

newsletter

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IN THIS ISSUE:

Doing Business in Ukraine Almost 100 permits cancelled	p. 1
Doing Business in Ukraine Status of temporarily occupied territory of Ukraine	p. 3
Public Procurement New law on public procurement	p. 5
Dispute Resolution Improvement of the Courts system	p. 6
Pharmaceuticals The New List of Medicinal Products Subject to 7 % VAT	p. 6
Personal Data Protection Ombudsman's office on the protection of privacy	p. 7

DOING BUSINESS IN UKRAINE

Almost 100 permits cancelled

On 9 April 2014, the Parliament of Ukraine, adopted the Law No. 2436a (the "Law"), which cancels almost 100 permits and approvals, simplifies respective permitting procedures and shifts the current approach from state- to business-oriented.

The Law is a very important step towards simplification of permitting procedures and creation of credibility in permits issued by the respective state authorities.

According to the Law, any permit is to be received by a legal entity only if such permit is included in the [List of Permits](#). Exception has been made only for permits in the areas of export control, financial services, state secret, economic competition protection, and nuclear energy use, which are set forth by the respective laws and not included in the [List of Permits](#).

Any approval, opinion or other document necessary to be obtained in the permitting procedure shall be collected directly by the permit-issuing authority. Prior to such amendments, legal entities often had to obtain necessary approvals and opinions on their own, which made the permitting procedure complicated and time-consuming.

The Law prohibits the cancellation of permits by the issuing authority when the legal entity has provided inadequate information or is carrying out its business violating the law subject to prior receipt of an improvement notice from an issuing authority. In such cases the competent authority may file a claim to the administrative court for cancellation of the permit, which will then take a decision on the cancellation of the permit.

Permits for emission of contaminants into the air

The Law provides for an extension of the validity term of permits for emission of contaminants into the air by facilities of all three groups of environmental danger. In particular, in case of operation of facilities of the second group (registered facilities which are not engaged in manufacturing and have no manufacturing equipment) the permit remains valid for 10 years, permits for the facilities of the third group (the less dangerous) will be valid for an indefinite period of time while permits for the most dangerous facilities (i.e. of the first group) will be valid for 7 years.

Permits for waste disposal

According to the Law, the permit for waste disposal will be compulsory from now on only for legal entities generating over 1,000 tons of waste which activity is not limited to waste generation but also covers other operations with waste. Legal entities which generate less and which activity leads only to waste generation will only have to submit the annual waste declaration.

The Law also proposes to cancel the requirement of limits on generation and disposal of waste from the list of documents necessary for the receipt of permits for waste disposal. Up to now, the validity of such permits is linked to the approval of the limits by local administrations and prior agreement with environmental authorities. Such procedure usually takes several months and failure to agree the limits with the environmental authorities, or non-approval by local administrations, will make the permits invalid. Thus, the proposed amendments will significantly speed up and simplify the permitting procedure for applicants.

Permits for special water usage

Prior approval of applications for receipt of the permit for special water usage will be replaced with opinions of the relevant state authorities which will be required only for special water usage of underwater and healing waters, while the permit for special usage of surface waters will be issued by the local authorities without any additional opinion to be issued.

Permits for generation, transmission and supply of electric, thermal, mechanical power generated from renewable sources

The Law annuls permits for generation, transmission and supply of electric, thermal, mechanical power generated from renewable sources as well as permits for: geothermal energy generation; allocation of equipment which uses solar radiation, wind, tidal waves for energy facilities construction; grid connection; network creation for transportation of electric power generated from renewable sources to consumers which may encourage construction of energy facilities and generation of electric power from renewable sources.

Temporary prohibition (suspension) of business activity

The Law annuls Resolution of the Parliament of Ukraine dated 29 October 1992, which proves to be the main legal basis for a temporary prohibition (suspension) of business activity of legal entities by environmental authorities. If the Law is signed by the acting President, the environmental authorities will no longer be authorised to take decisions on temporary prohibition (suspension) of business activity in case of failure by the legal entity to receive ecological permits.

Grain quality certificates and compliance certificates

The grain quality certificates and compliance certificates for grain storage services will not be required anymore. Moreover, the Register of Grain Quality Certificates and Derived Products as well as the Register of Compliance Certificates for Grain and Derived Products Storage Services will be abolished.

According to the current version of the Law of Ukraine "On Grain and Grain Market", the grain quality certificates are deemed to be a pre-requisite for the transportation of grain and derived products and grain export-import operations, while certification of the grain storage services is required for commencing grain warehousing activities. Hence, such amendments will significantly simplify the transportation of grain and derived products within the territory of Ukraine and grain export-import operations and considerably facilitate grain warehousing.

The Law was signed by the Chairman of the Parliament who at the same time is the acting President of Ukraine and published on 25 April 2014. The Law became effective on the day following its publication.

Status of Temporarily Occupied Territory of Ukraine

On 15 April 2014 the Parliament of Ukraine adopted the Law of Ukraine on Guaranteeing the Rights and Freedoms of People on the Temporarily Occupied Territory of Ukraine (registered under No. 4473-1). The Law was signed into law (No. 1207-VII) by the acting President, officially published on 26 April 2014 and came into force on the next day (27 April 2014).

We may note the following key issues of the Law.

No prohibition of economic activity

Unlike the initial version of the draft, the Law does not prohibit economic activities in the Crimea. Instead, special conditions of pursuing business activities in the occupied land as well as any applicable restrictions or limitations are to be specifically addressed in a separate law which is to be drafted and submitted to the Parliament by the Cabinet of Ministers of Ukraine within 15 days, *i.e.*, by 12 May 2014..

As of the date of this Newsletter, no draft law on economic activities in the Crimea has been registered with the Parliament of Ukraine.

Unrestricted entry for Ukrainians

Unlike the draft, the Law does not introduce any restrictions on travel to and from Crimea for the Ukrainians. The Ukrainian citizens (whether residents of Crimea or not) will enjoy a right of free passage to and from Crimea upon presentation of a document confirming Ukrainian citizenship. At the same time, we may not exclude that Ukrainian citizens may be subject to certain restrictions introduced by Russia or Crimean local authorities.)

Foreigners will need a special permit to enter the Crimea and will have to cross the border of Crimea at the special check-points, subject to the border control. A procedure for issuance of such permits is yet to be adopted by the government of Ukraine.

An attempt to enter or exit the Crimea in breach of the applicable migration procedures (*e.g.*, without a valid permit) will lead to administrative liability (a fine or arrest, with confiscation of the vehicle), denial of entry into Ukraine for a foreign citizen and deportation; in some limited cases (if a purpose of an unauthorized travel is found to be damaging the interests of the state) unauthorized visitors may be subject to criminal liability

Citizenship

The Ukrainian parliament expressly refused to recognize involuntary automatic conferral of the Russian citizenship upon Ukrainian citizens permanently residing in the Crimea. Those Ukrainians residing in Crimea, who were forced into accepting the Russian citizenship without having applied for it, will continue to be recognized as citizens of Ukraine.

Notably, this provision is not new to the Ukrainian law and appears to be more a political statement, as Ukraine, by virtue of the Law "On Citizenship", has not recognized a second (foreign) citizenship of the Ukrainian citizens, unless their Ukrainian citizenship was terminated by the President of Ukraine.

At the same time, the Law re-confirms the intention of the State of Ukraine to continue providing social security to the Ukrainians in the Crimea who do not receive it from the Russian Federation. However, the procedures for proving non-receipt of social security from the Russian authorities remain unclear.

Ukrainian authorities in the Crimea

The Law expressly refuses to recognize any Crimean authorities which were formed in breach of the Ukrainian laws (e.g., those which are now being created by the Russian Federation) and declares their decisions, or any documents issued by them, null and void.

This is, indeed, an important statement in the light of the new governmental bodies which were created in the Crimea. The State of Ukraine does not recognize the new authorities in Crimea and will not bring to liability those who will not perform their decisions.

Guarantees with regard to private and public property

The Law guarantees survival and continuance of existing rights to property of individuals and companies in the territory of the Crimea. State companies and municipalities maintain the status quo with respect to the ownership of the property located in the Crimea, including land, air space, continental seabed, sea water, radio frequencies, mining resources and utilities.

The Law does not prohibit transactions with the real property located in Crimea, however, subjects such transactions to the Ukrainian laws and requires their execution (e.g., notarization) to be done outside of Crimea, under the rules and procedures yet to be adopted by the Ukrainian government. Any transactions with real property in the Crimea in breach of the laws of Ukraine are expressly declared null and void.

Jurisdiction

The Law submits any civil and commercial disputes to the jurisdiction of local courts the courts of appeal of Kyiv and the Kyiv region, pursuant to the special allocation rules set forth in the Law.

The courts of Crimea and the city of Sevastopol are required to transfer any pending cases to the respective courts of the city of Kyiv within 10 working days after entering into force of the Law, i.e., by 15 May 2014 (however, it is unclear whether the Crimean courts will comply).

Criminal liability for legal entities

The Law accelerated introduction of criminal liability for Ukrainian legal entities starting from the date of the entering into force on the Law (otherwise, the law on criminal liability of legal entities which had been passed in May 2013 as a part of the anti-corruption package would have entered into force on 1 September 2014).

Under the provisions of the law on criminal liability (a full name is the Law “On Amending Certain Legislative Acts of Ukraine Regarding Compliance with the Action Plan on Liberalization by the European Union of the Visa Regime for Ukraine concerning criminal liability of legal entities” No. 314-VII dated 23 May 2013) which has become effective as of 27 April 2014, legal entities may be held criminally liable (by a fine, or confiscation, or forcible liquidation) for certain acts or omissions, most notably, crimes against national security (*coup*, sabotage); abduction of people and taking hostages; violation of the election laws; commercial bribery (kickbacks); money laundering; terrorism, unlawful creation of military or paramilitary groups and their supply with weapons and ammunition, *etc.* Apparently, the purpose of that acceleration was prevention of the Ukrainian companies from involvement into illegal activities in the occupied territories which would harm interests of Ukraine and/or assist separatists.

At the same time, unlike the earlier draft which proposed to make criminally punishable and ‘voluntary cooperation in any form with the occupation government to the detriment of the interests of Ukraine’ (‘collaborationist activities’), that provision was removed from the final version of the Law and was not introduced.

PUBLIC PROCUREMENT

On April 10, 2014 the Parliament of Ukraine voted for the new version of the Law of Ukraine on Public Procurements (the “Law”). The main purpose of the Law is to facilitate and streamline the public procurements process in Ukraine. The most essential novelties of the Law compared to its current version can be summarized as follows.

Scope of application

The Law applies to all public employers including companies controlled by the government, save for a few exceptional cases. Small scale procurements of approx. EUR 80,000 (for goods) or EUR 400,000 (for works) may be carried out by certain groups of public employers (e.g. employers empowered with special or exclusive rights) without an obligatory public tender, unless such procurements are funded by public budget means.

The list of exceptional cases requiring no public tender was significantly reduced (from more 30 to only 11 positions).

Procedure

The one-bidder tender was replaced by the negotiated procedure, which may be used by the public employer in a number of exceptions cases and includes negotiations with several (not necessarily one) predefined bidders.

The requirement on availability of production facilities and/or a service center on the territory of Ukraine was removed.

The Law provides for the possibility of procurements with the use of electronically signed documents; it also envisages a possibility of completely electronic tenders.

Besides, the Law contains a number of new procedural details, which needs to be taken into account before participation in a tender, including, without being limited to:

- the new extended definition of affiliation between tender participants and/or public employer;
- the new rule to prevent participation in public tenders of off-shore companies (the list of the relevant jurisdictions is to be defined by the government);

- the new thresholds for subcontracting and additional works not envisaged by the initial tender offer.

Long-term contracts

The possibility of signing of long-term ("framework") agreements was preserved. However it still requires an additional regulation by the government.

Free movement of goods and services

We would like to emphasize, that the Law introduces a new principle of free movement of goods and services (in addition to the non-discrimination principle). The way of its application is yet to be proven in practice.

The Law was signed by the acting President of Ukraine and entered into force on 20 April 2014.

DISPUTE RESOLUTION

Improvement of the Courts system

On 8 April 2014 the Parliament of Ukraine adopted the Law of Ukraine on Restoration of Confidence in the Judicial Authorities in Ukraine No. 1188-VII. The Law was signed, published and entered into force on 10 April 2014.

The Law aims at improving the judicial system of Ukraine and strengthening the confidence in Ukrainian courts. In order to achieve this goal, the Law provides for an assessment of judges to be performed within 1 year from the date of appointment of the Ad-hoc Commission charged with performing the task.

The Ad-hoc Commission will be comprised of members appointed by the Plenum of the Supreme Court of Ukraine, the Commissioner for Anticorruption Policy and the Parliament of Ukraine.

It is important to note that any legal entity or natural person may ask the Commission, following the prescribed procedure, to assess actions of a judge or judges.

Upon results of the assessments, the Commission will report its findings to the High Council of Justice or to the High Qualifications Commission of Judges of Ukraine, if disciplinary offences are found, or to the General Prosecutor's Office, if criminal offences are revealed.

PHARMACEUTICALS

The New List of Medicinal Products Subject to 7 % VAT

On April 23 the Cabinet of Ministers of Ukraine approved the resolution No 118 "On approval of the list of medicinal products, operations on distribution at the custom territory of Ukraine and import of which is subject to 7 % VAT." The resolution is valid only till July 1, 2014.

Simultaneously with entering into effect of the resolution No 118, the resolution of the CMU No 867 dated August 8, 2011 (which introduced a special list of medicinal products subject to VAT relief) terminates its effect.

The new list contains 116 positions. The list takes into account new codes of goods which were introduced since January 1, 2014 due to the Law on Custom Tariff of Ukraine.

The list 2014 contains 2 positions less than the list of 2011.

The distribution and import of the medicinal products which are not enlisted are subject to 20 % VAT.

PERSONAL DATA PROTECTION

Ombudsman's office on the protection of privacy

Landmark changes to the personal data protection laws of Ukraine took effect on 1 January 2014. Under the new paradigm, the Ombudsman is now responsible for invasions of privacy and regulatory work, the responsibilities of the government were shifted from supervision to mediation between individuals ("personal data subjects", using the terminology of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data) and businesses, and individuals and governmental agencies. Below, we have described several developments that may affect your compliance model.

Only businesses that process sensitive personal data need to file a notice to the Ombudsman's Personal Data Protection Officer. If the processing of such personal data was commenced after 1 January 2014, a notice to that effect must be given to the authorities within 30 business days; a notice concerning the processing that started prior to the above date must be filed before 1 July 2014.

However, recent directives by the Officer to implement the reform are unclear, opening the way for ambiguous interpretation.

Order of the Ombudsman No. 1/02-14 dated 8 January 2014 approving, inter alia, the Procedure for Notification of the Ombudsman about the Processing of Personal Data of Particular Risk to the Rights and Freedoms of Subjects of Personal Data, Regulation on the Department or the Official Organizing Activities Related to the Protection of Personal Data During its Processing, and also Publication of such Information contains the following exhaustive list of data "constituting a special risk to the rights and freedoms of a person", namely "sensitive" data, processing of which must be reported to the Ombudsman:

- racial, ethnic and national origin;
- political, religious convictions or personal belief;
- membership in political parties and/or organizations, professional unions, religious or civic organizations with ideology;
- health status;
- sexual life;
- biometric data;
- genetic data;
- administrative or criminal liability record;
- pre-trial investigation record;
- actions taken against a person under the Law of Ukraine On Investigative Activities;
- any violence committed against a person;
- location or movements of a person.

In our view, the following items present a risk of misinterpretation:

- the concept of "national" origin (*natsionalne pokhodzhennia*), as opposed to "ethnic" origin (*etnichne pokhodzhennia*). If "citizenship" (*hromadianstvo*) was the intended term, however, this information is a matter of official registers and can be made public;
- the stretched concepts of "personal belief" (*svitohliadni perekonannia*) and "religious convictions" (*relihiini perekonannia*);

- the concept of “ideological” (*svitohliadnoho spriamuvannia*) civic organisations being placed in the matrix of non-governmental associations under Ukrainian law; can they be treated as synonyms?
- the meaning of a person’s “location” (*mistseperebuvannia*), except that it is not related to the person’s place of registration;
- the potentially broad definition of sexual life, given the variety of sexual orientations under modern psychology as well as their manifestations;
- the broad nature of genetic, biometric and health data, since these concepts may comprise all aspects of a person’s physical appearance and interaction with the natural world;
- which view of “violence” (*nasy/stvo*) should be adopted (e.g. Criminal Law, International Humanitarian Law, human right instruments etc.).

We expect that recommendations from the Council of Europe will be used as guidance in complex situations. In the address to the business community at the meeting organized by one of the business chambers in Kyiv in February of this year, Mr Markijan Bem, the Ombudsman’s Personal Data Protection Officer, expressed his willingness to provide advice and opinion letters when requested by businesses.

The Officer has expressly excluded employment relations from the list of sensitive data to be reported (even if the processed data is otherwise “sensitive”), but there is neither a definition, nor a list of labour-related personal data. This approach seems aligned with general EU standards, although EU law requires that national law specifically authorize collection of the personal data concerned¹. In Ukraine, reporting the data processed for employment purposes therefore falls under conflicting standards spelling uncertainty for recruiting, crewing and headhunting firms, clients of temping agencies and companies contracting private entrepreneurs. The Officer currently applies a broad interpretation of the term “labour relationship” (*trudovi vidnosyny*), thereby making the risk of incompliance with reporting rules remote. In all complex relationships, we recommend seeking legal advice in order to ensure lawful processing of personal data.

An applicant may select the method of submission, but completion of the filing, however, is still subject to confirmation. As of 2014, paper confirmations are no longer provided; publication on the Officer’s official website is the final evidence of a business’s compliance.

We recommend, therefore, that each business ensures acknowledgement of receipt by the Officer by sending submissions:

- by registered letter (with confirmation of delivery);
- by facsimile (transmission report); by e-mailing a scanned copy (through exchange of electronic digital signatures or even with an electronic confirmation of receipt).

¹ See for instance Article 8 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data

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