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**U.S.-Ukraine Business Council
Legal Committee**

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**White Paper
*Second Edition***

**LEGAL AND GOVERNANCE REFORM IN UKRAINE: STRATEGIC PRIORITIES
Business and Economic Sector**

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Introduction

By Irina Paliashvili¹

The legal community has always been active in the reforms process in Ukraine, but it has significantly intensified its efforts within past two years. There are many ongoing pro bono projects on legal reforms under way, mostly focused on specific sectors, or issues. The law firms involved in this project, which are members of USUBC, decided to focus on an overall strategic vision for legal and governance reform in the business and economic sector. The initial result of this work was the first edition of the **White Paper on LEGAL REFORM: STRATEGIC PRIORITIES**, released a year ago², followed by the **first USUBC-KSE conference** held on 15 October 2014 at the Kyiv School of Economics (KSE)³.

Recognizing the crucial importance for Ukraine of fundamental and systematic legal and governance reform, the USUBC Legal Committee decided to make the White Paper an ongoing project by preparing this second edition, and also by transforming our endeavor into a multidisciplinary project involving economists and political scientists. When the second edition of the White Paper was drafted, we invited prominent legal and non-legal experts to become our Commentators.

Following several months of this collective effort, we are pleased to release the second edition of the **White Paper on LEGAL AND GOVERNANCE REFORM IN UKRAINE: STRATEGIC PRIORITIES /Business and Economic Sector/⁴** – jointly developed by thirteen leading law firms with the participation of five Commentators, and presented on 30 October 2015 at the **second USUBC-KSE Conference⁵**.

The first edition of the White Paper was released a year ago, before the new Verkhovna Rada and the new Government came into place, but our main conclusion then and now remains the same: Ukraine's current post-Soviet oligarchic and kleptocratic system needs to be entirely dismantled and replaced by a brand new, modern, fair, civilized and service-based legal and governance system. This mission requires a systematic and strategic approach, which we continue to promote in the second edition of the White Paper. At this time, we have analyzed the achievements and failures of the new Rada and the new Government, and have shared our advice on the course of reforms for 21 sectors of the legal and governance system. We are pleased that some of our recommendations, especially in the area of judicial reform, are currently being considered.

¹ The author thanks Bohdan Vitvitsky and Nonna Tsiganok for their most valuable help in preparing this Introduction.

² English and Ukrainian versions are available at <http://www.usubc.org/site/recent-news/legal-reform-in-ukraine-strategic-priorities>

³ The conference Program is available at http://www.rulg.com/documents/Program_USUBC-KSE_Cnfrnc_Legal%20Reform_2014_Oct15.pdf and the conference can be watched (starts with 30:30) at <https://youtu.be/MDerRFMCKeY?t=30m30s>

⁴ English and Ukrainian versions

⁵ The conference Program is available at the end of this White Paper and the conference can be watched at https://youtu.be/f_RxqiRCPB0

Overall, it is disappointing that after one year of having been in office, the Rada and the Government have not succeeded in dismantling the current system, let alone replacing it with the new one. We have observed various sporadic attempts and efforts, some of them progressive and effective, but none of them amounting to the dismantling of the old system and radically reforming its fundamental pillars: legislation, governance structure, public administration, institutions, judiciary, law enforcement and others.

The Rada did produce numerous new laws and amendments, but this was done within the framework of the old system, and resulted in making our legislation even more complicated, contradictory and confusing. Even the language of the new legislation has not changed – the new laws are still drafted using the same archaic, often incomprehensible, legalistic language.

The Rada is measuring its success by how many new laws it adopted, which is an entirely wrong criterion. At his lecture at KSE on 29 May 2015, the architect of Polish reforms, Leszek Balcerowicz, called this "the more legislation the better" approach "a socialist way". What is needed, he said, is "not many laws, but good laws; good enforcement of bad laws is bad".⁶

Existing Ukrainian legislation is a massive, post-Soviet mess, which incorporates numerous special interests and corrupt schemes accumulated over 20 years. It is worsened by ongoing manipulations with the Constitution, swinging the country back and forth from Presidential-Parliamentarian to Parliamentarian-Presidential system, yet always preserving intact the insane duality of power (the "worst possible solution", as it was defined by Ivan Miklos, a former Deputy Prime Minister and Minister of Finance of the Slovak Republic⁷).

Piling up new laws on top of this mess will not miraculously turn it into a new system, but this will continue to prevent Ukraine from becoming a true "rule of law" country. Rule of law means, among other things, strict enforcement of the existing laws, but if the entire body of current outdated and often absurd legislation gets enforced, the country will be paralyzed. This is why the current system cannot function without selective enforcement, which gives the vast bureaucratic class, including law enforcement and the judiciary, enormous discretionary power over the ordinary citizens and businesses and feeds systematic corruption.

No anticorruption measures can succeed if they are undertaken within this system, which itself is a Petri dish for corruption. Corruption, as a consequence, cannot be fought in isolation from its basis. The only effective tool to fight it is to eliminate its breeding ground, to throw away the Petri dish. Until this happens, any anticorruption measures will be ineffective and will turn into a camouflage for more corruption.

⁶ https://youtu.be/gy5nyBxwo_M Minutes 23.30 and 26.40 – 26.58

⁷ Second USUBC-KSE Conference on Legal and Governance Reform, 30 October 2015

https://youtu.be/f_RxqiRCPB0

It is therefore no surprise that the current legal and governance system feeds corruption and corruption feeds it back, locking Ukraine into a vicious cycle, which no number of new laws and anticorruption agencies can break, and in which no meaningful "rule of law" can be installed. This situation also breeds cynicism by the public, as summarized in the anecdote: "The Ukrainian people want two things: (1) to get rid of corruption in the country; and (2) to be able to evade any law for as small a bribe as possible".

Evidently, before demanding "rule of law" and eliminating corruption, we need to change the system since the current one is beyond repair – in response to any attempt to improve it, the system simply mutates and adjusts, breeding a new class of corrupt public servants.

There is a common sense solution to this ongoing crisis:

- **Ukraine can borrow the most modern, simple, uncorrupt and well-tested legal and governance system from the most successful countries in our neighboring region, and install the best components from each.**

As an overall model, we can use the Estonian system because it is 100% EU-compatible, is oriented at freedom of entrepreneurship, but also at social and environment protection, has no corruption component, and perfectly fits into modern IT solutions. The tax system can be borrowed from Slovakia. The anticorruption, law enforcement and customs components can be borrowed from the Georgian experience, especially given that the first steps with creating the new patrol police according to the Georgian model and with the help of Georgian experts proved to be quite successful.

Then Ukraine will need to place a five-year moratorium on changing any laws (most of corrupt schemes are installed through never-ending legislative amendments), which would ensure stability and trust in the new system in the society.

The experts, who designed and implemented the best reforms in the countries of the region (Estonia, Slovakia, Poland, etc.) and who are fluent in EU requirements, should train the new cadre of Ukrainian civil servants and judges, and carry out the selection process (all previous ones must leave, but apart from those who were lustrated, should be allowed to participate in the new selection process). Georgian experts should help to reform the law enforcement, prosecutors' office (*prokuratura*) and customs service, and be given a full mandate to eliminate corruption.

Ukrainian society and business are ready for this: they have been suffocated by the current system for a long time. They have nothing to lose and a lot to gain if a new,

transparent and simple legal system, modeled after the least corrupt and most successful countries, is introduced in Ukraine.

A modern, globalized and free-market Ukraine will no longer need a separate law for every step of the way, with a vast bureaucracy to selectively enforce it (in the civilized world there is no need for a separate Law "On Milk and Dairy Products", "On Libraries and Librarian Activities" or "On Grapes and Grape Wine"). The current legislation, on the other hand, is so massive and inconsistent that compliance often is just not possible, but there stand "on guard" the law enforcement, the tax authorities and the judiciary, which continues to blackmail the society and extort bribes because they are an integral structural part of the current system.

At present, when a real reform is needed, the Government often claims to be helpless. Why? Because "we need a new law" to do this. However, every time the Government wishes to introduce new restrictions and hurdles, it goes ahead and does it without the need for a "new law", and sometimes in direct contradiction with existing laws. Similar situation is at the Rada: if a special interest needs a new law or an amendment, it gets adopted in record time, but if a new bill is needed in the interest of general public, it goes through many weeks and months of agony, before it finally gets passed in a neutralized version.

Under the current dual governance system, nobody takes responsibility, but it is always a legal technicality that both prevents a branch of power from making a progressive effort, and also keeps corrupt officials or judges in their job. There are many examples when legal technicalities are successfully used to stop a progressive effort: thus during the selection process for new key officials, somehow the candidates, who are best qualified, but independent, are disqualified because of legal technicalities.

The society no longer accepts the "we need a new law" and "legal technicalities" excuses. The inability of the current system to cope with modern challenges forces the public and businesses to resort to various parallel structures – all kinds of ombudsmen, or even to so-called "garbage bin lustration" (when the frustrated public throws most notorious politicians into garbage bins) – these measures, although useful during the transition period, ultimately only have a cosmetic effect on the current system, and in the long run they will help it to survive. Even the current deregulation will not work because no meaningful deregulation is possible at the level of secondary legislation (regulations by the ministries), when overregulation continues at the level of primary legislation (laws adopted by the Rada), and when the same unreformed public administration makes sure this vicious circle continues. At present, cancellation of one regulation by a ministry is followed by adoption of the new law by the Rada, which requires yet another regulation.

Ukraine need a clean break from its Soviet past. It is not by chance, however, that a new book by Anders Åslund is entitled: *Ukraine: What Went Wrong and How to Fix It* – because before fixing the problem, it needs to be acknowledged first, which our political class refuses to do. One of our White Paper Commentators, Bohdan Vitvitsky, who served

as a US Federal Prosecutor and a Resident Legal Advisor at the U.S. Embassy in Ukraine, stated in his interview to Alexander J. Motyl: "...one thing that needs to be addressed, which few in Ukraine seem to realize, is the systemic deformities in the entire legal system going back to Soviet times... Since a well-functioning legal system is necessary for a country's normal political and economic development, a successful anticorruption drive and real reforms of the legal system need to be attempted in tandem".⁸

We need a breakthrough - installation of a civilized legal and governance system just in two or three years will push Ukraine from the Stone Age into the 21st century, it will liberate and restart the economy and will result in significant domestic and foreign investment.

Can it be done? It absolutely can. Other countries in the region, under similar circumstances, including the war, have done it. Ukraine's current leadership, instead of finding ridiculous excuses every time (Georgia is too small, Poland is too big, Estonia and other Baltic countries had spent less time under Soviet occupation, etc.) must express a decisive political will and move ahead with these radical changes.

Historically it was even done in this land. Prince Vladimir, who ruled Kievan Rus in X-XI centuries, came to understanding that the Pagan system was outdated and was slowing the country's progress compared to more advanced neighbors who practiced mainstream religions. He sent envoys to study different religions and laws, ultimately deciding on Christianity and "Christian Law". History can be the judge on whether it was the right choice, but definitely at that time this was a major breakthrough for Kievan Rus. So we do have a historic precedent, when one of the most revered leaders of Kievan Rus acknowledged that the current system was outdated, looked abroad for the new system, studied and compared what would work best, and then radically and successfully replaced the old system with the new one. That happened 1000 years before the information age – today Ukraine can do this too!

⁸ World Affairs Journal, 1 June 2015 <http://worldaffairsjournal.org/blog/alexander-j-motyl/fighting-corruption-ukraine>

Section I: Fundamental Legal Reform

1. **Anti-Corruption.** *Edited by Squire Patton Boggs.*

Ukraine's systemic corruption is a barrier against it becoming a "normal" country, that is, a country with a fully functioning market economy, a full democracy, active foreign investment and legal justice. What is needed are *deeds* rather than declarations. Such deeds must include not only legislative changes but also the efficient, unbiased and expeditious investigation and prosecution of corruption crimes and related offences by law enforcement authorities.

General Anti-Corruption Measures

- Reform the judicial system so that it is marked by a high degree of professionalism and integrity rather than corruption or incompetence; (See Section I.2 for specific suggestions)
- Eliminate the current system of "absolute" immunity of judges and replace it with a system of "functional immunity", which would be limited in scope and extend only to a judge's performance of his/her judicial functions in a professional manner and in good faith, and that would preclude the application of immunity to any investigation and prosecution for illegal judgments and corruption-related offences;
- Revoke immunity for members of parliament (MPs), except for political speech;
- Provide that MPs, Ministers, Deputy Ministers and judges are personally liable for any bribes taken or egregious corruption-related offences committed by any of their employees/subordinates, consultants or family members;
- Introduce comprehensive protection for whistleblowers;
- Adopt laws allowing for the use in trials for corruption related offences of circumstantial evidence and evidence of wealth belonging to relatives, and place the burden on the individual possessor of expensive property and personal items (*e.g.*, houses, cars, boats, watches, *etc.*) to prove that their income was legally earned, reported and taxed or face fines and potential confiscation. Close the legal loopholes used to avoid responsibility (*e.g.* gifts, ownership by spouses or children, under reported purchase price contracts, *etc.*);
- Reduce the number of permits, approvals, licenses and inspections from public authorities;
- Reduce the overall number of people employed by the government;
- Introduce transparency in the state procurement system by providing mandatory public access to all key procurement information (including procurement contracts), and adopt a new e-procurement law to implement the electronic procurement system (see Section 11 for specific suggestions);
- Introduce a new procedure allowing any person (*e.g.*, journalists), who has credible evidence that a civil servant received a bribe or unlawful benefit, to report to the law enforcement agencies and, if a case is opened based on that evidence, to receive information about the status of the case from the prosecutor as well as relevant decisions from the court (so-called "public prosecution");
- Issue electronic (digital) documents by public authorities (without any official signature and seal of the public authority);
- Launch educational programs at schools to inform children about anti-corruption measures and general public awareness campaigns;
- Raise public awareness on anti-corruption mechanisms to solicit input with regard to anti-corruption efforts.

Status of Civil Servants

- Ensure a livable wage for civil servants (especially for judges and public prosecutors);
- Introduce an obligation to disclose beneficial owners of real estate holdings and land plots in the State Property Register;
- Establish a legal mechanism of control of private expenditures of civil servants and all public officials and their relatives.

Structure of Public Anti-Corruption Agencies

- Ensure lawful establishment and independent functioning of National Corruption Prevention Agency;
- Detach the Specialized Anti-Corruption Prosecutor's Office from the Prosecutor General's Office, and ensure real independence and resources (including appropriate security) for that body to fight organized crimes and high-level corruption offences;
- Ensure allocation of sufficient budgets for effective functioning of the anti-corruption authorities;
- Introduce specialized anti-corruption courts or judges.

Political Parties Financing

- Create an efficient procedure for monitoring the compliance with the law on financing of political parties and election campaigns;
- Establish swift and severe sanctions for violations of legislation on political financing;
- Adopt comprehensive legislation on lobbying.

State Property Registers

- Update the state property register and land cadastre of Ukraine with information about property/land lease and provide public access to respective information: on title holder (owner, lessee or others), terms of usage (term of lease agreement, amount of lease payments, *etc.*);
- Include information about the disposal price of state and municipally owned real estate and land plots in the state property register, and make such information accessible to the public.

Responsibility

- Increase civil servants' liability for corruption offences, including removal from office, loss of pension, and asset forfeiture, and make information about such offences public;
- Increase liability for non-compliance by public officials with the requirements on conflicts of interest, especially with regard to holding an interest in commercial and business arrangements/undertakings;
- Introduce tougher penalties for non-disclosure of beneficial owners of companies — up to criminal responsibility;
- Increase criminal liability for corruption offences, namely, increase the amount of bail for the release of a detained civil servant under investigation on corruption charges and link the amount of bail directly to the amount of the improper benefits received or the

- anticipated damages caused by the offence; remove criminal liability for provocation of bribery by civil servants (section 370 of the Criminal Code of Ukraine), which is a hindrance to the efficient investigation of corruption offences;
- Amend laws on criminal liability of legal entities for corruption offences (namely, for giving a bribe to civil servants in order to obtain benefits for a company); and strengthen the scope of such responsibility (increase the amount of fines, introduce forfeiture of property and penalties against the legal entities).

COMMENT BY: Professor Alan Riley

I echo all the observations made in the paper as to the need for a professional and independent anti-corruption agency.

One additional recommendation I would make would be for Ukraine to consider adopting a version of the US Civil False Claims Act (CFCA) into national law. The CFCA is the most successful anti-fraud statute ever enacted. It was originally enacted by Abraham Lincoln during the US Civil War to protect against fraud in the defense budget. It was reintroduced by Ronald Reagan in 1986 for similar reasons (though it applies to all forms of Federal revenues and expenditures). The CFCA has two key provisions. First, that any false claim on the US budget will result in a civil fine of three times the loss. Second, any innocent person (*e.g.* an employee at a defense contractor) who finds out about the fraud and as a result the Justice Department is about to recover can apply to a Federal Judge, who may award up to one-third of the recovery. The state effectively recovers twice from the fraudster and the fraudster may pay once over again to the whistleblower. Because the fines are civil it also means the cases are easier to prove.

Since it was reintroduced in 1986 the CFCA has recovered tens of billions of dollars in false claims, and deterred hundreds of billions of dollars in false claims. Previously I produced a paper for the Centre for European Policy Studies on how the CFCA could apply in a EU law context. That paper can be found here:

<http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?lang=en&id=25987>

COMMENT BY: Dr. Bohdan Vitvitsky

Since there exists international experience with significantly reducing corruption, what needs to be done is not a mystery, although how to implement that which needs to be done certainly can be. The goal of any country is to keep official corruption at an episodic level rather than at a systemic level. To reduce a condition of systemic corruption to one of merely episodic corruption requires three things. First, a major change in public awareness and understanding about how and why corruption cripples and deforms a country's political and economic systems and how it deprives its citizens of justice and dignity. Second, a significant reduction in or even elimination of imbalances between, on the one hand, the kinds of duties and responsibilities held by public officials and, on the other hand, their salaries, benefits and pensions. Third, a well functioning criminal legal system that has the capacity to competently and fairly investigate, prosecute and convict those who have engaged in corruption. To help monitor and help discourage corrupt acts, various preventive mechanisms such as a system of required financial declarations by public servants is likewise very helpful.

Ukraine's Revolution of Dignity demonstrated that the attitudes of its citizenry towards corruption have begun to change dramatically. More public education is needed. There has, however, been very little or no progress in addressing the issue of salaries for public servants, particularly, but not only, as regards the compensation packages of judges and prosecutors. Where, as in Ukraine, the level of rule of law is low, i.e., where the legal system is in many ways dysfunctional, that creates additional hurdles to reducing corruption, but there can be a solution. The solution is to create a special unit of detectives, a special unit of prosecutors and a special unit of judges to honestly, competently and fairly handle corruption cases.

The White Paper helpfully identifies many actions that the Ukrainian government needs to perform in order to demonstrate that it is serious about actually, rather than merely declaratively, reducing the level of corruption in Ukraine.

2. Constitutional Reform of the Judicial System. *Edited by CMS Cameron McKenna.*

Proposals on Amending the Constitution of Ukraine regarding reform of the judicial system were prepared by the Working Group on Justice and published on the Constitutional Commission's web-page ("Proposals") and were sent by President Poroshenko to the Council of Europe's Venice Commission for review. Arguably, the Proposals represent the first significant institutional and systemic changes to Constitutional provisions regarding the judiciary since the adoption of the Constitution in 1996 and begin to address the serious crisis of legitimacy faced by the judicial system.

Overall, the Proposals appear to improve access to and the efficiency of justice by making the judicial system more transparent and accountable. To date, the lack of public debate regarding the substance and implications of the Proposals has, however, raised concerns among professional and civil society groups. Many believe that the Proposals may not fully address transparency and corruption issues and do not sufficiently restore the legitimacy of an institution fundamental to the protection of the rights of citizens (including, crucially, property rights) and to the success of all of the other reforms underway in Ukraine.

The President has, to his credit, sent both the Proposals and the Maidan-inspired Reanimation Package of Reforms groups suggested changes ("RPR Proposals") to the Venice Commission for joint consideration. Our contribution to the debate follows below.

Appointment and Rejuvenation of the Judiciary

- Appointment

The credibility and authority of the current Ukrainian judicial system has been altogether undermined due to the judiciary's lack of independence from outside influence, be it political or commercial in nature. While the Proposals (Article 131) significantly expand the powers and responsibilities of the Higher Council of Justice ("HJC") to provide it with overall supervisory control of the judiciary, the current unsatisfactory appointment formula of HJC members remains intact, whereby the President, Verkhovna Rada, Council of Judges, conference of advocates, conference of law faculties and conference of prosecutors each appoint their own representatives. Although the Proposals re-weight the proportion of appointments in favor of the Council of Judges, the appointment process of HJC members may, however, be easily perceived by a skeptical (cynical) public to represent the corporate interests of their patrons.

The better approach to resolving this issue would be to follow the recommendations advanced by the RPR Proposals, whereby the Council of Judges appoints 9 of 20 HJC members directly, and where **a special independent HJC appointment commission**, equally representing the advocates, law faculties and prosecutors (there are two *ex officio* members as well), appoints 9 other members. The HJC appointment commission itself would be appointed in equal numbers by the President and Verkhovna Rada from "people of unimpeachable reputation and high moral authority in society".

This approach would help to enhance transparency and would take the process outside of the narrow circle of political and corporate interests of those involved directly in the judicial system, introducing a degree of accountability to civil society. The HJC, under the RPR Proposals, would

then make appointments and deal with the disciplining and qualifications of judges, *etc.*, free of external, especially political, influence. This would allow justice not only to be done, but, crucially, to be seen as being done, thereby hopefully restoring credibility and legitimacy to the judicial system.

- Lustration

The second element to restoring legitimacy to the judicial system is the issue of how to deal with the present corpus of judges. While not all judges have engaged in or facilitated corporate raider attacks on businesses, decided cases based on bribes, or colluded with law enforcement authorities to violate human rights before and during the Revolution of Dignity, sufficient numbers have behaved in a manner that has put the entire system of justice into disrepute. Polls consistently show that no other institutions have degraded public trust in Ukraine's institutions as much as the judiciary and the law enforcement authorities.

We are calling for the "de-Sovietization" of Ukraine's judicial system, which ultimately became the handmaiden of a criminal regime and that, in its current state, may effectively hinder the implementation of all other reforms currently being implemented or contemplated. The issue is not a matter of retribution or revenge; it is a case of what the Venice Commission in its positive Opinion regarding the Law of Ukraine "On the Cleansing of Government" ("Lustration Law"), relying on decisions of the European Court of Human Rights, has described as a "democracy protecting itself" from the possible return of a repressive criminalized regime. Indeed, this approach is wholly analogous and consistent with the measures taken by countries in Central and Eastern Europe during their processes of "de-communization."

How to determine which judges should remain and which should leave is a fundamental question, fraught with many difficulties. The Proposals, in the Transitional Provisions (Chapter XV), keep the present cadre of judges in place and provide that they will remain in their places until some form of review of their individual behavior takes place, the basis of which will be set out in a special law.

This proposal will not, in our view, inspire confidence that anything in the system will change. In fact, we maintain that this approach will completely undermine the positive aspects of the structural reforms under consideration, as a judge appealing his removal to a judge who still has not been investigated creates an inherent bias and conflict of interest. Many other similar problems with this system can be envisioned.

As demanded by the public, it may be better to begin with a fresh start in the judiciary through **lustration of judges currently holding their positions**. A judge, or any other public servant for that matter, does not have a "right" to hold public office – they hold an **office of public trust** for the benefit and protection of all citizens. As President Andrew Jackson of the United States once famously said:

"In a country where offices are created solely for the benefit of the people no one man has any more intrinsic right to official station than another. Offices were not established to give support to particular men at the public expense. No individual wrong is, therefore, done by removal, since neither appointment to nor continuance in office is a matter of right..." (quoted in Roman David, *Lustration and Transitional Justice*, 2011, p. 17).

The Lustration Law attempts to side-line judges for a period of 10 years who took decisions violating the rights and freedoms of protesters across Ukraine. We maintain that the efforts to cleanse the judiciary under the Lustration Law should continue, since these judges violated their oaths to uphold the Constitution and perform their most vital function, namely, to administer real justice and protect the rights of citizens. Let us not forget that judges do not sign their decisions as private citizens; they do so in the name of the State of Ukraine.

We would adopt the approach set out in the RPR Proposals, where **lustrated judges are granted the status of reserve judges**. After a period of six months they can apply to be re-instated under the new rules of appointment. Their lustration would not constitute discrimination, or even punishment; like the situation in post-communist Central Europe, their removal is status-based and forward-looking, designed to reset and rebuild a broken institution whose proper functioning is essential to building Ukraine's democracy and market economy. Fault, or issues of criminal liability or even prosecution, is not germane to this process and judges not re-appointed under the new rules remain free to seek alternative employment and to hold other positions.

Prokuratura

Maintaining the Prokuratura essentially as a Constitutional body is perhaps our greatest concern regarding the Proposals. In 1937 Josef Stalin created the Prokuratura to oversee the "legality" of actions of courts, police and Soviet citizens and it quickly became a repressive law enforcement instrument that cowed a fearful citizenry. The misnomer of "prosecutor" confuses foreigners, as the understanding of that term in democratic countries does not begin to describe the powers that this body wields.

For better or for worse, the Prokuratura has been an essential instrument of the exercise of power in the hands of every president of Ukraine since independence. Its wide powers of detention, investigation, arrest, and prosecution have been the bane of large and small foreign-owned and Ukrainian businesses alike and the fortunes amassed by many prokurators at all levels have boggled the minds of citizens. Many Ukrainians maintain that it is the largest and most powerful "mafia" in the country.

Nothing like the Prokuratura exists in democratic countries – and it should not exist in its present form in Ukraine. It was a huge mistake to entrench its powers in the 1996 Constitution, effectively creating a fourth branch of power in Ukraine. This is now well-understood, and a new law on the Prokuratura, as well as both the Proposals and the RPR Proposals, have attempted to restrict the Prokuratura's competency to representing the state in criminal prosecutions before the courts and to oversight of criminal investigations by the police, who will inherit this function.

There is no compelling reason, therefore, for the powers of the Prokuratura to be constitutionally defined. Accordingly, we do not believe that the provisions dealing with the Prokuratura (Article 131-1) in the Proposals should find any place in Ukraine's Constitution. First, we fear that so long as the Prokuratura remains a constitutionally-mandated body, its Soviet and post-Soviet legacy will permanently perpetuate it as a publicly unaccountable instrument of the exercise of executive power and, in the minds of many Ukrainians (and prokurators themselves), a fourth branch of state authority. Indeed, purging the Constitution of the Prokuratura as a constitutional body would be a key step forward in the de-Sovietization of the Ukrainian state.

Second, creating what effectively amounts to a separate constitutional system of criminal prosecution is inimical to the establishment and operation of a coherent and unified system of administration of justice. The Constitution states (Article 24) that everyone is equal before the law, which should be sufficient to guide proper prosecution practices in criminal cases. To ensure that everyone understands that the Constitution exists to safeguard the rights and freedoms of persons, provisions could be added to **include rights of due process in criminal trials**; *i.e.*, the guarantee that no state entity can deprive a citizen of life, liberty, or property without notice, a full opportunity for the citizen to be heard at a hearing, and a decision based on a hearing by an independent and impartial adjudicator. Public prosecution is a service provided by the state, and is an essential aspect of the administration of justice in any democracy. In this regard, responsibility for the prosecution of criminal cases should be solely concentrated in the hands of the Ministry of Justice, as a matter of the exercise of executive power and accountability, as it is in virtually every democratic European state.

In particular, we recommend that Ukraine create an independent public prosecutor's office, which would come under the responsibility of the Minister of Justice of Ukraine (who should be also reinstated in the Constitution as an *ex officio* member of the HCJ).

Structure, Organization and Operation of the Courts

(i) Unified System of Courts of General Jurisdiction

Establishing the principle of a unified system of courts of general application (Article 125), with the Supreme Court at the apex, the possibility of creating specialized courts (such as commercial, or juvenile courts) and their territorial jurisdiction subject to statute is a very important step to creating a coherent administration of justice system and improving the efficiency of and access to justice.

- Administrative Courts

The Proposals should, however, clarify that the administrative courts' competence to deal with "public-private relations" does not undermine the unified system of courts and is not a "carve-out" to that system, and that the competency of specialized administrative courts is limited to hearing cases involving the judicial review of administrative action. In this context, the government should **adopt an administrative procedure code to govern the actions of public servants.**

To maintain the integrity of the unified system, it should be clear that administrative courts **do not** have jurisdiction to hear cases involving civil law claims (generally commercial) by persons against the state. In this connection, we strongly recommend that the Verkhovna Rada **repeal the Economic Code of Ukraine**, which in theory and practice conflicts with the Ukrainian Civil Code, and **unify the relevant provisions of the Economic Procedure Code with the Civil Procedure Code** to govern the procedures regarding all property, commercial and civil claims and disputes.

- Inherent jurisdiction

In establishing the jurisdiction of the courts, **specific mention should be made of the Supreme Court's inherent jurisdiction** in order to make clear that the reference in Article 124 of the

Proposals to its "jurisdiction over any rights and obligations of a person" includes competency over all aspects of a person's life. Such competence can only be limited by law, international treaties of Ukraine and/or agreement in writing between the parties to civil/commercial relations (which means that the courts shall have no competence to review cases where, for example, parties agree to use international/domestic arbitration forums to settle their disputes.)

- Precedent

In order to rectify the problem of the (often deliberate) unpredictability and inconsistency of court decisions, **a constitutional principle of consistency of judicial decisions through the introduction of the principle of precedent** should be added to Article 125 of the Constitution. Lower courts must be bound by appellate and Supreme Court decisions involving similar cases or circumstances. Departure from this principle would constitute grounds of appeal and the basis for overturning a lower court ruling. As a result, persons will benefit from the predictability of court decisions and the application of laws by courts in a consistent manner.

- Three-tier system of justice

Further, to ensure the efficiency of and proper access to justice, **there should only be a three-tier system of court review of claims**, instead of the four-tier system implied in the Proposals. First instance and appeal cases can be heard in specialized courts, with final appeals heard (or rejected) in the specialized chambers of the Supreme Court.

- Justices of the Peace

We also recommend the **establishment of a "justice of the peace" system at the lowest level of the judicial system** comprised of non-judicial officials of unimpeachable moral character and uncompromised reputation, whether having a legal background or not, to hear simple cases with a view to bringing justice closer to the people and unburdening the courts with an already overwhelming caseload. The system will be a constituent part of the Ukrainian system of justice that will be authorized to resolve civil disputes and/or small administrative offence cases that fall within certain de-minimis parameters provided by law.

(ii) Constitutional Court

We applaud the introduction of the concept of a "constitutional petition" (Article 55), in the Proposals, giving any citizen for the first time the direct right to apply to the Constitutional Court of Ukraine ("CCU") to determine the constitutionality of acts of Parliament.

Nevertheless, we remain concerned with the restrictive admissibility of the constitutional petition with respect to laws of the Verkhovna Rada only (Article 151-1). This narrowing of scope is likely designed to protect against challenges to the acts of the President, Cabinet of Ministers and other agencies, as well as to perhaps reduce the number of possible claims.

As a matter of justice, we maintain that **the CCU should (as it does under Article 150) have the authority to review the constitutionality of acts of the Government, President and the Parliament of the Autonomous Republic of Crimea as they apply to a constitutional petition**, since most violations of a citizen's rights are found with respect to these acts, especially in criminal and administrative cases.

We recommend in this case following the suggestion of the RPR Proposals, to allow but to **filter claims in respect of other normative acts**, by authorizing courts to refer cases involving the violation of the constitutional rights of citizens to the CCU.

We also feel that the proposed mandatory retirement age of seventy-years (Article 149-1) does not have any merit and that **the age of a CCU judge should not be a reason for the termination of his/her tenure in office.**

(iii) Legal Profession

As with our comments regarding the Prokuratura, there does not appear to be any sound public protection or policy reason for the introduction into the Constitution of a *de facto* monopoly of licensed advocates to represent litigants in court. There is no clear explanation why this would benefit anyone other than the licensed advocates themselves.

We recommend that the Constitution provide for the establishment of a self-governing *legal profession* (finally fulfilling the obligations Ukraine took upon itself when becoming a Member State of the Council of Europe) and a declaration that each person has the right to professionally qualified legal representation before the courts. The latter will provide the basis for the Ministry of Justice to establish a proper functioning system of legal aid.

COMMENT BY: Professor Alan Riley

Again I agree with the need for lustration and for urgent reform of the judiciary. I also agree that unless steps are taken for major reform of the judiciary then most of the other proposed reforms will not work, *e.g.* my proposal for a Ukrainian CFCA above or my proposed reforms to the competition law regime below.

The question I have is one of prioritization. Where does one start?

My view is that there are three key requirements. First, is the removal of all compromised judges from the most senior courts. This practically should be an easier task in that there are fewer to remove and fewer who need replacing with persons of the highest intellect and credibility. The major difficulty here is likely to be constitutional constraints but in any through going reform where constitutional change is on the table replacing the most senior judiciary at the top of the judicial hierarchy should be possible.

The second requirement is the creation of specialized courts. Realistically one cannot replace all or most of the judges in one go. However, with the very top courts replaced, specialized courts, again assuming the relevant constitutional changes are made, can provide a means to provide citizens and businesses with access to much better quality justice and begin the process of change. Ideally, the first specialized courts would include an anti-corruption court, a competition court and a tax court.

The third key requirement would be to deal with the problem of interference with the mass of unreformed courts at the same level and at first instance appeal. The way to deal with the unreformed courts seeking to interfere would be to enact a preferential jurisdictional rule so that the specialized courts would always be able to take jurisdiction from the general courts. If that were not possible then consider a court first seized rule as usually it will be the reformers bringing cases, not those seeking the protection of the old order. The other danger stemming from the old judiciary is that the first tier of appeals court will seek to over-rule the specialized courts forcing cases to appeal at the highest level. The way to deal with that issue is to allow the judges in the specialized courts adopt a procedure known in the English Courts as the 'leapfrog procedure' which allows the case to go direct from the first instance level (here the specialized courts) to the third level appeal.

COMMENT BY: Tymofiy Mylovanov for VoxUkraine

I would like to offer a conceptual comment on the Constitutional Reform. My comments are broader than the scope of the corresponding sections in the white paper.

The current constitution of Ukraine features a number of imbalances. One critical problem is potential for the conflict between the president and the prime minister. The president, currently, is responsible for foreign policy, a number of law enforcement functions, and for military and defense. In addition, the president appoints the heads of local governments. The prime minister leads the national government. The responsibilities should be streamlined and clarified. There should be no overlaps. There should be no reason for the two national leaders to jockey for power. One possibility is to discuss whether Ukraine would benefit from strengthening the powers of the prime minister or the president and weakening those of the other.

In addition, Ukraine is over centralized. The decentralization reform is under way. Some of the aspects of the reform are controversial. It is important that the decentralization reform produces clear division of power between the center and the local governments.

The foremost objectives of the constitutional reform should be:

- (i) to create checks and balances in a way to minimize political infighting among the ruling elites, and
- (ii) to ensure that the new structure of power provides ample opportunities to raise a new generation of leaders who do not depend in their survival or success on the existing political elites.

COMMENT BY: Dr. Bohdan Vitvitsky

Regarding the judiciary, the procuracy and the legal system as a whole: If a gentleman were to invite a lady to join him for dinner and then if he were to show up to meet her at one of Kyiv's finest restaurants wearing nothing more than his underwear, I take it that both the lady and everyone else in the restaurant would consider such an action to be bizarre and unacceptable—assuming, of course, that this was not part of some theater of the absurd stunt. Similarly, if a man were to decide that when he needs to drive down the Khreshchatik, he will point the rear of his automobile in the direction in which he wishes to travel and then do so in reverse while everyone else is going forward, I take it that this likewise would be considered bizarre and unacceptable behavior.

But equally bizarre events and occurrences have taken and do take place in Ukraine's legal system, yet until recently most people pretended or had to pretend that such events and occurrences were in fact not bizarre. A man who had led the election commission that engaged in massive electoral fraud was later appointed the dean or president of a prominent law school in Ukraine. That sort of thing does not happen in a country with a normal legal system. The dean of another prominent law school in Ukraine advised members of the Ukrainian parliament to reject an anti-corruption law because, in his words, such a law would be inconsistent with Ukrainian legal traditions. A group of Ukrainian prosecutors told me, when I was at that time a U.S. federal prosecutor, that no real prosecutor could think that placing any restrictions on what a prosecutor can do is a good idea. Numerous judges have participated in criminal "raiderstvo", and numerous judges have taken and continue to take bribes. And, today's Ukrainian Constitutional Court apparently contains not one but eight judges who voted repeatedly in support of former president Yanukhovich's total and un-constitutional usurpation of power. Once again, these kinds of things do *not* regularly, if ever, take place in countries with normal legal systems.

Perhaps the most important impetus for the Revolution of Dignity was revulsion at just this state of abnormality. But what is encouraging about the White Paper is that it represents a segment of the *legal community's* efforts to come to terms with the fact that the entire post-Soviet Ukrainian legal system was and remains in numerous ways deformed and perverted from its very foundations. That happened because Karl Marx and his friend Engels made the catastrophic error of fundamentally misperceiving and misunderstanding what Western and, in particular, the English legal systems were all about. Marx and Engels blindly were convinced (why let facts get in the way of theory, right?) that existing legal systems had nothing to do with justice. Thus when Lenin and Trotsky came to power, they, being loyal Marxists, completely dismantled the existing legal system and substituted for it what later came to be called by the Harvard historian Richard Pipes "legalized lawlessness"—a system that was created not to administer justice but to help the Communist Party and its state destroy all of its actual and imagined enemies as well as to subjugate and control its population.

The first steps towards achieving genuine reform of the entire Ukrainian legal system need to include the following types of actions. There must be public recognition that the post-Soviet legal system is *not* normal. There must develop an understanding of what the historical reasons for that abnormality are. There needs to develop a broad-based realization that the entire legal system must be re-conceptualized and re-oriented from it being used to exercise political and economic power to, instead, it existing in order to administer justice in the sense of fairness. And there is a need to develop the outline of a comprehensive plan for re-fashioning that entire system—ranging from re-designing what law schools do and teach to reforming who becomes a constitutional judge—in accordance with the goal of creating a system of justice. The White Paper contains many specific pointers in that direction.

3. Taxation. Edited by Juscutum Attorneys Association.

Despite the introduction of a number of legislative initiatives, the Ukrainian tax system still requires further improvement to ensure fair taxation of all members of society and a balanced formation of the expenditure system. Further reforms should be based on the principle of restoring the confidence of citizens, businesses and the international community in the Ukrainian tax system. The main directions of further reforms should focus on the following:

A reforming of the fiscal authorities of Ukraine

Complete the institutional reform of the State Fiscal Service of Ukraine in respect of the delimitation of powers between the authorities:

- (i) Separate (delimit) service and law-enforcement functions performed by the State Fiscal Service of Ukraine;
- (ii) Create a separate structure for the implementation of law-enforcement functions in respect of the investigation of economic crimes;
- (iii) Require the State Fiscal Service of Ukraine to perform service functions only: administration of taxes, fees, consulting on the application of legislation, summarizing of tax advice;
- (iv) Improve personnel policy by changing the organization of the selection, motivation and evaluation of personnel.

Appeals against decisions of the fiscal authorities

The current two-level system of appeals against decisions of the State Fiscal Service provides filtering of complaints that come to the State Fiscal Service of Ukraine itself. In addition, it is more affordable and convenient for a taxpayer to arrive to examine a complaint in the regional center at his location than at the location of the State Fiscal Service of Ukraine. In light of the foregoing, we recommend the following:

- (i) Maintain a two-level system of administrative appeals against decisions of the fiscal authorities;
- (ii) Require the fiscal authorities to systematize the main problematic issues which are the basis of frequent complaints by taxpayers and to publish their official views about these types of problematic issues.

Tax Consultation

The possibility of providing individual tax consultations that can only be relied upon by the specific taxpayer that received such consultation directly contradicts Article 24 of the Constitution, which stipulates that citizens have equal constitutional rights and freedoms and are equal before the law.

- (i) Cancel the possibility of providing such individual tax consultations;
- (ii) Instead, if a taxpayer seeks a tax consultation on a specific issue, such tax consultation should be generally applicable to all similarly situated taxpayers.

Investigation of criminal cases of economic crimes

The number of closed criminal proceedings in cases of economic crimes indicates that most of these proceedings are initiated at a time when the actions of the taxpayer have not evidenced any elements of a crime, as in many cases the decisions, on the basis of which the criminal proceedings were initiated, are contested by the taxpayer:

- (i) Prohibit the beginning of criminal proceedings in cases of tax evasion if the taxpayer appeals the decision about the calculation of taxes and fees in an administrative and/or judicial procedure;
- (ii) Consolidate the position of the law, according to which criminal proceedings on tax evasion begin only when the amounts of tax liabilities are agreed.

Other

- (i) Improve and simplify the system of tax administration;
- (ii) Reduce the payroll tax burden on the wage fund with simultaneous reform of the simplified taxation system;
- (iii) Expand the list of expenses that can be considered as deductible;
- (iv) Introduce a three-year period following changes in tax legislation during which further changes on that matter are not possible. This will allow taxpayers to adapt to the existing conditions smoothly and plan their future activities more adequately, as well as simplify the evaluation of the effectiveness of the existing tax model for public authorities.
- (v) Improve the automatic state budget value added tax compensation;
- (vi) Improve the existing electronic service for providing electronic services to taxpayers;
- (vii) Develop new forms of explanatory work by the fiscal authorities, in particular, through the use of Internet resources, in order to achieve voluntary fulfillment of tax obligations by taxpayers.

The history of formation of the tax service in Ukraine:

- (i) 01.07.1990p. — State Revenue Service was established
- (ii) 07.07.1992p. — State Revenue Service was placed under the Ministry of Finance of Ukraine as a part of the State Tax Inspectorate of Ukraine, state tax inspectorates in the Autonomous Republic of the Crimea, regions, cities and districts in cities
- (iii) 22.08.1996p. — State Tax Administration and local state tax administrations were formed
- (iv) 05.02.1998p. — State tax administration was transferred from the subordination to Ministry of Finance of Ukraine
- (v) 05.02.1998 p. — Tax Police was formed
- (vi) 13.07.2000p. — Regulations on the State Tax Administration of Ukraine were approved
- (vii) 09.12.2010p. — Reorganization of the State Tax Administration of Ukraine to the State Tax Service of Ukraine started
- (viii) 24.12.2012p. — The Ministry of Incomes and Fees of Ukraine was formed by reorganizing the State Customs Service of Ukraine and the State Tax Service of Ukraine
- (ix) 21.05.2014p. — By reorganizing The Ministry of Incomes and Fees of Ukraine, State Fiscal Service was designed as a central executive body, activities of which are directed and coordinated by the Cabinet of Ministers of Ukraine
- (x) According to tax reform plan the state fiscal service of Ukraine will be eliminated as a separate governmental body. The Tax Service will be created as a department of Ministry of Finance.

TOP Dates Of the Tax Service in Ukraine



01.07.1990



The State Revenue Service was established

07.07.1992



The State Revenue Service was placed under control of the Ministry of Finance of Ukraine as a part of the State Tax Inspectorate of Ukraine and state tax inspectorates in the Autonomous Republic of Crimea, regions, cities and districts in cities

05.02.1998



The Tax Police was formed

05.02.1998



The State Tax Administration was transferred from subordination to Ministry of Finance of Ukraine

22.08.1996



The State Tax Administration and local state tax administrations were formed

13.07.2000



The Regulation on the State Tax Administration of Ukraine was approved

09.12.2010



Reorganization of the State Tax Administration of Ukraine into the State Tax Service of Ukraine started

24.12.2012



The Ministry of Incomes and Fees of Ukraine was formed by way of reorganizing the State Customs Service of Ukraine and the State Tax Service of Ukraine

2015



According to the tax reform plan, the State Fiscal Service of Ukraine will not act as a separate governing body. The Tax Service will be set up as a department of Ministry of Finance of Ukraine.

21.05.2014



By way of reorganizing the Ministry of Incomes and Fees of Ukraine, the State Fiscal Service has been set up as a central executive body, which is directed and coordinated by the Cabinet of Ministers of Ukraine

The Tax Compromise

Chairman of the State Fiscal Service of Ukraine Igor Bilous (12.03.2014 – 23.03.2015) (<http://sfs.gov.ua/media-tsentri/novini/179143.html>) commented on the enactment of the tax compromise: “ This law came in response to a request of a business that wants to turn the page and start to work transparently. The tax compromise is not an obligation, it is the right of the business. Taking the signing of the Association Agreement with the EU and the opportunities it opens for Ukrainian business into consideration, I am convinced that many companies will take advantage of this tool”.

(I) State Fiscal Service of Ukraine Forecasts.

State Fiscal Service of Ukraine expected that hundreds of thousands of companies will take advantage of the tax compromise procedure, and the budget will receive an additional UAH 3 billion (<http://finbalance.com.ua/news/Podatkoviy-kompromis-ne-pratsyu---nardepi>).

(II) The result of applying the tax compromise.

As a result of achieving tax compromise, the budget received UAH 358 800 000 (<http://sfs.gov.ua/media-tsentri/novini/194554.html>)

5119 taxpayers decided to use the advantages of the application of the tax compromise. 6764 allegations on the intention for use of this mechanism were received from the taxpayers to the authorities of the State Fiscal Service of Ukraine as of April 16, 2015.

(III) Reasons for not applying the right on the tax compromise.

1. Decision on the harmonization of the application of the tax compromise was accepted by the tax authority. In return, taxpayers expected that the procedure for applying the tax compromise will not be limited by the "will" of the tax authority.
2. The Law of Ukraine from 25.12.14 № 63-VIII "On Amendments to the Tax Code of Ukraine concerning the Features of Corrections to the Tax Liabilities of Corporate Income Tax and Value Added Tax in the Case of Application of the Tax Compromise" set only the exemption from criminal liability under Article 212 of the Criminal Code of Ukraine.
3. Criminal responsibility under Article 205 of the Criminal Code of Ukraine ("fictitious business"), Article 358 of the Criminal Code of Ukraine ("falsification of documents"), Article 209 of the Criminal Code of Ukraine ("the legalization of funds obtained by criminal means") was left out of sight of legislators. Business had concerns about the possibility of retraining crimes under Article 212 of the Criminal Code of Ukraine to Articles 205, 209, 358 of the Criminal Code of Ukraine.

Section II: Legal Reform in Key Specific Sectors

1. Corporate. Edited by Avellum Partners.

Since the first edition of the White Paper was released in September 2014, some of the reforms of corporate law in respect of joint stock companies ("JSCs") previously proposed were adopted and will enter into force on 1 May 2016. We positively assess these reforms.

At the same time, the state used some reforms in relation to JSCs as "a sledge-hammer to crack a nut", which it shouldn't have done.

Furthermore, the long-awaited law on limited liability companies ("LLCs") is still far from being adopted and has not been even developed.

Below we set out a brief overview of what has been done and what remains to be done.

What has been done

- Quasi-public companies (public JSCs whose shares are not traded on a stock exchange) are now incentivized to become private. Otherwise, they will be subject to more stringent requirements as of 1 January 2018
- Higher standards of corporate governance in JSCs have been introduced by: (1) adoption of derivative claim rules, (2) introduction of the notion of an independent director and (3) enhancing conflict of interest and related party transactions rules
- Dividend payment procedure has been simplified: the need to make payments of dividends by JSCs via the Central Depository has been eliminated
- The statutory provisions in respect of bringing the members of the executive body of the company to liability have been improved, in particular, their powers may be terminated early or they may be temporarily suspended from office at any point of time upon resolution of the respective governing body. Further to that, provisions of the Labor Code have been finally made consistent with the Civil Code by stipulating that the labor agreement with the company's officials terminates automatically upon termination of their powers
- The Labor Code now also provides that the company's officials are deemed liable not only for direct damage sustained and falling within the category of ordinary manufacturing and commercial risks, but also may incur liability for lost profits.

What shouldn't have been done

In its fight against private shareholders of PJSC "Ukrnafta" the state reduced the quorum requirements at general shareholders' meetings of all JSCs from 60% to 50%+1 share and removed flexibility for a quorum at supervisory board meetings of all JSCs. This broke the equilibrium which existed for years and, as such, is an undue interference of the state into private business. We strongly discourage the state from using such methods of achieving its aims. In light of this we have been disappointed that the Parliament adopted (in the first reading) draft law No.2757 reducing the quorum in LLCs to 50%+1 share.

What remains to be done

As we emphasized in the first edition of the White Paper, Ukrainian corporate law must be rebuilt on the principles developed by the Ukrainian Bar Association in their White Paper on Corporate Law Reform⁹. While some of the reforms highlighted in the White Paper on Corporate Law Reform have been implemented as described above, the following reforms remain necessary:

- deregulation of the system of corporate governance
- universal division of companies into private and public and ultimate abolition of private JSCs together with elaborating uniform general approaches towards public and private companies, irrespective of their exact organizational forms
- wide discretion of private companies (or, at least, LLCs) to opt-out from the majority of the provisions of corporate law and re-designing these provisions into default rules that companies or their shareholders could change to bring them closer to their needs
- recognition of shareholders' agreements that may deviate from the company's charter in matters of mutual interest of the signing shareholders (including voting and selling arrangements), which agreements may be governed by foreign law where there is a foreign shareholder
- allow for arbitration of corporate law disputes, at least for LLCs and non-listed JSCs. The arbitrability should include disputes concerning validity of general meeting resolutions
- elaborating comprehensive rules on determination of market price of the shares within the procedure of mandatory buy-out or squeeze-out
- enabling the parties to use option schemes while constructing their relations within the company. Recognition and enforcement of options and option contracts
- recognition of the consequences of consolidation of ownership in Ukrainian companies with a redefinition of the notion of minority shareholders. Controllers of quasi-public companies should be given the right to squeeze-out so-called ballast shareholders, *i.e.*, those who show no interest in exercising their shareholders' rights and who are the legacy of the privatization era
- setting higher standards of protection of minorities in truly public companies (*i.e.*, companies whose shares are listed and traded on stock exchanges) and setting up the legislative framework for creation of public value for shares of such public companies
- Implementation of provisions of Third and Sixth EU Directives into the JSCs Law and Law on LLCs dealing with corporate reorganizations, embracing all kinds of reorganizations (mergers, divisions, spin-offs). The respective laws must include special provisions relating to access to information, challenging reorganizations, bringing the members of the management bodies to civil liability in case of their misconduct, as well as other rules aimed at protection of interests of both those participating in reorganization and the third parties.

Some of the specific examples for corporate law reform outlined above include:

Joint Stock Companies (JSCs)

Adopt amendments to the Law "On Joint Stock Companies", which, in particular, should:

- elaborate the procedure for voting by poll (notice)
- elaborate the status of the corporate secretary

⁹ http://www.uba.ua/ukr/project_reform_in_corporate_law/

- allow 50%+1 share minimum quorum requirement to be reduced if quorum cannot be met after, for example, 3 attempts to hold a meeting
- introduce escrow mechanisms into Ukrainian law

Limited Liability Companies (LLCs)

Adopt the law on LLCs allowing the shareholders maximum discretion to opt-out from the majority of the provisions of corporate law.

The key issues to be reflected in new law "On Limited Liability Companies" are the following:

- The quorum of the general meeting (the possibility to define the quorum at the discretion of shareholders, the right of shareholders to define different quorums for different sets of questions, the list of the most important questions which could be adopted only subject to an increased mandatory quorum prescribed by law).
- The voting at the general meeting (the possibility of shareholders to establish special thresholds for voting on particular kinds of questions, groups of the most important questions which are subject to a mandatory increased threshold for voting prescribed by law).
- Taking a decision by the shareholders (other bodies of the company) by poll, teleconference.
- Voting on questions which are not included into the agenda (to regulate strictly the procedure).
- The procedure for the appointment of a collective executive body (the shareholders' agreement may envisage that each shareholder may be entitled to appoint a certain number of directors).
- The possibility to establish a supervisory board and other corporate governance bodies.
- Responsibility of company's officers (fiduciary duties and derivative claim).
- Raising funds from a third party (by contribution of funds to the charter capital, procedure for increasing charter capital out of the funds of a third party, pre-emptive right of other shareholders).
- Regulation of the procedure for increasing charter capital (1) with share premium and (2) by debt to equity conversion.
- Pre-emptive rights in case of share transfers (procedure for, and terms of, exercise).
- Pledge of shares (procedure for granting the consent to pledge, the right of other shareholders to fulfill the obligation secured by the pledge, mechanism of enforcement of the pledge).
- Foreclosure of company's property by the creditors of a shareholder pro rata to the share of such a shareholder in the charter capital of the company.
- Inheritance of the shareholder's share.
- The obligation of the company to buy out the share from the shareholder who voted against certain decisions of the general meeting.
- The possibility of the voluntary withdrawal of a shareholder from the company.
- Expulsion of a shareholder from the company.
- Shareholders' agreement (the possibility of conclusion between all or some shareholders, confidentiality, correlation with the charter, possibility to reflect the provisions of the shareholders' agreement in the charter, ways of resolving a deadlock (Russian roulette, Texas shoot-out, mediation), possibility to establish and cancel additional restrictions on

transfer of shares in the shareholders' agreement, as well as the consequences of breach of terms of the shareholders' agreement (tag along, drag along, ROFO)).

Establishment of legal entities

- despite recent improvements in respect of the procedure for the establishment of legal entities, it is still necessary to simplify the process of incorporation of JSCs in terms of shortening the time required for registration of a JSC and issuance of its shares and the list of documents required for such registration
- considerably liberalize and shorten the procedure for the closing of legal entities

Representative Offices ("RepOffices")

Simplify regulation of establishment, operation and closing of RepOffices and make it similar to the procedure for an LLC, in particular:

- authority to register the establishment and closing of RepOffices must be transferred from the Ministry of Economy to the Ministry of Justice (State Registration Service) to deregulate and concentrate registration authority within one state body
- reduce registration time to two business days, same as for LLCs (at present two months)
- eliminate the fee for the registration of a RepOffice (at present USD2,500)
- allow a RepOffice to update its file in case of merger or other "global" corporate restructuring that creates legal "successors" or new replacement entities
- eliminate need for GDIP to maintain Ukrainian staff employment books
- make the adoption of the "internal regulation" of the RepOffice optional
- number of expat employees, whom the RepOffice may employ must be unlimited and must not be reflected in the certificate of registration of the RepOffice
- considerably liberalize and shorten the procedure for the RepOffice closing

Foreign Investments

Rules on protection of foreign investment in Ukraine should be improved to enable foreign investors to register their foreign investments in Ukraine (and thus obtain statutory protections envisaged by law) without limiting possible forms of the investment.

Bankruptcy and liquidation of legal entities

It is necessary to simplify and shorten the procedure significantly, as today it takes years, and requires material and human resources that are wasted. It is necessary to develop an effective and fast procedure of liquidation of legal entities, including in bankruptcy.

At the same time, there is a need to develop and implement efficient mechanisms of responsibility of the owners and managers of bankrupt companies if they commit malfeasance (*for example*, piercing of the "corporate veil", prohibition to be engaged in entrepreneurial/managerial activities, *etc.*)

2. Civil Law. Edited by Squire Patton Boggs.

Civil Code v. Commercial Code

Today, two basic codes are applied in Ukraine simultaneously: the Civil Code and the Commercial Code. In fact, the provisions of these Codes while covering similar regulatory domains, at the same time contradict each other. These Codes cannot be reconciled, and only the Civil Code should remain in effect, while the Commercial Code must be abolished, as has been recommended by various international expert reports (including by the OECD). At the same time, a mere abolition of the Commercial Code without more could entail a number of problems. That is why it would be logical to suggest its abolition and set a brief transition period for introduction of relevant amendments to the Civil Code relating to "entrepreneurship" (as this was taken from the old law "On Entrepreneurship") (for example, according to the Civil Code entrepreneurial partnerships may be established only in the form of business partnerships ("господарські товариства") and production cooperatives, which leaves many existing companies (private enterprises, subsidiaries, etc.) out of the legal environment).

Damages

Damages for certain breaches can be on an indemnity basis but the general principle is that damages are compensation for actual loss suffered as a result of the breach committed. Express confirmation of indemnities would be useful to add to the Civil Code.

Representations and Warranties

Rights of claim for breaches of contractual representations and warranties are not prohibited under Ukrainian law, but nor are they expressly recognized. The Civil Code refers only to standard statutory seller's and manufacturer's warranties. It would be useful to include express provisions for contractual damages or indemnification for breach of representations and warranties.

Status of Natural Persons

Establishing registration of the place of residence/stay of natural persons by notice without the need to prove the right to live/stay in the residency. Keeping a single document that identifies a person allowing to travel abroad and containing an identification code).

Governing the Commons

Civil Code lacks modern rules for governing common ownership of private property that would enable the co-owner to use his or her property effectively and for commercial purposes. In particular, under the general rule in order for the co-owner to use his/her co-owned property he or she must obtain the consent of all other co-owners. In practice this means that usage of any co-owned property in Ukraine may effectively be blocked by any co-owner who does not support the co-owner seeking such approval, which leads to inability to adopt a common legitimate decision.

Another problem is that there is no mechanism how to divide or use the property if there is a conflict between the co-owners and the property cannot be divided or distributed for use by the co-owners exactly in accordance with their ideal ownership shares.

Lack of these concepts and mechanisms in the Civil Code prevents, inter alia, adoption of common legitimate decisions in relation to usage of co-owned property and, consequently, development of real estate industry, because individuals are prevented to purchase partial ownership of immovable property without the risk of having a dispute with their co-owners in the future. Therefore, Civil Code must be supplemented by a number of modern rules for governing the commons to enable the co-owners to resolve various property conflicts effectively and enable them to use their property more efficiently.

Solution for the above problems will be to establish the following regulation:

- decision making by the majority of the co-owners as to the use of the property;
- bidding and/or drawing mechanisms allowing to define which co-owner will receive the entire property or its portion that is bigger than his or her ideal ownership share. Such mechanism should also provide proper compensation to the other co-owner who ceases to be the co-owner or receives the portion less than his or her ideal share in favor of the other co-owner;
- possibility for the co-owner to register his/her ownership rights in the Registry of Rights to enable the co-owner to freely dispose of the share.

3. Land and Real Estate. Edited by Avellum Partners.

After the first edition of the White Paper was released in September 2014 many reforms in respect of land and real estate, in particular relating to transparency of ownership and other property rights to real estate, were adopted. Generally, we positively assess these reforms.

At the same time, some major issues remain unregulated or are regulated poorly, which hold back the development of the real estate market in Ukraine.

Below we set out (i) a brief overview of what has been done and what remains to be done and (ii) other proposals for reforms in the real estate sector.

(i) What has been done

- The latest legislative amendments provide for opening the State Register of Property Rights to Real Estate and the State Land Cadastre to the public. In particular, all information contained therein may now be obtained online in electronic or paper form subject to compliance with certain requirements (*i.e.*, in some cases subject to prior identification with the use of electronic digital signature or other alternative means of identification, *etc.*). However, the acts of legislation regulating the respective procedures have not yet been adopted.
- As another step towards the increase of transparency and simplicity of state registration of property rights to real estate, developers and agricultural companies in certain regions were granted access to software that is compatible with the software of the State Register of Property Rights to Real Estate for the purpose of filing applications for state registration of property rights to real estate online and preliminary review of such applications by state registration authorities.
- One of the major supervisory authorities, the State Agriculture Inspection of Ukraine, which, in fact, duplicates the powers of the State Ecological Inspection of Ukraine and the State Architectural and Construction Inspection of Ukraine, is currently in the process of liquidation (which should be completed by the end of 2015).
- Notaries were granted certain powers of state registrars with regard to registration of derivative rights to agricultural land plots (*i.e.*, lease rights, easement, emphyteusis, *etc.*).
- Ukrainian government is now obliged to procure automatic transfer of information on land plots and rights to the land plots from the State Land Register (valid before 1 January 2013) to the State Register of Property Rights to Real Estate by 1 July 2016. No specific act setting out the relevant procedure has, however, been adopted by the Ukrainian government. In addition, companies and individuals were released from payment of administrative duties for the state registration of those property rights, which had arisen and had been registered prior to the state registration under the new Law On State Registration of Property Rights to Real Estate and their Encumbrances.

(ii) What needs to be done

- The principle of silent consent is already provided for in various legislative acts. In practice, the sphere of its application is, however, quite limited, mainly due to the absence of relevant detailed procedures. To remedy this, acts of legislation governing authority of state bodies and local self-government bodies in respect of real estate issues must clearly state the periods of time to make a decision and/or to issue a document, and provide for

- the principle of silent consent to apply if such document has not been issued within the specified term.
- Title to state owned lands outside of populated areas must be returned to local communities as previously envisaged by the cancelled Law On State and Communal Property Land Division.
 - Environmental laws must be codified into one single legislative act. Presently, a number of provisions in various regulatory acts dealing with environmental permits conflict with the principal law establishing a comprehensive list of permits and approvals, resulting in legal uncertainties.

Other proposals for reforms in the real estate sector

- (i) Introduce clear regulation for transfer of title to lands in collective ownership

Currently, there is an unresolved problem with rights to land plots in collective ownership, which were either not distributed to individuals, or were not allocated "in kind" after having been distributed to individuals in the form of so-called "ideal" land plots ("*payi*"). Procedures and conditions for the transfer and registration of property rights to such land plots have not been established.

In particular, this problem relates to the following types of land plots:

- land in collective ownership which was divided into *payi* and in such form was distributed among individuals; and
- certain categories of land that remained in ownership of collective agricultural enterprises. After reorganization of such collective agricultural enterprises, title to such undistributed land should have been transferred to the legal successors of such collective agricultural enterprises. At the same time, the detailed procedure for and conditions of transferring title to, and registration of, such land plots into private ownership have not been defined.

We then recommend establishing a procedure and conditions for the transfer and registration of property rights to land plots in collective ownership into private ownership. We also recommend establishing a certain transitional period, for example, a two-year period, in order to allocate *payi* in kind. Upon expiry of the proposed transitional period all land plots that have not been allocated in kind must then be transferred to the respective local authorities.

- (ii) Introduce clear regulation for disposal of land lease rights and enforcement of pledges of land lease rights

Currently, Ukrainian legislation does not expressly provide a procedure or conditions for the disposal (by sale or assignment) of land lease rights.

Due to the lack of a clear and efficient mechanism in the law, when there is a need to transfer land lease rights to a third party, indirect methods are often used, including the sale of shares in the charter capital of the company, which leases the land.

To remedy this, a clear legislative regulation for the disposal of land lease rights must be introduced. Similarly, a detailed regulation for the enforcement of pledged lease rights must be adopted.

The key points of such regulation must be the following:

- a lessee must be entitled to dispose of the land lease right if it has the prior written consent of the landlord;
- only land lease rights to privately owned land plots may be disposed of by a lessee. The disposal of lease rights to municipal or state owned land plots creates complications because the lessee would typically have obtained such lease rights through a tender procedure. Permitting lessees to dispose of such rights would thus create a risk of using the disposal as a means to avoid the applicable tender procedure;
- duly executed agreement on the sale and purchase (assignment) of land lease rights and a pledge agreement must constitute a valid and sufficient ground for registration of transfer of land lease rights to a new lessee. The Regulation on State Registration of Rights Over Real Estate must be amended accordingly; and
- private notaries alongside with state notaries should receive the authority to carry out the state registration of transfers of land lease rights under pledge agreements and sale and purchase (assignment) agreements.

(iii) Eliminate uncertainty of legal status of property rights to real estate under construction

Currently, there is no uniform or clear approach regarding the legal status of real estate under construction and related property rights. As a result, although an object under construction has all of the features of real estate, formally, prior to the completion of construction, commissioning and the registration of related property rights, it is recognized as movable property (namely, materials and equipment). This leads to significant uncertainties in transactions with real estate under construction and numerous abuses from the side of certain developers acting in bad faith.

We recommend establishing a clear legal status of real estate objects under construction as separate objects and a procedure for conducting transactions with real estate property under construction. We also propose to register such property rights in the State Register of Property Rights to Real Estate in a separate section as is already being conducted in relation to mortgages. After completion of construction and commissioning of the real estate object, the related property rights will convert into property rights to a completed real estate object in the same register.

(iv) Improve the procedures for land allocation and land auctions

The procedures for land allocation and land auctions should be improved in order to boost the development of the land market and related transactions.

Currently certain procedural issues in relation to land auctions impede their occurrence and effectively prevent the implementation of investment projects on state and community/municipal land plots. For instance, according to the law, the financing for the preparation and conducting of land actions, as a rule, should be arranged at the expense of the organizer of such auction, who often may lack sufficient funds to cover these expenses.

In addition, Ukrainian legislation provides a general prohibition effective from 1 January 2015 (earlier its application was postponed from 1 January 2013 to 1 January 2015) to allocate land plots from state or community ownership into private ownership or for use for construction (town-planning) purposes in the absence of zoning plans or detailed plans of the relevant settlements (urban-planning documentation).

Due to the fact that the majority of settlements do not have relevant urban-planning documentation and are not willing to incur the expense necessary for the development of such documentation, this prohibition has led to an almost complete halt in the allocation of land plots from state or community ownership into private ownership. To resolve this situation, we suggest amending paragraphs 6 and 6-1 of the Final Provisions of the Law of Ukraine "On Regulation of City-Building Activities", which postponed the term of application of this prohibition from 1 January 2013 to 1 January 2015 to further postpone its application. Alternatively, we suggest introducing a clear list of cases in which the local authorities will be obliged to develop urban-planning documentation.

COMMENT BY: Denys Nizalov for VoxUkraine and KSE

The authors highlighted many issues relevant to the current stage of land reform in Ukraine. In my comments, I would like to add some important points that were overlooked and try to clarify some details. For recent comprehensive reviews of land governance in Ukraine and relevant policy issues please see LGAF report by the World Bank (<http://go.worldbank.org/CEES859PY0>) and MoA Agricultural Reform Strategy (in part of land market — <http://minagro.gov.ua/en/node/16113>). A good guidance for development of governance of land resources could be found in FAO Voluntary Guideline for Governance of Tenure.

Regarding recent development mentioned by the authors, several other changes have to be mentioned:

- a. Development of the above mentioned Strategy by MoA is a big step forward. This strategy is currently under review by the National Reform Committee under the President Administration. This strategy is widely supported by industry stakeholders and international donors.
- b. A restriction to the minimum length of rental contracts (7 years) was introduced in April 2015 by Law N 191-VIII of 12 February 2015. It has already resulted in more than 70% drop in the number of formal registrations of rental rights.
- c. Since June 2015, State GeoCadastr has provided notaries with on-line access to the Land Cadastre for registration of rental transactions
- d. Since August 2015, GeoCadastr has introduced an electronic service for providing extracts from the Land Cadastre, which is designed to simplify processing of land related transactions. A similar service is about to start for providing a normative value of land parcels.

I think the "to do" section would benefit from a clear statement of the general philosophy of land reform that the rights have to be clearly defined and secure, and to be transferable at a reasonable low cost. Such approach would be true for both sales and rental markets.

The authors correctly mentioned several issues, but a few issues are missing.

- Regarding definition and security of rights, unclaimed inheritance and error correction in cadastral and registry records have to be addressed.
- The issue with unclaimed inheritance is that currently, only the local governments by the place of residence of a deceased owner can claim the rights for unused inheritance. In case the immobile property is located in a different region, the inheritance stays unclaimed indefinitely. There are several law proposals developed already.
- Regarding errors, the issue is that parcels with errors in records could not be transacted prior the errors are corrected, but there is no simple procedure to correct them. In practice, owners often required to do a costly resurveying and development of new technical documentation or to pay a bribe for ignoring the errors. However, most of the errors could be corrected by registrars without resurveying (*e.g.* spelling errors). A law that provides registrars with rights to correct errors and corresponding procedures need to be developed.
- The security of rights for state and community land is a separate issue. A very small share of this land is formally registered, which is a big source of corruption. The issue is with enforcement of already developed procedures for inventory of state land.

- Regarding transferability of rights, the primary issue is the Moratorium for sales and change of designation of agricultural land. The recent Meetings of the Cabinet of Ministers on land issues have revealed Government intention to preserve the Moratorium for another two years. A better strategy could be development and adoption of Law on agricultural land turnover now with a provision to open a market at a particular date in the future.
- Making the lease rights disposable is definitely important. What needs to be considered in addition is how to prevent speculation with rental rights (particularly in case of communal and state land). Second, consolidation of ownership and rental rights needs to be supported with clear procedures. Current fragmentation of ownership makes it difficult to implement investment projects (*e.g.* irrigation) and would be a problem in the future for sales market and for pledging ownership and rental rights.

Several smaller issues can be found in the MoA strategy in addition to what is listed above.

4. Banking and Currency Control. Edited by DLA Piper Ukraine.

Ukrainian banking and currency control regulations have never encouraged either the stable development of banking and financial markets or the vigorous inflow of foreign investments. Furthermore, the overall situation on these markets was very much negatively impacted by the economic and financial crisis experienced by Ukraine in last two years.

In such circumstances, a number of decisive measures must be immediately undertaken by Ukrainian authorities to rectify this situation. The National Bank of Ukraine, as well as other relevant state bodies, must substantially revise their basic approaches to the exercise of state control over cross-border transactions and re-design currently effective models of state regulation.

We see that the vast majority of suggestions proposed in the 2014 edition of the White Paper regarding gradual liberalization of the stock, foreign exchange and capital markets were simply ignored by Ukrainian authorities. Taking into account our earlier suggestions and considering the current challenges faced by the Ukrainian banking and financial systems, the following recommendations must be implemented in order to liberalize the cross-border business climate.

(i) Banking

- To adopt amendments to the Banking Law allowing incorporation of banks in any permissible form of corporate legal entity;
- to abolish any limitations on opening, operating and maintaining bank accounts (denominated either in UAH or in a foreign currency) in Ukraine for foreign companies without a fixed place of business in Ukraine. This should permit foreign companies to transact in UAH on cross-border deals. Amendments must be made to the Law of Ukraine On Payment Systems and Transfer of Funds in Ukraine and Instruction on the Procedure of Opening, Use and Closing of Accounts in Domestic and Foreign Currencies approved by NBU Resolution No. 492 dated 12 November 2003 to allow non-resident legal entities to open, use and maintain UAH/foreign currency current accounts;
- to abolish mandatory registration of cross-border loan agreements with the NBU;
- to eliminate entirely or significantly raise the threshold for obtaining the mandatory state pricing expert report from Derzhzovnishinform to make foreign currency payments abroad for any services provided by foreign companies (currently set at 50,000 EUR);
- to enact laws and regulations improving creditors' rights (inter alia, by providing for the practical ability of the State Enforcement Service to operate FX accounts, moneys and cross-border payments; proper regulation of pledges over foreign currency accounts in Ukraine, introduction of the floating charge concept, concept of holding moneys and assets on-trust, and other efficient means and best practices for taking security that are used in developed markets).

(ii) Currency control

- To complete the process of abolishing the requirements for NBU individual licensing, inter alia, the need to obtain any license for opening a foreign bank account or for making investments abroad. No cross-border license should be required for making bank loans, at least not to legal entities registered in the member states of the EU, the EEA or the OECD.

- Cross-border licenses may, however be required only for transactions involving countries which are not members of the EU, the EEA or the OECD and do not have investment treaties with Ukraine providing for free flow of capital, for: (i) opening bank accounts; (ii) making certain investments (such as, investments into securities or real estate); or (iii) making payments under cross-border guarantees in respect of off-shore loan agreements to persons located in such countries;
- to abolish the mandatory sale of foreign currency in Ukraine;
 - to abolish any requirements/limitations on receipt of foreign currency from abroad by individuals and corporations, other than those posed by the anti-money laundering legislation;
 - to abolish the "90-day rule" on return of foreign currency proceeds in any of its forms (meaning that it cannot be restored as the previous "180-day rule");
 - to simplify the procedure for investing into Ukrainian securities for foreign entities;
 - to adopt a comprehensive currency control regulation envisaging, among other things, that:
 - any transaction is permitted unless it is specifically prohibited; and
 - any discrepancy in currency control rules is interpreted in favor of the transaction counterparties.
 - to reduce the currency control functions of Ukrainian banks until their full abolishment.

COMMENT BY: Yuriy Gorodnichenko for VoxUkraine

I like the general philosophy of the proposed changes: i) the markets should be minimally regulated; ii) property rights should be clearly delineated; iii) ownership should be transparent (open access to ownership records).

However, financial markets have a special nature and thus need a calibrated approach in implementing *laissez faire*. Specifically, financial markets in developing countries, which includes Ukraine, are shallow and fragile. Free capital mobility can lead to boom-bust cycles where investors can flock to a country and, consequently, overheat the economy and then flee the country at a first sign of a trouble. To avoid this volatility, economic theory and international agencies such as the IMF suggest macro-prudential regulation which typically means some form of capital controls. An increasing number of countries implement such policies to stabilize the financial sector and thus reduce macroeconomic volatility. Thus, complete liberalization is not desirable for Ukraine at this stage of its development. In light of this reasoning, I propose the following changes:

(i) Banking

- Any form of legal ownership is fine as long as it does not prevent the National Bank of Ukraine from regulating a bank.
- Mergers and acquisition (M&A) are often associated with direct control, *i.e.*, foreign direct investment (FDI). Because FDI is less prone to panics, it makes sense to reduce regulation for this type of capital flows. At the same time, I do not see why foreign companies should be given a preferential treatment in doing M&As. Even small differences in ability of financial intermediaries to handle these transactions can lead to large distortions. Thus, the restriction "foreign companies without a fixed place of business in Ukraine" should be eliminated.
- I disagree with abolishing mandatory registration of cross-border loan agreements. This registration is an essential source of information about exposure of banks and firms to exchange rate risks. Many (if not all) currency/banking crises were greatly exacerbated by high exposure to borrowing from abroad. Most of the time, central banks and other regulators were unaware of the exposure and thus were unable to limit the overheating of the economy. Ukraine is no exception: the 2008/2009 crisis ("Great Recession") revealed an enormous over-borrowing from abroad that nearly destroyed the banking sector.
- Derzhzovnishinform: I agree, this should go.
- I support strengthening creditors' rights.

(ii) Currency control

- The idea to allow anybody to open a bank account anywhere (or at least anywhere in the EU) is attractive. Likewise, allowing free capital flows with the EU/OECD countries is appealing in general. However, at this stage of development of the financial sector in Ukraine, I believe that free capital mobility envisioned by this proposal is likely counterproductive. Consider the recent foreign exchange rate panic. There was a massive

capital outflow and it was only stopped when the National Bank of Ukraine imposed tight capital controls. Some form of capital controls may be necessary for the next 3-5 years. Thus deregulation in this area should be gradual. For example, the first stage could be that foreign accounts for physical persons should be registered and capped (very few people will be affected by this regulation).

- This proposal also calls for free capital mobility. While this is desirable to have eventually, implementing free capital mobility can make the financial sector vulnerable. I would emphasize that free capital mobility is a long-term goal rather than an immediate objective.
- Abolish mandatory sale: I agree, this should go eventually. For now, it's a tool to enforce capital controls.
- Requirements/limitations on receipt of foreign currency from abroad by individuals and corporations: These requirements limit the ability of firms to get around capital controls. In other words, these are tools to enforce capital controls. Perhaps, the objective should be to make administration of these requirements as easy as possible (*e.g.*, these apply only for transactions greater than X and may be approved by authorized banks).
- "90-day rule": again the point of the rule is to enforce capital controls. 90 days may be a tight timeframe, and so maybe it should be 180 days. This type of rules should be phased out gradually rather than in the immediate future.
- I support simplifying the procedure for investing into Ukrainian securities for foreign practices especially if these involve taking control.
- Any transaction is permitted unless it is specifically prohibited: Generally, I support this idea but one should realize that loopholes in the regulation of financial markets can effectively make regulation void with this approach. Given the degree of innovation and the amounts of money involved, I believe it is risky to allow this approach in Ukraine's current conditions. Instead, the objective should be to make the regulation simple so that standardized transactions should have minimum "frictions" in terms of regulation.

5. Securities and Stock Market. Edited by Baker & McKenzie.

In order to revive the market it is necessary to complete certain preliminary reforms. In particular, a number of actions must be carried out to ensure protection of private property. Most developed countries achieved this aim, among other means, by creating publicly available property registers. Although the State Register of Property Rights to Real Estate and the State Land Cadastre were launched in Ukraine, the property register remains largely empty and mostly contains information in relation to recent transactions which occurred after 2012.

In order to create an up-to-date property register, a national program of inventarization (formalization, *i.e.*, recordation of property rights) must be launched to capture all relevant property. Absence of this information in the public domain prevents its inclusion into the market economy, because it is then difficult/expensive to validate title and evaluate risks for any transaction involving such assets.

On a related matter, although there have been some recent changes in the Law of Ukraine "On State Registration of Property Rights to Real Estate and its Encumbrances" concerning access of any interested party to the property register, it is necessary to ensure that implementing legislation does not contain any limitations or technical difficulties to obtain such information in relation to any individual and/or property object in Ukraine.

In addition to the foregoing, to further protect ownership title Ukraine should considering introducing a system similar to the "Torrens system", which is a system of property title in which a register of immovable holdings maintained by the state guarantees indefeasible title to those included in the register. The main purpose of this system is to simplify property transactions and to ensure absolute title to immovable property. The state guarantees title and the system is usually supported by a compensation scheme for those who lose their title due to the state's operation of the system. Ukraine currently maintains a hybrid deed-registration system, which is not guaranteed by the state, which leads to uncertainties and risks for investors.

Derivatives and repo transactions

- (i) The Parliament of Ukraine should adopt a separate law "On Derivatives" which should, among other things, (a) regulate close-out netting in derivative transactions; and (b) expressly refer to standard derivatives market documentation (such as ISDA documentation) to be used for documenting derivative transactions.
- (ii) Ukrainian banks should be allowed to enter into currency derivatives on behalf of their Ukrainian corporate and individual clients.
- (iii) The entry by Ukrainian counterparties into all types of currency and commodity derivatives should be allowed, including, but without limitation, non-deliverable forwards, UAH/FX swaps with non-residents, interest rate swaps, *etc.*

Special legislation on repo trading should be approved. Such legislation should expressly refer to standard repo market documentation (such as GMRA documentation) to be used for documenting repo transactions.

COMMENT BY: Yuriy Gorodnichenko *for VoxUkraine*

I support the first part of this section. It is critical to have ownership titles established and to have open access to ownership records. With respect to derivatives, I believe that the most important part is to establish a market for standardized contracts. This will give transparency (price is market determined, the volume of trade is observed, exposure is measurable) and broaden access (*e.g.*, nonfinancial firms can trade in these markets). The details of how this market should operate should be determined by the regulator (*e.g.*, the National Bank of Ukraine). However, given the state of financial market development, a fully functioning market for derivatives appears to be remote and maybe it should not be prioritized.

In summary, I agree with the stated goals but I would shift the part about free capital mobility to the period when the banking sector stabilizes and financial markets mature.

6. Antitrust. Edited by DLA Piper Ukraine.

In addition to the imminent and eagerly anticipated reforms in the field of antitrust regulation (see below), the following strategic changes should be implemented:

- Critically re-assess the role of the Antimonopoly Committee of Ukraine ("AMC"), in particular, remove non-relevant functions, such as fire emergency, which allegedly should control retail prices; or dealing with minor unfair competition cases instead of concentrating on substantial cases; or reviewing thousands of merger control applications, the majority of which have little to no influence on competition in Ukraine. The AMC needs to realize it cannot do everything. Instead it should focus on major antitrust issues, and not be distracted by minor issues. In particular, the AMC needs to focus on significant price-fixing cartels, abuses of dominance and major merger cases.
- Ensure the independence of AMC and initiate de-monopolization of oligarchic holdings.
- Introduce standard requirements to vertical arrangements (*e.g.* between manufacturers and distributors) to implement vertical block exemptions.
- Revise the leniency program, in particular, reduce fines not only to the first party, which provided information to the AMC, but to other parties co-operating with the agency. Developing an effective leniency program and following through with effective execution will allow the AMC to establish broader credibility with the public, the media and the political class. Breaking a number of cartels and imposing significant fines will help to build the credibility of the AMC, which will then help it across the full area of its responsibility.
- Adopt a "black list" of claims, statements and practices in the field of unfair competition (*e.g.*, misleading actions, omissions, aggressive commercial practices).
- Improve the procedure for challenging decisions of the AMC, in particular establish clear jurisdiction of courts. In addition, courts should be able to review and reconsider the substance of AMC decisions.
- Implement internal administrative reform in the AMC, in particular, replace the large number of poorly paid staff having broad powers of jurisdiction, which they cannot possibly hope to enforce. Instead, hire a smaller group of well-paid, well trained and well-motivated lawyers and economists who can steadily build a reputation for effective enforcement.
- Involve the AMC in the review of draft bills to be able to amend those, which would otherwise have the effect of accidentally suppressing competition in particular markets. In addition, involve the AMC in drafting the laws aimed at deregulation and strengthening self-regulation of markets.

Apart from the above, we support the reforms noted below, which are already being prepared and discussed but are yet to be implemented:

- **Reform of merger control regime**, including re-thinking and increasing the relevant financial thresholds for filings; ensuring assessment of only those transactions, which have an appropriate local nexus, *i.e.*, eliminating the need for filings in instances of concentrations that occur outside of Ukraine but that have limited effects in Ukraine; introduction of simplified procedure for reviewing unproblematic (foreign-to-foreign and minor local) concentrations; introducing a simplified filing procedure for cases when the parties applied to the AMC for preliminary conclusions on whether merger clearance is needed; reducing the amount of information required for notifying transactions in all cases, whether or not under the simplified procedure; introduction of expedited review procedures for concentrations with increased filing fees for such expedited reviews;

introduction of an exemption for ancillary restraints in M&A transactions to the extent such restraints are justifiable (*i.e.*, appropriately limited in scope and duration, are directly related and necessary for a transaction).

- **Adoption and implementation of Guidelines on penalties**, in which the AMC provides the principles and methods to calculate fines, lists aggravating and mitigating factors and suggests a one-time amnesty for those concentrations implemented without proper approval of the AMC but notified to the AMC within one year after adoption of the Guidelines.
- **Publication of all substantive decisions of the AMC** (approvals for concentrations and concerted practices as well as refusals, decisions on investigations, recommendations, *etc.*) to make the activity of the AMC, its position, argumentation and assessments more transparent and predictable for businesses.

In addition, donors may consider assisting the AMC with the development of an electronic database of concentrations (basically to replace the existing non-operational database).

In terms of "quick wins", we would recommend the following:

- Reform the merger control rules, in particular, increase the antimonopoly thresholds requiring filings and introduce simplified and fast-track procedures;
- Abolish the need for a separate permit for restrictions directly related to and necessary for the concentration;
- Adopt the Guidelines on penalties imposed by the AMC;
- Adopt the "black list" of claims, statements and practices in the field of unfair competition (misleading actions, omissions, aggressive commercial practices).

COMMENT BY: Professor Alan Riley

I agree with the vast majority of the proposals laid out here. I would make only a few additional comments.

Clearly one of the major problems with the AMC is its unwillingness to prioritize. One great example is the taking of a far too extensive jurisdiction in merger cases which should be radically cut back introducing serious limits which would involve doing deals where there the parties conceivably have some market power and there is a nexus with Ukraine.

More broadly a new AMC needs to pull together an effective work program which prioritizes the greatest threats to a functioning market economy in Ukraine. This would include de-monopolization in some sectors; an active and effective cartel busting operation; active application of the abuse of dominance provision, and also a willingness to be willing to not just waive larger mergers through (likely to occur when various firms are challenged for price-fixing). This will require the AMC to be willing to both block deals and impose stringent structural remedies.

Consideration should also be given to creating to how the AMC should make its decisions. One option would be to adopt the EU approach where the Commission investigates, prosecutes and decides the case. There are a number of difficulties with this approach. It is laborious and time consuming with the Commission having to file two major sets of documents and run its own internal hearing before adopting a decision and it also tends to generate a range of procedural problems which have to subsequently be dealt with much later in hearings before the EU courts.

My view is that Ukraine should consider adopting a procedure more akin to the US Federal Trade Commission, where the FTC argues its case before an internal administrative tribunal which then makes a decision. This gives more opportunity for the AMC to seek to appropriately settle the case, reduces the AMC's workload and shifts the initial decision to the administrative law judges.

Also in the Ukrainian context having such a procedure might make it easier to justify going from an administrative law judges' decision, to a specialized court, and then from there to the top court in the system by leapfrog procedure.

COMMENT BY: Jocelyn Guitton for VoxUkraine

Most comments make great sense, and several of the reforms recommended are indeed considered now by the Ukrainian authorities, often following requests by international donors (such as raising the thresholds for merger control, increase the transparency in setting fines through public guidelines).

One needs to keep in mind the role of a competition authority in a market economy. It exists because some market failures (such as asymmetry of information, high entry costs in certain industries, *etc.*) may lead to excessive market power for some companies, which may entail negative consequences in the short run (excessive prices for consumers) and long run (disincentive to innovate and to invest).

Therefore in a limited number of case the competition authorities act to prevent abuse of existing excessive market power (abuse of a dominant position) or to avoid the increase of market power *de jure* (merger control) or *de facto* (when cartels are created among companies). Some sectors (particularly natural monopolies such as energy, transports or telecommunications) are particularly likely to suffer from anti-competitive practices. Some other sectors much less.

This triggers two consequences. First, a competition authority needs to act when necessary, but refrain from interfering in normal business life whenever possible. In other words, intervention must be the exception rather than the rule. It must be transparent (hence the need of guidelines for setting fines and of public decisions), fast and predictable (with decision based on economical rather than political motivation, hence the need for independence)

Second, the authority needs to be able to devote its resources to most problematic cases, which are very often complex. It makes for instance no sense that a competition authority controls a vast number of merger and antitrust cases, since only a few of them can lead to anticompetitive behaviors.

Finally, a competition authority is not a price control agency. Excessive prices and margins are indeed a signal that a market is not functioning properly. But the role of the authority is certainly not to set the "correct" prices: this should be determined only by the equilibrium between supply and demand, not by civil servants.

An efficient competition authority has a critical role to play in Ukraine, which has been suffering from oligopolies and monopolies since its independence. It would be such as wasted opportunity that the competition authority keeps making life of most businesses more difficult whereas it has such challenges to focus on.

COMMENT BY: Volodymyr Bilotkach *for VoxUkraine*

It appears that there is some progress in antitrust regulation, and further suggestions are aimed at ensuring the AMC is able to focus on the core issues: preventing abuse of market power and prosecuting in case such abuse is discovered. I fully support the suggestion that AMC must act as an independent authority, and I hope that the Committee will be able to move towards the best practice in antitrust policy, as practiced by the European Commission's Directorate General on Competition and the US Department of Justice's Antitrust Division. I am however skeptical about the suggestion related to "demonopolization of oligarchic holdings". Not only does this statement stand out from what is otherwise a well-thought and carefully crafted section of this white paper: it effectively presumes guilt before trial. At the same time, it could be appropriate to initiate the procedures to investigate potential abuse of market power by the large holding companies, and to devise appropriate remedies, up to and including breaking up such conglomerates, should abuse of market power be demonstrated to take place.

My other comment to this section relates to vertical arrangements. General approach to these relationships is to examine them on case-by-case basis, weighing potential increase in market power against offsetting benefits (such as increased efficiency). I would therefore suggest that the recommendation for developing standard requirements to such relationships be replaced with a suggestion to develop a set of guidelines, which will give the AMC more room when considering vertical arrangements in practice.

7. Energy and Natural Resources. *Edited by Asters.*

Recent regulatory developments

Since the first edition of the White Paper, the oil & gas sector has experienced several major developments which are worth mentioning here:

- on 28 December 2014, the Parliament amended the Tax Code, in which the temporary significant increase in rent payments was made permanent;
- the Coalition Agreement and the Government Plan for 2015 suggested converting joint activity agreements into production sharing agreements;
- on 25 March 2015, the Cabinet of Ministers of Ukraine ("CMU") adopted the Action plan for reformation of the gas sector;
- on 09 April 2015, the Parliament adopted the Law of Ukraine "On Natural Gas Market", which is fully compliant with the Third Energy Package ("Gas Market Law");
- on 16 June 2015, the Parliament introduced changes to legislation according to which Ukraine joined the Extractive Industries Transparency Initiative (EITI initiative).

Implementation of the Gas Market Law

Adoption of the Gas Market Law is a significant step for Ukraine in the reformation of its gas sector. Despite the Gas Market Law becoming effective in October 2015, full implementation of the law requires the enactment of a significant amount of subordinate legislation as well as the unbundling of NAK "Naftogaz of Ukraine".

Rent payments

The dramatic increase of rent payments in 2014 has negatively affected the Ukrainian upstream sector. Notwithstanding the political will in the Government to decrease these high rent payments, relevant changes to the Tax Code, which would stabilize the situation with rent payments, need to be enacted no later than by 1 January 2016.

Improvement of the general upstream sector

In order to improve the overall legal framework in the upstream sector of Ukraine, enacting the long-awaited Subsoil Code of Ukraine would help in simplifying the procedures for the transfer and disposal of subsoil use rights. Moreover, as a matter of priority changes to the procedures for issuing special permits for subsoil use and to the related auction procedure should be enacted, as should a procedure for the development of oil and gas deposits. Relevant drafts have already been developed by the Ministry of Ecology and Natural Resources. Given the Government's initiative to convert joint activity agreements into production sharing agreements, relevant changes to the Law of Ukraine "On Production Sharing Agreements" should also be enacted.

ELECTRIC ENERGY SECTOR

Recent Regulatory Developments

Since the first edition of the White Paper, the electricity sector experienced several major developments, including:

- on 27 August 2014, the President of Ukraine established a sole regulator for the entire energy and utilities sectors, the National Commission for State Regulation of Energy and Public Utilities (the "Regulator"). This new regulator substituted its two predecessors, the energy regulator and the regulator of public utilities;
- on 26 February 2015, the Regulator gradually increased electricity tariffs for households. Tariffs will continue to increase gradually during a 2 year period. This measure would bring electricity tariffs closer to economically substantiated levels and contribute to the reduction of cross-subsidies in the electricity sector;
- on 13 August 2014, the CMU approved the procedure for introducing temporary emergency measures in the electricity market. Subsequently, the CMU on several occasions introduced such emergency measures;
- on 29 December 2014, the CMU repealed several of its earlier resolutions, which regulated formation of prices for electricity purchased for export purposes. Effectively, this measure brought prices for electricity purchased for domestic purposes in line with prices for electricity purchased for export purposes.

Strengthening of the Regulator

The EU rules, which Ukraine undertook to implement (specifically the Third Energy Package) as a member of the European Energy Community, purport to harmonize the powers and strengthen the independence of the energy regulators. To this end, initiatives to develop new legislation on the energy regulator have thus far been unsuccessful. New legislation that would strengthen the status of the Regulator is imperative for the purpose of developing liberalized electricity and gas markets in Ukraine, and Parliament should focus on enacting such legislation without delay.

Liberalization of electricity market

Ukraine's electricity market functions on a single-buyer model. Transition to a full-fledged liberalized electricity market is set to take place in mid-2017. Relevant legislation is not, however, fully compliant with the EU rules that Ukraine undertook to implement (specifically the Third Energy Package).

To remedy this, existing legislation must be either amended or replaced, and various secondary legislation enacted, to have the new electricity market operational by mid-2017. We note here that the Ministry of Energy and Coal Industry together with the Energy Community Secretariat have developed a draft law "On Electric Power Market" that is compliant with the Third Energy Package. It is expected that shortly it will be submitted to the Parliament for consideration.

ENTSO-E integration

The Ukrainian electricity sector functions within the Unified Electricity System of Ukraine, which is not synchronized with the grid of Continental Europe (except for the Burshtyn TPP Island, which is located in the westernmost part of Ukraine). This prevents Ukraine from taking

advantage of being a part of the single electricity market existing in Europe. Currently NPC "Ukrenergo", Ukraine's transmission system operator cooperates with ENTSO-E, a network of European transmission system operators, in assessing the possibility of integrating the Ukrainian grid into the synchronized grid of Continental Europe. This process should be enhanced and encouraged.

Liberalization of energy coal market

- Ukraine's coal sector is substantially controlled by the government of Ukraine. State-owned mines, which are predominantly loss-making, sell coal to the State Enterprise "Coal of Ukraine" (a state-owned trading company), which further sells the coal to the market. There is an urgent need for liberalization of the sector, which should include:
- reformation of state-owned mines and promotion of private investment into energy coal assets (including by way of privatization, concession and lease);
- promotion of market-based price-formation for energy coal (elimination of State Enterprise "Coal of Ukraine" and introduction of direct sale contracts); and
- promotion of exchange-based trade of energy coal.

Privatization of assets in electricity sector

On 12 May 2015, the CMU initiated privatization of various state assets scheduled for 2015. The list of assets included various assets relating to the electricity sector, among them majority and minority shareholdings as well as production facilities of coalmines and enrichment plants, electricity supply and distribution companies, thermal and hydro generation companies, CHP plants, *etc.* Although it is unclear whether the government will be able to actually complete such an ambitious privatization plan in 2015 or even in 2016 (on 7 October 2015 the CMU resolved to extend the plan to 2016), this initiative represents a significant step forward for the electricity sector. Needless to say that fair and transparent privatization of electricity assets would create preconditions for private investment into the sector, in which obsolete infrastructure requires financing and effective management.

RENEWABLE ENERGY SECTOR

(i) Recent regulatory developments

Renewable energy (RES) has been a hot topic in Ukraine during this past year, with a number of legislation developments taking place, including the following:

(ii) State policy establishment

- On 1 October 2014, the Cabinet of Ministers of Ukraine approved the "National Action Plan for Renewable Energy for the Period until 2020" and the "Action Plan to Implement the National Action Plan for Renewable Energy for the Period until 2020". According to these documents, the share of electricity generated in Ukraine from RES should be at least 11% of the total energy consumption by 2020. Nonetheless, we emphasize that such documents have no purpose if they only remain declarative and are not implemented in practice.

(iii) Tax incentives for RES

- On 31 July 2014, the Parliament, among other things, cancelled corporate profit tax incentives for enterprises engaged in RES;
- On 29 December 2014, import VAT and custom duty incentives for RES were cancelled by CMU Resolution.

Taking into account the recent appeals of the government to increase the share of RES in the overall energy consumption of Ukraine, the cancellation of these incentives, to our mind, are counter-intuitive and negatively impact new RES projects.

(iv) Emergency measures on the Ukrainian electricity market. Reduced "green" tariffs

- On 31 January 2015, referring to the temporary emergency measures in the electricity market the Regulator reduced the "green" tariff (i) by 20% for solar power plants, commissioned before 31 March 2013, and (ii) by 10% — for power plants producing electrical energy from RES, commissioned before 31 March 2013.
- At the end of February 2015 the Regulator introduced a (i) 55% tariff cut for solar power plants and (ii) 50% cut for all other renewable power plants. These actions of the Regulator evidence a complete disregard for the state guarantee to purchase electricity at the "green" tariff until 2030, and may lead to investment protection claims against the State of Ukraine, in particular, under (i) the Energy Charter Treaty, and/or (ii) an applicable Bilateral Investment Treaty¹⁰.
- In the period between August 2014 and January 2015, the Regulator refused to revise the "green" tariff according to the relevant euro rate¹¹.

(v) Law No.514-VIII "On Amendments to some Laws of Ukraine to ensure a competitive environment for the generation of electricity from alternative energy sources"

- On 16 July 2015, in order to find a balance between (what was termed as) expensive "green" energy and the need to urgently ensure Ukraine's energy independence, the Parliament adopted Law No.514-VIII "On Amendments to some Laws of Ukraine to ensure a competitive environment for the generation of electricity from alternative energy sources". This law contains an array of changes to the mechanism for stimulating electricity production from RES, including:
- introducing the "green" tariff for electricity generated in private households from wind energy, while at the same time increasing the maximum installed capacity for private "green" solar and wind projects from 10 kW to 30 kW. Although some solar projects have already been awarded the "green" tariff, private households still face reluctance of oblenenergosp to connect such projects to the grid;
- the compulsory local content requirement has been changed to a special "bonus" surcharge to the "green" tariff. Thus, while a RES no longer needs to include local content to qualify for the "green" tariff, should it do so it may qualify for an additional payment. We do not completely agree with such approach, as taking into account the current vulnerable state of the Ukrainian economy and the significant pressures on the

¹⁰ Note that starting with 25 March 2015 "green" tariffs were paid in full again based on the respective exchange rate.

¹¹ After a number of claims filed by injured parties, the Regulator finally, on 23 July 2015, with its Resolution No. 2060, awarded compensation for non-indexation to a number of companies.

- state budget , there is no sense to introduce any additional payments for renewable energy producers, as the market itself will regulate competition between Ukrainian and foreign equipment producers;
- the Law now provides a definition of biomass in accordance with the provisions of the Directive of the European Parliament and the Council 2009/28/EC, which is a long awaited development considered by experts as a positive step. However, despite heated debate, the "green" tariff for electricity produced from biogas remained at the same rate as that established for electricity produced from biomass, even though the international practice evidences that biogas tariffs should be at least 30% higher than biomass tariffs.
- (vi) Amendments to be introduced:
- The Regulator should establish procurement procedures for electricity generated in private households from wind energy and solar energy with installed capacity up to 30 kW.
 - The Regulator should develop and approve the order on determination of the level of usage of Ukrainian equipment for purposes of RES projects.
 - Taking into account the obligation of Ukraine to liberalize the electricity market in compliance with the provisions of the Third Energy Package and transition from the single-buyer model, the Parliament should provide for a new competitive model for the purchase of electricity produced by RES under the "green" tariff.

COMMENT BY: Professor Alan Riley

The difficulty with the Ukrainian energy market and particularly the gas market is that for over 20 years it has been the principal source of loot, graft and corruption in the state. Therefore although reforms such as the gas liberalization law enacted in April are welcome it has to remain an open question whether the forces of reaction will seek to undermine real reform on the ground.

One approach I have recommended for consideration is whether to upgrade Ukraine's membership of the Energy Community. Potentially by doing so Ukraine would obtain additional international and European support on the ground to resist the forces of reaction.

The Energy Community transfers the EU's energy acquests consisting of its energy liberalization rules, energy efficiency and supply security rules combined with flanking measures in environmental and antitrust law for the sector.

Ukraine could negotiate a protocol to the Energy Community effectively Europeanizing¹² the operation of the Energy Community on Ukrainian territory. This would give the Energy Secretariat the powers of the European Commission in the energy sector. It would also establish an energy court in Kyiv with similar powers to the European Court of Justice (ECJ). It would be able to receive direct actions from the Secretariat to enforce the Energy Community's rules and receive references on points of energy community law from Ukrainian courts.

Europeanization would turbo-charge reform of the key energy sector. It would force forward the liberalization of the Ukrainian energy market. It would also make it much more likely to encourage foreign direct investment into the energy sector. Foreign investors would have the guarantee of a European level of supervision of the rules of the energy sector. It would also provide a greater guarantee of transparency making it much more difficult for traditional Russian and Ukrainian forces to resurrect corrupt practices.

The other major advantage of Europeanization is that will help to effectively de-oligarchise Ukraine. An impartial European administration and courts in the energy sector, source of Ukrainian corruption and power will for the first time since independence make the oligarchic groups fully subject to the law. Europeanization will assist the government in Kyiv in achieving its key aim of subjecting all entities on Ukrainian soil to the law.

The principal objection to Europeanization is that it is an infringement of Ukrainian national sovereignty. However, the Ukrainian government has set itself the task of joining the European Union which will involve a far greater transfer of national sovereignty than envisaged here. Ukraine would in fact be demonstrating its European commitment and its willingness to embrace the rule of law and not the rule of men.

¹² What is meant by 'Europeanization' is upgrading the obligations of the Energy Community which currently only commit Ukraine as a matter of international treaty obligations to comply with the EU's energy acquests, to full European level of compliance. Full European compliance means supervision by a supranational executive, here the Energy Secretariat, and subject to a supranational court, which would be the proposed energy court based in Kyiv, which would operate according to the procedures of the EU's ECJ.

COMMENT BY: Dirk Buschle, Deputy Director and Head of Legal, Energy Community; Vienna, Austria

A member of the Energy Community since 2011, it took Ukraine four – highly eventful – years until the reform process finally gained momentum and started yielding tangible results. 2015 was a breakthrough for the reform of the gas sector in line with the Third Energy Community. Instead of continuing with a piece-meal approach favored by Ukrainian authorities and IFIs alike (with a focus on Naftogaz unbundling and price increases), the Ministry for Energy together with the Energy Community Secretariat decided to start with the legal foundation for all further reform steps and jointly drafted a Gas market Law which eventually was adopted in April this year and entered into force in October. Entry into force depended on a set of secondary legislation, amongst them public service obligations meant to govern the transitional time until full liberalization of the market, which was adopted in an impressive race against time just before 1 October. Ukraine managed to achieve what few would have considered possible at the beginning of the year, to be among the first adopters of the Third Package in the Energy Community, and of all sectors in the gas sector, which inside and outside the country so far had been a synonym for crisis.

Maybe it was not realistic that the other two areas in need to be harmonized with the Third Energy Package – the electricity sector and the national energy regulator still widely known under its old name NERC – would be reformed at the same speed and with the same enthusiasm as the gas sector. So far this has not happened. Both areas require new legislation which again was drafted by the authorities in charge jointly with the Secretariat. The draft Law on the Regulator was subject to a struggle for influence between the President and the Prime Minister resulting in a formula compromise of which the Rada did not approve. The draft Electricity Market Law has not been submitted yet to Parliament and is currently exposed to intensive lobbying. Unlike the existing Law, it was drafted in a non-partisan manner by a comprehensive working group and subject to public consultation. Once adopted, it would not only transpose the Third Package but also break up Ukraine's cartelistic electricity market structures. Consultants hired by the Secretariat with the support of the United Kingdom have already started drafting the necessary secondary legislation, just to be ready on Day X when the electricity sector will have caught up with gas and the Law is adopted.

Even though the full implementation of the Third Energy Package beyond the gas sector still this year may be against the odds, the path that Ukraine decided to take earlier this year seems irreversible and change will finally come to the energy sectors of the country.

COMMENT BY: *VoxUkraine*

It has been always known that the gas market reform (or implementation of the EU gas directive) takes a number of years (as long as 10 years in some EU countries). A specific implementation period has been actually stipulated in the Energy Community Treaty (most of the deadlines are for 2016-2018). It has been clear that Ukraine is failing the ECT timelines and will have to renegotiate new ones. Therefore, it should not be a surprise that the adoption of the gas market law is not the end of the reforms, but just one of the milestones.

Aside from the ECT conditionality, Naftogaz unbundling is being also linked to recent loans (to purchase gas) from EBRD and IFC.

Regarding rent payments, political arguments for keeping rent rates high do exist (funding energy subsidies, controlling the fiscal deficit etc). Besides, the likely purpose of revising the rent rates is not to "stabilize the situation around rent payments", but rather to encourage gas production and investments in the upstream sector.

8. Employment Law. Edited by Squire Patton Boggs.

New Labor Code

Labor relations in Ukraine to this day remain governed by an obsolete Soviet Labor Code dated 1971, which is wholly inadequate to ensure a modern system of labor relations. This Code must be replaced with a new labor code, based on the legislation and best practices of the EU and the US, that will eliminate a vast array of bureaucratic provisions, allow considerable flexibility for employment agreements, while at the same time ensuring social protection of employees in general and of selected, most vulnerable, categories of employees, in particular.

Labor Books

Cancel the requirement for labor books in order to decrease document flow burdens and eliminate bureaucratic rules in Ukraine. The main role of a labor book is to reflect the labor history of each employee. We suggest creating a unified electronic database on the basis of the existing database of the Pension Fund of Ukraine, which will contain information on employment history and contributions to the Pension Fund of Ukraine regarding each employee. We also suggest making such database available to individuals, whose information has been input into the database, including the possibility to receive an official extract from such database.

Employment Agreements and Contracts

Cancel oral employment agreements. Along with the existing requirement for written employment contracts, require all employment agreements to be in writing. Fix obligatory terms and conditions for employment agreements (for example, employment duties, work schedule, vacation, salary, *etc.*). This will help identify the significant terms and conditions of employment if they are not set out in other internal employer documents. In addition, adopt a template form of employment agreement recommended for employers and employees to simplify the procedure of negotiating and drafting an employment agreement.

Permit employment agreements to be entered into not only for an indefinite term but for a specific term as well. Currently, employment agreements may only be concluded for a specific term in respect of certain types of work (seasonal work, specific scope of work to be performed, *etc.*). If an employment agreement is prolonged by the parties at least once, it is then considered as executed for an indefinite term. Provide an option to prolong an employment agreement for a specific term any number of times, without further considering such prolonged agreement as executed for an indefinite term.

Extend the list of employees with whom employment contracts instead of employment agreements can be entered into (for example, to all management employees). This will then allow employers and employees to negotiate additional terms and conditions of employment with a wider range of employees.

Eliminate an employer's obligation to send written notification on hiring new employees to the state authorities as it creates unnecessary additional administrative burden on employers.

Labor Inspections

We suggest either disbanding the concept of a labor inspection agency, namely, the State Inspection of Ukraine on Labor Issues, or limiting its authority only to the most important aspects of employment relations, such as the presence of employment agreements, compliance with labor safety, payment of salary, employment of minorities, *etc.*

Over-regulation of employment relations by the Labor Code of Ukraine combined with the vast authority of labor inspectors creates significant bureaucratic difficulties for business.

COMMENT BY: Olena Nizalova for VoxUkraine

The efforts put forward by the U.S.-Ukraine Business Council to promote Legal Reform in Ukraine are very timely and needed. In spite of the genuine desire to reform the country from within, the remainder corrupt forces inside the Ukrainian political and bureaucratic circles are still extremely strong and form powerful opposition to much needed changes. Therefore, the pressure from both the civil movements within the country and international support from such organizations as U.S.-UBC, including analysis of suggested reforms and guidelines for the development of new ones, can be critical in ensuring timely changes to the business and social environment in the country.

I am wholeheartedly supporting the priorities delineated in the White paper for several reasons. First of all, the directions outlined in the Fundamental Legal reform section are precisely the ones which are hindering on the resolution of many arising problems in various spheres of business and economic life of the country. Deficiencies in any specific area such as Land and Real Estate or Employment relations could have been addressed, at least to some extent, via impartial court procedures, while the corrupt judicial system works in the interests of only politically powerful and wealthy.

Section II provides a comprehensive list of areas which require extra attention of policy makers. However, I would like to stress that without radical changes in areas of concern in Section I, everything else would be in vain. I would like to provide several comments on the Employment Law developments outlined in Section II, chapter 8.

Overall, this is an extremely important area to focus on, as it affects directly majority of the country's population, both because we spend a considerable amount of our lives at the workplaces and because most of us rely almost entirely on labor income. Therefore, well-functioning labor markets form the basis for the well-being of any nation. Given the significance of this area, I am somewhat disappointed by both the lower priority compared to other areas and by the depth of the development of this section compared to the others. My specific comments are the following:

- Currently the background information in the sub-section is limited to the statement that at present employment relations are governed by the obsolete Labor code from the Soviet era and it requires replacement. Because something is old (and in this case from the Soviet era) does not make it automatically bad. In my opinion, more background on the deficiencies of the existing Labor code should be specified, if not in this paper, then a reference to a trustworthy source should be given.
- The recommendations provided in the sub-section concern certain formalities, namely Labor books, Employment agreements/contracts, and Labor inspections.

However, more fundamental issues should be addressed. The new Labor code should:

- Replace not only the old Labor code but also numerous government regulations in the sphere of employer-employee relations.
- Create more flexible conditions for employer-employee conflict resolutions.
- Ensure the balance between flexibility and security of the employer-employee relations.
- Ensure incentives to proper registration of the workforce (which is of course partially addressed by the taxation reform via alleviating the tax burden).

- Ensure the correspondence of the employee protection to the EU standards (given the country's ambition to join the EU in the future).
- I support the abolishment of the Labor books and maintenance of the unified electronic database that is accessible by the individuals.
- I see no enforceable way of canceling the employment agreements in oral form (even though they may be outlawed). Such type of employment exists anyway in both developed and developing countries, and constitutes a form of informal work arrangement, which is not secure for the worker and very flexible for the employer. Rather I support the initiative to promote the use of Employment agreements and Contracts and the outlined steps to simplify the procedure of negotiating and drafting them.
- I do not quite understand the recommendation to "enable entering into employment agreements not only for an indefinite term but for a specific term a" well". As far as I know, currently there exist three types of contracts – with an indefinite term, for a term agreed for by both parties, and for the time needed to implement a specific task. To prevent a transformation of the employment agreement with a fixed term into the one with an indefinite term, the parties simply have to enter into a new fixed-term employment agreement on the date following the date of the termination of the previous one. This new agreement has to be in place anyway. Otherwise, if it neither transforms into an indefinite term employment, nor into a new fixed-term employment, the parties enter into an informal relation which is outside of the legal framework. I do not know of any restrictions on the number of time one can prolong the fixed-term employment agreement.
- I support the extension of the list of employees with whom employment contracts can be signed. This will allow more flexibility both for employers and employees.
- I am not in favor of the elimination of the employer's obligation to send written notification on hiring new employees to the state authorities. Moreover, this is in direct conflict with the earlier recommendation to maintain the database of employees' records. How would this database be populated if there is no obligation to report the start and end of the employment relations.
- Regarding the Labor Inspections, more background work on this issue is needed. On the one hand, their abolishment would eliminate yet another incentive for corruption and free honest businesses from extra expenses and hurdles. On the other hand, there should exist a mechanism to enforce lawful behavior of the employers in assuring employment security and safe working conditions (as partly mentioned in the White paper). In the EU Labor Unions usually monitor the majority of these issues (except for the safety in work environment). Unfortunately, in Ukraine Labor Unions also bear the legacy of formality from the Soviet times and it may take some time before the true organizations striving for the protection of workers' rights develop. Therefore, it may be necessary to ensure some form of state monitoring on key aspects, such as safety of the work environment, discrimination, etc.

9. Franchising. *Edited by Baker & McKenzie.*

Franchise Law

Until recent times, there was a requirement for state registration of commercial concession agreements (the term 'commercial concession agreement' is used in Ukrainian law with respect to franchise agreements). This statutory requirement impeded the ability of one party to a franchising agreement to grant rights to use intellectual property to another party. However, the requirement to register commercial concession agreements was cancelled (as of 5 April 2015), and now such agreements may be concluded in simple written form, as other commercial agreements.

Earlier Part 2 of Article 1118 of the Civil Code of Ukraine and Part 2 of Article 367 of the Commercial Code of Ukraine stated that a commercial concession agreement was subject to state registration by a state body, who registered the rights holder. According to Part 3 of Article 1118 of the Civil Code of Ukraine and Part 3 of Article 367 of the Commercial Code of Ukraine in cases where the rights holder was not registered in Ukraine, registration of a commercial concession agreement should have been done by the (state) body that registered the user of the rights.

State registrars that conduct state registration of legal entities and natural persons — entrepreneurs, should have registered commercial concession agreements. Because a corresponding regulation on registration of commercial concession agreements was not approved until 29 September 2014 (Order of the Ministry of Justice of Ukraine No. 1601/5 "On Approval of the Order of State Registration of Commercial Concession (Sub-Concession) Agreements"), such registration was not conducted.

The absence of registration of a commercial concession agreement led to a situation where a party to such agreement could not refer to such agreement in case of a dispute. Under the Civil Code, relations with third parties and the right of a party to a commercial concession agreement to refer to such agreement was in effect only from the date of its state registration (Part 4 of Article 1118 of the Civil Code of Ukraine and Part 3 of Article 367 of the Commercial Code of Ukraine).

On 5 April 2015, provisions which related to the state registration of commercial concession agreements were excluded from the Civil Code (Law of Ukraine No. 191-VIII dated 12 February 2015 "On Entering Amendments to Certain Legislative Acts of Ukraine on Simplification of Terms of Business Conducting (Deregulation)"). Similar provisions requiring state registration of commercial concession agreements under the Commercial Code of Ukraine also were changed.

The Ministry of Justice in June 2015, changed its Order requiring state registration of commercial concession agreements. As of 26 June 2015 Order No. 842/5 dated 4 June 2015 "On Declaring Invalid the Order of the Ministry of Justice of Ukraine No. 1601/5 dated 29 September 2014 "On Approval of the Order of State Registration of Commercial Concession (Sub-Concession) Agreements" came into effect. It should be noted that mentioned Order No. 1601/5 was in direct contradiction to Article 210 of the Civil Code of Ukraine, which stipulates that a transaction is subject to state registration only in cases, established by the law, and declaration of this Order invalid is thus quite logical.

10. Commercial Disputes (Commercial Arbitration, Court Practice, Enforcement).

Edited by Avellum Partners.

Recent legislative developments

Reform of the judicial system has been one of the most discussed topics in Ukraine during this year. Therefore, a number of legislative developments have taken place.

On 12 February 2015, the Parliament adopted the Law of Ukraine "*On the Guaranteeing of the Right to the Fair Trial*", which aims to increase the efficiency of the court system, ensure the consistent application of legislation and establish legal and organizational grounds for judges' evaluation and their disciplinary liability.

Nevertheless, there is much to be done to effectively implement the adopted mechanisms.

Improvement of Judiciary in Ukraine

In order to make the Ukrainian judiciary more effective and attractive for business, among others, the following legislative changes are required:

- (i) Amending the Civil Procedure Code and Commercial Procedure Code: (i) to improve the mechanism of obtaining interim measures, among others, by introducing cross-undertaking in damages to prevent the claimant from taking actions aimed at blocking of economic activity of the respondent, (ii) to introduce criteria for admittance of appeal claims and cassation claims not to overload courts with ungrounded claims, (iii) to improve the procedure for reconsideration of court judgments under newly established circumstances, (iv) to introduce criteria for permissible evidence to prevent parties from submitting vague and irrelevant materials.
- (ii) Amending the Law of Ukraine "On International Commercial Arbitration" to establish: (i) the clear procedure for obtaining of interim measures by a party to arbitration proceedings in support of such arbitration proceedings, (ii) the procedure for enforcement of international arbitral awards in Ukraine, which must be more definite, transparent and clear, namely, consideration of applications for recognition and enforcement should be reduced to their hearing only in court of appeal and cassation instance along with establishing specific time limits for consideration in each instance.
- (iii) Amending the Law of Ukraine "On the Enforcement Proceeding": (i) to grant the status of "a procedural document which is subject to enforcement" to orders on interim measures rendered by arbitral tribunals with their seat in Ukraine, (ii) to introduce a clear mechanism of recovery of debt in foreign currency under court judgments and arbitral awards, (iii) to improve a mechanism of court supervision over the bailiffs actions within the enforcement proceedings.

The International Commercial Court under the Ukrainian Chamber of Commerce and Industry (the "**ICC under the UCCI**") should be seriously reformed and its Rules should be amended to attract more disputes for its consideration. The list of arbitrators of the ICC under the UCCI should stop being exhaustive.

One of the top priorities for national courts is to introduce e-justice mechanism to speed up resolution of disputes, make it more effective and transparent.

Enforcement of Court Judgments

The system of enforcement of court judgments in Ukraine is outdated and ineffective. Even if a positive court decision is rendered and enters into force, it is highly questionable whether it would be successfully enforced for the benefit of the granted party in a reasonable period of time.

Currently, there are few draft laws registered in the Parliament aimed to improve the enforcement system (draft law "*On the Enforcement Proceeding*" No. 2506a, "*On Bodies and Persons Conducting Enforcement of Court Judgments and Decisions of Other Bodies*" No. 2507a and "*On Amendments to Tax Code*" No. 2508a). These draft laws intend to introduce the institute of the private bailiff, which is a novel for Ukrainian legislation. Moreover, it is proposed to establish the open unified registers of debtors and electronic system of administration of enforcement proceedings. Generally, these changes constitute a positive step towards reforming Ukrainian judiciary. However, they still require further improvement.

Recognition and Enforcement of Foreign Judgments and Arbitral Awards

An application for the recognition and enforcement of a foreign court judgment or arbitral award must be submitted directly to courts of appeal. Judgments of the courts of appeal must be subject to so-called second appeal with the cassation court. The proposed changes will significantly simplify and unify the procedure for the recognition and enforcement of foreign court judgments. Such system existed in Ukraine until 2005 and proved to be more efficient.

Also, the procedure for the voluntary fulfillment by a debtor of foreign judgments and arbitral awards should be improved. Currently, a debtor cannot voluntarily pay its debt determined in foreign currency under foreign judgments and arbitral awards (this may be done only upon recognition and enforcement of foreign judgments and arbitral awards in Ukraine).

Interim Measures Granted by Commercial Tribunals

Ukraine should implement the 2006 amendments to the *UNCITRAL Model Law on International Commercial Arbitration* in the national legislation, *i.e.*, into the Law of Ukraine "*On International Commercial Arbitration*" and to amend respectively Civil Procedure Code and the Law of Ukraine "*On the Enforcement Proceeding*".

The 2006 amendments to Article 17 of the *UNCITRAL Model Law* relate to interim measures, namely, to the authority of an arbitral tribunal to order interim measures, determine conditions for granting interim measures and issue preliminary orders. Most importantly is that Article 17 H of the *UNCITRAL Model Law* clearly states that interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court. This will finally remove legislative uncertainty as to the procedural status of an order on interim measures issued by a Ukrainian arbitral tribunal.

Along with the foregoing, a mechanism for the recognition and enforcement of interim measures granted by foreign courts or arbitral tribunals should be introduced.

Interim Measures Granted by National Courts

Ukraine should introduce special procedures for applications to grant interim measures in support of an international arbitration. Interim measures should be granted by the national courts in accordance with the specially defined criteria and subject to the fulfillment by the applicant of certain requirements, *i.e.*, provision of cross-undertaking in damages. This will prevent the claimant from submitting an application for interim measures with the sole purpose to block economic activity of the respondent.

Development of Unanimous Court Practice

Under Ukrainian legislation, decisions of the Supreme Court of Ukraine on the application of legislative provisions are binding for state authorities. This provision is aimed at unification of court practice thereby creating a legal certainty in resolving disputes, however, it stays a mere declaration.

Powers of the Supreme Court of Ukraine should be extended to secure its status of a supreme judicial body.

Furthermore, resolutions of the plenary sessions of higher specialized courts issued for clarification and generalization of court practice should be made legally binding for the lower courts.

To resolve disputes arising out of analogous grounds, the concept of "principal importance of the decisions" should be introduced. This would allow the Supreme Court of Ukraine to give clarifications in respect of some legislative provisions (*i.e.*, newly adopted) when they may result in numerous identical claims.

11. Public Procurement. Edited by Baker & McKenzie.

Although Law of Ukraine No. 1197-VII dated 10 April 2014 "On Public Procurement" (the "Procurement Law") in general corresponds to the key principles of the EU legislation on public procurement and the WTO Agreement on Government Procurement (GPA), the legislation still requires substantial changes to ensure procurement procedures are transparent, and adhere to efficient international standards. In particular, the following changes are vital to improve the public procurement procedures:

- (i) amendments to public procurement legislation required for accession of Ukraine to WTO Agreement on Government Procurement (GPA);
- (ii) implementation of the EU directives on public procurement as required by the DCFTA between Ukraine and the EU;
- (iii) revision of the Procurement Law to remove inconsistent and conflicting provisions within the law and with other legal acts, including the Law of Ukraine 4851-VI dated 24 May 2012 "On Specifics of Procurement in Certain Areas of Business";
- (iv) establishment of clear regulations for procurement contracts. In particular, the Procurement Law should specify what law is applicable to the procurement process and whether the choice of foreign law is allowed, whether choice of foreign arbitration is available, and a mechanism for transparent bidding and execution of long term procurement contracts, (for more than one year);
- (v) development and implementation of standardized types of procurement contracts/terms for different types of goods/services/works procured which would be used by all state authorities and companies to ensure the consistency and proper legal quality of procurement contracts;
- (vi) implementation of a special procurement procedure applicable to situations when the choice of the contractor is limited by the terms of financing, (*e.g.* when financing is available only for contracts from a particular country). This would facilitate implementation of major infrastructure projects which require significant financing from abroad and could be financed with the involvement of foreign export-credit agencies; and
- (vii) amending the Procurement Law to provide proper regulation of procurement with the use of electronic bidding system, *e.g.* PROZORRO, including providing for an obligation to use such system for procurements below the mandatory threshold for public procurement.

COMMENT BY: Tymofiy Mylovanov for VoxUkraine

My expertise lies in game theory, contract theory, and institutions design. There is one section that falls directly under these topics: public procurement.

Public procurement is always subject to abuse. There are two key reasons why public funds can be wasted. First, misallocation of funds: the government will procure goods and services that are not needed. Second, overpaying for goods and services. The standard approach to deal with overpaying is to award contracts through competitive auctions whenever possible. In addition, more transparency about the rules and the results of the auctions, clear and equal rules for all participants of the auctions, and minimal discretion for the public officials to adjust the rules of the auctions can help to minimize overpaying, corruption, and diversion of funds. Regular audits by independent government non-affiliated watchdogs is another effective mechanism to address the second problem.

By contrast, insuring that the resources are not wasted on non-essential goods and services is more difficult. There is no guaranteed way to write down a law or decree to regulate what and when the government can and cannot procure. The idea of procurement is that the government reacts to the ever changing needs of the state and the market conditions; these conditions are impossible to foresee in advance. Thus, the public officials must be given discretion to decide what and when to buy. The market and transparency can discipline the prices at which these goods and services are bought, but not what kinds of goods and services are procured.

In order to ensure that the government officials do not misallocate public funds they have to be provided with incentives to act in the public interest. The way to do it is to offer performance-based rewards to the government departments and key officials in leadership positions. One can develop key performance indicators and allocate resources, including those available for public procurement, based on these indicators. In other words, instead of allocating the budget based on the requests from the departments, as it is currently done in Ukraine, the budget can be at least partially allocated based on performance of relative departments. The departments then will have the incentives to perform well in order to obtain more resources in the future.

In summary, a possible vision for the public procurement is to

1. use the market to discipline the prices,
2. allow full discretion in choosing what and when to procure, and
3. reward and punish the government departments financially based on their performance.

12. Agribusiness. Edited by Sayenko Kharenko.

Institutional Reform of the MAPF and Related State Agencies and State-Owned Enterprises

The decision-making process of the Ministry of Agrarian Policy and Food of Ukraine ("MAPF") over recent period looks like "fire-fighting" in that it is focused mainly on imminent problems. Given that Ukrainian government attempts to provide efficient and systemic reforms, the MAPF should redefine its role and concentrate primarily on sustained policymaking and strategy development. Change in the role of the MAPF requires that the role of the Minister of Agrarian Policy and Food should be strengthened. Being clothed with authority for the policy development, the Minister has to assume personal responsibility for the transformations in the agrarian sector.

A major focus should concentrate on the reform of state agencies related to the MAPF. Many activities performed by the Ministry have to be decentralized and transferred to the state agencies – the service providers. One of such agencies is the recently established State Service on Food Safety and Consumer Protection.

Of particular concern is the reform of state-owned enterprises related to the MAPF. Being a regulator of the entire agricultural sector, the MAPF is also in charge of numerous state enterprises. This system leads to interests lobbying as well as differential treatment of public and private sectors. Moreover, it goes without saying that the major part of state-owned enterprises is subsidized from the state budget. Besides that, recent years have witnessed a serious damage to the state's financial and reputational interests caused by some of these entities (*e.g.* the PJSC "State Food and Grain Corporation of Ukraine"; **the state enterprise "UKRSPYRT"**; the Agrarian Commodity Exchange; the PJSC "Agrarian Fund", *etc.*). Therefore, most of the state-owned enterprises relating to agricultural sector have to be privatized and de-monopolized.

Deregulation

Agricultural business deregulation is one of the core instruments to increase the potential and competitiveness of Ukrainian agricultural sector. Therefore, in order to facilitate agricultural business, elimination of unnecessary state control functions, simplification of licensing and permission procedures are of primary importance. It shall be noted that, in March 2015, **the Cabinet of Ministers of Ukraine elaborated the Action Plan for deregulation of economic activities. Some of the deregulation laws in the field of food and agriculture took effect already. Still, in an attempt to** promote the deregulation process, the following steps should be taken:

- the procedure of seed import for scientific purposes, prescribed by the Order of the Ministry of Agrarian Policy and Food of Ukraine No. 116 dated 20 February 2013 should be based on the "declarative" principle. Namely, it is advisable to cancel necessity to obtain confirmation for seeds, imported for scientific purposes, and to introduce "declaration" on import of seeds;
- the permit procedure for subsurface (underground water) use has to be simplified. In particular, the Subsurface Code of Ukraine and Resolution of the CMU No. 615 of 30 May 2011 should be amended by shortening the list of documents to be filed and term for their consideration;
- the village councils should be given the authority to register the agricultural land lease agreements due to absence of notary offices in rural areas.

Approximation to the EU Legislation

The main factor, which closes the EU markets to the majority of Ukrainian goods, is non-tariff barriers. This problem became evident in the scope of negotiations on the Association Agreement between the EU and Ukraine, and, partly solved, still requires a lot of work. Therefore, the approximation of Ukraine's laws relating sanitary and phytosanitary (SPS) measures to those of the EU is of utmost importance. The SPS regime of the EU covers food safety, animal health and plant protection.

Until now, the approximation of Ukraine's legislation in this sphere has been "case-specific" for the most part, *i.e.*, the fundamental principles on which the EU market is based have not been taken into account. In particular, the regulatory approximation was focused primarily on the legislation covering products of animal origin as far as these products can only be imported into the EU if they come from a third country which is eligible for import.

The present situation requires a completely new approach towards agricultural and food products regulation. This new approach has to ensure the appropriate level of public health protection without placing the excessive regulatory burden on business. In particular, the comprehensive standards, applicable through the whole food supply chain "from farm to fork" have to be implemented. The list of the EU SPS legislation to be adopted by Ukraine is defined in Annex V to the EU-Ukraine Association Agreement. The timescale in which the domestic laws have to be approximated has been outlined already in the Action Plan for the Implementation of the Association Agreement for 2014-2017 (approved by the CMU Regulation No. 847 dated 17 September 2014).

However, as it became evident, Ukraine has been facing not only the problem of improvement of its legislation through adaptation to the EU standards, but also the application of legal norms. In September 2015, the new Law on Food Safety entered into force. Being based on the principle "from farm to fork", the Food Safety Law introduces all basic EU standards applicable to the cycle of production, processing and distribution of agricultural food (*e.g.* the principles of HACCP, traceability, responsibility of business operators). In addition, the Law envisages a new approach towards the system of state supervision and control on the market. Subsequently, at this stage, the task of primary importance is to enforce this Law in proper and adequate manner.

Agriculture Financing

One of the key obstacles limiting access to financing and making financing more expensive for Ukrainian agriculture business is the absence of enforceable and smoothly operating security instruments over commodities, including grain, and future crops. Due to inconsistencies and flows in the legal acts regulating the operation of warehouse certificates and pledge of grain and other commodities, currently it is impossible to create security over commodities with the use of warehouse certificates, which would be free of legal defects and 100% enforceable.

To introduce clear and consistent regulation of security instruments with the use of warehouse certificates the following steps should be taken:

- removing discrepancies and gaps between different laws (Law of Ukraine "On Grain and Grain Market in Ukraine", Law of Ukraine "On Certified Warehouses and Ordinary and Double Warehouses Certificates") and executive regulations (Order of the Ministry of Agrarian Policy of Ukraine No. 198 dated 27 June 2003 "On Circulation of Warehouse

- Documents on Grain", Resolution of the Cabinet of Ministers of Ukraine No. 510 dated 11 April 2003 " On Approval of the Order on Issue of Blanks of Warehouse Certificates for Grain, their Transfer and Sale to the Grain Warehouses and the Model Agreement on Warehouse Storage of Grain ") regulating grain finance and pledge of grain;
- revision of the Law of Ukraine "On Certified Warehouses and Ordinary and Double Warehouses Certificates" and Adoption of Supporting regulations that would allow to use Double Warehouse Certificates for Pledge of Commodities (other than grain);
 - revision of the form of the double warehouse certificate and removing defects regarding use of seal, state registration certificate, filling in the relevant information on terms of the loan agreement, description of the collateral *etc.*; and
 - improvement of the out-of-court procedure of enforcement of security.

State Support and Taxation

Within the last years, Ukraine's agricultural sector was endowed with a series of tax benefits relating to the value added tax (VAT) regime. During the last decade, the VAT taxation of agrarian producers varied year by year: from VAT partial refund to "zero VAT" and *vice versa*. Such frequent changes in the VAT policy exemption usually resulted in uncertainty on the market and led to increased volatility of prices. Therefore, a stable policy is expected in this regard.

Besides that of particular concern is the measurement of tax benefits granted by Ukrainian government to the agrarian sector. The WTO Agreement on Agriculture (the AA) requires all WTO Members to provide support in favor of domestic agricultural producers in amount that does not accede the estimated support level – the Total Aggregate Measurement of Support (the Total AMS). The AMS calculation includes all money spent by the government that effect the market prices.

The amount of Total AMS for Ukraine is UAN 3,043.4 mln. It shall be noted that when Ukraine fixed its Total AMS upon accession to the WTO, the base period for its calculation was 2005-2006. Therefore, this sum was bound to the exchange rate of UAH 5 per US Dollar. Given that the national currency devaluated significantly, it is questionable now whether our current AMS will meet this "ceiling".

It shall be noted that **not only Ukraine faces** this problem. In particular, the WTO Members have been confronted for many years with the excessive inflation, which is similar to devaluation in economic terms. According to Article 18.4 of the AA, the WTO Members "shall give due consideration to the influence of excessive rates of inflation on the ability of any Member to abide by its domestic support commitments". However, neither AA, nor relevant case law specify the terms of "due consideration" or "excessive rates of inflation".

In an effort to remain in line with their commitments, the countries usually make notifications on the Total AMS in a currency other than the one specified during their accession to the WTO (or during the Uruguay Round). Some of the countries provide a "double" notification: one with national currency, the other with US Dollars (*e.g.* Iceland). Others present their data in US Dollars (*e.g.* India). The possible solution for Ukraine could also be to reschedule its commitments as it is envisaged by Article XXVIII GATT. However, it is questionable whether Ukraine will be able to negotiate this issue with all WTO Members.

Besides that, it shall be noted that the Law of Ukraine regulating the state support of agriculture has to be revised. In this connection, the Ministry of Agrarian Policy and Food elaborated a new the new version of the Law "On State Support of Agriculture" envisaging transparency, targeted use and effectiveness among the principles on which the state support shall be based. The aim of the Draft Law is also to create the conditions and mechanisms for the development of small and medium agribusinesses. Therefore, in the short-run the necessary legislative amendments are to be adopted.

Export Promotion

Ukraine is the world's top exporter of such agricultural products as grain and sunflower oil. Nevertheless, despite favorable natural resources, Ukraine does not fully take advantage of its agricultural potential. Thus, in order to increase the performance in this sector, the following steps should be taken:

- elaboration of the national export strategy;
- development of self-regulation in the agricultural sector; delegation of certain state functions (*e.g.* monitoring the quality and safety of certain agricultural products) to self-regulated organizations;
- cancelation or simplification of export revenue sale rule (at least, the obligatory foreign currency revenue sale for agricultural exporters should be decreased from 75 percent to 25 percent);
- extension of the tariff quotas for the duty-free export of Ukrainian agricultural products to the EU market; and
- improvement of the existing VAT refund procedures for exporters.

COMMENT BY: Oleg Nivievskiy for VoxUkraine

In my view, the list of strategic priorities in Agribusiness does not look exhaustive. In some areas the Ministry of Agrarian Policy and Food of Ukraine (MAPF) has a shared or minor responsibility with other Ministries but this is not an excuse for omitting this area from the list of strategic priorities. First of all this is related to the Farmland market, Agricultural Logistics and Agricultural Education and Science.

I think there is no reason for the government to intervene in highly competitive grain trading sector. Moreover these companies are notorious for the scandal articles in the press on corruption/assets misuse accusations and confirmed inefficiencies and loss making.

One justification, though, for government intervention could be ensuring food security in the country, *e.g.* maintaining the stock food reserves for extreme emergency situations. Currently this function is performed by the State Material Reserve of Ukraine.

In addition to state enterprises, considered herein, I want to draw attention, for example, on the role of MAPF in Rural Development and this would require different approach to the institutional build up when it were only agribusiness focused. Institutional capacity to develop and implement reforms is also an important factor. Glaring shortage of young, well trained and paid personnel is a key bottleneck.

No doubt that Deregulation is one of the key priorities in this area. In grain sector, for example, regulatory burden is estimated at about US30/t of grain which is ultimately a forgone revenue for the farmers.

I think that the current deregulation process in Ukraine would benefit from a smarter approach that includes a thorough regulatory impact assessment facility. Deregulation is a mainstream at the moment, but poorly developed and thought trough initiatives can make only worse. One such example is the introduction of the minimum duration for farmland rental agreements.

Approximation to the EU legislation is very important part of the strategy. But this section looks very descriptive at the moment without an answer HOW to do the approximation. And this is more related to the current capacity of the Ministry to develop some pieces of legislation envisioned by the Association Agreement and implement them. Generally speaking there is nothing to think about, Association Agreement was adopted, it is all clear what to do, and the only question left is who and how will do it. The Ministry's capacity is weak at the moment, so the strategy in implementing the Association Agreement might be involving all interesting stakeholders/donors to help up the Ministry in this endeavor.

Regarding financing, the paper focuses only on warehouse certificates as a financing instrument. This aspect is relevant and definitely should give more opportunities to farmers to attract a financing.

It is also necessary to mention the moratorium on farmland sales market, which does not allow farmers to use their farmland as a collateral.

13. IT Sector, Cyber Security, e-Commerce. Edited by Sayenko Kharenko.

Information Technologies is a ticket to the innovative economics, desired by Ukraine. To grab this opportunity it is necessary at least to: (i) implement "Safe harbor" for intermediary service providers, and EU standards of data protection on the Internet; (ii) provide equal access to the telecommunication infrastructure; (iii) apply the E-Commerce Act to websites not used for sale of goods or services; (iv) permit post services to accept cash payments on behalf of online sellers; (v) facilitate the use of digital currencies; (vi) provide plaintiffs with opportunities to snapshot the online infringements; (vii) govern relations regarding domain names; (viii) permit state authorities to use cloud computing and open-source software; (ix) improve corporate, contract, labor and intellectual property law.

Telecommunications

Many kinds of businesses and activities could be characterized as Information Technologies. The oldest IT field is telecommunication, which is waiting for implementation of the "Safe harbor" stipulated in Articles 244-249 of the Association Agreement between the European Union and Ukraine. To ensure free circulation of information services, Ukraine should have an explicit definition for *intermediary service providers* and establish clear-cut liability limitation provisions applicable to them.

In addition, it is important for the IT service market to offer equal opportunities to all Internet providers. Most of them do not have access to telecommunication infrastructure and, as a result, suffer from unfair competition. Another important task for growth of Internet connectivity is to create a legal basis for 4G, including grounds for reforming of radio frequencies (GSM spectrum) and introduction of the frequency spectrum usage criteria. It would allow canceling some licenses in spectrum over 2200 MHz, which are not in active use. It is also necessary to eliminate licensing of services not related to the limited resources (numbering capacity and radiofrequencies).

E-Commerce / Digital Currency

Internet user extension would be a good impetus to e-commerce, including online services. Unfortunately, if a website is not used for sale of goods or services, Terms of Use/Terms of Service may not be deemed as a public offer according to the Civil Code and the E-Commerce Act of Ukraine, which is an inconsistency per se. We highly appreciate the E-Commerce Act enactment, especially the creation of new ways for remote contracting, which are more convenient and practicable than personal signature or electronic digital signature. However, by entering into the sale contract, the online shop undertakes to comply with the Consumer Rights Protection Act, which unfortunately does not keep pace with current development level of online shopping.

Online business still lacks clear requirements for the use of privacy policies and cookie policies on the websites, and may rely only on scarce general legal provisions on personal data. The procedure for online obtaining of the permit to use personal data was introduced only for e-commerce but not for other websites, including social media. Therefore, current legislation needs certain amendments to be compatible with the EU standards of data protection on the Internet. This would also include "right to be forgotten", if Ukraine opts for harmonization of legislation with the *acquis communautaire*.

Another barrier for e-commerce development is a prohibition for post services and independent couriers to accept cash payments on behalf of online sellers. Delivery services would be more effective if they were agents of payment systems or could conduct money transfers. The online payments market would also have better opportunities for growth if Ukraine allowed full-featured circulation of digital currency. We appreciate that Ukrainian sellers and customers have been allowed to use foreign digital currency, though only for settlements under cross-border transactions. Furthermore, foreign digital currency may be used solely if it is issued by foreign financial institutions included into the relevant register of the National Bank of Ukraine.

Therefore, it is still necessary: (i) to grant non-bank financial institutions the right to issue digital currency; (ii) to permit single-tax payers to receive payments in digital currency (currently qualified as nonmonetary payments); (iii) to allow entrepreneurs to receive payments in the digital currency legally issued by foreign financial institutions, including from Ukrainian residents; and (iv) to raise or cancel the limit for the amount of digital currency that can be used.

IPR Protection

Unfortunately, doing online business in Ukraine also means lacking efficient tools protecting from IPR infringements and some forms of unfair competition. It is vital to establish a procedure for capturing IPR infringements on the Internet and to ensure their admissibility in evidence in courts, provided they are properly documented by a protocol made by notary and/or an expert finding that may be produced promptly and/or a certificate issued by the state authority. In any case, the plaintiff should have an opportunity to snapshot the online infringement as soon as practicable. In addition, it is reasonable to make a list of efficient methods of copyright protection on the Internet. It could be an equivalent of the Digital Millennium Copyright Act applied in USA or a special procedure for obtaining injunctions or other. Under all circumstances, the methods should be feasible.

Also, rights for TM need effective methods of protection on the Internet. New express provisions of law should support infrequent judgments on termination of domain name delegation and domain name transfer to the party affected by TM infringement. Disputes regarding domain names of .ua domain zone should be settled in accordance with a clearly shaped procedure (*e.g.* an equivalent of the UDRP). In addition, it is reasonable to consider establishing of the national arbitration body specialized on IT-related disputes, including cyber squatting. The law should address an array of other domain name related issues, in particular, domain name (right to use the domain name) should become an object of civil circulation, which would allow to pledge or otherwise dispose of it.

Technologies for Government

While trying to create the digital agenda for Ukraine, its state authorities do not yet have access to cloud computing. Using clouds for government purposes will help to implement e-document flow and e-government services in less time and at lower cost. Moreover, official recognition of cloud safeness will propel Ukrainian data processing industry. Open-source software is another must have for state authorities though, unfortunately, still prohibited for them.

World Best Practices

Lacking such popular investment instruments as convertible notes, stock option plans or other, Ukrainian entrepreneurs are forced to establish companies abroad. Further improvement of corporate law is important for startup environment and retaining of capital in Ukraine. Especially noteworthy innovations are non-compete and non-solicitation provisions: though typical for contract in IT industry, they are void and unenforceable according to the Ukrainian legislation. Such provisions should be applicable to top-management, PMs and other senior staff of the companies, who possess strategic information on company's plans, finances, clients and other.

Investments into the product development industry would skyrocket after removing of conflicting provisions of the Civil Code and the Copyright Act of Ukraine. The legal framework should be explicit regarding the copyright to works made for hire and the moment of the employer's acquisition of rights to them. In addition, harmonization with EU legislation should take the form of aligning the scope of copyright protection of computer programs and databases with the Council Directive 91/250/EEC and Directive 96/9/EC of the European Parliament and the Council.

Unless executed in writing, licenses granted on terms of GNU and Creative Commons communities are void according to the Civil Code of Ukraine. While used globally for free, copyrighted works from all over the world are not available for Ukrainian developers because of archaic legislation. Thus, public licenses should be legalized.

However, celebrating simplification in currency control the small IT business faces overregulated tax policies and is hopeful of the elimination of certificates of acceptance for accounting of cross-border transactions. Therefore, complex simplifying of starting and doing business in Ukraine would also be for the benefit of IT industry.

Tax

Tax legislation should be made more clear and unequivocal. In particular, there might be a situation when a payment for computer program could be treated as "royalty" according to the National or International Accounting Standards, but cannot be treated as "royalty" according to the general terms of the Tax Code of Ukraine. In addition, use of terms "computer program" and "program production" is controversial regarding taxation of the (i) alienation of exclusive proprietary copyright; (ii) issuing of end-user license; (iii) sale of copies of computer programs (both on cd/dvd disks and via Internet).

Scientific Institutions / Cyber Security

Ukrainian IT industry could also benefit from introducing the mechanisms of commercializing the prospective technologies developed by local scientific institutions. While there is no strict prohibition on licensing or trading in the intellectual property created by scientific institutions, respective legislation suggests that state-financed institutions may conduct solely scientific activity. Inconsistencies similar to the abovementioned should be eliminated. There is also an issue of conservative management at scientific institutions. Adopting U.S. practices when institutes have a dedicated position of the innovation manager responsible for fund raising and cooperation with investors would be of great help for both the IT industry and Ukrainian science.

Government measures regarding cyber security are counteractions against the aggressor. Unfortunately, there is no clear vision of Ukrainian cyber security strategy, nor there is a clear division of responsibilities and powers between the state authorities responsible for cyber security. Until the strategy is shaped, there is a need for public officers and state authorities to develop standards of data storage, use of e-mail and other online services, antivirus software or other. We highly appreciate the opportunity of applying the well-known and popular digital data encryption specifications like the symmetric block cipher AES, which was recommended for use in cryptographic information protection facilities by the State Service of Special Communications of Ukraine in June 2015.

14. Development of Infrastructure (PPP). Edited by Arzinger.

At the moment the core legislation regarding public private partnership (PPP) envisions, as main forms of PPP:

- (i) concessions,
- (ii) joint ventures, and
- (iii) PPP on the basis of investment agreements.

Experience shows that one of the most efficient model of concession is the model where the balance holder/user of the state or municipal property (for instance, a port authority in regard to sea ports), implementing the will of the state or municipal community, simultaneously acts as a grantor and as a landlord of land plots transferred under a concession.

In accordance with the Law of Ukraine "On Concessions" a grantor is always a state or municipal authority. In case of concessions of property of state enterprises it is a core ministry, and is the body authorized to manage property of relevant enterprises. In order to perform concession activities an investor should obtain (in addition to a right for a concession object) a right to use a land plot where a concession object is located. Law of Ukraine "On Concessions" separates the procedure of conclusion of a concession agreement from the procedure of conclusion of a lease agreement regarding certain land plot where a concession object is located. Such lease agreement must be concluded subject to provisions of the Land Code of Ukraine and Law "On Land Lease". Local state administrations may act as landlords in regard to land plots owned by the state may act. Because the Law of Ukraine "On Concessions" does not regulate an issue where a landlord and a grantor are not the same person, in practice there may be a situation, when in order to start a concession activities, a concessioner will be required firstly to conclude a concession agreement and then to get a lease over a land plot which is state property. Such rules impede the opportunity to implement investment projects on the basis of a concession. Therefore there are no concession agreements concluded in Ukraine as of today.

Defects of the core legislation may also be observed in the area of PPP in regard to protection of investments (*e.g.* it is impossible to get ownership of objects established within PPP, and there are imperfect mechanisms of reimbursement of investments).

In addition, the procedure of organization of a tender for selection of a private partner as well as procedures of implementation of initial stages of PPP are too bureaucratic in relation to private partners (in particular, relevant legislative acts envisage large amounts of superfluous paperwork), which leads to risks of delayed/non-productive implementation of projects for private partners.

In order to rectify aforementioned issues following steps are proposed:

- (i) To amend the Law of Ukraine "On Public Private Partnership", the Law of Ukraine "On Concessions", the Law of Ukraine "On Land Lease", the Land Code of Ukraine to envisage the right of state and municipal enterprises, which are holders/users of state or municipal property, to be simultaneously grantors and landlords of land plots, being necessary for concession activities, when concluding concession agreements;
- (ii) To amend the Law of Ukraine "On Public Private Partnership", the Law of Ukraine "On Concessions", the Law of Ukraine "On Land Lease", and the Land Code of Ukraine and to provide that in case of lease of land plots to a private partner for PPP purposes, a public

- partner is responsible for development of technical documentation regarding organization of the use of land and for a land plot allotment;
- (iii) To envisage in the Law of Ukraine "On Public Private Partnership" and in the Law of Ukraine "On Concessions" several models of concession activities on the basis of recommendations of the World Bank, which allow private partners to obtain ownership of objects established within PPP;
 - (iv) To provide transparent, convenient and flexible options for compensation of investments that were made into PPP objects;
 - (v) To simplify the procedure for obtaining permits, necessary for a private partner in order to implement PPP projects;
 - (vi) Create form electronic tender offers for PPP projects;
 - (vii) Provide an opportunity for a private partner to request benefits regarding payment of concession fees in case of negative results of commercial activities not only in relation to unprofitable or distressed objects having social significance, but also in relation to other concession objects;
 - (viii) Eliminate requirement to pay concession fees for objects being built (established) by a private partner at its own expense.

Transport

The main disadvantage of state regulation in the area of road and railroad transport is the absence of legal possibilities to make private investments into road and railroad infrastructure. Further, in the railroad sector the impossibility to perform carriage by private carriers should be also mentioned.

In case of river and sea carriages problems that should be separately mentioned include absence of transparent methodology to determine rates of port dues, charging of vessels flying Ukrainian flag (including those performing coastal voyages) in foreign currency, and also absence of the modern legislation regarding regulations of river carriage.

To rectify aforementioned issues it is proposed:

- (i) To enact the Law of Ukraine "On Railroad Transport" and envisage therein the possibility to establish private objects of railroad infrastructure (including stations and main lines) and also the possibility to perform railroad carriage by private carriers;
- (ii) To amend the Law of Ukraine "On Roads" and to envisage the possibility to establish private objects of railroad infrastructure (including highways);
- (iii) To amend the Law of Ukraine "On Sea Ports of Ukraine" and to envisage that setting rates of port dues is only allowed if made on the basis of the methodology of calculation of rates of port dues adopted by the Cabinet of Ministers of Ukraine. To develop and to adopt appropriate methodology with regard to provisions of Proposal for Regulation of the European Parliament and of the Council establishing a framework on market access to port services and financial transparency of ports;
- (iv) To amend the procedure for charging and rates of port dues and to envisage that port dues charged from vessels flying Ukrainian flag to be paid in the national currency of Ukraine;
- (v) To enact the Law of Ukraine "On Internal Water Transport" where, among other things, should be envisaged that investments of entities made into dredging of internal water ways are subject to reimbursement at the expense of the river fee;
- (vi) To develop and enact the law that will establish the legal background to the land use and ownership to secure airports development, PPP relationship, airport charges policy across different ownership etc.

COMMENT BY: Volodymyr Bilotkach for VoxUkraine

The general approach of introducing private investment into the infrastructure sectors of the economy is in line with the general trends. Overall, involvement of private sector can take the forms of private-public-partnerships (concessions); competition of private firms for provision of services, while keeping infrastructure in public ownership; and privatization of infrastructure objects. While I understand that the white paper is probably deliberately leaving the room for maneuver, I believe that focusing on concessions alone creates an impression that you are advocating for a particular option from among the available alternatives, without giving much justification for your choice. Subject to this, I would also like to bring your attention to the following points:

- As I understand that you do not propose removing regulation from either of the industries covered by this section, it would be a good idea to suggest the appropriate regulatory mechanisms. For instance, it might be a good idea to establish sectoral regulators for rail, air, and water transport outside of the Ministry of Infrastructure's framework, to allow them to act as independent regulator – in a similar way, for instance, as such regulators are set up in the UK;
- Establishing appropriate institutions for competition for concessions is instrumental for the system of PPPs to work as intended. The proposal to "envisage an opportunity to form electronic tender offers for PPP projects" "appears too generic, especially if we, for instance, talk about a long-term concession to run a major sea port. Such concessions normally require establishment of a clear and transparent system for reviewing the bids and communicating the award decisions to the public.
- The suggestion to introduce private ownership into railroad sector is rather vague. Perhaps this is done to allow for the above-mentioned room for maneuver (as it is not clear at this stage whether Ukraine will move towards a US-style system of vertically integrated private firms or a UK-type system with franchise bidding for services, and a single regulated operator of the mainline infrastructure).
- Airports are overlooked. In this sector developed economies have accumulated substantial experience with the private sector involvement, including concessions and privatization of airports.

15. International Trade and WTO, E-Commerce. Edited by Baker & McKenzie.

Ukraine's economy is dependent to a very significant extent on international trade. However, the volumes of international trade of Ukraine have declined significantly over the last several years primarily because of either very poor regulation in Ukraine or an inability of the Ukrainian Government to protect the interests of Ukrainian exports in foreign markets. Apart from lack of experience in international trade matters in many markets, Ukrainian businesses do not seem to have sufficient information about the remedies available to them under international trade treaties of Ukraine and the Ministry of Economy has only recently started to focus on the right issues of international trade development, without clear successes yet.

Apart from political instability in 2014 and 2015, Ukraine faces many economic problems and export challenges. First of all, because of dependency on the Russian and CIS markets, the deterioration of trade relations with the Russian Federation significantly undermined the economy of Ukraine. The export competitiveness is also affected by such factors as: (1) significant decline in exports from Donetsk and Lugansk regions; (2) low competitiveness of domestic products in the EU market; (3) low share of services in trade exports; (4) low share of small and medium enterprises in exports.

In order to increase the export potential of Ukraine, the following fundamental steps should be taken:

- (i) development of a clear and transparent legal framework regulating the activities of the Inter-Departmental Commission on International Trade;
- (ii) elaboration of the national export strategy envisaging the priorities for state trade policy;
- (iii) implementation of the institution of trade representatives for the promotion and development of Ukrainian export abroad;
- (iv) introduction of changes to the Ukrainian trade remedy laws, in particular:
 - the Law of Ukraine "On Protection of the Domestic Producer against Dumped Imports". The Law regulates the conduct of anti-dumping investigations in Ukraine, specifies the powers of the authorities and regulates the procedure of the investigation. Generally, the Law corresponds to the WTO Agreement on implementation of Article VI of GATT, but still has some issues that should be clarified. First, certain changes should be made in the definitions of dumping, injury and causation to bring them in line with WTO practice. Second, and most importantly, a new legal framework should regulate in detail the dumping margin calculations, their methods and practices according to existing standards in the EU and the USA. This would allow more options for domestic producers to defend their interests against unfairly traded imports;
 - the Law of Ukraine "On Application of Safeguard Measures against Imports to Ukraine". The Law regulates the conduct of safeguard investigations in Ukraine. Since safeguard measures are implemented against fair trade practices it is vitally important to have clear-cut regulations in this sphere. The Law requires modification in connection with (1) the definition of a safeguard measure and its forms that may be used against imports; (2) specifications of procedure in connection with the rights of applicant in each stage of the investigation and (3) specification of safeguard measure calculations, including its methodology;

- the Law of Ukraine "On Protection of Domestic Producer against Subsidized Imports". The Law regulates the conduct of countervailing investigations in Ukraine. In fact, after becoming a WTO member, Ukraine held only one countervailing investigation. The reason behind such situation is not only the complexity of economic calculations, but rather a general legislation loophole where certain provisions of the Law are not in line with the WTO legal framework. Our general opinion on this is that the definitions of subsidy and its forms should be made very clear, the methodology of the countervailing duty should be developed preferably in a separate regulation according to the EU and the US best practices. Currently, the Cabinet of Ministers of Ukraine initiated the revision of this Law. In particular, on 21 August 2015, the Draft Law "On Amendment of the Law of Ukraine "On Protection of the Domestic Producer against Subsidized Imports" No. 2517a was put on the agenda of the Parliament of Ukraine. Aiming to harmonize the national legislation with the relevant WTO Agreement, the abovementioned Draft Law will enable the national authorities to act within the WTO framework during the conduct of the anti-subsidy investigations.
- (v) abolishment of additional import duty introduced by the Law of Ukraine "On Measures of Stabilizing Balance of Payment of Ukraine in Accordance with Article XII of GATT". The additional importation duty is widely regarded as contradicting the nature of measures, envisaged by GATT Article XII and negatively affects trading status of Ukraine. Potentially, it may also result in retaliation from other concerned countries and affect the temporary liberalized trading regime between Ukraine and the EU. Significantly, this additional duty has affected negatively Ukrainian businesses importing foreign components into Ukraine and, in fact, has decreased the volume of international trade to very significant extent;
- (vi) acceleration of conforming state standards in respect of goods and services with corresponding EU standards, in order to proximate Ukrainian producers to the EU quality standards and promote competition in the internal market the market;
- (vii) fundamentally reforming the existing currency control regime by way of steady movement towards liberalization of capital movement. In particular, it is strongly recommended to abolish rules on compulsory sale of foreign currency by Ukrainian banks, "90 days" settlement requirement, restrictions on repatriation of foreign investments, compulsory registration of cross-border loan facilities, etc. The mentioned rules have proven to be not only obsolete and contradicting Ukrainian Constitution, as well as the EU rules of free movement of capital, but also ineffective and unnecessary. Liberalization of currency control regime will significantly expand possibilities for development of diverse trade finance instruments in Ukraine and simplify settlements under international trade contracts;
- (viii) complete cancellation/termination of the Law of Ukraine "On Foreign Economic Activities", as it creates difficulties for international trade operations, inconsistencies in regulation of international trade operations and interferes with contractual relations of the parties. This law is an atavism of a soviet system and implements into Ukrainian law approaches which no longer exist in even other post soviet counties. In particular, such special economic measures as individual licensing of foreign economic activities and temporary suspension of foreign economic activity block activities of businesses and create an extremely negative image of Ukraine as a counterparty.

- (ix) intensifying initiation of dispute settlement mechanisms within WTO, aimed at protecting interests of Ukrainian exporters from overt and disguised discrimination by other WTO members. In the recent years, the Russian Federation has introduced a series of restrictions on import of products originating from Ukraine, such as agricultural goods, confectionary products, poultry, alcohol, machinery, *etc.* Even though the majority of such restrictions were justified based on relevant provisions of WTO TBT and SPS agreements, there have been expressed numerous concerns that these restrictions were guided by current political agenda and had discriminatory character. The cooperation between Ukrainian businesses and the Government in pursuing protection of Ukrainian exports in this domain should be expanded;
- (x) introduce clear rules of regulation of e-commerce in Ukraine by way of adopting respective specialized law. Introducing a preferred taxation regime for e-commerce operations would boost the e-commerce infrastructure and facilitate its steady development;
- (xi) adoption of more keen attitude towards combating smuggling, production and distribution of counterfeit products, usage of unfair trade practices by businesses in order to improve Ukraine's position in international IP protection rankings (*e.g.*, USTR Special 301, GIPC International Index, *etc.*), which currently reflect negative investors' perception of Ukraine's system of IP rights protection, and in order to promote fair competition in the internal market.

16. Intellectual Property. Edited by Sayenko Kharenko.

Intellectual property laws show enviable immunity to any amendments for years. IP laws remain intact despite developing various initiatives how to improve, despite extensive and intensive public discussions of *n*-versions of concepts and drafts laws in relation to various IP issues, and despite high demand from business. However, today is right time to change the legal framework in relation to intellectual property. Some issues are close to being solved, close as never before. Below we highlight main legal issues which solving should significantly improve efficiency of protection of intellectual property in Ukraine:

- (i) The State Register of Designs is flooded with offensive design patents, which have nothing to do with novelty, *i.e.*, protection of new, innovative and competitive designs. Such patents are obtained by 'patent-trolls' for common designs like designs of bulbs, cloth hangers, AA batteries, *etc.* The main intention to obtain such design patents is to further record such patents with the Customs Registry of Intellectual Property Objects ("Registry") and claim payment of royalty from genuine producers for release of each shipment subject to customs clearance. Such records are now dominating in the Registry. The core legal problem of this issue is that the Ukrainian Patent and Trademark Office is not obliged to examine the novelty of the design filed for registration (even if lack of novelty is obvious) and issues the design patents against formal promise of an applicant that the design is new.

This issue requires immediate solving. There is already Draft Law No. 2352¹³ registered with the Ukrainian Parliament on 10 March 2015, which should significantly improve regulation of this issue and eliminate any further negative effect on business (public access to design applications by third parties and possibility to oppose such applications, including introduction of post-grant opposition).

- (ii) Trademark owners have limited legal tools for protection of their rights. In particular, there is no legal opportunity for trademark owners to claim recovery of statutory damages (one-time compensation for infringement of their rights) instead of recovery of actual damages, which are difficult to prove. Recovery of statutory damages has proven its efficiency with respect to protection copyright and should be available in Law of Ukraine "On Protection of Trademarks" No. 3689-XII dated 15 December 1993 (as amended) as well. There are already Draft Laws No. 2157a¹⁴ and No. 2696¹⁵ registered with the Ukrainian Parliament on 24 June 2015 and on 21 April 2015 respectively, which should help to solve this issue.

Moreover, efficient opposition of trademark applications by the interested / affected third parties, as well as opportunity for third parties to claim final decision with respect to trademark application to the Board of Appeal at the Ukrainian Patent and Trademark Office (today only a trademark applicant enjoys this right) are long-awaited improvements of Ukrainian trademark laws. There is already Draft Law No. 2696¹⁶ registered with the Ukrainian Parliament on 21 April 2015, which also aimed at solving these legal issues.

- (iii) Similar amendments with respect to recovery of statutory damages require changes to the

¹³ http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=54344

¹⁴ http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=55721

¹⁵ http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=54874

¹⁶ http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=54874

Law of Ukraine "On Protection of Rights to Inventions and Utility Models" No. 3687-XII dated 15 December 1993 (as amended) and Law of Ukraine "On Protection of Designs" No. 3688-XII dated 15 December 1993 (as amended).

- (iv) There is also a detrimental situation with offensive 'umbrella' patents for already known inventions. Although such patents do not comply with patentability requirement, such patents grant unreasonably broad rights for its owners that give them an opportunity to claim infringement of their patents by third parties who legally use them. Solving this issue would require raising awareness and deepening skills and knowledge of the officers of the Ukrainian Patent and Trademark Office with respect to use of foreign data bases of patents in English and enhancing professional level of such officers with respect to patent searches at the stage of substantial examination of an application.
- (v) Intellectual property rights holders do not have sufficient control over destruction of counterfeit goods (*e.g.*, not involved in enforcement proceedings), so such goods often again appear on the market or are transferred for the needs of healthcare, educational institutions, organization of cultural and social sphere, other institutions and organization funded from state or local budgets. Ukrainian laws should be amended to ensure efficient and complete destruction of counterfeit goods and provide the intellectual property rights holder the opportunity to be a party to the destruction process.
- (vi) According to the current legal framework, intellectual property rights are jointly owned by employer / customer and employee / developer, unless otherwise stipulated by a written agreement (Sections 429, 430 of the Civil Code of Ukraine). Moreover, moral rights in intellectual property are not assignable to employers / customers. This legal regulation does not serve a fair balance of interests of an author and employer / customer. Instead, it jeopardizes legal risks for employers / customers where they invest money in development of a certain product (innovation) and also are required to use unreasonable endeavors (significant paperwork with each employee / developer) to ensure protection of their rights. Therefore, Ukrainian laws should be harmonized to the best foreign practices in this area. Article 181 (4) of the EU-Ukraine Association Agreement already stipulates that employers shall enjoy all intellectual property rights in the software created within employment relations from the moment of creation of the intellectual property. There are already draft laws No. 1812-1¹⁷ and 2447¹⁸ registered with the Ukrainian Parliament, which are aimed at solving these issues and which deserve support from business community. Adoption of one of these draft laws should significantly improve the situation with protection of IP rights of employer and customer within employment / civil law-based relations with employees / developers.

Notably, we call for consolidated position of lawmakers and other authorities involved in lawmaking activity because there also draft laws which are still not submitted to the Parliament, but drafted to amend Ukrainian laws with respect to the said issues. Furthermore, there is also one draft law No. 1812¹⁹ registered with the Ukrainian Parliament, which is in conflict with the above two draft laws and should yield to these two as more comprehensive and solving more topical issues for business.

¹⁷ http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=53854

¹⁸ http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=54505

¹⁹ http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=53660

- (vii) Collective management of copyright and related rights require adoption of a separate law which should comprehensively and clearly regulate this sphere (*e.g.*, legal status of collective managements organizations ("CMO") (not overly clear today), extension of additional legal grounds for CMOs for acquisition of the right to manage copyright and related rights, establishing a legal mechanism of control of the state over activity of CMOs, collection and fair sharing of royalty, *etc.*).

There is Draft Law No. 2943²⁰ registered with the Ukrainian Parliament on 21 May 2015 which aims to amend the existing Law of Ukraine "On Copyright and Related Rights" for the purposes of improving the efficiency of collective management of copyright and related rights, rather than to adopt a separate law. This draft law is differently perceived by business community circles. Moreover, compliance of this draft law with Directive 93/83/EC is questionable. Finally, a conflicting draft law No. 2265a²¹ was registered with the Ukrainian Parliament on 03 July 2015. The latter draft law suggests adoption of a separate law on collective management of copyright and related rights.

- (viii) Efficient protection of copyright on the Internet requires significant revisions to Law of Ukraine "On Copyright and Related Rights" No. 3792-XII dated 23 December 1993 (as amended). Revision mainly relates to aligning the said law with the EU-Ukraine Association Agreement and E-Commerce Directive 2000/31/EC, introduction of a procedure of takedown of allegedly copyright infringing content, and improvement of the mechanism of capturing evidences of copyright infringement on Internet. Business is waiting for the respective amendments for more than ten years. A number of draft laws were developed in this regard but not one of them go further than to become a publicly debatable concept or, not to mention, a draft law. The State Intellectual Property Service of Ukraine announced its work of old-new draft law in this regard, but again has a long way to go.

²⁰ http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=55308

²¹ http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=55869

17. *Criminal Law and Criminal Proceedings. Edited by Arzinger.*

Almost a year has passed since the first edition of the White Paper was released. Unfortunately, most of the problems addressed in it are still unsolved.

The existing tools under criminal and criminal procedure law are still used for exercising pressure on business.

- (i) In particular, the practice of registration with the Unified Register of Pretrial Investigations and criminal procedure investigations based on results of tax audits of taxpayers is still common and results in additional tax accruals.

The most widespread are criminal proceedings on tax evasion under Article 212 of the Criminal Code or misappropriation of public funds under Article 191 of the Criminal Code in case of a reduction of VAT refund amounts.

Such criminal proceedings are registered in connection with the transfer of tax audit materials to the police after the relevant tax notices are issued. If a taxpayer applies the stage of administrative appeals, the time of transfer of audit materials to law enforcement agencies is deferred until such appeal proceedings are completed. Tax audit materials are transferred to law enforcement agencies based on provisions of Para 2.5 of the Guidelines on Interaction Procedure for Departments of the State Fiscal Service in arranging, conducting and implementing the materials of taxpayer audits approved by Order of the State Fiscal Service of Ukraine dated 31.07.2014 No.22. This Order did not pass the registration mandatory for regulations and thus cannot establish rules as compulsory codes of conduct.

As a result, taxpayers are involved in two processes based on tax audit outcomes: tax disputes in administrative proceedings and criminal proceedings. At the same time, taxpayers are pressured with criminal proceedings alleging tax evasion long before any competent court rules on whether the taxpayer had to pay such tax liabilities. Moreover, criminal proceedings against taxpayers actually continue even after a judgment cancelling the relevant tax notices comes into effect.

Considering that the acts of tax authorities have quite a negative impact on business and investment climate in Ukraine, the need to amend the relevant laws is generally seen as an urgent one. Thus, as a quick fix, it is proposed to amend the Guidelines on Interaction Procedure for Departments of the State Fiscal Service in arranging, conducting and implementing the materials of taxpayer audits approved by Order of the State Fiscal Service of Ukraine dated 31.07.2014 No.22. In particular, the time of transfer of audit materials to law enforcement agencies to settle the issue of registration of criminal proceedings would be deferred until the entry into force of a judgment dismissing a taxpayer's claim to cancel tax notices in case a taxpayer is late paying relevant tax liabilities within the period provided for by tax regulations.

- (ii) Where taxpayers file statements alleging indices of criminal offences in actions of officials and public servants, cases where law enforcement agencies breach their obligation to register criminal proceedings upon receipt of appropriate statements or notices of criminal offences are still quite widespread.

Law enforcement officers ignore the requirement to promptly enter information about a committed crime into the Unified Register of Pretrial Investigations — within a 24-hour period as set in Article 214 of the Criminal Procedure Code of Ukraine — and treat them as citizen appeals. Further, law enforcement officers refuse to register criminal proceedings in the Unified Register of Pretrial Investigations and justify their decision by alleging a lack of *corpus delicti* in an applicant's statement. However, according to the law, whether a person's actions contain *corpus delicti* shall be decided in the course of pretrial investigation within existing criminal proceedings rather than based on personal beliefs of the relevant police officer at the stage of familiarization with the application/notice of offence.

In this light, given the lack of any constraints for police officers, we consider it prudent to introduce disciplinary liability for pretrial investigation authorities violating the requirements of Article 214 of the Criminal Procedure Code of Ukraine.

- (iii) A new problem for business in 2015 is the increasing frequency of cases where a verdict is passed regarding founders/directors of a contractor to approve a guilty plea. The content of such a plea (agreement) normally specifies the list of buyers, including the taxpayer, as well as transactions qualified as sham business. Tax authorities then use such information as a prejudicial fact and calculate additional liabilities as well as impose fines on the relevant taxpayer. In turn, law enforcement agencies commence criminal proceedings regarding officials of that taxpayer.

At the same time, though such verdicts approving guilty pleas are directly related to taxpayers and their delivery transactions, a taxpayer learns about them from tax audit materials only after verdicts against them come into effect.

Despite the fact that verdicts approving settlements on pleading guilty, where facts are established regarding third parties' deliveries, are directly in conflict with provisions of criminal procedure regulations (Para 3 part 7 Article 474 of the Criminal Procedure Code of Ukraine prohibits approval of settlements on pleading guilty, which violate the rights, freedoms or interests of the parties or other persons), such taxpayers cannot appeal the relevant verdicts as they are not subjects of appeal under part 4 Article 394 of the Criminal Procedure Code of Ukraine.

Therefore, it is proposed to amend part 4 Article 394 of the Criminal Procedure Code of Ukraine by adding a rule stipulating the right of persons that are not parties to criminal proceedings, but whose rights, freedoms or interests are violated by such a settlement on pleading guilty, to appeal against verdicts that are in conflict with Para 3 part 7 Article 474 of the Criminal Procedure Code of Ukraine.

- (iv) Another means of exercising pressure on business is the practice of investigations regarding the so-called "factual" criminal proceedings regarding a legal entity's officials. In this case no notification of suspicion is handed to officers. However, they are summoned for interrogations as witnesses time and again. In fact, they are treated as "suspected witnesses." In connection with such procedural specifics "suspected witnesses" do not have the same set of rights as suspects in criminal proceedings and thus cannot make their defense effective within criminal proceedings. At the same time, pretrial investigation

authorities are actually not limited in the timeframe of criminal proceedings until they serve a notice of suspicion.

To reduce abuses, it is proposed to extent the rights similar to those vested in persons qualified as suspects to witnesses who have been interrogated more than two times.

- (v) It is also important to mention about multiple violations of the rights of defendants and representatives, as well as their clients.

For example, Article 236 of the Criminal Procedure Code of Ukraine establishes a right (not an obligation) of the investigator / prosecutor to invite defense counsel or a representative of the person to participate in a search. In practice, investigators refuse defendants to participate in mentioned investigative action even if the defendant is located directly at the place of the search.

In this regard, it is appropriate to amend Article 236 of the CPC of Ukraine, providing a duty of investigator and prosecutor to allow a lawyer (defense counsel, representative of the person) to participate in the investigative action, when he arrives at the venue.

Moreover, section 7 of Article 236 gives the right to the investigator during the search to remove not only the documents and items specifically mentioned in the court decision or seized by law from circulation, but also other things and documents that often do not directly linked to the criminal proceedings (so-called "temporarily seized property"). The existence of this provision is extremely controversial, because in practice the return of such property for the owner becomes a challenging task until the end of the criminal proceedings.

The list of best projects for donors

- Assist with making amendments to tax legislation related to transferring of audit materials to law enforcement agencies for registration of criminal proceedings.

The list of Quick Wins

- Introduce disciplinary liability for pretrial investigation authorities violating the requirements of Article 214 of the Criminal Procedure Code of Ukraine.
- Add to the Criminal Procedure Code of Ukraine a rule stipulating the right of persons that are not parties to criminal proceedings, but whose rights, freedoms of interests are violated by settlement on pleading guilty, to appeal against verdicts, which approved such settlement.
- Making amendments to the Article 236 of the Criminal Procedure Code of Ukraine related to defender's admission to participate in the investigative actions.

The list of rules and GOU bodies that must be abolished

- Para 2.5 of the Guidelines on Interaction Procedure for Departments of the State Fiscal Service in arranging, conducting and implementing the materials of taxpayer audits approved by Order of the State Fiscal Service of Ukraine dated 31.07.2014 No.22.

18. E-governance. Edited by CMS Cameron McKenna.

In the modern world, a transparent and comprehensive E-governance system is a keystone of success of the whole governance of a respective state. The status of development of the E-governance processes can show the total level of modernization of a country as well as evidence the ease of starting and conducting business which ultimately impacts the investment climate in a region.

E-governance is commonly treated as an electronic interaction at various levels with the state always being a party to it. Commonly, when talking about the electronic government one means any of the following forms of interaction:

- (i) government to citizens;
- (ii) government to government (interaction of various governmental authorities);
- (iii) government to businesses; and
- (iv) citizens to government.

Ukraine is a heavily regulated country with complicated and lengthy administrative procedures, creating a lot of obstacles for businesses to work normally.

Although public authorities have already taken certain steps towards overcoming the above problem, it is obvious that there are still a lot of things to be done. Below we address those issues.

Government to Citizens (G2C)

G2C aims at connecting citizens to government by improving public services. For the past year, Ukrainian Parliament adopted a long-awaited law²² making some important information accessible by the public (*e.g.* state registers) by means of open online access. Additionally, the government is moving a long way to establish and develop the E-services system.

Open Online Access To Information

On 1 May 2015 the amendments to the Law of Ukraine on Access to Public Information came into effect.

By those amendments state authorities have to publish certain public information in open source data format, *e.g.* at their official web-sites, as well as on the unified state portal of open source data. The individuals are, in turn, entitled to copy, distribute and use such information.

According to the law the list of open source data that must be disclosed to public has to be adopted by the Cabinet of Ministers of Ukraine (CMU). After a long pause, on 21 October 2015 CMU has adopted a relevant resolution on open data, which actually launches the development of an open information infrastructure of the country. Specifically, according to the resolution of the CMU, the whole variety of databases, including the register of patents of Ukraine, the register of medicines and prices on medicines, *etc.*, will be soon placed on the unified state portal of open source data <https://data.gov.ua>

²² Law of Ukraine "On Amendments of Certain Legal Acts on Access to Public Information in Open Source Data Format".

Electronic Services

The biggest slice of the E-governance cake is clearly the state electronic services which may be openly used by the public. The majority of Ukrainians simply look at the E-governance as the process of state services going online. In the eyes of many Ukrainians the picture of success of the E-governance reform looks like completing the majority of formalities without coming out of their homes.

Having that in mind, in state program Ukraine 2020²³ the President and the CMU announced the priority reform to provide and develop the electronic services to citizens and businesses. Following this, numbers of state authorities are now raising various initiatives to move the interaction with the state into the electronic platform.

What we have

Specifically, in March 2015, the Ministry of Justice launched its own e-portal of services (<https://minjust.gov.ua/ua/services>). Unfortunately at present the portal has still little to demonstrate to the visitors.

The Ministry of Economic Development and Trade of Ukraine is also planning to launch a single state portal of electronic services in autumn of this year.

Further, citizens and businesses obtained an opportunity officially to declare the start of the constructive works via the web-page <https://e-dabi.gov.ua>, or prepare and submit the tax reporting through the taxpayers e-cabinet at <http://www.sfs.gov.ua/>.

While the ministries are providing E-services on the national level, local authorities are also willing to implement their own online platforms for providing e-services. Vinnytsya city council has established the unified Centre for Administrative Services that the city council provides and the plan is to move them into electronic format as much as it is possible. The E-services like the one in Vinnytsya are now being developed in more than 15 cities in Ukraine

In parallel to the approaches of the state and municipal authorities, in June 2015, volunteers opened the E-services portal: <https://iGov.org.ua> which, as of today, combines on-line services of more than 60 ministries and agencies and offers services both for citizens and for businesses.

Currently various portals, web-sites, e-cabinets offer similar and sometimes the same e-services, which fact may be confusing to the public. Therefore, in order correctly to promote the E-governance services to the society and let them being used in a right manner, the best way seems to be to consolidate all state online services at a single state portal. For that a comprehensive state program of development of electronic services should be implemented.

Barriers and ways out

One of the main barriers for the implementation and successful use of the electronic services is the problematic identification of the end user of those services. Despite the existence of the

²³ Decree of the President of Ukraine No. 5/2015 dated 12 January 2015 "On Sustainable Development Strategy "Ukraine 2020".

concept of the electronic digital signature in the country, it is still not common for most of the Ukrainians. By way of illustration, at present, there are around one million issued electronic digital signatures in Ukraine and most of them are kept by legal entities. Therefore, to make electronic services simple and commonly used by the ordinary customers, an alternative end user identification mechanism should be developed. Those may be, for example, one-time identifier (the special code forwarded to the customer's mobile phone or e-mail) that has been already provided in the recently adopted E-Commerce Law²⁴ or establishment of the special (but easily accessible) points of access to the electronic services.

Another barrier is underdeveloped legislation which slows down the whole process. In practice, even if the authority is open to E-services initiatives, it will be very often unable to issue certain certificates/provide official confirmation on-line due to various requirements to submit various documents in hard copies, notarized documents, *etc.*

For that barrier to be removed a set of laws providing the detail procedure for rendering electronic services to citizens and businesses should be developed and approved as soon as possible. In addition, the Strategy for the Development of the E-governance in Ukraine should be also quickly adopted in a short-term prospective.

Priorities And Objectives

We see the following major priorities in the field of the development of G2C relations:

- Development of current electronic services and introducing new ones (for example car registration, applying for doctor appointments, *etc.*); and
- Preparation and adoption of respective set of laws regulating in details the procedure of electronic services (as described above).

Government to Government (G2G)

G2G can also be referred to as an E-administration. It involves improving governmental processes by cutting costs, managing performance and by improving strategic connections within government.

New State Authority

On 4 June 2014 the CMU has reorganized the Ukrainian State Agency for Science, Innovation and Informatization to the new authority — State Agency for E-governance of Ukraine (E-governance Agency). The newly established central executive body is responsible for implementing the state policy in the field of information, E-governance, development and use of national electronic information resources (<http://dknii.gov.ua/>).

In practice, during the year of its activity, the E-governance Agency has been assisting the other state authorities with implementing electronic services, developing the concept (policy) in the field of E-governance and drafting governmental regulations.

²⁴ Law of Ukraine "On Electronic Commerce" adopted on 3 September 2015. It is yet to be signed by the President.

Electronic Documents Circulation

According to the official information, over 20,000 of pages are printed for each governmental meeting which eats up a lot of taxpayers' money. Therefore to reduce unnecessary expenses and follow the worldwide ecology trend Ukrainian government and other state authorities have to avoid this avalanche of paper circulation.

Therefore, one of the first initiatives in the E-governance sector that was announced by the Administration of the President of Ukraine and the Cabinet of Ministers was the switch to electronic document circulation.

At present, the electronic document circulation in state authorities is regulated by the Law of Ukraine "*On Electronic Documents and Electronic Documents Circulation*", the respective Resolution of the CMU and different internal orders.

Meanwhile, the existing regulations do not encourage governmental agencies using e-mail communication at all as doing that create even more bureaucracy (*i.e.*, obligatory use of electronic digital signatures, approval of the outgoing e-mail by the chief officer, *etc.*) than using the hard paper copies. As a result, E-document flow between the public offices is almost absent.

Priorities And Objectives

The next important steps in the G2G relations should be changes in the internal procedures for the documents circulation, so that most of them can be managed by the simple electronic messages exchange.

Government to Business (G2B)

This part of E-governance relations constitutes various services businesses need to obtain from the government, as well as business relations with the state. The developments, problems and perspectives of electronic services to businesses in Ukraine are fully covered by section G2C above.

In addition, Ukrainian government is now actively developing the initiative to implement the electronic public procurement.

Public Procurement

Public procurement is known as one of the most corruption-infected sectors. According to the First Deputy Minister of Economic Development and Trade of Ukraine, our state is losing UAH 50 billion every year due to non-transparent public procurement processes.

It is not a secret that one of the most effective mechanisms to overcome the corruption is to exclude the human factor and let the computer to rule the processes (like in Estonia, the Czech Republic and many other EU countries).

It has been heard a lot about the legislative initiatives with respect to the implementations of the electronic procurement. In particular, at the end of 2014, the government has submitted to the

Parliament the draft law on the implementation of electronic procurement²⁵. However, in February 2015 it was withdrawn from the Parliament with the aim additionally to develop and rework the draft.

At present, the Ministry of Economic Development and Trade of Ukraine is responsible for the reform of public procurement and, under the publicly available information, they have already prepared the draft law regarding the electronic procurement. The Ministry is expecting to submit it to the Ukrainian Parliament in October-November 2015 and the hope that it may be adopted by the end of this year.

Meanwhile, during the process of preparation of the draft law, the CMU has launched a pilot project²⁶ for the implementation of the electronic procurement. Specifically, according to the foregoing project, the state authorities may voluntarily join certain web-portals and conduct on-line procurement below the value of UAH 100,000.

One such portal is 'Prozorro' (Transparency), a pilot system of electronic public procurement that was launched by the volunteers and controlled by Transparency International. At present, this is the main private platform for electronic procurement (as of 20 August 2015 total value of all registered procurements at Prozorro platform exceeds UAH 1,7 billion) and, for example, the Ministry of Defense of Ukraine has moved all its public procurements (within the above value limits) to Prozorro.

The Ministry of Economic Development and Trade of Ukraine is expecting to move 100% of public procurement into electronic area before January 2017²⁷.

Priorities and objectives

The way to introduce mandatory electronic procurement is very straightforward and clear. The government should submit to the Parliament the transparent and comprehensive draft law and the later shall adopt it as soon as possible. Then the majority, if not all, state procurements should go on-line.

Citizen to Government (C2G)

C2G will mainly constitute the areas where citizens interact with the government in a manner other than described in section 2 above.

Electronic Petitions

The main development in the C2G E-governance area was the recent adoption by the Parliament (2 July 2015) of the amendments to the Law of Ukraine on "*Petition of Citizens*".

²⁵ Draft law of Ukraine on Amendment of the Law of Ukraine on public Procurement (Regarding Development of the Procurement and Electronic Procurement System) No. 1551 dated 22 December 2014.

²⁶ Order of the Cabinet of Ministers of Ukraine "On the Realization of the Pilot Project on the Implementation of the Electronic Procurement" No. 501-p dated 20 May 2016.

²⁷ <http://www.me.gov.ua/News/Detail?lang=uk-UA&id=26a83214-70ee-444f-ae7-646c65323c25&title=ProektZakonuproPublichniZakupivliZakladeOsnoviNovogoEtapuReformi>.

The amendments provide the possibility for the citizens to make their petition to the state authorities and receive official responses in an electronic form. These changes became effective on 28 October 2015.

The newly amended law has also introduced the '*electronic petition*' mechanism with respect to public petitions in the name of the President, the Parliament, the government and the municipal authorities. Those petitions, if they comply with mandatory requirements (*e.g.*, petitions addressed to the President, the Parliament and the government should collect minimum 25,000 citizens' e-signatures) will have to be considered by the respective state authority within 10 business days with the response to be officially promulgated.

Under the law, each the President, the Parliament, the government and the municipal authorities should adopt their own procedures of review of electronic petitions. The President was the first one to have such a procedure. The relevant Order of the President was adopted on 28 August 2015. The President's petitions web site can be found at <https://petition.president.gov.ua>.

The introduction of the electronic petitions immediately attracted huge public attention. As of 22 October 2015 at the President's petitions web-site over 15,000 petitions were registered for signatures collection, some of them have already passed the 25,000 threshold and some have been already considered by the President (*e.g.*, regarding appointment of Mr. Saakashvili the country's Prime Minister, to cancel the excise duty to importation of cars, to secure a right of citizens to personal protection by way of free holding of weapon).

Kyiv City Council has also developed its own procedure of review of electronic petitions²⁸. Similar procedures are yet to be adopted in other regions of Ukraine.

Priorities and Objectives

The legislation in the C2G sector still needs substantial development. Given the laws in this sphere are very new, the state and the public need some time to digest it and adapt to the life realities.

²⁸ <http://kmr.gov.ua/uk/content/kyivrada-rozglyadatyme-elektronni-petycyi-ta-zvernennya-gromadyan-0>

Annex 1**Chart of Contributors to the White Paper**

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Squire Patton Boggs	Peter Teluk	Co-Editor
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Annex 2

**USUBC-KSE CONFERENCE ON LEGAL AND GOVERNANCE REFORM
PRESENTATION OF THE USUBC WHITE PAPER ON LEGAL AND GOVERNANCE
REFORM**

Friday, 30 October 2015

At Kyiv School of Economics: 1, Ivana Mazepy str., Kyiv, 01010

Sponsoring law firms: *Arzinger, Asters, Avellum Partners, Baker & McKenzie, CMS Cameron McKenna, Dentons, DLA Piper Ukraine, Juscutum, LCF Law Group, RULG - Ukrainian Legal Group, Sayenko Kharenko, Squire Patton Boggs, Syutkin and Partners*

PROGRAM

8:15 AM – 8:45 AM	Delegate Registration and Welcome Coffee
8:45 AM – 10 AM	<p>Keynote Address: HE Geoffrey R. Pyatt - the United States Ambassador to Ukraine Bohdan Vitvitsky - Former Federal Prosecutor, U.S. Department of Justice, New Jersey, USA; former Resident Legal Advisor at the U.S. Embassy in Ukraine</p> <p>Welcome and Introductory Remarks HE Andreas von Beckerath - Ambassador of Sweden to Ukraine Oleksandr Danyliuk - Deputy Head of the Presidential Administration of Ukraine HE Luc Jacobs - Ambassador of Belgium to Ukraine Irina Paliashvili - Chair, USUBC Legal Committee and Managing Partner, RULG-Ukrainian Legal Group Dmytro Sologub - Deputy Governor, National Bank of Ukraine Morgan Williams - President, U.S.-Ukraine Business Council (USUBC)</p>
10:00 AM – 11 AM	<p>Panel: “Legal and Governance Reform” presented by law firms – contributors to the White Paper and Commentators on the topics of:</p> <p>Anti-Corruption - Peter Teluk, Squire Patton Boggs Constitutional Reform of the Judicial System - Olexander Martinenko, CMS Cameron McKenna Taxation - Andriy Fomichov, Juscutum Corporate - Yuriy Nechayev, Avellum Partners Antitrust - Galyna Zagorodniuk, DLA Piper Ukraine</p>
11:00 AM – 11:15 AM	Coffee Break
11:15 AM – 12:15 PM	<p>Panel: “Non-Lawyer Points of View” presented by KSE, VoxUkraine with the prominent members of the Business Community, Civic Society and International Institutions</p> <p>Moderator: Tymofiy Mylovanov - Associate Professor, Department of Economics, University of Pittsburgh; Co-Founder and Member of the Editorial Board, VoxUkraine</p> <p>Panelists: Brian Bonner - Chief Editor, Kyiv Post; Regional coordinator of Objective investigative reporting project for Ukraine, Belarus & Moldova; Member of</p>

	<p>the Media Development Foundation Board of Directors Ivan Miklos - Advisor to the Minister, Ministry of Finance of Ukraine, Ministry of Economic Development and Trade of Ukraine; MP, National Council of the Slovak Republic; former Deputy Prime Minister and Minister of Finance of the Slovak Republic Vitaliy Shabunin - Head of Anti-Corruption Action Center NGO</p>
12:15 PM – 13:15 PM	<p>Panel: “Legal and Governance Reform” presented by law firms – contributors to the White Paper and Commentators on the topics of:</p> <p>Land and Real Estate - Yuriy Zaremba, Avellum Partners Banking and Currency Control and Securities and Stock Market - Stepanyda Badovska, DLA Piper Ukraine Energy and Natural Resources - Yaroslav Petrov, Asters Franchising - Yuliya Kolchenko, Baker & McKenzie Commercial Disputes (Commercial Arbitration, Court Practice, Enforcement) - Dmytro Marchukov, Avellum Partners and Comment by Anna Ogrenchuk, LCF Law Group Public Procurement - Hanna Shtepa, Baker & McKenzie</p>
13:15 PM – 14:15 PM	<p>Panel: “Legal and Governance Reform” presented by law firms – contributors to the White Paper and Commentators on the topics of:</p> <p>Agribusiness - Andrew Zablotskyi, Sayenko Kharenko Infrastructure Development (PPP Projects) - Andriy Selyutin, Arzinger IT Sector, e-Commerce, Cyber Security and Intellectual Property - Mykyta Polatayko, Sayenko Kharenko Trade and WTO – Compliance - Ihor Olekhov, Baker & McKenzie Criminal Law and Criminal Proceedings - Kateryna Gupalo, Arzinger and Nataliya Osadchaya, Syutkin and Partners e-Governance - Olga Belyakova, CMS Cameron McKenna</p>
14:15 PM	Networking Lunch