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CONTENTS

Ukraine

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Brief overview of the law and enforcement regime

The Ukrainian anti-corruption legal framework consists of the following major segments:

- the anti-corruption legislation itself;
- provisions of the Code of Ukraine on Administrative Offences (the "**Administrative Offences Code**") and the Criminal Code of Ukraine (the "**Criminal Code**") regulating corruption-related administrative offences and crimes; and
- legal provisions establishing the rules of conduct of Ukrainian governmental officials, including officials representing Ukrainian legislative, administrative and regulatory bodies (the "**Officials**").

Starting from 26 April 2015, the main legislative act dealing with combatting corruption in Ukraine is the Law of Ukraine No. 1700-VII "On Preventing Corruption" dated 14 October 2014 (the "**Anti-Corruption Law**"). The Anti-Corruption Law:

- defines corruption, a corruption offence, an unjustified benefit and, importantly, a gift;
- distinguishes between a corruption offence and a corruption-related offence;
- introduces changes in the groups of subjects of liability for corruption offences;
- provides for an algorithm for preventing acceptance of unjustified benefits and gifts, and for dealing with them when provided;
- introduces several important restrictions aimed at preventing and combatting corruption (e.g. restriction on receiving gifts by Officials);
- sets up the rules aimed at preventing corruption in legal entities;
- introduces certain changes related to liability for corruption and corruption-related offences to the Criminal Code and the Administrative Offences Code;
- regulates protection of whistle-blowers;
- emphasises the importance of corporate anti-corruption compliance programmes;
- establishes the ethical conduct rules for certain groups of Officials; and
- tightens the financial control regulation for Officials.

Unlike the U.S. Foreign Corrupt Practices Act (**FCPA**) and the UK Bribery Act 2010 (**UKBA**), the Anti-Corruption Law does not have extraterritorial application. However, recently there have been discussions among some members of parliament about the need to make its application extraterritorial, in particular to prohibit corruption of foreign Officials. Nor does the Anti-Corruption Law use the term 'bribery'; however, the legal meaning of the bribery notion under the FCPA and the UKBA is mostly covered by the corruption-related crimes of the Criminal Code (e.g. corruption payments to the officers of private companies and persons rendering public services, exercising undue influence, giving unjustified benefits to Officials, etc.).

In 2014, Ukraine became a jurisdiction, the legislation of which provides for criminal liability of companies, including for crimes of corruption committed by their authorised representatives (*please see section below, 'Company liability for corruption offences', for more detail*).

Neither the Anti-Corruption Law nor the Criminal Code establish liability of the officers and employees of the company for corruption offences and crimes committed by agents and other third parties, including if they commit them specifically to get business, keep business, or gain a business advantage for this company.

Bribery *vs* unjustified benefits

The notable distinction of the Ukrainian anti-bribery and anti-corruption legislation is that it has never clearly distinguished between corruption and bribery. For instance, the Anti-Corruption Law contains provisions directly or indirectly related to bribery (e.g. gifts to officials, payment of charitable contributions, membership of NGOs, etc.) and the legal meaning of the bribery notion under the FCPA is mostly covered by the corruption-related crimes of the Criminal Code (e.g. corruption payments to the officers of private companies and persons rendering public services, exercising undue influence, giving unjustified benefits to officials, etc.). However, the legal notions of 'bribe' and 'bribery' were eliminated from the Ukrainian law a few years ago and replaced with the notion of 'unjustified benefits', (i.e. the term 'bribery' is no longer used under Ukrainian law). Therefore, the words 'anti-corruption legislation' or 'anti-corruption legal framework' will be a sufficient equivalent of bribery in the meaning of the FCPA and the UKBA.

Under the Anti-Corruption Law, the unjustified benefits are defined as money or other property, preferences, advantages, services, non-pecuniary assets, and any other benefits of non-pecuniary or intangible nature that are being illicitly promised, offered, delivered, or received. Under the old anti-corruption legislation, the unjustified benefits were defined as money or other property, preferences, advantages, services, non-pecuniary assets being illicitly promised, offered, delivered, or obtained free of charge or at a price lower than a minimum market value. This definition suggested two tests for classifying benefits as unjustified, being their promise, offer, delivery or obtaining: (1) illicitly; and (2) free of charge or at a price lower than a minimum market value. In the definition of the unjustified benefits provided by the Anti-Corruption Law, the second test (i.e. price) is missing. Considering that the unjustified benefits are the key category of the anti-corruption legislation, its definition in the present wording gives the law enforcement authorities and courts more discretion in applying the anti-corruption laws and deciding on the guilt of the potential subjects of liability for corruption offences.

Subjects of liability for corruption offences, corruption and corruption offence

The term 'Officials' is not defined in the Anti-Corruption Law *per se*. However, it speaks of the 'individuals authorised to perform state or local government functions' and covers government officials, as well as public servants and local government officers.

In addition to Officials, Article 3 of the Anti-Corruption Law lists other groups of individuals who potentially can be held liable for committing corruption offences (the "**Subjects of Liability**"), including:

- persons conferred the same status as persons authorised to perform state or local government functions for the purposes of the Anti-Corruption Law, namely: (i) officers of the public legal entities other than Officials, as well as members of supervisory boards of public banks, public companies and public for-profit organisations (the "**Public Entity Officers**"); (ii) individuals, other than public servants or local government officials,

rendering public services (e.g. auditors, notaries, experts, and other persons determined by law) (the "**Public Services Officials**"); and (iii) representatives of NGOs, scientific and educational institutions, and relevant experts of contest committees created in accordance with the Law of Ukraine on the Public Service;

- individuals permanently or temporarily holding positions related to organisational, executive, or administrative and economic responsibilities, or persons specifically authorised to perform such duties in any private company in accordance with the law, as well as other individuals who are not officers but perform works for or render services to such companies based on respective agreements (in cases provided by the Anti-Corruption Law) (the "**Private Company Officers**");
- duly registered parliamentary candidates, presidential candidates, as well as local councils and government candidates; and
- individuals who: (i) receive funds and property in the course of implementing in Ukraine technical and other assistance (including grant-in-aid) programmes in the anti-corruption area (either directly or via third parties, or as otherwise may be provided by a relevant programme (project); (ii) systematically, within a year, provide services related to implementing the anti-corruption policy standards, if financing of (payment for) such work/services is provided within the framework of a technical or other assistance (including grant-in-aid) programme in the anti-corruption sphere; and (iii) are managers or members of the governing bodies of NGOs and non-profit companies engaged in the anti-corruption activities and/or participating in taking measures aimed at fighting and preventing corruption.

Ukrainian law defines corruption as an activity of Officials and other Subjects of Liability aimed at unlawful use of their powers and related opportunities to obtain unjustified benefits or accept such benefits, or accept a promise/offer of such unjustified benefits for themselves or other individuals, as well as a promise/offer of unjustified benefits to Officials and other Subjects of Liability or provision of unjustified benefits to them or, at their demand, to other individuals or legal entities, aimed at persuading Officials and other Subjects of Liability to unlawfully use their powers and related opportunities.

The Anti-Corruption Law distinguishes between a corruption offence and a corruption-related offence, which is a novelty in the Ukrainian anti-corruption regulation. A corruption offence is the intended act of corruption, for which the law establishes criminal, disciplinary and/or civil law liability, committed by an Official or other Subjects of Liability.

A corruption-related offence is a wrongdoing that does not fall under the characteristics of corruption but violates the requirements, prohibitions and limitations imposed by the Anti-Corruption Law, for which the law establishes criminal, administrative, disciplinary and/or civil law liability, committed by an Official or other Subjects of Liability.

The Anti-Corruption Law gives significant attention to prevention and regulation of the conflict of interest. Under this Law, the key for establishing a potential or real conflict of interest of Subjects of Liability is discovering their private interest that may affect the objectivity and impartiality of their decisions or performance of their official or representative duties. The Anti-Corruption Law defines a private interest as any tangible or intangible interest of a person, including the one caused by his/her personal, family, friendship, and other outside-of-duty relationships with individuals and legal entities, including those arising from membership in and activities of political, religious and other NGOs. The conflict of interest may arise if the restrictions established by the Anti-Corruption Law are violated (e.g., those related to receiving gifts, new employment after quitting the public service, etc.).

Liability for corruption offences

The Anti-Corruption Law sets forth criminal liability for legal entities (*discussed in section 'Company liability for corruption offences' below*), as well as criminal, administrative, civil and disciplinary liability for corruption offences and corruption-related offences for responsible Officials and other Subjects of Liability.

The Anti-Corruption Law introduced a new wording to or supplemented several Sections of the Administrative Offences Code resulting in increased administrative liability for corruption-related offences. This includes establishing administrative liability for violating the restrictions to:

- engage in other paid or entrepreneurial activities (except for teaching, scientific and creative work, as well as some other activities);
- become a member of governing bodies of profitable companies (except when representing the state interests in the governing bodies of such companies);
- receiving gifts;
- violating the financial control requirements;
- preventing and resolving conflicts of interest;
- unlawful use of information which became known during performance of the official duties; and
- failure to take anti-corruption measures.

Additionally, the Anti-Corruption Law introduced a new Article 188[46] into the Administrative Offences Code, establishing liability for:

- not observing the lawful requirements (orders) of the National Anti-Corruption Agency of Ukraine (the "**Anti-Corruption Agency**");
- failing to provide it with information and documents (violation of the statutory terms of their provision); or
- providing knowingly untrue or incomplete information.

The Criminal Code provides for the following types of corruption crime:

- receiving unjustified benefits;
- receiving the offer or promise of unjustified benefits;
- promising or providing unjustified benefits;
- corrupt payment[1] to Private Company Officers;
- corrupt payment to Public Services Officials;
- corrupt payment to an employee of an entity, other than the Official, or a person working for the benefit of an entity;
- unlawful enrichment; and
- unlawful influencing of Officials performing state duties.

Penalties for individuals convicted of corruption offences

Depending on the degree and type of a particular crime, corruption crimes committed by individuals are punishable by (as a single penalty or in combination with the below penalties):

- a fine;
- community works;
- confinement or imprisonment; and, as the case may be; and
- deprivation of the right to hold certain office or engage in certain activities for up to three years and confiscation of property and/or special confiscation.

Other legal consequences of corruption activities

Under Ukrainian law, information on persons liable for corruption shall be listed in the Unified Register of Individuals Liable for Committing Corruption Offences within three

days of the coming into force of a respective judgment, or receipt by the Anti-Corruption Agency of the paper copy of the internal order of the relevant employer on taking disciplinary action for committing a corruption/corruption-related offence.

Under Article 22 of the Anti-Corruption Law, performance of duties of an Official or another Subject of Liability shall be suspended if formal charges are filed against such person to initiate prosecution for committing a crime within the scope of his/her official duties. Officials brought to criminal or administrative liability for corruption offences shall be subject to dismissal within three days after a respective judgment comes into force, unless otherwise provided by law.

The Anti-Corruption Law supplemented Article 36 of the Labour Code of Ukraine (the "**Labour Code**") with a new ground for employment termination, namely concluding an employment agreement (contract) contrary to the requirements of the Anti-Corruption Law established for Officials listed in Article 3, part 1 (1) of the Anti-Corruption Law.

According to Article 53 of the Anti-Corruption Law, whistle-blowers cannot be fired or caused to terminate their employment, or brought to disciplinary liability or otherwise face retaliation (or be threatened with retaliation) by their employers in connection with reporting by such whistle-blowers of violations of the Anti-Corruption Law committed by other persons. Article 235 of the Labour Code was amended with a new provision aimed at protecting whistle-blowers or members of their families from such retaliation. The new part 4 of this Article 235 provides that in case whistle-blowers refuse being reinstated at their job, they shall be entitled to compensation in the amount of their average salary for six months. The above should be considered, in particular, during the workforce restructuring.

Apart from the aforementioned administrative, criminal and disciplinary liability, Officials violating provisions of the Anti-Corruption Law may be held liable for damages. In addition, they can be forced to eliminate the consequences of their corrupt actions by:

- compensating damages;
- annulling unlawful laws, regulations and decisions initially enacted in the course of corruption activities;
- restoring rights of and compensating damages to the offended companies and individuals; and
- seizing the unlawfully gained property.

Anti-Corruption Agency

Under the Anti-Corruption Law, the Anti-Corruption Agency is a central government body having a special status and tasked with forming and implementing the state anti-corruption policy. The Anti-Corruption Agency is authorised, in particular, to:

- control and verify financial declarations of Officials, keep and publish such declarations, as well as monitor the Officials' way of living;
- control compliance with the statutory restrictions regarding the political parties financing and financial reporting;
- maintain the Uniform State Register of Declarations of Individuals Authorised to Perform State Functions or Local Government Functions and the Uniform State Register of Individuals who Committed Corruption and Corruption Related Offences;
- develop a template anti-corruption compliance programme for legal entities; and
- cooperate with whistle-blowers, ensure their legal and other protection, and bring to liability those guilty of violating whistle-blowers' rights related to notification of possible corruption or corruption-related offences.

Corruption activities investigation and law enforcement bodies

Under the Criminal Procedure Code of Ukraine (the "**Criminal Procedure Code**"), investigation of the abovementioned corruption offences falls within the competence of the Ministry of Internal Affairs of Ukraine, the Prosecutor's Office of Ukraine and the Security Service of Ukraine.

The National Bureau of Investigations is responsible for investigating offences committed by the highest Officials, as well as by judges and officers of the law enforcement bodies, except for the offences within the investigation authority of the Anti-Corruption Bureau (defined below).

In accordance with the Law of Ukraine No. 1698-VII "On the National Anti-Corruption Bureau of Ukraine", the National Anti-Corruption Bureau of Ukraine (the "**Anti-Corruption Bureau**") is a state law enforcement agency authorised with preventing, detecting, stopping, investigating, and exposing corruption offences within its competence, as well as discouragement from committing new ones. The task of the Anti-Corruption Bureau is fighting corruption crimes committed by high public Officials that threaten the national security of Ukraine.

Overview of enforcement activity and policy during the last year

Recently, the Ukrainian anti-corruption legislation was significantly amended. For instance, some important amendments were introduced to the Anti-Corruption Law (e.g., the list of the Subjects of Liability was extended), and the Law No. 1975 "On Amending Certain Laws of Ukraine Regarding the Specifics of Exercising Financial Control over Particular Categories of Officials" was enacted on 23 March 2017.

In 2016–2017, the Anti-Corruption Agency adopted its first regulations giving some guidance regarding several important issues (e.g., conflict of interest in activities of Officials, Officials' gift *vs.* entertainment, companies' anti-corruption compliance programmes, etc.). The most significant of these acts are: (i) the Methodical Recommendations Related to Preventing and Regulating the Conflict of Interest in Activities of Persons Authorized to Perform State or Local Government Functions and Related Individuals (Decision No. 2 dated 14 July 2016); (ii) the Model Anti-Corruption Program for Legal Entities (Decision No. 75 dated 2 March 2017); and (iii) the Procedure for Informing the Anti-Corruption Agency on Opening a Foreign Currency Bank Account Abroad (Decision No. 20 dated 6 September 2016).

On 5 August 2016, the National Public Service Agency of Ukraine approved the General Code of Ethical Conduct of Public Servants and Local Government Officials.

Considering that the Anti-Corruption Law became fully effective on 26 April 2015, and other anti-corruption legislation was significantly amended and that the new legislation introduces a number of new notions and concepts into the Ukrainian law, the enforcement of the new anti-corruption legal framework remains an issue, while the success of its application will largely depend on interpretation of the new laws by the Ukrainian enforcement agencies and courts.

There have been no significant or policy-shaping court cases in the anti-corruption area during the last year. On the other hand, court rulings on various corruption/corruption-related offences seem to be relatively consistent for many years in a row.

Based on established court practice, it appears that the most frequently prosecuted corruption-related cases remain crimes punishable under Article 368 of the Criminal Code

(i.e. for accepting the offer or promise of unjustified benefits, or for receiving unjustified benefits by an Official). Particular punishment ordered by courts normally depends on the circumstances of a committed crime, position held by the Official, amount of the unjustified benefits involved, and the level of the criminal intent's implementation.

The established court practice evidences that law enforcement in the anti-corruption area remain rather subjective in Ukraine. Mainly prosecution and conviction have been carried out with respect to mid- or low-level Officials (i.e. mostly local government Officials), judges and Public Entity Officers, as well as related to so-called "social corruption" (e.g. against doctors, teachers, etc.).

In 2017, the number of corruption-related criminal proceedings increased. However, there were many instances when the sentence was too mild as compared, for instance, to the amount of unjustified benefits received by the Official. Ukrainian courts also seem to avoid imprisoning Officials found guilty in corruption crimes, punishing them with a fine or another milder sanction.

The Ukrainian legal and business community is anticipating first court rulings related to bringing companies to criminal liability for corruption offences to receive some guidance on prospective law enforcement in this area.

Law and policy relating to issues such as facilitation payments, gifts and hospitality

Facilitation payments

Unlike the FCPA, facilitation payments are not allowed by Ukrainian legislation. The facilitation or 'grease' payments defence under the FCPA should be carefully considered while doing business in Ukraine. Normally in Ukraine, various central and local government agencies and state and municipal entities officially establish higher fees for the expedited performance of their services. Therefore, any payments other than such official fees may be viewed as corruption under Ukrainian law.

Gifts

Under Article 1 of the Anti-Corruption Law, the notion of a 'gift' is defined as money or other property, advantages, preferences, services, intangible assets provided/received free of charge or at a price lower than the minimum market price. This legal definition of a gift is rather broad and the only clear test for distinguishing between a gift and an unjustified benefit seems to be the pecuniary nature of the gift. Analysis of the relevant provisions of the Anti-Corruption Law allows another test for differentiating between a gift and an unjustified benefit, being the illegitimate ground for providing/receiving unjustified benefits. Finally, a gift is something that can be given/received, while an unjustified benefit is something that can also be promised/offered.

Based on the above, a company or an individual presenting a gift to an Official may bear a risk of such gift being treated as a corrupt payment or provision of unjustified benefits (i.e. commit corruption crimes punishable under the Criminal Code), depending on the value of the gift, intent of the gift giver, circumstances and the timeframe.

Article 23, part 1 of the Anti-Corruption Law bans Officials, as well as Public Entity Officers and Public Services Officials (the "**Restricted Individuals**") from demanding, asking and receiving, either directly or through closely associated persons, gifts from legal entities and individuals: (i) with respect to conducting activity related to the implementation of state or municipal government functions by liable individuals; and (ii) from subordinates of such persons (the "**Prohibited Instances**").

An Official can be held criminally liable for receiving unjustified benefits only if s/he received those unjustified benefits for performance (non-performance) of actions, which could have been performed only by using his/her powers or duties in his/her capacity as an Official or related to his/her position.

An Official can be charged for committing the act of corruption notwithstanding his/her actual performance or non-performance of any actions (their consequences) for the benefit of a person who provided this Official with the valuables, services, preferences or other benefits (i.e. the mere fact of the receipt of benefits is sufficient for bringing the charges).

Notwithstanding the abovementioned prohibition on Officials and Restricted Individuals receiving gifts from companies and individuals, these individuals may accept so-called "permitted" gifts, as follows: (i) gifts (except for the Prohibited Instances) consistent with the generally recognised ideas for hospitality (the "**Business Gifts**"); (ii) gifts received from close persons; and (iii) gifts provided as generally available discounts for goods, services, and wins, prizes, and bonuses (the "**Permitted Gifts**").

Any of the Permitted Gifts cannot be presented: (i) on a regular basis; and (ii) to affect the objectivity and impartiality of decisions taken by an Official/Restricted Individual receiving a Permitted Gift or performing/non-performing actions by such person within his/her authorities.

Under the Anti-Corruption Law, the value of a one-time Business Gift may not exceed the amount of one minimum subsistence level amount established for capable of working individuals on the date of a particular gift acceptance (currently constituting €55). The aggregate value of gifts from the same person (group of persons) within a given year should not exceed two minimum subsistence level amounts established for individuals capable of working as of 1 January of the year during which the gifts were received (currently being €110).

The above 'group of persons' notion is a recently introduced amendment. Therefore, there is no official or any commonly accepted interpretation of it yet. The 'group of persons' can mean either several persons visiting an official and presenting a gift to him/her at the same time, or just people from the same organisation presenting gifts to such official during a given year. In the latter case, this amendment appears to be a more precise equivalent of the 'same source' notion under the previous anti-corruption statute. Therefore, until there is more clarity on this issue, it is recommended to interpret the 'group of persons' as people from the same organisation.

It should be emphasised that not only the gift's value, but also the circumstances under which it is presented are important for determining the corporate policy for giving gifts to Officials. Under certain conditions, even a Business Gift of the equivalent of €20 or a modest private lunch with an Official could raise the suspicion of the law enforcement authorities and result in allegations of corruption. Therefore, in addition to the value/timeframe established by the Anti-Corruption Law, it is always important to consider circumstances under which each particular gift is presented. Otherwise, there is a significant risk of prosecution against responsible Officials, a company's officers or a company itself.

Hospitality/entertainment

There is no definition of a hospitality/entertainment under Ukrainian law. However, the definition of the gift provided in the Anti-Corruption Law seems to be broad enough to cover hospitality/entertainment (similarly to the FCPA, UKBA, and some other foreign anti-bribery legislation). This is supported by Section 5.2 of the Methodical Recommendations

Related to Preventing and Regulating the Conflict of Interest in Activities of Persons Authorized to Perform State of Local Government Functions and Related Individuals approved by Decision No. 2 of the Anti-Corruption Agency dated 14 July 2016, under which an invitation for coffee or dinner and other hospitality widely used for establishing/maintaining good business relationships and strengthening working relationship are considered as gifts subject to restrictions imposed by Article 23 of the Anti-Corruption Law. Therefore, each case of entertaining an Official should be carefully evaluated.

For instance, paying a fee (honorarium) to an Official for speaking at a conference organised or sponsored by a company is not prohibited by the Anti-Corruption Law and, therefore, should not be treated as an act of corruption. On the other hand, compensation of an Official's expenses for his/her travel to the venue of the conference, accommodation, etc. could be viewed as corruption. Furthermore, whereas an invitation of an Official to attend a formal reception might be acceptable, treatment of the same Official to a private dinner might be considered as a corrupt activity. Some Ukrainian companies prefer to extend invitations to government agencies rather than to particular Officials to minimise the risk of being accused of corruption.

Key issues relating to investigation, decision-making and enforcement procedures

Article 96^{10} of the Criminal Code directly provides that, while deciding on penalties to be imposed on companies, courts have to consider the following:

- degree of the corruption crime committed;
- level of implementation of criminal intent;
- amount of damage caused by this crime;
- nature and amount of unjustified benefits received or which may have been received by the company; and
- measures taken by the company to prevent the crime.

The Criminal Procedure Code provides that a prosecutor and a suspected or accused person may conclude special agreements on recognition of guilt (the "**Plea Agreement**") under which they can determine:

- precise wording of the suspicion or accusation and its legal qualification under the appropriate Section of the Criminal Code;
- essential circumstances for the proper criminal proceeding;
- unconditional recognition by a suspected or accused person of his/her guilt in committing the relevant crime;
- obligations of a suspected or accused person in relation to collaboration in investigating the crime committed by another person (in case it was agreed);
- agreed punishment and consent of a suspected or accused person for his/her punishment or for declaring the agreed punishment and his/her further release from serving the sentence on the terms of probation;
- consequences of conclusion and approval of the Plea Agreement provided by the Criminal Code; and
- consequences for a suspected or accused person in case of his/her failure to execute the Plea Agreement.

Ukrainian law does not generally stipulate for Plea Agreements with companies. Under the Criminal Code, a provider of unjustified benefits responsible for committing certain crimes (e.g. offering, promising or providing unjustified benefits to an Official) provided by the Criminal Code may be released from criminal liability: (i) if unjustified benefits were given

due to their extortion; or (ii) in case of his/her voluntary reporting on providing unjustified benefits to the body responsible for commencing criminal proceedings prior to initiation of investigation by such body in respect of the provider of unjustified benefits. This provision of the Criminal Code is widely applied by Ukrainian courts in the abovementioned cases.

In addition to the abovementioned release from criminal liability, the Criminal Code provides for leniency and its conditions (e.g., voluntary compensation of damages, committing a crime under duress or due to a pecuniary or subordination dependence, etc.). These circumstances are evaluated by the court and mentioned in its judgment.

Under the Criminal Code, confession to the commission of a crime, sincere repentance and active assistance in investigation of a crime are considered as defences.

Overview of cross-border issues

Article 7 of the Criminal Code provides that citizens of Ukraine who have committed crimes abroad shall be held criminally liable under the Criminal Code, unless otherwise provided by the international treaties of Ukraine ratified by the Ukrainian parliament. If such individuals were brought to liability abroad for committing crimes envisaged by the Criminal Code, they may not be brought to criminal liability in Ukraine for these crimes.

Under the general rule stipulated by Article 8 of the Criminal Code, foreigners who do not permanently reside in Ukraine and committed crimes abroad, can be held liable in Ukraine under the Criminal Code in cases provided by the ratified international treaties of Ukraine, or if they committed grave or especially grave crimes against human rights and liberties or interests of Ukraine.

Part 2 of Article 8 provides that foreigners who do not permanently reside in Ukraine can be prosecuted in Ukraine under the Criminal Code if they commit any of the following corruption crimes abroad in complicity with Officials who are nationals of Ukraine:

- accepting an offer or promise, or receiving unjustified benefits by an Official;
- corrupt payment to a Private Company Officer;
- corrupt payment to a Public Services Official;
- offering, promising or providing unjustified benefits to an Official; or
- improper influence.

In addition, such foreigners can be prosecuted in Ukraine under the Criminal Code if they offered, promised or provided unjustified benefits to such Officials, or accepted from them an offer or promise of unjustified benefits, or received such benefits.

Foreign legal entities are not expressly listed in the Criminal Code of Ukraine as subjects of corruption-related crimes (unlike other crimes where foreign entities are expressly listed as potential subjects) and, to our knowledge, there is no case when they were held criminally liable for such crimes in Ukraine.

FCPA/UKBA enforcement in Ukraine

To our knowledge, as of today there have been no precedents of the FCPA/UKBA's enforcement in Ukraine. Ukrainian authorities cannot initiate any action in Ukraine under foreign law.

On the other hand, Ukraine is required to provide legal assistance for foreign law enforcement authorities on their request in accordance with a respective international treaty on legal assistance in civil or crime cases ratified by Ukraine. For instance, the Treaty between the U.S. and Ukraine on Mutual Legal Assistance in Criminal Matters, effective as of 27 February 2001, requires Ukrainian government bodies to cooperate with the U.S. authorised

agencies by providing legal assistance to the U.S. authorities during ongoing investigations, prosecution or for crime prevention purposes (e.g. to provide copies of publicly accessible documents, to pass requests from the competent U.S. agencies for a potential witness (including an Official) to testify before a U.S. court, etc.). However, during the past few years there have been several FCPA related cases prosecuted by the U.S. Securities and Exchange Commission, in particular cases that involved charges for violation of the FCPA by paying bribes to foreign government officials in Ukraine,[2] and for failing to prevent illicit payments made by a Ukrainian subsidiary of a U.S.-based company to Ukrainian government officials in violation of the FCPA.[3] In addition, the UK Serious Fraud Office is currently investigating possible money laundering arising from suspicions of corruption in Ukraine.[4]

Article 72 of the Anti-Corruption Law provides that the competent Ukrainian agencies can give to/receive from the relevant foreign agencies information, including restricted data, related to preventing and fighting corruption. In addition to that, under Article 11 of the Anti-Corruption Law, the Anti-Corruption Agency is authorised to exchange information with competent authorities of foreign countries and international organisations, as well as cooperate with foreign public agencies, NGOs and international organisations on the matters within the Anti-Corruption Agency's authority. Moreover, the Anti-Corruption Bureau is entitled to conclude agreements with foreign and international law enforcement bodies on cooperation in the matters within its competence and participate in international investigations.

Even though the number of publications on the FCPA and the UKBA and their extraterritorial application has been growing in Ukraine, and more Ukrainian companies and enforcement agencies (especially those dealing with U.S. or UK companies) are aware of the existence of the FCPA and the UKBA and their effect on U.S. and UK companies (their subsidiaries, officers and employees, and agents), based on our observation it rarely influences their business and other decisions.

Corporate liability for bribery and corruption offences

The Anti-Corruption Law and the Criminal Code provide, among others, that a company may be brought to criminal liability for committing corruption crimes listed in Article 96³ of the Criminal Code by the company's authorised representative (independently or in complicity with this legal entity) on behalf and in the interests of this company. In such case, according to the Anti-Corruption Law, to identify the reasons for and conditions of committing the crime by this company employee, the company's CEO orders (based on the action of the Anti-Corruption Bureau or the order of the Anti-Corruption Agency) the conduct of an internal compliance investigation.

Criminal liability is introduced only for private companies (i.e. any companies that are not in state or municipal ownership).

A company may be brought to criminal liability for committing the following corruption crimes by the company's authorised representative on behalf and in the interests of this company:

- corrupt payment to a Private Company Officer;
- corrupt payment to a Public Services Official;
- offering, promising or providing unjustified benefits to an Official; or
- improper influence.

Under the Criminal Code, in case the company's authorised representative is found guilty in committing a corruption crime, the company may be ordered to pay a fine in an amount

ranging from 5,000 to 75,000 tax-exempted incomes (currently being approximately €2,770 to €41,530), depending on the degree of the particular crime committed by the company's authorised representative.

The Anti-Corruption Law gives special attention to preventing corruption in activities of legal entities by dedicating its entire Section X to this issue. In particular, it requires Ukrainian companies to ensure developing and implementing adequate measures for preventing corruption in their activities. It also mandates companies' CEOs and founders (participants) to ensure regular assessment of the corruption risks their companies may face and implementation of relevant anti-corruption measures. A company may engage independent experts to facilitate detection and elimination of corruption risks in the company's activities, including during anti-corruption due diligences.

The Anti-Corruption Law directly imposes the following obligations in the anti-corruption compliance area on all employees of any Ukrainian companies, violation of which (if made part of the employment duties) may result in taking a disciplinary action against guilty employees, up to their dismissal):

- not to commit and not to participate in committing corrupt offences related to the company's activities;
- to refrain from behaving in a manner that might be interpreted as readiness to commit a corruption offence related to the company's activities;
- immediately inform the company's anti-corruption compliance officer, its CEO or founders (shareholders) on the instances of spurring into committing a corruption offence related to the company's activities, as well as about actual commitment of corruption or corruption-related offences by other company employees or by other persons; and
- immediately inform the company's anti-corruption compliance officer, its CEO or founders (shareholders) of any actual or potential conflicts of interest.

The Anti-Corruption Law introduces the notions of the anti-corruption compliance programme of a legal entity and an anti-corruption compliance officer of a company.

Based on the above, introduction and effective implementation by Ukrainian companies of sound corporate anti-corruption programmes (including adoption by them of sophisticated anti-corruption policies/regulations) may mitigate the risk of potential criminal liability of these companies for corruption offences committed by their officers and other authorised representatives.

Proposed reforms / The year ahead

The Anti-Corruption Law is more consistent and clear in comparison to the earlier legislation, and generally seems to conform to international best practices. However, the Ukrainian anti-corruption legislative, regulatory and law enforcement environment still needs significant improvement to fully meet the international standards.

In general, many anti-corruption legislative initiatives introduced in 2015–2016 were implemented during the last year, and most of the national anti-corruption bodies have now been formed.

It is expected that the year ahead will be marked by the following:

- Ukrainian anti-corruption legislation will continue to change (e.g., two bills aimed at increasing transparency and publicity in activities on NGOs have been recently initiated by President Poroshenko and submitted to the parliament).
- Various national bodies tasked with preventing and fighting corruption will start to cooperate and this cooperation will bring long-awaited results.

- Significant and policy-shaping cases can be prosecuted/initiated and awarded punishments will be adequate to the gravity of a particular corruption/corruption-related office.
- All state bodies will adopt their anti-corruption compliance programmes.
- Serious compliance initiatives (launching/amending anti-corruption compliance programmes, assessing corruption risks, conducting internal compliance investigations, etc.) of Ukrainian companies can take place.

* * *

Endnotes

1. Corrupt payment ('*niðкyn*', in Ukrainian) is formally called in English 'commercial bribery'. For the purposes of this chapter, it was decided to replace it with the term 'corrupt payment' to avoid confusion with the term 'bribery', which was eliminated from Ukrainian law in 2013.
2. https://www.sec.gov/news/pressrelease/2016-277.html.
3. https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540535139.
4. https://www.sfo.gov.uk/cases/ukraine-money-laundering-investigation/.

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