



**U.S.-UKRAINE BUSINESS COUNCIL (USUBC)
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U.S.-Ukraine Business Council

Legal Committee

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White Paper

LEGAL REFORM IN UKRAINE: STRATEGIC PRIORITIES

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Introduction

Ukraine needs a fundamental, systematic and structural re-design of its entire legal and governance system. The current system, which is enforced by a massive bureaucratic class, is not only inadequate, but it also sabotages any chances of Ukraine to become a modern State with a developed market economy integrated into the globalized world economy. It is archaic, chaotic, and at times absurd.

The current system stems from the old Soviet bureaucratic fundamentals, which were aimed at suppressing any initiative, entrepreneurship, civic society, human rights and freedoms. On top of these Soviet fundamentals the successive governments of Ukraine (“GOU”) built a manually governed special interests system, or actually an anti-system, which benefited only limited “elite” groups of society with special benefits, privileges and exemptions – at the legislative level, and even more so at the practical level. At the same time, the rest of the society was left at the mercy of this anti-system and the hostile and utterly corrupt bureaucratic class, deprived of any practical rights, or any chance to defend their rights in the equally archaic and corrupt law enforcement and judiciary.

This anti-system was outfitted with camouflage institutions, which in practice did the opposite of what they were designated to do. The Antimonopoly Committee, for example, in the past few years presided over the largest monopolization of Ukraine’s economy in the hands of a select few, while turning from an antimonopoly regulator into a fiscal collector concerning all others. The web of these schemes for years was weaved through laws and regulations, regulatory and court practices, and it cannot be eliminated by amending one law or another. Therefore, the myth, often repeated by various GOU officials, including the Prime Minister, that “Ukraine has good laws, but needs better enforcement” could not be further from reality. This myth is used by special interest groups to preserve the corrupt anti-system and avoid real reforms.

This anti-system is serviced by a massive archaic, conflicting and incomprehensible body of legislation (laws and regulations), with various corrupt schemes incorporated behind most of its provisions, which benefit one “elite” group or another.

It is clear that the Association Agreement between the EU and Ukraine, including The Deep and Comprehensive Free Trade Area (DCFTA), when ratified and implemented, will be a powerful external instrument for modernizing Ukraine’s governance and legal system and moving them closer to EU standards. There are many other external instruments, such as international treaties and conventions, to which Ukraine is a party, various international organizations, institutions and donors, etc. that can also assist with this process.

At the same time, these external instruments cannot achieve what only can be achieved internally within Ukraine – fundamental structural redesign of the governance and legal system. To this end Ukraine can benefit from the know-how and practical experience of several countries in the region, which have gone through similar transitions before Ukraine, and today demonstrate successful results – such as the Baltic States, Poland, Slovakia and others. These countries, however, have gone through fundamental reforms very early on and very fast, becoming EU members and not being influenced by several key factors that Ukraine is experiencing at this time.

It appears that the closest blueprint for Ukraine to follow is Georgia, which in 2004-2012 prepared, adopted and implemented a comprehensive package of reforms covering the entire spectrum of its governance and legal system, while minimizing corruption to a negligible level. Georgia has done it under circumstances similar to Ukraine's: on the negative side – under a trade embargo on Georgian exports to the Russian Federation, a cut off of gas supplies, a military invasion with subsequent occupation of significant parts of Georgian territory; and on the positive side – under the prospect of signing the Association Agreement with the EU. Ukraine may have the benefit of learning not only from Georgia's undeniable overall success, but also from less significant practical mistakes made during its transition period.

Ukraine needs to entirely dismantle the current manually-managed and special interest anti-system and all of its elements, including the current bureaucratic class, the laws and regulations, and even to replace the language of the legislation, which is archaic, overly complicated, hostile towards the public and often incomprehensible.

As Kakha Bendukidze, the architect of Georgia's economic reforms, said - there is nothing in the current system worth keeping. Any arguments about taking it slowly, gradually, step by step, or adjusting the reforms to Ukrainian reality must be rejected outright as a recipe that did not work for 23 years of Ukraine's independence and led to its near collapse, as we are witnessing today. The current anti-system is beyond fixing, liberalizing and deregulating, and the current bureaucratic, law enforcement and judicial class is beyond modernizing and convincing to carry out the reforms and function in the new transparent and non-corrupt system. It is, therefore, high time to now change the reality instead of adjusting to the current reality.

One of the advantages Ukraine has at present, which other countries that went through whole-scale modernization earlier did not have even a decade ago, is the benefit of new technologies. Using advanced IT solutions for governance and legal reform (including those already developed and tested in Estonia for example), can save a tremendous amount of time and effort, and create a modern service-based system for Ukrainian citizens and businesses. Ukraine's reforms should be as much about software and IT solutions as it is about new laws.

There are multiple reform efforts under way in Ukraine by civic society (most notably Reanimation Package of Reforms http://platforma-reform.org/?page_id=351), trade associations and think—tanks (EBA, USUBC, AmCham, Kyiv School of Economics (KSE) and many others), international institutions and donors (the World Bank, USAID, EBRD, SIDA, International Renaissance Foundation, Open Society Foundations, Strategic Advisory Group (SAG) and others). GOU also came up with significant initiatives, such as the newly established National Reform Council under the President of Ukraine and new interactive deregulation tool EasyBusiness, developed by the Ministry of Economic Development and Trade of Ukraine (<http://www.easybusiness.in.ua/>). One of the key problems with all these reform initiatives, however, is the lack of coordination between these efforts, and the fragmentary nature of some of the proposed reforms, which may be aimed at fixing some elements of the current system, but not at replacing it entirely.

Ukraine badly and urgently needs a massive, coordinated, systematic and on-going effort of all interested participants targeting the entire governance and legal system (and all of its components), replacing it with a modern, transparent, competitive, liberalized and simplified, as well as decentralized system, fitted with new legislation and regulatory practices, and implemented by a new non-corrupt class of civil servants, protected by fair courts.

This White Paper represents the contribution by USUBC and is a voluntary effort by the members of the USUBC Legal Committee. As such, it is only a high-level strategic outline, with some specific examples and proposals incorporated, but not a proposal for comprehensive design of the new system. Some of the topics are outlined in more detail than others, and some important topics are not covered by the White Paper, which does not reflect on the significance of these topics, but is instead explained by our limited resources.

We note that most members of the USUBC Legal Committee are more deeply involved in reforms of specific sectors (for example, agriculture, energy, healthcare, etc.) and can be available to coordinate and share their expertise.

Section I: Fundamental Legal Reform

1. *Anticorruption*

Endemic cradle to grave corruption has to be stopped. Revise current anti-corruption legislation to:

- (i) Facilitate and implement criminal prosecution of government officials and employees at all levels for involvement in corrupt activities;
- (ii) Create an online database and toll-free number to which citizens may report information on corruption activities;
- (iii) Adopt a Law on Lustration which would establish procedures for carrying out an open, transparent lustration adjudication, providing the accused with the right to defend against charges of corruption;
- (iv) Identify corrupt officials at all branches of the prior government and the judiciary and prevent such officials from serving in government positions for a specified number of years or, if appropriate, a lifetime. The mechanisms are developed in the new law No. 4359a "On Lustration of the State Power" (adopted by the Rada on 16 September 2014 and now signed by the President) establishing procedures for carrying out checks and provide for cases when such checks are considered not passed;
- (v) Prohibit state officials and their affiliated persons from engaging in business while holding a state position and envisage that the breach will lead to loss of a respective government position, loss of pension, compensation of material damages arising from corrupt conduct to the state/municipality;
- (vi) Enact sunshine legislation which would require public hearings at the Rada levels and provide sessions for consideration of citizen comments;
- (vii) Require officials and their affiliated persons to regularly file tax declarations and income declarations;
- (viii) Require that civil servants be politically neutral while in office, retaining the right to vote, but not representing a particular party in their official duties; and,
- (ix) At the Rada, provide for the loss of a deputy mandate for absence at work without a valid ground and for voting on another deputy's behalf, etc.

2. *Elections Legislation*

Overhaul current election legislation to allow direct election of officials at the national, regional and local levels of government without secret party lists and quotas:

- (i) Terms of office for all public officials should be spelled out in legislation, prohibiting cancellation of elections for any reason;
- (ii) Provide for recall of all public officials, once a court rules they were involved in any forms of corruption);
- (iii) Provide for specific grounds and procedure for impeachment of the President by adoption of an appropriate law;
- (iv) Require elected officials to report to the public on a regular basis, on the state of the nation, oblast or local government;
- (v) Provide for televised debates among the candidates for the Presidency, mayors, etc.

3. *Judicial System*

Some of the procedural laws that are currently in force in Ukraine are worn-out and obsolete, while others are drawn in a manner that is so detailed yet far from reality that enables the abuse of the rights of parties. The procedure of selection of judges and supervision of their practice is basically nontransparent and gives room for both manipulation and pressure.

Moreover, the level of confidence in the court system in Ukraine is lower than 3% - this dictates the necessity of a political decision to dismiss all judges with no right to return to the judicial system (lustration). It should be emphasized that lustration is not a punishment or judgment of wrongdoing, and it does not require collecting evidence of misbehavior – this is simply a political decision based on total mistrust of judges. At the same time lustration is not an indulgence and it does not free those responsible for wrongdoing from criminal liability.

The respect for the judicial process should be encouraged as it is the basis for the rule of law as such, legislation should be adopted that would allow the following:

- (i) Exercise lustration of all judges through a public process;
- (ii) Enact legislation for recall and prosecution of all judges, regardless of level, for misconduct;
- (iii) In order to establish control of civil society over judges the latter should be elected by citizens together with election of local councils for a limited period. Local communities should have the right to recall the judge at any time;
- (iv) Only the person who has passed a respective test/exam can be elected as a judge;
- (v) Train judges to rule not on technicalities but on principles of justice and fairness;
- (vi) The information on complaints about judges, as well as any reaction of the competent supervisory body to such complaints, should be available and open for public access. There should be one competent supervisory body for judges instead of two;
- (vii) Enable the real enforcement of laws providing for open court hearings on all court matters (except those that are closed in view of national security issues, protecting privacy of certain categories of individuals, such as minors, etc.). As of today, judges can reject the attendance at a court hearing by individuals that are not representatives of the parties;
- (viii) Amend the procedural codes with respect to the definition of "evidence" to allow electronic documents, in particular e-mail correspondence, data published on web-sites and similar items, to be treated as evidence;
- (ix) Incorporate into the procedural codes the latest initiative allowing the filing of party submissions in litigation proceedings via courier, e-mail along with regular mail;
- (x) Change the procedure of use of the automatic computerized lottery system for assigning cases (Decision of the Council of Judges of Ukraine N 30 dated 26 November 2010). The control of the officials (court chairman, head of court administration etc.) of a certain court over the system should be eliminated, potentially by assigning employees of a different competent body to this court or other means;
- (xi) Provide for and enforce personal liability for judges for failure to comply with the obligation to enter all court rulings and decisions into the public register of court decisions to allow all texts of decisions to be on-line and to ensure that the national data-base of court decisions is full and complete (this is not the case today);
- (xii) Court fees for submitting complaints to appellate and cassation instances should be increased substantially.

4. Law Enforcement

Restructure the various security/law enforcement agencies to regain civilian respect after their dismal behavior during the months of Euromaidan:

- (i) Establish thorough background checks on applicants for law enforcement jobs to assure that those hired are psychologically suitable to serve Ukraine's citizens;
- (ii) Require a competitive examination of law enforcement officers prior to their appointment;
- (iii) Conduct new performance reviews of law enforcement officers not based on the current system that simply forces law enforcement officers to spend too much time creating reports about themselves; create review procedures not based on simple statistics, but on properly serving the community, provide increase in salary / incentives to eliminate need for collection of bribes;
- (iv) Investigate all complaints of police brutality, harshly and openly prosecuting the alleged accused with appropriate due process protections; and
- (v) Require the agency heads to report annually on their agency's law enforcement activities to citizens.

5. Administrative Reforms

5.1. Public Administration

Even the most democratic and progressive leadership will not be able to make significant changes in fighting corruption and making Ukraine's government open and transparent without an overhaul of public administration. Much of the government bureaucratic underpinning has lasted through many presidential administrations and is inclined to maintain the status quo. Thus, Ukraine should:

- (i) Create a professional civil service, categorizing the numerous government employees by rank (civil service grade from lowest to the highest) which would identify required education and experience for a specific position and provide for an appropriate salary;
- (ii) Civil service examinations should be required for positions at mid and upper levels;
- (iii) Adopt a code of ethics for government servants;
- (iv) Significantly decrease the number of civil servants;
- (v) Increase pay scales to reduce need to collect illicit payments;
- (vi) Limit political appointments to only the highest levels of government;
- (vii) Undertake a thorough de-regulation, leaving only specific regulated industries (telecommunications, energy, drugs, etc) where government approvals would still be necessary;
- (viii) Develop a comprehensive e-government system decreasing to the minimum the interaction between civil servants and citizens;
- (ix) Increase the thresholds for anti-monopoly approval to European Union levels and eliminate the need for filings in instances of acquisitions outside of Ukraine that have limited effects in Ukraine;
- (x) Increase citizen involvement in democratic processes (on-line communication between public and agency officials to share feedback, make complaints, share ideas on improving services etc.).

5.2. Entry into effect of regulations.

Full prohibition of adoption and entry into effect of regulatory acts without postponement of the effect except regulations that are directly connected with national security. Introduction of minimum terms for entry into effect (*for example*, at least one month). Introduction of an efficient procedure (but not declarative as it often happens) for mandatory consultations with experts/public/business on the key acts, both preliminary and in the process of implementation.

5.3. Reorganization of state authorities.

A temporary moratorium for reorganization of state authorities (except complete liquidation) because in practice this usually results only in the replacement of signs on the buildings, as well as moratorium on re-naming the state authorities.

5.4. Development and implementation of procedures for the activities of state authorities.

For most of the areas - development of clear instructions for state authorities (these may be internal documents but they must be publicly available); detailed instructions for employees; and checkups for compliance with such instructions. The instructions must provide for: (1) a list

of reasons for the state authority to deny consideration of a document and the situations when the documents must be accepted for review; (2) a requirement to provide a clear response in case a document is denied consideration/passage with a detailed description of necessary corrections in the documents (similar to court decisions of this kind); (3) impossibility to refuse the acceptance of the same document more than once if all errors indicated in the official denial have been corrected; (4) introduction of a system, under which realistic and prompt consultations are possible with the specialists of state authorities if a situation is atypical or not envisaged by Ukrainian legislation. Such consultations must be definitive (impossibility to refuse the acceptance of the documents if they are prepared in compliance with the consultations). Prohibition of establishment by internal rules/directions of the state authorities of additional requirements/restrictions, which are not envisaged by effective law.

Section II: Legal Reform in Key Specific Sectors

1. Corporate

Corporate Law

This area of law should be re-built on the principles developed by the Ukrainian Bar Association in their White Paper on Corporate Law Reform¹, including the principles of:

- deregulation
- universal division of companies into private and public and abolition of private joint stock companies
- re-classification of quasi-public companies (public joint stock companies whose shares are not traded on the stock exchange) into private companies
- wide discretion of companies to opt-out from the majority of the provisions of corporate law and re-designing these provisions into default rules that companies or their members 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)
- 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
- setting higher standards of corporate governance through recognition of the important role of enforcement of directors' duties, including development of conflict of interest and derivative claim rules. In particular, allow shareholders to sue officers and directors of the company for misconduct or misuse of corporate assets for personal gain. The relevant draft Law No. 2013a is registered with the Parliament and was prepared for the repeated second reading in the end of 2013, but there were no developments with this draft Law in 2014.

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" (in line with Draft Law No. 2037), which, in particular, should:

- introduce the notion of an independent director;
- elaborate the procedure for voting by poll (notice) (was addressed in the initial draft of Draft Law No. 2037); and
- elaborate the status of the corporate secretary (was addressed in the initial draft of Draft Law No. 2037).

¹ http://www.uba.ua/ukr/project_reform_in_corporate_law/

Introduce escrow accounts into Ukrainian law (in line with Draft Law No. 8188).

Allow 60% minimum quorum requirement to be reduced if quorum cannot be met after, for example, three attempts to hold a meeting.

Simplify the current dividend payment procedure. Eliminate the need to make payments of dividends via the Central Depository.

Limited Liability Companies (LLCs)

An Audit Committee for an LLC requires a minimum of 3 members (even though this is not the case for JSC). The number of members of the Audit Committee should be left to the discretion of the LLC General Participants Meeting.

Eliminate the clause in the Law on Commercial Companies allowing a participant to be expelled and leave this issue to the discretion of the LLC Participants.

Eliminate the need for notarized copies or notarized originals of the participatory interest sale/transfer agreement.

Shareholders/Participants Agreements for JSCs/LLCs

We propose to amend the legislation to allow for standard international shareholder provisions such as:

- Option to deviate from Percentage Voting Requirement on Key Contractual Issues,
- Allowing Payment of Dividends more than once a year for JSC,
- Allowing Contractual Exits through Mandatory Put and Call Options

We also propose to allow applicability of foreign law to Shareholders/Participants Agreements, in case there is a Foreign Shareholder/Participant. Currently Shareholders/Participants cannot agree to foreign law to govern their relationship and must apply Ukrainian law.

Representative Offices

Reduce Registration Time to three business days from current two months. In addition, the fee for the registration of a Rep Office (at present USD2,500) should be eliminated, or significantly reduced

Allow a Rep Office to “re-register” in case of merger or other “global” corporate restructuring that creates legal “successors” or new replacement entities.

Eliminate the need for GDIP to maintain Ukrainian staff Employment Books.

Eliminate the need for a Rep Office “internal regulation”.

Remove requirement that the Rep Office Registration limits the number of expat employees to three (3) without additional approvals.

Considerably liberalize and shorten the procedure for Rep Office closing.

Foreign Investments.

Rules on protection of foreign investment in Ukraine should be improved to enable investors to register their foreign investments in Ukraine (and thus obtain statutory protections envisaged by the law) made by way of acquisition of participatory interest(s) or shares on the secondary market.

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 functional mechanisms of responsibility of the owners and managers of bankrupt companies in cases of malfeasance (*for example*, piercing of the "corporate veil", prohibition to be engaged in entrepreneurial/managerial activities, etc.)

We also propose significant liberalization of corporate regulatory procedures for all types of corporate entities, such as: improve / ensure the single-window (one-stop) registration process for all government and local state agencies and authorities; implement effective electronic registration; simplify corporate reorganization procedures; allow for easier "change-of-name" re-registrations, etc.

2. Civil Law

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.

Reps 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, although we recognize that this is fairly a common law rather than a civil law concept.

Status of natural persons.

Cancellation of registration of the place of residence/stay of natural persons. Keeping a single document that identifies a person (an internal and foreign passport in one document, a document on assignment of an identification code).

3. Land and Real Estate

Land Issues

Proposals:

- (i) Reduction in the number of supervisory authorities. It would be expedient to remove the State Agriculture Inspection of Ukraine. It duplicates the powers of two other inspections: the State Ecological Inspection of Ukraine and the State Architectural and Construction Inspection of Ukraine. Numerous instances occur when for the same offence persons are held liable twice due to the existence of the State Agricultural Inspection.
- (ii) Open in part for the public the State Register of Rights and the State Land Cadaster in on-line mode. Definite information must be available of the specific owner of real estate property (land and buildings). It will accelerate the business cycles/negotiations/decrease corruption.
- (iii) The legislative acts governing the operations of government authorities and local self-government bodies must clearly fix the periods of time necessary to make a specific decision/issue a document, and if the document has not been issued or the decision has not been adopted, such document and decision are to be considered issued and adopted. Since 2012, this principle has enabled to significantly reduce the periods for the issuance of construction permits and approvals.
- (iv) Returning of the state owned lands outside of populated areas to local communities as it was envisaged by the cancelled Law On State and Communal Property Land Division
- (v) Carry out codification of the environmental laws. Presently, a number of provisions in the regulatory acts dealing with the environmental permits conflict with the principal law establishing the comprehensive list of permits and approvals. As a result, the local controlling authorities use the opportunity to temporarily terminate enterprise's operations under the pretext of violation of the provisions of environmental laws, demand a bribe or require the enterprise to obtain the "unnecessary" permit, which is again obtained through payment of a bribe.
- (vi) Make amendments to the laws, whereby the registration of the rights to real estate property, if such rights had been registered before 01.01.2013, are to be registered in the Registry of Rights free of charge for business entities. Obligate the Bureau of Technical Inventory and land resources bodies to finally transfer all data from the old registers to the new ones.
- (vii) Public notaries should be granted powers to register rights of use of land plots, as they are already involved in some other registration activities. Taking into account the high qualification of public notaries and their current involvement into state registration of titles to real estate and encumbrances, as well as the broad network of public notaries in Ukraine, granting them with such powers will ease business in the agricultural sector.

4. Banking and Currency Control

General and Comprehensive Liberalization of the stock market, foreign exchange market and capital market is required, including: admission of branches of foreign banks and insurance companies into Ukraine, cancellation of the actual prohibition in the form of the individual regime of licensing for investments abroad and opening of accounts with foreign banks, cancellation of currency restrictions, etc.

Currency Regulations

Ukrainian currency regulations require the Ukrainian surety to obtain a one-off license to actually perform its payment obligation in foreign currency before a foreign party (particularly a problem in the case of non-resident affiliates or foreign shareholders).

Proceeds from sales of assets under court ordered auctions (enforcement proceedings) are in UAH and difficult to convert into foreign currency for repatriation to a foreign creditor / claimant (i.e., a foreign bank). The reason is that some departments of the State Enforcement Service do not have any foreign currency accounts. This circumstance makes it virtually impossible to enforce a decision to recover debt from resident debtors in favor of non-resident lenders. Analysis of the existing legislation, *inter alia* Article 53 of the Law of Ukraine "On Enforcement Proceedings", demonstrates a lack in regulation of the question of opening foreign currency accounts by the State Enforcement Service. In particular, the law does not clearly establish the duty of the State Enforcement Service to open and maintain such foreign currency accounts. Given the lack of legal regulation in respect of this issue and the relevant practical implications, it is proposed to clearly prescribe, in a specialized law (with a subsequent reflection in statutory and regulatory enactments), the obligation of each Enforcement Service authority to maintain on a regular basis a multi-currency account denominated in key currencies belonging to the 1st group of the foreign currencies classifier approved by the National Bank of Ukraine (the "NBU").

1. Banking

- (i) Eliminate entirely or significantly raise the threshold for the mandatory state pricing expertise at Derzhzovnishinform for any services provided by foreign companies (currently set at 100,000 EUR).
- (ii) The mandatory registration of cross-border loan agreements with the NBU should be abolished.
- (iii) The interest rate caps should be abolished or significantly increased, although we understand that the NBU is extremely reticent to do this.

2. Currency control

- (i) Cross-border licenses should be in general abolished and required only for:
 - (a) opening bank accounts in;
 - (b) making certain investments (such as in securities or real estate) in; or
 - (c) making payments under cross-border guarantees in respect of off-shore loan agreements to persons located in:
 - (d) countries which are not members of the EU, the EEA or the OECD; and do not have investment treaties with Ukraine providing for a free flow of capital.

- (ii) No cross-border license should be required for making bank loans to legal entities registered in the member states of the EU, the EEA or the OECD.
- (iii) There should be no restrictions on purchasing or borrowing foreign currency for any purposes, unless the relevant payment requires a license or the NBU introduces temporary restrictions during financial turmoil.
- (iv) The "90-day rule" on return of foreign currency proceeds must be immediately abolished in any of its forms (meaning that it cannot be restored as a "180-day rule").
- (v) Any mandatory conversion of foreign currency proceeds (currently 75%) must be abolished.
- (vi) Limitation on the currency of investments and the restrictions applicable to an investment deposit should be abolished.
- (vii) The procedure for investing into Ukrainian securities should be simplified.
- (viii) A comprehensive currency control regulation should be adopted to provide, among other things, that:
 - (a) any transaction is permitted unless it is specifically prohibited; and
 - (b) any discrepancy in currency control rules is interpreted in favor of the transaction counterparties.
- (ix) The currency control functions of Ukrainian banks should be gradually reduced until their full abolishment.

5. Securities and Stock Market

Changes to Depository Law -

Payment of dividends – The Depository Law still requires that dividends shall be paid out by a JSC through the Central Depository (and Settlement Center), rather than to a shareholder directly as before: we suggest to provide for direct payment of dividends to Shareholders.

Derivatives and repo transactions

- (i) The Parliament of Ukraine should adopt a separate law "On Derivatives" and bring the effective Ukrainian legislation into compliance with such law. Ukrainian legislation should 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.
- (iv) A separate Law "On Netting" needs to be adopted to regulate close-out netting in derivative transactions. Alternatively, provisions on close-out netting may be incorporated into the insolvency laws or a separate law "On Derivatives".
- (v) 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.

6. Antitrust

Current antimonopoly legislation in Ukraine establishes very low thresholds for transactions requiring a prior clearance of the Antimonopoly Committee of Ukraine ("AMC"). Antimonopoly thresholds should be revised and raised with the aim to decrease the number of transactions, which require prior clearance from the AMC. This can be achieved by increasing the thresholds for anti-monopoly approval to European Union levels. In addition, the law should be revised to eliminate the need for filings in instances of concentrations that occur outside of Ukraine but that have limited effects in Ukraine.

Simplify procedures for reviewing unproblematic concentrations and reduce the amount of information required for notifying transactions in all cases, whether under the simplified procedure or not. This is expected to bring significant benefits for businesses and advisers in terms of preparatory work and related costs. A similar merger simplification package was recently introduced in the EU.

Introduce expedited review procedures for concentrations, but increase filing fees for such expedited reviews. This will substantially reduce corruption of the AMC officials and will bring more revenues to the state budget.

Introduce standard requirements to vertical concerted actions (i.e. between manufacturers and distributors) that would exempt such actions if the action meets the requirements.

Introduce a transparent procedure for determination of the amounts of fines for breach of antitrust laws.

Ensure the independence of the AMC and initiate de-monopolization of oligarchic holdings.

Introduce an exemption for non-compete restrictions in M&A transactions to the extent such restrictions are justifiable (*i.e.*, appropriately limited in scope and duration and necessary for a transaction).

Improve the procedure for challenging decisions of the AMC.

7. Energy and Natural Resources

Subsoil Code

Adopt a new Subsoil Code ensuring that subsoil rights can be sold, transferred and pledged.

Licenses Registry

Create a Public Registry of Subsoil Licenses, Production Sharing Agreements (PSA) and Joint Activity Agreements (JAA) and Joint Operation Agreements (JOA).

Joint Activity Agreements / Joint Operating Agreements.

Expressly allow a Subsoil License and/or License Agreement to refer to the rights of non-licensee partners under a JAA/JOA.

LNG

Create a legislative base for import and regasification of LNG in Ukraine, as well as codifying the property rights to an off-shore terminal. Codify whether the trade of LNG (as opposed to natural gas per se) requires licensing in Ukraine and whether trade/import to Ukraine requires registration.

State of Emergency Law and Requisitioning Requests

We completely disagree with the Cabinet of Minister's efforts to requisition gas into storage for the top Ukrainian gas producers.

Further, the extremely broad current draft Law No. 4117a "On a Special Period in the Energy Sector", which was adopted in the first reading on 4 July 2014, also gives far too broad powers to the Cabinet of Ministers and provides no guidelines on how those powers would be utilized. It will kill the market.

8. Employment Law

New Labor Code

Labor relations in Ukraine are still governed by a desperately outdated old Soviet Labor Code, which is entirely inadequate for establishing a modern system of labor relations. This Code must be replaced as soon as possible with a new Code based on the legislation and best practices of the EU and the US, eliminating a vast body of unnecessary bureaucratic provisions, allowing considerable flexibility for an agreement on terms and conditions of employment between the employer and employee, at the same time ensuring social protection of employees in general and of selected, most vulnerable, categories of employees, in particular.

Expat Issues –

Allow Expats to be paid in foreign currency (as previously) and potentially to their foreign bank accounts (subject to full declaration of income).

Work Permits

In pursuance of Article 17 of the Association Agreement between Ukraine and EU, it is suggested to cancel or simplify the procedure of provision of permits for the employment of foreigners in Ukraine, for example, to keep this procedure only for state-owned or municipal companies, institutions and organizations.

At a minimum to eliminate the work permit requirement for the General Director and one more expat (CFO, COO, Deputy Director) of a foreign-owned company, particularly at start-up (incorporation), which is precisely when foreign investors have the most difficult time in developing human resource capabilities in-country.

Allow work permits to be issued for the full term of an employment contract (not merely for the current one-year maximum).

From a practical viewpoint, the collection and preparation of documents and their submission to the Employment Center to obtain and to receive the work permit generally takes 2 to 2.5 months (and often is longer – depending on how long it takes to receive and apostille university diplomas, health certificates etc.). This makes urgent hiring and firing decisions regarding expats virtually impossible. Therefore, the procedures for obtaining work permits must be significantly liberalized and shortened.

Receipt of work permits for expats generally are a problem. This is because of a clause in a recent regulation (the Cabinet of Ministers Resolution No. 437 dated 27 May 2013) that refers to “qualified” and “unqualified” employees and that expats employed in a company should not exceed more than 50% of “qualified employees” under a given contract. In any event, any quota should apply to the work force of a company at large and not to a specific Contract (say, a specific secondment contract for various expats).

Cancellation of work permits currently can be completely unexpected and without notice or ability to appeal. Numerous cases in Kyiv in particular of “snap” (and erroneous) cancellations of work permits notified to the company and relevant employee after the fact, with no ability to contest except through court proceedings. This causes business interruption for the company and obvious consternation for the employee and his/her family.

Residency Permits

Introduction of a simplified mechanism for issue of temporary residence permits. Cancellation of the procedure when the State Migration Service or the Ministry of Economy issue invitations to foreigners who require visas to enter Ukraine/special visas to obtain residence certificates.

Ukrainian Employees

Standard Foreign Employee Entitlements under a Labor Agreement are problematic because:

Ukrainians

- Need NBU License for holding accounts / monies abroad
- Need NBU License for Non-Ukrainian retirement (e.g. 401K) / stock option plans, which requirements should be abolished.

“Employment contracts” and “employment agreements”

Ukrainian law restricts “employment contracts” to a head of company only, rather than to all employees (which are subject to “employment agreements” with termination rights and other terms and conditions fixed solely to those contemplated by the Labor Code). This reduces employer’s flexibility to terminate employment relations and agree on other, more flexible, terms and conditions. Therefore, we propose to allow “employment contracts” as an option for all categories of employees under mutual agreement between an employer and an employee.

Tax deductibility of all Employee Benefits

Allow all Employee Benefits to be fully tax deductible for the Employer (including Health Insurance not mandatorily required by law, etc.).

9. *Franchising*

Franchise Law

Article 1118.2 of the Civil Code of Ukraine and Article 367 of the Commercial Code of Ukraine require the registration of franchise agreements (commercial concessions) with the same registration authority that registered the franchisor or franchisee (provided that the franchisor is a foreign company and hence not registered in Ukraine). In other words, registration is contemplated at the national corporate registry. The language in both Codes is virtually identical and states that the parties to a franchise agreement cannot rely on their contract vis-à-vis third parties absent such registration. Unfortunately, however, there is no regulation in place that allows for implementation of the contemplated national franchise registry. Hence, agreements that have not been properly registered (and in fact this means all such agreements) are generally deemed not valid as against third parties. We, therefore propose to cancel the registration requirement for franchise agreements (commercial concessions). We also propose to amend the legislation eliminating the term “commercial concession” and using only one term: “franchise agreements”.

Other Problem issues for Franchise Agreements -

- upon expiry of the fixed term of a franchise agreement, the franchisee is entitled to renewal on the same terms (mandatory renewal). This is not friendly to the franchisor, and we propose to leave this issue to the discretion of the parties.
- the renewal right does not apply if the franchise agreement is for an open-ended term. In those cases, either party has the right to terminate the agreement on 6 months notice. This is fine, but the term is too long and generally franchise agreements specify specific terms, which takes us back to the first point. We propose to leave this issue to the discretion of the parties
- Under article 1123 of the Civil Code and article 373 of the Commercial Code, the franchisor is jointly liable to the consumer for defective goods, works or services supplied by the franchisee. We propose to expressly provide for an exemption under which a franchisor can avoid liability if the franchisee was not following the guidelines established by the franchisor.

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

Ukraine is in need for legislative changes regarding the following:

- (i) Amend the *Civil Procedural Code of Ukraine* and the Law of Ukraine "On International Commercial Arbitration". Currently a party to arbitration proceedings cannot obtain an injunction in Ukraine. The procedure for enforcing international arbitral awards in Ukraine must be more definite, transparent and clear. The enforcement procedure according to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") is supposed to be a mere formality, which is a concept clearly forgotten by Ukrainian legislation and courts.
- (ii) The International Commercial Court under the Ukrainian Chamber of Commerce and Industry should be seriously reformed and its Rules amended to attract major disputes for consideration. The list of arbitrators of the International Commercial Court under the Ukrainian Chamber of Commerce and Industry should stop being exhaustive.

Enforcement of court decisions.

Today's situation in Ukraine with regard to the enforcement of court decisions that came into legal effect is simply terrible. Obtaining of a positive decision in the court does not at all mean that the case is won because enforcement requires significant efforts and time in order to get results. It is necessary to simplify and strengthen the enforcement mechanism to a significant extent.

Enforcement of arbitral awards – amendments to available means which are at the disposal of enforcement officers

Ukrainian courts refuse to recognize and enforce certain types of foreign court decisions and international arbitral awards, in full or in part, due to the impossibility of their further enforcement by enforcement agencies. This is the result of limited enforcement means available to enforcement officers. Various types of court decisions are problematic in terms of enforcement, including those that provide for penalties to be calculated up through to the completion of the enforcement or that call for specific performance. We propose to create instruments enabling exequatur and subsequent enforcement of these types of court decisions, such as by granting courts the right to prescribe special (*ad hoc*) enforcement.

Enforcement of foreign judgments

Reducing the number of "circles"

Application for the recognition and enforcement of a foreign court decision shall be submitted directly to courts of appellate jurisdiction. Decisions of the appellate courts on the matter shall be subject to appeal at courts of cassation. The proposed scheme aims to reduce the time and efforts required for enforcement of foreign court decisions.

It is also proposed to consider the possibility to *separate* the procedures for recognition and enforcement of foreign court decisions, depending on the type of the dispute in question. For instance, the procedure for recognition and enforcement of foreign judgments in commercial matters shall be subjected to exequatur in commercial courts of Ukraine.

It is proposed to *transfer the burden of proof* from creditor to debtor in this type of proceedings. The intent is to make presumption of validity of foreign judicial decisions more effective.

Forum prorogatum

The Code of Commercial Procedure of Ukraine (Article 80) does not provide for termination of proceedings on the ground that the parties to the dispute have previously agreed to resolve disputes in a different court and that one of the parties has petitioned (before consideration of the dispute on merits) to transfer the dispute to the chosen court.

Another problem is that the national legislation does not establish any criteria for the validity of *forum prorogatum* agreements.

Ukrainian laws do not set requirements as to whether the parties are allowed to choose particular courts or are just allowed to incorporate into their agreement a reference to the judicial system as a whole. Also, Ukrainian laws do not provide guidelines on how to determine territorial jurisdiction in cases when reference is made to the judicial system. One more question to consider is whether the chosen court shall have a preferential right to consider the dispute over the court entitled to consider the dispute based on the provisions of law.

It is proposed to evaluate the necessity of Ukraine's accession to *the 2005 Hague Convention on Choice of Court Agreements* or at least to incorporate into the national legislation the rules enshrined in the Convention. The Convention regulates the validity of *forum prorogatum* agreements, competence of chosen and non-chosen courts, recognition and enforcement of court decisions passed by chosen courts.

As of early 2012, the Convention had not taken effect yet, since it was signed only by the United States, the European Union and Mexico; the latter also ratified the Convention.

Arbitrability of disputes

The scope of the provision on "exclusive jurisdiction" (Article 77 of the Law "On Private International Law") requires clarification. Namely, in respect of whether this article refers solely to jurisdiction of forums located in Ukraine or also includes a list of disputes that are prohibited from being heard in international commercial arbitration.

Interim measures in commercial arbitration

It is proposed to consider implementation of 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".

The 2006 amendments to Article 17 of the UNCITRAL Model Law are related 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.

Along with the foregoing, it is proposed to amend national legislation by introducing a mechanism for recognition and enforcement of interim measures.

Interim measures granted by national courts

There is a need to amend national legislation, namely, to introduce special proceedings for consideration of applications for granting interim measures in support of international arbitration. Respective draft Law was registered in the Verkhovna Rada of Ukraine under No. 3366, but no developments have occurred on this draft Law so far.

State immunity

Question of jurisdictional immunity of states and their property (including the immunity from enforcement measures) is of immediate interest in light of the possible need for obtaining compensation for the expropriation of property in Crimea.

Article 79 of the Law of Ukraine "On Private International Law" prescribes jurisdictional immunity of foreign states. The rule is as follows: Ukrainian courts can not consider cases involving a foreign state without the consent of such foreign state.

The doctrine of functional immunity becomes more recognized in the world. Under this doctrine, immunity depends on the nature of the transaction. There is a certain disproportionality in state immunity regulations, since Ukraine obtains less protection in the courts of other states than Ukraine affords to foreign states in Ukrainian courts.

It is proposed to replace the doctrine of absolute immunity embodied in the law with the doctrine of functional immunity. Thus, immunity will be limited only to acts *jure imperii* of foreign states.

In light of the above, it is proposed to consider the accession to provisions of *the European Convention on Immunities of States* (1972) and *the UN Convention on Jurisdictional Immunities of States and Their Property* (2004, not yet entered into force).

Notary

Law No. 3425-XII dated 2 September 1993 On Notaries requires amendments in order to grant more powers to notaries, for instance, a power to conclude and certify the protocol of Internet inspection. This will facilitate the provision of evidence in disputes concerning violations of rights on the Internet.

Development of unanimous court practice

It is proposed to establish that resolutions of the plenary sessions of higher specialized courts issued for clarification and generalization of court practice are in fact legally binding.

11. Public Procurement

The new Law No. 1197-VII dated 10 April 2014 “On Public Procurement”, which took effect on 20 April 2014, aims to facilitate the public procurement procedures taking into account the relevant EU legislation. International and local experts are united in their assessments that the new Law “On Public Procurement” shall help to make public procurement policy in Ukraine more transparent and effective.

Nevertheless, the following still must be accomplished to ensure that open transparent tenders organized to attract the largest number of participants on an equal playing field will ensure that the government will obtain the best value for its purchases of goods and services:

- (i) Further improvement of the legislation (publicity, bidding process, etc.) to exclude any corrupt practices;
- (ii) Further harmonization of Ukrainian legislation with relevant EU practice;
- (iii) Additional tender requirements may be necessary for special purchases or licenses (drug manufacture, land use, natural resource exploration, use of radio frequencies, etc.) and should be identified in the legislation;
- (iv) Prepare a publically available manual for government procurement.

12. Agribusiness

Further growth in agribusiness in Ukraine can be achieved only through deep regulatory reform of state authorities, which are empowered to control business in agriculture.

But the first and most important step which should be done is elaborating an agribusiness development program for the next ten or fifteen years. This will enable to understand the further role of state authorities regulating agribusiness, including the State Agricultural Inspection and State Veterinary and Phytosanitary Inspection. This strategic objective should be finished by the middle of 2015 at the latest.

The laws and regulations related to the State Agricultural Inspection and the State Veterinary and Phytosanitary Inspection should be reviewed very closely, as these agencies have become notorious for extorting bribes.

Currently the State Agricultural Inspection's sphere of activities widely overlaps with a large number of other state authorities.

We propose to either eliminate the State Agricultural Inspection entirely, or strip them of the following powers:

- (i) Control over use and protection of land of all designations (clause a of Section 1 of the Regulations on the State Agricultural Inspection approved by the Decree of the President # 459/2011 dated 13 April 2011 (hereinafter – the “Regulations”) (the State Agricultural Inspection should be entrusted only with control over use of agricultural land);
- (ii) Control over state registration of land and compliance with the land law during change of title to the land plots (clause a of Section 1 of the Regulations) (these powers overlap with ones of the State Registration Service and the State Land Resources Agency (the Law on the State Registration of the Title to and Encumbrances over Immovable Property));
- (iii) Control over land planning, compliance with the terms of return and use of the land plots, compliance with the land law by the state and local authorities (clause a of Section 1 of the Regulations) (these powers overlap with ones of the State Land Resources Agency (the Law on Land Planning));
- (iv) Control over allocation, designing and construction of the buildings and other structures (clause a of Section 1 of the Regulations) (these powers overlap with ones of the State Architectural and Construction Inspection (the Law on the Regulation of Town Building));
- (v) Control over compliance with the requirements of state standards (clause b of Section 1 of the Regulations) (these powers overlap with ones of the Economic Development Ministry and the State Inspection for the Protection of Consumers' Rights (the Law on the Standardization, the Decree of the Cabinet of Ministers on Standardization and Certification));
- (vi) Issue of excerpts from the main register of warehouse documents for grain and register of grain kept at the warehouses and administering of said register (Section 5 of the Regulations) (these powers overlap with ones of the Ministry of Agrarian Policy and Food, “Derzhreistry Ukrainy” state enterprise and cornhouses (the Law on Grain and Grain Market in Ukraine));

- (vii) Issue of blanks of warehouses documents (Section 5 of the Regulations) (these powers overlap with ones of the Ministry of Agrarian Policy and Food (the Decree of the Cabinet of Ministers of Ukraine # 1569 dated 17 November 2004));
- (viii) Coordination of calculation and payment of subsidies to the agricultural companies for their product (Section 8 of the Regulations) (these powers overlap with ones of the Ministry of Agrarian Policy and Food and departments of the local state administrations (the Decree of the Cabinet of Ministers of Ukraine # 246 dated 2 March 2011));
- (ix) Preventing falsifying wines (Section 11 of the Regulations) (these powers should be vested in the law enforcement agencies);
- (x) Control over health and safety, fire protection and traffic safety at the agricultural companies, organization of drafting state programs in the spheres of health and safety, fire protection and traffic safety at the agricultural companies (Section 26 of the Regulations) (these powers overlap with ones of the State Labor Inspection, the State Emergencies Service, and the State Traffic Patrol Inspection (the Law on the Labor Safety, the Law on Fire Safety, the Decree of the Cabinet of Ministers of Ukraine # 1306 dated 10 October 2001));
- (xi) Conducting academic researches in the agricultural spheres (Section 41 of the Regulations) (these activities should be vested with the scientific institutions as they are much more suitable institutions for such a function).

It is obvious that this modification will need to be done not only to Presidential Decree # 459/2011 dated 13 April 2011 approving Regulations on the State Agricultural Inspection but to a number related laws and Decrees of the Cabinet of Ministers of Ukraine and other regulations.

13. Taxation

Despite recent amendments, the Tax Code still merits a thorough review to assure that all members of Ukrainian society are paying their fair share of taxes. Such revision of the Tax Code is a major undertaking which will take many months to complete. At present we urge that:

- (i) Existing wasteful practice of tax authorities appealing any and each court decision against them up to the Supreme Court of Ukraine should be eliminated;
- (ii) Provide for reimbursement of legal and other court expenses by a losing party in disputes with tax authorities;
- (iii) Increase the criteria for allowable tax deductions along the lines of western practice;
- (iv) Allow for more charitable deductions.

14. Infrastructure Development (PPP Projects)

Reducing the government's role in social and infrastructure improvements can be accomplished with the implementation of private public partnerships. In this regard:

- (i) Improve the legal framework for PPPs in the social and infrastructure sectors, removing bureaucratic barriers (unnecessary paperwork, filings, etc.) for private partners;
- (ii) Establish procedures for the organization and tender of PPP projects;
- (iii) Make public private partnership relations transparent and predictable by publically disclosing information on the proposed and implemented PPP projects;
- (iv) Allow online applications for PPP projects;
- (v) Require milestone focused performance audits of each PPP projects; and
- (vi) Prepare and make public evaluation reports on the implementation of PPP projects, indicating the tasks performed by both the private and a public partner; such information should be open to the public.

15. Trade, WTO – Compliance, e-Commerce

Ukraine has a triad of laws regulating anti-dumping, safeguards and countervailing proceedings.

Based on our experience we believe that following loopholes should be addressed:

- (i) 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 we think that certain changes should be made in the definitions of dumping, injury and causation to make them correspond with WTO practice.
Second, and most importantly, is that a new regulation should be developed which would regulate in detail dumping margin calculations, their methods and practices according to existing standards in the EU and the USA. This would definitely allow more options for domestic producers to defend their interests and thus being able to compete effectively both in domestic and export markets.
- (ii) The Law of Ukraine “On application of safeguard measures against imports to Ukraine”. The Law regulates conducting of safeguard investigations in Ukraine. Since safeguard measures are implemented against fair trade practices it is vitally important to have precise regulations in this sphere. Our experience shows that the Law requires modification in connection with (i) the definition of a safeguard measure and its forms that may be used against imports (not only a duty or quota as it is provided now); (ii) specifications of procedure in connection with the rights of applicant in each stage of the investigation and (iii) specification of safeguard measure calculations, including its methodology.
- (iii) The Law of Ukraine “On protection of domestic producer against subsidized imports”. The Law regulates conducting of countervailing investigations in Ukraine. In fact Ukraine after becoming a WTO member did not hold a single countervailing investigation. One reason was not only the complexity of economic calculations, but rather a general legislation loophole where certain provisions of the law are not in line with WTO laws. The Law was initiated to be modified, but due to change of the Government it was returned to the Ministry of Economy without due revision. Our general opinion on this is that the definitions of subsidy and its forms should be made very clear and without any doubts the methodology of the countervailing duty should be developed preferably in a separate regulation according to the EU and the USA best practices.

16. *Legal Issues Related to the Occupied Territory of Ukraine (Crimea)*

Annexation by the Russian Federation of the Autonomous Republic of Crimea poses extraordinary challenges for the Ukrainian government. An entire set of new laws and regulations needs to be approved and implemented in order to regulate the new reality of Crimea being an occupied territory.

The Law No.1207-VII dated 15 April 2014 “On Securing Rights and Freedoms of the Citizens and the Legal Regime at the Temporary Occupied Territory” reflects certain immediate needs, but leaves unattended a number of needs of people, corporate businesses, governmental and nongovernmental organizations, including trade unions and health institutions (Verkhovna Rada also adopted the Draft Law No.4032a “On Tax and Customs Free Zone in the Crimea and the Peculiarities of Economic Activity in the Temporarily Occupied Territory of Ukraine” and was sent for President’s signature on 20 August 2014).

Such new laws need to encourage Crimean people to stay loyal and related to Ukraine and to prevent any actions of Crimean residents which could harm Ukrainian national interests. However, no blanket punitive measures towards Crimean residents need to be introduced.

The main spheres and sectors where new laws and regulations need to be approved are as follows:

- (i) Payment of pensions and social benefits. It is necessary to regulate such payments to Crimean residents who were entitled, or will achieve retirement age and will become entitled to pension under Ukrainian law. The main problem of regulating this issue will be the conflict between the status of Crimea under Ukrainian law and under Russian law. It is also important to settle these issues in terms of Crimea using the Russian rouble as its currency.
- (ii) Legal status of the property owned by the state, NGOs, Ukrainian companies and individuals. As some property may be nationalized by the Crimean government it is important to state that no actions made by the Crimean authorities after the occupation are legal and effective according to Ukrainian law. It is important to differentiate between the property owned by the state and national NGOs, which may be nationalized by Crimean authorities or Russia and the property owned by individuals and legal entities.
- (iii) As the Ukrainian government does not recognize any new status of Crimea and its accession to the Russian Federation, it is important to have a mediator who is going to represent interests of Ukraine in Crimea. The most suitable countries for such a mission are Turkey as one of the largest countries in the Black Sea region (having a large Crimean Tatar Diaspora is also an advantage) or Romania as the member of the European Union closest to Crimea. One more issue in need of regulation is activities of Ukrainian state authorities in Crimea. Another issue to be addressed is representation and support to Ukrainian citizens in the occupied territory - it cannot be made through a regular consular office because it cannot be established in the territory of Ukraine, and so another approach needs to be developed (Cyprus can be an example).
- (iv) Status of state authorities and local self-government authorities as of the date of the beginning of the occupation and any authorities which are appointed or elected after the beginning of the occupation. It is important to define that Ukraine is not going to recognize any authorities appointed or elected in Crimea after the beginning of occupation including ones appointed by the Russian Federation.

- (v) Regulation of the business activity at the occupied territory and business activities between Crimean and Ukrainian residents. Main sectors where new regulation needs to be approved are banking activities (including regulations related to Russian rouble becoming the new currency in Crimea) and relations between Crimean and Ukrainian banks and payment systems; transportation between Crimea and Ukraine.
- (vi) Status of legal entities, which are residents of Crimea. Distinction should be made between entities incorporated before and after the beginning of occupation.
- (vii) Taxation and investment activity in Crimea. As Crimea is de facto part of a foreign country, Ukraine should legislate on whether any investments in Crimea should be treated as investments abroad and how they should be taxed. The same is important for activities of Crimean residents in Ukraine.
- (viii) Recognition of any documents issued by the Crimean government or by the Russian Federation in Crimea or in relation to Crimea and its residents. It should be discussed whether documents confirming birth, death and marriage should be recognized in Ukraine.
- (ix) Status of individuals obtaining Russian citizenship without renunciation of their Ukrainian nationality. It should be discussed whether such persons should be prevented from entertaining some of their rights as citizens of Ukraine (e.g., voting).
- (x) Sanctions for collaboration with the Crimean authorities or with the authorities of the Russian Federation in Crimea. It is important not to punish individuals who choose to remain in Crimea for their choice and to encourage Crimean residents to stay loyal to Ukraine without endangering their lives and interests. Therefore, it should be expressly provided that sanctions should be imposed only for activities which harm national interests of Ukraine.
- (xi) Ramifications of the occupation for Ukrainian court system. The main purpose is to ensure legal continuity as regards the Ukrainian court system in Crimea in order for any legal cases not to be disrupted by the occupation and be continued in mainland Ukraine.
- (xii) Enforcing any claims Ukraine or Ukrainian residents may have against the Russian Federation, the Republic of Crimea, its officials or residents of Crimea. It is important to devise a mechanism which will ensure effective enforcement of such claims in Ukraine and abroad.

17. Criminal Law and Criminal Proceedings

Ukrainian criminal law and criminal proceedings require immediate attention. In November 2012 a new Criminal Procedure Code (CPC) came into force in Ukraine. According to the new provisions pre-trial investigation starts (according to Art. 214) with enrollment of crime data in the Unified register of pre-trial investigations (Register).

Under part 1 of Art. 214 of CPC the investigator or the prosecutor immediately (but no later than 24 hours after receiving the application, information about the crime or after self-identification of any source of circumstances that might indicate a crime) shall include appropriate information in the Register and start an investigation. Thus, CPC clearly indicates what an authority should do after receiving information about the crime – to open a criminal proceeding.

However, from our experience, the police found a way to evade this rule, so as not to open the proceeding. For this purpose, the operational units of the Ministry of Internal Affairs starts verification of information that results in a decision – considered a crime such as being occurred or not. However, there are no barriers or other prohibitions to open the proceeding. Law, as stated above, directly encourages the investigator to start such investigation. Especially this relates to the tax police units, which receive information on tax legislation violations not for additional screening, but for opening proceeding under Art. 212 of the Criminal Code (tax evasion). One should understand that wording of Art. 214 CPC, “the application, information about the crime or a self-identification with any source of circumstances that might indicate a crime” is not interconnected with the provisions of other laws, in particular tax legislation. Therefore, any written or even oral source of information can be a source of crime report including a tax audit conclusion. This rule has a very broad meaning in fact.

At the same time, automatic opening of criminal proceeding under Art. 212 of the Criminal Code on the basis of a tax audit conclusion cannot be considered as being legitimate. Disposition of Art. 212 of the Criminal Code sounds like “intentional evasion of taxes and further actual budget shortfalls”. Meanwhile, a tax audit cannot prove the intent of the business entity authority for tax evasion because a research on “intentional” evasion is out of the tax inspector competence.

According to the logic of the new Criminal Procedure Code, there is nothing dangerous in opening of a criminal proceeding – in fact, before charging any restrictions (such as custody, seizure of property) to the subject of tax evasion cannot be applied. Although there is a possibility to exhaust the “client” by interrogations and searches, which is also unfair.

In case, as required by law, tax authorities, after the composing of a tax audit conclusion, make an issue of tax notices (in which the sum of unpaid taxes are noted) it is time immediately to start their administrative and further court appealing. This is important in the light of paragraph 56.22 of the Tax Code, which prohibits accusing of evading taxes while the continuing appeals of the tax authorities’ decision. The rule, however, is only valid when the investigator has no other evidence of tax evading except of a tax audit conclusion and tax notices.

It is understood that after abolition of tax notices by the Administrative Court, and after entry of a judicial decision in force, the criminal proceedings under Art. 212 of the Criminal Code

(again – in the absence of other evidence) shall be closed automatically as the main evidence of a crime disappears.

Much more dangerous is a situation when tax officers, abusing their powers, are not hurrying to issue tax notices (without tax notices appeal procedure is impossible), and in the same time initiate criminal proceedings.

To prevent such abuses it would be appropriate to give the taxpayer the right to appeal a tax audit conclusion separately from tax notices. We also propose to broaden the content of paragraph 56.22 of the Tax Code, stating therein that the automatic opening of criminal proceedings on the basis of a tax audit conclusion before the end of the appeal procedure is impossible.

Annex I: The list of best projects for donors

- Assist with carrying out lustration in Ukraine (training of relevant officers responsible for lustration, supervision over the process by foreign highly respected public persons, creating and maintaining website with the regularly updated information on lustration in Ukraine).
- Assist with the implementation of testing and training system of judges, law-enforcement officers, anti-monopoly committee and other state officials.
- Provide comprehensive multi-level assistance with designing software obtaining hardware and IP licenses for e-Government and IT solutions, implementing the most advanced experience of Estonia and Georgia (including translation of content into Ukrainian).
- Assist with creation of the computerized land title registry system.
- Create an independent ombudsman institution for disputes of businesses with the Government authorities.
- Establish FCPA Compliance Programs for companies and civil servants.
- Assist with asset recovery from foreign jurisdictions.
- Establish Western-oriented educational programs for law, political sciences and public administration undergraduate and graduate degrees.
- Assist with English-language and IT training of civil servants, judges and law enforcement.
- Considerably increase support for educational institutions in Ukraine providing Western-oriented educational programs.
- Considerably increase support for education of Ukrainian students abroad.

Annex II: The list of Quick Wins

- Abolish the Commercial Code.
- The "90-day rule" must be immediately abolished in any of its forms (meaning that it cannot be restored as a "180-day rule").
- Abolish registration of cross-border intercompany loans with the National bank of Ukraine.
- Increase the antimonopoly thresholds to the EU levels.
- No separate antimonopoly filing should be required for approval of restrictions directly related and necessary to concentrations.
- Adopt the typical requirements to the concerted actions with respect to supply and use of goods, which will exempt respective concerted actions from the requirement to obtain antimonopoly approval.
- Ukrainian guarantors (sureties) should be allowed to freely purchase foreign currency to make payments under suretyship agreements securing loans given by a foreign lender to a Ukrainian borrower.
- A requirement to obtain a Price Evaluation Act (for any agreement with a Ukrainian counterparty the payments for which exceed EUR 100,000 or the equivalent of this amount in other currency) should be abolished.
- The Law of Ukraine "On Financial Services" should be amended to expressly allow Ukrainian companies, which are not financial institutions, to provide interest-bearing intercompany loans and suretyships.
- The Tax Code of Ukraine should be amended to expressly specify tax gross-up clauses are allowed. The letter of the Main Department of the NBU in the city of Kyiv and Kyivska Oblast' issued in November 2011, which clarified that cross-border loan agreements should not contain any tax gross-up provisions in favor of non-resident lenders should be cancelled.
- A special legislative act should be adopted to expressly specify that court judgments rendered in the USA and any country, which is a party to the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters dated 30 October 2007 (Lugano Convention), are recognized and enforced in Ukraine, regardless of whether or not Ukrainian court judgments are recognized in those countries.

Annex III: The list of rules and GOU bodies that must be abolished

The State Architectural and Construction Inspection of Ukraine [in the case there is the detailed plan of development of the respective territory adopted by local council - any entity should be able to construct on its land plot the object envisaged by such plan and corresponding to conditions and limits issued by local council]

The State Service of Mining Supervision and Industrial Safety of Ukraine

The State Environmental Inspection of Ukraine

The State Technogenic Safety Inspection of Ukraine [mandatory (for public buildings) insurance of liability before third persons in the case of fire due to non-observance of fire safety rules will create much more efficient mechanism of controlling fire safety]

The State Inspection of Ukraine on Consumer Protection [independent and efficient court system makes this authority redundant]

The State Agriculture Inspection of Ukraine