The Private Wealth & Private Client Review

Fifth Edition

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John Riches

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EDITOR'S PREFACE

The first six months of 2016 have been characterised by turbulence for the world in general, and particularly for those holding significant private wealth. The key development of 2016 to date has been the publication of the 'Panama Papers'. The response to the publication from governments and the Organisation for Economic Co-operation and Development (OECD) has reinforced trends seen in prior years towards greater transparency and regulation in the domain of cross-border holding structures and in the context of beneficial ownership information.

i Panama Papers

Many have pointed to the irony surrounding the approach taken by the International Consortium of Investigative Journalists (ICIJ) in Washington in the context of its publication of the Panama Papers. The ICIJ's website sets out an elaborate procedure for whistle-blowers to provide information to them on a 'confidential' basis and the organisation has been resolute in its assurances that it will keep its sources confidential. So while the ICIJ argues for full transparency of information about the holding of private wealth, it does not consider that this standard should apply to those who provide information about wealthy families, even if the information is secured by unlawful means. Clearly, the Panama Papers have highlighted some issues concerned with offshore structures being used to provide a veil of secrecy to allow unlawful activity to go undetected and there is no sympathy for those whose unlawful acts have been exposed. Of deeper concern, however, is those who have sought to defend their privacy and yet have been accused of wrongdoing on a completely false basis – the case of Emma Watson who placed her home in the name of an offshore nominee to protect herself against stalkers serves to illustrate this trend. What has been striking from a UK perspective is the extent to which journalists from respected media organisations comment on issues relating to offshore structuring using language that is sensationalist in tone and frequently wildly inaccurate. The apparent furore over the former prime minster David Cameron's holding in an entirely conventional offshore fund structure established by his late father for third-party investors was reported by the BBC as an 'offshore fund trust'. The impression

one gained from this reporting was that the journalist concerned was merely including as many words in the article that he felt had negative connotations to achieve maximum effect, regardless of their technical inaccuracy.

While the Tax Justice Network asserts in a 28 June 2016 report that 'trusts become the preferred choice by tax dodgers, corrupt officials or money launderers' to avoid transparency, there is precious little evidence of the large-scale use of trusts that has been unearthed by recent revelations such as the Panama Papers. A perspective that will not be published in any newspaper in the context of the Panama Papers is to explain that the vast majority of offshore trusts are used by tax-compliant families for legitimate wealth structuring and intergenerational succession planning. However, we should not assume that this will silence those who oppose trusts as a matter of principle. The party line of the Tax Justice Network and others is that the reasons trusts escape frequent references in the context of scandals is because they are so effective in hiding wrongdoers and so are very difficult to detect. They clearly have no idea about the depth of scrutiny a family is subject to in terms of anti-money laundering or know-your-client procedures to establish a trust in a well-regulated offshore finance centre.

I do not suggest that we can afford to be complacent about the scope for misuse of offshore vehicles in any way, but it is essential we take every opportunity to explain to policymakers the entirely legitimate purposes for which the overwhelming majority of families employ trusts and similar structures as part of their succession planning and wealth structuring.

ii The Common Reporting Standard (CRS) update

We are now fully in the era of the CRS, which became effective on 1 January 2016. Certain aspects of the CRS are causing a degree of confusion in terms of implementation, especially in the trust arena. Many of the difficulties here stem from the basic conceptual framework, copied over from the Foreign Account Tax Compliance Act (FATCA), which treats a trust fund as a 'financial account'. The most notable 'glitch' in this framework is in identifying those persons connected with trusts who need to be reported on. When trustees self-report as reporting financial institutions, the concept of an 'equity interest' does not name protectors. Alternatively, if one turns to the parallel list for trusts that are passive non-financial entities, protectors are expressly named. The OECD's own position set out in a recent FAQ is that the protector should always be named, but the formal legal basis included in the CRS model treaty is doubtful. It is to be hoped that in the second half of 2016 it will be possible to obtain clearer guidance on many areas of ambiguity so that all parties are fully prepared for the first wave of CRS-related disclosure for the 2016 financial year, which will be required before May 2017.

One silver lining to this confusion and uncertainty on protectors is a renewed focus on the choice of an appropriate person to serve in a protector role. In some cases, families are electing to formalise governance processes around fiduciary holding structures and introduce independent professional protectors in place of close relatives or family friends whose understanding of their duties may have been somewhat limited.

There already appears to be a two-speed world in the context of CRS with an enthusiastic group of early adopters who have signed the Multilateral Competent Authority Agreement so as to be able to exchange information with as many nations as possible, while a more reticent group of nations plan to adopt CRS on a bilateral treaty-by-treaty basis. The EU and Crown Dependencies and Overseas Territories are in the first group, while notably the Bahamas, Hong Kong, Singapore and Switzerland are in the second.

There is an emerging trend of consolidation of offshore structures into single jurisdictions to reduce complexity and multiple service provider compliance. It will be interesting to

see which jurisdictions win out in this time of transition and, in particular, whether those international finance centres such as Jersey and Cayman that have placed themselves in the early adopter group will benefit from this stance. It is becoming apparent that many clients are keen to demonstrate their commitment to working in a transparent environment to forestall the type of ill-informed criticism unleashed in the wake of the Panama Papers.

iii Exchange of Beneficial Ownership Information (EBOI)

EBOI is the latest initiative being promoted by the G5 in Europe (the UK, Germany, France, Spain and Italy) and was a direct response to the Panama Papers' publication. EBOI builds on the same concepts that underpin the CRS and FATCA. The aim is, in parallel to the tax-related disclosure generated by FATCA and the CRS, to require the annual provision of beneficial ownership information on companies, trusts, foundations and similar legal arrangements or entities. The starting point is to require all jurisdictions that participate to maintain an accurate register in the hands of competent authorities to identify the beneficial owners of all such legal entities and arrangements.

The OECD is due to report back on the framework for potential implementation of EBOI in October 2016. What is increasingly apparent from the initial proposals is that their scope could well be significantly wider than the CRS framework. Where EBOI could widen the disclosure of information further is in requiring every single entity within a holding structure to have its own beneficial ownership register. If one takes, for example, the disclosure that relates to the holding structure ultimately held through a trust, the current rules under the CRS enable trustees that are themselves reporting financial institutions to take overall responsibility for reporting on the entire structure. If all underlying entities held within the trust are themselves reporting financial institutions or active non-financial entities (NFEs), only a single report is provided in relation to the trust as a whole. However, under EBOI, it may well be necessary to make multiple disclosures on all holding entities in a trust even though they have a common set of beneficial owners. The same rules could also apply for multiple layer holding structures ultimately held by individuals.

At inception, the proposals for EBOI are based around the idea of access being provided to 'competent authorities' such as regulators and law enforcement agencies. Predictably, there are already calls from NGOs for such registers to be made public. While many jurisdictions (for example, Jersey and Bermuda) have required beneficial ownership information on companies to be provided to them for many years, the effect of the EBOI proposals seems likely to require the creation of trust registers in many jurisdictions for the first time. It remains to be seen how these registers would work in practice. It is proposed that there will be an annual requirement to update the register to note any material changes. Potentially, this annual update will need to be provided in parallel to CRS and FATCA-type data, which tax authorities required by the end of May, with reference to the position as at the end of the prior calendar year.

iv Public registers of beneficial ownership

The UK's People with Significant Control (PSC) register has been operational since 30 June 2016. It will be interesting to see the approach taken by EU jurisdictions in implementing the Fourth Anti-Money Laundering Directive. The PSC register substantially implements that directive in the UK, although its terms are not completely aligned with the Fourth Anti-Money Laundering Directive.

It is already apparent, in considering the information to be provided for the PSC register, that the ultimate quest to name natural persons rather than entities can give rise to some unexpected results. As with the CRS, particular difficulties arise where a UK company is ultimately controlled by a trust. This is because in considering the application of the rules in a trust context, one does not name, for example, corporate trustees. One is required to look to individuals who control those corporate entities. This means that the information provided with respect to those natural persons is unlikely to have any meaningful connection with stated objectives of the legislation in providing greater clarity for third parties dealing with the company as to who, ultimately, influences its activities. It is also striking that in cases where the corporate trustee is owned by a listed group or controlled by a private equity firm, there may, in some circumstances, be no ultimate PSC required to be named.

If one contrasts the position here with that applicable to the French Trust Register, (ironically, made public on the same date, 30 June 2016), the information required to be made public under the French Register is extensive and, unlike the PSC register, requires one to provide details of the beneficiaries as well as the names of the trust. There is also a separate requirement to file a stand-alone 'event-based return' if the terms of a trust are modified in any way during the course of a calendar year.

The EU has recently published proposals to amend the Fourth Anti-Money Laundering Directive in the wake of the Panama Papers. In this context, it seems likely that the initial decision taken in 2015 not to require details of trusts to be placed on a public register will be reversed. If this proposal gains wider support (as seems likely), it will be interesting to see whether it will be modelled on the French register or will be more analogous to the UK PSC register.

iii Conclusion

In closing, it has never been more important for advisers to give balanced and considered advice to families on how best to structure their arrangements, not just in the light of prevailing family circumstances and tax considerations, but also in the knowledge of the likelihood that information about the holding structure will be subjected to greater regulatory, government and potentially public disclosure in the years ahead. The paradigm that currently prevails in Western Europe is markedly different from that applicable in Asia, the Middle East and Latin America.

It remains to be seen whether, in the long term, many international families who have compliant structures that are fully disclosed to tax authorities will favour the United States as a tax-favoured jurisdiction from which to administer their family structures. This is on the basis that with a thriving domestic trust industry, the US could well be seen as a reputable jurisdiction which protects families from unwarranted public intrusion into their personal affairs to a greater extent than traditional offshore finance centres if beneficial ownership registers do become public in due course.

John Riches
RMW Law LLP
London
August 2016

Chapter 37

UKRAINE

Alina Plyushch and Dmytro Riabikin[1]

I INTRODUCTION

Following Ukraine's 2014 announcement of its intention to create a single economic and social space with the European Union, Ukrainian legislation is undergoing fundamental changes aimed at its harmonisation with EU Law. Following simultaneous ratification of the Association Agreement with the EU by the Verkhovna Rada (the parliament of Ukraine) and the European Parliament, on 16 September 2014, the government of Ukraine commenced substantial reforms of the law, with new taxation, corporate and banking law bills being passed into law on an almost monthly basis. Implementation of the Association Agreement is designed to create new opportunities both for Ukrainian businesses in Europe and for foreign investors in Ukraine.

In 2015, the EU decided to open a formal process that will result in the introduction of a visa-free regime for Ukrainian citizens. The EU has set a number of strict criteria, including substantial changes in the regulation of border control passport rules and exchange of information, which will create a regulatory framework for visa liberalisation with the EU.

The introduction in 2016 of a new electronic declaration system for politically exposed persons is aimed at fighting corruption, which is one of the key targets in the EU's path before the visa liberalisation decision is taken.

On 18 December 2015, the EU Commission in its Sixth Progress Report on the Implementation by Ukraine of the Action Plan on Visa Liberalisation confirmed that Ukraine has fulfilled all of its obligations on the path to visa liberalisation with the EU.

Ukraine is also seeking to increase transparency of its business and ownership in line with the recent global trend to increase transparency and accountability of business. As part of this process, Ukraine has recently introduced a public register of ultimate beneficial owners of bodies corporate.

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In April 2016, in line with the global de-offshorisation trend, the president of Ukraine created the Special Working Group on de-offshorisation. The group aims to develop a de-offshorisation law by the end of 2016.

Another substantial international instrument that influences Ukrainian legislative reforms is the Extended Fund Facility (EFF) between Ukraine and the International Monetary Fund (IMF), approved on 11 March 2015 by the IMF Executive Board, which superseded the previous stand-by arrangements. In accordance with the EFF, Ukraine is obliged to implement a number of fiscal, economic and legislative measures under the IMF's supervision.

In compliance with the EFF, significant changes were introduced to the regulation of banking and energy sectors, anti-money laundering, anti-corruption and investor protection regimes. The general drive of these reforms is aimed towards the introduction of recognised international standards (including those of the IMF, the EU and the FATF) in these areas. However, practical achievements of these reforms remain modest.

In recent years, Ukrainian business people were primarily focused on effective wealth protection and management mechanisms. The armed conflict in the eastern Ukrainian region of Donbas and the still substantial level of corruption continues to make wealth preservation and protection a number one priority.

II TAX

Taxation of individuals in Ukraine depends on the tax residence, source and type of income.

i Tax residency

The Tax Code of Ukraine (the Tax Code) provides the following residency tests to determine the individual's tax residency: (1) residence (permanent residence in Ukraine for a period exceeding 183 days); (2) centre of vital interests (close economic and personal ties); and (3) citizenship.

Registration of an individual as an entrepreneur in Ukraine is also sufficient to recognise this individual as a Ukrainian tax resident. In addition, an individual may voluntarily accept to become a tax resident in Ukraine in accordance with the procedures set out in the Tax Code.

Despite the above tests, in practice the main test to determine the tax residency regularly applied by the Ukrainian tax authorities is the number of days spent by an individual in Ukraine in a calendar year.

For the purposes of the Tax Code any person who fails to qualify as a Ukrainian tax resident is considered to be a non-resident of Ukraine for tax purposes.

ii Source of income

Tax residents of Ukraine pay tax on their aggregate worldwide income. Non-residents pay tax on Ukrainian-sourced income only. Non-resident individuals are not eligible for certain deductions and exemptions available to residents for personal taxation purposes.

iii Types of taxable personal income

The Tax Code recognises both monetary and non-monetary personal income.

The Tax Code provides for the following taxable types of personal income (irrespective of residency): employment income, interest and dividends income, gifts, inheritance, investment income, insurance payments, rental income, fringe benefits, amounts of punitive damages paid and written-off payment obligations to third parties, etc.

The Tax Code specifically excludes certain types of income from the taxable basis of both residents and non-residents.

In addition, certain categories of low-income taxpayers are entitled to reduce their respective incomes by an amount of the 'social tax benefit'.

The Tax Code prescribes that if so provided by the respective international tax treaties, amount of taxes paid by a tax resident outside Ukraine may be used as credit against the amount of taxes to be paid in Ukraine, provided that the taxpayer submits a written confirmation from the foreign tax authority acknowledging that such foreign taxes have in fact been paid. However, the total amount of such foreign tax credit may not exceed the total amount of the personal income tax (PIT) due in Ukraine.

iv Rates

In 2016, a flat rate of 18 per cent personal income tax was introduced for most types of income for both residents and non-residents.

Passive income, such as dividends, interest and royalties, is generally taxable at the rate of 18 per cent, except for dividends distributed (accrued) by corporations that are subject to corporate income tax at the 5 per cent rate. Notwithstanding, the 18 per cent rate applies if the dividends are distributed (accrued) by collective investment schemes.

Income derived from disposal of real estate is taxed at the rate of either zero per cent or 5 per cent depending on (1) the type of property, (2) the frequency of disposals, and (3) the duration of the seller's title to such property. However, disposal of real estate made by a non-resident is taxed at the rate of 18 per cent.

Standard rate for disposal of moveable property (such as vehicles) is 5 per cent. A single disposal of a car or a motorcycle within a year is non-taxable. An 18 per cent tax rate applies to the non-resident's income from a disposal of moveable property in Ukraine.

v Gift and succession taxes

Gifts and inheritance are taxable income and both are subject to the PIT at the rate of zero per cent, 5 per cent or 18 per cent. The exact applicable rate depends on the residency status of the donator or the testator and on the degree of relation between the donator or the testator and the recipient or the heir (varying from zero per cent for spouses and children to 18 per cent for inheritance or gifts received from or by non-residents).

Tax residents shall pay income tax on inheritance and gifts irrespective of the location of the acquired assets.

vi Assets tax

Currently, the Tax Code has a consolidated assets tax that consists of land tax, non-land real estate tax and transport tax.

The land tax is payable by individuals holding title to or right of permanent use of land plots in Ukraine, irrespective of their tax residency. Particular land tax rates are determined by the municipal authorities and shall not exceed 12 per cent of the cadastral value of a land plot, depending on the type of land plot and the particular rights of its holder (i.e., either title

or right to permanent use). The Tax Code provides for a number of tax exemptions regarding land tax depending, *inter alia*, on the status of an individual, the type of land plot, its size and the purpose of its use.

Residual and non-residual real estate owned by an individual is subject to a non-land real estate tax. The tax rates are set forth by the municipal authorities but shall not exceed 3 per cent of the minimum wage as of 1 January of the reporting (calendar) year per square metre. At the same time, the Tax Code sets forth certain exemptions for the real estate tax (e.g., the minimum size of a real estate, which is exempt from the real estate tax).

The first 60 square metres (for an apartment), 120 square metres (for a house) or 180 square metres (where an apartment and house are under the same ownership) are exempt from taxation. This exemption applies only once, irrespective of the number of properties in ownership.

If the taxpayer owns an apartment of more than 300 square metres or a house of more than 500 square metres, the amount of tax due increases by 25,000 hryvnas.

Owners of vehicles registered in Ukraine, irrespective of their residency, are subject to transport tax in the amount of 25,000 hryvnas per vehicle that is less than five years old and has an average market value exceeding 750 minimum wages. The average market value for each type of vehicle is determined by the Ministry of Economic Development and Trade of Ukraine.

vii Military duty

To provide the Ukrainian armed forces with additional funding in view of the current political situation in Ukraine, the Verkhovna Rada has introduced a military duty. Military duty is levied on Ukrainian-sourced income of non-residents and on the worldwide income of the tax residents of Ukraine at the rate of 1.5 per cent.

viii Issues relating to cross-border structuring

Ukraine has a wide network of the double taxation treaties with approximately 70 countries. However, the double taxation treaties with such jurisdictions as Malta and Luxembourg are still pending ratification. The majority of the double taxation treaties entered into by Ukraine is based on the OECD model convention.

Currently while considering trans-border structuring options Ukrainian private business is focused on such jurisdictions as the Netherlands, Estonia, Hungary, Slovakia, Latvia and the UAE due to the favourable provisions of the respective double taxation treaties between Ukraine and these countries. While Cyprus remains to be one of the most popular and attractive cross-border structuring option for the majority of Ukrainian businessmen in tax planning and private wealth protection and preservation, the interest in structuring through the Netherlands, Estonia, Hungary, Malta, Luxembourg, the UAE and other jurisdictions with favourable tax regimes for holding, financial and operational companies will continue to grow for the observable future.

As a part of the tax reform the transfer pricing rules set in the Tax Code were significantly amended, in particular with regard to the list of transactions that are subject to the transfer pricing regulation (the TP Rules). The TP Rules are based on the OECD Transfer Pricing Guidelines. These regulations require that prices for goods and services in certain transactions shall be set on an arm's length principle.

The TP Rules apply primarily to cross-border transactions with related foreign entities. However, they may also apply to transactions between unrelated parties (namely, cross-border transactions involving counterparties from certain 'low-tax' jurisdictions).

The above transactions are subject to the TP Rules provided that the following criteria are met: the total taxable income of the respective Ukrainian taxpayer or its related parties exceeds 50 million hryvnas and the volume of such transactions with any particular counterparty exceeds 5 million hryvnas (exclusive of VAT) in the relevant calendar year (each such transaction a 'controlled transaction'). Ukrainian taxpayers are required to report all controlled transactions to the tax authorities on an annual basis.

Based on such reporting, as well as on their own monitoring and tax audits, Ukrainian tax authorities have the ability to make transfer pricing adjustments and impose additional tax liabilities in respect of the controlled transaction if the terms and conditions of a particular controlled transaction are not on an arm's-length basis.

III SUCCESSION

Rules governing succession are incorporated in the Sixth Book (Chapter) of the Civil Code of Ukraine (the Civil Code). Conflict of law issues arising out of and connected with succession are set forth in the Law on Private International Law. Useful guidelines on the application of the succession legislation are outlined in the Letter of the High Special Court of Ukraine on Civil and Criminal Cases on court practice in succession cases dated 16 May 2013.

Following Roman civil law traditions, succession in Ukraine is regulated either by way of a testament or pursuant to provisions of the Civil Code (succession by law).

A testator's estate is defined as all the testator's rights and liabilities remaining in force after his or her death.

The death of the testator triggers probation. Within six months after the commencement of the probation, the heirs may either execute or renounce their rights to succession.

Transfer of title to heirs is effected on the basis of a certificate of inheritance issued by a notary or, in rural settlements, by the authorised officer of a municipal government body, upon expiration of the six months' probation period. Issuance of a certificate is mandatory for immoveable property, while for moveable property it is optional (though highly recommended).

i Intestacy rules

Inheritance by law arises if a testator leaves no valid will and testament. Inheritance by law rules will also apply if the testator has left a will but it was successfully challenged by heirs or if inheritance was renounced by heirs.

There are several lines of priority of succession. The testator's estate is distributed among the heirs of each priority line (i.e., the heirs of each priority line exclude the members of the next lines). This order of succession may be changed upon written and notarized agreement between the heirs when such agreement does not infringe rights of the heirs that are not parties thereto.

The principle of representation applies (i.e., in case of the death of an heir of the first priority line (e.g., the testator's son) his or her heirs will have the right to their share of the inheritance).

The Civil Code intestacy rules provide that only individuals may inherit by law. The right to succession may be executed by an heir upon provision of evidence of his or her

relations with the testator (e.g., birth or marriage certificate). The heirs of the same priority line inherit the testator's estate in equal shares; however, they may enter into a separate agreement and decide upon distribution of the testator's estate among them.

ii Inheritance by will

The Civil Code sets out strict requirements to the form of the will. It shall be made by a testator in writing with a statement of the date and place of notarisation. The testator may define as the heirs either individuals or legal persons. Only adult persons of full legal capacity may execute a will (they must be 18 years old (or in certain cases 16) or over and with full mental capacity).

A testator may set out in a will any additional bequests in favour of any designated person (e.g., right to abide in the inherited real property). The testator may also determine certain preconditions or conditions for his or her heirs to satisfy in order to receive the right to inheritance (e.g., residence in certain place, being of a certain age). However, such preconditions must not contradict the law or principles of public morality.

A document executed in breach of will execution rules set out in the Civil Code or by a person lacking full legal capacity is deemed void *ab initio*.

A will is deemed void when there is evidence that the testator has executed the purported will either by coercion or as a result of fraud. Upon claim of the interested person such will may be declared void by the judgement of the court.

Spouses may draft a joint will. Apart from the will a testator may also enter into a succession agreement under which acquirer obliges to undertake certain actions prescribed by alienator (testator) in return for ownership rights to the testator's estate.

iii Mandatory inheritance

Testator's right to choose heirs is limited by provisions of Section 1241 of the Civil Code, which guarantees that underage or disabled children, spouses and parents shall in any case inherit at least half of the portion they would have received in the absence of the last will. Under Ukrainian law the definition of a 'disabled person' covers both persons with disabilities and retired persons.

iv Conflict of law issues

As a general rule succession is governed by the law of the country of the last residence of the testator (i.e., if a citizen of Romania resides and dies in Ukraine the applicable law is that of Ukraine). However, if a testator executes a will he or she can choose his *lex patriae* (e.g., in the case of a Hungarian testator – the law of Hungary).

There are, however, certain overriding provisions of *lex specialis*. The form of the act shall correspond to the requirements of the law of a place (country) of the testator's death. However, the will may not be declared void on the basis of error in form if it corresponds to the law of the country where the testator's immoveable property is situated, the *lex patriae*, the law of the country of the last residence or the law of the country where the will was executed, whichever is applicable.

Transfer of title to immoveable property shall be governed by the law of the state where such immoveable property is situated.

v Matrimonial rules

In 2014–2015 no amendments were made to the Family Code of Ukraine (the Family Code), the act governing matrimonial relations in Ukraine. Same-sex marriages are not recognised by the Family Code and their official recognition is unlikely in Ukraine in the foreseeable future.

The Family Code provides for tenancy-in-common of the spouses' property with certain exclusions (e.g., personal belongings, property acquired before the marriage). This regime can be changed by way of a prenuptial agreement. Prenuptial, maintenance and alimony agreements must be executed in writing and notarised. However, there is no developed case law in Ukraine regarding such agreements. Difficulties may arise in the case of foreign spouses and with conflict of law issues.

IV WEALTH STRUCTURING & REGULATION

i General overview of private wealth regulation

None of the forms of legal entities provided by Ukrainian corporate legislation may be viewed as specifically designed for private wealth management purposes. The trusts and foundations are generally not recognised in Ukraine, though the relevant terminology sometimes appear in the new legislation.

Significant developments in the legislation aimed at establishing economic and financial transparency occured in 2015. Substantial changes were introduced to the regulatory regime of the banking sector.

ii Beneficial owners' disclosure requirements

Following FATF Recommendations 24 and 25 in late October 2014 the Verkhovna Rada introduced requirements to the disclosure of the ultimate beneficial owners (UBO) of Ukrainian legal entities.

Current Ukrainian legislation provides that all legal entities in Ukraine shall file with the State Registry of Legal Entities and Private Entrepreneurs of Ukraine (the State Registry) information on their: ownership structure and the UBO. The filing requirements do not cover legal entities whose members are exclusively individuals.

Upon filing with the State Registry, the UBOs' personal data (including full name and place of residence) is publicly available on the webpage of the State Registry.

The definition of the UBO included into the AML Law (as defined below) covers both shareholding and dominant control tests endorsed by the FATF in the 2014's Guidance on Transparency and Beneficial Ownership. Moreover, nominee shareholders may not be registered as the UBOs of Ukrainian legal entities.

Failure to file information on the UBO results in fines being imposed on the management of Ukrainian legal entities (up to 8,500 hryvnas).

Current Ukrainian legislation does not provide for any specific rules regarding controlled foreign companies (CFC), however, in the course of de-offshorisation, which was started in 2016, significant development of the CFC rules is in process, and it is expected that by the end of 2016 Ukraine will have introduced new CFC legislation.

iii New requirements of the National Bank of Ukraine

In 2014, the National Bank of Ukraine (NBU) started to develop the strategy of Ukrainian banking sector reform, with the principal goal of securing its transparency, sustainability

and stability. Following the IMF's recommendations, the NBU has substantially amended legislative requirements for the owners and ownership structures of Ukrainian banks. As at the time of writing, the NBU has already liquidated about 70 banks, which in the beginning of 2014 represented about 30 per cent of the banking system of Ukraine.

New provisions have amended procedures for obtaining the NBU's approval for acquisition or increase of significant interest in Ukrainian banks. Thresholds for acquisition or increase of the significant interest are set at 10 per cent, 25 per cent, 50 per cent and 75 per cent and the NBU's approval is required when any of these thresholds is reached. When considering the approval, the NBU analyses the transparency of the future structure of a bank (direct and indirect shareholders, including ultimate beneficial owners); the business reputation of the managers of the bank or individuals who are applying for acquisition of the significant interest; sources of the applicant's own funds, out of which the significant interest is intended to be acquired; and the ability of the applicant to provide additional financial support to the bank, etc.

If the significant interest is acquired or increased without obtaining the approval, the NBU may impose a fine on the direct significant owner, or on any legal entity in the bank ownership structure, of up to 10 per cent of such significant interest. However, payment of the fine does not remove the obligation to obtain the approval. In the period before obtaining the approval, the NBU may temporarily deprive the owner of voting rights and appoint an authorised representative to whom their voting rights are transferred, as well remove the owner's right to take part in the management of a bank.

In general, the bank's structure is considered transparent, provided that the documents submitted to the NBU disclose (1) all the legal entities and individuals who own the significant interest directly or indirectly or have a decisive influence over the bank's management or activity; (2) all key shareholders of a bank and all key shareholders of the legal entities in the ownership chain of a bank; and (3) the relations between mentioned legal entities and individuals. Any bank ownership structure that includes discretionary trust arrangements is viewed by the NBU as non-transparent, as it restricts the NBU's ability to establish the ultimate owner of a bank.

If a bank's structure is considered 'non-transparent', the NBU may designate the bank as problematic. In such case the NBU gives the bank a term of up to 180 days to bring the structure of the bank into accordance with relevant transparency requirements, and if the bank complies with such requirements, the NBU declares it insolvent.

iv Anti-money laundering and anticorruption regime

The Law on Prevention and Counteraction to Legalisation (Money Laundering) of the Proceeds from Crime, Terrorism Financing, as well as Financing of the Proliferation of Weapons of Mass Destruction (the AML Law) together with the Criminal Code of Ukraine (the Criminal Code) is the primary legislative act in the sphere of anti-money laundering in Ukraine.

In line with the EFF, the AML Law is aimed at compliance with the principal FATF recommendations (including the 40 Recommendations) on combating money laundering and terrorist financing.

Ukrainian anti-money laundering regime includes a two-level strict monitoring system over the financial operations performed by residents and non-residents of Ukraine. Initial financial monitoring (identification of a client, details of and grounds for particular financial operation, etc.) of financial operations is conducted by intermediaries including

banks, insurance (and reinsurance) companies, other financial institutions, stock and commodities exchanges, professional members of the security market (e.g., brokers, dealers), notaries, auditors and individuals rendering accounting services, attorneys at law and other persons providing legal services (the initial financial monitoring performers).

The AML Law, *inter alia*:

a provides for outsourcing of client identification or verification to a third party;

b authorises the initial financial monitoring performers to require a client to provide its ownership structure to enable them to determine beneficial owners of the client;

c introduces financial monitoring with respect to national or foreign politically exposed persons and officials of international organisations, establishes a high-level risk for operations involving (or carried out in the interests of) politically exposed persons or officials of international organisations and provides for additional measures of financial monitoring for clients with a high level of risk; and

d clarifies the legal basis for termination of relationships with a client by the initial financial monitoring performers in case the identification or verification of a client is not possible.

The AML Law also provides for the formation of a national analytical database that may be used by the law enforcement agencies of Ukraine and other countries for the purposes of identification, examination and investigation of crimes related to money laundering and other illegal financial transactions.

The major authority vested with the general supervision of the financial monitoring system function is the State Service for Financial Monitoring of Ukraine (the Service). The Service, *inter alia*, adopts standards and recommendations as to the conduct of financial monitoring and keeps updated the list of persons connected with terrorist activities and targets of international sanctions.

The Criminal Code provides for a criminal liability for laundering of the proceeds of a crime. This leads to imprisonment of up to 15 years, combined with confiscation of the proceeds of a crime and property of the liable person, as well as deprivation of the right to perform certain activities or hold certain positions for up to three years.

In 2015, Ukraine introduced the Law on Prevention of Corruption, which provides a new electronic system of submission of the declarations of the politically exposed persons and persons authorised to perform the functions of a state or local government (the Person) and provides for a comprehensive list of information that must be reflected in the declaration.

The following shall be reflected in the Person's declaration:

a assets of the Person and his or her family members;

b real estate owned by the Person and his or her family members, including joint ownership, lease or other right of possession;

c cash assets, including cash, assets placed in bank accounts, deposits to credit unions and other non-bank financial institutions;

d securities, including shares, bonds, checks, certificates, promissory notes, including those controlled by another person (indicating the share in the company); and

e all financial liabilities of the person (including loans, liabilities under lease contracts, amount of cash paid in respect of the principal amount of the loan and interest thereto, liabilities under insurance contracts and assets lent to other persons).

V CONCLUSIONS & OUTLOOK

Ukrainian legislation is going through a reform period, with the aim of becoming compliant with international and EU standards, in particular in the course of the visa liberalisation process. Substantial changes are already visible, though the climate for private wealth management and protection in Ukraine is still not friendly enough.

There is a growing need to introduce these structures at the owners' level. First-generation Ukrainian business people are starting to look into restructuring their businesses to secure the interests of their families for years to come.

A reliable and effective solution for achieving these goals remains the creation of a cross-border structure with a trust or foundation at the top. Such structuring provides for a transparent and reliable ownership and control system for the business and helps to protect the interests of the beneficiaries. Since Ukrainian legislation now emphasises transparency as a major requirement for all such structures, it is always important to consider that the UBOs of such structures may be disclosed to Ukrainian authorities and that such information will be publicly available.

In 2015–2016, the Ukrainian tax system did not show enough stability. In 2016, Ukraine reverted to a flat tax rate. In the course of fighting corruption, anti-BEPS measures are widely being considered, including the necessity of implementing the CFC rules and tax amnesty proposals. While these initiatives have not yet been introduced, the taxpayers can enjoy a wide network of Ukrainian double tax treaties and opportunities to use their benefits.

Ukrainian law covers the main aspects of succession and matrimonial relations, and provides for the possibility of entering into agreements, structuring such relations and defining specific regulations for specific cases. No updates or amendments thereto have been announced by the Ukrainian government at this stage.

Apart from the banking sector, currently there are a number of draft laws aimed at reforming the financial services sector to 'clear' it of unfair non-banking financial institutions. Draft laws provide for new requirements on transparency (i.e., disclosure of the ultimate beneficiaries) and the financial standing of such institutions. To improve the effectiveness of the state regulation system for financial markets, the draft laws envisage liquidation of the current state regulator (the State Commission for Regulation of Financial Services Markets of Ukraine) and transfer one part of its powers to the NBU and another part to the National Securities and Stock Market Commission. Therefore, if the relevant legislation is implemented, the NBU is expected to start the second 'clear-up wave'.

The AML Law and the Criminal Code serve as the main sources of the Ukrainian anti-money laundering regime. In particular, the AML Law provides for the financial monitoring procedures.

Ukraine is gradually moving forward to a disclosure and transparency regime, in particular by introducing the electronic declaration of assets by individuals. Ukraine is also developing certain de-offshorisation regulations and, *inter alia*, it is expected that by the end of 2016 the new CFC rules will be adopted.

Appendix 1

ABOUT THE AUTHORS

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Alina Plyushch is a counsel with Sayenko Kharenko specialising in corporate law, M&A, corporate finance, capital markets and private wealth management.

Alina has over 16 years of professional experience in advising clients on corporate restructuring, share and asset sales, joint ventures, private placement and capital markets transactions.

Ms Plyushch is one of the leading specialists in Ukraine in the private wealth management area and has extensive experience in advising on protection of the beneficial owners' interests both in Ukraine and abroad, including corporate restructurings, incorporation of trusts, foundations and segregated portfolio companies.

Alina Plyushch is listed among world's best Private Client lawyers by the independent review *Who's Who Legal: Private Client 2015*.

Alina earned her graduate diploma in law and postgraduate diploma in legal practice from BPP University Law School (London) and law degree *summa cum laude* from the Academy of Advocacy of Ukraine.

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Dmytro Riabikin is an associate at Sayenko Kharenko specialising in private wealth management, M&A, corporate law and securities market.

Dmytro has a six years' experience of advising clients on various private wealth management issues, including protection of interests of the beneficial owners of Ukrainian and foreign businesses by means of corporate restructurings and setting up trusts.

Dmytro earned his master's degree *summa cum laude* in private international law from the Institute of International Relations of Taras Shevchenko National University of Kiev. In 2016, Dmytro became a PhD in private international law.

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