lowered threshold for the imported works, services, IP rights and debts that require positive expert opinion on their pricing - from EUR 100,000 value (per recipient per year) to EUR 50,000 - through amendment of the relevant Regulation No. 597 dated 30 December 2003.

The Law on Anti-corruption Policy Adopted

On 14 October 2014 the Parliament passed a package of anti-corruption laws, which were intended to re-shape and reinforce the approach of the anti-corruption laws passed in 2011 during the Yanukovych administration, which contained numerous loopholes and proved to be not particularly effective. The 'flagship law' of the newly passed package is the Law on Prevention of Corruption (the "**Corruption Prevention Law**" or the "**Law**") which replaces the 2011 Law on the Fundamentals of Prevention of and Counteraction against Corruption.

The Corruption Prevention Law introduces a number of important changes to the anti-corruption regulation, in particular:

- the National Corruption Prevention Agency (the NCPA) is established as a central coordination body responsible for implementation of anti-corruption strategies and policies in Ukraine, anti-corruption clearance and administration of the database of annual tax declarations of civil servants as well as a database of corruption offenders (importantly, investigation of corruption offenses is not a competence of NCPA, but that of the National Anti-Corruption Bureau, a law enforcement authority established by another law of 14 October 2014);

- considerably expanded provisions on prevention of actual or potential conflict of interests (Chapter V) by state and municipal officials as well as officers of state and municipal enterprises;

- detailed requirements for declaration of income, assets and financial liabilities of civil servants and their family members;

- introduction of the concept of illicit enrichment (which was absent in the 2011 law): *i.e.*, lifestyle or expenditures of an unjustified scale which cannot be explained by the declared income and assets of a civil servant which gives rise to anti-corruption investigation; the lifestyles of civil servants are to be randomly monitored by the NCPA;

- subjection of civil servants and candidates seeking positions in civil service to a special anti-corruption clearance procedure;

- protection of whistle-blowers, *i.e.*, informers reporting corrupt activities and assisting with anti-corruption investigation: such persons are protected from sanctions (including dismissal) related to their whistle-blowing activities; any sanctions applied to them are presumed to be retributory, unless the employer proves otherwise; in case of unfair dismissal, such persons are entitled to reinstatement or, upon their discretion, compensation in the amount of a 6 month average salary.

While the Corruption Prevention Law primarily addresses corrupt activities involving civil servants (government and municipal officials, judges, policemen, etc.), officers of state and municipal enterprises and persons rendering public services (such as notaries public, arbitrators, appraisers, auditors, etc.), Chapter X of the Law specifically deals with private businesses. In particular, the Law prohibits private companies as well as their officers and employees from engaging in any sort of corrupt activities (*e.g.*, bribery, kick-backs, etc.) related to operations of the company (*i.e.*, either with regard to public institutions or other private companies) and requires that any cases of corruption or actual or potential conflict of interest be immediately reported to the management, for further action.

Additionally, any state-owned enterprises and private companies seeking to participate in public procurement procedures are obliged to introduce a position of a compliance officer and to develop and adopt internal compliance rules which have to include, inter alia, description of anti-corruption procedures, professional ethical rules, confidential reporting procedures, internal investigation and enforcement procedures, etc. Compliance rules are to be introduced after internal discussion with personnel and must remain constantly available for the employees (*e.g.*, through the official website or on the intranet); the compliance rules are to be included in employment agreements and may be incorporated in civil contracts of the company. A failure to adopt compliance rules or to have a position of a compliance officer will result in disqualification of the company from public procurement procedures.

Notably, the Corruption Prevention Law amends, among other laws, the Code of Administrative Offenses (considerably increasing fines for mild corruption offenses) as well as the Criminal

Code of Ukraine (by introducing criminal liability for a failure to submit a declaration of income, assets and financial liabilities or submitting a false (incomplete) declaration by a civil servant or a candidate for civil service).

The Corruption Prevention Law was signed by President and entered into force the next day after its official publication (*i.e.*, on 26 October 2014) but will become binding within 6 months therefrom, *i.e.*, on 26 April 2015 (with such a 'double introduction' procedure to expectedly result in problems with its interpretation and practical application).

The Law on Disclosure of the Companies' Ultimate Beneficiaries

On 14 October 2014 the Parliament has enacted open access to the real estate registers and an obligation of the business to disclose their beneficial owners. The law is signed and published on 25 October 2014 and will come into force within one month upon official publication, i.e. on 25 November 2014.

New Obligations

The law obliges business entities, except for state-owned and municipal enterprises, to identify their ultimate beneficiaries and to regularly update and keep information about them. Besides, the law requires that detailed information about holders of substantial stakes and beneficial owners is reported to the state registrar by founders in case of establishment of a new company. All companies registered before the law came into force will have to submit the aforesaid information to the local state registrars within 6 months. The companies are also obliged to repeat disclosure when the holder of the material stake changes.

Ultimate Beneficiaries, Public Officials and Substantial Stake Holders

"Ultimate beneficiary" is defined as an individual, who directly or indirectly, individually or jointly with other related persons, can influence the company due to holding 25 per cent of voting shares, or who, formally or informally, can exercise any other form of control over the legal entity. Thus, the law emphasises potential influence, rather than actual control. Besides, the law expressly provides that a nominal holder, trustee or an agent cannot be deemed an ultimate beneficiary.

"Substantial stake" is not defined in the law. The law refers in so far to the law on financial monitoring, which currently sets the threshold at 10 per cent of the charter capital or votes. However, simultaneously with the law on disclosure of the companies' ultimate beneficiaries a new law on financial monitoring was adopted. The new law on financial monitoring, at least in the currently available draft law, does not contain a definition of a "substantial stake"; hopefully the finally adopted law will bring clarity.

Furthermore, the law lists, in detail, state officers which are considered to be public officials for financial monitoring purposes. As the previous definition was very vague and ambiguous, this is a progress.

Scope of Disclosure and Liability

Scope of information about holders of material stakes and beneficial owners was expanded and will include full name, citizenship, passport details, Ukrainian tax number (if any) and residence address for individuals, and full name, country of incorporation, registered address, and identification number for legal entities. Information on ultimate beneficiaries and substantial stake holders should be publicly available.

Unlike the previous version of the draft, the approved law does not suggest criminal liability for non-submission or incorrect submission of the obligatory information. The law provides for an administrative fine of up to 500 tax exempt allowances (currently, UAH 8,500 or EUR 500) for a

failure to submit information about ultimate beneficiaries. The fine can be imposed on the company's management.

Fighting Financing of Illegal Activities

The abuses of the previous political regime, hybrid war and external aggression prompted the Ukrainian government to step up fighting against criminal proceeds and look closer at the legalisation of such proceeds and the challenge of terrorism. The Cabinet of Ministers submitted (see Gide Newsletter issued in early October this year) and on 14 October 2014 the Parliament approved the new financial monitoring rules, codifying the proactive position of the current government to counteract and prevent, where possible, access of unlawful profits to the real sector of the economy. The new Law on Prevention of and Counteraction to the Legalisation (Laundering) of Criminal Proceeds, Financing of Terrorism and Financing of Proliferation of Weapons of Mass Destruction is, in essence, a restatement of the existing law, which had a similar albeit shorter name. The previous law will cease to be effective with the signing of the new law, which, however, will only become effective 90 days after the publication: this flow may therefore result in three months of holidays for the criminal underworld - free of financial monitoring.

The new anti-money laundering (AML) law provides better language for many adopted FATF rules; in addition, it gives an opportunity to provide local content in many respects. That is, formal approach is replaced with the result - driven strategy through revision, supplementing and modification of several material elements in the AML model.

First, primary AML monitors were properly re-defined to include all forms of service providers: lawyers, accountants and auditors; in addition, insurance brokers became primary monitors. For some reason, asset management companies are not among such subjects anymore although their activities comprise mainly financial transactions; such an exemption looks like a loophole: acquisition of investment certificates from the issuer is not subject to AML, while monitoring must be made when they change hands on the secondary market. Each primary monitor may request information not only from the counterparties, but also from governmental authorities, which must provide information free of charge; banks have obtained a particularly wide discretion in requesting of information - partially, due to the vague wording of the scope. Each AML monitor must identify ultimate beneficiaries of their potential clients and verify existing customers. The monitors must inform the central AML authority (State Committee) about:

- appointment and replacement of the AML officer, including acting officer;
- registration data of the AML monitor or its liquidation;
- not only material data of the suspected financial transaction in the pre-established format, but also "additional information" broadly defined.

Special AML monitors, such as notaries, lawyers, auditors, accountants and traders in precious metals or stones were relieved from constant monitoring and will only need to identify their customers when certain financial transactions are contemplated. The obligation to conduct training was restricted only to banks and participants of payment systems except postal services operators.

A novelty of the AML law is that banking institutions may be able to delegate responsibility to identify and verify ultimate beneficiaries of potential clients (customers). Such authorisation of a third party should open a way to innovative distant contracts, however, not before the National Bank of Ukraine legislates on the form and substance of such delegation.

Importantly, all AML monitors from corporate sector must verify information about their clients on annual basis. Moreover, banks must now verify all lenders providing subordinated financing.

The National Bank of Ukraine was delegated substantial AML authority in respect to banking institutions, next to the authorities of the State Committee for Financial Monitoring. Decisions of both the NBU and SCFM on penalties must be enforced by the State Executive Service without judgement, i.e without the review of a court.

The National Commission for the State Regulation of the Financial Services Markets can now verify ultimate beneficiaries of non-banking financial institutions. Moreover, regulators of the financial markets (including the NBU and the National Commission) can refuse to license or register financial institution with appointed officer which have a recent criminal record. The Deposit Guarantee Fund will supervise compliance with the AML rules by insolvent banks. The State Security Service and the Ministry of Foreign Affairs will nominate persons to the UN list of terrorists and related organisations.

As to the AML rules, the law has defined a 'politically exposed person' (PEP) broadly and included Ukrainian public activists. Previously, only foreign PEP was included. Interestingly, directors and officers of government-owned companies are among PEPs; however, officers of local self-governance bodies are not considered PEPs and, thus, are not considered high risk and are exempt from regular verification.

Under pressure from the industry, the thresholds for insurance policies were modified - instead of UAH 150,000 *coverage*, the mandatory monitoring must be conducted with respect to *premium* equal to or above UAH 5,000; gambling organizers must identify beneficiaries of transactions (whether bet or price) starting from UAH 30,000. Other transactions continue to trigger monitoring at the UAH 150,000 threshold. The restated law retains a provision, requiring financial monitoring of transactions *without establishment of business relations, which is difficult to interpret, given a broad definition of business relations*.

A Mandatory Requirement of a Corporate Seal Abolished

On 30 October 2014, the Law No.1206-VII "On Amending Certain Laws Regarding Simplification of the Procedure of Opening Business" dated 15 April 2014 entered into force. The Law abolishes a requirement of mandatory affixing of a corporate seal to documents (most notably, contracts and powers of attorney) as an essential element of a written form of contracts done by legal entities. Thus, as of 30 October 2014, for a contract of a company to be deemed duly executed it is sufficient if the contract is signed by an authorized person, *i.e.*, a person indicated as a signatory in the public register or constituent documents (most frequently, a director), or a person acting on the basis of a valid power of attorney; the lack of a seal on a document no longer undermines its legal effect, nor does it automatically invalidate certain formal contracts (*e.g.*, mortgage, pledge, loan agreements) or powers of attorney. Accordingly, companies can, but no longer obliged, to possess a corporate seal, and the lack (*e.g.*, a loss) of the corporate seal no longer affects their ability to do business.

At the same time, the provisions of the Law are apparently intended to apply only to those contracts which are concluded on or after 30 October 2014. Any earlier contracts concluded by companies without affixing a corporate seal remain exposed to all legal risks associated with a defective written form (including, in certain cases, invalidity) under the preceding civil laws. Moreover, a number of regulatory laws still contain a requirement of a seal for documents of companies and may conflict with the Law; applicability of the seal abolishment to the public procurement procedures is also unclear, due to a curious (likely erroneous) language of the Law.

The new Law on the Public Prosecutor's Office adopted

The new Law on the Public Prosecutor's Office was approved by the Parliament on 14 October 2014, published on 25 October 2014 and will come into effect on 25 April 2015.

Back in the autumn of 2013 the adoption of the law was a requirement of the European Union for signing the Association Agreement with Ukraine. The law received a positive assessment from the Venice Commission and was recommended for approval by the Parliament.

Abolishment of the general supervision function

The main novelty of the law is the abolishment of the general supervision function of public prosecutors. According to the new law, prosecutors will not be able to review 'compliance by businesses with the effective laws', request documents and make audits.

The general supervision function was a rudiment of the Soviet legal system and had to be abolished according to the transitional provisions of the Constitution of Ukraine. In practice, the general supervision function was used by prosecutors to exert pressure on businesses.

Transfer of the responsibility to conduct investigations to another authority

Another 'breakthrough' of the law is the elimination of investigators from public prosecutor's offices. According to the law, conduction of investigations will be taken over by the State Bureau of Investigations of Ukraine. The new authority must be created in the next 3 years; until then investigation will remain in the competence of the prosecutor's office.

Guarantees of the Independency

Additional recommendations of the Venice Commission were implemented into the law by the Parliament this year designed to secure the independence of public prosecutors. According to the law, the General Prosecutor of Ukraine cannot be dismissed by the President of Ukraine at his will.

The dismissal of the General Prosecutor of Ukraine requires consent of the Parliament and can be made only upon suggestion of the Qualification and Disciplinary Commission of Prosecutors of Ukraine or the High Council of Justice of Ukraine. The Qualification and Disciplinary Commission of Prosecutors of Ukraine is comprised of 11 members, 5 of which are appointed by the Ukrainian Congress of Prosecutors, 1 - by the Congress of Advocates of Ukraine, 3 - by the Ombudsman upon approval of the appropriate Parliament's committee, while the remaining 2 members must be legal scientists appointed by the Congress of Law Schools and Legal Scientists of Ukraine.

Besides, the law provides for detailed regulations of dismissal of the General Prosecutor of Ukraine, suspension of his authorities, and grounds for disciplinary actions.

Military Prosecutors

The new law provides for establishment of the Military Prosecutor's Office of Ukraine which is a structural unit of the general prosecutor's office competent for supervising military affairs.

BANKING AND FINANCE

Discharge of the Surety by Lapse of Time

The Supreme Court of Ukraine issued a curious ruling on discharge of the surety (decisions in cases Nos. 6-6цс14 and 6-125цс14 dated 17 September 2014), explaining that the general statutory three-year limitation period must not be applied to claims under suretyships. The court

ruled that a six-month statutory term for claim under on-demand suretyship is a preclusive term. Therefore, where the lender did not claim performance from the surety within six months after the principal obligation had become overdue (or such other term as established in the surety agreement), no claim can be presented afterwards. The court went on further to state in case No. 6-125цс14 that not only the direct demand to the surety must be made within the six-month statutory period, but the creditor should also file a suit to the court. In other words, the court declared the preclusive term for demand to be a substitute for the statute of limitations in case of suretyship. Surprisingly, only the dissenting opinion by Justice Yuriy Senin speaks about classification of the preclusive term as a shorter (six months or as established by the agreement) statute of limitation, and the dissenter concluded that the Supreme Court erred in re-characterisation of such term. In Justice Senin's approach, the Supreme Court meant that filing of the court suit would restart the statute of limitations, however, the reasoning by the majority (of the Supreme Court) did not state this conclusion; consequently, no judicial protection can be sought if the preclusive term expired before the court ruled on the merits. In other words, if no judgement is rendered by the expiration of the preclusive term, the claim is cancelled.

REAL ESTATE

Free Access to the State Register of Real Rights to Immovable Property

Following the best European transparency and anti-corruption practice the Parliament of Ukraine finally allowed free access to the State Register of Real Rights to Immovable Property (the "Register"), which contains information about both land and immovable property. The Law on Amendments to Certain Laws of Ukraine on Identification of Ultimate Beneficiaries of Legal Entities and Public Officials (the "Law") provides for two ways how information from the Register can be received by any interested person:

- by submitting a request to a local office of Ukrderzhreyestr (the State Registration Service of Ukraine) or to a notary. Such a request can also be mailed in;

- on the official website of Ukrderzhreyestr. Information received in this manner will be considered to be official.

It remains an open issue whether it will be necessary to register online in order to receive information. The Law also does not specify whether access to the Register will be a paid service and whether users will be required to identify themselves or to give out any other personal data.

The Register's search criteria will be limited for individuals and legal entities and unlimited for state and local authorities, including the security service, agencies of the Ministry of the Interior, prosecutor's offices, as well as notaries and advocates. In particular, individuals or legal entities will only be able to search the Register using details of immovable property, while state and local authorities, notaries and advocates will be able to do searches using details of immovable property as well as details of holders of rights/encumbrances.

Further amendments to the Procedure for Receiving Information from the Register approved by the Resolution of the Cabinet of Ministers of Ukraine no. 868 dated 17 October 2013 should clarify the outstanding issues raised above.

TRADE AND MANUFACTURING

New State Registration Procedure for Commercial Concession Contracts

On 21 October 2014, the Ministry of Justice published the Regulation on Public Registration of Commercial Concession Contracts dated 29 September 2014 (the "Regulation").

The Regulation introduces the long-awaited procedure for official registration of commercial concession contracts (or franchising agreements, as they are known in Western jurisdictions).

More than a decade ago the Ukrainian Parliament envisaged that commercial concession contracts must undergo state registration to be valid in relations between concessioners and any third parties (Article 1118 of the Ukrainian Civil Code). Since then no clear administrative procedure existed for performing such registration, leaving the issue highly uncertain for businesses and causing risk of disputes.

Pursuant to the Regulation, the registration is performed in the Ukrainian register of companies, irrespective of the concessionaire's location, subject to provision of a number of formal documents, including the concession contract drafted in Ukrainian. The registration is free-of-charge and takes no longer than 5 working days.

Upon registration the main terms and conditions of each commercial concession contract, including, without limitation, the effective period, territory and exclusivity provisions, become available to any third interested party through a special web-portal.

The Regulation will become effective 6 months after its publication, i.e. on 21 April 2015. ■

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