

**Baker  
McKenzie.**

**CONDUCTING BUSINESS  
IN UKRAINE**

**2020**



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# **CONDUCTING BUSINESS IN UKRAINE**

## **2020**

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## PREFACE

Baker McKenzie helps clients overcome the challenges of competing in the global economy. We solve complex legal problems across borders and practice areas. Our unique culture, developed over 70 years, enables our 13,000 people to understand local markets and navigate multiple jurisdictions, working together as trusted colleagues and friends to instill confidence in our clients.

In close cooperation with our offices worldwide, we offer expertise on all aspects of investment in the region.

Baker McKenzie's Kyiv office has maintained a leading market position in Ukraine for 27 years. We offer a full range of legal services and business solutions.

*Conducting Business in Ukraine* is intended to be a general guide for companies operating or considering investment in Ukraine. It presents an overview of the Ukrainian legal system and the regulation of business activities in the country.

We would be happy to provide you with further information regarding a specific industry or area of Ukrainian law in which you may have a particular interest.

Baker McKenzie, Kyiv office

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**1**

**UKRAINE —  
AN OVERVIEW**

## 1.1 Geography, topography and population

Ukraine is one of the largest (by population and territory) countries in Europe, which:

- has the population of approximately 42.42 million (as of 1 November 2017)<sup>1</sup>, with a population density of about 75.3 people per sq. kilometer;
- covers the land area of 603,500 sq. kilometers with a coastline of 2,782 kilometers;<sup>2</sup> and
- borders the Russian Federation to the east, Belarus to the north, Poland, Slovakia, Hungary, Moldova and Romania to the west, and the Black Sea and the Sea of Azov to the south.

## 1.2 Government and political and legal systems

Ukraine follows a civil law system.

The legal system of Ukraine comprises the following principal layers:

- the Constitution, which forms the foundation for the whole political, state governance and legal system;
- laws adopted by the Verkhovna Rada (Parliament) of Ukraine, including the Civil Code of Ukraine;
- international agreements of Ukraine ratified, or acceded to, by the Verkhovna Rada (which prevail over conflicting norms of the domestic laws of Ukraine); and
- other normative acts.

Pursuant to the Constitution, Ukraine has three branches of state power:

- the legislative branch, represented by the Verkhovna Rada;
- the executive branch, represented by the Cabinet of Ministers of Ukraine (the "Cabinet of Ministers") and headed by the Prime Minister; and
- the judicial branch, represented by a multilevel system of courts, the highest being the Supreme Court of Ukraine.

The President:

- is the head of state and the commander-in-chief of armed forces;
- has significant authority over the executive branch;
- is elected every five years; and

<sup>1</sup>Information of the State Statistics Service of Ukraine does not include data on the Autonomous Republic of Crimea (illegally and temporarily annexed by the Russian Federation in 2014).

<sup>2</sup>Including the data on the Autonomous Republic of Crimea (illegally and temporarily annexed by the Russian Federation in 2014).

- possesses such powers as the dissolution of the Verkhovna Rada in specific cases and the appointment of the Prosecutor General.

The Verkhovna Rada:

- is the supreme legislative body in Ukraine;
- comprises 450 people's deputies:
  - half of whom are elected through proportional representation
  - the other half are elected directly and individually by a majority vote in each voting district
- is elected for a five-year term;
- has the power to adopt laws and resolutions and approve the state budget of Ukraine;
- ratifies, or accedes to, international agreements in the form of laws of Ukraine;
- approves Prime Minister candidates; and
- appoints the Chair of the National Bank of Ukraine, the Head of the Security Service of Ukraine and several other senior government officers.

In Ukraine, a bill becomes a law once it gains a majority (226 deputies) of the votes in the Verkhovna Rada (except for certain types of laws requiring a supermajority of 300 votes), and is signed into law by the President.

The Cabinet of Ministers:

- is the highest body within the executive branch;
- implements laws once they are adopted;
- is led by the Prime Minister;
- is responsible before the President and the Verkhovna Rada; and
- is accountable to the Verkhovna Rada.

The various ministries, state committees and other authorized bodies of the executive branch are responsible for the direct implementation of the resolutions passed by the Cabinet of Ministers.

The Prime Minister:

- is proposed to the President by the parliamentary coalition;
- is appointed by the Verkhovna Rada upon the nomination by the President; and
- has the right to nominate members of the Cabinet of Ministers (other than the Minister of Defense of Ukraine and the Minister of Foreign

Affairs of Ukraine, who are nominated by the President) for the approval by the Verkhovna Rada.

The Ukrainian court system exercises independent judicial power in Ukraine and consists of:

- courts of general jurisdiction; and
- the Constitutional Court of Ukraine

The courts of general jurisdiction:

- are responsible for civil, criminal, commercial and administrative cases as well as cases on administrative offenses;
- have the following three-tier structure:
  - the Supreme Court of Ukraine;
  - appellate courts:
    - general appellate courts
    - commercial appellate courts
    - administrative appellate courts
  - local courts:
    - general courts (consider civil and criminal cases as well as cases on administrative offenses)
    - commercial courts
    - administrative courts.

Pursuant to the judicial reform of June 2016, there will no longer be standalone highest specialized courts in Ukraine, other than:

- the Highest Intellectual Property Court; and
- the Highest Anticorruption Court, which are yet to be created.

The Supreme Court of Ukraine:

- is the highest judicial body within the general jurisdiction court system; and
- comprises:
  - the administrative court of cassation
  - the criminal court of cassation
  - the civil court of cassation
  - the commercial court of cassation
  - the Great Chamber of the Supreme Court

The Constitutional Court of Ukraine is the only body authorized to exercise control over compliance with the Constitution and the laws of Ukraine, its

international agreements and acts of the President, the Cabinet of Ministers and other governmental agencies.

### 1.3 Regional structure

Ukraine is a unitary state divided into:

- 24 oblasts (regions);
- the Autonomous Republic of Crimea (illegally and temporarily annexed by the Russian Federation in 2014); and
- the cities of Kyiv and Sevastopol (each of which is deemed a separate administrative unit; Sevastopol was illegally and temporarily annexed by the Russian Federation in 2014).

Each oblast and both Kyiv and Sevastopol have a governor who is appointed by the President.

The Autonomous Republic of Crimea has its own constitution, Verkhovna Rada and government, but remains subordinate to the central Government of Ukraine.

It is anticipated that major administrative and territorial reforms will take place in Ukraine in the medium term.

Following the Russian annexation of Crimea and the City of Sevastopol in March 2014:

- a special Law of Ukraine assigned the status of temporarily occupied territories to these regions of Ukraine and established a special regime for conducting business transactions in these regions and between these regions and mainland Ukraine; and
- Crimea and the City of Sevastopol were declared, with effect from September 2014 and for the following 10-year period, a Free Economic Zone with a special tax and customs clearance regime and a number of other features aimed at protecting the businesses affected by the annexation and the future economic development of these regions upon the termination of the occupation.

### 1.4 Economy

Ukraine:

- benefits from a consumer market of approximately 42.42 million people;
- enjoys:
  - an opportune geographical location
  - a mild climate

- fertile land
- a rich natural resource base
- a highly educated labor force
- a well-developed transport infrastructure
- a long-established tradition of scientific research and development.

Following the Russian annexation of Crimea and the occupation of the Donbass region by Russian troops and Russian-backed separatists, the country faced significant economic and financial challenges and remains in need of investment in all sectors of industry, with many industrial plants either located in occupied territories or otherwise unable to meet the current consumer demand.

Ukraine's most significant exporting power lies within the IT sector, agriculture, chemicals and fertilizers and steel products.

The Ukrainian financial sector:

- has undergone substantial changes and improvements in the past several years with an effective regulatory framework being progressively created and a modern financial system, based on market principles, steadily emerging; and
- is still experiencing the negative effects of the world financial crisis, as are other economies.

The National Bank of Ukraine and the government are implementing, among others, the following measures to combat the negative consequences of the world financial crisis:

- cleansing the market of troubled banks;
- recapitalization of remaining banks;
- limitation of the outflow of capital from Ukraine; and
- facilitation of the performance of debt obligations by Ukrainian borrowers.

## 1.5 Foreign relations

Ukraine:

- is a constituent member of the UN and various other multilateral organizations, including the IMF, IBRD, IFC, MIGA, EBRD, BSTDB, EIB, OSCE and the Council of Europe;
- has become party to more than 400 multilateral treaties and over 2,000 bilateral agreements since gaining its independence in 1991;
- joined the WTO in 2008;
- cooperates with the OECD, the European Union and NATO;

- has stated its intention to ultimately join the European Union within the next decade and to continue cooperation with NATO in various areas; and
- has signed and ratified the Cooperation Agreement with NATO, which is now in force.

Ukraine seeks to further deepen EU-Ukraine relations. The political part of the EU-Ukraine Association Agreement was signed on 21 March 2014. The economic part of the EU-Ukraine Association Agreement (the "Deep and Comprehensive Free Trade Agreement") was signed on 27 June 2014 as part of the Association Agreement ("AA").

The AA establishes major rules for political dialog and cooperation in numerous areas such as energy, transport and public finance management. The Deep and Comprehensive Free Trade Agreement significantly integrates the EU and Ukrainian markets by banning trade restrictions. The AA entered into force on 1 September 2017.



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**2**

**FOREIGN  
INVESTMENT IN UKRAINE**



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Ukrainian legislation provides (with a few exceptions) that foreign investors are authorized to carry out their investment activities in Ukraine on the same basis as Ukrainian domestic investors. This relates to the types of investments, the available investment vehicles and the investment targets.

## 2.1 Foreign investment

- The Law of Ukraine On Investment Activity establishes the general principles for investment activity in Ukraine, irrespective of the nationality of the investor. The particularities of making *foreign investments* in Ukraine are regulated by the Law of Ukraine On the Regime of Foreign Investment ("**Foreign Investment Law**").
- Under the Foreign Investment Law, the term "*foreign investment*" refers to all forms of value invested by foreign investors into objects of investment activity in accordance with the applicable Ukrainian legislation for the purposes of obtaining profit or a social effect. Pursuant to the Commercial Code of Ukraine ("**Commercial Code**") and the Foreign Investment Law, any Ukrainian company qualifies as an "*enterprise with foreign investment*" if the foreign investment in its charter capital amounts to at least 10%.

## 2.2 Privileges and guarantees for foreign investors

### **Protection against changes in legislation**

Foreign investors are guaranteed protection against changes in foreign investment legislation for a period of 10 years. However, certain changes to other areas of Ukrainian legislation have, in fact, limited the applicability of the above guarantee to changes in Ukrainian legislation relating to nationalization, expropriation etc.

<p><b>Protection against nationalization</b></p>	<p>Foreign investments may not be nationalized. State bodies may not expropriate foreign investments, with the exception of emergency measures (such as national disasters, accidents, epidemics, etc.). This measure can be taken only on the basis of the decisions of bodies authorized to that effect by the Cabinet of Ministers of Ukraine.</p>
<p><b>Guarantee for compensation and reimbursement of losses</b></p>	<ul style="list-style-type: none"> <li>■ Foreign investors have the right to be reimbursed for their losses, including lost profits and moral damages incurred as a result of the action, the failure to act or the improper performance on the part of state or municipal bodies of Ukraine or their officials with regard to their obligations to foreign investors or enterprises with foreign investment as required by law.</li> <li>■ All expenses and losses of foreign investors must be reimbursed at the current market rate or on the basis of a well-founded valuation certified by an independent auditor or auditing firm.</li> </ul>
<p><b>Guarantee in the event of the termination of investment activity</b></p>	<p>The Foreign Investment Law provides that in the event of the termination of its investment activity, a foreign investor has the right, within six months of the date of the termination of such activity, to recover its investment in kind or in the currency of the investment to the amount of the actual contribution (taking into account any possible reduction of charter capital), without the payment of any fees or duties. A foreign investor has the right to recover the benefits from its investments in cash or in kind on the basis of the actual market value of the investment at the time of termination of the investment activity, unless otherwise stipulated by applicable Ukrainian legislation or international agreements to which Ukraine is a party.</p>
<p><b>Guarantee of profit repatriation</b></p>	<p>After the payment of taxes, duties and other mandatory payments, foreign investors are guaranteed the right to the unimpeded and immediate transfer abroad in a foreign currency of all profits and other proceeds legally earned as a result of their investment activity (subject to applicable currency exchange regulations).</p>

<p><b>Exemption from paying import duties</b></p>	<p>Under the Customs Code of Ukraine, enterprises with foreign investments are exempt from paying import duties on their foreign investors' in-kind contributions to their charter capitals (except for goods for sale or use for purposes not directly related to business activities). However, in the event that the corresponding assets are alienated by such enterprises earlier than three years from the date of them being added to the balance of the enterprise, the enterprise will then be required to pay the applicable import duty on general grounds.</p>
<p><b>Public-private partnerships</b></p>	<p>The Foreign Investment Law contemplates the possibility of the establishment of a priority regime with respect to certain projects with the participation of foreign investors, which will be implemented pursuant to state programs promoting key sectors of the economy, the social sphere and territories.</p>
<p><b>Free economic zones</b></p>	<p>Current Ukrainian legislation provides for the establishment of free economic zones. The legal status of foreign investments in such zones is regulated by separate legislation on free economic zones, under which foreign investors may be granted additional privileges and benefits.</p>

### 2.3 Restrictions to investment activity

<p><b>Common for foreign and domestic investors</b></p>	<p>Pursuant to applicable Ukrainian legislation, certain types of business activity may be pursued only by state-owned enterprises e.g., the rocket industry, printing of banknotes and certain forms of securities certificates, etc.</p>
<p><b>Applicable only to foreign investors</b></p>	<p>Foreign citizens and legal entities are prohibited from owning agricultural land in Ukraine and are only authorized to own land designated for non-agricultural use under the current version of the Land Code of Ukraine.</p>

## 2.4 Making an investment

A foreign investments may be made in either Ukrainian Hryvnia or in a foreign currency. Any such investment may be conducted exclusively through banks by means of a non-cash payment (a cash transfer is allowed only for purchasing shares of joint-stock companies by using an escrow account). For making an investment a foreign investor may use one of the following options.

### Options for investors when making both portfolio and direct investments in Ukraine

Open a bank account (investment, current, escrow or correspondent) with a Ukrainian bank and transfer funds from abroad to this bank account.

Transfer funds from abroad directly to a current account of a Ukrainian resident maintained in Ukraine.

Settle payments through the bank accounts of other foreign investors, residents or non-residents maintained with Ukrainian commercial banks.

Convert funds in a foreign currency kept in an investment account at a Ukrainian commercial bank into Ukrainian currency for further investment.

Foreign investors may also make an investment deposit at a Ukrainian bank. The investment deposit consists of funds that a foreign investor, pursuant to a deposit agreement, puts into a deposit account in a Ukrainian commercial bank to receive interest.

## 2.5 Dispute resolution

- In the event of a dispute arising with respect to a foreign investment, a foreign investor may seek recourse through a number of institutions. As a general matter, the Foreign Investment Law provides that a dispute arising between a foreign investor and the state of Ukraine must be settled in Ukrainian courts, unless otherwise provided for by international treaties, while all other disputes involving a foreign investor must be settled in Ukrainian courts or, upon the parties' agreement, in courts of arbitration (including international arbitration courts).

- Furthermore, the Law of Ukraine On Foreign Economic Activity (“LFEA”) allows parties to a commercial dispute to select a forum for its resolution. In accordance with Article 38 of the LFEA, disputes between parties regarding foreign economic activity may be resolved by Ukrainian courts, the International Commercial Arbitration Court, the Maritime Arbitration Commission of the Chamber of Commerce and Industry of Ukraine, or by other dispute resolution bodies chosen by the parties to the dispute. In addition, the Law of Ukraine On the International Commercial Arbitration Court, specifically provides that both foreign investors and Ukrainian enterprises with foreign investment have the right to resolve disputes between themselves and third parties in international commercial arbitration courts.
- As a party to the 1966 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention or the Washington Convention), Ukraine shall recognize and enforce the awards of the International Centre for Settlement of Investment Disputes.

## 2.6 Investment treaties

- Ukraine is currently a signatory to treaties on the mutual protection of foreign investments with various countries, including:

*Albania, Argentina, Armenia, Austria, Azerbaijan, Belarus, the Belgium–Luxembourg Economic Union, Bosnia and Herzegovina, Brunei, Bulgaria, Canada, Chile, China, Croatia, Cuba, Czech Republic, Denmark, Egypt, Equatorial Guinea, Estonia, Finland, France, the Gambia, Georgia, Germany, Greece, Hungary, India, Indonesia, Iran, Israel, Italy, Jordan, Kazakhstan, Korea, Kuwait, Kyrgyzstan, Latvia, Lebanon, Libya, Lithuania, Macedonia, Moldova, Mongolia, Morocco, the Netherlands, Oman, Panama, Poland, Portugal, Russian Federation, San Marino, Saudi Arabia, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syria, Tajikistan, Turkey, Turkmenistan, the United Arab Emirates, the United Kingdom, the United States of America, Uzbekistan, Vietnam, Yemen and Yugoslavia.*

- Ukraine also signed the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part in 2014.
- On 16 May 2008, Ukraine became a member of the World Trade Organization.

**Baker  
McKenzie.**



**3 ESTABLISHING  
A LEGAL PRESENCE**



**EXPERT**

**Olga  
Gavrylyuk**  
Senior Associate



**PARTNER**

**Viacheslav  
Yakymchuk**  
Partner

### 3.1 Introduction

The establishment, maintenance and liquidation of business legal entities in Ukraine are regulated by the following laws:

- the Civil Code of Ukraine ("**Civil Code**")
- the Commercial Code of Ukraine ("**Commercial Code**")
- the Law of Ukraine on Companies ("**Company Law**") (not valid with respect to limited and additional liability companies)
- the Law of Ukraine on Limited and Additional Liability Companies ("**LLC Law**")
- the Law of Ukraine on Joint Stock Companies ("**JSC Law**")
- the Law of Ukraine on the State Registration of Legal Entities, Private Entrepreneurs and Public Organizations

Under the Civil Code, legal entities that carry out entrepreneurial activities to earn a profit must be established in the form of companies, which are the following:

- 1** General partnership
- 2** Limited partnership
- 3** Additional liability company
- 4** Limited liability company
- 5** Joint stock company

The most common companies for conducting business activities in Ukraine are limited liability companies (LLCs) and joint stock companies (JSCs), both of which embody the concept of limited liability for investors.

In choosing between an LLC and a private JSC in establishing a wholly owned subsidiary, LLCs appear to be more popular than private JSCs due to the various establishment and operational considerations. The main general corporate benefit of an LLC in comparison with a JSC is that the procedure for the establishment and operation of an LLC is significantly less burdensome and time-consuming. An LLC does not have to issue shares or perform the procedural steps required for issuing shares. The absence of shares in an LLC makes this form of legal entity more mobile and flexible when the participants of the LLC have to change (increase or decrease) the charter capital of the company.

The LLC Law, which became effective on 17 June 2018, fundamentally changed the regulation of LLCs in Ukraine and gave rise to new opportunities for business, provided participants with a discretion in establishing the rules on LLC governance and abolished the outdated mandatory provisions of the Company Law applicable to LLCs.

**3.2 Limited liability companies**

**A limited liability company** is a company established by one or more persons (legal or individuals), the charter capital of which is divided into participatory interests.

The legal nature of an LLC is similar to that of a German GmbH and a French *société à responsabilité limitée* (SARL).

**Participatory interest**

- The participatory interests of participants can be expressed in the form of the respective percentages of an LLC’s charter capital.
- Participatory interests in an LLC do not qualify as “securities” for the purposes of applicable Ukrainian legislation and, therefore, are not subject to registration with the Securities Commission.

**Liability**

The participants of an LLC who failed to pay contributions in full will be jointly and severally liable for their obligations to the extent of the portion of the contribution that each participant failed to pay.

Establishment requirements	
<b>Founders</b>	<p><b>Quantity</b></p> <p>A single founder or a group of founders. No limitation of the maximum quantity of founders.</p>
	<p><b>Restrictions</b></p> <p>A subsidiary in the legal form of an LLC that is wholly owned by a foreign person (legal or individual) may not own agricultural land in Ukraine under the current version of the Land Code ("<b>Land Code</b>"). If the amendments to the laws of Ukraine regarding the turnover of agricultural land are adopted by the Ukrainian government, legal entities having foreign persons (legal or individual) as their beneficial owners will be able to own the agricultural land starting from 1 January 2024.</p>
<b>Minimum capitalization</b>	No minimum capitalization is required for an LLC.
General participants' meeting	
<b>Role</b>	The general participants' meeting is the highest governing body responsible for policy decisions of an LLC, which consists of all participants of an LLC.
<b>Conveying the meeting</b>	<ul style="list-style-type: none"> <li>■ The period for issuing a prior notice for convening a meeting of participants will be not less than 30 days, if another period is not prescribed in the charter.</li> <li>■ The absence of proper notification to a participant can be a ground for a claim on the invalidity of decisions, adopted by the general participants' meeting.</li> </ul>
<b>Voting</b>	<ul style="list-style-type: none"> <li>■ Each participant has a number of votes proportionate to the percentage of their interest in an LLC's charter capital.</li> <li>■ As a general rule, resolutions are approved by a simple majority of the participants of an LLC.</li> <li>■ Three quarters of votes of all the participants of an LLC is required for: <ul style="list-style-type: none"> <li>○ adoption and approval of any amendments to the charter</li> <li>○ change of the amount of the charter capital</li> </ul> </li> </ul>

	<ul style="list-style-type: none"> <li>○ approval of a spin-off, merger, separation, liquidation and transformation of the LLC, appointment of the LLC’s termination commission (liquidation commission), approval of the procedure for the LLC’s termination, approval of the terms and conditions of the distribution among the participants of the assets remaining after satisfaction of the creditors’ claims, and approval of the liquidation balance sheet</li> <li>■ Unanimous vote of all the participants of an LLC is required for:             <ul style="list-style-type: none"> <li>○ approval of the value of the participant(s)’s non-cash contribution(s)</li> <li>○ redistribution of the participatory interests of the charter capital</li> <li>○ establishment of other bodies of the LLC and determination of the terms and conditions of their operation</li> <li>○ approval of resolutions on the acquisition by the LLC of the participant’s participatory interest (portion thereof)</li> </ul> </li> </ul>
<b>Executive body</b>	
<b>Role</b>	Responsible for the day-to-day operations of an LLC.
<b>Form</b>	<ul style="list-style-type: none"> <li>■ A “directorate” (collective management) or a “director” (individual management)</li> <li>■ The form of an LLC’s management and the number of its members may be decided at the discretion of the participants and further specified in the LLC’s charter</li> <li>■ The director or the directorate’s members can be appointed and removed (at any time) by the general participants’ meeting or the supervisory board (if the authority is delegated by the general participants’ meeting)</li> </ul>
<b>Officers</b>	
<b>Persons qualified as officers</b>	The director and members of the supervisory board are officers by virtue of the LLC Law, and the chief accountant is the officer by virtue of the administrative and criminal law. It can be prescribed in the charter that any other employee of the LLC is considered as an officer.

<p><b>Obligations</b></p>	<ul style="list-style-type: none"> <li>■ Under the conflict of interests provisions, officers are obliged to act reasonably and in good faith in the best interests of the LLC and not their own private interests or the interests of their affiliates.</li> <li>■ Officers are prohibited from disclosing information that became known to them in connection with the performance of their duties and is a trade secret of an LLC or is confidential, unless the disclosure of such information is required by law.</li> </ul>
<p style="text-align: center;"><b>Supervisory board</b></p>	
<p><b>Supervisory board</b></p>	<ul style="list-style-type: none"> <li>■ The supervisory board of an LLC is a collective body responsible for the control and supervision of the activities of the director (directorate).</li> <li>■ The members of the supervisory board do not need to obtain a temporary residency or work permit if they are not employed by the LLC.</li> </ul>
<p style="text-align: center;"><b>Approval of transactions</b></p>	
<p><b>Significant transaction</b></p>	<p>The LLC Law establishes that a significant transaction is any agreement to be entered into by the LLC in case the value of the assets, works or services that are the subject matter of such agreement exceeds 50% of the LLC's net assets value according to the last approved financial reporting. Any other transaction with the specified criteria can also be determined as significant in the charter. Alternatively, such requirement can be waived by the charter.</p>
<p><b>Interested party transaction</b></p>	<p>An interested party transaction is any transaction between the LLC and the director or its affiliate, among others. The charter of an LLC may provide for a specific approval process regarding interested party transactions. There is no obligatory requirement to establish the criteria for interested party transactions and the specific approval process. If the interested party transactions are not regulated in the charter of the LLC, there would be no obligation to refrain from concluding such transactions.</p>
<p><b>Post-approval of transactions</b></p>	<p>If any significant transaction or interested party transaction was entered into in breach of the required procedure, such transaction will create, modify and terminate civil rights and obligations only if further approved in the way that is required for its adoption.</p>

### 3.3 Joint stock companies

**A joint stock company** is a company whose charter capital is divided into shares of equal par value.

A joint stock company is very similar in form and operation to US corporations, German AGs and French *sociétés anonymes* (SAs).

<p><b>Types</b></p>	<ul style="list-style-type: none"> <li>■ Public (the rough equivalent of an open JSC under former legislation)</li> <li>■ Private (the rough equivalent of a closed JSC under former legislation)</li> </ul>
<p><b>Liability</b></p>	<p>Shareholders are liable for the JSC’s obligations only to the extent of their respective equity contributions to its charter capital, except for the shareholders of banks with substantial participatory interest, which may have additional liability imposed.</p>
<p style="text-align: center;"><b>Establishment requirements</b></p>	
<p><b>Founders</b></p>	<p><b>Quantity</b></p> <p>A single founder or a group of founders. No limitation in relation to the maximum quantity of founders.</p> <p><b>Restrictions</b></p> <ul style="list-style-type: none"> <li>■ A wholly owned subsidiary in the legal form of a JSC may not be established by another wholly owned subsidiary (either foreign or Ukrainian).</li> <li>■ A JSC may not have among its shareholders only legal entities that are wholly owned by the same person.</li> <li>■ A subsidiary in the legal form of a JSC that is wholly owned by a foreign company may not own agricultural land in Ukraine under the current version of the Land Code. If the amendments to the laws of Ukraine regarding the turnover of agricultural land are adopted by the Ukrainian government, legal entities having foreign persons (legal or individual) as their beneficial owners will be able to own the agricultural land starting from 1 January 2024.</li> </ul>

<b>Minimum capitalization</b>	1,250 times the officially established minimum monthly salary as of the date of the formation of the JSC (UAH 5,903,750 in 2020, or approximately USD 249,916.91 or EUR 224,985.93).
<b>Issuance of shares</b>	
<b>First issuance</b>	The first issuance of shares upon the establishment of either a public or a private JSC must be made exclusively by means of a private placement of shares among the founders of the JSC.
<b>Additional issuance by public JSC</b>	<p>Additional shares may be issued by means of public and private placements of shares.</p> <p>Further, a public JSC is obligated to include its shares into the register of at least one of the Ukrainian stock exchanges and may not be included in the list of more than one Ukrainian stock exchange.</p>
<b>Additional issuance by private JSC</b>	<p>Additional shares may be issued only by means of a private placement of shares.</p> <p>If a shareholders' meeting of a private JSC adopts a decision to carry out a public placement of its shares, then the charter of such JSC must be amended; in particular, the type of JSC must be changed from private to public.*</p> <p>* changing the JSC's type from private to public and vice versa is not considered a transformation of the JSC.</p>
<b>Registration of issuance of shares</b>	<ul style="list-style-type: none"> <li>■ An issuance of shares by both a private and a public JSC must be registered with the Ukrainian National Commission on Securities and the Stock Market ("<b>Securities Commission</b>") with the registration of a share issue and an offering prospectus, a report on the results of the placement of shares and the issuance of a certificate on the registration of shares issuance.</li> <li>■ If a JSC fails to officially register any issue of its shares with the Securities Commission, any and all of the share purchase agreements entered into with respect to such shares issued, as well as any subsequent share issuances, will be deemed void.</li> </ul>

Meeting of shareholders	
<b>Role</b>	The highest governing body responsible for the policy decisions of a JSC
<b>Conveying the meeting</b>	<ul style="list-style-type: none"> <li>■ The period for issuing a prior notice for convening a meeting of shareholders and communicating the agenda thereof is 30 days.</li> <li>■ JSCs (both public and private) that have 25 shareholders or less may approve shareholders' decisions by written polling, as opposed to voting in person at a shareholders' meeting, if it is envisaged by the JSC's charter.</li> <li>■ If a JSC is wholly owned by one participant, it is exempt from the requirement to convene and hold shareholders' meetings; instead, the powers vested in the meeting of shareholders are to be exercised by the sole shareholder. A quorum of more than 50% of all voting shares is needed for the convocation of shareholders' meetings.</li> <li>■ The absence of proper notification to a shareholder can be a ground for a claim on invalidity of decisions, adopted by the general shareholders' meeting.</li> </ul>
<b>Voting</b>	<ul style="list-style-type: none"> <li>■ Voting rights are based on the principle of "one share, one vote" except for cases of cumulative voting.</li> <li>■ Cumulative voting can be used for the appointment of members of the supervisory board and/or the audit commission; mandatory cumulative voting for the appointment of members of the supervisory board is required in a public JSC.</li> <li>■ Three-quarters of votes of the shareholders registered for the particular shareholders' meeting is required to pass resolutions on:               <ul style="list-style-type: none"> <li>○ amendments to the charter</li> <li>○ cancellations of "treasury shares" (shares bought out by a JSC)</li> <li>○ changes to the JSC's type</li> <li>○ placements of shares and securities that can be converted into shares</li> <li>○ increases/decreases of the charter capital</li> <li>○ terminations and spin-offs, save for some cases stipulated by the JSC Law</li> </ul> </li> </ul>

	<ul style="list-style-type: none"> <li>■ All other resolutions may be adopted by a simple majority of the votes of those shareholders registered for the relevant meeting.</li> </ul>
<b>Supervisory board</b>	
<b>Necessity to be established</b>	<ul style="list-style-type: none"> <li>■ It is mandatory for the supervisory board to be established in public JSCs, banks and private JSCs with 10 or more shareholders.</li> <li>■ If 10 or more shareholders of a private JSC are affiliated in relation to each other, the establishment of a supervisory board is not mandatory.</li> <li>■ In the case of an absence of a supervisory board in a private JSC, its authorities are exercised by the general shareholders' meeting.</li> </ul>
<b>Role</b>	<ul style="list-style-type: none"> <li>■ The supervisory board represents the interests of the shareholders between the shareholders' meetings and exercises control over a JSC's management to the extent indicated by a JSC's charter.</li> <li>■ The JSC Law establishes a list of matters under the exclusive competence of the supervisory board.</li> <li>■ It may establish permanent or temporary committees and elect a corporate secretary who is responsible for a JSC's relationship with its shareholders and/or investors.</li> </ul>
<b>Requirements for members</b>	<ul style="list-style-type: none"> <li>■ Only individuals may be elected as members of the supervisory board.</li> <li>■ Members of the supervisory board of a JSC may not be members of its management or audit commission.</li> </ul>
<b>Executive body</b>	
<b>Role</b>	The executive body manages a JSC's day-to-day business activities.
<b>Form</b>	<ul style="list-style-type: none"> <li>■ A "management board" (collective management)</li> <li>■ A "director" (individual management)</li> </ul>

Auditor/audit commission	
<b>Role</b>	It conducts an audit of the financial and commercial activity of a JSC.
<b>Form</b>	<ul style="list-style-type: none"> <li>■ A JSC with less than 100 shareholders must either establish the position of an auditor or elect an audit commission.</li> <li>■ A JSC with more than 100 shareholders must elect an audit commission.</li> </ul>
<b>Requirements for members</b>	<ul style="list-style-type: none"> <li>■ Individual or legal entity shareholders of a JSC may be elected as members of the audit commission.</li> <li>■ The corporate secretary and the members of the other bodies of a JSC may not be elected as members of the audit commission (the auditor).</li> </ul>
Approval of transactions	
<b>Significant transaction</b>	<ul style="list-style-type: none"> <li>■ The supervisory board will approve transactions with the value of 10-25% of the JSC's assets in accordance with the previous yearly financial statement.</li> <li>■ The shareholders' meeting will approve transactions with the value of more than 25% of the JSC's assets (from 25% to 50% - can be approved by a simple majority of shareholders present at the meeting; above 50% — will be approved by more than 50% of the total number of shareholders).</li> </ul>
<b>Interested party transaction</b>	Transactions with "interested parties" require approval by either the supervisory board or the shareholders' meeting.
<b>Post-approval of transactions</b>	If any significant transaction or interested party transaction was entered into in breach of the required procedure, such transaction will create, modify and terminate civil rights and obligations only if further approved in the way that is required for its adoption.
Reporting and disclosure requirements	
<b>"Regular"</b>	Regular reporting is the disclosure on an annual basis (for private JSCs) and an interim and annual basis (for public JSCs) of the information on the results of the financial and business activities of a JSC.

## **"Special"**

Special reporting is the ad hoc disclosure of information on any actions that may influence the financial or business activities of a JSC and lead to a significant change in the value of its securities.

## **Other publication requirements**

- An entity intending to purchase a significant shareholding in a JSC (10% or more) must notify a JSC in advance of its intention in writing and must disclose its intention to the Securities Commission and in the official public electronic database.
- A person who has acquired a controlling shareholding in a JSC (50% or more) must notify the Securities Commission and a JSC and make an offer to all other shareholders to purchase their shares at a price not less than the market price and must notify the Securities Commission and the stock exchange (for a public JSC) of such offer.
- A person acquiring more than 50% or 75% of shares in the JSCs will offer to purchase shares of minority shareholders and will make certain disclosures: to notify a JSC and the Securities Commission and make a notice in the official public electronic database (i) on the intention to purchase shares; (ii) on conclusion of the respective agreement after signing and (iii) on the acquisition of the respective stake once the share ownership is transferred (including the highest share price paid by the stakeholder over a period of 12 months).
- A person that acquired 95% or more of the ordinary shares in any type of JSC should submit a notification to the JSC and the Securities Commission that it has acquired such stake. The notification should include the number of shares owned before such acquisition, the ownership structure of the stakeholder and its affiliates (as applicable), the highest share price paid by the stakeholder (directly or indirectly) over a period of 12 months and the date it acquired a dominant controlling stake.

### 3.4 Representative offices/branches

<p><b>Notion</b></p>	<ul style="list-style-type: none"> <li>■ Representative offices are deemed to be structural divisions of an enterprise, located in localities different from that of the headquarters of the enterprise.</li> <li>■ “Branches” do not technically exist in Ukraine but representative offices are their closest equivalent.</li> <li>■ Representative offices do not enjoy the status of a separate legal entity. This type of structural division must act on the basis of regulations adopted by the corresponding governing body of its founding enterprise.</li> <li>■ The manager of a representative office must act on the basis of a special power of attorney issued by the management of his/her founding enterprise.</li> </ul>
<p><b>Activities</b></p>	<ul style="list-style-type: none"> <li>■ A foreign legal entity may establish its representative office in Ukraine to carry out marketing, promotional and other auxiliary functions on behalf of the foreign legal entity.</li> <li>■ It is not clear whether a foreign legal entity may conduct trade or business through a representative office, although “commercial” representative offices (in effect, the equivalent of “branches” in most other countries) are quite common in Ukraine.</li> <li>■ The practice has been to permit a representative office to carry out a wide range of commercial activities (including signing contracts and implementing imports, exports and other transactions). Normally, these practices result in the creation of a permanent establishment for such foreign companies in Ukraine for the purposes of Ukrainian corporate income tax legislation and, thus, the commercial representative office’s activities become taxable in Ukraine on a general basis (whereas, generally speaking, the activities of a representative office are non-taxable).</li> </ul>
<p><b>Registration</b></p>	<ul style="list-style-type: none"> <li>■ Representative offices of foreign legal entities must be registered with the Ministry of Economic Development and Trade of Ukraine. A one-time registration fee equal to the amount of the one subsistence minimum for able-bodied persons (approx. USD 86 for 2020) is payable.</li> </ul>

- The state registration of a representative office takes up to 30 business days, as registration with the Ministry of Economic Development and Trade of Ukraine takes 20 business days and registration with other state authorities takes approximately 10 business days.
- The registration fee and period are different for the entities-residents of states declared as “aggressor-states” by the Ukrainian parliament — 30 subsistence minimums for able-bodied persons (approx. USD 2,580 for 2020) and 60 business days for registration with the Ministry of Economic Development and Trade of Ukraine respectively.
- Current Ukrainian legislation fails to provide any guidance on the procedure to be followed by a foreign business entity to open a branch in Ukraine. As a result, in practice, foreign legal entities do not carry out their business activities in Ukraine through branches, but rather through either their (commercial) representative offices registered as permanent establishments, or their wholly owned Ukrainian subsidiaries, which are usually established in the form of LLCs.

### 3.5 Joint venture/cooperation agreements

- Contractual investment vehicles are represented in Ukraine by a variety of agreements on joint business activities. The most common type of these agreements is the joint activity agreement, whereby the parties combine their funds, knowhow, business reputation and/or publicity into their joint operations. Such contractual joint ventures must maintain separate accounting records and must establish separate bank accounts for their joint operations.
- Any income generated by the participants in such contractual joint ventures from their engagement in such joint operations is also taxed separately from their respective incomes generated from their principal business activities.
- Both domestic and foreign investors may carry out investment activities on the basis of joint activity agreements. Joint activity agreements between foreign investors and their Ukrainian partners must be registered in the manner established by the Cabinet of Ministers of Ukraine.

### 3.6 Investment funds

The Law of Ukraine On Joint Investment Institutions (“**Investment Funds Law**”) provides for specific legal vehicles to be established and maintained for the purpose of conducting portfolio investment activities. The Investment Funds Law provides that these specialized investment vehicles may be established in both unit and corporate forms.

#### Corporate investment fund/unit investment fund

<b>Legal entity status</b>	A corporate investment fund has the status of a legal entity, and it may be established in the form of either a public or a private JSC. A unit investment fund is not considered to be a legal entity.
<b>Asset management company</b>	<ul style="list-style-type: none"> <li>■ Every investment fund is obligated to hire a specialist company to manage its assets (an asset management company).</li> <li>■ Corporate investment funds, unlike unit investment funds, are authorized to replace their current asset management companies on the grounds envisaged in their internal regulations upon a decision of the general meeting of shareholders.</li> </ul>
<b>Issuance</b>	Corporate investment funds issue shares to their investors. Unit investment funds issue investment certificates to their investors. The issuer of the shares will be the corporate investment fund itself, while the issuer of the investment certificates will be the unit investment fund’s asset management company. Both instruments are subject to mandatory registration with the Securities Commission.
<b>Limitations</b>	Investment funds are expressly prohibited from: (i) having more than 20% of their portfolio investments in securities issued by foreign issuers; and (ii) investing in foreign securities that are not listed on at least one internationally recognized stock exchange and/or over-the-counter securities trading system, a list of which is compiled by the Securities Commission.

#### Classifications of types of investment funds

<b>Open investment fund</b>	<ul style="list-style-type: none"> <li>■ An open investment fund is liable at all times to purchase back the securities issued by such fund from any investor holding such securities at any given moment.</li> </ul>
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	<ul style="list-style-type: none"> <li>■ It is prohibited from paying dividends to its investors.</li> <li>■ It may be established either for a fixed period of time or for an indefinite period of time.</li> </ul>
<b>Closed investment fund</b>	<ul style="list-style-type: none"> <li>■ A closed investment fund is not liable to purchase back the securities issued by such fund from any investor holding such securities at any given moment.</li> <li>■ It may be established only for a fixed period of time.</li> </ul>
<b>An "interval" investment fund (a combination of open and closed investment funds)</b>	<ul style="list-style-type: none"> <li>■ An interval investment fund remains liable to purchase back the securities issued by such fund from any investor holding such securities during the time period prescribed in the prospectus.</li> <li>■ It is prohibited from paying dividends to its investors.</li> <li>■ It may be established either for a fixed period of time or for an indefinite period of time.</li> </ul>
<b>Diversified investment fund</b>	It is required to comply with a number of rigid thresholds and restrictions on their investment activity for the diversification of risks associated with portfolio investment activities.
<b>Non-diversified investment fund</b>	These are not subject to the thresholds and/or restrictions provided for diversified investment funds.
<b>Specialized investment fund</b>	These can make investments only in the assets defined by the Investment Funds Law.
<b>Qualification investment fund</b>	These must invest assets exclusively into one of the qualification classes, including: the united class of shares; real property class; credit assets class and other classes as defined by the Securities Commission.
<b>Venture investment fund</b>	These may be established by legal entities and individuals, provided that the minimum purchase of securities in such fund by the individual investor will not be less than 1,500 times the minimum monthly salary as of 1 January 2014 (UAH 1,827,000 or approximately USD 77,124 or EUR 69,625). These venture investment funds enjoy the status of non-diversified closed investment funds, which carry out only private (closed) placements of securities.

<sup>1</sup> An exchange rate of UAH 23.689203 per USD 1 is taken for these calculations.

<sup>2</sup> An exchange rate of UAH 26.24053 per EUR 1 is taken for these calculations.

**Baker  
McKenzie.**



**4 COMPLIANCE WITH  
ANTI-CORRUPTION  
LEGISLATION OF UKRAINE**



**EXPERT**

**Mariana  
Marchuk**  
Counsel



**PARTNER**

**Ihor  
Siusel**  
Partner

#### **4.1 General**

Compliance issues are currently high on the list of priorities for all multinational companies doing business in Ukraine and for the Ukrainian government. First, there is a clear perception that the problem of corruption in Ukraine is significant, a fact borne out by the 201 Transparency International Corruption Perceptions Index, which ranks Ukraine 120 out of 180 countries — a slight improvement on the previous ratings.

Second, in an effort to address Ukraine's corruption problem, new anti-corruption legislation was introduced in Ukraine in October 2014, and has been amended and actively supplemented ever since, which made it necessary for multinational companies with Ukrainian operations to review their compliance policies and procedures. For example, as of January 2020, an express requirement for a whistleblower hotline allowing anonymous reports has been established. Also, protections of the Anti-Corruption Law for whistleblowers and their family members have been significantly strengthened (non-retaliation, witness protection program, etc.). In addition, payment of financial incentives to whistleblowers has been envisaged in certain cases. The incentive should be in the amount of 10% of the corruption benefit or of the damages caused to the state (but capped at 3,000 times the minimum statutory monthly salary).

Lastly, all of the above developments have been occurring against the backdrop of the introduction of the United Kingdom's Bribery Act, the enhanced enforcement in the USA of the Foreign Corrupt Practices Act and the increasing level of cooperation between enforcement authorities across the USA and Western Europe in terms of oversight and regulation of the business conduct of their companies overseas, particularly in high-risk emerging markets.

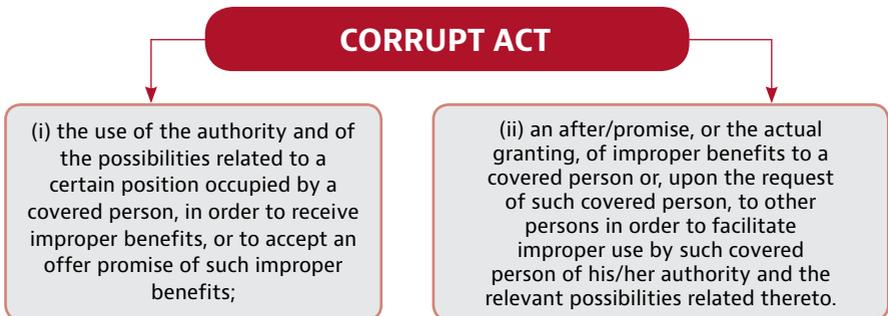
4.2 Ukrainian anti-corruption legislation

- Law of Ukraine “On Prevention of and Counteraction against Corruption in Ukraine” (the “Anti-Corruption Law”)
- Criminal Code
- Code of Administrative Violations
- Regulations on Creation and Implementation of Anti-Corruption Program

The Anti-Corruption Law establishes the main principles for combating corruption, criteria for the in-house anti-corruption officer and certain obligations for the owners and managers of companies in preventing and combatting corruption. Although the Anti-Corruption Law covers the corruption misconduct of officials of legal entities i.e., commercial bribery, it does not make legal entities subject to liability. Nevertheless, as of 1 September 2014, legal entities may face sanctions for the corruption offenses of their officers and employees, in accordance with the Criminal Code of Ukraine.

*Corruption misconduct*

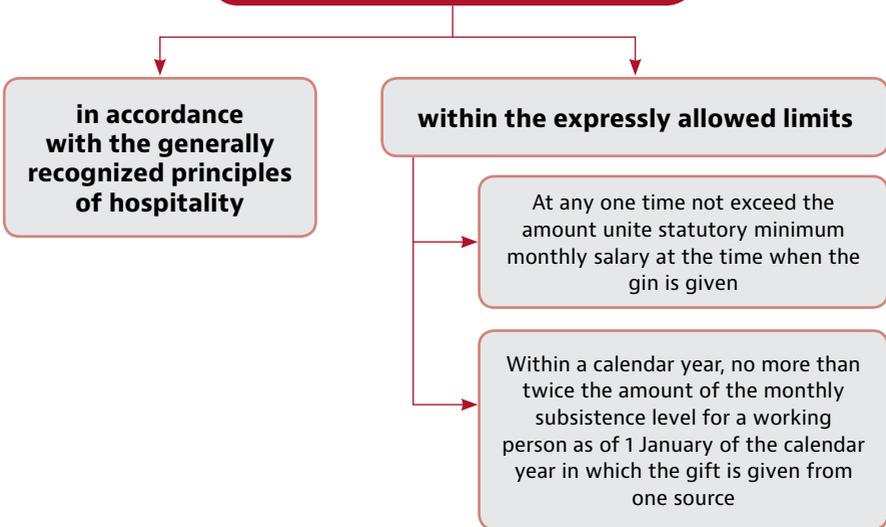
The Anti-Corruption Law defines corruption misconduct as an intentional act that has the features of corruption, and is performed by a covered person (as defined below) who is subject to criminal, administrative, civil and/or disciplinary liability.



## Covered Persons



## GIFTS



\*The amount of both the statutory monthly salary and the subsistence level are regularly changed. Updates as to their currently applicable level should be obtained before any decision regarding the gift is made.

Any gift made for the purpose of influencing a government official's exercise of their functions is considered a bribe, even if its amount is negligible.

*Transparency requirements*

The Anti-Corruption Law provides for certain types of information which cannot be subject to limited access (confidential), and to which access, therefore, cannot be limited by its owner. Such information covers, in particular, data regarding any types of remuneration, gifts and/or charitable assistance received by a civil servant. In addition, information about a state official's property, income, expenses and financial obligations must be declared and is subject to public disclosure in annual property declarations.

*Limitations on state officials' activities*

The Anti-Corruption Law expressly requires that a state official take active measures to prevent any conflict of interests. If such a conflict arises, the state official is required to immediately disclose it.

State officials are not allowed to have any income in addition to their salaries, apart from the income received from medical or sports judging practice, teaching, or artistic or scientific activity.

In addition, for one year after their resignation, former state officials are prohibited from occupying positions within, consulting for or representing the interests of the companies they monitored within 12 months prior to their resignation.

*Liability*

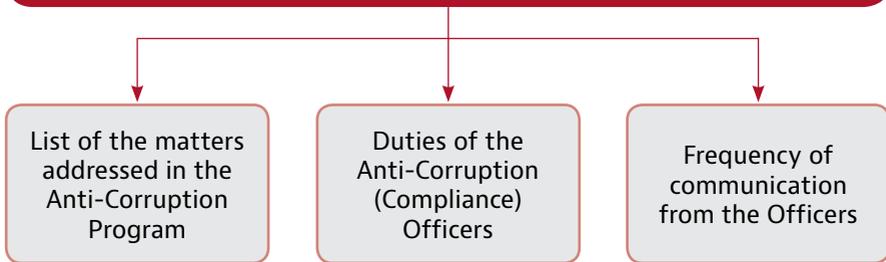
Any losses and/or damages caused by corruption misconduct must be duly compensated to the state and/or another injured party, including an individual or company.

The decisions of a state body adopted as a result of a corruption offense must be cancelled by a superior body. Transactions made in violation of the Anti-Corruption Law may be challenged in court.

**4.3 Elements to ensure compliance**

The adoption of the Anti-Corruption Program is mandatory for fully or partially (50% or more) state- (or municipal-) owned companies and for private companies that wish to participate in state or municipal tenders. There is a recommended template for an anti-corruption program under Ukrainian law. However, legal entities can add their own chapters to their anti-corruption programs and, thus, tailor them to their specific needs.

## Anti-Corruption Program



## Enforceable Anti-Corruption Program (compliance policy) should be



The Anti-Corruption Law does not indicate any actions or measures that could exculpate the company. However, the precautions that would protect a company from being penalized under the US or European anti-corruption legislation (e.g., adopting policies, training staff, monitoring and enforcing policies, investigating allegations of violations, etc.) can be implemented in Ukraine, too, and will be a mitigating factor when the court is determining the amount of the fine for a corruption violation.

Under the Ukrainian laws applicable to employment and privacy, establishing hotlines or investigating whistleblower reports about compliance breaches requires a separate evaluation by qualified and experienced Ukrainian counsel in each particular situation to decrease the risk of claims for invasion of privacy or illegal processing of personal data.

Conducting an “anti-corruption due diligence investigation” of potential business partners and intermediaries before engaging in business activity with them is certainly recommended in order to confirm their compliance with Ukrainian and other applicable laws.

**Baker  
McKenzie.**



**5**

**TAXATION**



**EXPERT**

**Roman  
Koren**  
Associate



**PARTNER**

**Hennadiy  
Voytsitskyi**  
Partner

## 5.1 General

The general principles of the Ukrainian tax system, as well as the taxes and duties (mandatory payments) which may be levied in Ukraine, are defined in Law No. 2755-VI of 2 December 2010 of the Tax Code of Ukraine ("**Tax Code**"). The Tax Code stipulates that tax rates, tax exemptions and the procedures and mechanisms for tax assessments and payments may not be introduced or changed by legislative acts other than those introducing changes to the Tax Code. In addition, any changes or amendments with regard to the determination of tax rates, tax exemptions and procedures and mechanisms for their assessment and payment may be introduced into tax legislation no less than six months before the beginning of a new budget year.

The Tax Code establishes uniform rules for the filing tax returns and the settlement of tax liabilities; a statutory period of limitations of three years for the payment of tax liabilities, the rates and procedure for calculating penalties for the violation of tax rules and late payment interest and the administrative procedure for appealing the assessment of tax deficiencies.

## 5.2 Corporate income tax

Section III of the Tax Code is the principal law governing income tax liabilities of corporate taxpayers in Ukraine. It entered into force on 1 April 2011.

### CIT Payers

Resident business entities that generate profits from their activity both within and outside the territory of Ukraine.

Foreign legal entities that derive profits from Ukrainian sources (with the exception of diplomatic establishments and other organizations enjoying immunity from taxation).

Permanent establishments of foreign entities, which such foreign entities may acquire either through their fixed place of business in Ukraine or through a Ukrainian resident entity.

### CIT Non-payers\*

state authorities

public organizations

political parties

religious and charitable organizations

other non-profit organizations

\* If included in the Register of Non-Profit Institutions and Organizations.

**CIT rate — 18%**

**Taxation base** — The financial result calculated according to Ukrainian and international accounting rules, adjusted for certain differences\*\* derived from: (i) depreciation of fixed assets; (ii) recognition of reserves; and (iii) conducting financial transactions.

\*\*Business entities, whose annual income for the preceding financial year does not exceed UAH 20 million (approximately USD 851,000), may declare their financial result for CIT purposes without any adjustments.

The Tax Code also establishes special taxation rules for certain activities and transactions (e.g., insurance activity).

### 5.3 Taxation of foreign entities

The Tax Code establishes the following general principles for taxation of foreign legal entities:

- Foreign legal entities will be taxed in Ukraine on their profits derived from their commercial activities undertaken in the territory of Ukraine through a permanent establishment.
- Income derived from sources within the territory of Ukraine by foreign entities that are not engaged in commercial activities in the territory of

Ukraine through a permanent establishment will be taxed at the time of the remittance of such income to such foreign entities or their authorized representatives and such taxes will be withheld from the sums remitted.

The Tax Code provides that a foreign entity is liable for the payment of CIT with respect to all "Ukrainian-sourced" income. Article 141.4 of the Tax Code provides a non-exhaustive list of the types of income, which are deemed to constitute Ukrainian-sourced income, including:

- interest payments
- dividends
- Royalties
- freight and engineering income
- lease payments
- proceeds from real estate sales in the territory of Ukraine
- profits from securities transactions
- profits from joint activity agreements or long-term agreements
- broker's or agency fees
- other kinds of income derived by a foreign entity from its business activity in the territory of Ukraine

However, the Tax Code provides that the income of a foreign entity received in the form of a payment or other kind of compensation for the value of goods (works or services) supplied from abroad by a foreign entity (or its permanent establishment) to a resident shall not constitute Ukrainian-sourced income.

The Tax Code provides a standard withholding tax rate of 15% to be withheld by a resident entity or by the permanent establishment of a foreign entity from the amount of any Ukrainian-sourced income if and when such foreign entity's Ukrainian-sourced income is remitted to such foreign entity or its authorized representative by a resident taxpayer or by the permanent establishment of such foreign entity, unless an applicable bilateral double taxation treaty provides relief with respect to such a withholding.

Dividends received by a foreign entity shareholder/owner of corporate rights from its shareholding/ownership rights in a resident legal entity are subject to withholding tax at the rate of 15%, unless a bilateral double taxation treaty provides otherwise.

#### **5.4 Double taxation treaties**

Ukraine is a party to more than 70 bilateral double taxation treaties with the following countries, as of December 2019:

**Table 1: Double taxation treaties**

Treaty partner	Treaty dividend rate(s)	Treaty interest rates	Treaty royalty rates	Ownership requirement — WHT tax rate reduction eligibility
<b>Algeria</b>	5%, 15%	10%	10%	<b>Dividends:</b> The 5% rate applies to a company (other than a partnership) directly holding a minimum stake of 25%. Otherwise, the rate is 15%.
<b>Armenia</b>	5%, 15%	10%	0%	<b>Dividends:</b> The 5% rate applies to a company holding a minimum stake of 25%. Otherwise, the rate is 15%.
<b>Austria</b>	5%, 10%	2%, 5%	0%, 5%	<p><b>Dividends:</b> The 5% rate applies to a company (other than a partnership) directly holding a minimum stake of 10%. Otherwise, the rate is 10%.</p> <p><b>Interest:</b> The 2% tax rate applies to interest paid: (i) in connection with the sale on credit of any industrial, commercial or scientific equipment; (ii) in connection with the sale or rendering on credit of any merchandise or service by one enterprise to another enterprise; or (iii) on any loan of whatever kind granted by a bank or any other financial institution. Otherwise, the rate is 5%.</p> <p><b>Royalties:</b> The 0% rate applies to royalties for the use of, or the right to use, any copyright of scientific work, any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience.</p> <p>The 5% rate applies to royalties for the use of, or the right to use, any copyright of literary or artistic work including cinematograph films, and films or tapes for radio or television broadcasting.</p>
<b>Azerbaijan</b>	10%	10%	10%	N/A
<b>Belarus</b>	15%	10%	15%	N/A

Treaty partner	Treaty dividend rate(s)	Treaty interest rates	Treaty royalty rates	Ownership requirement — WHT tax rate reduction eligibility
<b>Belgium</b>	5%, 15%	2%, 10%	0%, 10%	<p><b>Dividends:</b> The 5% rate applies to a company directly holding a minimum stake of 20%. Otherwise, the rate is 15%.</p> <p><b>Interest:</b> The 2% tax rate applies to interest paid: (i) in connection with the sale on credit of any industrial, commercial or scientific equipment; (ii) in connection with the sale or supply on credit of any merchandise or service by one enterprise to another enterprise; or (iii) on any loan of whatever kind granted by a bank or any other financial institution. Otherwise, the rate is 10%.</p> <p><b>Royalties:</b> The 0% rate applies to royalties for the use of, or the right to use, any copyright of scientific work, any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience.</p> <p>The 10% rate applies to royalties for the use of, or the right to use, any copyright of literary or artistic work including cinematograph films, and films or tapes for radio or television broadcasting.</p>
<b>Brazil</b>	10%, 15%	15%	15%	<p><b>Dividends:</b> The 10% rate applies to a company (other than a partnership) holding a minimum stake of 25%. Otherwise, the rate is 15%.</p>
<b>Bulgaria</b>	5%, 15%	10%	10%	<p><b>Dividends:</b> The 5% rate applies to a company (other than a partnership) holding a minimum stake of 25%. Otherwise, the rate is 15%.</p>
<b>Canada</b>	5%, 15%	10%	0%, 10%	<p><b>Dividends:</b> The 5% rate applies to a company that controls directly or indirectly, in the case of Canada, at least 20% of the voting power in the company paying the dividends, and in the case of Ukraine, at least 20% of the authorized capital in the company paying the dividends.</p>

Treaty partner	Treaty dividend rate(s)	Treaty interest rates	Treaty royalty rates	Ownership requirement — WHT tax rate reduction eligibility
Canada				<p>The 15% rate applies to dividends paid by a non-resident-owned investment corporation that is a resident of Canada and in all other cases.</p> <p><b>Royalties:</b> The 0% rate applies to royalties for the use of, or the right to use, computer software. Otherwise, the rate is 10%.</p>
China	5%, 10%	10%	10%	<p><b>Dividends:</b> The 5% rate applies to a company (other than a partnership) holding a minimum stake of 25%. Otherwise, the rate is 10%.</p>
Croatia	5%, 10%	10%	10%	<p><b>Dividends:</b> The 5% rate applies to a company (other than a partnership) holding a minimum stake of 25%. Otherwise, the rate is 10%.</p>
Cyprus	5%, 10%	5%	5%, 10%	<p><b>Dividends:</b> The 5% rate applies if the beneficial owner holds a minimum stake of 20% of the paying company and has invested an amount of at least EUR 100,000. Otherwise, the rate is 10%.</p> <p><b>Royalties:</b> The 5% rate applies to royalties for the use, or the right to use, any copyright of scientific work, any patent, trademark, secret formula, process or information concerning industrial, commercial or scientific experience. Otherwise, the rate is 10%.</p>
Czech Republic	5%, 15%	5%	10%	<p><b>Dividends:</b> The 5% rate applies to a company (other than a partnership) holding a minimum stake of 25%. Otherwise, the rate is 15%.</p>
Denmark	5%, 15%	10%	0%, 10%	<p><b>Dividends:</b> The 5% rate applies to a company (other than a partnership) holding a minimum stake of 25%. Otherwise, the rate is 15%.</p> <p><b>Royalties:</b> The 0% rate applies to royalties for the use of, or the right to use, any secret formula or process, or for information (know-how) concerning industrial, commercial or scientific experience. Otherwise, the rate is 10%.</p>
Egypt	12%	12%	12%	N/A

Treaty partner	Treaty dividend rate(s)	Treaty interest rates	Treaty royalty rates	Ownership requirement — WHT tax rate reduction eligibility
<b>Estonia</b>	5%, 15%	10%	10%	<b>Dividends:</b> The 5% rate applies to a company (other than a partnership) holding a minimum stake of 25%. Otherwise, the rate is 15%.
<b>Finland</b>	0%, 5%, 15%	5%, 10%	0%, 5%, 10%	<p><b>Dividends:</b> The 0% rate applies if: (i) an investment guarantee is granted by the Finnish Guarantee Board for the capital invested for which the dividends are paid, or for dividends paid; or (ii) the capital invested (other than in the fields of gambling, show business or intermediation business or auctions) for which the dividends are paid is at least USD 1 million, and the recipient holds at least 50% of the equity capital of the company paying the dividends.</p> <p>The 5% rate applies to a company (other than a partnership) directly holding a minimum stake of 20%. Otherwise, the rate is 15%.</p> <p><b>Interest:</b> The 5% rate applies if: (i) the recipient is a resident of the other state; (ii) such a recipient is an enterprise of the other state and is the beneficial owner of the interest; and (iii) the interest is paid with respect to indebtedness arising on the sale on credit of any merchandise or industrial, commercial or scientific equipment (except where the sale of such indebtedness is between related persons). Otherwise, the rate is 10%.</p> <p><b>Royalties:</b> The 0% rate applies to royalties for the use of, or the right to use, any computer software, patent, design or model, or plan. The 5% rate applies to royalties for the use of, or the right to use, any secret formula or process, or for information concerning industrial, commercial or scientific experience (know-how). The 10% rate applies to royalties for the use of, or the right to use, any copyright of literary artistic work including cinematograph films, and films or tapes for radio or television broadcasting, or any trademark.</p>

Treaty partner	Treaty dividend rate(s)	Treaty interest rates	Treaty royalty rates	Ownership requirement — WHT tax rate reduction eligibility
France	0%, 5%, 15%	2%, 10%	0%, 10%	<p><b>Dividends:</b> The 0% rate applies if: (i) a company or companies hold directly or indirectly at least 50% of the capital of the company paying the dividends, and the total amount of their investments is at least UAH 5 million (EUR 762,245.09); or (ii) investments are guaranteed or insured by the other state, central bank or any person acting on behalf of that other state. The 5% rate applies to a company that holds directly or indirectly at least 10% (in the case that the company is a resident of France)/20% (in the case that the company is a resident of Ukraine) of the capital of the company paying the dividends. Otherwise, the rate is 15%.</p> <p><b>Interest:</b> The 2% rate applies to the interest paid: (i) with respect to the sale on credit of any industrial, commercial or scientific equipment, or with respect to the sale or furnishing on credit of any goods or merchandise or service by an enterprise to another enterprise; or (ii) with respect to a loan of any kind granted by a bank or any other financial institution. Otherwise, the rate is 10%.</p> <p><b>Royalties:</b> The 0% rate applies to royalties for the use of, or the right to use, any computer software, patent, trademark, design or model, or plan, secret formula or process, or for information concerning industrial, commercial or scientific experience (know-how). Otherwise, the rate is 10%.</p>
Georgia	5%, 10%	10%	10%	<p><b>Dividends:</b> The 5% rate applies to a company (other than a partnership) holding a minimum stake of 25%. Otherwise, the rate is 10%.</p>

Treaty partner	Treaty dividend rate(s)	Treaty interest rates	Treaty royalty rates	Ownership requirement — WHT tax rate reduction eligibility
Germany	5%, 10%	2%, 5%	0%, 5%	<p><b>Dividends:</b> The 5% rate applies to a company (other than a partnership) that holds a minimum stake of 20%. Otherwise, the rate is 10%.</p> <p><b>Interest:</b> The 2% rate applies to interest paid: (i) in connection with the sale on credit of any industrial, commercial or scientific equipment; (ii) in connection with the sale or rendering on credit of any merchandise or service by one enterprise to another enterprise; or (iii) on any loan of whatever kind granted by a bank or any other financial institution. Otherwise, the rate is 5%.</p> <p><b>Royalties:</b> The 0% rate applies to royalties for the use of, or the right to use, any copyright of scientific work, patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience. The 5% rate applies to royalties for the use of, or the right to use, any copyright of literary or artistic work including cinematograph films, and films or tapes for radio or television broadcasting.</p>
Greece	5%, 10%	10%	10%	<p><b>Dividends:</b> The 5% rate applies to a company (other than a partnership) holding a minimum stake of 25%. Otherwise, the rate is 10%.</p>
Hungary	5%, 15%	10%	5%	<p><b>Dividends:</b> The 5% rate applies to a company (other than a partnership) holding a minimum stake of 25%. Otherwise, the rate is 15%.</p>
Iceland	5%, 15%	10%	10%	<p><b>Dividends:</b> The 5% rate applies to a company (other than a partnership) directly holding a minimum stake of 25%. Otherwise, the rate is 15%.</p>
India	10%, 15%	10%	10%	<p><b>Dividends:</b> The 10% rate applies to a company (other than a partnership) holding a minimum stake of 25%. Otherwise, the rate is 15%.</p>
Indonesia	10%, 15%	10%	10%	<p><b>Dividends:</b> The 10% rate applies to a company (other than a partnership) holding a minimum stake of 20%. Otherwise, the rate is 15%.</p>

Treaty partner	Treaty dividend rate(s)	Treaty interest rates	Treaty royalty rates	Ownership requirement — WHT tax rate reduction eligibility
Iran	10%	10%	10%	N/A
Ireland	5%, 15%	5%, 10%	5%, 10%	<p><b>Dividends:</b> The 5% rate applies to a company (other than a partnership) directly holding a minimum stake of 25%. Otherwise, the rate is 15%.</p> <p><b>Interest:</b> The 5% rate applies to the interest paid: (i) in connection with the sale on credit of industrial, commercial or scientific equipment; or (ii) on any loan granted by a bank. Otherwise, the rate is 10%.</p> <p><b>Royalties:</b> The 5% rate applies to royalties with respect to any copyright of scientific work, any patent, trademark, secret formula, process or information concerning industrial, commercial or scientific experience. Otherwise, the rate is 10%.</p>
Israel	5%, 10%, 15%	5%, 10%	10%	<p><b>Dividends:</b> The 5% rate applies to a company (other than a partnership) directly holding a minimum stake of 25%. The 10% rate applies to a company that holds directly a minimum stake of 10% of the capital of the company paying the dividends where that latter company is a resident of Israel and the dividends are paid out of profits that are subject to tax in Israel at a lower rate than the normal rate of Israeli company tax. Otherwise, the rate is 15%.</p> <p><b>Interest:</b> The 5% rate applies to the interest paid on any loan of whatever kind granted by a bank. Otherwise, the rate is 10%.</p>
Italy	5%, 15%	10%	7%	<p><b>Dividends:</b> The 5% rate applies to a company (other than a partnership) holding a minimum stake of 20%. Otherwise, the rate is 15%.</p>

Treaty partner	Treaty dividend rate(s)	Treaty interest rates	Treaty royalty rates	Ownership requirement — WHT tax rate reduction eligibility
Japan*	15%	10%	0%, 10%	<b>Royalties:</b> The 0% rate applies to royalties for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films and films or tapes for radio or television broadcasting. The 10% rate applies to royalties for the use of, or the right to use, any copyright of scientific work, any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific experience.
Jordan	10%, 15%	10%	10%	<b>Dividends:</b> The 10% rate applies to a company (other than a partnership) directly holding a minimum stake of 25%. Otherwise, the rate is 15%.
Kazakhstan	5%, 15%	10%	10%	<b>Dividends:</b> The 5% rate applies to a company holding a minimum stake of 25%. Otherwise, the rate is 15%.
Kyrgyzstan	5%, 15%	10%	10%	<b>Dividends:</b> The 5% rate applies to a company holding a minimum stake of 50%. Otherwise, the rate is 15%.
Korea (ROK)	5%, 15%	5%	5%	<b>Dividends:</b> The 5% rate applies to a company (other than a partnership) holding a minimum stake of 20%. Otherwise, the rate is 15%.
Kuwait	5%	0%	10%	N/A
Latvia	5%, 15%	10%	10%	<b>Dividends:</b> The 5% rate applies to a company (other than a partnership) holding a minimum stake of 25%. Otherwise, the rate is 15%.
Lebanon	5%, 15%	10%	10%	<b>Dividends:</b> The 5% rate applies to a company (other than a partnership) holding a minimum stake of 20%. Otherwise, the rate is 15%.
Libya	5%, 15%	10%	10%	<b>Dividends:</b> The 5% rate applies to a company directly holding a minimum stake of 25%. Otherwise, the rate is 15%.
Lithuania	5%, 15%	10%	10%	<b>Dividends:</b> The 5% rate applies to a company (other than a partnership) holding a minimum stake of 25%. Otherwise, the rate is 15%.

Treaty partner	Treaty dividend rate(s)	Treaty interest rates	Treaty royalty rates	Ownership requirement — WHT tax rate reduction eligibility
Luxembourg	5%, 15%	5%, 10%	5%, 10%	<p><b>Dividends:</b> The 5% rate applies to a company (other than a partnership) holding a minimum stake of 20%. Otherwise, the rate is 15%.</p> <p><b>Interest:</b> The 5% rate applies to the interest paid on any loan of whatever kind granted by a bank. Otherwise, the rate is 10%.</p> <p><b>Royalties:</b> The 5% rate applies to royalties for the use of, or the right to use, any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience (know-how).</p> <p>The 10% rate applies to royalties for the use of, or the right to use, any copyright of literary, artistic, or scientific work including cinematograph films, or tapes for radio or television broadcasting.</p>
Macedonia	5%, 15%	10%	10%	<p><b>Dividends:</b> The 5% rate applies to a company (other than a partnership) holding a minimum stake of 25%. Otherwise, the rate is 15%.</p>
Malaysia*	15%	15%	10%, 15%	<p><b>Royalties:</b> The 10% rate applies to royalties for the use of, or the right to use, any patent, trademark, design or model, plan, secret formula or process, or any copyright of scientific work, or for the use of, or the right to use, industrial, commercial, or scientific equipment, or for information concerning industrial, commercial or scientific experience.</p> <p>The 15% rate applies to royalties for the use of, or the right to use, cinematograph films, or tapes for radio or television broadcasting, any copyright of literary or artistic work.</p>
Malta	5%, 15%	10%	10%	<p><b>Dividends:</b> The 5% rate applies to a company (other than a partnership) directly holding a minimum stake of 20%. Otherwise, the rate is 15%.</p>

Treaty partner	Treaty dividend rate(s)	Treaty interest rates	Treaty royalty rates	Ownership requirement — WHT tax rate reduction eligibility
<b>Mexico</b>	5%, 15%	10%	10%	<b>Dividends:</b> The 5% rate applies to a company (other than a partnership) directly holding a minimum stake of 25%. Otherwise, the rate is 15%.
<b>Moldova</b>	5%, 15%	10%	10%	<b>Dividends:</b> The 5% rate applies to a company (other than a partnership) holding a minimum stake of 25%. Otherwise, the rate is 15%.
<b>Mongolia</b>	10%	10%	10%	N/A
<b>Montenegro</b>	5%, 10%	10%	10%	<b>Dividends:</b> The 5% rate applies to a company (other than a partnership) directly holding a minimum stake of 25%. Otherwise, the rate is 10%.
<b>Morocco</b>	10%	10%	10%	N/A
<b>Netherlands</b>	0%, 5%, 15%	2%, 10%	0%, 10%	<p><b>Dividends:</b> The 0% rate applies to a company (other than a partnership): (i) directly holding at least 50% of the capital of the company paying the dividends and provided that an investment of at least USD 300,000 has been made in the capital of the company paying the dividends; or (ii) whose investment in the capital of the company paying the dividends is guaranteed or insured by the government of the contracting state, the central bank of the contracting state or any agency or instrumentality (including a financial institution) owned or controlled by that government. The 5% rate applies to a company (other than a partnership) directly holding a minimum stake of 20%. Otherwise, the rate is 15%.</p> <p><b>Interest:</b> The 2% rate applies to interest: (i) paid on any loans of whatever kind granted by a bank or any other financial institution, including investment banks and savings banks, and insurance companies; or (ii) paid by the purchaser of machinery and equipment to the seller of the machinery and equipment in connection with a sale on credit. Otherwise, the rate is 10%.</p>

Treaty partner	Treaty dividend rate(s)	Treaty interest rates	Treaty royalty rates	Ownership requirement — WHT tax rate reduction eligibility
Netherlands				<b>Royalties:</b> The 0% rate applies to the royalties for the use of, or the right to use, any copyright of scientific work, any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience. The 10% rate applies to royalties for the use of, or the right to use, any copyright of literary or artistic work including cinematograph films, and films or tapes for radio or television broadcasting.
Norway	5%, 15%	10%	5%, 10%	<b>Dividends:</b> The 5% rate applies to a company (other than a partnership) holding a minimum stake of 25%. Otherwise, the rate is 15%.  <b>Royalties:</b> The 5% rate applies to royalties for the use of, or the right to use, any patent, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience (know-how). Otherwise, the rate is 10%.
Pakistan	10%, 15%	10%	10%	<b>Dividends:</b> The 10% rate applies to a company directly holding a minimum stake of 25%. Otherwise, the rate is 15%.
Poland	5%, 15%	10%	10%	<b>Dividends:</b> The 5% rate applies to a company (other than a partnership) holding a minimum stake of 25%. Otherwise, the rate is 15%.
Portugal	10%, 15%	10%	10%	<b>Dividends:</b> The 10% rate applies if a company that, for an uninterrupted period of two years before payment of the dividends, has held directly a minimum stake of 25% of the capital of the company paying the dividends. Otherwise, the rate is 15%.
Romania	10%, 15%	10%	10%, 15%	<b>Dividends:</b> The 10% rate applies to a company (other than a partnership) holding a minimum stake of 25%. Otherwise, the rate is 15%.  <b>Royalties:</b> The 10% rate applies to royalties for the use of, or the right to use, any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience. Otherwise, the rate is 15%.

Treaty partner	Treaty dividend rate(s)	Treaty interest rates	Treaty royalty rates	Ownership requirement — WHT tax rate reduction eligibility
<b>Russia</b>	5%, 15%	10%	10%	<b>Dividends:</b> The 5% rate applies if the recipient of the dividends invested at least USD 50,000 into the capital of the company paying the dividends. Otherwise, the rate is 15%.
<b>Saudi Arabia</b>	5%, 15%	10%	10%	<b>Dividends:</b> The 5% rate applies if the beneficial owner holds directly a minimum stake of 20% of the company paying the dividends. Otherwise, the rate is 15%.
<b>Serbia</b>	5%, 10%	10%	10%	<b>Dividends:</b> The 5% rate applies to a company (other than a partnership) directly holding a minimum stake of 25%. Otherwise, the rate is 10%.
<b>Singapore</b>	5%, 15%	10%	7.5%	<b>Dividends:</b> The 5% rate applies to a company (other than a partnership) directly holding a minimum stake of 20%. Otherwise, the rate is 15%.
<b>Slovakia</b>	10%	10%	10%	N/A
<b>Slovenia</b>	5%, 15%	5%	5%, 10%	<b>Dividends:</b> The 5% rate applies to a company directly holding a minimum stake of 25%. Otherwise, the rate is 15%.  <b>Royalties:</b> The 5% rate applies to royalties for the use of, or the right to use, any copyright of scientific work, any patent, trademark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific experience. The 10% rate applies to the royalties for the use of, or the right to use, any copyright of literary or artistic work including cinematograph films, and films or tapes for radio or television broadcasting.
<b>South Africa</b>	5%, 15%	10%	10%	<b>Dividends:</b> The 5% rate applies to a company (other than a partnership) holding a minimum stake of 20%. Otherwise, the rate is 15%.

Treaty partner	Treaty dividend rate(s)	Treaty interest rates	Treaty royalty rates	Ownership requirement — WHT tax rate reduction eligibility
Spain*	18%	0%	0%, 5%	<p><b>Dividends:</b> Although the treaty dividend rate stands at 18%, Ukraine would apply the general WHT rate of 15% to the dividends.</p> <p><b>Royalties:</b> The 0% rate applies to royalties for the use of, or the right to use, any copyright of literary, dramatic, musical or artistic work (excluding royalties concerning cinematograph films, and films or tapes for radio or television broadcasting). Otherwise, the rate is 5%.</p>
Sweden	0%, 5%, 10%	0%, 10%	0%, 10%	<p><b>Dividends:</b> The 0% rate applies to a company (other than a partnership) that directly holds at least 25% of the voting power of the company paying the dividends, and at least 50% of the voting power of the company, which is the beneficial owner of the dividends and is held by residents of that contracting state. The 5% rate applies to a company (other than a partnership) that holds a minimum stake of 20%. Otherwise, the rate is 10%.</p> <p><b>Interest:</b> The 0% rate applies to interest paid with respect to indebtedness arising on the sale on credit of any merchandise or industrial, commercial or scientific equipment, except where the sale or indebtedness is between related persons. Otherwise, the rate is 10%.</p> <p><b>Royalties:</b> The 0% rate applies to royalties paid with respect to any patent concerning industrial and manufacturing know-how or process as well as agriculture, pharmaceutical, computers, software and building constructions, secret formula or process, or for information concerning industrial, commercial or scientific experience. Otherwise, the rate is 10%.</p>

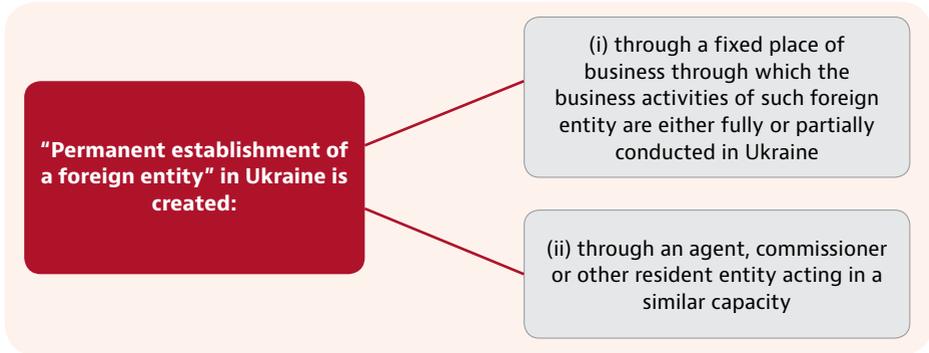
Treaty partner	Treaty dividend rate(s)	Treaty interest rates	Treaty royalty rates	Ownership requirement — WHT tax rate reduction eligibility
Switzerland	5%, 15%	0%, 10%	0%, 10%	<p><b>Dividends:</b> The 5% rate applies to a company (other than a partnership) directly holding a minimum stake of 20%. Otherwise, the rate is 15%.</p> <p><b>Interest:</b> The 0% rate applies if the interest is paid: (i) in connection with the sale on credit of any industrial, commercial or scientific equipment; (ii) in connection with the sale of any merchandise by one enterprise to another enterprise; (iii) on any loan of whatever kind granted by a bank; or (iv) to a contracting state, a political subdivision or local authority thereof. Otherwise, the rate is 10%.</p> <p><b>Royalties:</b> The 0% rate applies to royalties for the use of, or the right to use, any copyright of scientific work, any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience (know-how). The 10% rate applies to royalties for the use of, or the right to use, any copyright of literary or artistic work including cinematograph films and films or tapes for radio or television broadcasting.</p>
Syria	10%	10%	18%	<p><b>Royalties:</b> Although the treaty royalty rate stands at 18%, Ukraine would apply the general WHT rate of 15% to the royalties.</p>
Tajikistan	10%	10%	10%	N/A
Thailand	10%, 15%	10%, 15%	15%	<p><b>Dividends:</b> The 10% rate applies to a company (other than a partnership) directly holding a minimum stake of 25%. Otherwise, the rate is 15%.</p> <p><b>Interest:</b> The 10% rate applies to interest paid on any loans granted by a bank or any financial institution, including investment banks and savings banks, and insurance companies. Otherwise, the rate is 15%.</p>

Treaty partner	Treaty dividend rate(s)	Treaty interest rates	Treaty royalty rates	Ownership requirement — WHT tax rate reduction eligibility
Turkey	10%, 15%	10%	10%	<b>Dividends:</b> The 10% rate applies to a company (other than a partnership) holding a minimum stake of 25%. Otherwise, the rate is 15%.
Turkmenistan	10%	10%	10%	N/A
United Arab Emirates	5%	3%	0%, 10%	<b>Dividends:</b> The 5% rate applies in cases when the beneficial owner is a company holding a minimum stake of 10%.  <b>Royalties:</b> The 0% rate applies to royalties for the use of, or the right to use, any copyright of scientific work, any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience. The 10% rate is applied to royalties for the use of, or the right to use, any copyright of literary or artistic work including cinematograph films, and films or tapes for radio or television broadcasting.
United Kingdom	5%, 15%	5%	5%	<b>Dividends:</b> The 5% rate applies to a company that controls, directly or indirectly, in the case of the United Kingdom, at least 20% of the voting power in the company paying the dividends and, in the case of Ukraine, at least 20% of the authorized capital in the company paying the dividends. Otherwise, the rate is 15%.
United States of America	5%, 15%	0%	10%	<b>Dividends:</b> The 5% rate applies to a company that owns at least 10% of the voting stock (or, if the company does not have voting stock, at least 10% of the authorized capital) and, in the case of Ukraine, non-residents of Ukraine own at least 20% of the voting stock (or, if the company does not have voting stock, at least 20% of the authorized capital). Otherwise, the rate is 15%.
Uzbekistan	10%	10%	10%	N/A
Vietnam	10%	10%	10%	N/A

\* Treaties of the former Soviet Union, to which Ukraine is a party as a legal successor.

## 5.5 Taxation of permanent establishments

As mentioned above, for the purposes of the Tax Code, permanent establishments of foreign entities are deemed to be independent (of such foreign entities) as taxpayers in Ukraine.



The definition of a permanent establishment is aligned with the definition under most double taxation treaties. Thus, the domestic definition of a permanent establishment includes a construction site; and the provision of services, including consultancy services, by a foreign entity through its employees working in Ukraine for a period exceeding six months in any 12-month period.

At the same time, the Tax Code introduces a "safe harbor" with respect to the provision of personnel (secondment) services and provides for the types of activities that do not give rise to a permanent establishment, e.g., preparatory and auxiliary activities.

The Tax Code provides that income derived by a foreign entity that conducts its business activities in Ukraine through a permanent establishment is subject to taxation at the general tax rate of 18%.

## 5.6 Value-added tax

In accordance with Article 180.1 of the Tax Code, any Ukrainian or non-Ukrainian legal entity will be required to pay VAT, if that entity:

- Has sold goods (or provided works or services), including via global or local computer networks, subject to VAT during the last 12 calendar months with an aggregate value in excess of the UAH 1 million threshold (approximately USD 42,600).
- Imports (ships) goods into the customs territory of Ukraine.

The Tax Code outlines the scope of transactions: (i) subject to VAT; and (ii) exempted from VAT, as follows:

Transactions subject to VAT	Transactions excluded from VAT
<ul style="list-style-type: none"> <li>■ the sale of goods (or the provision of services) on and within the customs territory of Ukraine</li> <li>■ the import of goods into the customs territory of Ukraine</li> <li>■ the export of goods out of the customs territory of Ukraine</li> <li>■ the provision of services by foreign persons to VAT registered payers and other qualifying recipients on and within the customs territory of Ukraine</li> </ul>	<ul style="list-style-type: none"> <li>■ the issuance, placement and cash sale of securities</li> <li>■ the interest or commission element of lease payments pursuant to a financial lease agreement</li> <li>■ the transfer of title to pledged property pursuant to a loan agreement and its return to the pledger after the expiry of such agreement (conditions apply)</li> <li>■ the provision of insurance and re-insurance services</li> </ul>

The basic VAT rate is 20% of the contractual value of the relevant goods (services), but not less than the original purchase price thereof or, in case of the sale of produced goods, not less than the arm’s length value thereof (for goods imported into Ukraine, this value cannot be lower than their customs value with the excise tax and import customs duty included).

A reduced rate of 7% is applied to the sale and import of medicine and medical devices. A 0% tax rate is provided by the Tax Code for the export of goods.

Effective from 1 February 2015, Ukraine switched to electronic VAT administration and introduced VAT accounts. On 1 July 2017, Ukraine introduced a system of automatic blocking of risk-bearing VAT invoices (what constitutes a risk factor is specifically determined in the legislation).

**5.7 Personal income tax**

**5.7.1 Introduction**

Issues of personal income taxation are principally regulated by the Tax Code, including tax rates, tax residency rules and determination of taxable income, tax administration, tax credit rules and others.

**5.7.2 Tax rates**

Effective from 1 January 2016, the general tax rate applicable to almost all income received by a resident individual in Ukraine is 18%.

Tax residents can benefit from certain tax exemptions and reduced tax rates (e.g., 5% applicable to income from sales of real estate and movable property; under certain conditions such income can be exempt). The Tax Code establishes the tax rate applicable to dividends paid by Ukrainian CIT payers at a level of 5% (9% on dividends distributed by institutes of joint investment, foreign entities and entities that do not pay Ukrainian CIT), while interest, royalties and capital gains are taxed at 18%. Winnings and prizes are subject to personal income tax at a flat rate of 18%.

Special rules of taxation are established for inherited property, securities and other specific items.

Reduced tax rates for business income and other incentives are prescribed for certain categories of individual entrepreneurs.

Additional military tax at 1.5% is levied on the income that is subject to personal income tax and a couple of categories of income that are exempt from personal income tax.

### **5.7.3 Tax residency**

The concept of the determination of tax residency, which is incorporated into the Tax Code, is now very similar to that of most bilateral double taxation treaties drafted based on the OECD Model Tax Convention.

The Tax Code defines an individual to be a tax resident if they have an abode in Ukraine. That being said, the tax residency of an individual should be determined: (i) on the basis of facts and circumstances, e.g., domicile, center of vital interests, duration of stay; and (ii) with the reliance on the applicable "tie-breaker" rules.

**Criteria for determination of the resident status of a person:**

- A tax resident of Ukraine is an individual who has a permanent abode in Ukraine.
- If an individual has a permanent abode in more than one country, they will be a tax resident in that country with which they have closer personal or economic ties (e.g., their center of vital interests). The Tax Code specifically outlines that the place of permanent abode of the members of an individual's family or the place of an individual's registration as a business entity (as a subject of entrepreneurial activity) will be a sufficient (but not exclusive) condition for determining the location of the center of vital interests of such an individual.
- If it is impossible to determine the country in which the individual has their center of vital interests, or if the individual does not have a permanent abode in any country, then the individual will be considered a Ukrainian tax resident if they are present in Ukraine for at least 183 days of the tax period (including days of arrival and departure).
- If it is impossible to determine tax residency based on the above provisions, then the individual will be a tax resident of Ukraine if they are a Ukrainian citizen.
- The Tax Code stipulates that an individual's own identification of their principal place of abode on the territory of Ukraine according to the procedure established by the Tax Code, or the registration of an individual as a self-employed person in Ukraine, will constitute a sufficient basis for identifying such an individual as a tax resident of Ukraine.
- A person who fails to qualify as a Ukrainian tax resident will be considered a "non-resident" for the purposes of the Tax Code.

The criterion of "one's own identification," as well as the variety of criteria in and of themselves, combined with the absence of clear guidance, might create situations where an individual is treated as a tax resident in several jurisdictions simultaneously. Moreover, the above set of criteria makes it difficult in practice to identify the correct criterion when several can easily be applied. The latter circumstances can also create a conflict between two residences. In the majority of cases, the rules of applicable double tax treaties may be applied to solve such residency conflicts.

#### **5.7.4 Taxable income**

Ukrainian residents are taxed on their aggregate worldwide income. Non-resident individuals are taxed only on all income derived from sources within Ukraine. Non-resident individuals are not eligible for certain exemptions or deductions available to residents for personal income tax purposes.

The Tax Code provides a list of items specifically included in the gross income of either a resident or a non-resident individual. These include gifts, insurance payments and premiums, rental income, fringe benefits (including the cost of received property, food, assistance of home service staff, expense reimbursements and amounts of financial aid, etc.), amounts of punitive (versus actual) damages received, forgiven debts and obligations, interest and dividend income, investment income and inheritances.

At the same time, a number of items are specifically excluded from the taxable income of both residents and non-resident individuals. Apart from such excluded items, the Tax Code allows an individual resident taxpayer to claim as non-taxable deductions certain expenses made during the tax year, provided that such expenses can be confirmed by the relevant documents. In particular, an individual resident taxpayer will be able to claim a deduction for the following: part of the interest payments made under a loan secured by a mortgage provided that the loan is used to finance the purchase or construction of the taxpayer's principal home, charitable contributions of no more than 4% of the taxpayer's annual taxable income, a certain amount of expenses paid to educational institutions for professional or higher education and a certain amount of expenses paid to health institutions for personal medical needs.

The Tax Code also allows certain categories of low-income taxpayers to reduce their income by the amount of the "social tax benefit."

Taxes paid by a resident taxpayer outside Ukraine may be taken as credits against Ukrainian taxes due (provided an applicable tax treaty allows this) in the event that the taxpayer provides a written acknowledgment from the foreign tax authority that such foreign taxes have, in fact, been paid. However, the total of such foreign tax credits may not exceed the amount of the Ukrainian personal income tax due.

### **5.7.5 Tax administration**

The general rule of the Tax Code is that it is the duty of the payer of sourced income, i.e., "tax agents" in the parlance of the Tax Code, to report, charge, collect and remit personal income tax to the government. Thus, employers are deemed tax agents with respect to the personal income tax and military tax due on the wages and salaries payable to their employees. The relevant tax returns are filed by tax agents quarterly and the remittance is made when income is paid.

If income were received from payers who are not regarded by the Tax Code as tax agents, then the recipients would be obligated to file an annual tax return for the year in which such income is received. A tax return may also be filed voluntarily if a tax resident, otherwise not required to file a tax return, wishes to claim applicable tax credits. The return must be filed by the income recipient by 1 May of the year following the reporting year. Sums due for personal income tax and military tax must be paid by 1 August of the year following the reporting year. Personal income tax and military tax are payable in the currency of Ukraine.

### 5.8 Payroll taxes

The payment of social insurance contributions is regulated primarily by the Law of Ukraine No 2464-VI "On Unified Mandatory State Social Insurance Contributions" of 8 July 2010, effective from 1 January 2011.

Employees in Ukraine who are deemed insured by virtue of their employment are guaranteed social security benefits including a pension. Employers are liable by law to make payroll-based Unified Mandatory State Social Insurance Contributions ("**Unified Contributions**") for insured employees to the State Pension Fund. Such contributions are then divided by the State Pension Fund between the relevant state funds (Pension Insurance Fund, Temporary Disability, Birth and Burial Fund, Unemployment Insurance Fund and Industrial Accident and Professional Disease Disability Insurance Fund).

The Unified Contribution to be paid by an employer is not deducted from employees' salaries, but must be paid by the employer in addition to their salaries. Effective from 1 January 2016, Unified Contribution is payable at a rate of 22%.

The Unified Contribution is payable by the employer at the time income is paid. All payroll taxes must be paid by wire transfer to the appropriate state treasury accounts at the same time that the employer withdraws funds from a bank to pay salaries to its employees or pays salaries to the bank accounts of its employees.

The maximum taxable base for the purposes of Unified Contribution constitutes 15 times the minimum monthly salary, which is UAH 70,845 (approximately USD 2,950) as of January 2020. Any portion of the taxable base in excess of the maximum taxable base is exempt from taxation for the purposes of Unified Contributions. The same cap, rates and rules apply for resident individuals and foreigners employed in Ukraine.

## 5.9 Land tax

Among other taxes, the Tax Code provides for land tax. Pursuant to the Tax Code, payments for land are established in the forms of land tax and rent. The owner of the land (other than the state) and the land user are required to pay land tax. Under a land lease agreement, the lessee of state-owned or municipal-owned land must pay rent but is not responsible for paying land tax.

For example, under the Tax Code, if the normative pecuniary valuation of the land has been carried out, the local municipal authorities may establish land tax at a rate of up to 3% per annum of the normative pecuniary valuation of the land; for agricultural land, 0.3-1% per annum; and for forest land, up to 0.1% per annum. This tax is paid on a monthly basis at 1/12 of the annual tax.

The State Agency of Ukraine for Geodesy, Cartography and Cadastre may issue extracts from technical documentation on the normative pecuniary valuation of a particular plot.

For each of the years following the normative pecuniary valuation of the land, the original valuation is adjusted by a coefficient of indexation, which is calculated and established for the relevant year by the State Agency of Ukraine for Geodesy, Cartography and Cadastre, in accordance with the formula stated in the Tax Code.

The yearly rent for land may not be lower than land tax for the same type of land and may not be higher than 12% of the normative pecuniary valuation of the land.

## 5.10 Excise duty

Excise duty is an indirect tax on some goods (products) that are defined by law as being excisable. Excise duty is included in the value of excisable goods and is payable by:

- producers of excisable goods (products) in the customs territory of Ukraine (including those produced in accordance with tolling mechanisms)
- entities that import excisable goods into the customs territory of Ukraine
- individuals (both Ukrainian and foreign) who transport excisable goods (products) into, or who ship excisable goods (products) from outside of, the customs territory of Ukraine
- wholesale suppliers of electricity
- licensed producers of electricity that sell electricity outside the wholesale electricity market

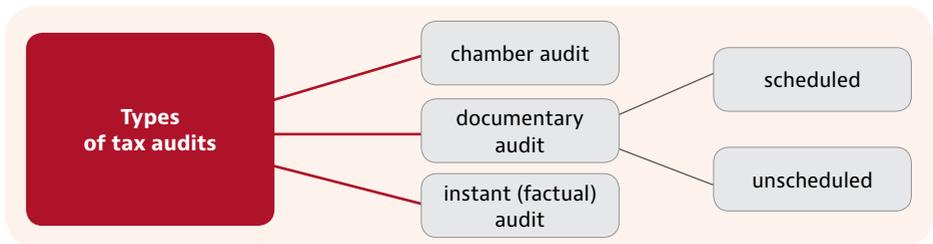
- owners of cargo trucks that are reconfigured into excisable passenger cars
- entities engaging in the retail sale of certain excisable goods

The list of excisable goods (products) includes alcoholic beverages, beer, tobacco products, cars, petrol, diesel and electricity.

The rates of excise duty on excisable goods (products) are primarily established as a fixed rate per item. Excise duty is calculated as follows: a fixed rate is applied to the price per item sold or imported. Exported goods are not subject to the excise duty.

The excise tax on retail of certain excisable goods is established at 5%. Effective from 1 March 2016, Ukraine introduced an electronic system for the administration of fuel sales.

**5.11 Tax controversies**



The chamber tax audit is conducted by tax auditors of the tax office based on tax returns and other mandatory filings of the taxpayer related to the computation of the taxpayer’s tax liability. A scheduled on-site documentary tax audit of a taxpayer is carried out only when such an audit is scheduled in the “plan of works” of the relevant tax office, which has to be published online. An unscheduled on-site documentary tax audit, in contrast to a scheduled one, is not pre-planned and is conducted upon the occurrence of any of the statutory defined events, e.g., when a taxpayer fails to file a tax return.

Effective from 1 September 2013, a special type of unscheduled on-site documentary tax audit was introduced in relation to compliance with transfer pricing legislation (“**TP Audit**”). A TP Audit differs from regular tax audits in scope, duration and grounds for conducting them.

The expected frequency of tax audits depends on the type of tax audit in question. A chamber tax audit may be carried out by the Ukrainian tax authorities on a discretionary basis. A scheduled on-site documentary tax audit may not be carried out more than once during the course of a calendar year for high-risk taxpayers, once during the course of two calendar years for medium-risk taxpayers and once during the course of three calendar years for low-risk taxpayers. An unscheduled on-site documentary tax audit may be conducted only upon the occurrence of one or more of the statutory defined events. In any event, each taxpayer is likely to be audited at least once every three years, which corresponds to the applicable statute of limitations.

TP Audits may not last longer than 18 months. In certain cases, such as submitting requests to foreign tax authorities and price experts, etc., the duration of the tax audit may be extended by another 12 months.

Generally, the Ukrainian tax authorities can exercise their authority to issue an assessment of a taxpayer's liability with respect to a tax return only within a period of 1,095 days (2,555 days in the case of transfer pricing tax audits) following: (a) the final statutory date of filing the tax return; (b) the final statutory date of discharging "payment obligations," (i.e., assessed taxes and applicable penalties); or (c) the date on which the tax return was actually filed, whichever is later. After the expiration of this period of limitations, the taxpayer may not be levied additional taxes, tax penalties or late payment interest with respect to such past due tax liability.

The exceptions to this general rule are as follows:

- The failure of a taxpayer to file a tax return for the reported period, during which the tax liability in question has arisen.
- An executive officer of a corporate taxpayer or an individual taxpayer is convicted of criminal tax evasion with respect to the tax liability in question.

The 1,095-day limitation period also applies to a taxpayer's obligation to eliminate its tax liability. If the taxpayer's liability, which has been ascertained and reported by the taxpayer or, alternatively, assessed by the tax office, remains unpaid during this 1,095-day period, then the taxpayer will be released from such a liability.

Finally, the 1,095-day limitation period also applies to a taxpayer's obligation to pay "financial penalties" in the form of tax penalties and late payment interest.

A tax audit starts with a review of the correctness of the tax returns filed by the taxpayer and how they reconcile with the taxpayer's tax ledgers. Based on their findings, the tax auditors usually proceed with an in-depth study of the taxpayer's commercial documentation. As a matter of law, a taxpayer may be denied otherwise deductible expenditures if they have not been properly documented.

For the purposes of checking a tax return, the auditing tax officer may require the taxpayer to produce documents or information in the taxpayer's possession or within their power to secure, and which may be reasonably required to establish whether the tax return is incorrect or incomplete. In certain circumstances, the Ukrainian tax authorities may conduct an unscheduled on-site tax audit of a taxpayer, based on information obtained from a third party. Special conditions may apply giving the tax authorities the right to access information protected by legal privilege or bank secrecy.

The Ukrainian tax authorities may send requests to foreign tax authorities for assistance in obtaining documents and information from third parties located in their jurisdictions. Such documents and information may also be requested from foreign tax authorities pursuant to an applicable double tax treaty.

The penalties for the failure of a taxpayer: (a) to file a tax return or to do so in a timely fashion; (b) to pay taxes or do so in a timely fashion; or (c) to comply with other tax obligations, can be generally divided into three broad penalty categories: administrative, financial (tax) and criminal. Financial (tax) penalties are imposed by the Ukrainian tax authorities and may be appealed by a taxpayer either at a higher level tax office in accordance with the administrative appeal procedure or in an administrative court in the course of tax litigation. Criminal penalties are imposed by criminal courts in cases of tax evasion of significant amounts.

Under applicable law, the Ukrainian tax authorities may not enforce the collection of outstanding taxes, tax penalties and/or penalty interest without going through the preliminary administrative or court procedure of agreeing the tax obligations with the taxpayer. The recovery of tax debt from the bank accounts of a taxpayer or from the property of an individual or from debtors of the taxpayer is only possible based on court decision.



**Baker  
McKenzie.**



**6** CUSTOMS  
REGULATIONS



**EXPERT**

**Roman  
Koren**  
Associate



**PARTNER**

**Hennadiy  
Voytsitskyi**  
Partner

## 6.1 Introduction

The general principles of customs regulations in Ukraine, as well as the procedures for customs clearance, control and other related issues, are regulated by the Customs Code of Ukraine ("**Customs Code**"), effective as of 1 June 2012.

In addition to the Customs Code, the applicable Ukrainian legislation on customs consists of the Law of Ukraine on Customs Tariffs of Ukraine, dated 19 September 2013. The principal law governing import and export VAT, as well as the refund of export VAT, is Section V of the Tax Code of Ukraine, dated 2 December 2010 ("**Tax Code**").

The most recent provisions to and developments of the Customs Code and the Ukrainian customs legislation were made in furtherance of the accession of Ukraine to the World Trade Organization (WTO) to harmonize Ukrainian customs legislation with WTO rules. The main changes relate to the simplification of customs procedures, customs valuation rules, protection of IP rights and customs control procedures.

The Customs Code is designed to, among other things, harmonize the customs legislation of Ukraine with the International Convention on the Simplification and Harmonization of Customs Procedures and the Convention on Temporary Admission, as well as to implement the World Customs Organization SAFE Framework of Standards to Secure and Facilitate Global Trade into national legislation.

On 1 January 2016, the Deep and Comprehensive Free Trade Area, which is a part of the EU-Ukraine Association Agreement, became provisionally applicable. It eliminates import duties on most goods imported from the EU into Ukraine and vice versa.

On 11 July 2016, the Governments of Canada and Ukraine signed the Canada-Ukraine Free Trade Agreement, which, upon entering into force, immediately eliminated Canadian import duties on 99.9% of Ukraine's current exports to Canada and Ukrainian import duties on 86% of Canada's current exports to Ukraine.

Upon the annexation of Crimea by the Russian Federation, the Parliament of Ukraine adopted the Law of Ukraine on Establishing the Free Economic Zone "Crimea" and the Specifics of Conducting Economic Activity in the Temporarily Occupied Territory of Ukraine, effective as of 27 September 2014. According to this law, the supply of goods from Crimea to mainland Ukraine is treated as import and the supply of goods from mainland Ukraine to Crimea is treated as export for customs clearance purposes.

However, according to Resolution of the Cabinet of Ministers of Ukraine No. 1035 dated 16 December 2015, the supply of goods to/from mainland Ukraine from/to Crimea under all customs regimes is suspended as of 17 January 2016. The transfer of personal belongings and a limited amount of food products is still permitted. The resolution does not apply to: (i) the supply of electricity to and from Crimea; (ii) the supply of "strategically important" goods from Crimea to mainland Ukraine; or (iii) the supply of humanitarian aid to Crimea.

As of 1 January 2016, the Russian Federation suspended the CIS Free Trade Agreement with regard to Ukrainian goods and permanently imposed other restrictive measures (banned the import of a number of Ukrainian agricultural goods and prohibited the transit of Ukrainian goods through its territory). Ukraine, in turn, reciprocated by imposing customs duties on certain goods of Russian origin from 2 January 2016 until 31 December 2019, and banned certain agricultural goods and pesticides originating from Russia from 10 January 2016 until 31 December 2019.

On 4 February 2016, the Parliament of Ukraine adopted the amendments to the Customs Code that allowed gas backhaul operations. Import duties on ferrous metal scrap were cancelled as of 10 November 2016.

On 1 February 2018, Ukraine became a full-fledged member of the Regional Convention on Pan-Euro-Mediterranean Preferential Rules of Origin ("**PEM-Convention**"). The system of Pan-Euro-Mediterranean cumulation of origin allows for the application of diagonal cumulation between Ukraine, the EU, EFTA States, Turkey, the countries that signed the Barcelona Declaration, the Western Balkans and the Faroe Islands. On 1 January 2019, Ukraine started to apply provisions of the PEM-Convention.

Set forth below is a brief overview of the main provisions of customs regulations in Ukraine:

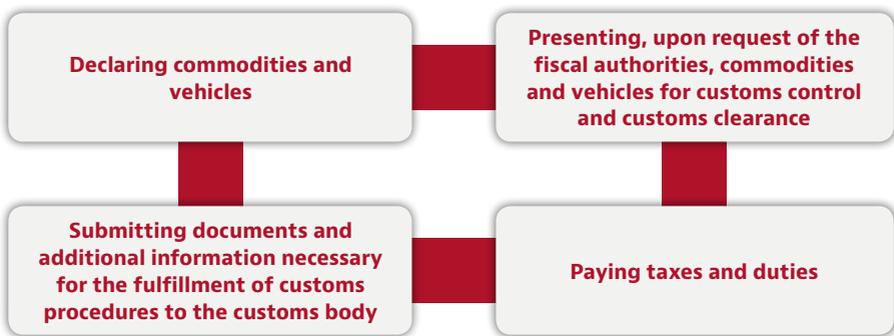
- declarant (importer of record)
- customs broker
- registration procedure
- customs clearance
- customs regimes
- certification and control
- customs valuation rules
- in-kind contribution
- customs control

### 6.2 Declarant (importer of record)

By law, both legal entities and individuals may act as importers of record regarding the Ukrainian customs authorities in connection with the customs clearance of commodities and/or vehicles imported into/exported from Ukraine.

Under the Customs Code, an importer of record is an entity that carries out customs clearance in its own name or in whose name the customs clearance is carried out.

The importers of record and their authorized representatives are responsible for the following:



### 6.3 Customs broker

All procedures and operations regarding customs clearance of goods (products) and means of transport for commercial use shipped through the customs border of Ukraine may be conducted through a customs broker. A customs broker is a legal entity carrying out customs clearance formalities on behalf and in the name of the importer of record. To conduct customs

brokerage activity in Ukraine, the entity must obtain a permit. Only a Ukrainian business entity may obtain such a permit and act as a customs broker. Customs brokers should be included in the official register of customs brokers.

#### **6.4 Registration procedure**

To conduct import/export operations, a business entity must be accredited with its local customs office.

The procedure for registration and list of required documents are established by the Procedure for Registration of Entities that Carry out Operations with Goods, approved by order of the Finance Ministry of Ukraine No. 552, dated 15 June 2015.

Please note that under the Customs Code, the customs clearance of goods can be carried out at any customs office regardless of the place of registration of the importer of record.

#### **6.5 Customs clearance**

The customs clearance of goods (products) is certified by a special stamp (or a special mark in case of electronic customs declarations) of the customs authorities, placed on a customs declaration, after which the goods (products) may be legally released for free circulation into the customs territory of Ukraine.

Customs clearance is conducted by the customs authorities to confirm information about the goods (products) and vehicles shipped through the customs border of Ukraine. Customs clearance is conducted in places where the appropriate customs subdivisions authorized to conduct customs clearance are located.

The main document required for customs clearance of goods (products) is a customs declaration filed by an importer of record (or by the customs broker acting on their behalf).

The Customs Code establishes the procedure for obtaining preliminary decisions and advance declarations. Under the Customs Code, all importers of record can apply for and obtain preliminary decisions of the customs authorities regarding: (i) the classification of goods; (ii) the confirmation of the goods' country of origin; and (iii) approval for declaring goods under various customs regimes. Preliminary decisions are valid for up to three years.

Under the Customs Code, importers of record can declare goods before the goods reach the customs territory of Ukraine or before the goods are delivered to the customs clearance office by means of submitting an advance customs declaration. Such an advance custom declaration shall contain the particulars sufficient for: (i) importing goods, means of transport for commercial use to the customs territory of Ukraine and ensuring their delivery to the revenue and duties authority of destination; or (ii) releasing goods, means of transport for commercial use under the customs procedure for which they were declared under an advance customs declaration, which contains all the required information, after the admission of goods, means of transport for commercial use across the customs border of Ukraine and without presenting them to the customs authority accepting such an advance customs declaration; or (iii) releasing goods, means of transport for commercial use under the customs procedure for which they were declared under cover of an advance customs declaration, which contains all the required information, after the presentation to the customs authority accepting such an advance customs declaration.

The Customs Code provides an exhaustive list of documents to be filed to determine the customs value of goods. The customs authorities cannot request documents that are not on the list, which makes customs clearance more transparent and predictable.

The importer of record is also required to submit the following documents:

- documents confirming the authority of an entity or individual(s) to represent the importer/exporter before the customs authorities (customs/broker agreement, power of attorney, permit for conducting customs brokerage activities)
- customs declaration
- customs value declaration (where applicable)
- supporting documents for the declared customs value of the goods (products) (e.g., foreign trade contract, invoice or document that specifies the value of goods (products), etc.)
- payment documents, financial and accounting documents, official price lists, etc.
- documents substantiating the provision of security or other guarantees, if required
- transportation documents (SMGS, CIM, air waybill, bill of lading, etc.), license of the customs carrier, etc.
- documents required under a particular customs regime
- documents specifying the code of goods (products) under the Ukrainian Customs Tariff (UKTZED)

- documents proving the right to apply tariff preferences or tax benefits, if any
- documents specifying the country of origin of goods (products) (i.e., the certificate of origin)
- documents proving that the relevant taxes and duties have been paid (e.g., payment orders, cash slips, promissory notes)
- other certificates, licenses and permits, if required.

However, it should be noted that under the Customs Code, the importer of record may be required to submit additional documents specified by applicable legislation. The list of required documents may be expanded at the request of the customs authorities in the event of: (i) discrepancies in the documents provided by the declarant; or (ii) the importer and exporter being related parties.

Under the Customs Code, customs clearance of goods should not exceed four business hours from the presentation of goods and submission of the full set of documents (including the customs declaration) to the customs authorities.

### **6.5.1 Authorized economic operator**

It should be noted specifically that the Customs Code introduces the concept of the Authorized Economic Operator, which was effectively revamped in the fall of 2019 by Law of Ukraine on Amendments to the Customs Code of Ukraine on Certain Issues of Functioning of Authorized Economic Operators.

This Law introduces the concept of the Authorized Economic Operator (AEO), materially similar to that of the EU. The ultimate aspiration is to achieve mutual recognition of AEOs with the EU.

Only legal entities that are residents of Ukraine registered with the customs office and participating in the international supply chain will be entitled to apply for the AEO status.

Ukrainian companies engaged in cross-border operations in the capacity of manufacturers, exporters, importers, customs agents, carriers, freight forwarders or customs warehouse keepers might apply for the AEO status.

The Law on AEO differentiates between two types of AEO authorizations, namely: (i) economic operators authorized for customs simplification (AEO-C); and (ii) economic operators authorized for security and safety (AEO-S). Companies may apply for both types of authorizations.

In order to receive the AEO status the applicant should meet the following criteria: (i) compliance with customs legislation and taxation rules and absence of criminal offences related to the economic activity; (ii) appropriate record keeping; (iii) financial solvency; (iv) proven practical standards of competence or professional qualifications (only for the AEO-C); and (v) appropriate security and safety measure (only for the AEO-S).

Within three years after the entry into force, only companies registered for more than three years with the Ukrainian customs office would be entitled to apply for the AEO status.

Ukraine also limits the number of simultaneous assessments procedures for AEO-C authorizations to 10 in the first year, 20 in the second year and 50 in the third year. In addition, during the first three years, only the manufacturers that are importers or exporters of products would be entitled to apply for the AEO-C authorization.

## 6.6 Customs regimes

The following customs regimes would apply depending on the purpose of the transfer of goods (products) through the customs border of Ukraine:

import	re-import
export	re-export
transit	temporary import
temporary export	bonded warehouse
free customs zone	customs free trade store
inward processing	outward processing
destruction	surrender to the state

The importer of record may choose the customs regime for the goods (products) shipped through the customs border of Ukraine in accordance with the purposes of their transfer, upon provision of all necessary documents to the customs office for customs control and clearance.

### 6.6.1 Import

Import is the main customs regime for the delivery of goods (products) into the customs territory of Ukraine. The import regime contemplates the free circulation of goods imported into Ukrainian territory without any further customs restrictions and post-clearance customs control, provided that all applicable customs duties and taxes have been paid properly and in full.

The import regime requires:

- submission of all necessary documents certifying the purposes and conditions for bringing the goods (products) into the customs territory of Ukraine
- payment of all applicable taxes and duties in accordance with the laws of Ukraine
- compliance with the non-tariff regulation regime and other restrictions

### **6.6.2 Re-import**

Re-import is the regime where goods that were shipped or declared to be shipped outside the customs territory of Ukraine re-enter the customs territory of Ukraine, with exemption from customs taxes and without the application of non-tariff measures. Re-import may be applied to: (i) goods that are shipped to the customs territory of Ukraine; and (ii) goods that remain under customs control or are placed under another customs regime.

Re-import of goods (products) is generally exempt from VAT, customs duties and excise tax, except for goods that were cleared under the export customs regime and are being returned to the exporter due to their failure to meet the terms and conditions of the contract.

The goods (products) may be cleared under the re-import customs regime if:

- the goods may be identified as those released outside the customs territory of Ukraine
- the goods (products) re-enter the customs territory of Ukraine no later than within the timeframes established by the law
- proper documents are filed with the customs authorities
- the goods (products) re-enter the customs territory of Ukraine in the same condition in which they were at the moment of their export, except for natural wear and tear or losses during transportation and storage.

Export duty, if paid upon the exportation of goods (products), is to be reimbursed provided that the goods (products) are re-imported into the customs territory of Ukraine within six months of the date of their exportation and remain in the same condition in which they had been exported.

### **6.6.3 Export**

Export of goods (products) is the main customs regime for final exportation of goods (products) outside the customs territory of Ukraine.

Export of goods (products) is allowed upon completion of the following formalities:

- submission of appropriate documents for the export of such goods (products)
- payment of export customs duties with respect to certain types of goods (products)
- application of 0% VAT to exported goods (products), save for VAT exempt exports

No excise tax applies to exported goods (products).

#### **6.6.4 Re-export**

Re-export is the customs regime where goods (products) initially delivered into Ukraine or a free customs zone may be shipped from the customs territory of Ukraine without the application of export customs duties or any non-tariff measures.

Re-export of goods (products) is allowed upon completion of the following formalities:

- submission of appropriate documents for re-export of such goods (products), including documents required for the identification of the goods
- provision of a permit in cases established by the law

Re-export of goods is generally exempt from VAT. The 0% VAT rate is applied to goods that were cleared under the import customs regime and are being returned to a non-resident due to their failure to meet the terms and conditions of the contract, provided that the goods: (i) are re-exported outside the customs territory of Ukraine within six months of the date of their importation; and (ii) remain in the same condition in which they had been imported.

Import customs duties paid upon importation of goods into the customs territory of Ukraine may be reimbursed to the importers or their successors.

#### **6.6.5 Transit**

*General transit procedure under the Customs Code*

Goods (products) and/or commercial vehicles may be moved across the territory of Ukraine under customs control between two customs authorities or within one customs authority's area of operation without the use of such goods, without the application of customs taxes or any non-tariff measures.

The Customs Code provides that the following additional mandatory conditions must be satisfied for the transit of goods (products):

- The goods (products) may not be used or modified, except for natural wear and tear or losses during transportation and storage.
- The goods (products) may not be used on the territory of Ukraine for any purposes other than their transit.
- In certain cases, a special permit may be required to move products (goods) under the transit regime.
- The identification marks, if applied, must be intact.
- The products (goods) under the transit regime must be delivered to the ultimate customs post within a certain pre-defined period of time.

#### *6.6.5.2 Common transit procedure under the Law on Regime of Common Transit*

In the fall of 2019, the Ukrainian Parliament adopted the Law on Regime of Common Transit and Implementation of National Electronic Transit System, which was developed and adopted in furtherance of Ukraine's commitment to approximate legislation under the EU-Ukraine Association Agreement.

The law transposes into Ukrainian legislation the provisions of the 1987 Convention on a Common Transit Procedure ("**Convention**"). Presently, 35 countries are members of the Convention, including, the EU Member States, EFTA, Turkey, Macedonia and Serbia.

The common transit regime will be applicable only upon provision of the customs office with the financial guarantee either in the form of an individual guarantee or a general financial guarantee with a view to securing payments of customs duties.

The law also provides that Ukrainian companies that: (i) have no records of serious infringement of customs and tax legislation; (ii) used the common transit regime more than 50 times during the last 12 months; and (iii) have internal standards of competence and professional qualifications may apply for the following simplifications:

- the use of a comprehensive guarantee
- the use of seals of a special type
- the status of the authorized consignor, allowing the placement of goods under the common transit regime without presenting them to customs officers
- the status of the authorized consignee, allowing goods moved under the common transit regime at an authorized place to be received

The companies with AEO status are automatically entitled to such simplifications.

The law was signed by the President of Ukraine on 23 September 2019, and was published on 25 September 2019.

It is set to enter into force six months after its publication, i.e., on 25 March 2020, and will remain in force until Ukraine becomes a party to the Convention.

Upon accession to the Convention, Ukraine will be in position to exchange customs information with 35 countries in real-time using common software and to accept a single customs declaration for the movement of goods from the country of departure to the country of destination.

To receive an official invitation to become a party to the Convention, Ukraine must comply with its provisions for at least one calendar year.

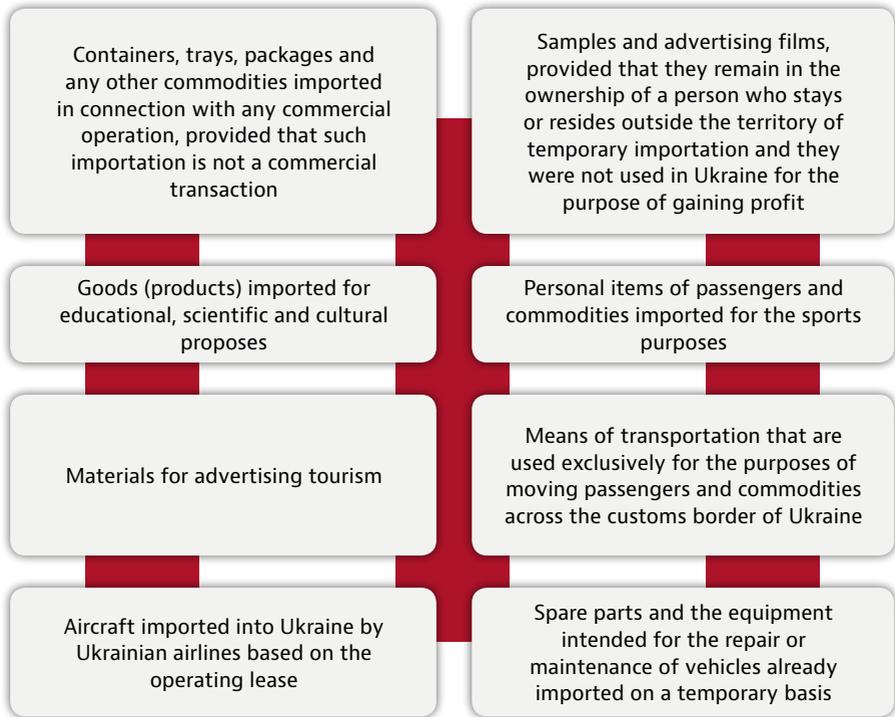
Thus, it is expected that Ukraine will receive an official invitation to become a party to the Convention, at earliest, in the middle of the year 2021.

#### ***6.6.6 Temporary import***

Under the Customs Code, goods (products) of foreign origin may be imported into Ukraine on a temporary basis for a particular purpose with full or conditional exemption from customs taxes and without the application of any non-tariff measures, provided that such goods (products) are imported for a period not exceeding three years.

The following commodities can be imported on a temporary basis:

Goods (products) imported for the purposes of demonstration or use at exhibitions, fairs, conferences, etc., professional equipment for preparing reports, making records for the mass media or making movies.



Additionally, commodities specified by the Customs Code as well as commodities identified in Annexes B.1-B.9, C, D and E of the Convention on Temporary Admission ("**1990 Istanbul Convention**"), if the criteria of the 1990 Istanbul Convention are satisfied, are allowed temporary import into Ukraine.

Customs clearance of certain goods (products) imported into Ukraine under the temporary import regime would require the issuance of a guarantee.

The guarantee should be provided in the form of a cash bond to the amount equal to the amount of taxes, duties and excise tax due under the import regime with respect to such goods (products) as of the date of filing the customs cargo declaration. The cash bond should be paid back upon re-export of the goods (products) based on the written application of the importer.

If goods (products) are imported into the customs territory of Ukraine under the temporary importation customs regime on the basis of A.T.A. carnets, no additional guarantee (e.g., cash bond) should be provided because, in

accordance with provisions of the 1990 Istanbul Convention, the A.T.A. carnet book would serve as an international guarantee for temporary import. A full conditional exemption or partial conditional exemption should apply to goods imported into the customs territory of Ukraine in a temporary import customs regime.

Full conditional exemption provides for exemption from customs taxes. The exemption should apply to goods specifically defined by the Customs Code as well as Annexes B.1-B.9, C and D of the 1990 Istanbul Convention.

Partial conditional exemption requires payment of 3% of the amount of customs taxes payable in case of delivery of goods under the import customs regime each month.

If the goods imported under the regime of temporary import are not promptly exported from the customs territory of Ukraine as a result of their arrest (seizure) in case of violation of customs rules, the calculation of period of temporary import is suspended for a period of such an arrest (seizure).

#### **6.6.7 Temporary export**

Under the Customs Code, goods and commercial vehicles of Ukrainian origin may be exported from Ukraine on a temporary basis with full conditional exemption from customs taxes and without the application of any non-tariff measures, provided that such goods and commercial vehicles are reimported into Ukraine within the period of temporary export. The period of temporary export should not exceed three years. This period can be prolonged by the customs authorities.

#### **6.6.8 Bonded warehouse**

Under the bonded warehouse customs regime, goods (products) imported into Ukraine are stored at bonded warehouses under customs control with full conditional exemption from customs taxes and without the application of any non-tariff measures.

The general maximum term for the storage of imported goods (products) at a bonded warehouse is three years (1095 days), while for excisable goods (products) such a term may not exceed one year (365 days) from the date of their placing under the bonded warehouse regime.

Upon the expiration of the storage term, the goods (products) should be declared under another customs regime with the payment of the relevant import customs duties, taxes and excise tax due.

The maximum term for the storage of the goods (products) designated for export at a bonded warehouse may not exceed one year as of the date of their placing in a bonded warehouse. Before the expiry of this term, the goods (products) should be exported from the customs territory of Ukraine.

Opening and operating bonded warehouses requires a permit from the customs authorities.

#### **6.6.9 Free customs zone**

A free customs zone regime whereby Ukrainian goods (products) and goods (products) of foreign origin that are imported into or exported from free customs zones outside the customs territory of Ukraine with exemption from customs taxes and without the application of any non-tariff measures are imported into the free customs zone with the application of customs taxes and non-tariff measures.

#### **6.6.10 Customs free trade store**

Under the customs free trade store regime, goods (products) that are not intended for free circulation in the customs territory of Ukraine are permitted to be sold without the payment of any customs taxes or the application of any non-tariff measures. This is provided that such goods (products) are sold within special areas under customs control, such as points of admission on the customs border of Ukraine intended for international connections and other relevant areas, and are designated for export outside the customs territory of Ukraine.

#### **6.6.11 Inward processing customs regime**

Under the regime of inward processing in the customs territory of Ukraine, goods (products) originating from other countries may be temporarily brought into the customs territory of Ukraine with conditional relief from VAT, customs duties and taxes, and without the application of any non-tariff measures to such goods (products), upon issuance of a financial guarantee (if applicable), provided that such goods (products) will be re-exported outside the customs territory of Ukraine. A permit from the customs authorities is required to clear the goods under the inward processing customs regime.

The processing may include the following types of operations with commodities:

- the processing of goods (products)
- the processing, assembling and dismantling of goods (products)
- the repair of the goods (products), including modernization, renovation and adjustment and calibration

- the use of goods (products) that improves or facilitates the processing of the goods

The term for the inward processing regime of goods (products) in the customs territory of Ukraine is established by the customs authorities on a case-by-case basis. The term for inward processing may be prolonged by the customs authorities; however, the total term of processing should not exceed 365 days. Goods originating in Ukraine (except for fuel and energy) used for processing foreign goods (products) could be cleared under the export customs regime.

If the processed goods are to be sold in the customs territory of Ukraine, such goods should be placed under the import customs regime with due payment of all applicable taxes and duties. The sale of processed goods in the customs territory of Ukraine by a foreign company is to be performed through its duly registered representative office, which would carry out customs clearance of the processed goods.

#### ***6.6.12 Outward processing customs regime***

Under the outward processing customs regime, Ukrainian goods (products) are processed outside the customs territory of Ukraine without the application of any non-tariff measures to such goods, provided that such goods or the processed goods will be imported back into Ukraine. A permit from the customs authorities is required to clear the goods under the outward processing customs regime. The total period for processing the goods may not exceed 365 days.

Goods (products) that are imported after warranty repair abroad are subject to full conditional exemption from VAT and customs duties if imported within the period of outward processing. Partial conditional exemption applies to the processed goods.

#### ***6.6.13 Destruction***

Destruction is the customs regime whereby goods (products) brought into the customs territory of Ukraine are subject to destruction under customs control, with the full conditional exemption from import customs taxes and without the application of any non-tariff measures. A permit of the customs authorities is required to clear the goods under the destruction customs regime. Waste generated as a result of destruction should be subject to customs clearance requirements and customs duties and taxes depending on the claimed customs regime.

#### **6.6.14 Surrender to the state**

Under the regime of surrender of goods (products) for the benefit of the state, the owner of the goods (products) may abandon the goods (products) in favor of the state without paying any customs taxes or the application of any non-tariff measures. A permit of the customs authorities is required to clear the goods under this customs regime. Goods determined by the Cabinet of Ministers of Ukraine may not be surrendered to the state (expired goods, nuclear and hazardous waste and goods the storing and sale of which would exceed sales proceeds, etc.).

### **6.7 Certification and control**

Certification of goods (products) is the activity designed to confirm the compliance of goods (products) with Ukrainian local statutory requirements of product quality and their consumer characteristics.

#### **6.7.1 Sanitary and epidemic certification**

According to the Law of Ukraine on Provision of Sanitary and Epidemical Protection of Citizens, dated 24 February 1994 ("**Sanitary Protection Law**"), the importation of certain goods into Ukraine is subject to sanitary and epidemiological expert examination and is allowed if a sanitary and epidemiological certificate, which certifies the safety of products for human health, is issued by the Consumer Protection Service of Ukraine. If the sanitary and epidemiologic examination is performed in the state of export and the relevant certificate was issued in this other state, the results of the examination may be recognized in Ukraine based on an agreement on mutual recognition of expert examination results. An examination is performed on products included on the List of Goods Subject to State Control upon Transfer (including transit) through the Customs Border of Ukraine, approved by Resolution of the Cabinet of Ministers of Ukraine No. 960, dated 24 October 2018.

Preliminary state control functions at the border, in particular, sanitary and epidemiological, veterinary and sanitary, phytosanitary and ecologic control, which were performed by various state authorities in the past, have now been delegated to the customs authorities and are performed according to the "single window" principle in the form of preliminary documentary control. This is aimed at the simplification and acceleration of control procedures at the border.

Furthermore, pursuant to the EU Ukraine Association Agreement, Ukraine has committed to bringing its sanitary and phytosanitary and animal welfare legislation closer to that of the EU, establishing a mechanism for the recognition of equivalence of sanitary or phytosanitary measures.

In connection with this, once equivalence is formally recognized by the importing party, the following is to be procured: (i) the reduction of physical checks at the frontiers; (ii) simplified certificates; and (iii) pre-listing procedures for establishments as appropriate.

### **6.7.2 Radiological control**

All products, with the exception of electricity and products transported through pipelines, are subject to radiological control at customs.

### **6.7.3 Certificate of origin**

A certificate of origin of goods is mandatory in the following cases: (i) when preferential customs duty rates are applied; (ii) when quantitative restrictions or other restrictive measures apply to the goods; and (iii) if it is required pursuant to the laws of Ukraine or Ukraine's international treaties.

## **6.8 Customs valuation rules**

The customs value of goods imported into Ukraine is the basis for the calculation of import custom duties and taxes and normally includes the cost of goods, insurance costs and transportation costs of the goods up to the Ukrainian customs border. Depending on the actual circumstances, including contractual arrangements and in addition to the aforementioned costs, a Ukrainian importer of record may be required to include royalties (payable for the right to use trademarks and other IP rights) into the customs value of those goods, provided that the Ukrainian importer must directly or indirectly (e.g., via third parties) pay those royalties, other license fees and/or other income as a condition/direct consequence of the importation of the goods being valued at customs.

The Customs Code provides an exhaustive list of documents to be filed for determining the customs value of goods. The Customs Code precludes the customs authorities from requesting documents other than those on the list. The Customs Code establishes an exhaustive list of cases where the customs value may be viewed to be incorrect: (i) the customs value is computed improperly; (ii) not all documents required under the list are filed; (iii) the valuation method applied by the importer of record is inconsistent with the terms prescribed by the Customs Code; or (iv) receipt by the customs authorities of official information from foreign customs authorities regarding the falsity of the declared customs value.

### **6.8.1 Import and export customs duties**

Customs duties are imposed on top of the declared customs value of imported goods confirmed and accepted by customs. Rates of import

customs duties in Ukraine normally range from 0% to 60% according to the Ukrainian Customs Tariff. Ukrainian customs legislation establishes three levels of rates for the payment of customs duties on imported products.

A preferential rate of customs duties is applied based on Ukraine's international agreements, which establish special preferential customs regimes (e.g., the EU-Ukraine Association Agreement and the Free Trade Agreement between the EFTA States and Ukraine).

Reduced rates of customs duties are applied to goods originating from WTO member states and countries that have been granted a most-favored nation regime in Ukraine based on a bilateral or regional treaty.

Customs duties are payable in full for all other goods and products not covered in the two categories described above.

Import customs duties should apply to the customs value of imported goods and may be deducted for corporate income tax purposes.

Export duties are levied only for certain limited categories of products (e.g., livestock, oil seeds, waste and scrap of ferrous metals and gas, etc.).

### **6.8.2 Import VAT**

As established under the Tax Code, generally the import of goods is subject to Ukrainian VAT at a general rate of 20%, with a special 7% rate being applicable to permitted medicines and medical products, levied on top of the tax base for imported goods.

For the purpose of VAT, the tax base for goods imported into Ukraine should be determined based on their contract price but should not be lower than their customs value. The excise tax and import customs duty are to be added to the tax base for VAT. The customs value should include the following costs incurred by the importer or to be paid by the importer for the imported goods, which should be added to the contract price: (i) transportation; (ii) loading/unloading, (iii) insurance; (iv) brokerage, agency, commission and other fees; and (v) payments for the use of intellectual property (royalties).

The cost thus determined shall be converted into Ukrainian currency at the National Bank of Ukraine with the exchange rate effective as of 12 am (midnight) of the day the customs declaration is filed or the customs formalities are carried out (if no customs declaration is filed).

Certain goods imported into Ukraine may be exempt from import VAT.

### **6.8.3 0% export VAT**

Export of goods is generally subject to 0% VAT. VAT-exempt supplies deprive a VAT payer of the right to claim input VAT.

Export VAT should be determined based on the contract price, which may not be lower than the purchase price of the goods or, if they were produced by the taxpayer, not lower than at arm's length price.

For VAT purposes, goods are viewed to be exported if and when their export is evidenced by the customs cargo declaration. More specifically, to confirm the export operation subject to 0% VAT, the taxpayer must file the original customs cargo declarations with the stamp of the customs office confirming that the export operation has been completed. The electronic customs cargo declarations are to be provided by the customs office that carried out the customs clearance of the goods.

In addition to the stamped customs declaration, the following main documents should support the export operation:

- the contract for the export of goods
- the payment documents
- the shipping documents (transfer and acceptance statements, waybills and invoices, etc.)

VAT should arise only if the actual shipment of the exported goods (i.e., the transfer across the customs border), supported by the customs declaration, is executed.

### **6.8.4 Import excise taxes**

Please refer to section 5.10 above for information on excise taxes payable in Ukraine.

## **6.9 In-kind contribution**

Importation of property as an in-kind share capital contribution by a foreign investor is exempt from customs duty in Ukraine.

However, this rule does not apply if the importer disposes of such property within a three-year period. The position of the Ukrainian customs authorities is that the rule applies not only to an asset deal but also to a share deal, as the sale of shares of a foreign participant is equal in the view of Ukrainian customs authorities to the sale of such assets. If the share or

asset sale took place within three years of the importation of the assets, the company is obligated to pay the exempted amount of import duties applied to such imported property to its local customs office.

### 6.10 Customs control

Customs authorities are allowed to carry out customs control of the accuracy of the imported goods' customs value determined. Customs control procedures may be executed at the moment of the goods' customs clearance and their transfer across the customs border of Ukraine and after the completion of customs clearance procedures and admission of goods across the customs border of Ukraine (e.g., the post-audit procedure).

During the customs control procedure, the customs authorities verify the accuracy of the information stated in the customs declaration and other documents submitted to the customs authorities for customs clearance.

The Customs Code introduces several types of post-audit control, which may be performed in the form of: (i) on-site documentary audits (scheduled and unscheduled); (ii) off-site documentary audits; and (iii) post-customs control. Documentary audits are not to take longer than 30 business days. Scheduled documentary on-site audits will not be conducted more often than once per year. Post-customs control is conducted according to the risk assessment indicators and may be carried out during the customs clearance or no later than 30 days after the goods were released. Post-customs control is performed off-site based on the documents requested by a customs officer.

Customs control at the moment of customs clearance may be executed in the form of:

- analysis of documents
- interviewing the importer's officials
- examination of imported products
- comparison of the reported customs value with the customs value of identical or similar goods or with the information available in information databases of the customs authorities
- other forms of control

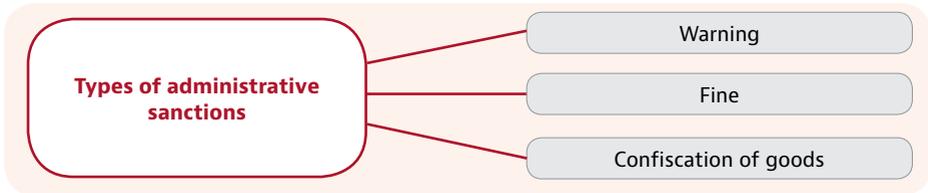
The post-audit procedures may be executed in the form of:

- verification of the data filed by the importer
- conducting chamber audits
- conducting scheduled and unscheduled on-site customs audits
- filing enquiries with the customs authorities of foreign states and other Ukrainian state authorities

When the customs authorities reveal inconsistencies in the reported customs value of imported goods they may issue a decision on the assessment of the customs value of the imported goods. This would lead to the re-computation of the tax liabilities and the application of additional customs duties, as well as the imposition of financial penalties on the importer, unless the importer decides to challenge the decision with the customs authorities of a higher level or in court.

### **6.10.1 Liability**

Based on the results of the customs inspection, the customs authorities may hold the inspected company responsible for breach of customs rules. Section XVIII of the Customs Code provides the following administrative sanctions for violations of customs rules and regulations:



Depending on the type of violation committed, the fine against company officials could amount to 10 to 1,000 times the non-taxable minimum (currently UAH 17 or USD 0.7), i.e., currently from UAH 170 to UAH 17,000 or approximately USD 7 to USD 700. In certain cases, the fine may even amount to 100% or 200% of the value of the goods and involve the confiscation of those goods, or 300% of the unpaid customs duties.

The Customs Code introduces a procedure for amicable agreement between the customs authorities and importers of record in disputes related to alleged violations of customs procedures, which, if successful, results in a no-administrative-liability record for importers of record (i.e., the person would be deemed not to have committed an offense).

Importers of record are exempt from administrative liability for unintentional mistakes not resulting in the unlawful exemption from, or reduction of, customs duties and taxes or non-application of non-tariff regulations.

There is a six-month limitation period under Article 467 of the Customs Code with respect to customs violations. Normally, it starts from the moment of the violation. However, in case of on-going violations, this six-month period

elapses from the date of discovery of the violation by the Ukrainian customs authorities.

Please note that administrative sanctions, such as the confiscation of goods, may be imposed only on the basis of a court decision. The customs authorities may not confiscate the goods.

### **6.10.2 Criminal liability**

The concept of corporate criminal liability was introduced into Ukrainian law on 23 May 2013 with effect from 27 April 2014. Legal entities may be liable for certain criminal offenses (e.g., money laundering, terrorism, bribing an executive of a private legal entity).

In turn, Article 201 of the Criminal Code provides for the criminal liability of individuals for smuggling an exhaustive list of items, including cultural valuables, weapons, poisonous substances, narcotics and explosives. The maximum liability for smuggling any such listed items may be 12 years of imprisonment with confiscation of the smuggled goods and confiscation of the guilty individual's property.

Smuggling goods other than those expressly listed in Article 201 of the Criminal Code is not deemed to constitute a criminal offense but can result in administrative liability.



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**7**

**PROPERTY RIGHTS  
TO REAL ESTATE**



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## 7.1 General

Under the Civil Code of Ukraine, dated 16 January 2003, as amended (“**Civil Code**”), three types of property ownership (private, state and municipal) exist in Ukraine. In contrast to the former system of state and collective ownership of property in the Soviet era, private ownership is specifically recognized and honored in Ukraine.

Under Article 26 of the Constitution, foreign citizens enjoy the same rights and freedoms and bear the same responsibilities as Ukrainian citizens, including property rights. According to the Civil Code, foreign citizens and legal entities are entitled to own property in Ukraine, unless otherwise provided for in the international treaties of Ukraine or other Ukrainian laws. The Ukrainian courts ensure protection of property rights in accordance with the applicable Ukrainian laws.

Property rights to and interests in real estate (ownership and different use rights, mortgages and others) are subject to state registration according to the procedure established by the Law of Ukraine on State Registration of Property Rights to Real Estate and their Encumbrances, dated 1 July 2004. On 1 January 2013, the restated version of this law came into force and a new property rights registration system became effective. As a result, the State Register of Property Rights to Real Estate administered by the Ministry of Justice of Ukraine (“**Property Rights Register**”) was created. The Property Rights Register contains, among other things, unified information on the property rights to land plots, buildings, structures, premises inside buildings, etc., as well as the existing encumbrances, including mortgages and lease rights thereto. The Property Rights Register replaced the numerous property rights registers, which contained information on restrictions and encumbrances over real estate, such as the State Register of Mortgages, State Register of Prohibitions on Alienation of Real Estate, etc.

Under the Law of Ukraine on State Registration of Property Rights to Real Estate and their Encumbrances, the documents for the state registration

of property rights may be generally submitted to any state-accredited registrars (including the notary) authorized in and for the region (or Kyiv or Sevastopol, as applicable) in which the respective real estate is located. As an exception, in the event of a notary-certified transaction, the state registration of property rights must be completed by the same notary who certified the relevant agreement and is authorized in the respective region (or Kyiv or Sevastopol, as applicable) in which the real estate is located or in which either party to the transaction has a registered address.

Property rights to land plots can only be registered in the Property Rights Register after the state registration of such land plots with the unified state cadaster registration system ("**State Land Cadaster**"), containing information on the size and designated use of land plots, their owners, encumbrances as well as various other features of land plots. The State Land Cadaster was introduced by the Law of Ukraine on the State Land Cadaster, effective since 1 January 2013.

Information on the rights to land plots or other real estate registered in the Property Rights Register and the State Land Cadaster is publicly available for all individuals and legal entities. In particular, any person or legal entity can obtain information about real estate, as well as about the holder of registered rights thereto and interests therein, from the Property Rights Register and the State Land Cadaster (with respect to land plots) in paper or electronic form. In addition, as of 30 June 2015, it has become possible to order an extract from the State Land Cadaster via the Public Cadastral Map website and obtain such extract at any administrative services center, irrespective of the location of the land plot, on the basis of the principle of extraterritoriality.

## **7.2 Lease of non-land real estate**

The lease of real estate (with the exception of land) in Ukraine is governed by the Civil Code, the Commercial Code and the Law of Ukraine on the Lease of State and Municipal Property, dated 10 April 1992, as amended ("**State Property Lease Law**"), as well as other laws and regulations. The State Property Lease Law is expected to be replaced by a new law soon.

The Civil Code and the Commercial Code contain general provisions governing the lease of movable and immovable property. In particular, according to the Civil Code, the lease of a building (or other capital structure) or a part thereof must be concluded in writing, notarized and registered in the Property Rights Register if entered into for a period of three years or longer. The Commercial Code defines the essential elements of a lease agreement.

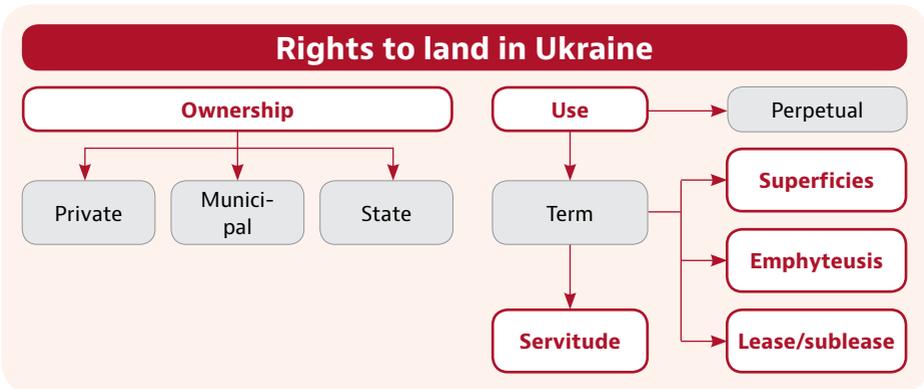
According to the Decree of the Cabinet of Ministers of Ukraine On State Duty, for the notarization of a lease agreement by a state notary,<sup>1</sup> parties to it must pay a state duty of 0.01% of the contract price of a lease agreement for a building or other capital structure, which is capped at 50 times the “non-taxable minimum income” (currently, UAH 850 (=UAH 17 x 50) or approximately USD 35), and 0.01% of the land appraisal (made on the basis of the state-approved methodology) for a land lease agreement. Private notaries’ fees are normally higher than the amount of state duty; however, they are negotiable.

The State Property Lease Law primarily regulates the lease of state and municipal property. However, its provisions may also apply to the lease of private property, unless otherwise expressly provided for by a lease agreement or by applicable laws.

### 7.3 Land ownership

The principal act of law regulating land issues in Ukraine is the Land Code of Ukraine, dated 25 October 2001, as amended (“**Land Code**”), which entered into force on 1 January 2002. The Land Code applies to all types of land in Ukraine; it governs the legal relations of Ukrainian and foreign individuals and legal entities, including state-owned companies, Ukrainian state and municipal authorities, and foreign states and international organizations in the area of the ownership, use and disposition of land in Ukraine. The Land Code distinguishes between agricultural and non-agricultural land and establishes specific legal treatment for each type of land.

The Land Code provides for the following types of rights to land in Ukraine:



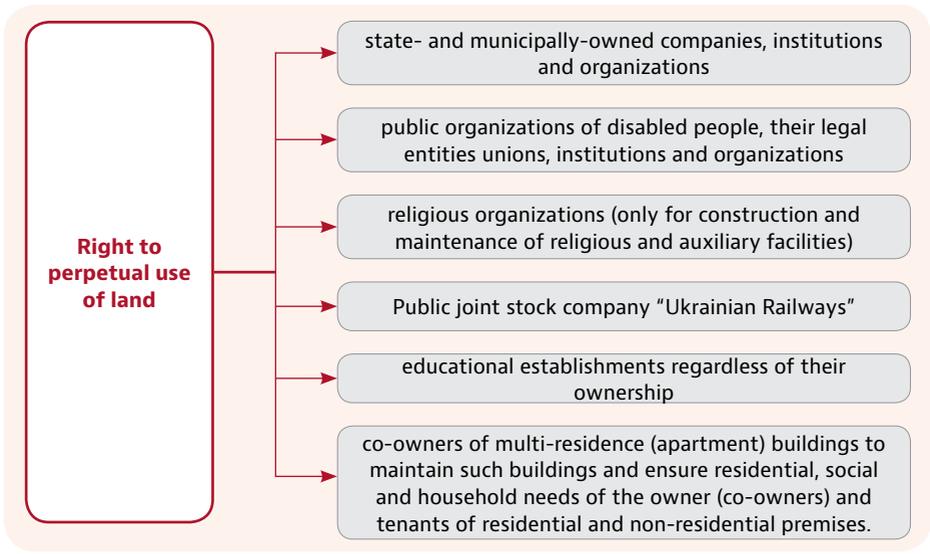
<sup>1</sup> There are two categories of notaries in Ukraine. A smaller one includes those notaries who are employed with, and provide notarial services through, the state notarial offices. A larger one encompasses all other notaries who practice privately.

The Land Code expressly states that there are three types of land ownership in Ukraine: private, municipal and state. Subject to certain limitations, Ukrainian individuals and legal entities are not restricted in the ownership, use or disposition of land. According to the Land Code, state or municipal land must be sold to individuals and legal entities exclusively on a competitive basis (auction), except when the purchaser of the land plot is the owner of a construction located on this land plot and in some other cases.

Foreign individuals, foreign legal entities and foreign states are allowed to own, use and dispose of certain non-agricultural land in Ukraine, but are explicitly prevented from owning agricultural land. Foreign legal entities may only own non-agricultural land: within city limits if they purchase buildings or structures, or land plots for construction purposes; and beyond city limits if they purchase buildings or structures. State or municipal land may, however, be sold to a foreign legal entity if it establishes and registers its permanent establishment in the form of a commercial representative office in Ukraine. The sale of state-owned non-agricultural land to a foreign legal entity or to a foreign state may be undertaken by the Cabinet of Ministers of Ukraine, subject to the sale's prior approval by the Verkhovna Rada of Ukraine (i.e., the Ukrainian parliament), except for state-owned non-agricultural land occupied by objects to be privatized, which can be sold by state privatization authorities, subject to the prior approval of such sale by the Cabinet of Ministers of Ukraine. Municipal non-agricultural land may be sold to a foreign legal entity or to a foreign state by the relevant municipal authorities, subject to the sale's prior approval by the Cabinet of Ministers of Ukraine.

The Land Code does not appear to directly grant the right to own any land in Ukraine to Ukrainian companies with 100% foreign investment. It stipulates that only those Ukrainian legal entities that have been founded by (i) Ukrainian individuals or legal entities, and (ii) foreign entities may own land in Ukraine. This discrepancy appears to be an anomaly, and the relevant amendments to the Land Code will need to be adopted to remove this defect. However, the Land Code does not contain any similar restrictions with respect to the lease of land by Ukrainian legal entities with 100% foreign investment (for more details, please see 8.4 below).

The right to perpetual use of land (i.e., for an indefinite period) may now be granted only to:



The Land Code contains a number of transitional provisions that postpone or limit the application of certain provisions until a future date. One of the most important of these, to represent a so-called "moratorium on turnover of agricultural lands" (as summarized in the chart below), states that until adoption of the law aimed at regulating the turnover of agricultural lands in Ukraine, (i) all state- and municipally owned agricultural land plots may not be sold, and (ii) certain parcels of privately owned agricultural lands may not be sold or otherwise alienated (unless such alienation occurs as a result of inheritance, exchange for another land plot in compliance with the statutory requirements or termination of land ownership rights for public purposes), may not be contributed to the charter capital of a legal entity, and the permitted use of the lands mentioned in item (ii) above may not be changed (unless changed with the purposes of any such plot to be used for production-sharing purposes).

At the end of 2017, the above moratorium was extended to 1 January 2020, which marks the earliest possible date for its cancellation by way of adoption of the law aimed at regulating the turnover of agricultural lands in Ukraine. The Land Code does not contain any similar restrictions with respect to non-agricultural lands. It is expected that moratorium will be lifted soon subject to restrictions against foreign individuals and legal entities owning agricultural land.

## Moratorium on turnover of agricultural lands

**state- and municipally owned agricultural lands of any permitted use**

ban on sale

**privately owned agricultural lands relating to:**

- agricultural commodity lands
- individual household lands allocated in kind to the owners of land shares
- land shares

ban on sale and other alienation

ban on contribution to charter capital

ban on change of the permitted use

### 7.4 Land leases

The Land Code contains a number of general provisions with respect to land leases. In particular, it provides that a land lease is the contractual, limited-in-time possession and use of a land plot for a lessee's commercial and other activities, which is granted for compensation. All Ukrainian and foreign individuals and legal entities, foreign states and international organizations may lease land in Ukraine. Under the Land Code, a land plot may be leased out for up to 50 years upon expiration of which such lease could be renewed for another period of up to 50 years and so on. The Land Code establishes the right of a lessee to sublease a land plot, subject to the lessor's consent. The term "lessors of land plots" is defined to include only landowners or their authorized representatives.

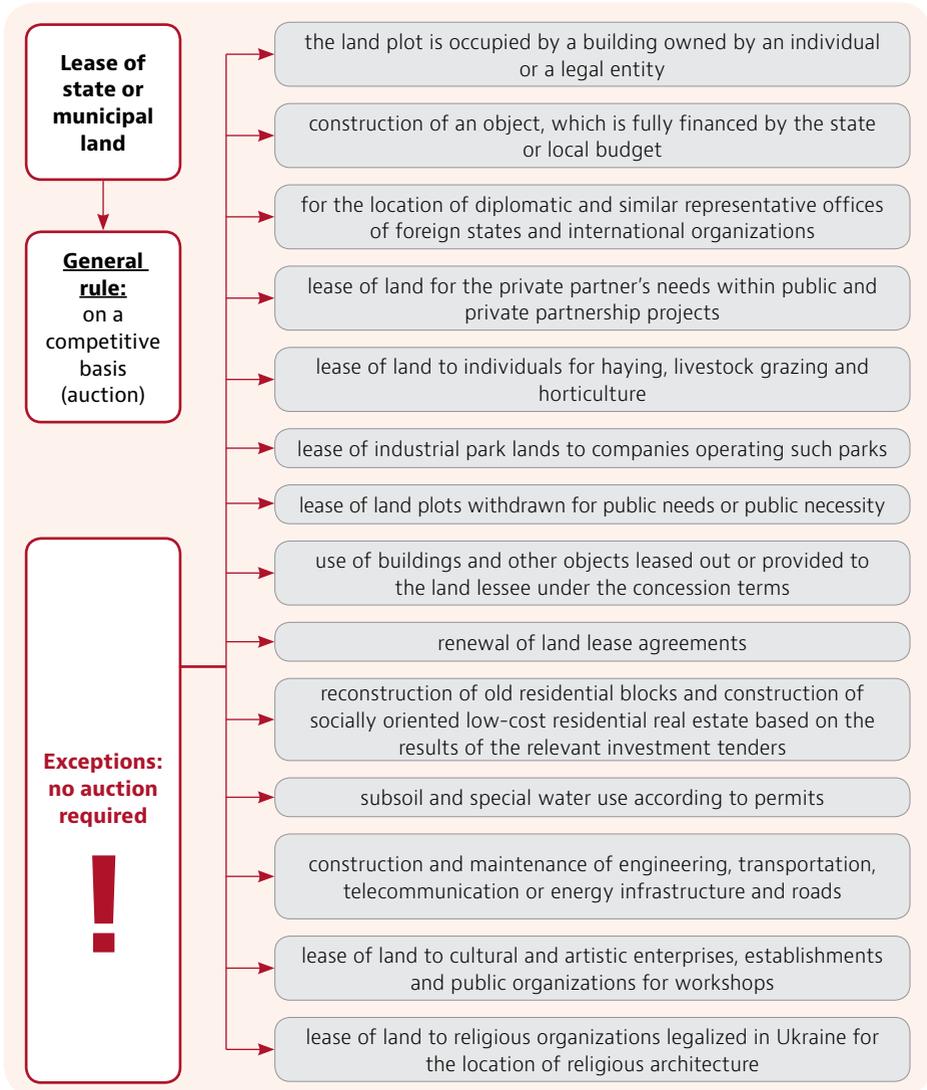
More specifically, land lease relations are regulated by the Law of Ukraine on Land Lease, dated 6 October 1998, as amended ("**Land Lease Law**").

According to the Land Lease Law, a land lease agreement must be executed in writing and must contain a set of essential terms. Those terms are provided in the Land Lease law and the Model Land Lease Agreement approved by resolution of the Cabinet of Ministers of Ukraine No. 220, dated 3 March 2004, as amended. In particular, a land lease agreement to be concluded should contain the following mandatory conditions: the leased object (its location, cadastral number and area); the lease term; the amount of lease rent and grounds for its revision; the terms for rent payment; and liability for failure to timely pay the rent. A land lease must be notarized at the request of either party to it.

The procedure for leasing state and municipal land is set forth in the Land Code and the Land Lease Law. Currently, state or municipal land can be

leased out pursuant to a decision of the respective body of executive power (i.e., the Cabinet of Ministers of Ukraine or local state administrations) or local council. As a general rule, a tenant of a state and municipal land plot is determined at an auction.

The Land Code waives the auction requirement in some cases as follows:



Currently, the Land Code establishes the requirements and procedure for holding land auctions.

### **7.5 Third-party rights**

The Land Code recognizes certain rights of third parties over a land plot within the concepts of "servitudes" (easements) and "good-neighborliness." The Land Code contains a description of various types of servitudes, and the procedures for their establishment and termination.

Under the concept of "good-neighborliness," landowners and land users are obliged to use the land in a manner that will cause the least possible inconvenience and discomfort to the landowners and land users of neighboring land plots (in particular, in terms of shading, smoke, odor nuisances and noise pollution).



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**8**

**PRIVATIZATION**





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## 8.1 Introduction

It has been almost two years since the new rules for the privatization of state and municipal property took effect. Originally, the upgraded legal framework was aimed at speeding up the overall process of selling state and municipal property, and it certainly reached that goal to the extent it relates to the sale of small privatization assets via an e-auction system. The types of small privatization assets vary from certain abandoned real estate located on the fringes of the country to fully functioning businesses with strong customer relationships. As of the end of 2019, the total revenue from the sale of all small privatization assets amounted to UAH 2.09 billion, where 40% of the e-auctions were successful, with an average price increase by more than 60%. In 2020, it is also expected that alienation of small and large privatization objects will ensure revenues to the state budget in the amount of UAH 12 billion.

Unfortunately, there has not been a single sale of any large privatization asset in 2019 and none of the instruments provided for by the new framework have been tested yet. The updated list of large privatization assets for the coming years includes companies such as Centrenergo (power generation), UMCC (mining of non-ferrous metals), Electrotyazhmash (manufacturing of power generators), Odesa Portside Plant (production of fertilizers), Indar (insulin product manufacturing), Ukragroleasing (leasing of agricultural machinery), several regional power distribution companies (e.g., Kharkivoblenergo and Mykolaivoblenergo), TPPs (e.g., Odesa TPP, Kherson TPP and Dnipro TPP), President Hotel, Ukraina Hotel and other companies. It is expected that other assets that fall within the large privatization assets category (such as Kyiv's Dnipro Hotel) will be added to the list of large privatization assets for further privatization.

## 8.2 Assets and buyers

All of the privatization assets are divided into two groups — large privatization assets (LPAs) and small privatization assets (SPAs). LPAs are

shares in joint stock companies and key assets of companies, the asset value of which exceeds UAH 250 million and where the state owns 50% of shares or more. All other assets fall into the SPA category.

The privatization regulations embed a principle pursuant to which all assets that are not prohibited from privatization can be sold. From a buyer's perspective, this means that any asset not prohibited from privatization by virtue of the law can be sold, for example, at the buyer's initiative, regardless of whether it is listed as an LPA or SPA.

As for the qualification criteria for buyers for the purposes of privatization, the law sets out a list of persons who cannot qualify as buyers, in particular:

- Buyers with non-transparent ownership structures registered in offshore zones
- Buyers registered in states included in the FATF blacklist and their 50% direct or indirect subsidiaries
- The aggressor state and legal persons where such state holds equity interest, as well as other entities controlled by such legal persons
- Legal entities whose beneficial owners of 10% or more of the shares (equity) in such legal entities are residents of the aggressor state (save for companies whose shares are traded on foreign stock exchanges other than those located in such aggressor state)
- Individuals (citizens or residents) of the aggressor state
- Persons under the national sanctions regime and their affiliates
- Ukrainian legal entities whose beneficial owners have not been disclosed in breach of the applicable law
- Persons who used to be a party to a privatization agreement that was later terminated as a result of these persons' violations, as well as their affiliates

If the winner of the auction refuses to sign the sale and purchase agreement in respect of an LPA or SPA, the winner and its end beneficiary will not be allowed to participate in any future auction for the sale of such asset. This approach allows the government to cut off disreputable investors and requires buyers to think more carefully when selecting a partner for a privatization project.

Furthermore, the buyer attracting the financing to purchase the privatization asset must provide information on its creditor, who must meet the requirements of buyers of privatization assets stipulated in the law.

### 8.3 Sale of LPAs

Regarding the sale of LPAs, the implementation of the new rules reduces the risks associated with determining the starting price; the price will be determined by a professional adviser engaged by the privatization authority. This should eliminate the conceptual conflict that used to be embedded in the law when the starting price was determined by valuation, which should have reflected the fair market value of the asset, while, in principle, the fair market value would be determined as a result of the auction. However, this only applies where an investment adviser is engaged, since, if no adviser wishes to support the sale process, the starting price would still be determined by the privatization authority based on the results of an independent valuation.

As for the actual sale process, the default option is an “English” auction with at least two bidders. However, if only one bidder is qualified, the LPA may be sold directly to that buyer at a price not less than the starting price. If the LPA is not sold by auction or direct buyout, the sale will be made via auction where the starting price should be determined by indicative bidding with the bid secured by the auction deposit (either in cash or as a bank guarantee).

The law expressly provides for cases when an LPA may be sold with a 25% or 50% decrease from the starting price via an “English” auction; however, it is not entirely clear when the privatization authorities will announce the indicative bidding auction, i.e., immediately following the very first auction where the LPA has not been sold, or after two failed auctions when the starting price has been decreased by 25% and 50%, respectively. These tools give a certain degree of flexibility to the privatization authorities, allowing them to choose the sale method appropriate to each particular asset depending on its individual characteristics.

Furthermore, the law allows the privatization agreement to be governed by the laws of England and Wales at the buyer's request. However, this option is only available until 2021 if the Ukrainian parliament does not extend it in the future.

The key point of the new regulations is the issue of protection of buyers' rights. The provisions governing the content of a privatization agreement, even if governed by Ukrainian law, may include a set of warranties of the seller as to information on the LPA, and the respective liability for breaching them. Further, after a privatization agreement has been signed, the target

company will not conclude any agreements that are beyond its ordinary course of business without the buyer's prior consent, e.g., asset pledge, set-off or suretyship.

Given that many state or municipal enterprises have a significant amount of (typically simulated) indebtedness, the law prescribes an important protection mechanism: no bankruptcy proceedings will be brought, within one year following completion of a privatization deal, against a privatized company based on grounds that relate to a period prior to the deal's completion. On top of that, once a privatization agreement has been signed, no changes to the custody account relating to the arrest or placement of other encumbrances will be made until the title to the LPA passes to the buyer. These protection measures would allow buyers to directly control any cash-out from the target company after signing the sale and purchase agreement, as well as increase the overall attractiveness of the asset.

#### **8.4 Sale of SPAs**

In relation to the privatization of SPAs, all SPAs will be sold via an electronic auction system. The privatization authorities conclude the agreements via e-platforms that are functionally capable of holding privatization auctions. Largely, all of the processes relating to the submission and acceptance of bids as well as the determination of the winner of the e-auction are automated and do not require the privatization authorities' involvement until the binding sale and purchase agreement is being executed.

In terms of the auction process, the default scenario is an "English" auction with no less than two bidders, and if there is only one bid submitted in respect of an SPA, the asset will be sold directly to that bidder. If the SPA is not sold, the starting price for the asset will be decreased by 50%. If the SPA still does not sell, the starting price will be decreased again by 50% and the asset will be sold at a "Dutch" auction.

To some extent, the protection of buyers' rights is also applicable to the sale of SPAs. The prohibition of bankruptcy within one year following completion of the deal, as well as placement of an encumbrance over the shares, remain actual for the sale of SPAs.



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**9**

**PUBLIC-PRIVATE  
PARTNERSHIPS  
IN UKRAINE**



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The principal law defining the operation of the public-private partnerships in Ukraine (PPP) is the Law of Ukraine “On Public-Private Partnerships” (“**PPP Law**”). This was substantially amended in 2019. Separate types of PPPs are governed by the Law of Ukraine “On Concession”, the Civil Code of Ukraine and the Commercial Code of Ukraine as well as other legislative acts regulating the contractual models, which the PPP Law qualifies the PPP projects as eligible for implementation.

### **9.1 PPP definition and features**

The PPP Law defines the PPP as any form of cooperation between the public partner and the private partner carried out based on an agreement with each of the following features:

- The PPP project must contemplate the creation and/or construction (new construction, reconstruction, restoration, capital repair and technical re-equipment) of a PPP facility and/or management (use, operation, technical servicing) of such a facility.
- The term of the PPP must not be less than five years nor more than 50 years.
- The public partner and the private partner must share the risks related to the PPP project.
- The private partner must invest in the PPP facility.

All investment projects having the abovementioned features should be implemented solely in accordance with the PPP Law.

### **9.2 PPP parties**

The PPP should always have at least two parties — the private partner and public partner — who may act individually or in concert with other private or public partners.

The public partner — the state of Ukraine (acting through a line ministry or other governmental agency), a municipality, the National Academy of Sciences of Ukraine or national sectoral academies of sciences — may engage on its side the relevant state owned or municipal enterprises operating the relevant PPP assets, in which case the public partners shall bear residual liability to the private partner for the breach committed by such enterprises. Furthermore, the PPP Law allows several state/municipal authorities, the National Academy of Sciences of Ukraine or national sectoral academies of sciences to act jointly on behalf of the public partner. In such a case, the basis for their involvement in the PPP project shall be provided for in the PPP agreement.

The private partners — companies or individual entrepreneurs — acting in concert bear joint and several liability to the public partner. If the PPP tender terms so provide, the private partner under the PPP agreement may create a special project company for the purpose of the implementation of the PPP, in which case the relevant changes to the PPP agreement shall be introduced, including the residual liability of the private partner for the breach committed by such a special project company. Establishment of a special project company for the purpose of the implementation of the PPP is mandatory in cases where a non-resident legal entity is the winner of the tender.

The PPP may also include a third party: the creditor, a financing institution or an international financial organization providing financing or guarantee in relation to performance of the PPP agreement.

### 9.3 Industry sectors for PPPs

The PPP Law explicitly lists over a dozen industry sectors in which the PPPs are allowed, among which are:

- heat production, transportation and supply, as well as the distribution and supply of natural gas
- construction and/or management of highways, roads, railways, landing strips, bridges, tunnels, sea and river ports, etc.
- machine-building
- waste treatment, except for waste collection and transportation
- power generation, distribution and supply

If the PPP Law does not expressly specify the sector available for PPP projects but there is an interest in it, the public partner may resolve to implement the PPP in another sector on the condition that the sector relates to the provision of socially important services, except where the law reserves certain business solely for state-owned enterprises, institutions and organizations.

## 9.4 PPP forms

The PPP may take several contractual forms such as:

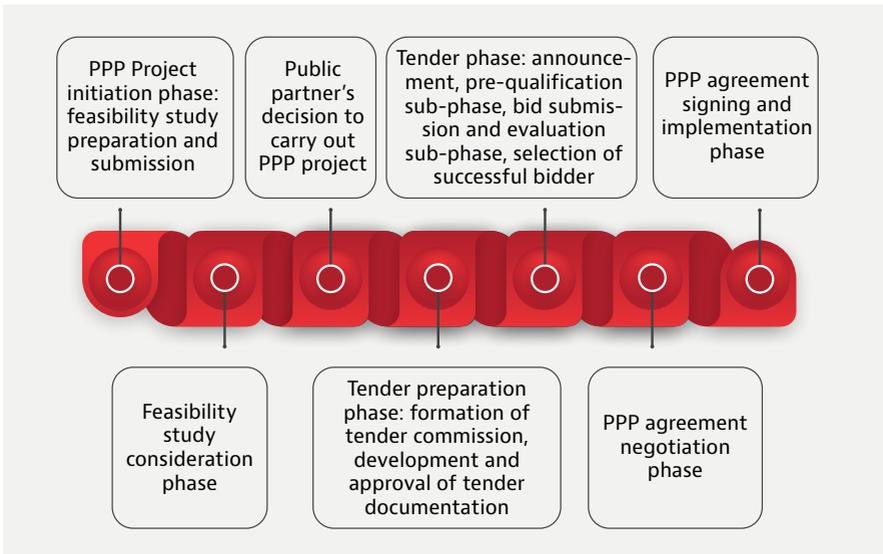
- concession agreement
- multi-element agreement
- property management agreement (subject to the private partner assuming investment obligations)
- joint activity agreements
- other contracts

The PPP Law defines the initiation of the PPP, the selection of the private partner, the preparation, execution and implementation of the PPP agreement, unless a special law governs these issues (such as for example concessions), in which case that special law shall apply. If the PPP is to take the form of a multi-element agreement, the PPP Law shall apply to regulate all relevant phases of the project from its initiation to post-PPP agreement implementation.

In addition, the PPP Law now specifically provides for a possibility to conclude ancillary civil law contracts to complement the PPP agreement for the performance of the PPP project. This may include financing agreements and direct agreements with creditors, among others.

## 9.5 Key PPP phases (basic scenario)

The below picture shows the key phases of a PPP project governed by the PPP Law in a sequential manner:



## 9.6 PPP benefits

The PPP model may be a preferred tool for those projects where the privatization of assets is not allowed or practicable. The private partners obtain the benefit of direct contracts with the public partner becoming entitled to direct claims to the relevant bodies and the state owned or municipal enterprises.

- *State support.* The PPP Law provides a number of public support tools for the PPP projects, including the provision of state guarantees, budget financing, payment to the private partner for completion of the PPP facilities, construction of ancillary infrastructure necessary for the PPP project, undertaking the purchase or supply of certain quantities of products (works, services) from/to the private partner within the PPP and some others. Such tools are not considered as state aid under the Ukrainian law and do not require special notification to the state authorities if certain criteria provided for in the PPP Law are met.
- *Legislative stability.* The PPP Law includes a stability provision, thus securing throughout the whole duration of the project the private partner from future changes in Ukrainian civil law, which can be detrimental to the PPP project. This, however, does not extend to changes in public laws including tax, customs, environmental, national security laws and some others.
- *Arbitrability.* The parties to the PPP agreement may refer their disputes to international arbitration, provided that the founder of a private partner is a company with foreign investments. The latter, in accordance with the laws of Ukraine, is also a Ukrainian company having at least 10% of foreign investment in its charter capital.
- *Special protections for bank accounts.* The PPP Law gives the right to the private partner — a party to the PPP agreement — to open bank accounts in the national/foreign currency with the Ukrainian banks to be exclusively used for the activity related to the PPP agreement. No party may claim money from such bank accounts other than through a dispute resolution procedure.
- *Waiver of sovereign immunity.* There also is a possibility to obtain a waiver of sovereign immunity by the state. According to the PPP Law, the state can waive its immunity in the PPP agreement upon

the request of a private partner. Such a waiver will apply to all court or international arbitration awards, injunctions, as well as the enforcement of the court and arbitration awards. Prior to the legislative amendments of 2019, the law expressly allowed waivers of sovereign immunity through Ukrainian Parliament and only if the Cabinet of Ministers was the party to the relevant PPP agreement.

- ***Substitution of the private partner.*** For the financier, the PPP Law gives the possibility of substitution of the private partner in cases where the private partner procures third-party financing of the project. The substitution may be effected: (i) upon the initiative of the public partner, in case of severe violations of the PPP agreement by the private partner; (ii) upon the initiative of the creditor, by way of enforcement of the pledge over the property rights under the PPP agreement pledged to secure the performance of the financing agreement, in case of severe violations of the financial obligations by the private partner under such financing agreement. In such a case, the grounds, procedure and terms of substitution have to be provided for in the direct contract between the public partner, private partner and the creditor, concluded within 180 business days after conclusion of the PPP agreement, unless the latter provides otherwise. If substitution takes place, the public partner or the creditor (or a person authorized by any of them) shall perform the obligations of the private partner under the PPP agreement until a new private partner is selected.
- ***Public procurements not applicable.*** The Ukrainian public procurement laws do not apply to relations arising from the selection of the private partner, the performance of the PPP agreement and the provision of the state support for the implementation of a PPP. Therefore, the public partner will not have to go through a public procurement tender procedure should the investment agreements imply procurement of services by relevant state companies from the private partner.
- ***Public property lease procedures not applicable.*** The Ukrainian laws on the lease of state-owned property (except for the lease of land) providing for a separate procedure for granting lease over such property do not apply to the PPP facilities during the term of the PPP agreement. Instead, the terms and conditions of the lease of such a property are to be provided for in the PPP agreement.

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**10** CURRENCY  
REGULATIONS



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### **10.1 General**

In February 2019, the new Law of Ukraine “On Currency and Currency Transactions” (the “Currency Law”) came into effect, marking the movement to a more liberal and less restrictive regulation of currency transactions, including cross-border payments, in Ukraine.

Unlike the previous currency control regime (that existed since 1993 and was built upon the principle that foreign currency transactions may only be carried out if and as expressly permitted by law or the regulator), the Currency Law sets forth the principle that any cross-border payment, foreign currency purchase or currency exchange transaction is permissible if not expressly prohibited or restricted in accordance with the Currency Law.

### **10.2 Status of the national currency**

The Ukrainian national currency is Hryvnia (UAH), introduced in September 1996. The Currency Law provides that UAH is the only lawful means of payment on the territory of Ukraine and UAH is acceptable without any limitations when settling obligations.

### **10.3 Payments within Ukraine**

Any payment within Ukraine must be made in UAH only, save for certain transactions permitted in a foreign currency. Such exceptions include, among others:

- provision of banking or other financial services by Ukrainian banks
- issuance, interest payment under, or repayment of, bonds or notes denominated in a foreign currency
- sale and purchase of government securities denominated in a foreign currency
- making foreign investments in Ukraine and repatriation of dividends and other investment profits

#### 10.4 Payments under contracts

Residents can make or receive payments to or from non-residents (under trade and capital transactions) either in UAH or in a foreign currency.

#### 10.5 Supervision of foreign currency transactions

In order to prevent the carrying out of any “doubtful” transaction that is not compliant with foreign exchange regulations, Ukrainian banks will monitor all transactions against certain risk “indicators” set out by the NBU.

Under the Currency Law, foreign currency transactions that do not exceed UAH 150,000<sup>1</sup> (or its equivalent in any other currency) will not be subject to such monitoring.

#### 10.6 Status of non-residents in Ukraine

Non-resident companies may open current accounts with Ukrainian banks for the purposes of making foreign investments in Ukraine or carrying out other business transactions with their Ukrainian counterparties.

The Currency Law guarantees that non-residents will enjoy the same rights in respect of foreign currency transactions as granted to Ukrainian residents.

#### 10.7 Currency control relaxations

To facilitate the free movement of capital and to improve the investment climate in Ukraine, the NBU cancelled more than 30 foreign exchange restrictions in 2019. The following are the most notable relaxations:

- cross-border loans are no longer subject to:
  - registration with the NBU
  - restrictions on early repayment
  - maximum interest rate cap
- Ukrainian businesses are no longer required to mandatorily convert into UAH their foreign currency proceeds received from abroad
- restrictions on the amount of dividend repatriation and repatriation of other investment proceeds (e.g., received from sale of corporate rights or securities) are abolished
- Ukrainian businesses and individuals are free to open and maintain bank accounts outside Ukraine without any restriction or limitation in respect of the amount or type of transactions

<sup>1</sup> Starting from 28 April 2020, the amount will be increased to UAH 400,000.

- individual NBU license requirements are abolished – instead, certain foreign currency transactions will be subject to a cumulative annual limit
- individual licensing regime and temporary suspension of cross-border trade are excluded from the list of available penalties that may be imposed on businesses
- foreign investors are permitted to invest in Ukraine in any second group foreign currency, such as Turkish lira or Russian rouble
- bank clients may purchase foreign currency:
  - on the same day when respective purchase request is submitted (without applying the T+1 rule)
  - using borrowed funds

### **10.8 Continuing foreign currency restrictions**

At the same time, the NBU continues to limit certain foreign currency transactions (cross-border payments in particular) aiming to stabilise the financial market in Ukraine. Such restrictions include, among others:

- 365-day maximum period for settlements under export or import contracts
- investments outside Ukraine or cross-border transfers from Ukraine to the same person's foreign bank account should not exceed the cumulative annual limit of:
  - EUR 2 million per year for Ukrainian businesses
  - EUR 100,000 per year for individuals
- no foreign currency purchases by businesses for amounts exceeding UAH 150,000<sup>2</sup> (or its equivalent in any other currency) if such purchases are not related to respective contract obligations
- no UAH-denominated loans from Ukrainian lenders to non-resident borrowers

These restrictions are expected to remain in effect until the situation in the financial market of Ukraine stabilises, thereby allowing the NBU to gradually remove such limitations.

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<sup>1</sup> Starting from 28 April 2020, the amount will be increased to UAH 400,000.

**Baker  
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**11**

**BANKING**



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### 11.1 Ukrainian banking sector

The Ukrainian banking sector has a two-tier structure consisting of the following:

- the National Bank of Ukraine (NBU)
- commercial banks of various types and forms of ownership

Ukrainian banks act in accordance with the following:

- the Constitution of Ukraine
- the Civil Code of Ukraine
- the Commercial Code of Ukraine
- the Law of Ukraine On the National Bank of Ukraine, dated 20 May 1999 ("**National Bank Law**")
- the Law of Ukraine On Banks and Banking Activity, dated 7 December 2000 ("**Banking Law**")
- the Law of Ukraine On Financial Services and State Regulation of the Financial Services Markets, dated 12 July 2001 (as long as non-banking financial services are concerned)
- the Ukrainian legislation on joint stock companies and other business entities, as well as the NBU regulations and their respective constituent documents

In 2015, the NBU, together with the Financial Services Commission and the National Securities and Stock Market Commission, adopted a comprehensive program of reforming the financial services markets by 2020, which includes significant reforms in the regulation of the Ukrainian banking sector.

## 11.2 Role of the National Bank of Ukraine and monetary policy

- The NBU was established in 1991 and is governed by the Constitution of Ukraine and the National Bank Law.
- It is the central bank of Ukraine, with the principal objective of ensuring the external and internal stability of the national currency.
- It possesses broad regulatory and supervisory functions in the banking sector, including the power to:
  - develop and conduct monetary policy
  - organize banking settlements and the foreign exchange system
  - ensure stability of the monetary, financial and banking systems of Ukraine
  - regulate and oversee the activity of payment systems
  - protect the interests of commercial bank depositors

The principal governing bodies of the NBU are:

- the council
- the board

The council:

- is the highest governing body of the NBU
- consists of nine members:
  - four members are appointed for a seven-year term by the parliament
  - another four members are appointed for a seven-year term by the president
- is charged with developing the principles of Ukraine's monetary policy pursuant to the recommendations of the board

The chairperson of the council is elected among the other members of the council for a three-year term.

The chairperson of the NBU:

- is nominated by the president and appointed by the parliament
- acts ex officio as the ninth member of the council during their term of office
- cannot be elected as the chairperson of the council.

The board:

- consists of the chairperson, and their deputies
- is responsible for:
  - implementing Ukraine's monetary and other policies in the banking sector
  - generally managing the activity of the NBU

The NBU, which is charged with implementing monetary policy, currently implements this policy through instruments such as:

- mandatory reserve requirements for banks
- interest rates
- refinancing of commercial banks
- deposit operations
- reverse repo operations

The main channel for the release of funds into circulation is the foreign currency market.

With signs of the economy beginning to stabilize after the financial crisis in 1998 and the ensuing economic instability in the region, the NBU reduced the discount rate from 45% at the beginning of 2000 to 12.5% by the end of 2001, and 7% in December 2002. Since then, the discount rate has been increased and decreased numerous times, with the latest reconsideration occurring on 13 December 2019, when the discount rate of the NBU was fixed at 13.5% per annum.

The NBU also used to determine interest rates for overnight unsecured loans and overnight loans secured by state securities separately and set separate interest rates for deposits from banks placed with the NBU for various terms. However, starting from 2007, the NBU first ceased to set interest rates for overnight loans secured by state securities. Then, starting from 12 June 2013, it further ceased to set interest rates for overnight unsecured loans. Instead, the NBU has started determining interest rates for depositary certificates. Now the NBU has yet again restarted setting interest rates for overnight loans secured with state securities.

The main goal of the NBU's monetary policy for the years 2016 to 2020, as declared by the NBU, is to achieve and maintain price stability in Ukraine. The main contribution for achieving stable economic growth would be the low stable growth of inflation, which will be shown by the consumer price index being within 5% per year. In order to achieve this goal, the NBU will take inflation targeting measures, which is considered as one of the most effective monetary regimes to provide low and stable inflation.

### **11.3 Commercial banks**

Current Ukrainian legislation distinguishes between:

- "universal" (general) commercial banks
- "specialized" commercial banks, including savings and asset management banks

The regulatory capital (i.e., the sum of principal (core) capital and additional capital) of the bank cannot be less than the minimum statutory capital requirement and the minimum regulatory capital requirements established by the NBU.

On 18 December 2014, new amendments to the Banking Regulation Instruction came into effect whereby the minimum regulatory capital of a bank that obtained a banking license after 11 July 2014 cannot be less than UAH 500 million.

The minimum regulatory capital of a bank that obtained a banking license before 11 July 2014 should be as follows:

- UAH 200 million — starting from 11 July 2017
- UAH 300 million — starting from 11 July 2020
- UAH 400 million — starting from 11 July 2022
- UAH 500 million — starting from 11 July 2024

On 29 April 2017, the Law of Ukraine “On Facilitation of Banks’ Reorganization and Capitalization Procedures” (“**Bank Reorganization and Capitalization Law**”) came into force. The Bank Reorganization and Capitalization Law will be effective until 1 August 2020 and provides diverse instruments to reorganize and/or capitalize the banks within simplified procedures. In addition, those banks that are not able to fulfil all regulatory requirements will be able to exit the banking market and continue its activity as a financial institution.

On 8 March 2015, the Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine Regarding Liability of Bankers”, dated 2 March 2015 (“**Liability Law**”) came into force.

The purpose of the Liability Law was:

- to strengthen the liability of bank-related persons (bankers), i.e., primarily bank managers and beneficial owners of the banks who make decisions that affect the financial positions of banks
- to improve banking supervision
- to protect the interests of depositors and creditors

The Liability Law requires an individual who owns a qualifying holding in a bank:

- to notify the NBU within one month upon entry into force of the Liability Law about such a holding
- to disclose to the NBU all related documents within three months of the Liability Law entering into force

Banks are also required to disclose to the NBU their updated ownership structures within two months of the Liability Law entering into force. On 21 May 2015, the NBU adopted the procedure for disclosing such structures.

In addition, banks will have to submit the following to the NBU:

- information regarding persons related to the banks
- reports on transactions with bankers
- a calculation of credit risk ratios for transactions with bankers

Additionally:

- The Liability Law expands the list of persons related to a bank and requires that an agreement with such persons must be entered into based on the current market conditions and indicates which transactions are to be regarded as incompatible with current market conditions.
- The Liability Law envisages that a person related to a bank, whose actions or omissions result in damage to a bank, will be liable for such actions or omissions with their property. If another such related person benefited directly or indirectly from the actions or omissions of a bank-related person, which caused damage to a bank, such persons are jointly and severally liable for the damage caused to the bank.

The Deposit Guarantee Fund is authorized to seek redress for such damage in court from such persons.

#### **11.4 Banks with foreign participation and branches of foreign banks**

A foreign bank may establish a presence in Ukraine through:

- a representative office (without the right to conduct banking business)
- a Ukrainian commercial subsidiary bank

Foreign participation in a Ukrainian commercial bank is not limited (albeit previously Ukrainian legislation established a threshold of 35% of the charter capital).

The prior permission of the NBU is required for the establishment of a commercial bank with foreign participation, or for the conversion of an existing commercial bank into a bank with foreign participation.

The permission of the NBU is required for a Ukrainian or foreign person to directly or indirectly own, hold, or control a certain percentage of shares in

a commercial bank's charter capital or voting rights in its governing body, namely:

- 10% or more
- 25% or more
- 50% or more
- 75% or more

Once a person reaches any of these thresholds, they must apply for new permission from the NBU.

In 2011, the three Ukrainian financial regulators<sup>1</sup> (the NBU, the NSEC and the FSMC) became endowed with new authority to supervise not only banks and non-banking financial institutions in Ukraine, but also their related parties and their ultimate beneficial owners (UBOs). The NBU, as the principal author of the foregoing amendments, publicly announced that these amendments were directed at ensuring financial stability and protection of the interests of banks' depositors and investors in financial institutions.

The financial regulators became vested with much wider powers to supervise the activities of banks and financial institutions, and to restrict transactions of banking and non-banking financial groups in certain cases.

Consolidated control over banking and non-banking financial groups implies, among other things, the following:

- From 19 December 2011, the NBU, the SSEC and the FSMC have the right to establish certain additional requirements, including restricting a banking or non-banking financial group or its participants from carrying out certain activities or transactions in Ukraine or in other countries if the relevant national regulator considers such activities or transactions to be too risky.
- The UBOs of a financial group must appoint an entity from among the group's participants to be responsible for the group's fulfilment of the requirements established on a consolidated basis, notifying the group's national regulator about the group's ownership structure or business activities, including any changes, and for the preparation of consolidated reporting information. This entity should be approved by the national regulator of the group (the NBU, the SSEC or the FSMC).

<sup>1</sup> The NBU, the National Securities and Stock Exchange Commission (NSEC), and the National Commission for Regulation of Financial Services Markets (FSMC; please see more details in Financial Services Section).

- No participant of a banking group may hold corporate rights/shares in one of the group's non-financial institutions consisting of more than 15% of the consolidated regulatory capital of the whole group, or in all such entities consisting of more than 60% of the consolidated regulatory capital of the group.
- Participants of a banking group may carry out transactions generating a credit risk (the list of such transactions is yet to be approved by the NBU) for their non-financial institutions in an amount not exceeding 20% of the consolidated charter capital of the whole group, or in an amount not exceeding 5% of the consolidated charter capital of a single entity of the group.
- Banks are prohibited from creating branches, representative offices or subsidiary banks in countries in which banking supervision and control does not comply with the Basic Principles of Effective Banking Supervision of the Basel Committee on Banking Supervision. If a Ukrainian commercial bank has an operating branch, representative office or subsidiary bank in such a country, it will be obliged to decrease participation in the capital of the subsidiary bank or to close such a branch, representative office or subsidiary bank.
- The NBU is authorized to force a banking group to change its ownership structure if it is unclear to the NBU, or if the NBU is unable to control the transactions of the group.

Additional sanctions may be imposed on a banking group, such as prohibiting a bank from carrying out transactions with its related entities as a breach of the banking legislation not only by the bank itself but also by any participant of the banking group.

In view of the foregoing legislative changes, any group of companies having in its composition two or more banks or non-banking financial institutions should determine whether its activity may be classified as principally banking or non-banking financial services and, therefore, whether the group should submit to banking and non-banking supervisory control by the relevant regulator. The ultimate responsibility for making such a decision now rests with the UBOs.

### **11.5 Types of banking activities**

A commercial bank carries out its banking activities pursuant to a banking license issued by the NBU.

A banking license permits a bank to:

- attract funds (deposits) from legal entities and individuals

- open, maintain, and carry out transactions with current accounts of clients and correspondent banks
- place attracted funds in its own name, on its own terms, and at its own risk

Only a duly licensed commercial bank may carry out all of the foregoing except for certain banking operations that may be carried out by the Central Securities Depository based on the license of the NBU.

A duly licensed commercial bank may also render financial services to its clients (save for other commercial banks), including through its commercial agents based on agency agreements. The list of such services is set out by the NBU.

In addition, a duly licensed commercial bank may also carry out the following additional activities:

- the issuance of its own securities
- the provision of safekeeping services (but not including the custody of securities)
- the rendering of consulting and information services related to banking and other financial services
- investments
- the organization of monetary lotteries
- the transportation of currency valuables and cash collection

A duly licensed commercial bank may also perform foreign currency operations based on its banking license issued by the NBU.

### **11.6 Loan provisioning**

Banks must meet mandatory provisioning requirements to cover net loan risks.

In order to build up appropriate provisioning, banks must evaluate risks relating to the relevant borrowers.

Some loan products, such as funds transferred to the NBU (e.g., under direct repo transactions), do not require any provisions.

Ukrainian legislation sets forth separate provisioning requirements for loans extended to legal entities, banks, budget institutions as well as for consumer loans.

Loan provisioning requirements are determined by banks based on the formulae set out in the applicable NBU regulation. The respective formulae take into account the degree of the credit risk of any particular borrower, which is also determined in accordance with a formula applicable to a particular type of borrower.

### **11.7 Competition**

As of 1 October 2019, commercial banks have been performing banking transactions under the licenses granted by the NBU. As of the same date, the total net assets of all commercial banks in Ukraine amounted to UAH 1374.00 billion (approximately USD 56.78 billion/EUR 52.14 billion). As of 1 November 2019, their credit portfolio (including interbank loans) amounted to UAH 1.14 trillion (approximately USD 45.93 billion/EUR 41.19 billion).

According to the NBU, during the ten months ending on 31 October 2019, the statutory capital of Ukrainian banks performing banking operations increased by 1%, amounting to UAH 470.387 billion (approximately USD 18.95 billion/EUR 16.99 billion), as on 1 November 2019, compared to a 6% decrease in statutory capital during the previous 12 months in 2018.

During the 12 months in 2018, the total assets of Ukrainian banks performing banking operations increased by 3.8% compared to a 5.9% increase in the total assets during the 12 months in 2017. During the ten months ending on 31 October 2019, the total liabilities of Ukrainian banks performing banking operations increased by 0.3% compared to an increase of 2.7 % in 2018.

The regulatory capital of Ukrainian banks increased by approximately 5.6% during the nine months ending on 30 September 2019, amounting to UAH 143.9 billion (approximately USD 5.95 billion/EUR 5.46 billion).

In 2017, commercial banks operating in Ukraine were divided by the NBU into three groups depending on their asset size or shareholders. Specifically, as of 1 November 2019:

- Five banks with state participation in which the State directly or indirectly holds more than 75% of the banks' share capital.
- There are 20 banks belonging to foreign banking groups in which the majority stakes are held by foreign banks or foreign financial and banking groups.
- There are 50 private banks in which ultimate qualifying shareholders are one or several private investors that directly or indirectly hold at least 50% of the bank's share capital.

As of 1 November 2019, three of the largest banks in Ukraine, namely, PrivatBank, the Ukrainian Export-Import Bank (*Ukreximbank*) and the State Savings Bank of Ukraine (*Oschadsbank*), were state-owned and collectively have approximately 53.6% of total assets of the Ukrainian banking sector.

As of 1 November 2019, 36 banks in Ukraine had some foreign capital, 24 of which were foreign owned.

### **11.8 Consumer protection**

Back in 2007, the NBU adopted regulations on mandatory disclosure to individual customers of the essential information relating to consumer loans by Ukrainian commercial banks.

According to the applicable legislation, all banks are required to disclose the effective rate of interest under loans granted to individual consumers in the text of the loan agreement.

Furthermore, consumers are required to provide the banks with the written confirmation stating that they have received all the information from the bank relating to the terms and conditions of the loan and, specifically, the costs of the loan to the consumer.

Banks are allowed to apply either fixed or floating interest rates in relation to a loan agreement.

Fixed interest should remain unchanged during the life of the loan and banks are not allowed to change it unilaterally. If the agreement contains a clause saying it can be changed unilaterally, then this clause is regarded as void *ab initio*.

Banks are prohibited from issuing consumer loans denominated in foreign currency.

In June 2017, the Law of Ukraine "On Consumer Crediting" became effective, introducing the new legal framework for extending consumer loans to individuals. The new law is aimed at individuals' protection and addresses all issues previously used to distort the terms and conditions of consumer crediting.

### **11.9 Regulatory requirements to acquisition of substantial shareholding in Ukrainian banks**

The NBU regulations in place require shareholders of Ukrainian banks who intend to increase directly/indirectly their shareholding (i.e., over

10, 25, 50 or 75%) and/or potential shareholders who intend to acquire substantial shareholding (i.e., 10, 25, 50 or 75%) in Ukrainian banks to receive a prior approval from the NBU. If an owner of a substantial interest in a bank intends to decrease their interest in the bank below any of the set thresholds (i.e., 10, 25, 50 or 75%), this shareholder must inform the NBU within five days of making such a decision.

The applicable regulations provide comprehensive lists of documents to be submitted to the NBU for the above purposes and set forth requirements for the business reputation and financial status of bank shareholders. The applicable regulations also fix indicators for the absence of an impeccable business reputation and adequate financial status of shareholders (for example, the shareholders'/controllers' losses for the last reporting period (year) or the absence of business reputation issues for senior managers of direct or indirect shareholders or ultimate beneficial owners if individuals) that might affect the NBU's approval.

The NBU is permanently working on updates and amendments to the current procedure of obtaining the NBU approval for the acquisition of substantial interest in Ukrainian banks to make it more transparent and clear for potential shareholders and to make it as informative as possible for the NBU as a regulator.

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**12**

**FINANCIAL SERVICES**



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### 12.1 Ukrainian financial services sector

The Ukrainian financial (non-banking/non-securities) services sector is a significant part of the services sector in Ukraine.

Financial institutions act in accordance with:

- the Constitution of Ukraine
- the Civil Code of Ukraine
- the Commercial Code of Ukraine
- the Law of Ukraine On Financial Services and the State Regulation of the Financial Services Markets ("**Financial Services Law**") dated 12 July 2001
- Ukrainian legislation on joint stock companies and other business entities
- Regulations of the National Commission Carrying out State Regulation of the Financial Services Markets ("**Financial Services Commission**")

In addition, the regulations of the National Bank of Ukraine (NBU) and the National Securities and Stock Market Commission ("**Securities Commission**") may apply starting from 1 July 2020. Please refer to paragraphs 12.2 and 12.3 below concerning the reform of the financial services sector for more details.

### 12.2 Reform of financial services sector regulation

The Ukrainian financial services sector is undergoing a major reform. On 16 October 2019, the president of Ukraine signed Law of Ukraine No. 79-IX ("**Split Law**"), which contemplates a substantial reallocation of the regulatory powers on the financial services markets, i.e., (i) it provides for the liquidation of the Financial Services Commission and (ii) it reallocates its functions to the NBU and the Securities Commission.

The Split Law came into effect on 19 October 2019. The rest of the law will become fully effective on 1 July 2020. Additionally, on 16 January 2020, the NBU, the Securities Commission, the Financial Services Commission, the Deposit Guarantee Fund and the Ministry of Finance of Ukraine approved the Strategy of Ukrainian Financial Sector Development until 2025, which provides for alignment of financial services market regulation with the EU requirements and other internationally recognized principles applicable to financial services markets regulation.

Based on the foregoing and except as otherwise explicitly stated below, the following overview is made based on the laws that will come into full effect on 1 July 2020.

### 12.3 Role of the regulators

Before the adoption of the Split Law, the Financial Services Commission was the specialized state agency responsible for the regulation and control of (non-banking/non-securities) financial institutions in Ukraine.

As a result of the Split Law, the NBU will become responsible for:

- insurance companies
- leasing and financial companies
- credit unions
- pawnshops
- credit bureaus

Likewise, the Securities Commission will begin overseeing:

- non-state pension funds
- construction financing funds

Similar to the Financial Services Commission, the NBU and the Securities Commission will be authorized to:

- register financial institutions
- issue licenses to financial companies
- adopt regulations
- hold on-site inspections and remote documentary examinations of financial institutions
- set out mandatory capital adequacy and liquidity ratios
- impose administrative sanctions
- bring an action in a civil or a commercial court regarding regulatory breaches
- issue a mandatory warning to a financial institution or a self-regulated organization on rectifying breaches of applicable law
- initiate criminal or anti-trust proceedings

## 12.4 Financial institutions

Pursuant to the applicable Ukrainian legislation, **financial services are provided exclusively by financial institutions** (except in certain instances explicitly provided by law).

Any services are considered to be financial when they are rendered:

- for the benefit of a third party (regardless of whether the costs are borne by a service provider or allocated to a client)
- to obtain income or to preserve the value of financial assets

The Financial Services Law defines a “financial institution” as a legal entity that:

- provides one or several financial services and other services associated with the provision of financial services
- is included in the relevant register pursuant to the procedure prescribed by law

Pursuant to the Financial Services Law, the following entities are considered to be financial institutions:

- banks
- mutual funds
- pawn brokers
- leasing companies
- insurance companies
- trusts
- pension
- investment funds that exclusively pursue financial service activity

A legal entity that intends to provide financial services must:

- comply with the relevant legislative requirements and regulations
- apply to the Financial Services Commission (or, if after 1 July 2020, the NBU or the Securities Commission) for entry into the relevant registers
- in the case of an entity aiming to render banking services, apply to the NBU to be included in the register of Ukrainian banks
- in the case of an entity aiming to render securities services, apply to the Securities Commission to be included in the State Register of Financial Institutions rendering Financial Services on the Stock Market

A financial institution may be established in any organizational and legal form, unless otherwise provided in laws governing certain financial services. Depending on the type of financial institution, the requirements for the minimal charter capital will vary.

## 12.5 Types of financial services

On 10 October 2013, the Ukrainian parliament adopted amendments to the Financial Services Law, which became effective on 9 February 2014. The amendments aim to limit the number of financial services that may be rendered in Ukraine.

Prior to the adoption of the above amendments, any service that satisfied the core characteristics of a “financial service” could be regarded as such. As a result, theoretically, an entity could render such service, provided that it has registered as a financial institution and obtained a license from the Financial Services Commission (if applicable).

According to the amendments, a market participant is permitted to render only those financial services that are expressly listed in the Financial Services Law. The responsible regulator may also treat an unlisted service as falling within the scope of one of the listed services. However, in the absence of such treatment, a market participant will only be permitted to legitimately render the relevant service if it is added to the relevant list in the Financial Services Law. The Split Law introduced changes to the list, i.e., some of the services will no longer be regarded as financial.

## 12.6 Licensing

Generally, subject to certain exceptions, financial services may only be rendered by a financial institution that has obtained the relevant license from, as applicable:

- the Financial Services Commission
- the NBU
- the Securities Commission

All the licenses issued by the Financial Services Commission prior to 1 July 2020 will be deemed effective. If a company files for a license prior to 1 July 2020 and the Financial Services Commission fails to assess the application prior to 1 July 2020, the respective filing will be further reviewed by either the NBU or the Securities Commission. That said, the NBU and the Securities Commission will conduct their review on the basis of the currently applicable regulations of the Financial Services Commission until they adopt their own regulations.

## 12.7 Financial institutions with foreign participation

Foreign persons are generally permitted to be participants in Ukrainian financial institutions, for which purpose a foreign person may:

- set up a new financial institution and obtain an appropriate license for it (if necessary)
- buy an existing financial institution

In both cases, it would need to comply with:

- the legislation applicable to foreign investments
- the applicable competition legislation

The prior written approval of the Financial Services Commission is required for a Ukrainian or foreign person to directly or indirectly own, hold or control:

- 10% or more
- 25% or more
- 50% or more
- 75% or more

of shares/participatory interest in the charter capital of a financial institution or voting rights in its governing body.

A new approval from the Financial Services Commission is required once any of the above thresholds is reached, regardless of whether the applicant has obtained the approval for the respective prior threshold.

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**13** FINANCIAL  
TECHNOLOGY AND DIGITAL  
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### **13.1 Ukrainian financial technology services sector**

Fintech is an umbrella term used to refer to technology in the financial services sector.

Although various type of sophisticated technologies are used for a long time within the financial services industry, fintech as a term has only been coined recently to cover all of the developments within this space. There is no exhaustive list, but broadly speaking one could include the following types of activities within its scope: companies using technology to run traditional financial services, including money remittance and consumer lending companies. It also includes insurance technology (insurtech) and regulatory technology (regtech). In recent years the industry has seen an increase of companies using financial data and application programming interfaces (APIs) to offer finance and account management and payments services competing with incumbent financial institutions as well as companies dealing with new digital assets, including cryptocurrencies.

The digital age is pushing banks into a marketplace of interconnected digital services, making the customer central to their offering. Although banks have the customers, licenses and capital, fintech companies often have a disruptive technology, which enables them to offer innovative services in the online space. The Ukrainian fintech sector is an emerging industry with more than 100 market players. Most fintechs in Ukraine provide payments/ money transfer and technology/infrastructure services.<sup>1</sup>

Regulators in certain jurisdictions intervene to support new players. For instance, in the EU the recent example is the revised Second Payment Services Directive (EU) 2015/2366, dated 25 November 2015. This paved

<sup>1</sup> UA FINTECH Catalogue 2019

the way for new players and imposed an obligation on the existing financial institutions to give free access to some of their client data to the new players without any contract. The Ukrainian fintech industry is similarly promoted by the NBU and the NBU is now working on the draft payment services law, which is expected to contain similar "open banking" obligations. In addition, the NBU launched an innovation facilitator: an expert council that can consider applications from both local and foreign companies and seeks to offer an innovative solution at the Ukrainian market. The NBU has recently announced that it is considering converting this into a fully fledged "sandbox" testing environment.

### **13.2 Payments and money transfer**

Ukrainian law does not provide for separate fintech regulations. As such, to the extent a company does not render any financial service (please refer to para. 12.4 of this guide), it would not need to obtain financial services regulatory clearance to render its services. However, in practice, such companies often partner with Ukrainian financial institutions to render various technical services related to payments and money remittance services. If such engagement would contemplate: (i) carrying out certain informational and technical functions with payment cards; and/or (ii) acting as a broader technical intermediary within a payment system, such a service provider may need to apply for registration with the NBU. At the same time, if the respective company's service involves the protection of information (e.g., if it may act as an agent of a financial institution responsible for the handling of its clients personal data online), it may need to obtain regulatory clearance from the designated authority established under the auspice of the States Security Service of Ukraine to operate a so called "complex system of data protection."

If a company is engaged in one of the financial services (e.g., transfer of funds), it must register as a financial institution (please refer to para. 12.4 of this guide) and obtain an appropriate license (please refer to para. 12.6 of this guide).

As indicated in paragraph (i) above, the NBU is now working on the draft law, which is expected to provide a regulatory regime for new types of fintech players. If this draft law is adopted, such players may need to become registered with the NBU prior to commencing their activity.

### **13.3 Lending**

Consumer lending is another segment of the market where fintech players increasingly compete with the incumbent financial institutions. For instance,

online consumer lending is a fast developing service line available to consumers in Ukraine. Companies that offer this service would also need to register as a financial institution (please refer to para. 12.4 of this guide) and obtain the appropriate license (please refer to para. 12.6 of this guide). If the draft law is adopted, these market players can benefit from the new regulatory regime (e.g., regime of “account information service provider”), which could permit them to render their services more efficiently (e.g., they could improve their risk management and pricing practices by obtaining access to information about their potential clients held by incumbent financial institutions).

### **13.4 Cryptocurrencies**

On 30 November 2017, three core Ukrainian financial services regulators (the NBU, Financial Services Commission and Securities Commission) acknowledged in a public joint statement that in their view “cryptocurrency” should not be regarded as cash nor as a hard currency or payment instrument of another country or electronic money or securities or some form of money surrogate. This statement indicates that regulators continue their analysis of the legal nature of this phenomenon and that any transactions with such “assets” should be done with the greatest level of caution, because Ukrainian law would not provide any protection in case of loss.

In view of the above, the regulatory regime in Ukraine for the companies dealing with cryptocurrencies, such as crypto exchanges and crypto shops, was unclear. In practice, some of the market participants render relevant services to Ukrainian consumers on a cross-border basis from outside of Ukraine.

On 6 December 2019, the Ukrainian Parliament adopted a new version of the AML law (which is expected to come into effect soon), which now recognizes the “virtual asset.” This is defined as the digital expression of value that can be traded, transferred or used for payment or investment purposes. It also defines a service provider concerned with the circulation of such assets. In particular, the law recognizes a few business models: exchange of virtual assets, their transfer, custody and administration or instruments, which enables their control, and finally, the provision of financial services based on the issuer’s offer or sale of virtual assets. These providers are recognized as a new type of an obliged entity. The Ministry of Digital Transformation (MDT) has been appointed as the regulator for these entities. Reportedly, MDT together with the team of experts will now work to develop the new terms for the virtual assets industry based on the above AML law.

In addition, a recently registered draft law 2461 seeks to introduce a separate taxation regime for transactions involving crypto assets, which are regarded as a type of virtual asset. Thus, if a transaction involves a conversion (sale) of a crypto asset into fiat currency, income generated from such a conversion may be subject to tax. Income is defined as a positive margin between the revenue received from the sale of the asset and its value (that is, the confirmed expense to purchase or mine such an asset). Conversion of one virtual asset into another virtual asset is not subject to tax. Moreover, the draft law introduces a favorable tax regime for individuals dealing with virtual assets, whereby an individual income tax of 5% would apply to income generated by an individual for five years from the adoption of this law. It also explicitly exempts the sale of crypto assets from VAT.

### **13.5 Digital transformation**

On 17 January 2018, the Ukrainian Government adopted a so-called “digital agenda” for 2018-2020, which defined the concept of digitization as the population of the physical world with electronic and digital devices and systems and the facilitation of electronic exchange between the same. This enables the integral cooperation of virtual and physical worlds, leading to the creation of a cyber-physical space. The main goal of digitization was defined as the digital transformation of existing sectors of the economy and the creation of new sectors.

On 5 July 2018, a Coordination Council was set up to manage the implementation of this agenda. As such, in November 2018 it produced a first draft of the Law of Ukraine “On Digital Economy of Ukraine” for public consultation. In particular, it set out the digital transformation as a key strategic goal of the Ukrainian digital economy.

Ukrainian financial institutions also consider the “digital transformation” as an important driver for the further development of their businesses. However, most of them realize that it may come at a cost, taking into account the silos of the legacy IT systems in place. In addition, such transformational projects may be challenging from the Ukrainian regulatory perspective, because the current regulatory model is often based on the assumption that a business process involves a human being. Furthermore, the transformation of the business often involves various forms of cooperation with technology companies providing the financial institutions with outsourcing, cloud, AI and other complex solutions. All of these raise a number of new challenges and risks.

In order to address some of the potential risks, the NBU has recently adopted a new regulation on the protection of information in the banking system, whereby a bank must set up a risk-oriented data security and cyber protection system. In particular, it requires:

- The implementation of a so-called “information security management system” based on the applicable standards, which should be managed by a separate designated unit.
- The appointment of a chief information security officer and the establishment of an information security unit.

Moreover, another NBU regulation introduced data residency requirements whereby a bank may not be able to store certain types of data on the servers located outside of Ukraine, which may limit cooperation with cloud service providers whose cloud computing resources are located purely outside of Ukraine.

Fintech and digital transformation areas present numerous opportunities for investors, technology companies and incumbent financial institutions, in both Ukraine and internationally. Ukraine’s regulators have the unique advantage of reacting quickly and efficiently with a “light-touch” regulation of these new areas, or just permitting the new players to operate without any regulation, often by virtue of expanding the concepts for existing regulated players and their partners or agents. Ukraine boast numerous high quality IT specialists and experts with younger generations open to new fintech ideas and culture. In particular, Ukraine has a fast growing IT industry, which is eager to support these efforts. As such, the International Association of Outsourcing Professionals included a number of Ukrainian companies, or companies that have Ukrainian origin, into TOP 100 of outsourcing service providers. These regulatory and business advantages make Ukraine an enviable testing site for novel ideas in fintech and digital transformation, which can normally be implemented much faster than in other jurisdictions.

**Baker  
McKenzie.**



**14**

**CAPITAL MARKETS**



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### 14.1 General overview of legislative framework

The debt and equity securities markets in Ukraine are regulated primarily by the Law of Ukraine “On Securities and the Stock Market” (dated 23 February 2006), the Law of Ukraine “On the State Regulation of the Securities Market in Ukraine” (dated 30 October 1996) and the Law of Ukraine “On the Depository System of Ukraine” (dated 6 July 2012). The peculiarities of particular types of securities are addressed in the Law of Ukraine “On Joint Stock Companies” (dated 17 September 2008), the Law of Ukraine “On the Circulation of Promissory Notes in Ukraine” (dated 5 April 2001), the Law of Ukraine “On Mortgage-Backed Bonds” (dated 22 December 2005) and others.

### 14.2 Types and forms of securities

Ukrainian legislation recognizes the following types of securities:

<b>Equity securities</b>	<ul style="list-style-type: none"> <li>■ shares of capital stock</li> <li>■ investment certificates</li> <li>■ certificates of funds for operations with real estate (<i>certyfykaty fondiv operatsiy z neruhomistyu</i>)</li> <li>■ corporate investment fund shares</li> </ul>
<b>Debt securities</b>	<ul style="list-style-type: none"> <li>■ state bonds of Ukraine</li> <li>■ municipal bonds</li> <li>■ corporate bonds</li> <li>■ bonds of international financial institutions</li> <li>■ Deposit Guarantee Fund bonds</li> <li>■ treasury bills</li> <li>■ deposit certificates</li> <li>■ promissory notes and bills of exchange</li> </ul>

**Other types of securities**

- mortgage-backed securities (mortgage-backed bonds, certificates and receipts)
- privatization securities
- derivative securities
- commodity-related securities (documents acknowledging receipt of goods for shipment, such as bills of lading)

Ukrainian issuers may issue securities in:

- registered (nominative) form
- bearer form
- order form

Ukrainian securities may exist in:

- documentary (certificated) form (this form may be represented by either paper or electronic documents)
- non-documentary (book-entry in the securities account within the depository system) form (the majority of securities exist in this form, including shares and bonds)

Non-emission securities (including commodity related securities and promissory notes) may exist as bearer or order securities and in documentary form (as paper or electronic documents) only. The majority of non-emission securities are issued in paper form as currently only financial bank and financial treasury promissory notes are allowed to exist as electronic documents.

Nominal emission securities (e.g., shares and bonds) may be issued in non-documentary form exclusively.

### **14.3 Transfer of ownership rights to securities**

The transfer of a title to order securities (which exist in non-documentary paper form only) is performed by way of endorsement.

Ownership rights to bearer securities issued in documentary paper form are transferred as of the moment of the physical transfer (delivery) of the securities to the new owner. Electronic bearer documents (financial bank and financial treasury promissory notes) are transferred in the order that may be adopted by the National Bank of Ukraine (NBU) or the Cabinet of Ministers of Ukraine (respectively).

The transfer of ownership rights to both bearer and "registered" securities issued in non-documentary form is effected from the moment

of the crediting of such securities to the new owner's securities account maintained with a depository institution.

While ownership rights to documentary form securities are evidenced by certificates of such securities, a title to non-documentary securities is confirmed by an extract from the securities account issued by the depository institution.

#### **14.4 Securities Commission**

The National Securities and Stock Market Commission of Ukraine ("**Securities Commission**") is the principal regulatory authority in the securities market in Ukraine.

The Securities Commission:

- is a state collegiate body authorized to:
  - determine and implement a uniform state policy in the area of the development and operation of the securities and derivative market in Ukraine
  - carry out state regulation and monitoring of the issuance and circulation of securities and derivatives in the territory of Ukraine
  
- has broad powers with respect to:
  - the formation of the overall legislative framework for the operation and development of Ukraine's securities market
  - registration, licensing, compliance monitoring and enforcement in the stock market

#### **14.5 Depository system**

The Law of Ukraine "On the Depository System of Ukraine" (dated 6 July 2012) provides for the formation of the depository system in Ukraine, which consists of the following participants:

- Central Depository (the National Depository of Ukraine), which is a public joint stock company, with the state of Ukraine together with the NBU as its majority shareholders, which is authorized to:
  - maintain accounts in securities of issuers, the NBU, Ukrainian depository institutions (the institutions carrying out the depository activities), correspondent depository institutions, clearing institutions and the Settlements Center
  - implement international standards with respect to the carrying out of depository activity
  - establish correspondent relations with foreign depositories

- the NBU, which exercises depository functions in respect of state and municipal securities
- depository institutions — legal entities holding a Securities Commission license to carry out the depository activities, which includes holding records of rights to securities in non-documentary form
- the Settlement Center — a licensed Ukrainian bank that ensures monetary settlements for the stock market and over-the-counter securities transactions that are settled on a delivery-versus-payment basis

#### **14.6 Securities sub-custody**

By virtue of amendments to the securities depository legislation (effective in November 2018), Ukrainian depository institutions are now allowed to open so-called sub-custody accounts for a nominal securities holder.

To be eligible for opening a securities account as a nominal securities holder, an entity must:

- be a financial institution
- be registered in a EU Member State and/or Member State of FATF
- comply with requirements of the Securities Commission
- possess the right to render to its clients the services of accounting of securities and registration of transfers of rights to securities

The agreement on the opening of securities account between a nominal holder and a Ukrainian depository institution must include several mandatory provisions, including the obligations of the nominal holder to: (i) disclose certain information (including information on the ultimate owners of securities) when required by law; and (ii) comply with Ukrainian sanctions legislation.

#### **14.7 Securities traders**

A license for acting as a securities trader may be granted by the Securities Commission to a bank or a company that is engaged exclusively in trading in securities and other financial instruments.

A securities trader may be licensed by the Securities Commission to perform any or all of the following activities with securities:

#### **brokerage activities**

transacting with securities and other financial instruments in its own name, or in the name of the client, and at the expense of the client

#### **dealership activities**

transacting with securities and other financial instruments in its own name and at its own expense for the purpose of subsequent resale

#### **underwriting**

placement (subscription or sale) of securities at the instruction, in the name and at the expense of a client-issuer

#### **securities management activities**

transacting with securities and other financial instruments for a fee in its own name but for the benefit and in the interests of a client or its nominee

A securities trader can carry out the relevant activities in the stock market if its charter capital (paid in monetary funds) is no less than:

- in case of dealer activities, UAH 500,000
- in case of brokerage activities, UAH 1 million
- in case of underwriting or securities management activities, UAH 7 million

A securities trader is not permitted to hold a share in another securities trader that exceeds 10%.

### **14.8 Stock exchanges**

Securities are traded in Ukraine on several stock exchanges and on an over-the-counter basis.

At present, most of the securities trading activity takes place on:

- the Stock Exchange "Perspektiva"
- the PFTS Stock Exchange
- the Ukrainian Exchange

The trading activity is limited to trading in domestic state bonds. There is also a small fraction of trading in corporate bonds, shares (including shared of foreign issuers), investment certificates, derivatives and foreign treasury bonds.

### **14.9 Admission of securities of foreign issuers to circulation in Ukraine**

Securities issued by a foreign issuer may be admitted to circulation in Ukraine subject to the following conditions:

- The issuer is registered in a foreign state in compliance with its laws.
- Issue and/or prospectus regarding the securities was/were duly registered in the country of the issuer's residence or the country of securities placement, and the corresponding securities were already placed outside Ukraine.
- ISIN/CFI were assigned to the securities.
- The Central Depository provided its confirmation that the securities may be accounted in its correspondent account opened with the foreign depository or international depository and clearing institution.
- The securities are admitted for circulation on at least one of the following exchanges abroad: (1) stock exchange included into Nasdaq, Inc network; (2) New York Stock exchange; (3) Stock exchanges registered in EU countries; or (4) Hong Kong Exchanges and Clearing.

The decision on the admission of the securities is adopted by the Securities Commission under the application of either the foreign issuer or the Central Depository. The securities admitted to circulation by the Securities Commission may be traded in Ukraine on a stock exchange or over-the-counter, starting from the business day following the publication of the corresponding decision of the Securities Commission on its website.

The securities of foreign issuers are accounted in the correspondent securities account of the Central Depository opened with a foreign depository or international depository and clearing institution.

#### **14.10 State securities**

The Ministry of Finance of Ukraine, acting upon the authorization of the Cabinet of Ministers of Ukraine, may issue bonds and derivatives to finance domestic or external state debt.

State bonds:

- are issued in a non-documentary form and are evidenced by book entries at the NBU
- have either registered (nominal) or bearer form
- can be denominated and offered for sale in the Ukrainian currency or in a foreign currency

Foreign entities and individuals are permitted to invest in domestic state bonds through depository institutions that are clients of the NBU as the depository of state securities. In 2019, the trade in domestic state

securities was bolstered, particularly by linking the Ukrainian market to the Clearstream system and, as a result, expediting access of foreign investors to Ukrainian hryvnia denominated state bonds.

In addition to state bonds, Ukraine may issue so-called “state derivatives”. The state derivatives (often referred to as GDP-linked warrants) are securities that evidence Ukraine’s obligations to make payment to a holder of such securities in case Ukrainian GDP reaches certain thresholds. Such securities may only be placed and traded on international securities markets.

Since 2000, Ukraine has carried out a significant number of issuances of state bonds (known as Eurobonds, denominated in euro and US dollars) in the international capital markets. Most of Ukraine’s debt was subject to massive restructuring, agreed to in 2015. The latest sovereign bonds issuance of Ukraine following the restructuring took place in June 2019. The issues of GDP-linked warrants occurred in 2015-2016 as part of the abovementioned restructuring of Ukraine’s sovereign debt.

#### **14.11 Capital markets and organized trade market reform**

On 19 December 2019, Verkhovna Rada passed in the first reading the draft law of Ukraine “On Amending Certain Legislative Acts of Ukraine Regarding Facilitation of Investments Attraction and Introduction of New Financial Law” (“**Capital Markets Draft Law**”). The Capital Markets Draft Law is aimed at amending Ukrainian laws governing the securities market in order to bring the regulation of organized markets in line with the EU legislation.

Among the major changes provided for by the Capital Markets Draft Law are the following:

- The improvement of financial infrastructure (the introduction of the institutes of regulated market operator and trade repository and the improvement of regulation on central counterparty agent).
- The implementation of MTF and OTF market models (in addition to regulated market) and the division of markets into four categories including stock, money, commodity and derivative markets.
- The improvement of the regulation on financial intermediaries (including transformation of securities trader into investment firm as per EU legislation).
- The introduction of new financial instruments (in particular domestic green bonds, option certificates and loan participation notes) and the improvement of the regulation for the circulation of existing instruments (including corporate obligations).

- The establishment of legislative framework for derivative contracts trade.
- The introduction of rules for final settlement and liquidation netting under transactions with financial instruments.
- The improvement of licensing and monitoring requirements for trading venues (including the introduction of licensing requirements for commodity exchanges).

It is expected that the Capital Markets Draft Law will be approved in 2020.



**Baker  
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**15** **DISPUTE  
RESOLUTION**



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## 15.1 Introduction

A foreign or Ukrainian legal entity or individual entrepreneur may apply to an appropriate Ukrainian court, or to an appropriate arbitration tribunal or institution within or outside Ukraine, for the resolution of disputes.

On 15 December 2017, judicial reform was implemented in Ukraine, through which the judicial system was reorganized and new procedural legislation was introduced.

In Ukraine, the courts of general jurisdiction are organized according to the principles of territoriality and specialization, and include local courts, appellate courts and the Supreme Court consisting of specialized cassation courts, as shown in Diagram 1 in Section 11.2.

Local courts consist of common courts and specialized courts (i.e., commercial and administrative courts). Local common courts consider civil and criminal cases, cases on administrative violations and, in certain situations, administrative cases as well. Local commercial courts exercise jurisdiction over disputes arising out of commercial relations (commercial cases), while local administrative courts administer justice in disputes connected with legal relations in the area of state and municipal governance (administrative cases), except for those assigned to the jurisdiction of local common courts, as mentioned above.

The appellate instance courts are composed of the appellate courts of general jurisdiction (with competence over civil cases, criminal cases and cases on administrative violations), appellate commercial courts and appellate administrative courts.

Cassation supervision is carried out by the relevant cassation specialized court in the structure of the Supreme Court.

The Supreme Court consists of five chambers: the Cassation Civil Court, the Cassation Criminal Court (both acting as the cassation instance court for cases resolved by the local and the appellate common courts), the

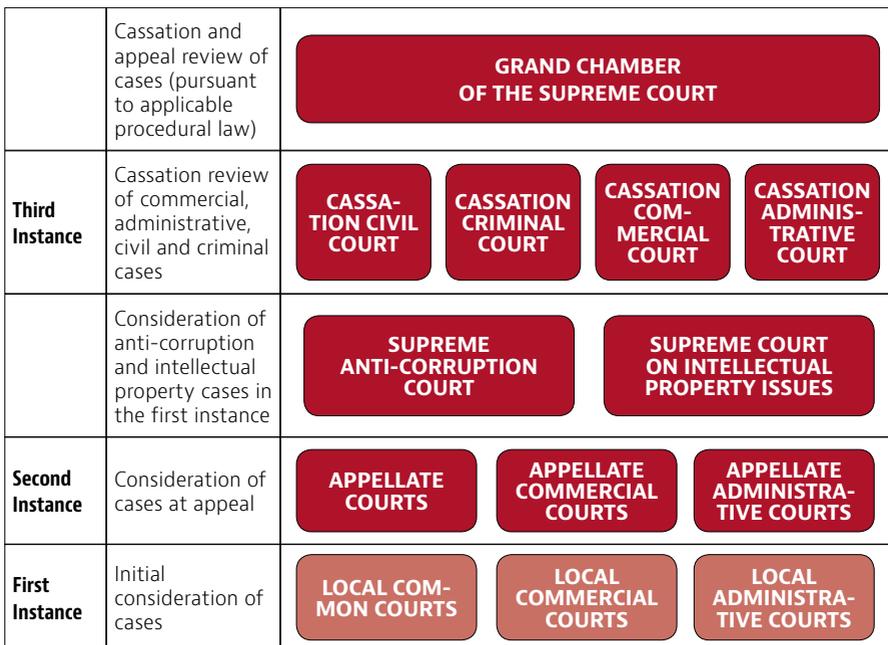
Cassation Commercial Court (acting as the cassation instance court for cases resolved by the local and the appellate commercial courts), the Cassation Administrative Court (acting as the cassation instance court for cases resolved by the local and the appellate administrative courts) and the Grand Chamber of the Supreme Court (responsible for the uniform application of legislation by the cassation courts and acting as the appellate instance court in cases considered by the Supreme Court).

Each cassation court consists of separate chambers specializing in particular categories of cases. In particular, the Cassation Commercial Court includes separate chambers for resolving corporate disputes, bankruptcy cases, disputes concerning the protection of intellectual property rights and antimonopoly disputes.

In 2019, the Supreme Anti-Corruption Court was launched. It acts as a first instance and the appellate court in criminal cases related to corruption crimes.

In addition, there will be one more new court — the Supreme Court on Intellectual Property Issues. It will act as the first instance and appellate court in resolving cases of intellectual property rights. This court is not operating yet.

**Diagram 1: The Ukrainian court system**



Since Ukraine is a civil law country, the exercise of judicial power is based on the application of statutes. However, the Ukrainian courts, when resolving cases, must refer to and consider decisions from the Supreme Court regarding the application of the relevant provisions of Ukrainian law applicable to the disputed relations of the parties. At the same time, the Ukrainian courts should take into consideration judgments of the European Court of Human Rights, which are a source of law in Ukraine.

## **15.2 Commercial litigation in Ukraine**

For the resolution of business-related disputes, a foreign or Ukrainian legal entity or individual entrepreneur may apply to an appropriate Ukrainian court or to an appropriate arbitration tribunal or institution within or outside Ukraine. A legal entity's/individual's right to apply to a Ukrainian court may not be waived by contract, not even by an arbitration agreement between the parties. If an arbitration agreement exists between the parties, the party objecting to the review of the dispute by a Ukrainian court must raise such objection in the relevant court proceedings before making its first submission on the merits of the dispute; otherwise, the court will accept jurisdiction and will proceed to review the dispute and to render a decision.

Currently, the specialized commercial courts exist within the system of courts of general jurisdiction (i.e., "*hospodarski sudy*" or "commercial courts"). As a rule, a business-related dispute between business entities (including individual entrepreneurs) will be reviewed by the commercial court having jurisdiction at the location of the respondent, according to the rules of the Commercial Procedural Code of Ukraine. However, all corporate disputes between a company and its participant (shareholder) as well as all corporate disputes between the founders (shareholders) of a company will be considered by the commercial court having jurisdiction at the location of the company. These disputes will be considered by a commercial court even when one of the parties is an individual (rather than a legal entity or an individual entrepreneur). In all other cases involving individuals, commercial cases will be considered in the local common courts under the rules of the Civil Procedural Code of Ukraine. In general, there are no limitations (including monetary limits) on the jurisdiction of the commercial courts, other than specialization and territorial factors.

According to the Law of Ukraine "On Court Fee," the maximum court fee for filing a monetary commercial claim is currently approximately USD 28,000. If the claim is non-monetary, the court fee will be approximately USD 80.

The Law of Ukraine "On International Private Law," dated 23 June 2005, envisages broader opportunities for the consideration of cases with a foreign element by the Ukrainian courts compared to the Commercial and Civil Procedural Codes. According to the court practice on disputes involving foreign companies, the Ukrainian courts' jurisdiction over disputes involving a "foreign element" should be established in accordance with the Law of Ukraine "On International Private Law."



The abovementioned provisions of the Law of Ukraine "On International Private Law" appear to have been adopted to make Ukrainian law consistent with the Hague Convention on Choice of Court Agreements of 30 June 2005. Ukraine signed the Convention on 21 March 2016. However, it has still not ratified the Convention and has not amended its procedural legislation accordingly. There remains a certain inconsistency in the application of the above provisions by the Ukrainian courts.

Under the Commercial Procedural Code of Ukraine, the court venue is determined following the territorial principle. Generally, disputes are considered by the commercial court at the location of the respondent. Cases for the conclusion, modification, termination or recognition as null and void of agreements are considered by the court at the location of the debtor

party to such agreement (i.e., the party under an obligation to provide the services, to transfer assets, etc.).

The exclusive venue for disputes involving title to property, the illegal use of property or the removal of obstacles to the use of property is established by the court at the location of the property. Disputes over the registration and recording of rights to securities are exclusively considered by the commercial court at the location of the securities' issuer, while disputes arising out of transportation agreements are considered by the court at the location of the transportation organization. The Kyiv City Commercial Court has exclusive jurisdiction for cases where the respondent is a central governmental authority or where state secrets are involved.

In commercial proceedings, the claimant may seek the issuance of an injunction before the commencement of the court proceedings or during consideration of the case by the competent court. In its request for injunctive relief, the claimant may ask the court to impose one or several measures, such as the arrest of funds or other assets of the respondent, or ordering the respondent or third parties to refrain from certain actions.

The procedural rules, which became effective on 15 December 2017, provide for more procedural measures to be applied in order to prevent or punish abuse of procedural rights by the parties to the dispute, which usually result in significant delays in the proceedings. These rules have also extended the range of evidence that can be considered by the court, recognized electronic documents as acceptable, conferred independent expert opinions to the same status as court expertise opinions, etc. The rules also provided more specific regulations related to court fees' allocation and compensation of damages that have occurred as a result of injunctive relief measures.

In addition, a number of legislative acts had been enacted to protect the rights of shareholders and other owners of commercial enterprises from unlawful corporate takeovers. These amendments to the rules of commercial and civil court procedure, as well as to the provisions of corporate legislation, substantially improved the consideration of corporate disputes by the courts.

Rules prohibit the application of the following injunctive measures in corporate disputes:

prohibition on holding general meetings of shareholders or other meetings of the owners of a commercial enterprise and prohibition on issuing decisions at these meetings

prohibition on providing the register of privileged shares or information about the shareholders or other owners of a commercial enterprise by the shares' issuer, the registrar, the keeper or the depository for holding general meetings of shareholders of a commercial enterprise

prohibition on shareholders or other owners of a commercial enterprise participating in general meetings of shareholders, and prohibition on establishing the legal capacity of general meetings of shareholders or other meetings of the owners of a commercial enterprise

prohibition on executing a decision of the Deposit Guarantee Fund regarding the appointment of an authorized person or the implementation of temporary administration or liquidation of a bank, or prohibition on such authorized person of the Deposit Guarantee Fund performing certain actions

It is also established that the claimant may seek, and the court may grant, only those injunctive relief measures that are stipulated in the Commercial Procedural Code of Ukraine.

As a general rule, in accordance with the Law of Ukraine "On Enforcement Proceedings," effective court decisions are subject to compulsory execution by the enforcement authorities (state enforcement officers or private enforcement officers, who started to perform their duties on 5 January 2017) at the location of the debtor or the debtor's assets.

In addition, the Law of Ukraine "On State Guarantees Regarding Enforcement of Court Decisions" establishes the procedure for the enforcement of court decisions rendered against state bodies, institutions and state-owned companies. This procedure is applied by the state enforcement authorities where a decision remains unenforced six months after the commencement of the enforcement proceedings. In these cases, further enforcement of the court decision is to be carried out by the state

treasury authority, and the debt will be recovered from the state budget. In certain cases, this recovery can be made even before the expiry of the six-month term (e.g., if the debtor has no recoverable assets).

### **15.3 Commercial arbitration**

A business-related dispute between a foreign legal entity (or individual entrepreneur) and a Ukrainian legal entity (or individual entrepreneur) may be referred, by agreement of the parties, for settlement by either ad hoc or institutional international commercial arbitration, either within or outside Ukraine. A business-related dispute involving only Ukrainian parties may be referred to either an ad hoc or an institutional arbitration only in the territory of Ukraine (i.e., domestic arbitration) and is not subject to international commercial arbitration. At the same time, disputes of Ukrainian legal entities with foreign investments between themselves or their participants, as well as their disputes with other Ukrainian entities, may be referred to international commercial arbitration.

Currently, there are two well-established institutional arbitration bodies in Ukraine: the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry, and the Maritime Arbitration Commission at the Ukrainian Chamber of Commerce and Industry.

### **15.4 Enforcement of foreign court decisions**

Foreign court decisions will be recognized and enforced in Ukraine only based on the relevant international agreements or under the reciprocity principle, which is presumed to operate unless otherwise proven. Ukraine has international agreements on the reciprocal enforcement of foreign court decisions with several countries, mostly members of the former Soviet Union and/or Soviet bloc.

A foreign court decision will not be enforced in Ukraine if it is determined that: it did not come into force; and/or Ukrainian courts or other Ukrainian authorities have exclusive jurisdiction over such disputes; and/or a Ukrainian court has rendered a decision or is currently considering a dispute in the same matter between the same parties and such consideration had started before opening of the proceedings by the foreign court; and/or the established term for applying for enforcement of a foreign decision expired; and/or under Ukrainian legislation, a disputed matter is not subject to a court's consideration. Ukrainian courts will also not recognize a foreign court decision against a party that was not given an opportunity to participate in

the proceedings due to improper notification or if the enforcement of such court decision would threaten the interests of Ukraine, or in other cases prescribed in international treaties and Ukrainian legislation.

In addition, it is possible for an interested party to seek injunctive relief measures in the process of recognition and enforcement of foreign court decisions. The same rule applies for the enforcement of foreign arbitration awards, discussed in 11.5 below.

Starting from 15 December 2017, the new procedural rules governing the recognition and enforcement of foreign court decisions in Ukraine became effective, providing for improved regulation of the general procedure for the recognition and enforcement of foreign court decisions in Ukraine.

### **15.5 Enforcement of foreign arbitral awards**

Foreign arbitral awards are, in general, easier to enforce in Ukraine than foreign court decisions, since Ukraine is a member of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

The new procedural rules, which became effective on 15 December 2017, significantly improved the mechanism of recognition and enforcement of arbitral awards. In particular, the procedure of filing applications for recognition and enforcement was improved, the mechanism of applying injunctive relief measures was improved, etc.

A foreign arbitral award should be recognized as binding and enforced upon a party filing an appropriate motion with the competent Ukrainian court, unless the opposing party proves the existence of any of the grounds established by the 1958 New York Convention or the applicable Ukrainian legislation for the denial of recognition and enforcement of the foreign arbitral award.

## Grounds for denying the recognition and enforcement of a foreign arbitral award



- (1) The agreement to arbitrate is invalid under the chosen law.
- (2) One of the parties, while entering into the arbitration agreement, was legally incapable.
- (3) The losing party was not duly notified of the appointment of the arbitrator or the conduct of the arbitration proceedings.
- (4) The losing party could not submit its explanations for valid reasons.
- (5) The arbitration award was rendered on an issue outside the scope of the arbitration agreement.
- (6) The arbitral tribunal or procedure did not comply with the arbitration agreement.
- (7) The arbitral award did not enter into force, or was annulled or its execution was suspended by the court of the country, according to the laws governing such arbitral award.

Similarly, a foreign or local arbitral award may be unenforceable in Ukraine if a Ukrainian court determines that the subject matter of the dispute cannot be subject to arbitration under Ukrainian legislation, or the recognition and enforcement of such arbitral award contradicts the public order of Ukraine.

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**16** **BANKRUPTCY  
ISSUES**



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## **16.1 General**

Ukraine's first law "On Bankruptcy" was adopted on 14 May 1992 and entered into force on 1 July 1992.

Starting from 21 October 2019, the new Code on Bankruptcy Procedures, providing for a new legal framework for bankruptcy cases, became effective.

Under the applicable Ukrainian legislation, state enterprises fall under the category of "*kazenne pidpryyemstvo*." The Code on Bankruptcy Procedures introduced the insolvency procedure for individuals, which had never been applied in Ukraine before.

## **16.2 Pre-trial rehabilitation of debtor (legal entity)**

The procedure for a debtor's financial rehabilitation prior to commencement of the debtor's bankruptcy in court may be initiated by the debtor's founders, participants or shareholders. The rehabilitation procedure is carried out according to the agreement between the debtor and the creditor.

The rehabilitation plan will determine the amount, procedure and terms of satisfaction of creditors' claims, as well as the authorities of the rehabilitation manager. The plan will be accompanied by a liquidation analysis, proving the profitability of such plan for the creditors compared to the liquidation procedure.

Claims admitted to the first and the second orders of priority of satisfaction of claims (see below for more details) will not be covered by the rehabilitation plan.

The debtor's rehabilitation will be first approved by the general meeting of creditors, which is called upon a written notice of the debtor sent to the creditors in accordance with the debtor's accounting information.

Once the debtor's rehabilitation is approved by the creditors, the debtor files an application for approval of the debtor's rehabilitation plan with the court at the location of the debtor within five calendar days from the date of its approval by the creditors. When accepting the application for consideration, the court imposes a moratorium prohibiting satisfaction of creditors' claims.

Upon approval of the debtor's rehabilitation plan by the court, the court cancels the moratorium prohibiting satisfaction of creditors' claims and appoints the rehabilitation manager needed according to the rehabilitation plan.

### **16.3 Specifics of bankruptcy proceedings for certain categories of debtors (legal entities)**

Bankruptcy proceedings for certain categories of debtors have important features compared to the generally applicable bankruptcy regime. These categories of debtors include companies of special social importance or companies with special status, banks, insurance companies, securities traders and joint investment institutions, issuers or managing companies of mortgage certificates, managers of utility (construction financing) funds, managers of real property operation funds, enterprises with a state holding of over 50% in the charter capital, farms, private (individual) entrepreneurs, individuals and debtors liquidated by their owners.

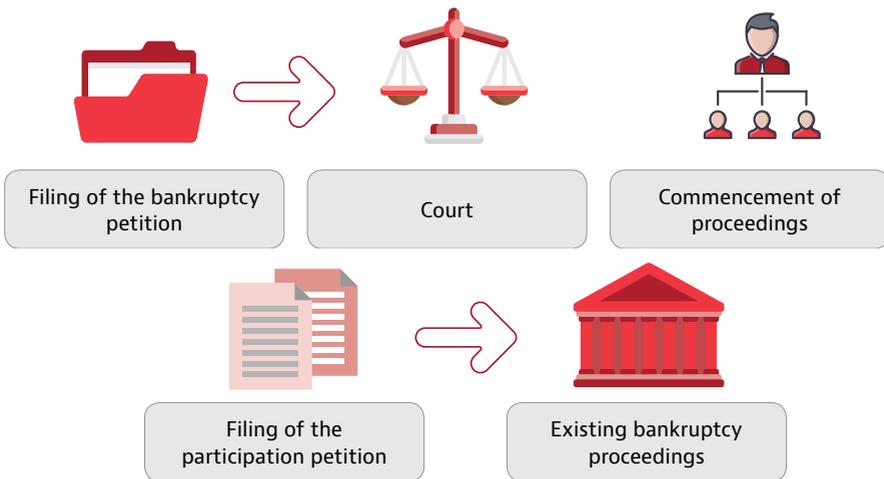
The specific features of the bankruptcy proceedings for such enterprises (and individuals) may include unique terms and conditions of the bankruptcy proceedings, participation of competent state authorities, provision of guarantees, a special list of priorities for the satisfaction of creditors' claims, extension of the term of the bankruptcy hearings, special assets sale procedures and restrictions on the attachment of the debtor's assets.

### **16.4 Initiation of bankruptcy proceedings in respect of legal entity**

A bankruptcy petition may be brought in a Ukrainian commercial court ("*hospodarsky sud*") at the location of the debtor by any creditor (other than a fully secured creditor), the debtor itself, the State Tax Administration and certain other state agencies acting as creditors. A creditor (an individual or a business entity) that holds an incontestable claim against the debtor may initiate bankruptcy proceedings against the debtor.

Where a claim is denominated in foreign currency (e.g., US dollars, euros, etc.), the creditor must apply the official exchange rate established by the National Bank of Ukraine as of the day of filing the application for commencement of the bankruptcy proceedings with the competent court, in order to determine the claim's amount in Ukrainian hryvnias.

## Ways to participate in bankruptcy proceedings

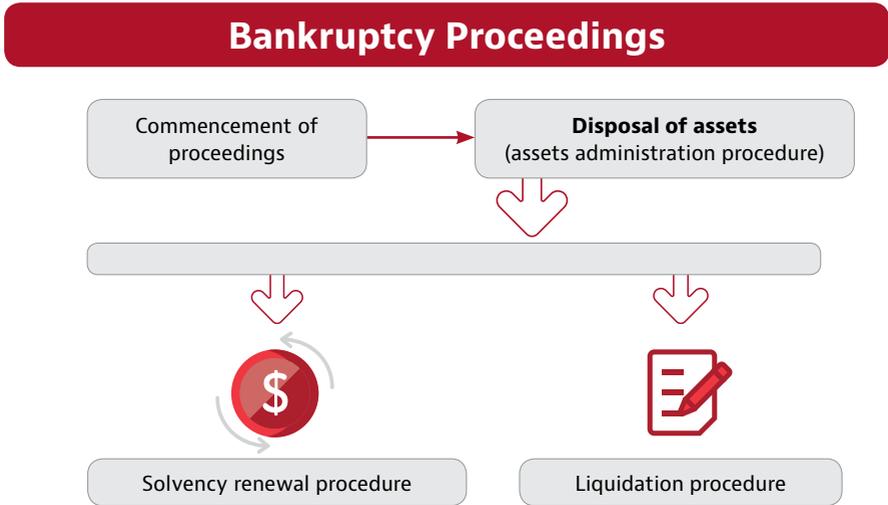


Once the bankruptcy proceedings have been triggered, any creditor (except a fully secured creditor) may submit a participation petition substantiating its claims against the debtor within 30 days of the formal publication on the commencement of the bankruptcy proceedings on the official website of the Ukrainian court system. Creditors whose claims matured prior to the commencement of the bankruptcy proceedings and were submitted after the expiry of the previously mentioned 30-day period will not have the right to participate and to vote in the creditors' committee.

A creditor whose claims are fully secured by collateral is deemed to be a secured creditor and, as a matter of law, such creditor may not initiate bankruptcy proceedings. If a secured creditor considers that its claims are not fully secured, or if the collateral has been lost or is absent, it can initiate bankruptcy proceedings or participate as a creditor with respect to the unsecured part of its claims or all its claims.

## 16.5 Stages of bankruptcy proceedings

Judicial bankruptcy proceedings in Ukraine may include the following stages:



Under the assets administration proceedings, the Ukrainian commercial court appoints a bankruptcy administrator ("*rozporyadnyk mayna*"), who will supervise and approve the disposal of the debtor's assets. The court may impose a moratorium on the discharge of claims of the debtor's creditors that arose before the bankruptcy proceedings.

A bankruptcy administrator is an individual who is registered as a private entrepreneur and is licensed to act as the administrator of a debtor's assets, the solvency renewal administrator or the liquidator at the relevant stage of the bankruptcy proceedings.

In the assets administration proceedings, the bankruptcy administrator identifies the creditors; prepares the register of the creditors and the amounts claimed from the debtor for further approval by the court; and organizes the general meeting of the debtor's creditors, which in turn appoints the creditors' committee (the "committee").

Once elected, the committee is entitled: (i) to initiate solvency renewal proceedings or liquidation proceedings against the debtor; (ii) to agree the terms and conditions of the solvency renewal plan and to apply to the court for its approval; (iii) to provide the court with candidates for appointment

as the solvency renewal administrator and liquidator; (iv) to apply for their replacement; and (v) to decide on other practical issues during the bankruptcy proceedings.

The creditors participating in the general meeting of creditors or in the meetings of the committee are allocated a number of votes determined pro rata to their claims (penalties excluded), and they take decisions by a majority of votes.

Asset administration proceedings may last 170 calendar days and may not be further extended.

Solvency renewal proceedings may be introduced by the court as the next stage of bankruptcy proceedings after the solvency renewal plan has been considered and approved by the creditors and the court.

Upon the ruling on the introduction of solvency renewal proceedings, the court appoints a solvency renewal administrator, who acts as the head of the debtor. For the period of the solvency renewal proceedings, other managing bodies of the debtor are not able to exercise their statutory powers.

The solvency renewal plan may include corporate restructuring of the debtor, sale of its assets, recovery of receivables, debt restructuring, asset restructuring, sale or cancellation of debt and other means of renewal of the debtor's solvency. If the debtor is a state-owned company in which the state owns at least 50%, the solvency renewal plan is subject to approval by the state authority supervising the disposal of the property.

Failure to approve the solvency renewal plan within the terms of the assets administration proceedings results in the introduction of the liquidation proceedings.

The court may also introduce liquidation proceedings with the relevant ruling, including at the request of the committee if the debtor has failed to restore its solvency in accordance with the solvency renewal plan.

It should be noted that the committee may ask the court to commence liquidation proceedings after the asset administration proceedings omitting the solvency renewal proceedings. Upon the introduction of liquidation proceedings, the court appoints a liquidator, who acts as the head of the debtor. For the period of the liquidation proceedings, other managing bodies of the debtor are not able to exercise their statutory powers.

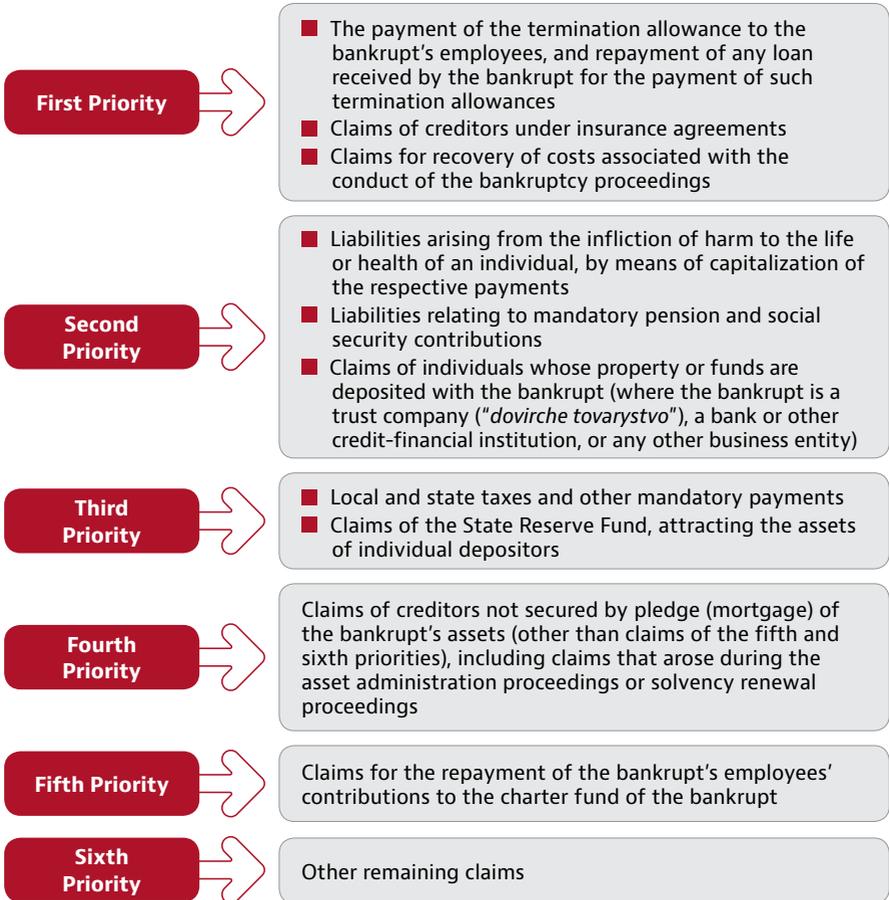
In the liquidation proceedings, the liquidator must determine the liquidation value of the debtor's assets, sell these assets and pay off the debt to the creditors in accordance with the order of priority for satisfaction of the creditors' claims as established by law.

Upon completion of the liquidation proceedings, the liquidator prepares a report, as well as the liquidation balance sheet of the debtor, and provides them to the court for consideration and approval. Based on the results of the liquidation proceedings, the court may approve the report and the liquidation balance sheet of the debtor, dissolve the debtor and terminate the bankruptcy proceedings.

The term of liquidation proceedings is 12 months from the day of commencement.

**16.6 Priority of claims**

Amounts received from the sale of the bankrupt’s assets are used to pay the claims of its creditors in the following order:



Higher priority claims must be satisfied in full before any lower-ranking claims may be paid. In the event that the cash proceeds from the sale of the property are insufficient to satisfy all claims with equal priority, they must be satisfied pro rata. Claims not paid due to the insufficiency of funds in the liquidation proceedings are deemed extinguished. Any assets remaining after the satisfaction of the claims of the creditors are to be returned to the "owners" of the debtor (i.e., its shareholders or holders of its participatory interests) if the court decides to dissolve the debtor. The court is not able to dissolve the debtor if the remaining assets of the debtor exceed the amount of assets required by law for operation of the relevant legal entity.

Ukrainian legislation establishes a special order of priority for the satisfaction of creditors' claims for certain categories of debtors (including banks).

### **16.7 Clawback**

There are a number of grounds on which transactions entered into by a Ukrainian debtor within three years before the commencement of the bankruptcy proceedings that caused damages to the debtor or the creditors may be challenged.

A challenge can be made in the bankruptcy proceedings by the bankruptcy administrator or by any of the creditors. These challenges can be made where:

- the debtor alienated its assets, assumed obligations or declined its claims without compensation
- the debtor fulfilled its obligations before the due date
- prior to commencement of the bankruptcy proceedings, the debtor entered into an agreement that led to its insolvency
- the debtor paid a creditor or accepted any property/assets as a set-off of payment obligations of its contractor, and as a result of such payment or set-off the amount of the debtor's assets became insufficient to satisfy creditors' claims
- the debtor alienated or acquired property at a price that was lower or higher than the market price, provided that the debtor's assets were insufficient for the satisfaction of creditors' claims at that time
- the debtor pledged its property to secure the fulfillment of pecuniary claims

### **16.8 Criminal liability**

Under the Criminal Code of Ukraine, "allowing bankruptcy" is defined as the intentional activity, with mercantile or personal motives or in the interest of

third parties, of an individual shareholder (participant) or a corporate official of an enterprise that caused the financial incapability of such enterprise and substantial material damage (i.e., for 2019 — more than approximately USD 20,000) to the state or a creditor, which is punishable with a monetary penalty of 2,000 to 3,000 times the monthly non-taxable salary (i.e., approximately from USD 1,416 to USD 2,125) with a prohibition against occupying certain positions or conducting certain activities for up to three years.

The Criminal Code of Ukraine as amended on 16 July 2015 provides for criminal liability for the falsification of information regarding contracts, obligations or property that is provided by a financial institution in its records or accounting documents and for the disclosure of such information if such actions are aimed at concealing bankruptcy or persistent financial insolvency. The Criminal Code of Ukraine provides for punishment for such actions in the form of a monetary penalty of 800 to 1,000 times the monthly non-taxable salary (i.e., approximately from USD 566 to USD 708) or imprisonment for up to four years with a prohibition against occupying certain positions or conducting certain activities for up to 10 years.



**Baker  
McKenzie.**



**17**

**EMPLOYMENT**



**EXPERT**

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Counsel

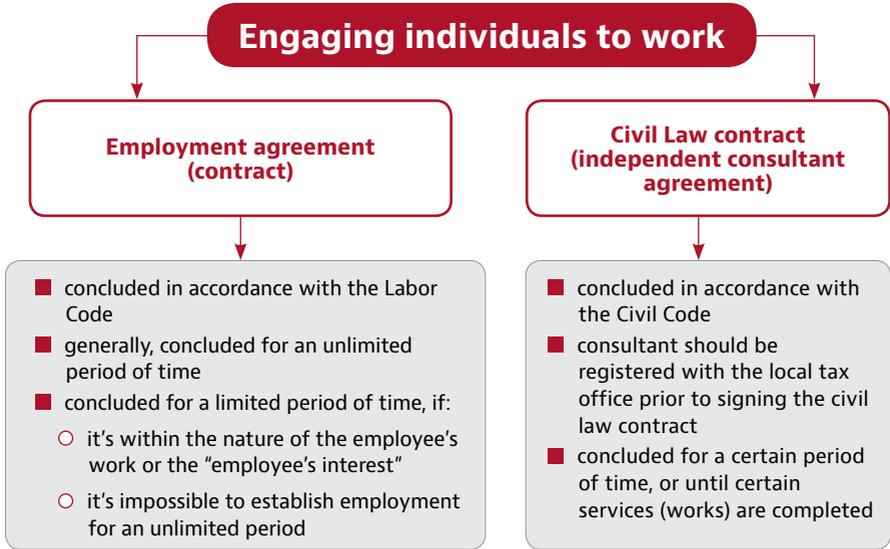
## **17.1 Legislation**

The Code of Laws on Labor of Ukraine (“**Labor Code**”) dated 10 December 1971, as amended, applies to all Ukrainian and foreign companies, other legal entities, foreign diplomatic missions and international organizations, and to all individuals employing labor in Ukraine.

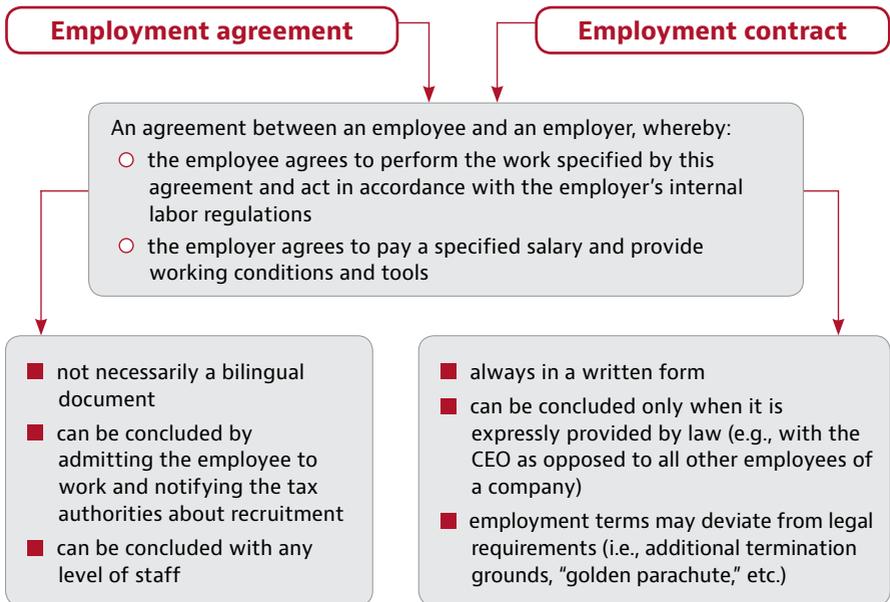
Employment relationships between companies with foreign investment (as well as representative offices of foreign companies) and their employees in Ukraine are governed by Ukrainian legislation and the bylaws of such companies. Thus, all employers (both foreign and Ukrainian) must comply with the Ukrainian labor laws, which apply to any employee in Ukraine regardless of whether the employee is a Ukrainian or foreign national. The employment guarantees and the social security benefits granted to employees of both representative offices of foreign companies and Ukrainian companies with foreign investment are the same as those granted to employees of other Ukrainian companies.

## **17.2 Employment agreements (contracts) and other employment-related documents**

Both local and foreign legal entities may engage individuals in Ukraine pursuant to either employment agreements (or employment contracts, where appropriate) concluded in accordance with the Labor laws, or so-called “civil law contracts” concluded in accordance with the Civil Code (e.g., an independent consultant agreement).



Ukrainian law distinguishes between an "employment agreement" and an "employment contract."



In addition, employers must properly record employment in the labor books of their employees and in certain mandatory payroll tax reports.

### 17.3 Equal job opportunities

The Labor laws of Ukraine establish the requirement for equal job opportunities.

#### Article 2-1 of the Labor Code

prohibition of any discrimination in the workplace, including violation of the principle of equal rights and opportunities, direct or indirect restriction of the rights of employees depending on certain criteria (e.g., race, colour, political, religious and other beliefs, sex, gender identity, sexual orientation, disability or suspected presence of HIV/AIDS, etc.)

#### Article 22 of the Labor Code

prohibition of any unjustified denial of employment; any direct or indirect restriction of rights or granting of any direct or indirect advantages during employment on the specified grounds

#### Article 25 of the Labor Code

prohibition to demand any information about political or national affiliation, origin, place of residence of a prospective employee or any additional documents not specified by law

#### Article 17 of the Law of Ukraine "On Equal Rights and Opportunities for Females and Males"

- females and males must be provided with equal rights and opportunities, promotion at work, further training and professional retraining
- obligations of an employer: (1) to create conditions allowing employees to work on an equal basis, (2) to ensure that females and males can combine work with their family responsibilities, (3) to provide equal pay, (4) to create safe and healthy working conditions, (5) to take measures to prevent sexual harassment at work (and/or other gender-based oppression)
- prohibition against advertising job vacancies exclusively to females or males (unless the nature of the work justifies it) or to require any data regarding the employee's private or family life

Moreover, the Law of Ukraine “On Employment” (“**Employment Law**”), dated 5 July 2012, as amended, introduced a mandatory quota for employment of certain categories of employees (recent graduates, youth, former convicts, etc.), in addition to the already existing quota for employment of individuals with a disability.

#### **17.4 Probation period**

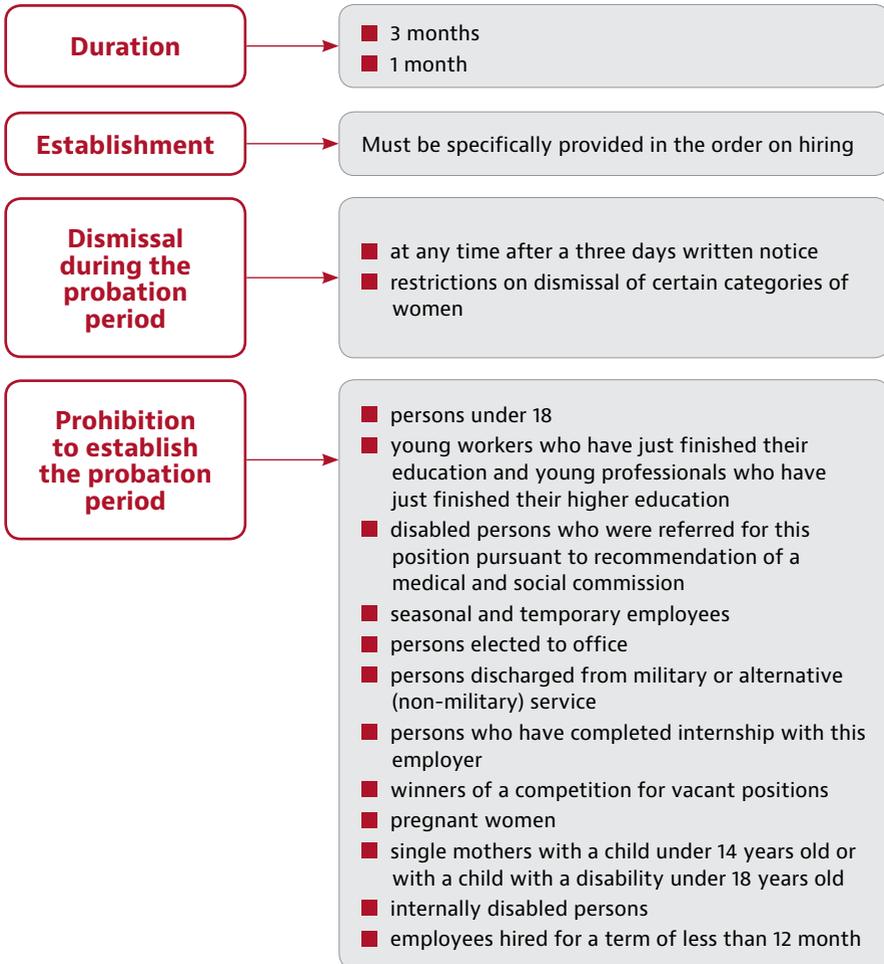
An employer has the right to establish a probation period for a newly hired employee.

Note that probation must be specifically provided in the order on hiring of the relevant employee.

Dismissal during the probation period is possible at any time upon three days' written notice to the employee.

Single mothers with a child under 14 years old or with a child with a disability under 18 years old are exempted from dismissal during probation period. Also exempted are internally displaced persons and employees hired for a term of less than 12 months.

## Establishment of a probation period

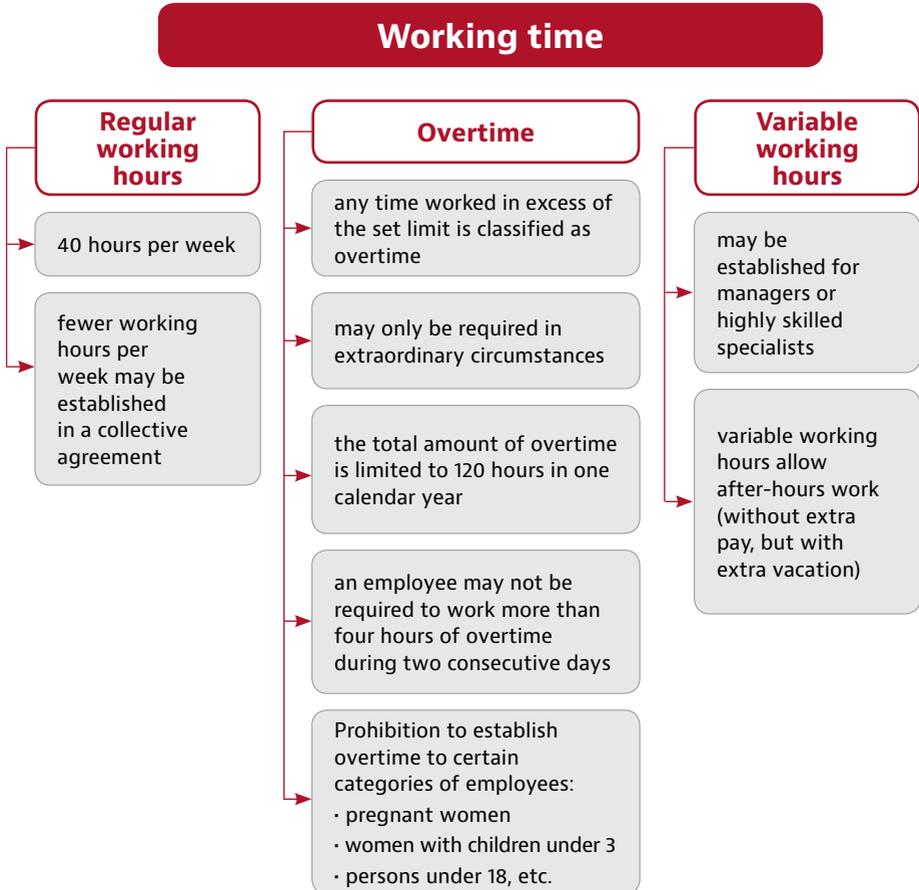


### 17.5 Minimum salary

Generally, the amount of the monthly salary accrued by the employee may not be lower than the minimum monthly salary established by law. The minimum monthly salary is subject to regular increases. As of 1 January 2020, the minimum monthly salary is equal to UAH 4,723 (approximately USD 202).

**17.6 Working week**

The regular working week in Ukraine is a maximum of 40 hours, unless certain exceptions apply. In certain limited situations, employees may be required to work overtime. For some employees, the employer may establish variable working hours.



## 17.7 Holidays and vacations

There are 11 official holidays in Ukraine. Employees may be required to work on an official holiday only in extraordinary circumstances, except for certain types of businesses.

The annual paid vacation should be at least 24 calendar days (to include weekends but excluding official holidays during the vacation period). The duration, terms and procedures for granting additional paid annual vacation are envisaged in various laws, and may also be indicated in the collective agreement.

### OFFICIAL HOLIDAYS



- 1 January** – New Year's Day
- 7 January and 25 December** – Christmas
- 8 March** – International Women's Day
- 1 May** – Labor Day
- 9 May** – Victory Day
- 28 June** – Ukraine Constitution Day
- 24 August** – Ukraine Independence Day
- 14 October** – Ukraine Defenders' Day
- One day** (*the following Monday*) – Easter
- One day** (*the following Monday*) – Trinity

### VACATION



Annual paid vacation should be at least 24 calendar days, unless a paid vacation of a longer duration is provided by law

Annual paid vacation includes weekends during the vacation period but excludes official holidays

Certain categories of employees are entitled to additional paid vacation, eg, employees:

- (i) in hazardous or difficult working conditions;
- (ii) engaged in special types of production;
- (iii) in other cases envisaged by law

### 17.8 Sick leave

The system of sick leave in Ukraine requires an employee to submit a medical certificate only after their recovery, i.e., on the first working day after an employee's recovery.

Sick leave compensation is covered by the Ukrainian State Social Security Fund funded by an employer's contributions made as a percentage of its employees' aggregate salaries. However, the first five days of each period of an employee's sickness are covered by the employer.

### 17.9 Maternity leave

Paid maternity leave is provided for a minimum of 70 calendar days prior to the birth, and for an additional 56 calendar days (or 70 calendar days in the event of multiple births or delivery complications) after the birth. An employee may take additional unpaid leave until the child reaches 3 years old. During the entire period of paid and unpaid leave, an employee retains the right to return to her job, with the full leave period included when calculating an employee's length of service.

### 17.10 Termination of employment and job protection

The procedure for terminating employment is governed by Articles 36 to 49 of the Labor Code.

An employer may initiate termination only on a limited number of grounds, primarily those listed in Article 40 of the Labor Code, including:

- staff redundancy
- an employee's systematic failure to fulfil their job duties
- an employee's insufficient qualifications (or deteriorating health)
- an employee's unjustified absence from the workplace for more than three consecutive hours during one working day
- in certain other cases

Additional grounds for termination may be specified in the employment contract (but not in the employment agreement).

The law prohibits employers to terminate certain categories of protected employees (e.g., pregnant women, women who have children of a certain age, single parents, guardians (custodians), etc.). This rule does not apply if the employing entity is dissolved or if a female employee was on a fixed-term agreement that expired. However, in such case, an employer is obliged to find alternative employment for the dismissed protected woman.

Termination of a trade union member requires the prior consent of their trade union under certain circumstances.

### 17.11 Collective agreements

The law generally requires legal entities operating in Ukraine and employing large numbers of employees to negotiate on the conclusion of collective bargaining agreements (CBA) with the relevant trade unions or other representatives of the employees' collective, unless certain exceptions apply.



A CBA, if concluded, is mandatory for the employer and all its employees



A CBA has an evergreen agreement status, i.e., it is effective until the parties conclude a new agreement or reconsider the current one (unless otherwise provided by the CBA)



Provisions that deprive employees of the rights and benefits guaranteed by law cannot be included in CBAs

### 17.12 Remuneration

Generally, all employers in Ukraine, both residents and non-residents, are required to pay salaries to their Ukrainian employees exclusively in Ukrainian currency to a bank account in Ukraine.

However, limited categories of employers (e.g., foreign diplomatic and consular missions, representative offices of international organizations, etc.) may pay their non-Ukrainian employees in foreign currency in certain cases. Therefore, while non-residents employed in Ukraine may be remunerated in

foreign currency, residents of Ukraine must be paid exclusively in Ukrainian currency.

**17.13 Foreign nationals working in Ukraine**

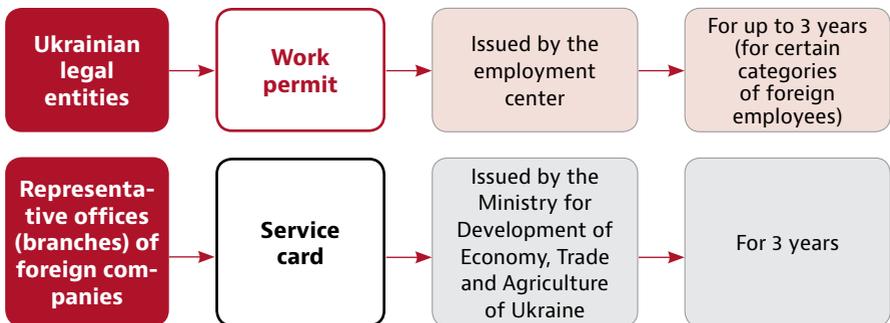
Foreign nationals who lawfully reside in Ukraine enjoy the same rights and opportunities (including employment) as Ukrainian citizens.

Generally, the employment relationships of foreign nationals and stateless persons (“**Foreign National**”) working in Ukraine are governed by the laws of Ukraine, except if:

- such Foreign Nationals work with a diplomatic mission or representative office of an international organization
- the employment agreement, which provides for the performance of works in Ukraine, was concluded outside Ukraine (with a non-Ukrainian employer).

If a Foreign National does not have a Ukrainian permanent residence permit, the hosting Ukrainian company may employ such Foreign National only subject to obtaining a work permit issued by the relevant employment center.

Foreign Nationals employed by representative offices of foreign entities are required to obtain a service card from the Ministry for Development of Economy, Trade and Agriculture of Ukraine.



The following are the main points in the procedure of employment of Foreign Nationals, effective as of 27 September 2017:

## Minimum monthly salary

### employers must pay Foreign Nationals a minimum salary:

- (a) not less than five times the statutory minimum monthly salary — for foreign employees of civic associations, charitable organizations and certain educational institutions
- (b) not less than 10 times the statutory minimum monthly salary — for other categories of foreign employees, except for the special categories of foreign employees

## Special categories of foreign employees

### special categories of foreign employees include:

- (a) highly paid foreign professionals
- (b) founders (as well as participants and/or beneficiaries) of a legal entity established in Ukraine
- (c) graduates of certain universities
- (d) foreign artists
- (e) foreign IT professionals

**an employer may obtain a work permit for these employees for up to three years**

## Secondary employment v. position overlap

**option to obtain an additional work permit for a Foreign National holding more than one office (secondary employment option) or whose job duties overlap several positions**

**any foreign employee may carry out the job duties of a temporarily absent employee for up to 60 calendar days per year without a separate work permit**

A work permit application is considered within seven business days by the relevant Ukrainian employment center. The state fee for the work permit depends on the term for which the work permit is obtained, and is calculated based on the subsistence level established for a working person as of 1 January of the calendar year in which the employer applies for the work permit.

After obtaining the work permit, the employer must conclude an employment agreement (contract) with the Foreign National and submit its certified copy to the employment center as provided by law. Otherwise, the employment center might cancel the already issued work permit.

The Employment Law sets an exhaustive list of grounds for refusing to issue a work permit, to prolong its term or to annul a work permit.

**Grounds for refusing a WP**

- employer's failure to bring the work permit application in compliance
- employer's failure to file the application to prolong the work permit in a timely manner, etc.
- non-registration of the employer in the Companies' Register, or its dissolution

**Grounds for annulling a WP**

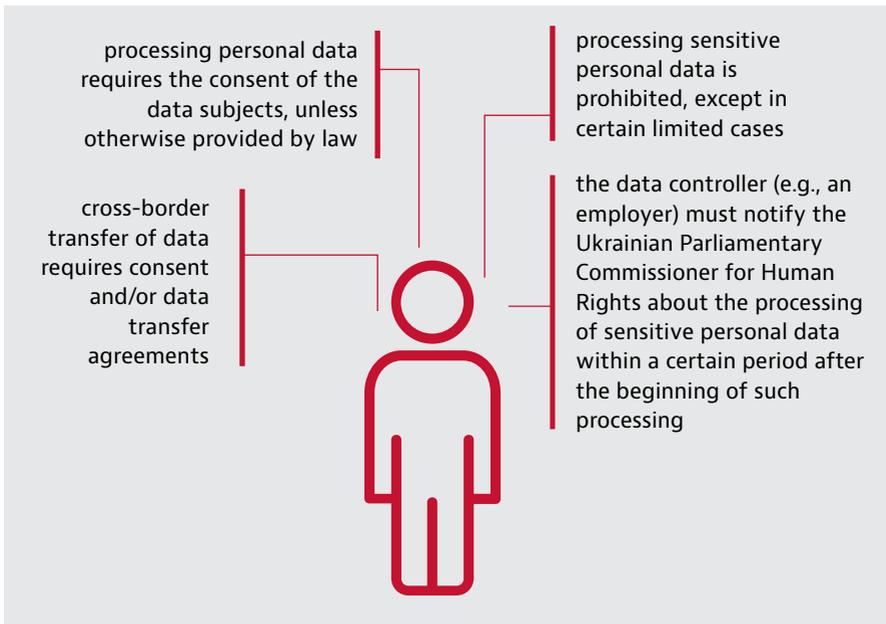
- early termination of the employment agreement (contract) with the Foreign National
- the Migration Authority's decision to expel the relevant Foreign National
- if the actual work performed by the Foreign National does not correspond to that provided for in the work permit
- decision of the court, whereby the Foreign National is convicted of a crime
- employer's failure to file a certified copy of the employment agreement (contract) in a timely manner
- employer's failure to pay for the work permit in a timely manner
- revealed inaccuracies in the data provided by the employer in the course of applying for the work permit that were impossible to detect during consideration of the work permit application

Allowing a Foreign National to commence their work in Ukraine prior to obtaining a work permit will trigger imposition of a significant fine on the Ukrainian employing entity for each Foreign National for whom the employer has failed to obtain the work permit. In addition, the Director (CEO) of the Ukrainian employing entity may be subject to an administrative fine.

After the work permit has been obtained, the Foreign National must apply for a long-term visa D (unless certain exceptions apply) and comply with other migration law formalities (i.e., apply for a temporary residence permit and register their place of residence in Ukraine).

### 17.14 Personal data

The data protection law establishes requirements for the processing of personal data and the relevant obligations of the data controllers and processors. The general rules on personal data processing are as follows:



Liability for failing to follow the above requirements may result in an administrative fine. In addition, certain other statutes, including the Civil Code, the Labor Code and the Criminal Code, contain separate provisions on the protection of privacy, which also apply to the workplace. Therefore, background checks and internal investigations should always be preceded by obtaining the relevant advice of a Ukrainian lawyer knowledgeable in this field.

### **17.15 On the horizon**

A new statute that will amend or replace the current Labor Code may be adopted in 2020. At the end of December 2019, a draft law No. 2708 ("Draft Law") was registered at the Ukrainian parliament. The Draft Law provides for the following key requirements:

- mandatory written form for employment agreements with all employees
- cancellation of Labor Books
- specific regulation of alternative work arrangements (i.e., distance work, flexible working hours)
- possibility to establish additional termination grounds for top management
- payment in lieu of notice in case of termination
- reduction of the range of categories of employees protected from termination, etc.



**Baker  
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**18** INTELLECTUAL  
PROPERTY



**EXPERT**

**Oleksiy  
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Partner

### 18.1 General

Ukrainian intellectual property legislation affords protection, among others, to:

- copyright and related rights
- trademarks and service marks
- trade names
- inventions
- utility models
- industrial designs
- trade secrets
- plant and animal varieties
- appellations of origin
- layouts of integrated circuits
- technical improvements

The above-mentioned intellectual property rights are, among others, regulated by the following Ukrainian laws:

- The Civil Code of Ukraine ("**Civil Code**")
- The Criminal Code of Ukraine ("**Criminal Code**")
- The Customs Code of Ukraine ("**Customs Code**")
- The Civil Procedural Code of Ukraine ("**Civil Procedural Code**")
- The Commercial Procedural Code of Ukraine ("**Commercial Procedural Code**")
- The Administrative Infringements Code of Ukraine ("**Administrative Infringements Code**")
- The Law of Ukraine on Copyright and Related Rights ("**Copyright Law**", dated 23 December 1993)
- The Law of Ukraine on the Protection of Rights in Trademarks and Service Marks ("**Trademark Law**", dated 15 December 1993)
- The Law of Ukraine on the Protection of Rights in Inventions and Utility Models ("**Inventions Law**", dated 15 December 1993)

- The Law of Ukraine on the Protection of Rights in Industrial Designs (“**Industrial Designs Law**”), dated 15 December 1993
- The Law of Ukraine on the Protection of Rights in Appellations of Origin, dated 17 June 1999
- The Law of Ukraine on the Protection of Plant Varieties, dated 21 April 1993
- The Law of Ukraine on the Protection of Rights in the Layouts of Integrated Circuits, dated 5 November 1997
- The Law of Ukraine on the State Regulation of Activities in the Sphere of Transfer of Technology, dated 14 September 2006
- The Law of Ukraine on Information, dated 2 October 1992
- The Law of Ukraine on Protection Against Unfair Competition, dated 7 June 1996
- The Law of Ukraine on the Effective Management of the Economic Rights of IP Rights Owners in the Field of Copyright and (or) Related Rights, dated 15 May 2018

The most recent improvement to the IP regulations in Ukraine was adoption of the Law “On Amendments to the Customs Code of Ukraine on Protection of Intellectual Property Rights during the Transfer of Goods across the Customs Border of Ukraine” (according to the Regulation (EU) No. 608/2013). This is aimed at strengthening customs enforcement of IP rights and accelerating the movement of genuine goods across the border (entered into force on 14 November 2019).

Amendments regarding increasing official fees for actions related to the protection of intellectual property rights were introduced by the Decree of the Cabinet of Ministers, entered into force on 19 July 2019.

Another improvement was the adoption of a separate law improving legal protection of geographical indications and aiming at facilitating the adaptation of the national legislation to the European Union law and fulfilment of obligations undertaken by Ukraine in accordance with the Association Agreement with the European Union (the law entered into force on 1 January 2020).

The most disputed and still unresolved issues of the IP reform in Ukraine are the patent and trademark reform, along with the adoption of a separate law regulating the whole IP ecosystem including creation of a single IP government agency (preliminary name: the National Agency for Intellectual Property).

Moreover, it is expected that the Intellectual Property High Court (formally established in 2017) will start functioning in 2020.

## 18.2 Intellectual property authority

In 2017, the functions of the Ukrainian Patent and Trademark Office were transferred from the State Intellectual Property Service of Ukraine to the Ministry for Development of Economy, Trade and Agriculture of Ukraine (MEDTA). It is anticipated that MEDTA will later transfer its functions to the National Agency for Intellectual Property, which is yet to be created. Such functions should have been transferred in the third quarter of 2017. However, the reform of the State Intellectual Property Service did not follow the outlined plan and its functions are still with MEDTA.

MEDTA is currently responsible for the overall control of carrying out examinations of intellectual property applications, maintaining a system for the search and examination of intellectual property applications and granting patents and certificates on trademarks and other intellectual property, as well as copyright certificates.

## 18.3 International conventions

Ukraine is a party to the following treaties in the field of intellectual property:

- The 1883 Paris Convention for the Protection of Industrial Property ("**Paris Convention**")
- The 1886 Berne Convention for the Protection of Literary and Artistic Works
- The 1891 Madrid Agreement Concerning the International Registration of Marks ("**Madrid Agreement**")
- The 1952 Universal Convention on Copyright
- The 1957 Nice Agreement Concerning the International Classification of Goods and Services
- The 1961 International Convention for the Protection of New Varieties of Plants
- The 1967 Convention Establishing the World Intellectual Property Organization (WIPO)
- The 1970 Patent Cooperation Treaty
- The 1977 Budapest Treaty on the International Recognition of Deposits of Microorganisms for the Purposes of Patent Protection
- The 1989 Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks ("**Madrid Protocol**")
- The 1994 Trademark Law Treaty

Ukraine has also signed a number of bilateral treaties on the protection of intellectual property and a number of multinational agreements on intellectual property matters, within the framework of the Commonwealth of Independent States.

Moreover, Ukraine became the 152nd member of the World Trade Organization (WTO) on 16 May 2008. Thus, Ukraine is now subject to the requirements of the Agreement of the World Trade Organization on Trade Related Aspects of Intellectual Property Rights ("**TRIPS Agreement**").

#### **18.4 Registration of intellectual property rights**

Ukraine is a "first-to-file" rather than a "first-to-use" jurisdiction. As a result, in order to protect those intellectual property rights that are subject to mandatory registration in Ukraine, it is important to file a formal application with the State Enterprise "Ukrpatent" of MEDTA for the registration of the relevant intellectual property.

#### **18.5 Trademark protection**

The current Ukrainian legislation affords protection to two types of trademarks and service marks:

- marks registered with MEDTA pursuant to the Trademark Law
- trademarks and trade names that are not registered with MEDTA, but that enjoy protection pursuant to international agreements to which Ukraine is a party

Trademarks pending registration enjoy temporary protection until the relevant registration certificates are granted. MEDTA issues trademark registration certificates for a term of 10 years from the filing date. At the request of the trademark owner, and upon payment of the required renewal fee, trademark registrations may be renewed an indefinite number of times for additional 10-year periods.

As a member of the Madrid Union, Ukraine honors international trademark registrations extended to the territory of Ukraine under both the Madrid Agreement and the Madrid Protocol.

The Law of Ukraine "On the Introduction of Changes and Amendments to Legislative Acts of Ukraine on the Legal Protection of Intellectual Property" ("**2003 IP Law**"), dated 22 May 2003, introduced a number of important changes to Ukrainian intellectual property legislation. Among them is the inclusion of provisions on the protection of "well-known trademarks." Under the revised law, well-known trademarks are protected

in Ukraine under the provisions of Article 6 of the Paris Convention and the amended Trademark Law, based on the recognition of a trademark as being "well-known" by the Chamber of Appeal of MEDTA or a court. A well-known trademark must be treated as if the application for its registration in Ukraine had been made on the date on which the Chamber of Appeal of MEDTA or the court made the decision that it was "well-known."

It should be noted that, in accordance with the Civil Code, a trademark assignment agreement is subject to obligatory registration with MEDTA, while registration of a trademark license or a sub-license agreement is at the discretion of the parties to such agreement. Registration of a commercial concession agreement (the definition of which may cover franchising agreements) is not subject to obligatory state registration.

The 2003 IP Law also brought significant changes to the opposition and cancellation procedures, set more severe sanctions for the violation of intellectual property rights and extended the authority of the courts by applying measures directed at removing infringing products from all trade channels.

Under the 2003 IP Law, any third person may file an opposition against a pending application with the examining authority if the trademark to be registered does not meet the requirements of registration. Such an opposition can be filed until the examining authority makes a final decision on the application. The results of the examination of the opposition must be reflected in MEDTA's decision on the relevant trademark application.

As a result of such revisions of the opposition procedure, an applicant has the opportunity to file an opposition against a conflicting application, whereas under the previous law, the applicant could only oppose a decision of the examining authority on the applicant's own application. However, the applicant now has less time to file an opposition against the examining authority's decision on the applicant's own application, within two months after the date of receipt of the decision. Furthermore, the Chamber of Appeal of MEDTA will consider oppositions within two months instead of four months, as was previously the case. This term may be extended at the applicant's request, but by no longer than two months. The term for opposing a decision of the Chamber of Appeal of MEDTA in court has also been reduced to two months instead of six months, as was previously the case.

Ukrainian intellectual property legislation and the 2003 IP Law in particular extend the scope of infringement of a trademark owner's rights to include the storage of goods bearing a registered trademark for the purpose of sale or offering for sale, and/or the importation and exportation of goods bearing this mark. Thus, trademark owners have the necessary tools to sue distributors and importers or exporters who violate their rights.

### **18.6 Patent protection of inventions and utility models**

Ukraine follows the principle of universal novelty in granting patents. This means that an invention must be completely original worldwide within the relevant area of science and technology. Inventions are required to meet each of the following requirements in order to be granted patent protection:

- novelty
- non-obviousness
- utility

The Inventions Law provides a 12-month grace period for any public disclosure of information concerning an invention either by the inventor or by any third person who directly or indirectly obtains such information from the inventor.

A patent may be issued for an invention in the name of the inventor, their employer or their legal successors. As a rule, an inventor is entitled to patent their own invention, unless the Inventions Law provides otherwise. In all cases, the inventor is entitled to retain the rights of authorship for their invention indefinitely. An invention made by an employee during their employment and in relation to their working functions should be patented in the name of the employer, to the extent that such an invention is made within the scope of the employee's working functions, pursuant to the direct instructions of the employer or with the use of the expertise, knowhow, trade secrets and/or equipment of the employer. Employers and employees are authorized to provide different conditions for the patenting of inventions under the employment agreements concluded between them.

Patents are granted to inventions for 20 years from the priority date. Patents for inventions in the area of medicine, pharmaceuticals, agrochemistry and related areas may be further extended for a maximum period of five years. The term of patent validity is conditional upon the payment of annual maintenance fees.

## 18.7 Copyright

The Copyright Law protects published, as well as unpublished, works of authorship. The works may be of a scientific, literary or artistic nature. They are protected regardless of their volume, purpose or genre, as well as their scientific, literary or artistic value.

The Copyright Law does not require fixation as a mandatory condition for copyright protection. It grants protection to any work of authorship, regardless of the manner of its expression. As a result, a protected work may exist in oral and/or written form.

The Copyright Law protects works of science, literature and arts (copyright) and grants protection to rights of performers, phonogram producers and broadcasting organizations (related rights). Copyright protection arises by virtue of the creation of a work of art without any registration requirements.

The Copyright Law also grants protection to separate parts of works of authorship, which may exist independently from the main work (including the original name of the work). For the purposes of the Copyright Law, such parts are deemed to be separate works of authorship. Additionally, the Copyright Law also affords special protection to computer software. Computer software, as an object of copyright protection, falls under the category of written literary works of authorship.

The Copyright Law distinguishes between, and provides protection for, both the proprietary and the non-proprietary rights of the author. The non-proprietary rights in copyright are protected indefinitely. The proprietary rights in copyright are granted for the author's lifetime, plus for an additional 70-year period following their death.

## 18.8 Protection of trade secrets and know how

The trade secrets and know how are protected in Ukraine under the name "commercial secret." According to the Civil Code of Ukraine, commercial secret is information that is secret in the sense that it is generally in a certain form and the aggregate of its constituents is unknown and not readily accessible to persons who usually deal with the type of information to which it belongs. A commercial secret also has a commercial value and is subject to measures that are adequate to the existing circumstances to preserve its secrecy, taken by the person who legally controls this information.

The Civil Code of Ukraine prescribes that the owner of the commercial secret has the following rights:

- the right to use commercial secrets
- the exclusive right to authorize the use of commercial secrets
- the exclusive right to interfere with the unlawful disclosure, collection or use of commercial secrets

The commercial secret is protected in Ukraine while it remains unknown to the general public and protected by the adequate protection measures indicated above.

## 18.9 Enforcement of intellectual property rights

### *Criminal liability*

Under Ukrainian law, any action under the Criminal Code, as amended on 12 February 2006 by the Law "On the Introduction of Changes to the Criminal Code with Regard to the Protection of Intellectual Property" ("**2006 IP Criminal Amendments**"), may only be initiated against an individual before the common courts. Under the Criminal Code, intellectual property infringement is criminally punishable if it has caused substantial, extensive or very extensive damage to the rights owner.

Criminal sanctions are based on the non-taxable minimum monthly income (currently UAH 17). However, the extent of damage is calculated based on the tax social privilege, which currently amounts to UAH 1051.

According to the footnote to Article 176 of the Criminal Code, which stipulates criminal liability for infringements of copyright and related rights, the damage is:

- substantial if it amounts to more than 20 times the tax social privilege
- extensive if it amounts to more than 200 times the tax social privilege
- very extensive if it amounts to more than 1,000 times the tax social privilege

The same gradation applies to individuation devices, i.e., trademarks, trade names and appellations of origin (Article 229 of the Criminal Code).

Under the Criminal Code, as amended by the 2006 IP Criminal Amendments, if a trademark infringement causes **substantial damage**, then the following sanctions apply:

- A fine of 1,000 to 2,000 times the non-taxable minimum monthly income (currently UAH 17,000–34,000). The criminal(s) may be prohibited

from occupying certain positions or engaging in certain activities at the discretion of the court.

If the above acts are committed repeatedly, by a group of people, are premeditated or cause **extensive damage**, the sanctions are as follows:

- A fine of 3,000 to 10,000 times the non-taxable minimum monthly income (currently UAH 51,000-UAH 170,000).

If the above acts are committed by an official abusing their position or by an organized group, or if the acts cause **particularly extensive damage**, the sanctions are as follows:

- A fine of 10,000 to 15,000 times the non-taxable minimum monthly income (currently UAH 170,000-UAH 255,000). The criminal(s) may be prohibited from occupying certain positions or engaging in certain activities at the discretion of the court.

#### *Civil liability*

**Trademarks** — in accordance with Item 5 of Article 16 of the Law of Ukraine “On Protection of Rights in Trademarks for Goods and Services” No. 3689-XII, dated 15 December 1993, the trademark certificate holder has an exclusive right to ban other persons from using a registered trademark with respect to the goods and services covered by the certificate and the goods and services related to them, without the trademark certificate holder’s authorization. The use of the mark in accordance with Item 4 of Article 16 of the same law shall constitute:

- the application of the mark to any goods for which the mark is registered, to a packaging in which the goods are placed, to a signboard connected to the goods, to a label, a stamp or any other item attached to the goods, storage of such goods with the indicated application of the mark with the aim of proposition for selling, proposition for selling, import and export
- the use of the mark in relation to any services
- the use of the mark in business documentation or in advertisement and on the internet, including in domain names

Item 1 of Article 20 of the mentioned law establishes that any encroachment on the trademark certificate holder’s rights, stipulated by Article 16 of this law, including committing actions, which require the trademark certificate holder’s authorization, without such authorization, as well as preparation for committing such actions, shall be considered infringement of the trademark certificate holder’s rights, which incurs responsibility according to the effective legislation of Ukraine. Moreover, Item 2 of Article 20 of

the mentioned law establishes that on the trademark certificate holder's demand, such an infringement will be terminated and the infringer will reimburse the damages incurred to the trademark certificate holder.

Therefore, in accordance with the Law of Ukraine "On Protection of Rights in Trademarks for Goods and Services" the trademark owner is able to sue the infringer in order to prohibit the infringer from using their trademark and receive a damage award caused by such illegal use.

**Copyrights** — according to Article 15 of the Law of Ukraine "On Copyright and Related Rights," an author has "an exclusive right to allow or prohibit the use of the creative work by other persons." This exclusive right covers such usages as reproduction of works; any repeated promulgation of works, if carried out by an organization other than the one that carried out the first promulgation; general notification of the public of its works in such a manner that public representatives can access the works at any place and at any time at their own discretion; as well as other usages.

As it is stipulated in Article 50 of the Law of Ukraine "On Copyright and Related Rights", actions of copyright infringement that give a right for the protection in court shall be any actions by any person that infringe the economic rights of the author or their successor, including actions that pose a threat of infringement of copyright.

**Patents** — according to Article 28 of the Law of Ukraine "On Protection of Rights to Inventions and Utility Models", a patent gives to a patent owner an exclusive right to use, to allow and to prohibit third parties the following types of usages:

- the manufacture of a product with the use of a patented invention (utility model), the use of such a product, offering it for sale, including through the internet, sale, import and other introduction into civil circulation or storage of such a product for the stated purposes
- the application of a patent protected process or offering it for use in Ukraine, if the person who proposes this process knows that its use is prohibited without the consent of the patent owner or, if in case it is obvious

Article 35 of the same law indicates that courts of Ukraine are primarily responsible for patent enforcement and have jurisdiction over the following disputes:

- authorship of invention (utility model)
- establishing the fact of the use of the invention (utility model)

- establishment of the identity of the patent owner
- infringement of the rights of the patent owner
- conclusion and execution of license agreements
- right of prior use;
- compensation.

#### *Administrative liability*

Article 51<sup>2</sup> of the Code of Ukraine "On Administrative Violations" establishes that unlawful use of an intellectual property object (trademark, patent, copyrighted material, etc.) or other willful infringement of rights to an intellectual property object, which is protect by law, shall incur levying a fine of 10 to 200 times the non-taxable minimum monthly income (currently UAH 170-3,400), with confiscation of unlawfully manufactured goods and respective equipment and materials.

#### *Unfair competition*

Pursuant to Article 1 of the Law of Ukraine "On Protection against Unfair Competition", any actions, which contradict trade and other fair customs in commercial activity, are recognized as unfair competition. In particular, Article 4 of the subject law establishes that it is unlawful to use, without consent of an authorized person, another person's name, company name, trademark or other marks, which actions may lead to confusion with the activity of another subject of entrepreneurial activity that has a priority in use of such marks. Such actions are qualified as unfair competition.

Article 20 of the mentioned law establishes that the committing of actions recognized as unfair competition incurs levying of fines by the Antimonopoly Committee of Ukraine, as well as administrative, civil and criminal responsibility according to the effective legislation. Article 21 of the mentioned law stipulates that a fine is levied in the amount up to 5% of the income for sales of goods or rendering of services by an entrepreneurial subject during the last reporting year, and in the case of absence of such information, up to ten thousand non-taxable minimum monthly incomes.

#### *Customs control*

Further to the relevant provisions of the Customs Code, Ukraine's Ministry of Finance has developed a procedure under which the owner of intellectual property rights can register goods containing intellectual property with the appropriate customs authorities. This is in accordance with Resolution No. 648 "On Approval of the Procedure for Registration of Intellectual Property Rights that are Protected by Law in the Customs Register," dated 30 May 2012.

In practice, in order to prevent the import or export of goods infringing their intellectual property rights, the owner of such rights (or their representative) is entitled to file a petition with Ukraine's State Customs Service on the registration of the intellectual property rights in the Customs Register and seek the introduction of customs controls.

Customs officers are also authorized to block goods ex officio if they suspect that transportation of the goods across the custom border of Ukraine may violate the intellectual property rights of an entity or an individual. The owner of the intellectual property rights must then file a petition with the customs. If the owner files the petition in time, the customs suspends the clearance of goods for their further authentication. If the owner fails to file the petition in time, the goods are cleared through customs and admitted to the territory of Ukraine.

On 17 October 2019, the Verkhovna Rada of Ukraine (Parliament of Ukraine) adopted amendments to the Customs Code legalizing parallel imports, in particular focusing on copyrighted materials, industrial designs and inventions.

The amended version of the code introduces a new definition of "pirated goods", defined as goods violating copyright rights and/or industrial design rights and produced without consent of the right owner in the country of their origin.

The adopted version expands on the list of goods to which the measures for protection of IP rights (i.e., suspension of customs clearance, destruction or change of labeling of goods) are not applied. According to this list, such measures will not be applied in relation to original goods that were manufactured with the consent of the IP right owner.

A new additional procedure for the seizure and destruction of counterfeits is being introduced.

Another key change is that a new version obligates the IP right owners to pay for the customs warehouses storage of goods, the registration of which is suspended, starting immediately from the calendar day after the day of their placement in such a warehouse.

### **18.10 New High Intellectual Property Court of Ukraine**

On 2 June 2016, the Verkhovna Rada of Ukraine (Parliament of Ukraine) adopted amendments to the Constitution and the Law of Ukraine "On the

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Judiciary and Status of Judges". This allowed the creation of specialized courts (the High Intellectual Property Court and the High Anti-Corruption Court), limited representation before the courts to individuals licensed and admitted to practice law ("advocates"), allowed the extension of the International Criminal Court's jurisdiction over Ukraine and introduced new qualification requirements for judges.

The most essential development in the IP sphere was the introduction of the High Intellectual Property Court to the general judiciary system of Ukraine, which will act as the court of first instance for IP-related disputes.

This is very exciting news for the IP community in Ukraine and a long-awaited development. We expect that the creation of the IP court will improve the IP enforcement system in Ukraine by decreasing the duration of court proceedings, simultaneously increasing the quality of decisions in IP cases and, thus, stimulating further innovation. It is expected that this will be accomplished through, among others, the selection and training of skilled judges within specific areas of IP specialization, as well as by developing a uniform and consistent judicial practice. The creation of the High Intellectual Property Court is expected to be completed by the end of 2020.

**Baker  
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**19**

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### 19.1 Overview of applicable legislation

The Ukrainian competition legislation comprises a number of various laws, regulations and guidelines, including: (i) the Law of Ukraine On Protection of Economic Competition ("**Competition Law**"), (ii) the Law of Ukraine On the Antimonopoly Committee of Ukraine, (iii) the Law of Ukraine On Protection Against Unfair Competition ("**Unfair Competition Law**"), (iv) the Regulation On the Procedure for Filing Applications with the Antimonopoly Committee of Ukraine for Obtaining of Prior Approval of the Concentrations of Undertakings ("**Concentration Regulation**"), and others.

The Antimonopoly Committee of Ukraine (AMC) is the state regulator in the sphere of Competition Law. It has the authority to investigate infringements of Competition Law and impose fines, as well as to clear transactions that require prior approval from the AMC.

The Competition Law has extra-territorial effect, meaning that its provisions extend to transactions, relations, agreements and actions that take place among and are carried out by Ukrainian and/or foreign persons in or outside of Ukraine if they could affect competition in Ukraine.

The Competition Law and related legislation regulate the following matters:

- 1** merger control issues
- 2** anticompetitive concerted actions of undertakings and governmental authorities
- 3** abuse of a monopoly (dominant) market position
- 4** restrictive and discriminatory conduct of undertakings
- 5** unfair competition and advertisement
- 6** review of public procurement rules violations
- 7** state aid

## 19.2 Merger control

### *Transactions subject to AMC approval*

The Competition Law requires prior AMC approval for the following transactions (i.e., "concentrations") if the financial thresholds described below are exceeded:

- mergers or consolidations of business entities
- acquisition of direct or indirect control over a business entity or part thereof, including through:
  - direct or indirect acquisition into ownership, lease, concession or management of a significant part of assets of a business entity (including in the process of liquidation)
  - appointment to the positions of chairperson and/or deputy chairperson of the supervisory/management board or other supervisory/executive body of persons, who already hold similar positions in other business entities; or creating a situation where more than half of the members of the mentioned bodies hold similar positions in other business entities

- establishment of a business entity by two or more business entities that will engage in independent business activities over a prolonged period, provided that such establishment does not result in the coordination of competitive conduct among the founding business entities, or among them and the newly established entity
- direct or indirect acquisition of, obtaining ownership of or management over the shares (participatory interests) of a business entity if such acquisition results in obtaining or exceeding 25% or 50% of the voting rights in the highest governing body of the target business entity

#### *Financial thresholds*

The foregoing types of transactions (i.e., "concentrations") are subject to prior AMC approval if:

- The aggregate worldwide asset value or turnover of all parties to the transaction exceeds EUR 30 million, while the Ukrainian asset value or turnover of each of at least two parties to the transaction exceeds EUR 4 million for the fiscal year preceding the year of the transaction.

OR

- The Ukrainian asset value or turnover of the target, or sellers of assets, or at least one of the founders of the new business entity exceeds EUR 8 million, while the worldwide turnover of the other party exceeds EUR 150 million for the fiscal year preceding the year of the transaction.

The thresholds are to be calculated on a group level, meaning that all parties related by control to the transaction parties should be taken into account when doing the calculations.

#### *Exempted transactions*

The following transactions do not qualify as "concentrations" and, thus, do not require prior merger control approval even if the financial thresholds are exceeded:

- establishment of a business entity aimed at or resulting in coordination of competitive behavior between its parents, or its parents and the new business entity (this transaction may qualify as concerted actions and may require approval for concerted actions)
- acquisition of shares (interest) in a business entity by a financial institution for the purposes of re-sale within one year and on the condition that the acquirer does not exercise voting rights attached to such shares (interest)
- intra-group transactions, provided, however, that a group has been established in compliance with Ukrainian merger control requirements (i.e., all necessary AMC approvals were obtained for transactions)

leading to the establishment of the group if and when such approvals were required in the past)

- acquisition of control over a business entity or a division thereof, including the right to manage and administer the assets of such entity, by an appointed receiver (in insolvency proceedings) or by a state official

In addition, under the newly adopted non-binding recommendatory Guidelines on Notifiability of Joint Ventures, to qualify as a concentration and be notifiable under the merger control rules, a joint venture should meet the following criteria: be established from scratch by two or more undertakings, perform all the functions of an autonomous economic entity on a lasting basis, and such establishment should not result in coordination of competitive behavior, either of its founders or of the new joint venture and its founders.

#### *Procedures and timing*

If the transaction qualifies as concentration, and financial thresholds are exceeded, filing is to be made to the AMC and prior approval is to be received before the transaction can close. The filing obligation is mandatory, and even foreign-to-foreign transactions with no material nexus to Ukraine have to be cleared by the AMC if the financial thresholds are exceeded.

Some time ago the AMC simplified disclosure requirements for merger control filings and introduced a simplified fast-track filing review procedure, which takes up to 25 calendar days (15 days for initial review and 10 days for substance review). Fast-track review is available for transactions where:

- only one party is active in Ukraine
- the combined market share of parties on the same (horizontal) market does not exceed 15%
- the combined market share of parties on vertically integrated markets does not exceed 20%

The standard Phase I review procedure takes 45 calendar days (15 days for initial review and 30 days for substance review). The Phase II review procedure (if establishing grounds to prohibit the transaction) is limited to 135 days from the date of Phase II notice to parties.

Transactions cleared by the AMC have to be completed within one year from the date of approval, unless the authority allows a longer period.

The AMC may prohibit the concentration if it leads to monopolization or a substantial restriction of competition in the respective market or a significant part thereof.

### *Approval of the Cabinet of Ministers of Ukraine*

If the AMC refuses to grant its approval to the notified transaction, the Cabinet of Ministers of Ukraine may grant such approval under special circumstances, which are limited to cases where the positive effects of the transaction will have a greater impact on public interest than its negative effects.

## **19.3 Anticompetitive concerted actions**

### *Prohibited concerted actions*

The Competition Law prohibits any actions/arrangements/conduct of business entities which resulted or may result in prevention, elimination or restriction of economic competition on any product market in Ukraine.

The list of prohibited concerted actions includes:

fixing prices or other conditions for purchase or sale of goods

limiting production, markets, technological development or investments, or assuming control over them

dividing markets or sources of supply according to territory, type of goods, sale or purchase volumes, types of sellers, purchasers or consumers, or otherwise

distorting results of tenders, auctions or bids

ousting from the market or limiting access to (exit from) the market for other business entities, purchasers or sellers

applying different terms to equivalent transactions with other business entities, placing them in a competitively disadvantageous position

making the conclusion of contracts subject to acceptance of additional obligations, which, by their nature or according to commercial practice, are not relevant to the subject matter of the concluded contracts

substantially limiting the competitiveness of other business entities on the market without objective, justifiable reasons

engaging in similar actions (or failing to act) on the market, which resulted or may result in prevention, elimination or restriction of competition when an analysis of the situation on the market proves the absence of objective reasons for such actions or failure to act

Such concerted actions are prohibited unless they are individually allowed by the AMC (under the procedure established by the Regulation On the Procedure for Filing Applications with the Antimonopoly Committee of Ukraine for Obtaining of Prior Approval for the Concerted Actions of Undertakings ("**Concerted Actions Regulation**")) or fall under a limited number of exemptions.

#### *Available exemptions*

The Competition Law provides for a block exemption and general exemption, under which the parties (if they qualify) do not need to obtain prior AMC approval in order to engage in the described concerted actions.

Under the block exemption, the aggregate market share of the parties (on a group level) cannot exceed 15% (for horizontal or mixed concerted actions) or 20% (for conglomerate concerted actions) in any product market.

Under the general exemption, the prohibition does not apply if the restrictions set by a party relate to the use of its products supplied by such party or other suppliers, the purchase of products from other business entities or the sale of such products to other business entities, unless such restrictions: (i) result in a substantial restriction of competition, including monopolization on any product market, (ii) restrict access to such market for other business entities or (iii) result in economically unjustified price increases or a shortage of the respective goods. It is expected that the general exemption will be removed from the Competition Law in the very near future.

It should also be noted that the block exemption does not apply to the vertical concerted practices as there is a separate list of exemptions relating to the vertical concerted actions that is envisaged by the Typical Requirements Relating to Vertical Concerted Actions ("**Vertical Guidelines**"), adopted by the AMC in October 2017, which have been in effect as of 5 December 2017.

According to the Vertical Guidelines, certain types of vertical arrangements are exempted from the necessity of getting AMC approval, subject to the following conditions:

- The market shares of the supplier and the buyer in the respective relevant markets do not exceed 30%.
- Subject to the preceding paragraph, if the vertical arrangements are to be performed between an association of retailers and its members or such association and its suppliers (provided that no member of the

association has a total annual turnover exceeding EUR 25 million for the previous fiscal year).

- Concerted actions are to be performed between contractor and subcontractor (with certain exemptions).

At the same time, the Vertical Guidelines prohibit implementation of the following concerted actions without the AMC's approval:

- vertical concerted actions implemented between competing undertakings (with some exceptions)
- hard-core restrictions, such as price-fixing, on the territory or customer type (with some exceptions)
- any non-compete obligations concluded for more than five years or for an unidentified period of time (with some exceptions)
- obligations of the buyer not to produce, buy, sell/resell the goods after the termination of an agreement (with some exceptions)
- any direct or indirect obligation causing the members of a selective distribution system not to sell the brands of particular competing supplier(s)

#### **19.4 Abuse of a monopoly (dominant) position**

Dominant entities are subject to certain restrictions on their activities. Under the Competition Law, an entity can be considered as holding a monopoly (dominant) position, if it:

- has no competitors in the market
- does not face significant competition, in particular due to the limited possibility for other companies to enter the market in connection with certain privileges, barriers, etc.
- holds 35% or more of the market share, unless it proves that it faces competition on the relevant market
- has a lower market share, but does not face any significant competition in the market

The following unilateral conduct of a dominant entity is considered abuse of dominance and is prohibited:

- setting prices or other conditions for purchase or sale of goods, which could not have been set if there was significant competition on the market
- applying different prices or other conditions to equivalent transactions with business entities, sellers or purchasers without reasonable justification
- making the conclusion of contracts subject to a business entity's acceptance of additional obligations, which, by their nature or

according to commercial practice, are not relevant to the subject of the concluded contracts

- limiting production, markets or technological development, which harmed or may harm other business entities, purchasers or sellers
- refusing (partially or in full) to purchase or sell goods in the absence of alternative sources of such supply or purchase
- significantly limiting the competitiveness of other entities without objective, justifiable reasons
- establishing barriers for entering into (exiting from) the market or removing sellers, buyers or other market participants from the markets, etc.

This list is not exhaustive. Thus, any other type of harmful, restrictive conduct (or failure to act) from a dominant entity may also potentially be considered abusive.

The Competition Law also establishes the concept of “collective dominance” according to which entities are considered dominant (unless they prove otherwise) if:

- the aggregate market share of up to three entities, which have the largest market shares in the same product market, exceeds 50%
- the aggregate market share of up to five entities, which have the largest market shares in the same product market, exceeds 70%

The exceeding percentage is not in itself a problem; an entity has to abuse its dominant position/substantial market power to be liable under the Competition Law.

Entities holding a dominant position on the market face higher risks of being scrutinized by the AMC.

### **19.5 Unfair competition and advertisement**

Unfair competition is deemed as any competitive act that contradicts trade and other good-faith customs in business. Unfair competition is prohibited in Ukraine.

Unfair competition issues are regulated by the Unfair Competition Law, which determines the following unfair market practices that result in liability for business entities who engage in them:

- unauthorized use of a commercial name, trademark, advertisement materials, packaging materials and other marks that belong to another business entity

- unauthorized use of the goods of another manufacturer or copying their appearance
- comparative advertisement (save for comparative advertisement which meets the conditions established by the newly adopted amendments to the Law of Ukraine On Advertisement)
- discrediting business entities (spreading false, misleading or inaccurate information) or their goods
- coercion toward boycotting or discriminating against a business entity
- bribing an employee or manager of a supplier or customer
- attaining unlawful advantages in competition
- spreading misleading information
- unlawfully collecting, using or disclosing commercial secrets

### 19.6 Public procurement

Public procurements in Ukraine are governed by the Law of Ukraine On Public Procurement ("**Public Procurement Law**"), which approved the mandatory transition of all public procurement to the e-procurement system ProZorro since August 2016. The Public Procurement Law provides for three public procurement procedures:



Under the recently adopted amendments to the Public Procurement Law, it is expected that starting from 19 April 2020 the procurement of goods, works or services with an expected cost equal to or greater than UAH 50,000 and lower than the threshold for public bids procedure established by the respective law will be conducted via simplified procurement procedure.

Under the Public Procurement Law, appeals against any decisions, actions or omissions of the contracting authority may be filed through the e-procurement web portal at any stage of the tender procedure.

The AMC was determined as the public procurement review body responsible for considering appeals regarding violations of the public procurement rules.

### 19.7 State aid

In August 2017, the State Aid Law ("**State Aid Law**") came into force. The State Aid Law established the legal basis for monitoring state aid to business entities, mechanisms for exercising control over the compatibility of such aid and determined the AMC as the state aid regulator in Ukraine.

Types of state aid include subsidies and grants, capital injections on preferential terms, debt write-offs, state guarantees, tax incentives, deferral of tax, duties or other mandatory payments to state budget, indemnification of losses and others. The state aid can only be granted following notification to the AMC and receipt from the authority of its decision.

The AMC is responsible for reviewing notifications on state aid from its providers and deciding whether such new state aid is compatible with the internal market, as well as making decisions on recovery of incompatible state aid. The State Aid Law also provides for the concept of *de minimis* aid in an amount not exceeding EUR 200,000 that a single undertaking may receive over a rolling three-year period, which is not subject to notification to the AMC.

Under the State Aid Law, state aid is deemed compatible if it is granted in order to:

- provide consumers with socially important goods, given that such aid is non-discriminatory in terms of origin of such goods
- indemnify losses caused by natural or man-induced emergencies pursuant to the law

State aid may be found compatible if it is granted to:

- contribute to social and economic development of regions with poor living standards or a high unemployment rate
- implement nationwide programs or address nationwide social and economic needs
- contribute to the development of certain types of business activities or undertakings operating in certain economic areas, unless this violates the effective international treaties of Ukraine approved by the Ukrainian Parliament
- support and preserve national cultural heritage, provided it has minor impact on competition

Also, in October 2017, the AMC issued the State Aid Guidelines, which interpret the provisions of the State Aid Law to the state providers and recipients.

## 19.8 Liability for infringements of Competition Law, immunity/leniency

### *Actions qualifying as infringements*

The following activities, among others, are recognized as violations of the Competition Law, resulting in liability for parties that engaged in them:

- anticompetitive concerted actions by business entities or state/municipal authorities
- abuse of a monopoly (dominant) position
- failure to comply with AMC decisions or partial compliance
- restrictive or discriminatory activities
- failure to obtain AMC approvals for concentrations or concerted actions where such approvals were required
- failure to submit information at the request of the AMC, or submission of incomplete or incorrect information
- impeding AMC officials during the course of audits, raids or collection of documents or data carriers

### *Sanctions*

The following sanctions may be imposed on undertakings for Competition Law infringements:

- fines
- splitting-up of business entities
- administrative fines for officials/employees of undertakings and state/municipal authorities
- compensation of third-party damages
- invalidation of transactions
- ban on the entity's foreign economic activities
- confiscation of goods from turnover if such goods were produced/sold using or copying other parties' goods/trademarks
- recovery of incompatible state aid

### *Fines that may be imposed*

The AMC is authorized to impose the following fines for various types of Competition Law infringements:

- Up to 1% of the parties' annual turnover for the year preceding the year in which the fine is imposed for:
  - coercion toward Competition Law infringements
  - failure to submit information at the request of the AMC, or submission of incomplete or incorrect information
  - impeding AMC officials during audits, raids or collection of documents or data carriers

- restricting business activities of an undertaking in response to the latter's complaint to the AMC regarding Competition Law infringement
- Up to 5% of the parties' annual turnover for the year preceding the year in which the fine is imposed for:
  - failure to obtain merger control or concerted actions approval for transactions/activities that required approval (the AMC may also apply to a court to invalidate the respective transaction if it led to monopolization of any product market or if it significantly restricted competition on any product market in Ukraine)
  - coercion toward engaging in anticompetitive concerted actions
  - discrimination of competitors
  - engaging in activities prohibited by the Unfair Competition Law
- Up to 10% of the parties' annual turnover for the year preceding the year in which the fine is imposed for:
  - actual performance of anticompetitive concerted actions (the AMC may also apply remedial measures (i.e., impose certain obligations on parties to concerted actions) in order to restore competition on the market)
  - abuse of monopoly (dominant position)
  - failure to comply with an AMC decision or partial compliance

Fines may be imposed based on the turnover of the infringing parties on a group level (including all persons/entities related to the infringers by control).

### *Fining Guidelines*

On 15 September 2015, the AMC approved the Guidelines for Calculation of Fines for Violation of Ukrainian Competition Law ("**Fining Guidelines**"), which made the AMC's process of calculating fines more predictable and transparent.

Under the Fining Guidelines, horizontal anticompetitive concerted actions that led or may lead to elimination, distortion or limitation of competition in the market are considered as the "most severe." The recommended fine for such infringements is 15% of the turnover generated from sales or purchase of products that are directly or indirectly related to the infringements.

Implementing a transaction without approval from the AMC may qualify as a "severe" infringement (where it resulted in market monopolization or a

significant restriction of competition in the markets) or a “medium severe” infringement (where implementing a transaction without approval from the AMC did not lead to market monopolization or a significant restriction of competition). Abuse of dominance and other types of anti-competitive concerted actions, as well as some other types of infringement, may qualify as severe infringements as well.

The recommended fine for severe infringements is up to 10% of the turnover generated from the sales on the market in which concentration has taken place or in the adjacent markets.

The recommended fine for medium severe infringements, if there is an overlap in the parties’ activities (including their related parties), is between UAH 510,000 and 5% of the turnover generated from sales on the market in which the concentration has taken place or in adjacent markets – starting from the completion of the transaction until the merger control application is filed to the AMC or for the last fiscal year preceding the year in which the fine is imposed. If the parties’ activities do not overlap and they are active in different and non-adjacent markets, the recommended fine is between UAH 170,000 and UAH 510,000.

The fine amounts may be increased further or reduced by 50% if there are aggravating or mitigating circumstances.

The Fining Guidelines also establish guidelines for calculating fines for other types of infringements (e.g., providing inaccurate or incomplete information or failing to provide information at the request of the AMC (the maximum fine is 1% of group turnover), etc.).

#### *Statute of limitation/appeal of AMC decisions*

The general statute of limitation for holding undertakings liable for Competition Law infringements is five years from the date of committing the infringement. For continued infringement, the undertakings may be held liable within five years after the termination of infringement.

The five-year statute applies to all types of infringements except for failing to submit information at the request of the AMC, submitting incomplete or incorrect information or impeding AMC officials during the course of audits, raids or collection of documents or data carriers (for which a three-year statute of limitation applies).

The AMC's decisions may be challenged in commercial courts within two months from the date of receiving the decision. Reviewing claims against the AMC's decisions in lower commercial courts is limited to a two-month term.

#### *AMC powers in investigating infringements*

The AMC is entitled to investigate and make decisions in cases of abuse of dominant positions, infringement of the Unfair Competition Law, anti-competitive actions/omission of state bodies/agencies, submission of incomplete/inaccurate information to the AMC, non-submission of information to the AMC at its request, etc.

The Competition Law provides that the AMC is authorized to consider cases on Competition Law infringements and to render decisions in such cases, including:

- recognizing the violation
- ordering the termination of the violation
- ordering the elimination of the violation's consequences
- compelling state authorities, local self-governing authorities and administrative management authorities to cancel or amend their decisions or to terminate such authorities' agreements constituting anti-competitive actions
- recognizing a business entity as holding a monopoly (dominant) position in a given market
- recognizing a business entity as abusing its monopoly (dominant) position
- ordering the splitting-up (divestiture) of a business entity abusing its monopoly (dominant) position in a given market
- imposing fines
- blocking securities on securities accounts

#### *Leniency (immunity)*

In 2012, the Leniency Regulation was approved to allow undertakings to apply for immunity in cases regarding anticompetitive concerted actions. In order to receive immunity from the AMC, an undertaking must:

- be the first to voluntarily inform the AMC regarding the anticompetitive concerted actions (this has to be done prior to the AMC issuing a statement of objection in the investigation)
- provide exhaustive information and evidence to the authority to enable the AMC to issue its decision in the case
- cease any participation in the anticompetitive conduct subject to investigation

## 19.9 Competition Law reforms: achievements and expectations

The Ukrainian competition legislation has significantly altered in the last two years and a half. The reasons for this are a notable change in the AMC's composition and the willingness of the AMC management to comply with Ukraine's obligations relating to the implementation of the Association Agreement with the European Union. The main reforms, which were recently implemented, are as follows:

- Starting from May 2016, financial thresholds triggering a requirement for merger control filing were increased and became effective, while the market share triggering threshold (35%) was abolished.
- A mechanism of preliminary consultations with the AMC is now available to allow filing applicants to consult with the authority regarding the scope of disclosure in filings.
- A simplified fast-track filing review procedure (not exceeding 25 calendar days) and a limitation for the Phase II review period (135 calendar days) were introduced.
- A new Concentration Regulation was approved, which simplified disclosure requirements for parties in the course of filing preparation on one hand, while requiring profound economic analysis for transactions that may impact competition in Ukraine on the other hand.
- Applicants in merger control filings are now required to disclose the beneficial owners of their groups; failure to do so serves as a ground for rejection of filing by the AMC as being incomplete.
- Applicants can now offer remedies in situations where the AMC identifies grounds for prohibition of notified transactions.
- The Fining Guidelines (providing for greater clarity on calculation of fines that may be imposed by the AMC) were approved and the authority committed to following them despite their non-binding nature.
- Starting from July 2015, the AMC voluntarily started publishing non-confidential versions of its decisions and, in March 2016, the publication became binding on the AMC, providing for greater transparency of the AMC's activities.
- In December 2016, the AMC approved the Horizontal Merger Guidelines, which provide guidance on the authority's assessment of concentrations involving potential or actual competitors on the same product market.
- In August 2017, the Law of Ukraine On State Aid became fully effective.

- In October 2017, the AMC adopted the Vertical Guidelines, which provide clearer guidance on the permitted and prohibited concerted practices.
- In December 2017, changes to the Competition Law came into force, providing the AMC with the right to return the merger control and/or concerted actions filings without consideration if any party to the notified transaction is subject to governmental sanctions on the basis of the Law of Ukraine On Sanctions. The authority has also been granted with power to cancel its previously issued approvals of transactions where sanctioned companies were involved.
- In March 2018, the AMC approved the Non-Horizontal Merger Guidelines.
- In November 2018, the AMC adopted the new Guidelines on Definition of Control, which were developed on the concept of control similar to the European Union competition legislation.
- In February 2019, the AMC adopted the recommendation containing clarifications on the application of laws on protection of economic competition by participants of pharmaceutical markets in vertical agreements as to supply and promotion of medicines where, among other issues, the AMC clarified on the approaches to the market definition.
- In June 2019, the AMC adopted amendments to the provisions on concerted actions, which cancelled the concerted actions financial thresholds and removed *de minimis* exemption.
- On 19 September 2019, the Parliament of Ukraine adopted amendments to the Public Procurement Law, which introduced, among others, the notion of a simplified procurement procedure. Major changes will come into force starting from April 2020.
- In September 2019, the AMC adopted the non-binding Guidelines clarifying the ability to notify of the establishment of the joint ventures.
- In November 2019, a brand-new website of the AMC was launched, which is available in English as well (<https://amcu.gov.ua/en>).
- In November 2019, the Parliament of Ukraine adopted amendments to laws on comparative advertising defining the scope and number of conditions that should be met by permitted comparative advertising.
- During 2019, the President of Ukraine appointed six new state commissioners (out of nine) to the composition of the AMC.
- The statistics for 2019 show there was an increase in the overall activity of the AMC and in the level of fines imposed by the AMC compared to previous years.

The completed reforms represent a broader effort to harmonize the Ukrainian Competition Law with that of the European Union and generally make Ukraine a friendlier place to do business in. While the reforms have been supported and welcomed by the business community and legal experts, there is still a number of unresolved issues that need to be addressed by the AMC and the Ukrainian Parliament, including:

- approval of the draft law on calculation of fines for Competition Law infringements, which will make the Fining Guidelines mandatory for the authority
- revision of the Concerted Actions Regulation (which remained unaddressed during the first wave of reforms)
- implementation of the simplified conditions for mergers involving exchange of technology
- proposed changes to the Concentration Regulation, according to which in a case of acquisition of control, or more than 50% in a target, the seller's group revenues are no longer taken into account, meaning that only the target's domestic revenue would be counted when determining whether financial thresholds are triggered for purposes of notification. In case the concentration is structured as transfer of control over a part of business (property complex or structural unit), irrespective of legal entity status, only a turnover, which is directly connected with the activities of such part of business, is taken into account when defining whether merger control triggering thresholds are met. If these proposed changes come into effect, this would significantly reduce the number of concentrations currently notified to AMC.
- implementation of provisions on transaction value thresholds that will be specifically intended to capture transactions in the digital economy involving targets with no, or only insignificant, revenues
- increasing the filing fee for submission of a concerted actions application and merger application that does not qualify for review under the simplified procedure
- a number of other changes to the Ukrainian competition legislation aiming at implementation of the Association Agreement with the European Union and improvement of current competition legislation.

**Baker  
McKenzie.**



**20** CONSUMER  
PROTECTION AND  
PRODUCT LIABILITY



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## 20.1 General

The principal legislative act in Ukraine in the area of consumer protection and product liability is the Law of Ukraine on Protection of Consumer Rights ("**Consumer Rights Law**"), dated 12 May 1991, as amended. The core principles of the Consumer Rights Law have been further affirmed by the new Civil Code of Ukraine ("**Civil Code**") and the Commercial Code of Ukraine ("**Commercial Code**").

Under the Consumer Rights Law, producers of goods, providers of services and merchants have the obligation to furnish consumers with goods and/or services that comply with the established quality standards, the terms of the agreement with the consumer and the information about the goods/services provided by the producer/provider/merchant.

Pursuant to the Consumer Rights Law, producers of goods must ensure that goods are safe to use for the duration of their service life established by law or by the agreement with the consumer or, in the absence of any relevant provisions, for a period of 10 years.

Furthermore, the Consumer Rights Law requires that a producer of goods must ensure the availability of maintenance services and of spare parts for their products for the duration of the production of the product. After the cessation of production, spare parts should be available for the service life of the product or, if this has not been established by the manufacturer, for a period of 10 years. It also sets forth the obligations of producers (merchants) toward consumers with respect to the replacement of defective goods and warranty repairs.

Moreover, the consumer has the right to exchange non-food goods of appropriate quality for the same goods within 14 days, if such goods do not satisfy them in shape, size, style, color, or for other reasons, or if they cannot

be used for the intended purpose, as long as these goods are not included in the list of goods that cannot be exchanged approved by the Cabinet of Ministers of Ukraine.

In addition, in December 2010, the Law on General Safety of Non-Foodstuffs ("**Law**") was adopted. The Law provides a framework for releasing goods to market and for ensuring the safety of any product that is not a foodstuff, whether imported or manufactured domestically. The safety of products is presumed as long as they conform to the Ukrainian state technical standards, which are being harmonized with the relevant EU regulations. If a national standard is non-existent, certain other documents, including foreign standards, will be taken into account. The Law also establishes labeling requirements and user manual/safety instructions for non-foodstuff products, and requires the withdrawal of such products from the market if other safety measures have failed.

To complement the Law, the Law on State Market Supervision and Control of Non-Foodstuffs was adopted concurrently. It establishes, among other things, the procedure and criteria for quality testing of products and the conditions for the use of the Mark of Conformity with Technical Regulations. In addition, it describes in detail the powers of the relevant authorities in relation to safeguarding the safety of non-foodstuff products. The list of the products, with respect to which the state market supervision is to be performed, has been approved by the Cabinet of Ministers Resolution No. 1069, dated 28 December 2016. This resolution also indicates which state authority should supervise which types of products.

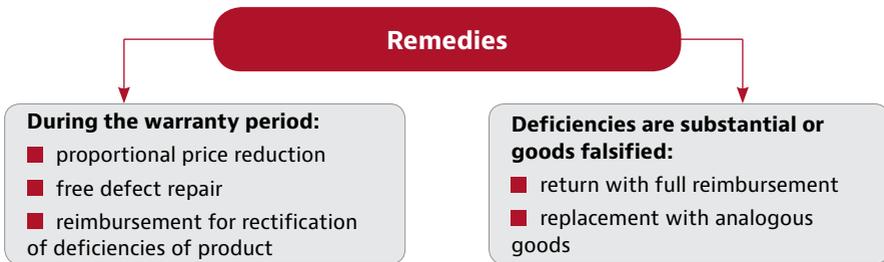
A number of technical regulations governing the quality of various groups of products (and harmonized with EU legislation) have been adopted since 2011.

As of 2 August 2019, the Law on Basic Principles and Requirements for Organic Production, Circulation and Marking of Organic Products establishes the criteria for organic products (including imported) and production processes. Please refer to Section 17.6.3 for brief overview of the new law.

## **20.2 Liability for damage caused by defective goods (services)**

Under the applicable Ukrainian legislation, in particular the Law on Liability for Damage Caused by Defect in Product ("**Defective Product Law**"), the Consumer Rights Law and the Civil Code, damage suffered by a consumer with regard to their life, health, or property caused by a producer's (provider's) goods (services) must be indemnified in full by the person who

inflicted the damage. The Defective Product Law introduced a concept of “defective goods” into Ukrainian legislation. It defines “defective goods” as goods that do not meet the level of security that the consumer or user may expect taking into account all the circumstances, including those related to the development, production, transportation, storage, installation, maintenance, consumption, use, destruction (recycling) of these goods, as well as the warnings and other information related to such goods.

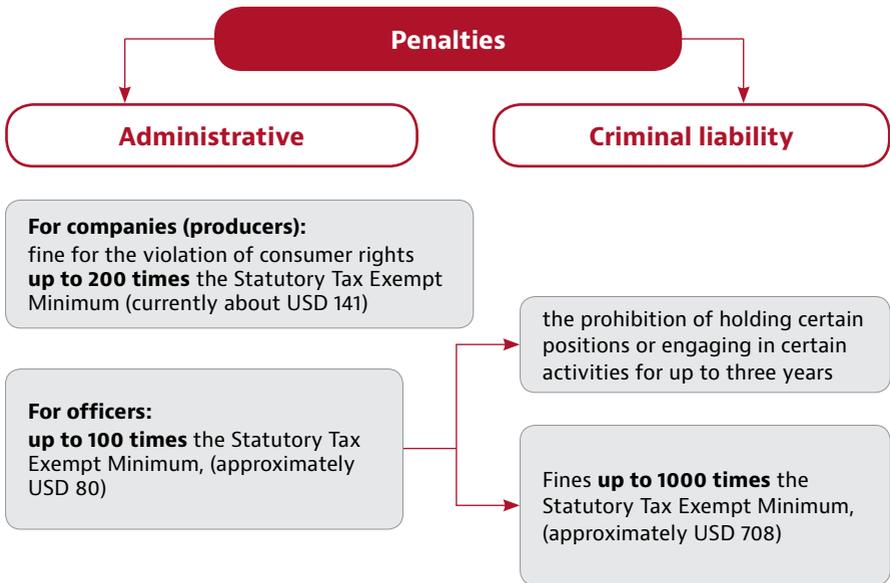


The right to claim damages, including “moral damages,” a concept similar to “emotional pain and suffering” in Western jurisdictions, is vested in every affected consumer, regardless of whether that consumer had concluded a contract with the producer (provider/merchant). This right is deemed valid for the duration of the service life of the specific product or, if the service life of the product is unidentified, for 10 years from the date of the manufacture of the goods (production of the works, rendering of services). The only exceptions to the above rule are cases where damage was inflicted due to the fault of the consumer or caused by force majeure.

### **20.3 Liability for violation of consumer rights and enforcement**

The applicable Ukrainian legislation provides for civil, administrative and criminal liability for the violation of consumer rights.

The scope of penalties envisaged by the Consumer Rights Law for the company for violation of consumer rights ranges from 1% to 500% of the cost of the relevant defective goods manufactured or sold, or the services rendered. Administrative fines and criminal liability is also possible.



**20.4 Enforcement**

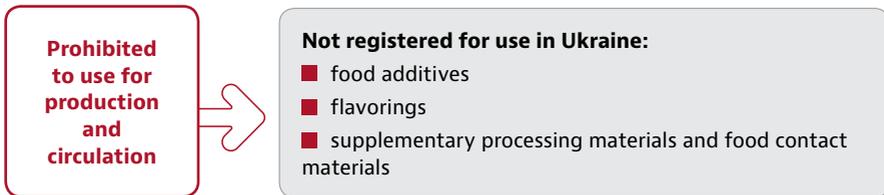
The State Service of Ukraine on Food Safety and Consumer Protection was formed in September 2015 and is subordinated to the Cabinet of Ministers of Ukraine. The service is responsible for the implementation of state policy in the areas of the state control of foodstuff safety; veterinary, sanitary and phytosanitary safety; state control of metrology; consumer rights protection related advertising; and state control of compliance with applicable regulations and technical standards. Its headquarters are in Kyiv and there are local branches in regions of Ukraine. Its officers are authorized to carry out planned and ad hoc inspections of the quality of products or services (including in response to customer complaints), to impose administrative fines and to issue mandatory orders or suspend operations of a production or trading facility if any violations of consumer rights (e.g., poor quality of products or services) are detected.

**20.5 Control over the quality of food products**

The Law of Ukraine on Main Principles and Requirements to Quality and Safety of Food Products ("**Quality Food Law**") sets requirements for producers, suppliers and sellers of food products for the development, production, import, supply, storage, transportation, sale, usage, consumption and utilization of these products. According to the Quality Food Law, feeds, live animals not intended for human consumption, plants

(before the harvest), medicines, cosmetic products, tobacco and tobacco products, narcotic and psychotropic substances, as well as pollutants do not qualify as food products. The Quality Food Law also does not apply to food products manufactured for personal consumption, supplementary processing materials and materials that are in contact with food (i.e., packaging).

The Quality Food Law is supplemented by the 2017 Law on State Control of Compliance with the Legislation on Foodstuffs, Feed, Byproducts of Animal Origin, Health and Wellbeing of Animals ("**Law on State Control**"), as amended. The Law on State Control determines the supervision of market operators' compliance with the legislation applicable to foodstuffs, feed, animal byproducts, as well as the health and wellbeing of animals in the course of their import into Ukraine. Also, from April 2018, the Law on State Control governs laboratory testing, defines the powers and qualification of the inspectors, conduct of inspections, etc. As of 2 August 2019, the Law on State Control also applies to the supervision of market operators engaged in organic production and/or the marketing of organic products.



On 6 January 2015, the Chief Inspector of Veterinary Medicine of Ukraine enacted an order approving the list of products of high and low risk for human and animal health ("**Inspection Order**"). Under the Inspection Order, products posing a high risk to human and animal health are in category I (fresh and frozen meat and fish, eggs, etc.) and category II (poultry, milk and dairy products, honey and bee products, etc.). Low risk products such as milk and milk products (for processing, not for consumption as is), frogs' legs and snails, bone and bone products, etc., are in category III.

On 4 October 2018, the Law on Amendments to the Customs Code of Ukraine and Other Laws of Ukraine on Implementation of Mechanism of "Single Window" and Optimization of Control for Moving Goods through Customs Border of Ukraine came into force, which significantly simplifies the control of goods imported into Ukraine. To supplement the law, on 24 October 2018, the Cabinet of Ministers adopted: (i) a list of products which, if imported into the customs territory of Ukraine (including for the

purpose of transit), are subject to official control measures; and (ii) a list of documents and information to be verified during preliminary documentary control.

Now, there is an express list of products that must undergo phytosanitary (vegetables, fruits, coffee, etc.), veterinary and sanitary control (live cattle, medicines for veterinary medicine, etc.), and products that must undergo the state control of food products (fish, eggs, meat, honey, etc.). A product is no longer checked several times; only one check by only one government authority is conducted for each particular product.

## 20.6 Food for children

On 2 December 2010, changes to the Law on Food for Children ("**Children's Food Law**") tightened the requirements for the raw materials, permissible additives and the manufacturing of foodstuffs for children of various ages. In particular, raw materials can only be used if they were produced in a specially certified area and comply with the minimal safety and quality requirements established by the Ministry of Health. Certain raw materials may not be used for the production of food for children (e.g., hydrated soybean protein, certain oils, fish and meat). The manufacturing facilities must have a special certificate issued pursuant to the procedure established by the Cabinet of Ministers. Moreover, in the production of food for children, use of artificial substances is prohibited: flavors (except vanilla, vanilla extract and ethyl vanilla); dyes; sweeteners (except special-purpose food for children); food additives, stabilizers; and aromas.

### *Food quality assurance*

Under the Quality Food Law, all food products produced in Ukraine must meet the legislative requirements with regard to safety and certain indicators of food products quality. If there is evidence that a food product may be harmful, regardless of its compliance with safety legislation and food quality indicators, the production and circulation of such a food product should be ceased and prohibited.

Due to the Law on State Control, the relevant state authorities are entitled to inspect the production process of market operators and quality of their food products (by conducting relevant laboratory analysis). Therefore, producers of food products must take appropriate measures to prove that their products are safe and comply with the international system of food products quality assurance "Hazard Analysis and Critical Control Point" (please refer to Section 17.5.6. for details). This can be achieved by the appropriate marking of the food products, among other measures.

In view of the recent changes with regard to food quality assurance, the requirement for many documents, which previously certified food quality, was cancelled. Certification of food products is not obligatory, except for the requirement to obtain an international certificate for food products destined for export, which is issued by the State Service of Ukraine for Food Safety and Consumer Protection.

In November 2010, the Ministry of Health of Ukraine enacted an order prescribing the list of food ingredients that must be tested for the presence of genetically modified organisms ("**Order**"), i.e., any organisms in which the genetic material has been altered using artificial gene transfer techniques that do not occur under natural conditions. The food ingredients that must be tested include soya, corn, potatoes, tomatoes, wheat, rice, sugar beet, melons, cotton and many other similar products and their derivatives. Among the products that must be tested are products for children and the raw materials used for their production, special dietary foods, special-purpose foods, dietary supplements and nutritional supplements that are produced with the use of ingredients specified in the Order.

#### *Operational permit*

According to the Quality Food Law, all market operators involved with the production and/or storage of food products of animal origin must obtain an operational permit for each food production unit. Such permits are issued by relevant territorial bodies of the State Service of Ukraine for Food Safety and Consumer Protection.

Moreover, under the Sanitary Law, economic activities that are related to potential hazards to human health are subject to obligatory licensing. Under the Law on Licensing Types of Economic Activities, dated 2 July 2015, among such activities are the production and sale of ethyl, cognac and fruit spirits, alcoholic beverages and tobacco.

#### *State registration of food products*

Under the Quality Food Law, novel foodstuffs, food additives and flavorings, as well as natural mineral drinking water, enzymes and some other products (e.g., materials that come into contact with foodstuffs) that can be used in food production and released into the Ukrainian market are subject to mandatory state registration. The Ministry of Health is in charge of the state registration of such novel foodstuffs, food additives, mineral drinking water, enzymes and flavorings. After state registration is carried out, the registered food additives and flavorings are included in a special register. For the majority of products, registration should be completed within 30 working days. Registration of

food additives may take up to 120 working days and registration of novelty foodstuffs may take up to 180 days. The Quality Food Law provides for the expedited registration of food additives if these particular food additives are approved for use by the relevant international organizations.

Under the Children's Food Law, all food products for children either produced in Ukraine or imported into Ukraine are subject to obligatory state registration.

Food products for special diets, special-purpose food products and dietary supplements are no longer subject to state registration, except for novel (non-traditional) food products, which must be registered.

#### *Labeling requirements*

The new Law of Ukraine on Information for Consumers on Food Products ("**Law on Food Products Information**"), which is in effect from February 2019, establishes labeling requirements for food products. It replaces and furthers the provisions of the Quality Food Law regarding labeling requirements.

The Law on Food Products Information provides that labeling must be in the Ukrainian language and convey the required information in a manner intelligible for consumers. The labeling should indicate: (i) the name of the food product; (ii) a list of ingredients; (iii) any ingredients and additional processing materials provoking the allergic reaction or intolerability; (iv) the quantity of certain ingredients or categories of ingredients in cases provided by law; (v) the net quantity of food in the established units; (vi) the minimal expiry date or date "best before"; (vii) any special conditions of storage and use; (viii) the name and full address of the operator of the food product market, responsible for the information about the food product; (ix) country or place of origin in certain cases; (x) instructions on the use, if its absence complicates the proper use of the food product; (xi) the actual alcohol content in a beverage, if it contains more than 1.2 percent volatile ethyl alcohol; and (xii) the nutritional value of the food product.

Food products must convey information about the presence or absence of genetically modified objects (GMOs) in the food product by placing the words "Contains GMO" or "GMO free," as the case may be, on the label of the product. Labeling food products that do not contain genetically modified organisms with the words "GMO free" is voluntary. Food products that contain more than 0.9% of genetically modified organisms or that have been produced from genetically modified organisms exceeded 0.9% must

have these facts stated on the label, or the producer (seller) must withdraw such products from the market. The abovementioned information shall be conveyed directly on the package or attached label in a visible place, be clear and legible and, if necessary, be applied in a way that makes it impossible to be removed. It should not be concealed or distorted by other text or graphic information.

Moreover, some additional information can be added on a voluntary basis. Such information should not (i) mislead the consumers; (ii) be unintelligible or complicated for the consumers; and (iii) should be based on the relevant scientific data (which may be need to support a claim about a product).

#### *Hazard analysis and critical control point system*

Under the Quality Food Law, individuals and legal entities engaged in the production or sales of food products (market operators) are obliged to apply the international system of food products quality assurance "Hazard Analysis and Critical Control Point" (HACCP) at their enterprises and/or other systems to ensure the safety and quality of the production and release of food products onto the market.

#### *Prohibition on non-milk ingredients in traditional dairy products*

In May 2013, amendments to the Law on Milk and Dairy Products expressly prohibited the use of any non-milk derived proteins or fats, as well as any stabilizers and preservatives, in traditional dairy products. These include butter, cheese, and various types of fermented milk products (yoghurts). Imported dairy products are subject to control in this respect prior to customs clearance. Any product that contains replacers of milk or of its components (including vegetable oils) must be marked as "milk containing products/drinks," "cheese products," etc.

#### *The Quality Food Law harmonized with EU law*

The Quality Food Law is in effect from 20 September 2015. It aims to: (i) harmonize the legislation of Ukraine with the EU legislation in the field of safety and food quality; (ii) ensure a high level of protection of human health and consumer interests; (iii) create transparent conditions for business; and (iv) improve the competitiveness of domestic foods and reduce their prices. It clarifies terminology, types of offenses and penalties and cancels some permits and procedures pursuant to the EU legislation.

- An operating permit is needed only by production facilities for the production and/or storage of food products of animal origin (i.e., milk, meat, fish and shellfish, including fresh, chilled or frozen, eggs, honey, derivatives and other products made from animal parts, their

organs and/or tissues intended for human consumption). However, this requirement does not apply to the primary production of food products of animal origin and related activities (transportation, storage, etc.).

- If it is not necessary to obtain an operating permit, the production facilities must be registered. An application for registration should be submitted no later than 10 days before the start of work of such production facilities.
- The list of products subject to state registration has been extended. In particular, new food products, nutritional supplements, flavorings, enzymes, processing aids and materials in contact with food that is released onto the Ukrainian market for the first time and drinking water that is classified as “natural mineral water.”
- The application of HACCP is obligatory. For a breach regarding the implementation of HACCP, legal entities will pay a fine in the amount of 30 times the minimum monthly salary, i.e., UAH 141,690<sup>1</sup> (approximately USD 5,899<sup>2</sup>). For the same violations, individual entrepreneurs will pay a fine in the amount of 15 times the minimum monthly salary, i.e., UAH 70,845<sup>3</sup> (approximately USD 2,949<sup>4</sup>).

## 20.7 New law on standardization

The USSR state standards (GOSTs), the standards of the Ukrainian Soviet Socialist Republic (PST USSR), codes of practice and technical standards, as well as the industry standards (OST) and other similar regulations of the former USSR, and the industry standards (GSTU) are applicable until they are replaced by national standards or codes of practices (which has happened a lot), or cancelled. All GOSTs should be cancelled by the end of 2021. At the same time, in the course of 2019, some new national standards harmonized with European standards have been adopted.

On 16 October 2020, the Law on Amendments to Some Legislative Acts of Ukraine in Connection with the Adoption of the Law of Ukraine “On Standardization” will come into force. This law is aimed at bringing the national standardization system in line with international and European practice. Please refer to Section 17.7 for brief overview of the new law.

The current Law of Ukraine on Standardization (“**Standardization Law**”) came into effect on 3 January 2015. Under the Standardization Law, among the objects that are subject to standardization are the following:

<sup>1</sup> Minimum Monthly Salary as of 15 February 2020.

<sup>2</sup> Exchange rate as of 15 February 2020.

<sup>3</sup> Minimum Monthly Salary as of 15 February 2020.

<sup>4</sup> Exchange rate as of 15 February 2020.

(i) materials, components, equipment, systems, their compatibility; (ii) rules, procedures, functions, methods, activities or their results, including products, control systems; (iii) requirements for terminology, symbols, packaging, marking, labeling, etc. It does not apply to sanitary measures regarding food safety; veterinary, sanitary and phytosanitary measures; construction standards; pharmaceuticals; health care standards; accounting; assessment of property, education and other social standards.

The Standardization Law provides for the establishment of a national standardization body ("**Standardization Body**") that is in charge of the realization of state policy in the field of standardization. This role has been assigned to the state enterprise "Ukrainian Scientific Research and Training Center for Issues of Standardization, Certification and Quality." The powers of the Standardization Body include organization and coordination in the field of standardization, approval of the schedule of standardization, adoption and cancellation of national standards, including the establishment and termination of technical committees on standardization and the representation of Ukraine in international regional organizations. The Standardization Body has been adopting existing EU standards as Ukrainian state standards, including the production of their translations into Ukrainian.

The Standardization Law envisages two levels of standardization: (i) national standards that are adopted by the Standardization Body (application is voluntary, unless otherwise expressly provided for in the relevant legislative acts); and (ii) standards and technical standards that are adopted by enterprises (application is voluntary). For example, Ukrainian companies wishing to sell their products in foreign markets may follow the standards required in such market(s).

#### *Technical regulations and conformity assessment law*

On 15 January 2015, the Verkhovna Rada of Ukraine enacted a new Law of Ukraine on Technical Regulations and Conformity Assessment ("**Technical Regulations Law**") pursuant to the obligations of Ukraine under the Agreement on Technical Barriers to Trade of 1994. The Technical Regulations Law is a consolidation of the Law of Ukraine on Conformity Assessment and Law of Ukraine on Standards, Technical Regulations and Conformity Assessment Procedures. It establishes unified legal and organizational principles for the development, adoption and application of technical regulations and conformity assessment procedures. The Technical Regulations Law is applicable to all products, except artwork and unique items of folk art and antiques. It is also not applicable to sanitary and phytosanitary measures; certification of seeds and planting

material; approval of design of wheeled vehicles and their parts; conformity assessment of services, etc. As of 3 July 2019, it also does not apply to the construction objects; certification of organic production and/or circulation of organic products; certification of subjects and objects of aviation activity.

The Technical Regulations Law extended the concept of “technical regulation”, which is defined as a legal act that stipulates the characteristics of products or related processes and production methods, including the relevant administrative provisions, the observance of which is mandatory. It may also include requirements for terminology, symbols, packaging, marking or labeling, in so far as they apply to a product, process or production method. In the previous Technical Regulations Law, technical regulation was limited only to the laws of Ukraine and legal acts adopted by the Cabinet of Ministers of Ukraine.

The purpose of technical regulations is to protect the life and health of people, animals and plants, the environment and natural resources, energy efficiency, property, national security and prevent business practice that defrauds consumers. However, the legislation may specify other purposes of the adoption of technical regulations.

Technical regulations can be developed on the basis of both: (i) international standards (except when such international standards or their relevant parts are ineffective, or use improper means to achieve the purposes of the relevant technical regulations); and (ii) regional standards, national standards of Ukraine and other states, legislative acts of the EU and other economic groups, or other states, or the relevant parts of such standards and legislation. At the same time, the Technical Regulations Law expressly stipulates that all technical regulations in Ukraine shall be developed, adopted and applied based on the principles established by the WTO Agreement on Technical Barriers to Trade of 1994.

Moreover, when technical regulations are developed based on an EU legislative act, their content, form and structure should fully and accurately reflect the content, form and structure of the EU legislative act, on the basis of which it is developed. All products must comply with the requirements stipulated in the relevant technical regulations, unless otherwise specified in the relevant technical regulation or the legal act that enacted this technical regulation.

The Technical Regulations Law also sets out the requirements for the conformity assessment procedure, the application of which is provided by

the relevant technical regulations. Such conformity assessment procedures should be developed, adopted and applied on the basis of the principles established by the WTO Agreement on Technical Barriers to Trade of 1994. The conformity assessment procedures can be developed on the basis of: (i) the guidelines or recommendations of international standardization organizations, except when they are inconsistent with the protection of the life or health of humans, animals or plants, the environment or natural resources, energy efficiency, the protection of property, national security, the prevention of business practices that defraud consumers; and (ii) the guidelines or recommendations of regional standardization organizations, legislative acts of the EU and other economic groups, or other relevant states.

The assessment of conformity with the requirements of the technical regulations is carried out in the cases and with the use of the conformity assessment procedures defined in the relevant technical regulations. These procedures are performed by either the producers or the importers or distributors (when this obligation is imposed on them by the relevant technical regulations).

In addition, the technical regulations may provide:

- A declaration of conformity with the technical regulations. In this case, the producer or its authorized representative shall issue a declaration of conformity claiming that the requirements applicable to the products defined in the relevant technical regulation have been met. If several technical regulations are applied with regard to one product and they provide the issuance of a declaration of conformity, the producer or its authorized representatives shall issue one declaration to cover the conformity of the products with all the technical regulations. The producer, by virtue of issuance of the declaration of conformity, undertakes responsibility for the conformity of the products with the requirements laid down in the relevant technical regulations.
- The labeling of products with a mark confirming their conformity with the technical regulations. The terms and conditions of the labeling are established in the technical regulations. When such terms are not established, the Cabinet of Ministers of Ukraine shall adopt the relevant labeling terms.

#### *Limitation on consumption of alcohol and tobacco*

In January 2010, the Verkhovna Rada of Ukraine adopted restrictions on the consumption of alcohol and tobacco, including special labeling requirements, zoning and other rules for the sales of these products. Under this law, low-

alcohol beverages have the legal status of alcohol. Moreover, all restrictions regarding alcohol consumption and sales are currently applied with regard to low-alcohol beverages. Furthermore, amendments to the Administrative Violations Code have been made whereby specific liability for the violation of the abovementioned restrictions has been established.

*Production, circulation and marking of organic products*

The Law on the Basic Principles and Requirements to Organic Production, Circulation and Marking of Organic Products regulates the circulation and marking of organic products produced in Ukraine, imported into the customs territory of Ukraine or exported from it. The law establishes certain requirements to the production, circulation and marking of the organic products (including imported) by the market operators, including the obligation to register as an organic products market operator in the special registry upon receipt of the relevant certification from an authorized surveyor. Such producers must undergo an annual certification of compliance with the requirements of the law and have the exclusive right to apply to their products labels the following words, among others: "organic," "biodynamic," "biological," "ecological," "natural" and any derivative words that include the prefixes "bio" and "eco". The law also provides fines for violation of the requirements of the production, circulation and marking of organic products.

## **20.8 Developments in legislation to come into effect in 2020**

On 20 September 2019, the Verkhovna Rada of Ukraine adopted the Law on Amendments to Some Legislative Acts of Ukraine in connection with the adoption of the Law of Ukraine "On Standardization". This law will come into force on 16 October 2020.

It amends a range of Ukrainian laws for the purpose of the alignment of the national standardization system with international and European practice.

In particular, the law provides for the voluntary application of national standards to comply with the WTO Agreement on Technical Barriers to Trade of 1994. It also stipulates the abolition of industry standardization, whereby over the period of the next 15 years, central executive authorities (relevant ministries, etc.) have the right, in their respective fields of activity, to review and revise their industry standards for the purpose of their transfer to national or enterprise levels, or their abolishing.



**Baker  
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**21** **INTERNATIONAL  
TRADE AND COMMERCE**



**EXPERT**

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**PARTNER**

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Managing Partner

## 21.1 World Trade Organization

On 16 May 2008, Ukraine officially became a member of the World Trade Organization (WTO) and undertook the commitments under the WTO multilateral agreements. In March 2016, Ukraine ratified the WTO's revised Agreement on Government Procurement (GPA), which includes 20 parties covering 48 WTO members including, among others, the European Union, Canada and the United States. Ukraine's commitments under the GPA cover the public procurement of goods and services except for the following:

- the goods and services for the design, development and production of its currency, personal identification documents, and citizenship documents, including passports, and other documents requiring special security features
- services of international mediation courts and international commercial arbitration institutions that are provided for resolution of disputes involving a procuring entity
- services of financial institutions, including international institutions, related to the raising of credit resources and funds by a procuring entity
- R&D services
- financial and related services procured or provided by Ukraine's National Bank

Ukraine is not a member of the Agreement on Trade in Civil Aircraft and holds an observer status on the Committee on Trade in Civil Aircraft.

Furthermore, Ukraine entered the WTO dispute settlement mechanism, which has facilitated the defense of Ukrainian trade interests. The WTO dispute settlement procedure is based on clearly defined rules of trade, with which all member states must comply. Ukraine has already sought consultations and dispute settlement with Armenia, Moldova, Australia, Kazakhstan, the Russian Federation and the Kyrgyz Republic regarding trade barriers within the WTO dispute settlement framework.

The most acute trade disputes considered by the WTO are between Ukraine and the Russian Federation. Ukrainian complaints refer to certain measures imposed by the Russian Federation on the importation of railway equipment and parts thereof (DS499) and traffic in transit from Ukraine through the Russian Federation to third countries (DS512). On 13 October 2017, Ukraine requested consultations with the Russian Federation with respect to measures concerning trade of certain Ukrainian goods (DS532). In its turn, the Russian Federation requested consultations with Ukraine regarding certain measures undertaken by Ukraine with respect to trade in goods and services (DS525) and anti-dumping measures on ammonium nitrate (DS493). In addition, on 17 October 2018, Ukraine requested consultations with Armenia (DS569) and the Kyrgyz Republic (DS570) with respect to the anti-dumping measures on steel pipes.

### 21.2 Measures on protection of national manufacturer

In line with the WTO Antidumping Agreement, Ukrainian legislation provides for the national measures on the protection of national manufacturers, governed by Law of Ukraine № 330-XIV, dated 22 December 1998 "On the Protection of the National Manufacturer from Dumped Imports", Law of Ukraine № 331-XIV dated 22 December 1998 "On the Protection of the National Manufacturer from Subsidized Imports" and Law of Ukraine № 332-XIV dated 22 December 1998 "On the Application of Special Measures on Imports into Ukraine".

The decision on initiation of an antidumping, compensation or special investigation, as well as on adoption of the relevant measures are taken by the Interdepartmental Commission on International Trade. The investigation is run by the Ministry for Development of Economy, Trade and Agriculture of Ukraine ("**Ministry**"). In case of the initiation of the investigation by the Interdepartmental Commission on International Trade, any foreign or Ukrainian company that might be affected by the potential measures may defend its interests by submitting to the Ministry its arguments and relevant evidence subject to prior registration with the Ministry as the interested party. As a rule, the registration as an interested party is possible within a short period of time, not exceeding 30 calendar days from the date of publication of the notice of initiation of the investigation.

The investigations are conducted in Ukrainian and all the evidence and other information provided by interested parties should be translated into Ukrainian.

The decision on the application of the antidumping, compensatory or special measures may be challenged in court within one month from the

date of adoption of the decision by the Interdepartmental Commission on International Trade. For WTO members, the decisions on the measures can be challenged in WTO. The countries who have special trade treaties with Ukraine may use the trade defense mechanism provided by such treaties to negotiate the lifting of the measures introduced by Ukraine.

Currently, national producers are actively addressing the Ministry with requests to initiate antidumping as well as special and compensatory investigations. In recent years, the number of trade investigations conducted in Ukraine has increased, in particular with respect to imports from CIS countries and China.

As of January 2020, there are seven pending antidumping investigations in Ukraine, including with respect to the import of aluminum wheel rims from China and Russia, of aerated concrete blocks from Russia and 3 pending sunset reviews. With respect to the import of ammonium nitrate from Russia, pending investigations include products made of ferrous metals without electrical insulation from China and seamless stainless steel pipes from China. There are also three pending special investigations with respect to the import of nitrogen fertilizers, mineral fertilizers and syringes irrespective of the country of origin.

Currently there are 20 antidumping measures, two special measures and one compensatory measure effective in Ukraine.

## **21.3 EU-Ukraine trade regime**

### ***21.3.1 Autonomous trade measures for Ukraine***

Autonomous trade measures (ATMs) for Ukraine entered into force on 1 October 2017 and consist of:

- establishing additional quantities of agricultural products which Ukraine can export to the EU under the DCFTA without paying customs duties (i.e., wheat, maize, barley, barley groats and pellets, natural honey, processed tomatoes, grape juice and oats)
- the elimination of customs duties for several industrial products (i.e., footwear, fertilizers, aluminum products and consumer electronics)

The ATMs shall apply until 1 October 2020 and are expected to further boost Ukrainian exports to the EU countries.

Additionally, in July 2019 the EU and Ukraine signed the agreement amending the trade preferences for poultry meat and poultry meat

preparations provided for by the EU-Ukraine Association Agreement ("**Amending Agreement**"). The Amending Agreement increased the amount of quotas for poultry meat and poultry meat preparations from 16,000 tons/year with linear increase in five years to 20,000 tons/year to 50,000 tons/year and extended tariff-rate quotas to additional tariff lines of poultry meat and poultry meat preparations.

### **21.3.2 Rules of origin**

The proof of origin must be supported by a EUR1 certificate, a EUR-MED certificate or an invoice declaration (for consignments of a value not exceeding EUR 6,000 or by an approved exporter). An invoice declaration should be made by the exporter by typing, stamping or printing on the invoice, the delivery note or another commercial document. A EUR1 certificate or a EUR-MED certificate should be issued by the customs authorities of Ukraine in one of the official EU languages.

### **21.4 Pan-Euro-Mediterranean preferential rules of origin**

On 1 February 2018, Ukraine joined the Regional Convention on Pan-Euro-Mediterranean Preferential Rules of Origin ("**PEM Convention**"). Starting from 1 January 2019, the PEM Convention applies to bilateral trade between Ukraine and the European Union.

The PEM Convention provides for identical rules of origin allowing for diagonal cumulation between its contracting states. This means that materials which have obtained the status of origin in one of the contracting states may be incorporated in goods produced in another contracting state without changing the status of origin of those goods when exported to a third contracting state. Diagonal cumulation will apply only if the free trade agreements are in place between all contracting states concerned. As of now, Ukraine has concluded the free trade agreements with the following parties to the PEM Convention: the EU member states, Iceland, Israel (as of January 2020, Ukraine is not yet ratified by Israel), Liechtenstein, Norway, Switzerland, Montenegro, Moldova, Macedonia and Georgia.

### **21.5 Ukraine sanctions legislation**

In response to the military aggression of the Russian Federation and the annexation of the Ukrainian territory, the Verkhovna Rada adopted the Law of Ukraine "On Sanctions", dated 14 August 2014 ("**Sanctions Law**"), which became effective on 12 September 2014.

### 21.5.1 Scope and grounds of application

The Sanctions Law establishes the grounds and mechanisms for applying special trade and trade-related restrictive measures (sanctions). According to the law, sanctions may be introduced by Ukraine against a foreign state, a foreign legal entity, a legal entity controlled by a foreign entity or an individual, foreign individuals, stateless persons, as well as against other persons involved in terrorist activity.

Decisions on imposing, amending or lifting sanctions are adopted by the National Security and Defense Council of Ukraine (NSDC) upon proposals of the Verkhovna Rada of Ukraine (the parliament), the President of Ukraine, the Cabinet of Ministers of Ukraine (the government), the National Bank of Ukraine or the Security Service of Ukraine. A decision of the NSDC on personal sanctions is brought into effect by an order of the President of Ukraine. In case of sectoral sanctions, a decision of the NSDC shall be enacted by an order of the President of Ukraine and subsequently approved by the Verkhovna Rada of Ukraine within 48 hours from the date of publication of the order of the President of Ukraine enacting the NSDC decision.

#### The basis for applying sanctions



### 21.5.2 Types of sanctions

The Sanctions Law allows both personal and sectorial sanctions to be introduced.



This list of sanctions is not exhaustive and allows for the introduction of other measures not directly provided by the Sanctions Law but corresponding to the objectives and principles of the Sanctions Law. Moreover, the majority of the sanctions referred to above may be broadly interpreted and further include a wider range of restrictive measures.

The Sanctions Law does not contain a list of persons (either natural persons or legal entities) subject to sanctions but provides a separate procedure on the approval of such lists.

### **21.5.3 Effective sanctions**

- Presidential Decree No. 133/2017, dated 15 May 2017, enacting the Resolution of the National Security and Defense Council of Ukraine, dated 28 April 2017

In May 2017, Ukraine prolonged the existing personal sanctions imposed in 2015-2016 on 271 legal entities and 780 individuals and introduced personal sanctions against 97 legal entities and 448 individuals.

Various types of sanctions apply to the abovementioned legal entities and individuals. The list of sanctions includes such measures as assets freeze, restrictions on trade operations, restrictions on withdrawal of capital from Ukraine, suspension of performing economic and financial obligations, prohibition from participating in public procurement, denial and cancellation of visas, prohibition from entering Ukraine, prohibition for Ukrainian internet service providers from providing access to certain online services/websites and other restrictions.

The sanctions were imposed against citizens of Russia, Ukraine, Poland, the United Kingdom, Italy, Greece, Serbia, Spain, France, Bulgaria, Israel, etc.

The sanctions also apply to legal entities but mostly to illegal militarized organizations operating in Eastern Ukraine and Russian legal entities operating in banking and finance, payment services, the military-industrial complex, aviation, navigation, telecommunication and IT sectors.

The term of sanctions application varies from one to three years for legal entities and from one to five years, or termless, for individuals.

- Presidential Decree No. 126/2018, dated 14 May 2018, enacting the Resolution of the National Security and Defense Council of Ukraine, dated 2 May 2018, as amended by Presidential Decree No. 176/2018, dated 21 June 2018, enacting the Resolution of the National Security and Defense Council of Ukraine, dated 21 June 2018

In May 2018, Ukraine prolonged the existing personal sanctions imposed in 2015-2017 and imposed new sanctions against legal entities and individuals involved in Russian aggression against Ukraine. The new set of sanctions targeted persons doing business in the Crimea and supplying weapons to Russia as well as those involved in information and cyber-attacks against Ukraine and in unlawful actions against Ukrainian citizens unlawfully detained in Russia.

The new sanctions significantly extended the Ukrainian sanctions program against Russia by placing more than 400 companies and 1000 individuals on the sanctions list with a broad range of sanctions measures (assets freeze, restrictions on financial and trade operations) applying to them. In particular, the following companies were affected:

- Russian oil and gas companies Rosneft, Lukoil and Transoil
- major Russian producers of fertilizers, such as PhosAgro PJSC, EuroChem Mineral and Chemical Company, United Chemical Company Uralkhim
- companies related to the WebMoney online payment settlement system, such as WM Transfer Ltd (Lithuania), BMP Ltd (Russia), WebMoney.Ru Ltd (Russia), WebMoney Europe Ltd (the United Kingdom), Amstar Holdings Limited (Hong Kong), etc. (The sanctions also prohibit internet providers to give access to the resources and services of WebMoney)
- Gaz Alliance Ltd, Coal Technologies Ltd and other Russian companies related to the supply of coal from the territories of Donetsk and Luhansk regions currently under the control of Donetsk and Luhansk People's Republics
- Moscow Exchange MICEX-RTS
- representative offices in Ukraine of the financial company Elmi, VM-Factor and Paymaster.

These Ukrainian sanctions partially reflect the US sanctions placed on prominent Russian businesspeople Oleg Deripaska, Igor Rotenberg, Vladimir Bogdanov, Suleiman Kerimov, Viktor Vekselberg, Andrey Kostin, Gazprom CEO Alexey Miller and Ukrainian oligarch Sergii Kurchenko.

In June 2018, the list of sanctions was extended in line with the sanctions imposed by the USA.

- Presidential Decree No. 82/2019, dated 19 March 2019, enacting the Resolution of the National Security and Defense Council of Ukraine, dated 19 March 2019

In March 2019, Ukraine imposed new and extended existing sanctions against 294 legal entities and 848 individuals.

Extensive sanctions restrictions, including, among others, assets freeze, restrictions on withdrawal of capital from Ukraine, and restrictions on trade operations, were imposed against Russian and foreign companies and individuals, that:

- were involved in construction of the Kerch Strait Bridge, Stroigasmontazh LLC, PJSC Mostotrest and JSC Insitute Giprostroimost — St. Petersburg, among others

- distribute publishing products of anti-Ukrainian content, including Publishing House Eksmo LLC, Publishing House Veche LLC, Publishing House Ast LLC
- violated Ukrainian legislation on entry and/or exit to/from the Crimea
- illegally received and used museum collections owned by Ukraine
- involved in an armed attack and seizure of the Ukrainian military boats, as well as the illegal detention of the Ukrainian sailors
- organized and facilitated elections on the temporarily occupied territories of Donetsk, Luhansk regions and in the Crimea

The new sanctions list include among others PJSC Severstal, PJSC Power Machines, JSC Stroytransgaz, JSC Russian Aircraft Corporation MIG, Shipbuilding Plant Zaliv LLC, PJSC Yaroslavsky Shipbuilding Plant, PJSC Tupolev, EN+ Group PLC and PJSC Mako Holding.

The NSDC also extended the term of certain existing sanctions restrictions, particularly against the banks with the Russian state capital (Sberbank PJSC, Prominvestbank PJSC and VTB Bank PJSC) and Yandex.

The new sanctions are imposed/extended for a period from two to three years.

## **21.6 Operations in the Crimea and in certain parts of Eastern Ukraine**

Both the Autonomous Republic of Crimea and of the city of Sevastopol ("**Crimea**") and the certain territories of Donetsk and Luhansk regions, as can be changed from time to time according to the applicable Ukrainian legislation ("**Temporary Occupied Territories**"), are the territories of Ukraine and Ukrainian law applies to all business and trade operations therein. Any activities violating Ukrainian legislation carried out in the Crimea and/or the Temporary Occupied Territories may result in liability for such violations, including, among others, criminal liability and imposing the sanctions.

The Ukrainian legislation sets forth the special aspects of engaging in economic activities in the Crimea and the Temporary Occupied Territories. In particular, the Cabinet of Ministers of Ukraine imposed restrictions on the supply of goods, works and services under all customs regimes from the Crimea to other territory of Ukraine and/or from other territory of Ukraine to the Crimea as well as from the Temporary Occupied Territories to other territory of Ukraine and/or from other territory of Ukraine to the Temporary Occupied Territories, save for certain critical goods as specified by law.

**Baker  
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**22** **EU-UKRAINE  
ASSOCIATION AGREEMENT**



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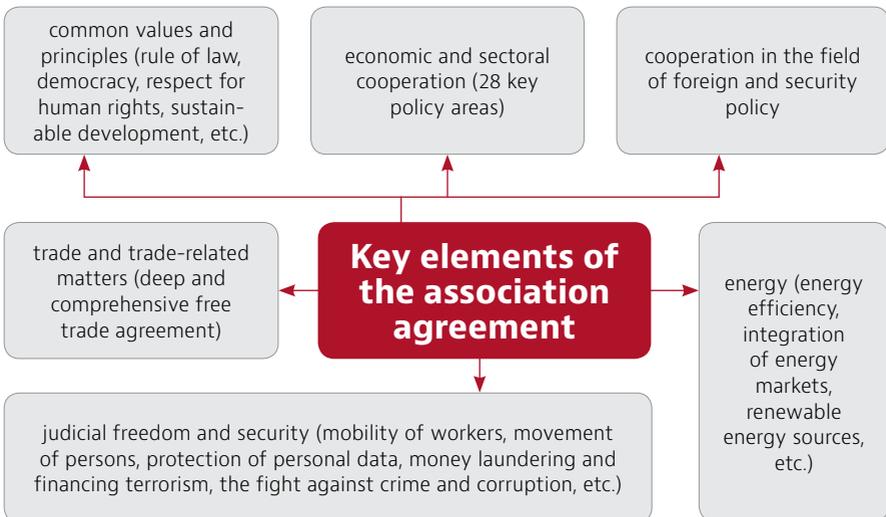


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Since 2015, the EU became Ukraine’s main commercial partner. Ukraine’s Association Agreement with the EU (AA), which came into force on 1 September 2017, makes Ukraine an attractive location for regional headquarters of foreign multinational companies and/or the outsourcing of their activities to partners in Ukraine in a number of industries (including financial services, such as financial technology services, e-commerce (computer and related services) and telecommunications) due to further elimination of trade barriers in such industries. Ukraine may also become very attractive for foreign direct investment due to potential access to the EU public procurement market upon the approximation of the Ukrainian public procurement laws (reference is made to market access commitments under AA in the public procurement area).

AA contains a so-called “deep and comprehensive” free trade agreement (DCFTA) providing the mutual opening of EU and Ukrainian markets for most goods and services.



Ukraine's commitments under the DCFTA create many opportunities for EU companies entering the Ukrainian market. In particular:

- starting from 1 January 2016, Ukraine eliminated 99,1% of its import duties with respect to EU products
- gradual alignment of Ukrainian technical regulations and sanitary and phytosanitary rules with EU standards reduces technical obstacles to EU export into Ukraine
- simplified customs requirements are expected to enable quicker and more fair customs clearance procedures
- the DCFTA leads to align Ukraine's competition law and its enforcement practice with the EU, which provides European companies with the equal access to the Ukrainian market
- the DCFTA gives companies the ability to defend their commercial rights through arbitration and mediation under DCFTA's dispute settlement mechanism

Since 1993, Ukraine has benefitted from the EU's Generalized System of Preferences (GSP) whereby many Ukrainian imports (including oils, base metals, chemicals and textiles) were subject to preferential tariffs. However, since the provisional application of the free trade agreement, Ukraine was removed from the list of GSP beneficiary countries (although it remains on the list of eligible countries).

Both Ukraine and the EU undertake to afford national treatment to the goods and services of each other. At the same time, AA results in rather asymmetrical import quotas in favor of an EU party in the agriculture industry, whereby the EU limits the quantity of Ukrainian imports regarding comparatively larger amounts of items. However, on 1 October 2017, the EU introduced preferential import terms for some Ukrainian goods until 1 October 2020, in particular:

- zero-tariff quotas for a number of agricultural products, including natural honey, grape juice, oats, common wheat, certain types of maize and barley
- 0% customs duties for a number of goods, including footwear, fertilizers, copper and aluminum products and consumer electronics

In July 2019, the EU and Ukraine signed the agreement amending the trade preferences for poultry meat and poultry meat preparations provided for by the EU-Ukraine Association Agreement ("**Amending Agreement**"). The Amending Agreement increased the amount of quotas for poultry meat and poultry meat preparations from 16,000 tons/year with linear increase in five years to 20,000 tons/year to 50,000 tons/year respectively and extended tariff-rate quotas to additional tariff lines of poultry meat and poultry meat preparations.

AA is considered an innovative form of EU trade agreement that offers a new type of integration without actual membership in the EU. AA is different from both EU trade agreements entered into with countries that are close to the EU (such as Norway, Switzerland, Turkey) and those countries that are far from its territory (such as South Korea and Vietnam). AA aims to integrate Ukraine into the EU internal market. However, such an opportunity is subject to strict conditions to approximate a number of Ukrainian laws to the relevant EU legislation. Access to the EU Internal Market will become available under a monitoring procedure confirming that Ukraine implemented the respective legislation in accordance with the timelines set out in the relevant annexes. Such timelines range from two to 10 years.



The Cabinet of Ministers of Ukraine approved a plan of measures required for implementing the AA and the harmonization of Ukrainian legislation with the EU legislation during 2016-2019. Many of Ukraine's obligations on harmonization have already been fulfilled in accordance with the plan.

According to the most recent report on the implementation of the AA prepared by the Vice Prime Minister's Office for European and Euro-Atlantic Integration of Ukraine and the Government Office for Coordination of European and Euro-Atlantic Integration of Ukraine, dated February 2019, Ukraine performed 52% of its obligations under the AA.

Another innovative element of the AA is its enhanced and reinforced type of institutional framework such as annual summit meetings facilitating accountability and transparency of the approximation process. AA also creates the association council composed of ministers, which has the power to amend annexes to the AA and exchange information regarding the approximation process.

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**23**

**COMMUNICATIONS**



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### **23.1 Regulatory framework**

Significant changes have been introduced into the regulatory framework of the Ukrainian telecommunications sector following independence in 1991. These changes have greatly facilitated the process of adjusting domestic legislation to fundamental principles adopted by the European Union. As a result, the Ukrainian regulatory framework now provides the separation of the regulatory and operational activities of the Ukrainian telecommunications administration.

As a first step toward its transformation into a traditional regulatory body, the former Ministry of Communications of Ukraine (now the Ministry of Infrastructure of Ukraine) created several umbrella organizations to take over its previous operational functions. Consequently, all organizations involved in the planning, building and operation of public telecommunications networks in Ukraine were merged into the Open Joint Stock Company "Ukrtelecom" (Ukrtelecom). In 2011, the State Property Fund of Ukraine sold Ukrtelecom at the privatization auction. In October 2013, Ukrtelecom was acquired by System Capital Management, a leading Ukrainian financial-industrial group.

The Law of Ukraine on Communications ("**Communications Law**"), dated 16 May 1995, was adopted by parliament to provide the legal, economic and organizational frameworks for enterprises, associations and governmental authorities, which were part of the telecommunications and/or postal communications networks in Ukraine. The Law of Ukraine on Telecommunications ("**Telecommunications Law**"), dated 18 November 2003, repealed the Communications Law.

Ukrainian telecommunications market is mainly regulated by the Telecommunications Law that establishes the competence of the Ukrainian

state authorities in regulating telecommunications activities, and determines the legal status of telecommunications operators, providers and consumers of telecommunications services.

The Telecommunications Law also regulates various issues, including:

- access to the telecommunications market
- interconnection of the telecommunications networks
- right of way
- privacy of subscribers and telecommunications
- authorizations
- pricing policy
- methods of settlement

The scope of application of the Telecommunications Law extends to the:

- fixed-line and mobile telephone communications
- maintenance and exploitation of on-air and cable broadcasting and television networks
- leasing of electronic communications channels and communications services based on the Internet protocol (IP-telephony)

The regulatory regime of the Telecommunications Law does not apply to those telecommunications networks that do not interact with the Public Switched Telecommunications Networks (PSTN), except for the use of such networks in a state of emergency or war.

Further fundamental regulation in the Ukrainian telecommunications sector is the Law of Ukraine on the Radio Frequency Resource of Ukraine ("**RFR Law**"), adopted by the Parliament on 1 June 2000. The RFR Law provides comprehensive rules for the allocation, assignment, conversion, interrelation and use of radio frequencies in Ukraine, as well as the licensing of users of radio frequencies and other related issues. Beyond that, the RFR Law also addresses the issues of import, trading in and use of radio electronic devices and emitters on the territory of Ukraine.

Other notable Ukrainian regulations with respect to the telecommunications sector include:

- Law of Ukraine on Principal Basis of Information Society Development in Ukraine for 2007-2015, dated 9 January 2007
- Rules for Provision and Receipt of Telecommunications Services, approved by the Regulation of the Cabinet of Ministers of Ukraine No. 295, dated 11 April 2012

- Plan for Use of Radio Frequency Resource of Ukraine, approved by the Decree of the Cabinet of Ministers of Ukraine No. 815, dated 9 June 2006
- National Numbering Plan of Ukraine, approved by the Order of the Ministry of Transport and Communications of Ukraine No. 1105, dated 23 November 2006

## 23.2 National regulatory authorities

### *National Commission for the State Regulation of Communications and Information (NCCIR)*

Under the Telecommunications Law, the NCCIR, which acts under the Presidential Decree No 1067/2011, dated 23 November 2011, as amended, has assumed responsibility for the following:

- maintaining the register of operators and providers of telecommunications and licensing issues
- allocation of radio frequencies and numbering resources
- tariff regulation
- regulation of interconnection agreements
- controlling quality of telecommunication services
- resolution of disputes in relation to the interconnection agreements

### *Administration of the State Service of Special Communication and Information Protection of Ukraine (“Administration of the SSSC”)*

The Administration of the SSSC is a central executive body with a special status, the authorities of which are prescribed in the Resolution of the Cabinet of Ministers of Ukraine No. 411, dated 3 September 2014. Among other things, the main responsibilities of the Administration of the SSSC are:

- determining the list of technical means that may be used in PSTNs
- conducting state examination and licensing the activity in the sphere of cryptographic and technical protection of information
- allowing the use of cryptographic protection of information, tools, complexes and special communication systems
- setting requirements for security and information protection for qualified providers of electronic trust services
- setting technical requirements for telecommunication networks, systems and complexes of special communication and general use

### *Ministry of Digital Transformation (MDT)*

The MDT is a newly established central executive body responsible for digitalization and digital transformation of Ukraine’s economy. Its legal status is laid out in the respective regulations approved by the

Cabinet of Ministers of Ukraine on 18 September 2019. Main tasks of the MDT include the formation and implementation of state policy in the following areas:

- digitalization, digital development, digital economy, digital innovation, e-governance and e-democracy and information society development
- digital skills development and digital rights of citizens
- open data, development of national electronic information resources and interoperability, development of infrastructure for broadband internet access and telecommunications, e-commerce and business
- provision of electronic administrative services
- electronic trust services and electronic identification
- IT-industry development

### **23.3 Establishing a legal presence**

Under the Telecommunications Law, exclusively legal entities or individual entrepreneurs registered in Ukraine may render telecommunications services in Ukraine.

Moreover, for the national security reasons, the parliament also adopted amendments to the Telecommunications Law, effective as of 30 November 2019, restricting telecommunications operators at all levels of the chain of ownership of corporate rights:

- be registered in offshore zones
- be residents of an aggressor state or an occupier state, as recognized by the VRU, as well as legal entities whose shareholders are such residents
- be founded by political parties, trade unions, religious organizations
- be founded by citizens who are serving sentences in correction facilities or with limited legal capacity

The beneficial owner of telecommunications operators providing services for the maintenance and operation of multi-channel digital networks of broadcast television and radio broadcasting with national coverage can only be a citizen of Ukraine.

### **23.4 Notification and licensing**

The amendments to the Telecommunications Law, dated 18 September 2019, cancelled the telecommunication-licensing requirement. Thus, starting from 25 December 2019, the business entities willing to provide telecommunication services may provide such services by filing a notification to the NCCIR. The NCCIR maintains a registry of all telecommunication operators and providers operating in Ukraine based on their notifications.

The only two outstanding licenses remaining in the sphere are the following:

- license/permit for use of a limited radio frequency and/or numbering resource
- license for the provision of the services related to cryptographic and technical protection of information (except for electronic digital signature services)

### **23.5 Radio frequency resource**

The Telecommunications Law and RFR Law prescribe obtaining a license for the use of radio frequencies in order to conduct telecommunication activities, which require the use of radio frequencies. For this purpose, the prospective licensee must file an application with the NCCIR, submit a set of documents and, following the decision of the NCCIR to grant the license, it must pay the fee for issuance of the license. In addition, starting from the date of issuance of the license and regardless of whether the radio frequencies are actually used or not by the licensee, the monthly rental charge established in the Tax Code of Ukraine is to be paid for the use of radio frequencies. Failure to pay the monthly rental charge for six months leads to revocation of the respective license without any compensation.

In addition, the decision of the NCCIR No. 281 "On Approval of the Procedure for Auctions or Tenders for Obtaining the Licenses for the Use of Radio Frequency Resource of Ukraine," dated 30 May 2017, sets forth a detailed procedure of auctions and tenders for the issuance of radio frequencies licenses.

### **23.6. Numbering resource**

The numbering resource is provided to the telecommunications operator by the NCCIR based on a permit issued for a period of no less than five years. The detailed procedure for obtaining permission to use the number resource is prescribed in the decision of the NCCIR No. 769 "On Approval of the Regulations on State Regulation of the Numbering Resource of the Public Telecommunication Network of Ukraine", dated 1 June 2007.

Until 1 January 2005, the allocation of numbering resources was provided free of charge to telecommunications operators. Currently, Ukrainian telecommunications operators have to pay state fees for the allocation of telephone numbering resources, depending on the types of services to be provided and the coverage area. The amount of fees is established in the Resolution No. 1147 of the Cabinet of Ministers of Ukraine "On the Approval of the Amount of Payment for the Allocation of Numbering Resources and the Payment Procedure," dated 27 December 2008.

Telecommunications operators are required to pay the established fee for the allocation of the numbering resources within 30 days of receiving a decision on such an allocation. Failure to pay the fee may result in the revocation of the relevant decision to allocate a share of the numbering resources.

The allocation of short telephone numbers for emergency services and for not-for-profit social services remains free of charge.

### **23.7 Import and trading in radio-electronic devices and emitters**

Under Ukrainian law, the import, trading-in and operation of radio-electronic and radio signal emitting devices in the territory of Ukraine may be performed provided that such devices are not included in the Register of Radio-Electronic and Radio Signal Emitting Devices Prohibited for Use and Import into Ukraine. The import of special-purpose radio-electronic and emitting devices can be performed only after obtaining the relevant permit from the General Staff of the Ukrainian Armed Forces in the procedure approved by the Cabinet of Ministers of Ukraine. Special-purpose devices are devices for special users (e.g., the Ministry of Defense, Ministry of the Interior, State Security Service).

On 13 February 2018, the NCCIR approved the Procedure for Import and Trading in Radio-Electronic Devices and Emitters in Ukraine, which now additionally requires that such devices, intended for general use, should:

- be included into the Register of Radio-Electronic Devices and Emitters that Can Be Used on the Territory of Ukraine in the Public Radio Frequency Bands
- comply with the Technical Regulations on Radio Equipment (approved by the Resolution of the Cabinet of Ministers of Ukraine No. 355, dated 24 May 2017)

Interestingly, in accordance with this new procedure, prototypes imported to Ukraine for software development fall into the list of products that do not require documents confirming compliance with the requirements of the Technical Regulation of Radio Equipment. In total, it is allowed to import up to 10 prototypes of one model of equipment, and the purpose of the prototype import must be confirmed by the agreement with the sender of the product.

### **23.8 Networks interconnection and settlements between the telecommunications operators**

According to the Telecommunications Law, interconnection of the telecommunications networks is conducted under the interconnection

agreements concluded between the operators, and the binding conditions for such agreements are set out by the NCCIR.

The procedure for telecommunication networks interconnection (with respect to PSTN only) as well as the binding conditions for interconnection agreements were determined by the Decision of the NCCIR No. 155 "On the Adoption of the Rules of Public Telecommunication Networks Interconnection," dated 8 December 2005 and restated on 31 March 2015.

The main conditions of settlement between operators that have entered into an interconnection agreement were adopted by the Decision of the NCCIR No. 1586 "On the Adoption of the Procedure for the Settlements Between the Telecommunications Operators for Services of the Access to the Public Telecommunications Networks," dated 9 July 2009, as amended.

### **23.9 ISP services**

At present, internet service provider (ISP) services are not subject to any licensing regime in Ukraine. However, an interested party wishing to provide internet services has to be included in the register of operators and providers of telecommunications mentioned above. The applicant has to submit the respective application to the NCCIR at least one calendar month prior to beginning to provide such services.

The organizational and technical requirements to ISPs, as well as ISP's staff qualifications, are prescribed in the decision of the NCCIR No. 803 "On the Adoption of the Rules for Carrying out Activities in the Sphere of Telecommunications (Activities for Providing Internet Access Services)," dated 10 December 2013, as amended.

### **23.10 Recent developments**

#### *New communications standards*

Following the tender for 3G communications frequencies conducted in February 2015 and early 2018 tenders for 4G licenses in the ranges 1800 MHz and 2600 MHz, it is further planned to broaden the coverage of 4G network and conduct tender for 5G communications frequencies in 2020.

On 29 October 2019, the Ukrainian government signed a memorandum with four leading mobile operators regarding the refarming of frequencies in the 900 MHz band, so that operators can increase coverage and bring broadband mobile internet to 90% of Ukrainian localities. It is expected

that in March 2020 all operators will receive new licenses that will also provide technological neutrality in the 900MHz, 1800MHz, 2100MHz and 2600MHz bands. The respective Action Plan for Creating Conditions for the Development of Mobile Broadband Access was approved by the Decree of the Cabinet of Ministers of Ukraine No 1272-p, dated 4 December 2019.

Importantly, in the process of the said refarming necessary frequencies for the launch of 5G standard will also be released. This is considered a prerequisite for the tender for 5G licenses, which may still be held in 2020, as it is set out in the Decree of the President of Ukraine No. 242/2019 "On Ensuring Conditions for Introduction of the Mobile Communication System of the Fifth Generation", dated 17 May 2019.

#### *Mobile Number Portability (MNP)*

Although, following the amendments to Telecommunications Law, dated 1 July 2010, consumers were entitled to keep their existing mobile numbers when they change their mobile service provider, the MNP was finally launched only on 1 May 2019. According to the Ukrainian State Centre of Frequencies, approximately 38,000 subscribers used the service as of December 2019.



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**24**

**CONCESSIONS**



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On 20 October 2020, the Law “On Concession”, dated 3 October 2019 No. 155-IX (“**Concession Law**”) became effective. The Concession Law revamps the Ukrainian regulation on concessions, aiming to make this an attractive tool to implement infrastructure projects of high social importance through the public-private partnership model.

Concession is a form of public-private partnership whereby the concession grantor provides to the concession holder of the right to create and/or build (construct, reconstruct, refurbish, carry out capital repair and technical re-equipment of) and/or manage (use, operate, carry out technical servicing of) a concession asset, and/or render services of high social importance on the terms and conditions set out in the concession agreement, as well as providing the transfer to the concession holder of a major part of operational risk, including the supply and/or demand risk.

#### **24.1 Areas available for concessions**

Concession may be implemented for any business projects unless the law limits or forbids it with respect to certain areas. Regardless of the business area, a concession model may not be used if the proposed project structure contemplates:

- no investor’s investments in the concession assets
- full repayment of investor’s investment out of the funds of the national or local budget
- no creation, construction and/or management of a concession asset and/or provision of services of high social importance
- prospecting for and the exploration of mineral deposits, as well as the production of minerals

Public procurement regulations do not apply to the concession holder selection, the performance of the concession agreement or the provision of the state aid to the concession projects.

The law also sets out specific additional terms for concessions in areas such as natural monopolies and construction and the operation of motor highways.

#### **24.2 Concession agreement parties**

Depending on the form of ownership over the concession assets, concession grantors could be, among others, the following:

- for state concession assets — the State of Ukraine acting through the relevant state bodies discharging their respective state management authorities and, in the relevant cases, state controlled companies
- for municipal concession assets — the municipal community acting through the executive committee of the local municipal body
- for state or municipally controlled companies' concession assets — the respective companies

Several concession grantors may be parties to the concession agreement, in which case they should enter into an agreement prior to the tender announcement or initiation of direct negotiations on the concession agreement as a result of conversion of the lease agreement (as applicable). The state or municipal companies may also participate in the concession agreement on the side of the concession grantor to perform specific obligations of the concession grantor. The entities of the state economy sector may incur their respective expenses under the concession agreement, including the capital expenditures, regardless of whether their relevant annual financial plans were endorsed or approved.

Only Ukrainian resident legal entities may become concession holders, whereas individual entrepreneurs are not eligible. However, at the stage of the tender, foreign legal entities are also eligible to submit the expressions of interest, as well as the tender offers. For the purposes of the conclusion of the concession agreement, the non-resident winner must establish a local Ukrainian legal entity.

Temporarily existing associations of legal entities (Ukrainian residents and/or non-residents) may take part in concession tenders and direct negotiations on the concession agreement as a result of the conversion of the lease agreement on the basis of a partnership (cooperation) agreement concluded among them. To confirm the compliance of such an association with the qualification criteria, the information must be provided both for

the association as a whole and in relation to its individual members or persons related to them by control. If such an association wins the tender, all its members are obliged to establish a Ukrainian resident entity for the purposes of the conclusion of the concession agreement.

### **24.3 Procedure for conclusion of concession agreements**

Concession agreements may be concluded either as a result of a tender or through the conversion of the existing lease agreement into a concession.

#### *Project initiation*

In order to initiate the concession project, the state or municipal side or private local or foreign legal entities should prepare and submit the supporting technical and economic documentation in accordance with the procedure set out in the PPP Law (see Chapter 9). The relevant authorized state or municipal body must make a decision as to whether concession is feasible within three months (where applicable, at the next session of the relevant municipal council) of the submission of the proposal, based on the outcome of the efficiency analysis of the public-private partnership in the form of concession.

The body that resolved as to the feasibility of the concession project must accordingly advise the project initiator and the Ministry for Development of Economy, Trade and Agriculture of Ukraine within five business days.

#### *Tender procedures*

The tender can take the form of a competitive process without preliminary discussions of the commercial terms with potential investors or with such discussions, in which latter case the process is called a 'competitive dialogue.' The tender may be held through an electronic trading system according to the procedure set out by the Cabinet of Ministers of Ukraine.

The tender procedure is run by the tender commission consisting of the representatives of the concession grantor, the relevant state and, where applicable, municipal bodies. The number of members must always be uneven and in the range between seven and 25 persons. Independent advisers may be involved in the commission meetings on a contractual basis.

The tender commission, among other things, develops and submits for the concession grantor's approval of the tender specification, including the tender terms, tender manual for participants, draft concession agreement, as well other documents as per the concession grantor's decision.

In case of a positive decision, the holder of the concession asset may not, without prior consent of the concession grantor, take actions having an adverse effect upon the assets to be transferred into concession. The list of restricted actions is set out in the Concession Law and includes a set-off of claims pertaining to the concession assets, their disposal, write-off, contribution into companies' share capital, mortgage etc. If actions are taken without prior consent of the concession grantor, they are deemed invalid.

The concession tender shall include the following stages:

- pre-qualification (optional stage for tenders held using electronic trading system)
- submission of the tender offers
- assessment of tender offers and selection of the highest bidder
- entry into the concession agreement

#### *Pre-qualification criteria*

In order to participate in the pre-qualification stage, the applicant or persons related to it by control must comply with at least three of the following criteria:

- have equipment and facilities to perform design, construction and operational works, as well as maintenance
- possess adequate level of professional and technical qualification of employees
- have documentary evidence of experience of implementation of similar agreements
- have resources to ensure the financing of the concession project or experience of the guaranteed financing for the implementation of similar projects
- other criteria as per decision of the tender commission

#### *Tender offer assessment*

The tender offers are assessed in two stages whereby the technical aspect of the tender offer is first subject to analysis in terms of its compliance with the tender terms from the perspective of expected efficiency parameters set out in the tender manual for participants and, if found compliant, thereafter is subject to the financial and economic assessment. At this second stage, one or combination of the following criteria may be used: (i) concession duration; (ii) project IRR; (iii) NPV of all project cash flows; (iv) NPV of capital investments, maintenance expenses and servicing with respect to the concession assets; (v) reliability of the financial mechanism; (vi) scope of possible state aid (in case of its provision); (vii) NPV of the

concession payment (if available); (viii) NPV of a one-off fixed payment and/or payment for asset readiness; or (ix) other criteria reflecting the project's financial and economic efficiency, based upon the concession grantor's decision. Should several criteria be applied for assessment their weight must be set out in the tender manual for participants.

Within 30 calendar days of the deadline for the submission of the tender offers, the tender commission must prepare its conclusion as to the best offered terms of the concession project, which is to be published on the official website of the concession grantor after its approval. Within three business days following such an approval, the concession grantor shall invite the highest bidder to enter into the concession agreement.

#### *Negotiations*

The change of essential terms of the concession agreement and the provisions constituting the essence of the tender offer is prohibited in the course of entry into the concession agreement with the bidder.

If within more than 90 days of receipt of the invitation to conclude the concession agreement the highest bidder failed to conclude it, the concession grantor must notify it of termination of the negotiations and invite the second highest bidder to conclude the agreement. The concession grantor may, at the consent of the parties, resolve to extend this term to 180 days if the planned concession constitutes an innovative project or large complex infrastructure project. Substantially, the same rules apply to the process of the conclusion of the concession agreement with the second highest bidder.

If the parties fail again to reach an agreement on the nonessential terms of the concession agreement, the tender shall be recognized as not having taken place, in which case the decision to hold the second concession tender may be made within 60 days thereof.

The concession grantor may not renew the negotiations with the bidder after their termination.

#### *Competitive dialogue*

The competitive dialogue may be applied where the concession grantor is unable to precisely define the project's technical and qualitative parameters or if it is unknown what technical, financial and legal solutions the potential bidders may offer. For the optimal decision it is necessary to

carry out the negotiations with the participants (in case of implementation of innovative projects, large complex infrastructure projects etc.).

The competitive dialogue includes the following stages:

- pre-selection of candidates (pre-qualification)
- submission by participants of proposals with respect to the project technical and qualitative parameters
- tender commission's negotiations with each participant
- development by the tender commission of the tender terms, the tender manual for participants and draft concession agreement
- invitation of participants to participate in the tender
- assessment of tender offers and selection of the highest bidder
- negotiations with the highest bidder

After publishing the invitation and pre-qualification, the tender commission must conduct negotiations with each participant separately. There could also be additional joint meetings to discuss the submitted proposals. The tender commission may not disclose commercially sensitive information it obtained during the negotiation process. After the end of the negotiation stage, the tender commission must develop and submit to the concession grantor for approval of the tender terms, the tender manual for participants, draft concession agreement and other necessary documents.

Unless otherwise expressly provided in the Concession Law, the tender in the form of a competitive dialogue is subject to the general concession tender procedure.

The key stages of the general procedure and a competitive dialogue are described in the picture which follows this Chapter.

#### *Tender offer guarantee or security*

The concession grantor may resolve to require the bidders to provide a tender offer guarantee or security as detailed in the approved terms of the tender, whereas the value thereof may not exceed 1% of the expected amount of capital investments of the concession project. If the tender is held via the electronic trading system without pre-qualification, then provision of the tender offer guarantees or security shall be mandatory.

The funds under the tender offer guarantee or security shall be transferred to the state or the relevant local budget:

- if the bidder revokes its tender offer after the tender offer submission deadline but before the tender offer expiry
- in case of the winner's failure to:
  - sign the concession agreement, save where such failure is due to a force majeure event
  - provide security for the performance under the concession agreement after receipt of the invitation to enter into the agreement where such security was provided for in the tender manual for participants
- in other cases provided for in the tender manual for participants

#### *Protections for project initiators*

In circumstances where the project was initiated by the private party, it may be selected as the winner of the tender if its tender offer was found the best as a result of assessment, or if it agrees to sign the concession agreement on the terms proposed by the highest bidder.

If the winner of the tender is not the initiator of the project, then the winner of the tender must reimburse the initiator for reasonable, fair and properly documented expenses incurred as a result of the preparation of the proposal to carry out the public-private partnership project in the form of concession.

#### *Tender cancellation or recognition of tender as not having taken place*

The concession grantor shall cancel the tender if there is no further need in the concession project or if all tender offers have been rejected.

The tender may be recognized as not having taken place based on the concession grantor's decision if (i) no tender offers have been submitted, (ii) the bidder revokes its tender offer after the submission deadline but before the expiry of such an offer, (iii) the tender is invalidated in court or (iv) the concession grantor is unable to reach an agreement on the nonessential terms of the concession agreement with the second highest bidder.

The concession grantor is not liable for loss caused to the applicants and/or bidders caused by the tender cancellation or recognition as not having taken place.

#### *Conversion of state property lease into concession*

The tenant of a state property under a lease agreement concluded prior to 20 October 2019 may initiate the conversion of such a lease into a concession if:

- the tenant has the intention of implementing an investment project on concession terms (using the leased property requiring additional investments)
- the tenant is not in breach of their lease agreement
- the proposed concession duration is within the term of the existing lease agreement and at the same time complies with the statutory requirements as to the concession duration (see below)
- the tenant complies with the qualification criteria applicable to the bidders, as well as other requirements as to the tenant as set out by the Concession Law
- the concession would not lead to reduction in any of the tenant's investment commitments assumed under the lease agreement

The tenant intending to convert their lease into concession has to prepare the proposal to implement the project on the public-private partnership terms in the form of concession. The tenant should first apply to the landlord with a concept note requesting to provide feedback as to whether it is reasonable to prepare a detailed project feasibility study. If found reasonable and when prepared, the detailed project feasibility study should be complemented by, among other things, the documents confirming the tenant's ability to finance the project, as well as the draft concession agreement.

If the proposed project is found feasible, the concession grantor should apply to the Cabinet of Ministers of Ukraine for the decision on the feasibility of concession and direct negotiations; a positive decision is the basis for such direct negotiations.

The lease agreement, to the extent it overlaps with the concession agreement, terminates upon conclusion of the concession agreement. The tenant is not entitled to the compensation of the value of improvements that were made in the course of the lease agreement and may not be detached.

#### **24.4 Concession agreement terms**

The parties to the concession agreement have equal contractual rights.

Essential are the following terms of the concession agreement, among others:

- agreement parties
- concession assets (list of assets and/or technical conditions for their creation, construction and duration of their operation)

- terms and conditions of effectiveness of the entire agreement or some provisions thereof
- subject-matter of the agreement, including the type, scope and description of works and/or services of social importance
- parties' rights and obligations, taking into account the risk allocation terms
- the procedure for granting land plot rights necessary for project implementation, as well as the list of such land plots with indication of their acreage and cadastral numbers
- agreement duration (which may be between five (or 10, in case of motor highway concessions) and 50 years)
- procedure for the amendment and termination of the agreement
- procedure for the return of the concession assets
- procedure for making concession payments (including a combination thereof, if applicable) and their amounts (concession holder's payments to the concession grantor or, in the relevant circumstances, vice versa; both one-off fixed payments or periodical payments are to be defined as a share in the concession revenues or market value of the concession asset, a fixed payment depending on the sales volumes achieved by the concession holder etc.)
- termination grounds, procedure and consequences, including the payments in case of premature termination of the agreement
- parties' liability
- procedure for concession grantor's control over performance of the agreement
- dispute resolution procedures

The concession agreement may also include the conditions for replacement of the concession holder, local component requirements, IP usage terms, terms of funding of the ancillary infrastructure that does not form part of concession assets but is necessary for project implementation, the conduct of environmental impact assessment by the concession holder and so on.

**Legislative stabilization.** The terms of the concession agreement remain valid throughout its duration, including in the case of adverse legislative changes affecting the concession holder. The rights and obligations of the concession holders are subject to a legislative stabilization that protects against adverse legislative amendments, save for those in the area of defense, national security, public order, the protection of environment, licensing and rules of provision of services of high social importance in the natural monopoly markets.

**Concession holder's exclusivity and special rights.** The concession holder may be vested with the special and exclusivity rights connected with the project implementation, provided that they are compliant with the Concession Law and are set out in the concession agreement.

**Right to amend concession agreement.** The parties may agree to amend the agreement terms, except those which were the basis to determine the highest bid.

**Governing law and dispute resolution.** The concession agreement may be governed by the Ukrainian or foreign law. The disputes shall be resolved amicably within the terms agreed in the concession agreement or in the respective investment treaties ratified by Ukraine. The parties may choose mediation, non-binding expert conclusions, national or international commercial or investment arbitration, including foreign arbitration, provided that the founder of the concession holder is a company with foreign investments (see Chapter 15), as well as rules of procedure.

**Waiver of sovereign immunity.** At the request of the concession holder or the lender, the state may waive its sovereign immunity in the concession agreement or the direct agreement.

#### *Lending in concession projects*

The concession agreement and/or the financing agreement must provide guarantees of the lenders' rights. The direct agreement may provide for the lender's rights in case of the replacement of the concession holder, including the lender's approval of the replacement initiated by the concession grantor and the step-in right of the lender to act as the concession holder.

Any limitations obstructing the enjoyment of lenders' rights in connection with the concession project are forbidden.

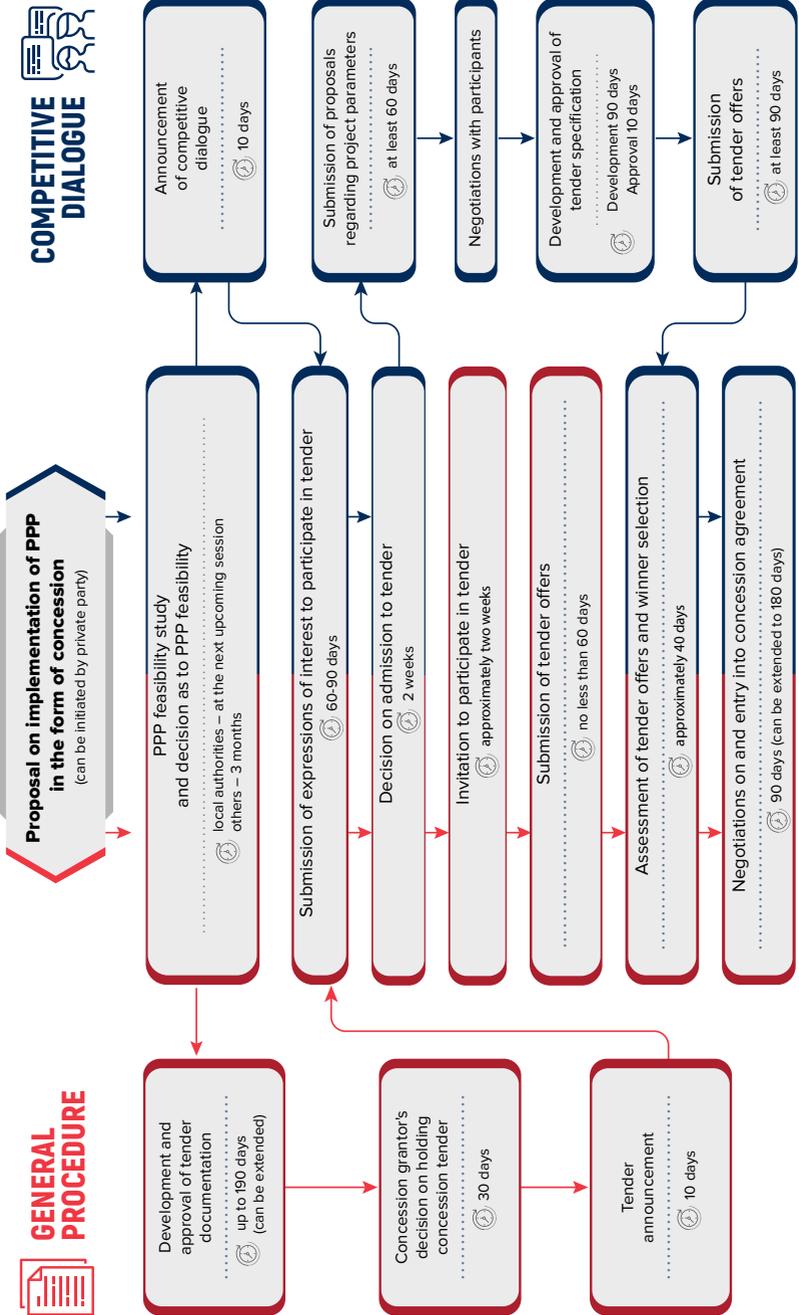
In order to implement the concession agreement, other civil-law agreements may be executed. Such agreements include the so called 'direct agreement' defined as a multi-party contract between the concession grantor, concession holder and one or several lenders providing for the procedure for the concession holder's replacement and, if necessary, the parties' undertakings in connection with such a replacement, the performance of financial commitments of the concession holder toward the lender(s) and other terms preventing the termination of the concession agreement. The direct agreement must be executed no later than 180 days after the signing

of the concession agreement, unless otherwise provided in the concession agreement.

Where the concession holder attracts financing for the concession project, the concession agreement may provide the right to replace the concession holder at:

- the concession grantor's initiative — in case of material breach of the concession agreement by the concession holder
- the lender's request — by way of a foreclosure on the concession holder's rights pledged to secure financing in case of a material breach of the financing agreement by the concession holder

In such a case, the direct agreement shall provide for the grounds, terms and conditions of the concession holder's replacement. The replacement shall be carried out in accordance with the procedure set out by the Cabinet of Ministers of Ukraine.





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**25** E-COMMERCE  
AND INFORMATIONAL  
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### **25.1 The Law of Ukraine “On Electronic Commerce”**

On 3 September 2015, the Ukrainian Parliament adopted the Law of Ukraine “On Electronic Commerce” (“**E-Commerce Law**”). The purpose of the E-Commerce Law is primarily to set the rules for preparing contracts in electronic form for online transactions and to confirm the application of Ukrainian consumer protection regulations to such transactions.

The E-Commerce Law stipulates the following:

- A contract may be prepared in electronic form by exchanging electronic messages with an offer (setting out the required material terms of the contract) and its acceptance, which may be delivered by: (i) electronic message; (ii) designated electronic form; or (iii) carrying out certain actions that are regarded as acceptance.
- An offer to enter into an electronic contract may be made by:
  - (i) delivery of an electronic message regarded as commercial; or
  - (ii) placement of such an offer on the internet or other informational or telecommunication networks. Such commercial electronic messages must be delivered to the addressee only with their express consent, unless the addressee unsubscribes from receiving such messages.
- A contract in electronic form may contain certain provisions in addition to those envisaged by the Civil Code of Ukraine, in particular: (i) the procedure for exchanging electronic messages; (ii) the procedure for amending a mistakenly sent message with acceptance of an offer; and (iii) the procedure for making amendments and other terms.
- To enter into a contract in the electronic system of the offering counterparty, the accepting counterparty must log into such system. The relevant system must allow the accepting counterparty to change the provided information prior to accepting the offer.

- A contract in electronic form may be concluded by: (i) electronic signature or electronic digital signature; (ii) electronic identification signature (by exchanging randomly generated codes); and (iii) application of the analog of a personal signature (signature stamp). An electronic contract based on one of the above methods is regarded as a contract executed in writing.
- An offer to enter into an electronic contract, a text of an electronic contract and electronic messages are concluded in the state language of Ukraine. The parties to the transaction may agree to conclude an electronic contract in other languages.
- Settlements may be carried out using various payment instruments, electronic money, transfer of funds, provision of cash and by other means.
- Sellers of goods and providers of services must provide consumers (via their websites or by other technological means) with their full name, address, email and/or website, EDRPOU code (state identification code for legal entities), taxpayer registration code for individuals, VAT tax registration certificate, information about any licenses and other information that is subject to mandatory disclosure.
- Buyers making a purchase by virtue of an electronic contract must provide the information necessary to conclude a contract. The list of information to be provided is defined by the applicable laws or agreed upon by the parties to the transaction.
- Internet service providers (ISPs), domain name registrars, hosting providers and operators of payment infrastructure services when involved in “mere conduit” activities, are immune from liability for all third-party infringements subject to the following conditions: (i) the ISP does not initiate the transmission; (ii) the ISP does not select the recipient of the information; (iii) the ISP does not modify the information contained in the transmission; and (iv) the ISP promptly disables access to the content in question upon becoming aware that the information in the primary source of transmission has been removed from the network or access to it was disabled, or there is a court ruling to remove or disable access to this content.
- ISPs involved in hosting content are immune from liability for all third-party infringements if: (i) ISPs are not aware of any illegal activity or facts or circumstances that indicate that the activity has signs of illegality or in relation to claims for compensation for such unlawful activities; and (ii) ISPs, upon becoming aware of such circumstances, promptly disable access to the content in question, including in accordance with the requirements of copyright law.

In summary, the E-Commerce Law was adopted to establish a consistent legal framework for preparing commercial contracts in electronic form. Its purposes include: (i) addressing existing legislative uncertainties concerning the formation and enforceability of electronic contracts; and (ii) bringing Ukrainian legislation in line with EC Directive 2000/31 on electronic commerce.

## **25.2 Electronic digital signatures and trusted services**

On 5 October 2017, the Ukrainian Parliament adopted the Law of Ukraine “On Electronic Trust Services” No. 2155-VIII (“**Law on the Trust Services**”), which entered into force on 7 November 2018. The Law on the Trust Services replaced the Law of Ukraine “On Electronic Digital Signature” and was designed to harmonize Ukrainian legislation with Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999. Since the EU has adopted a new Regulation (EU) No. 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC, Ukraine has to adopt the Law on the Trust Services to integrate all mandatory norms and provisions of the above regulation into national legislation.

Overall, the Law on the Trust Services is reforming the national regulatory framework in the field of electronic digital signatures. It will likely contribute to the development of a single system of electronic trust services, mutually recognize Ukrainian and foreign certificates of public keys, electronic signatures and seals, and enhance Ukraine’s integration into the EU digital single market, securing cross-border transactions and e-commerce both locally and with EU Member States.

The Law on the Trust Services stipulates the following:

- Electronic interaction of individuals and legal entities requiring the sending, receipt, use and permanent storage of electronic data by third parties (which do not require a handwritten signature), as well as authentication in the information systems, may be carried out using electronic trust services, subject to prior agreement between the parties.
- Electronic interaction of individuals and legal entities requiring the sending, receipt, use and permanent storage of electronic data by third parties (which do not require a handwritten signature), as well as authentication in the information systems, with state bodies, bodies of local self-government, enterprises, institutions and organizations owned by the state must be carried out using qualified electronic trust services.

- The requirements for electronic trust services and the procedure for the use of electronic trust services in state authorities, local self-government bodies, enterprises, institutions and organizations of state ownership are established by the Cabinet of Ministers of Ukraine.

The implementation of the Law on the Trust Services has provided Ukrainians with modern tools of electronic commerce and communication with third parties and the state. The Law on the Trust Services aims to introduce in Ukraine the model and principles of provision of EU electronic trust services, without destroying the systems of interaction between the subjects of relations in the field of electronic digital signature established in Ukraine. Currently, Ukrainian citizens and entrepreneurs are learning to enjoy the benefits of electronic trust services.

On 7 November 2018, the government also supported the resolution of the Cabinet of Ministers of Ukraine "On Approval of Requirements in the Sector of Electronic Trust Services and the Procedure for Verifying Compliance with Legislation in the Sector of Electronic Trust Services." This document was developed to ensure the creation of a single environment based on the system of electronic trust services with other countries and guarantees the protection of personal data.

Furthermore, on 18 September 2019, the Cabinet of Ministers of Ukraine approved the resolution on the activities of the Ministry of Digital Transformation. According to the adopted regulation, the newly established ministry will be responsible for the formation and implementation of state policy in the sector of digitization, open data, national electronic information resources and interoperability, the introduction of electronic services, electronic trust services and more. The Ministry of Digital Transformation will also embark on building digital skills of citizens.

### 25.3. The internet and domain names

Thus far, Ukrainian legislation has seen little intervention by the Ukrainian Parliament in issues governing the internet in Ukraine. Internet activities in Ukraine (including various internet-based industries) have been developing based on Ukraine's general laws and regulations governing "offline" or real-world life and business. However, numerous changes have taken place in this area, particularly following the entry into force of the Law of Ukraine "On Telecommunications" ("**Telecommunications Law**") on 23 December 2003 and the Civil Code on 1 January 2004.

The Telecommunications Law defines a “domain” as a part of a hierarchic system of names incorporated in internet addresses — a unique identifying name that is served by a group of server domain names and is administered centrally.

*Protection of intellectual property rights in domain names*

On 10 April 2008, the Ukrainian Parliament adopted the Law of Ukraine “On the Introduction of Amendments to Certain Laws of Ukraine on Intellectual Property Issues in Order to Fulfill Requirements on Accession of Ukraine to the WTO” (“**Amendments Law**”). The Amendments Law purports to enhance the applicability of some provisions of existing intellectual property laws to the internet. Most importantly, the Amendments Law changes some provisions of the Law of Ukraine “On the Protection of Rights in Trademarks and Service Marks” (“**Trademark Law**”) to address the issue of protecting the rights of trademark owners in connection with the use of trademarks in domain names.

The Trademark Law defines a “domain name” as the name that is used for addressing computers and resources over the internet. The exclusive rights of a registered trademark owner now include the use of its trademark over the internet and, under amendments introduced by the Amendments Law, the use of a trademark in a domain name without the permission of the trademark owner will constitute a violation of the trademark owner’s rights.

It should also be noted that an administrative procedure for the protection of trademark owners is reflected in the “Policy on the .UA Domain,” which is currently used for administering the Ukrainian country code top-level domain name or .UA domain. To obtain a second-level domain name (e.g., www.companyname.ua), it is necessary to present a trademark registration certificate or a trademark license agreement for the exact name. However, this requirement does not extend to third-level domain names (such as www.companyname.com.ua or www.companyname.kiev.ua, etc.), which remain susceptible to abusive registration.

*Administration of the Ukrainian ccTLD system*

A number of organizational and legislative developments indicate the Ukrainian government’s increased awareness of issues related to the internet in Ukraine. In particular, on 13 November 2002, the State Committee for Communications and Informatization of Ukraine (“**Committee**”) announced the establishment of the Ukrainian Net Information Center (UANIC). The purpose of UANIC is to administer and to service the Ukrainian ccTLD system, as well as to adopt rules for the designation of the .UA

domain. While the Committee and various associations of ISPs founded this organization, the officials of the State Security Service of Ukraine (Ukraine's intelligence and counterintelligence agency) also participated in the decision to establish UANIC. On 22 July 2003, the Cabinet of Ministers issued Order No. 447-p "On the Administration of the .UA Domain," which officially recognized UANIC's powers to administer Ukrainian ccTLDs.

A Ukrainian limited liability company, Hostmaster, administers the Ukrainian ccTLD ".UA." Since the ccTLD ".UA" began functioning in January 1993, all matters concerning the registration and maintenance of domain names have been largely self-regulated by various public associations and ISPs.

In addition, from 19 October 2010, the registration of Cyrillic domain names became available in the domain zones com.ua and kiev.ua (компания.com.ua and имя.kiev.ua) in Ukraine and, in 2013, a top-level Cyrillic domain name .укр was launched.

On 19 March 2019, Hostmaster LLC opened up the opportunity to publish the WHOIS<sup>1</sup> contact information on registrants in the domain registry .UA.

The information on the identity of the registrants was present in the WHOIS domain .UA domain service until May 2018. The registry ceased publishing this information after the entry into force of the new European legislation on personal data protection, i.e., the General Data Protection Regulation (GDPR). This decision was implemented in line with international practice and ICANN's recommendations.

At the end of February 2019, the registry agreement with domain name registrars was amended to take into account the requirements of GDPR. In particular, according to the new contracts, registrars have the opportunity to open or close the contact information of the registered users for WHOIS, taking into account the position of their clients.

#### *Domain name dispute resolution*

In 2018, the World Intellectual Property Organization (WIPO) and Hostmaster LLC (registrar of the .UA) signed an agreement to apply a dispute resolution mechanism similar to the Uniform Domain-Name Dispute Resolution Policy (UDRP) procedure to domain names in the .UA domain name zone.

<sup>1</sup>WHOIS (pronounced "who is"; not an acronym) - an internet protocol that is used to query databases to obtain information about the registration of a domain name (or IP address).

The .UA Domain-Name Dispute-Resolution Policy (UA-DRP) in domain .UA entered into force for the second-level private domain names in the .UA domain on 19 March 2019 and for the third-level private domain names in the com.ua domain on 19 December 2019.

The agency responsible for arbitration is WIPO. The decision of the arbitration should be delivered within 60 days and the default language of arbitration is the language of the registration agreement for the domain name (namely English, Russian or Ukrainian). As in the standard UDRP procedure, the parties are free to challenge the decision in the local courts of Ukraine.

#### *Protection of information in information and telecommunication systems*

The protection of information in automated databases is subject to the Law of Ukraine “On the Protection of Information in Information and Telecommunication Systems” (“**IT Systems Law**”) dated 5 July 1994, with amendments. The IT System Law establishes the principles for the regulation of relations between the parties involved in the processing of information in information and telecommunication systems (the IT systems) and the use of such information by third parties. It also provides for the protection of the rights of the owners of the information processed in information and telecommunication systems.

The IT Systems Law defines “information and telecommunication systems” as the set of technical and program means, functioning as a single whole, designed for the processing and exchange of data. Information in IT systems and data processing software is subject to protection regardless of the information’s means of expression.

The IT Systems Law requires that access to the information in the information and telecommunications systems be subject to rules established by the owner of the processed information.

#### *Cybersecurity regulations*

On 5 October 2018, the president of Ukraine signed the Law of Ukraine “On Basic Principles of Ensuring Cybersecurity of Ukraine” (“**Law on Cybersecurity**”). The Law on Cybersecurity is an attempt to patch and fix the outdated legislation in the sphere of cybersecurity in Ukraine and to create a framework for resolving a cross-industry problem that has significant ramifications for state security. This law is, in a way, a regulatory response to a number of cyberattacks that Ukraine suffered during 2017, believed to have originated from a neighboring

state. The Law on Cybersecurity contains a number of definitions and general statements broadly defining the cybersecurity, critical infrastructure, duties of government and public companies defending critical infrastructure against cyberattacks. It lays down the basics of future cooperation between government bodies, the private sector and integrating cybersecurity in a general state security framework. However, the law contains very little practical norms that could be applied directly. Therefore, we expect that, in 2020, the government of Ukraine will adopt a number of norms and regulations that will clarify the roles of government agencies and businesses in the implementation of the desired cybersecurity regime.

*Additional protection for IT companies during police searches*

On 16 November 2017, the Law of Ukraine "On Amendments to Certain Legislative Acts on Enforcement of the Rights of Participants in Criminal Proceedings and Other Persons by Law Enforcement Bodies during the Pre-trial Investigation" ("**Law Against Confiscation of Computer Equipment**") entered into force in Ukraine.

Ukrainian IT companies have suffered from numerous investigations and subsequent seizures of computer equipment by law enforcement bodies.

The Law Against Confiscation of Computer Equipment addressed the problem of groundless confiscations of computer equipment by law enforcement authorities for the purposes of disrupting the regular business activities of IT companies in Ukraine. The adoption of this law increased transparency and accountability for police actions through mandatory video fixation of police searches. It also prohibits seizures of telecom equipment (servers) and computers unless this is necessary for forensic examination.

*Ukraine banned popular Russian online services*

On 16 May 2017, the president of Ukraine signed Presidential Decree No. 133/2017, which introduces sanctions against 1,228 individuals and 468 legal entities.

The decree received unprecedented public attention because it established restrictive measures (sanctions) against Russian IT companies and their Ukrainian subsidiaries. Such companies/subsidiaries are popular with Ukrainians and provide services such as social networks, a search engine, a navigation service, accounting software, antivirus solutions and more.

The sanctions are based on Article 4 of the Law of Ukraine “On Sanctions” and include measures such as freezing assets, restricting trade operations, foreign transfers of funds, use of telecommunication networks and services, participation in state procurement procedures and transfers and assignment of IP rights, and prohibiting Ukrainian ISPs from providing access to the websites and online services of the sanctioned parties.

Although the Ukrainian government has introduced other types of sanctions before, restrictions that prohibit Ukrainian ISPs from providing internet access to certain online services and websites are the first of their kind and have come as a surprise to Ukrainian ISPs.

The authority responsible for supervising ISPs has already issued an official notice to ISPs explaining that compliance with the decree is mandatory and ISPs must disable access to the online resources indicated in the decree. Otherwise, the management of ISPs could be subject to administrative liability.

As of this moment, most of the major ISPs and mobile operators comply with the sanctions and block access to the list of URLs indicated in the decree.

#### **25.4 Software development and protection**

In Ukraine, software development and protection are regulated under the Law of Ukraine “On Copyright and Related Rights” (“**Copyright Law**”) dated 23 December 1993 as a literary work of authorship. Copyright protection extends both to operating systems and applications expressed in source and/or object code.

For the purposes of the Copyright Law, “software” is defined as a selection of instructions, expressed in words, numbers, codes, schemes, symbols or any other means of expression, comprehensible by a computer.

##### *Protection of rights in software*

Pursuant to the Copyright Law, copying a computer program without charge is permitted if the lawful user of the computer program makes one copy for archival purposes or as a replacement of a lawfully acquired copy in the case of loss or damage.

The free modification of a computer program is permitted for: (i) attaining compatibility with the user’s equipment; and (ii) correction of appreciable errors, unless otherwise provided by the parties’ agreement.

The free reverse engineering of a computer program is permitted with the intention of receiving the information necessary for attaining the compatibility of an independently created computer program with other computer programs, provided that the following conditions are met:

- The lawful owner of a copy of the computer program carries out the act of reverse engineering.
- The person specified above does not know the information necessary for attaining such compatibility from other sources prior to the act of reverse engineering.
- The reverse engineering is limited only to those elements of the computer program that are necessary for attaining compatibility.
- The information obtained in the process of the reverse engineering: (i) is used only for attaining the compatibility of the program with other software; (ii) cannot be transferred to a third party, except for the purposes of attaining compatibility with other programs; (iii) cannot be used for the development of other software similar to the decompiled software; and (iv) cannot be used for committing any other infringement.

#### *Protection of rights in databases*

Database rights are also protected under the Copyright Law. Pursuant to the Copyright Law, "databases" are defined as collections of works, data or any other independent information, selected and arranged as a result of creative work, integral parts of which can be accessed by means of special search engines.

Any database is afforded copyright protection if it is the result of creative work in the selection and assembling of its contents, subject to the condition that no violation of any copyright in the constituent works has taken place during the creation of the database.

Illegal reproduction and/or distribution of databases and software may lead to civil, administrative and criminal liability under the applicable Ukrainian law.

#### *Outsourcing of software development*

The outsourcing of software development has seen rapid development over the past decade in Ukraine.

Having regard for certain legal constraints related to claiming copyright in developed software products under the applicable Ukrainian legislation (see above), outsourcing software development projects must be properly structured from a legal standpoint before being implemented in practice.

Presently, the most widespread business model used by foreign companies for outsourcing software development to Ukraine is the establishment of a local Ukrainian subsidiary or a special-purpose company to retain local programmers (as either employees or independent contractors) and coordinate their work. Such local company is required to ensure that all intellectual property rights in the software products developed by such programmers are properly transferred to it from the individual programmers. Thereafter, the corresponding scope of the intellectual property rights must be further transferred from the local company to its foreign parent pursuant to a written assignment agreement between them.

Alternatively, foreign companies may enter into corresponding outsourcing agreements with independent Ukrainian companies or directly with individual programmers. These types of arrangements, however, must be crafted with precision to ensure full and effective transfer of intellectual property rights.

#### *Encryption technology*

Currently, the Law of Ukraine "On the Licensing Types of Entrepreneurial Activity" adopted on 2 March 2015 as amended ("**Licensing Law**"), provides that the provision of services in the sphere of cryptographic protection of information (except electronic signatures) and any trade in cryptosystems and encryption technologies are subject to licensing. The State Service for Special Communication and Information Protection of Ukraine ("**State Service**") issues licenses for five years. Licenses may be renewed upon their expiration.

Licenses are granted to "business entities," which are defined in the Licensing Law as duly registered legal entities engaged in business activities irrespective of their organizational forms or forms of ownership.

Qualification requirements for business entities engaging in encryption, as well as the kinds of activities that may be conducted in the area of encryption that is subject to licensing and the peculiarities of licensing in the area of encryption, are determined by regulations from the State Service. Under the applicable Ukrainian legislation, encryption technologies may qualify as dual-purpose goods/technologies and certain restrictions may apply to their importation into or exportation from Ukraine.

In addition, the "Regulations on Approval of the List of Services for the Cryptographic Protection of Information (except Electronic Signatures) and the Cryptosystems and Crypto-technologies for Protection of

Information the Commercial Activities Related to which are Subject to Licensing," approved by Decree No. 543 of the Cabinet of Ministers of Ukraine of 25 May 2011, set the list of services, cryptosystems and crypto-technologies that cannot be provided commercially without a license. These regulations also establish a list of exceptions from mandatory licensing for cryptosystems and crypto-technologies that are available to the public through the general retail system and in which the cryptographic functions cannot be changed by the end users themselves.



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**26**

**INSURANCE**



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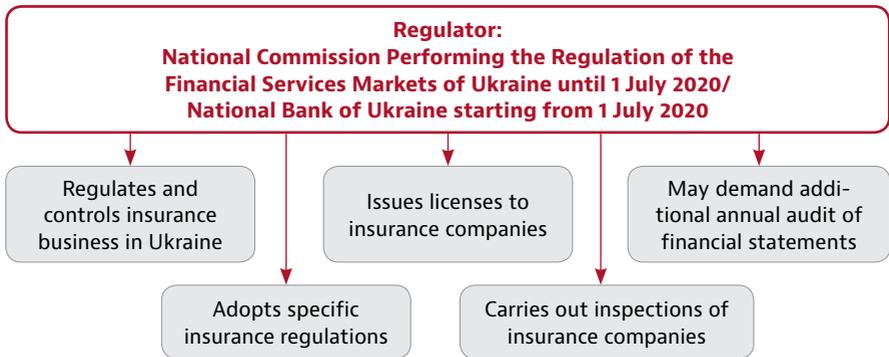
## 26.1 Regulatory Framework

Insurance services in Ukraine are governed by, among others:

- Law of Ukraine On Insurance, dated 7 March 1996, as restated on 4 October 2001 and further amended ("**Insurance Law**")
- Law of Ukraine No. 79-IX On Amendments to Some Legislative Acts of Ukraine Regarding Improvement of Regulation of Financial Services Market dated 12 September 2019 ("**Amending Law**")
- Order of the State Commission for the Regulation of the Financial Services Markets of Ukraine No. 41 On the Approval of the Regulation on the State Register of Financial Institutions dated 28 August 2003
- Order of the State Commission for the Regulation of the Financial Services Markets of Ukraine No. 39 On the Approval of the Procedure for Compiling Reporting Data of Insurers dated 3 February 2004
- Order of the State Commission for the Regulation of the Financial Services Markets of Ukraine No. 1590 On the Approval of the Professional Requirements Imposed on Managers and Chief Accountants of Financial Institutions dated 13 July 2004
- Regulation of the Cabinet of Ministers of Ukraine No. 913 On the Approval of Licensing Conditions to Conduct Business Activities on Providing Financial Services (Except Professional Activities on Securities Market) dated 7 December 2016
- Order of the State Commission for the Regulation of the Financial Services Markets of Ukraine No. 8170 On the Approval of the Procedure and Requirements for Conducting Intermediary Activities on the Territory of Ukraine on Concluding Insurance Agreements with Non-Resident Insurers dated 25 October 2007
- Regulation of the Cabinet of Ministers of Ukraine No. 1523 On the Procedure for the Activity of Insurance Intermediaries dated 18 December 1996
- Regulation of the Cabinet of Ministers of Ukraine No. 124 On the Approval of the Procedure and Requirements for Reinsurance with a Non-Resident Insurer (Reinsurer) dated 4 February 2004

- Law of Ukraine No. 1702-VII On Prevention of and Counteraction to Legalization (Laundering) of the Proceeds of Crime, Terrorism Financing and Financing of Proliferation of Weapons of Mass Destruction, dated 14 October 2014

**26.2 Regulation of the activities of an insurance company**



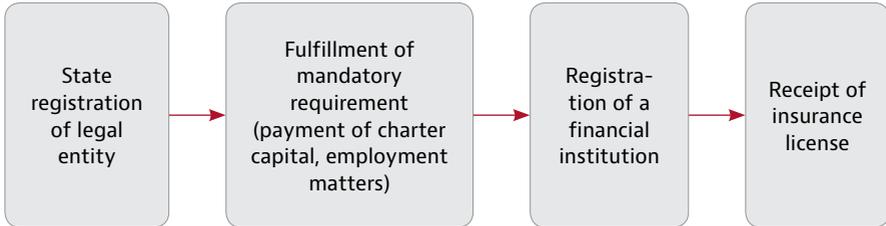
Insurance companies are obliged to submit quarterly and annual reports to the regulator. In addition, insurance companies are obliged to prepare and publish their annual financial statements and consolidated reports. An independent auditor must confirm the accuracy of these reports.

The Insurance Law also regulates reinsurance. When the cost of insuring a single object exceeds 10% of the sum of the paid charter capital and formed free reserves and insurance reserves, the insurance company is obliged to conclude a reinsurance agreement, which is subject to the registration pursuant to the procedure established by the regulator.

Resident insurers of Ukraine must pay an insurance premium under insurance agreements, other than life insurance, in hryvnia. Upon agreement of the parties, the resident insurers of Ukraine may pay an insurance premium under life insurance agreements either in hryvnia or in a foreign currency. Insurers, who are not residents of Ukraine, may pay an insurance premium in hryvnia or in a foreign currency. Insurance benefits are to be paid in the currency stated in the insurance agreement, if it does not contradict the applicable law.

### 26.3 Registration of an insurance company

A Ukrainian legal entity must undergo the following procedures in order to be qualified to carry out insurance activity:

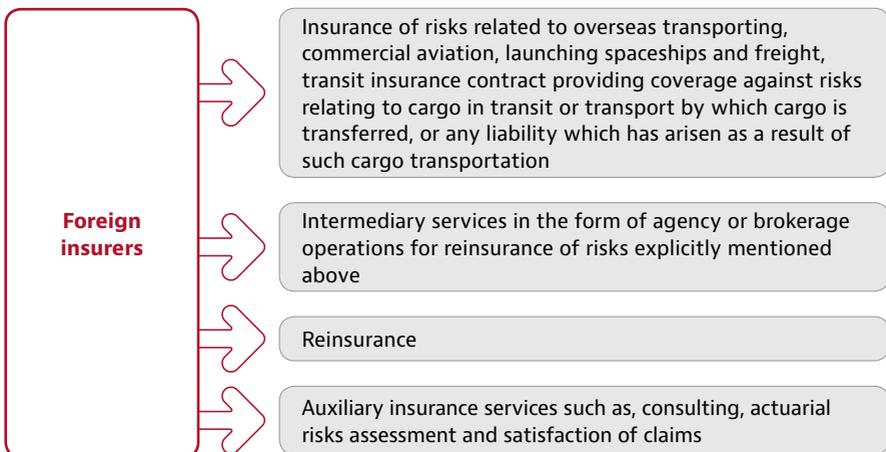


### 26.4 State registration

Only a Ukrainian legal entity in the form of a joint-stock company, a general partnership, a limited partnership or an additional responsibility company may become an insurer in Ukraine.

The Insurance Law requires that an insurer must be established by, and must exist with, at least three shareholders (participants). Ukrainian and foreign legal entities and individuals may be shareholders of an insurance company.

Under the Insurance Law, foreign insurers are only allowed to conduct the following insurance activity in Ukraine:



In addition, under the Insurance Law, a foreign insurer may conduct the above insurance activity in Ukraine if the following requirements are met:

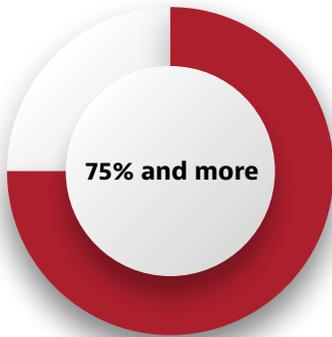
- The country where the foreign insurer is registered is a member of the World Trade Organization (WTO) and such country participates in the international cooperation aimed at the prevention of and counteraction to the legalization of money laundering and financing of terrorism and cooperates with the Financial Action Task Force (FATF). The requirement for membership of the WTO by the country where the foreign insurer is registered does not apply with respect to reinsurance.
- There is a memorandum (agreement) on the exchange of information signed between the regulator and the relevant authority entitled to exercise control over insurance companies of the country where the foreign insurer is registered.
- The country of the foreign insurer's registration exercises state control over the insurance business.
- There is a treaty on the avoidance of double taxation and prevention of fiscal evasion signed between Ukraine and the country where the foreign insurer is registered.
- The country where the foreign insurer is registered is not included by Ukraine in the list of tax haven jurisdictions.
- The foreign insurer has obtained an insurance license in the country of its registration.
- The foreign insurer's financial reliability rating meets the requirements established by the regulator.

Insurance companies are prohibited from providing any other types of insurance, except for:

- insurance and reinsurance of life insurance
- financial activities connected with the accumulation, investment and management of insurance reserves (asset management)
- the performance of any operations aimed at satisfying its own business needs

Insurance companies that provide life insurance may also provide credits to the insured individuals.

The statutory minimum for the charter capital of an insurer must be equal to the UAH equivalent of EUR 1 million for an insurance company not issuing life insurance, and the UAH equivalent of EUR 10 million for a life insurer. The charter capital of an insurer must satisfy the following requirements:



Cash



Insurance reserve funds  
Intangible assets  
Promissory note  
Borrowed funds  
Public funds



State securities at par value

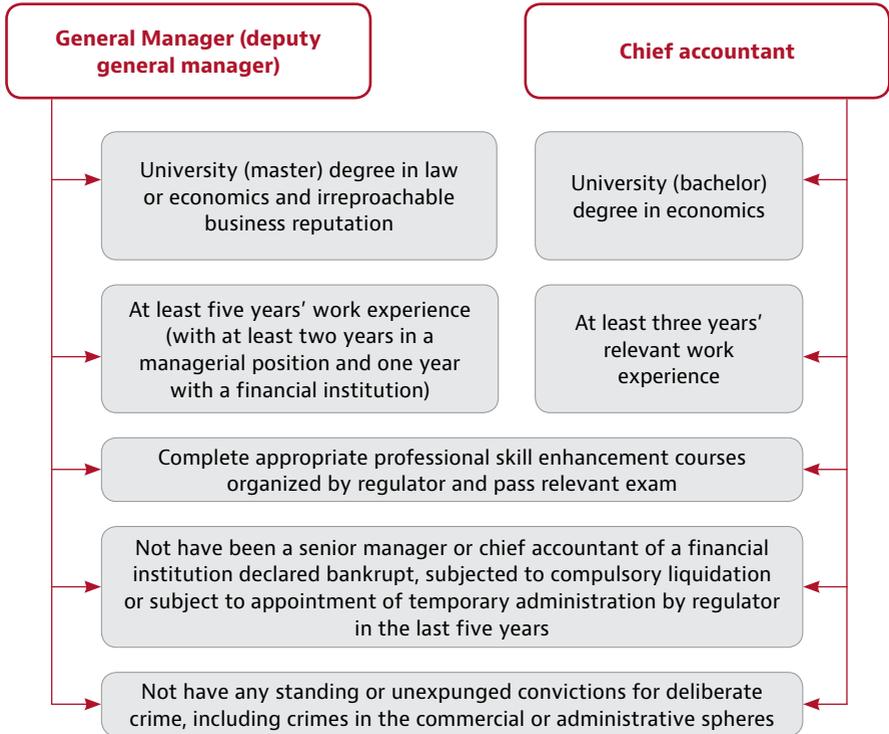
The total amount paid by an insurance company to the charter capital of any other Ukrainian insurer must not exceed 30% of its own charter capital (fund), and 10% of the charter capital per a particular insurer. However, this requirement does not apply to an insurer that provides services different from life insurance and contributes to the charter capital of an insurer that provides life insurance services.

## 26.5 Registration as a financial institution

In order to obtain the status of financial institution, a company must file an application for registration in the State Register of Financial Institutions within 30 calendar days from the date of its state registration as a company. On the date of submitting an application and throughout its existence, the company must comply with the following requirements:

- The company's paid-in charter capital must be equal to or exceed the UAH equivalent of EUR 1 million (calculated in accordance with the exchange rate of the National Bank of Ukraine ("**NBU**") on the date of its application) for an insurance company, or the UAH equivalent of EUR 10 million for a life insurance company.
- The company is required to own or lease non-residential premises at its registered office address, which must be used exclusively by such company for the insurance activities.
- The company must have software, hardware and communication facilities installed in the premises owned or leased by the company.

The general manager and chief accountant of a company must have advanced professional skills, in particular:



As a general rule, the actuary of an insurance company must have: (i) a university degree; (ii) at least three years' actuarial work experience; (iii) a special qualification certificate issued by the regulator; and (iv) a document proving successful completion of the professional exams according to the American or British examination systems. Other specific qualification requirements may apply to the actuary of a life insurer.

**26.6 Insurance license**

Only legal entities with an insurance license may use the words "insurer," "insurance company" and "insurance organization" in their name. In order to obtain and maintain an insurance license, a financial institution must comply with the following requirements in addition to the requirements discussed above.

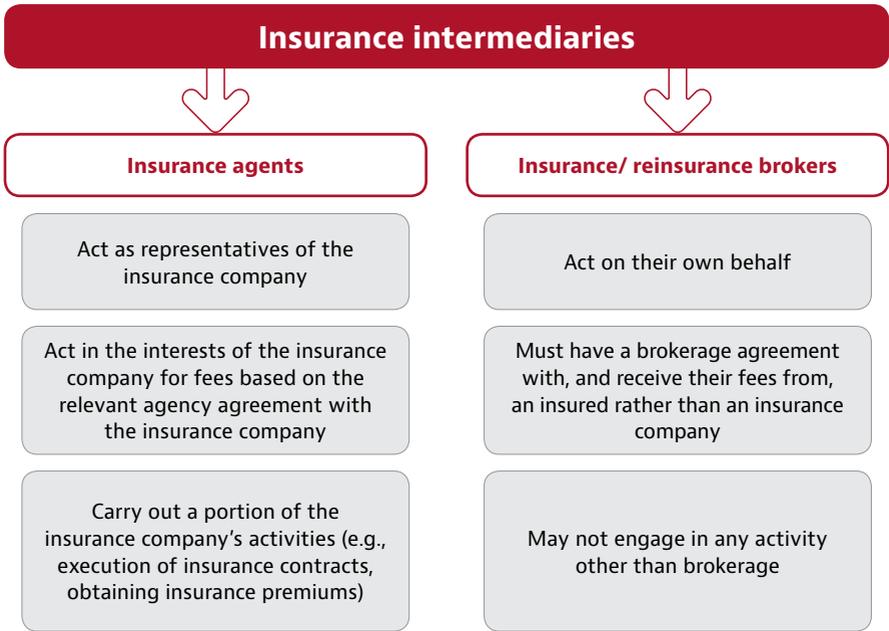
A financial institution must adopt and register its insurance conditions (containing a description of all of its insurance products) and any amendments thereto with the regulator.

In order to obtain a license, an insurance company must submit the following documents to the regulator:

- application
- questionnaire of the general manager/chief accountant of a company (submitted separately)
- description of the documents submitted for obtaining a license (in two copies)
- certified copies of statutory documents
- bank or auditor certificate confirming the amount of paid charter capital
- certificate on the financial condition of the founders (participants) of the insurance company certified by an auditor, where the insurance company is created as a general partnership, limited partnership or an additional liability company
- insurance conditions (rules)
- study of the feasibility of the planned insurance or reinsurance activity
- Information regarding the participants of the insurance company, the head of the executive body and its deputies; a copy of the diploma in economics or law of the head of the executive body of the insurance company or its first deputy and a copy of the diploma in economics of the chief accountant plus information on respective certificates in the cases provided by the regulator. All documents must be certified by the insurance company.
- Copies of education documents, including documents confirming the completion of professional skill enhancement courses by the general manager and chief accountant of the non-resident insurer's branch (for a branch of non-resident insurer)

The regulator is obliged to decide upon the application of the insurance company within 30 days after obtaining all the necessary documents. In the event that changes are made to the documents submitted to the regulator, the insurance company must inform the regulator of such changes within 10 days.

26.7 Insurance agents and brokers



According to Ukrainian law, the sale of insurance products of one company must not constitute more than 35% of a broker’s activity within one year. Therefore, a broker must sell insurance products of at least three insurance companies. In practice, this restriction limits the ability of an insurance broker to sell a significant amount of an insurance company’s products in Ukraine.

In Ukraine, non-resident insurance and reinsurance brokers may provide their services related to concluding insurance agreements with non-resident insurance companies either independently or through their permanent representative offices in Ukraine.

A non-resident insurance or reinsurance broker must notify the regulator in writing about its intention to conduct business in Ukraine, and the regulator will then publish such information on its official website and in printed mass media.

## **26.8 Changes to take effect in 2020**

In September 2019, a new "split" reform for the improvement of the financial market regulation was launched. For these purposes, the Ukrainian Parliament has adopted the Amending Law, with most of its provisions entering into force on 1 July 2020.

Pursuant to the Amending Law, on 1 July 2020 the National Commission Performing the Regulation of the Financial Services Markets of Ukraine will cease to exist. Starting from the mentioned date, it will be substituted with the NBU which will become the sole regulator of the insurance market and will perform all regulatory functions imposed on it by the Insurance Law.

After succeeding to the National Commission Performing the Regulation of the Financial Services Markets of Ukraine, the NBU will presumably amend certain insurance regulations, including those on licensing of insurance companies. In this regard, it is highly expected that some of the licensing conditions will be changed after 1 July 2020.

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**27** **NATURAL  
RESOURCES, MINING,  
AND OIL AND GAS**



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## 27.1 General

The principal legislative acts governing mining and oil and gas exploration activities in Ukraine are the Code of Ukraine on the Subsurface (“**Subsurface Code**”), and the Laws of Ukraine “On Oil and Gas,” “On Production Sharing Agreements,” “On Mining in Ukraine” and “On Gas (Methane) of Coal Fields.” The Law of Ukraine “On the Natural Gas Market” regulates the midstream and downstream oil and gas operations. The Law of Ukraine “On Ensuring Transparency in Extractive Industries” defines the disclosure obligations of the upstream market participants and the relevant state authorities.

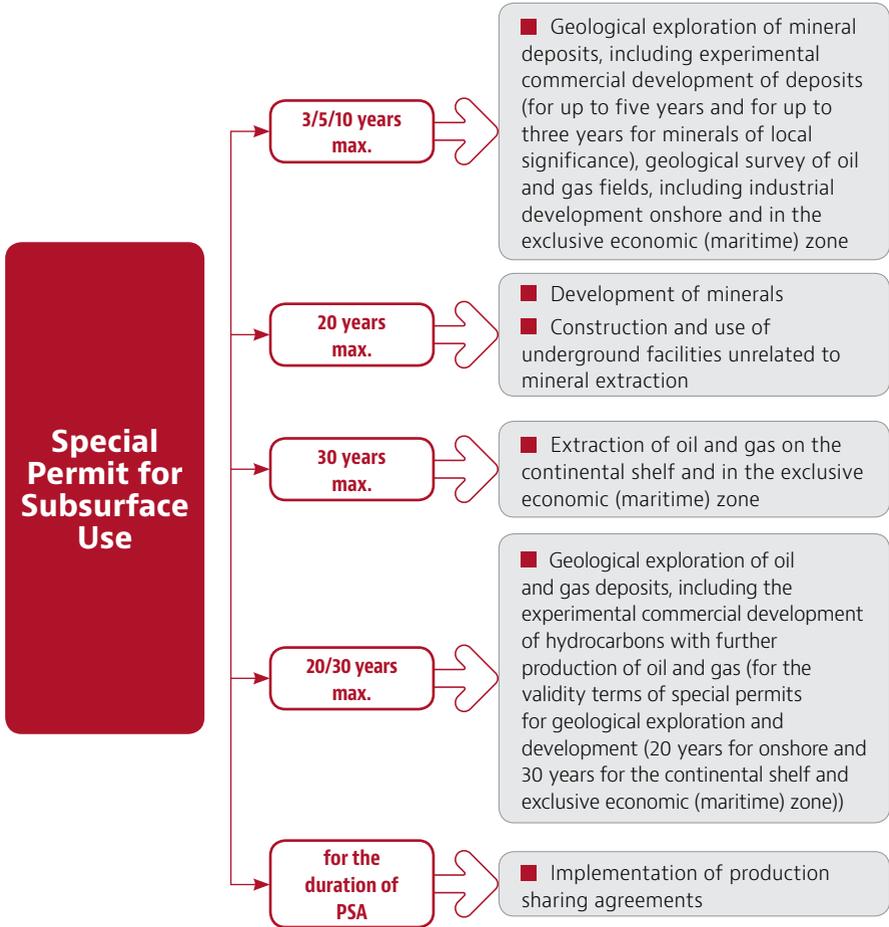
The Subsurface Code defines the subsurface as “a part of the earth’s crust underlying the land surface and the bottom of bodies of water and stretching to the depths accessible for geological exploration and development.” The subsurface is the exclusive property of the people of Ukraine and may be granted to Ukrainian and foreign legal entities and individual entrepreneurs for use only.

## 27.2 Permits

In most cases, business entities and/or individual entrepreneurs seeking to engage in the use of Ukrainian subsurface resources must follow the established procedure for obtaining the necessary permits and, where necessary, mining allotments.

### *Special permits*

Under Resolution of the Cabinet of Ministers of Ukraine “On Approval of the Procedure for Issuance of Special Permits for Subsurface Use” No. 615 dated 30 May 2011, subsurface use rights are granted in the form of a special permit for subsurface use, which can be issued for the following types of activities:



The applicable legislation provides that subsurface use rights are granted through auctions where the only criterion is the highest offered price.<sup>1</sup> From 24 October 2018 until 1 October 2020, the special permits shall be granted only via electronic auctions.<sup>2</sup> However, special permits may also be granted without an auction procedure on specific grounds, some of which are listed below:

<sup>1</sup>The rights to conclude the production sharing agreements are granted, with limited exceptions, on tenders where the bids are evaluated using multiple criteria (investment commitment, scope of works, experience of similar upstream operations, etc.).

<sup>2</sup>Resolution of the Cabinet of Ministers of Ukraine "On Implementation of Test Project on Deployment of Auctions for Sale of Special Permits for Subsurface Use by Way of Electronic Auctions" No. 848 dated 17 October 2018.

- Extraction of minerals (i) if the applicant, at its own expense, has conducted geological exploration of a subsurface area, evaluated the mineral reserves and this evaluation has been approved by the State Commission for Mineral Reserves of Ukraine (SCMR), and applied for the special permit within three years after the SCMR's approval, or (ii) if the applicant (other than in relation to the oil and gas deposits), using its own funds, obtained approbation of the mineral reserves from the SCMR in the event of further approval of the mineral reserves by the SCMR within a three-year period starting from the date of issuance of a special permit for subsurface use
- Geological exploration, including experimental commercial development of the deposits with subsequent extraction of oil and gas (commercial production of the deposits) if the applicant, using its own funds exclusively as a result of the geological exploration of the subsurface block on the basis of the relevant special permit, has obtained approbation in the event of further approval of the mineral reserves according to the established procedure after the issuance of a special permit for subsurface use
- Expansion of the boundaries of an area previously provided for subsurface use with the aim of geological exploration (including the areas granted for geological exploration, including experimental commercial development) or placing an underground storage facility by not more than 50% (or by not more than 50% of the reserves previously identified in a special permit in case of increase of extraction of minerals by expanding the boundaries of a subsurface plot), subject to the condition that the adjacent plot is not in use
- Construction and operation of underground facilities not related to the extraction of minerals, including facilities for underground storage of oil, gas and other substances and materials, disposal of hazardous substances and industrial waste, and discharging of waste water
- Geological survey and extraction of minerals of local significance
- Implementation of production sharing agreements

A subsurface user is not authorized to bestow, sell or otherwise transfer the rights granted by a permit, except for a very limited number of circumstances. The validity of a special permit for subsurface use, however, is not affected by a change of ownership of the permit holder. For this reason, a special permit is often obtained by an interested party through acquiring control over the licensee (i.e., by purchasing the relevant shares or participatory interest).

The conditions for the use of natural resources must be set forth in an agreement between the permit holder and the authorized governmental agency. The permit holder must start using the subsurface area within two<sup>3</sup> years after the issuance of a special permit (180 days for oil and gas deposits).

### *Mining allotments*

Pursuant to Article 17 of the Subsurface Code, a permit holder must, unless there is a special exemption, obtain a certificate approving its right to use the defined subsurface area for the purposes of commercial development of minerals, which is called the “mining allotment act” (“**Mining Allotment**”).<sup>4</sup>

To apply for a Mining Allotment, an applicant should have a special permit for subsurface use and a duly approved commercial development design. A Mining Allotment is issued in accordance with the borders of the subsurface area specified in the special permit. A subsurface user is not authorized to transfer the rights granted by virtue of the Mining Allotment (whether in full or in part) to any third party.

Business entities and/or individuals seeking to develop minerals of national importance or to construct and use underground oil or gas storage facilities must file an application for a Mining Allotment with the State Service of Ukraine for Employment Matters. If they would like to develop minerals of local importance, business entities and/or individuals at the location of the relevant deposit should apply to a regional council or other relevant local council depending on the circumstances.

A decision on the issuance of a Mining Allotment should be made within 21 calendar days.

### **27.3 Payments for subsurface use**

Under the applicable Ukrainian legislation, the following mandatory payments shall be required for subsurface use:

- Royalty payments for subsurface use for development of natural resources

<sup>3</sup>The Law of Ukraine “On Gas (Methane) of Coal Fields” requires the start of the activities prescribed in a special permit for exploration and extraction of gas (methane) of coal fields within one year of such permit being issued. estment commitment, scope of works, experience of similar petroleum operations, etc.).

<sup>4</sup>The procedure for issuing Mining Allotments is regulated by Resolution of the Cabinet of Ministers of Ukraine “On Approval of the Procedure for Issuance of Mining Allotments” No. 59 dated 27 January 1995.

- Royalty payments for subsurface use not connected with extraction of natural resources (e.g., storage of natural gas and related products, and storage of oil and oil products)

When extracting natural resources, the taxable object will include: (i) the amount of mineral resources extracted from the subsurface within the territory of Ukraine, its continental shelf and the exclusive (maritime) economic zone; and (ii) the amount of mineral resources produced from mine waste.

When subsurface use is not related to the extraction of natural resources, the taxable object will comprise the amount of subsurface to be used and will depend on the goals and method of its use. In addition, the Tax Code of Ukraine provides an exemption from the subsurface use payment for open underground constructions at a depth of less than 20 meters with or without their subsequent filling.

Moreover, the Tax Code of Ukraine envisages royalty payments for the transportation of oil and oil products through oil pipelines and oil-product pipelines, as well as for the transportation of ammonia through pipelines.

#### **27.4 Production sharing agreements**

The applicable Ukrainian legislation envisages certain incentives for investors that undertake mining activities directly pursuant to agreements on the sharing of the output of such activities (PSA).

The basic legal requirements with respect to PSAs are set forth in the Law of Ukraine "On Production Sharing Agreements" ("**PSA Law**") dated 14 September 1999 (with subsequent amendments).

The PSA Law envisages that relations arising in the course of prospecting, exploration and development operations, distribution of production and its transportation, processing, storage, use, sale or disposition as well as construction and operation of related industrial facilities, pipelines or other assets shall be governed by a PSA, which shall be concluded in accordance with the PSA Law. Moreover, in the case of any legal discrepancies between the PSA Law and other Ukrainian laws, the provisions of the PSA Law shall prevail.

Under the PSA Law, the Cabinet of Ministers of Ukraine, on behalf of the state and the investor(s), may enter into a PSA whereby the investor agrees to undertake certain mining activities at its own expense and risk, and is entitled to recovery of its expenses and to a certain share of the relevant

production. All PSAs are subject to state registration. When entering into a PSA, a foreign investor must establish a representative office in Ukraine within three months of the date on which the PSA was concluded.

The deposits to be granted under a PSA regime are selected under the relevant decision of the Cabinet of Ministers of Ukraine. The investors are then selected through a tender managed by the permanently acting Interagency Commission.

In addition, there are several cases where a PSA may be entered into without a tender, including:

- If there is a deposit with insignificant reserves of minerals, and the Cabinet of Ministers of Ukraine, together with the relevant local municipal authorities, approved entry into the PSA for such deposit without a tender
- If the subsurface user holding one or several special permits for subsurface use has commenced works on subsurface use and has expressed the intention to conclude a PSA on the basis thereof, subject to the approval of the Cabinet of Ministers of Ukraine

The PSA may be concluded for a term not exceeding 50 years. The validity term of the PSA may be prolonged at the investor's initiative if the investor fulfils the obligations under the PSA. Such prolongation is performed by concluding an additional agreement. Simultaneously with the signing of the agreement on prolongation of the PSA, the licenses and other permits issued to perform the PSA will also be prolonged. The agreement on prolongation of the PSA is subject to state registration.

Minerals extracted under the PSA should be shared between the state and the investor in accordance with the PSA terms. Until they have been shared, the state retains title to all minerals extracted under the PSA. The investor obtains ownership of the cost recovery and the profit production determined by the PSA at the time of their distribution. The remaining part of the minerals shall be retained by the state.

The quarterly share of cost recovery production may not exceed 70% of the total quarterly production until the investor has recovered its recoverable costs.

The investor is free to use and dispose of the volume of the extracted minerals owned under the PSA and it is not subject to any licensing or quota requirements.

The investor may be obliged to sell its share of the extracted minerals within Ukraine only if it is expressly required by the PSA, in which case the sale price of the extracted production may not be lower than the price in the international markets. No other limitations of the investor's rights are permitted, unless they are expressly specified in the PSA or follow from the tender terms.

The title to assets created or acquired by the investor while performing its obligations under the PSA is transferred to the state on the date when the value of such assets is fully covered by the cost recovery production, or upon termination of the PSA. However, during the validity of the PSA, the investor enjoys a pre-emptive right to use such assets.

The rights and obligations under the PSA may only be assigned by the investor to a third party with the prior consent of the state, and only if such third party possesses sufficient financial and technical capability and experience to perform the PSA. The state is deemed to have consented to the assignment if it fails to provide the investor with its response within 90 days after the date of the request for consent.

Taxation of the PSA is regulated by a separate chapter of the Tax Code of Ukraine. The most significant features of the taxation regime under a PSA include:

- During the validity of the PSA, the investor is exempt from national and local taxes and levies (save for VAT, CIT and subsurface use royalty for the purposes of extraction of minerals), which shall be replaced by the production sharing under the PSA between the state and the investor. The investor shall also be obliged to accrue, withhold and pay the personal income tax as employer or otherwise in accordance with the tax rules.
- CIT shall be paid exclusively by monetary means.
- In the case of import of goods and other property into the customs territory of Ukraine for the purposes of the PSA, no taxes are payable at the customs clearance of goods under the customs regime of import (excluding excise taxes).

For the whole duration of the PSA, the investor enjoys the following incentives, among others:

- Special royalty rates for (i) natural gas and (ii) oil and condensate of 1.25% and 2% of the product price, respectively.

- The investor and its subcontractors are exempt from licensing and quota requirements when importing the equipment necessary for their performance under the PSA; the same applies when such equipment is shipped out of Ukraine upon the termination of the PSA.
- Any product obtained by the investor is subject to VAT when sold within Ukraine, but it is not subject to any VAT, other tax or customs duties when exported out of Ukraine.
- Depreciation rates, other than those provided by the applicable legislation, may be set out in the PSA.
- Profits received under the PSA are exempt from the profit repatriation tax.
- Funds received under the PSA are exempt from any restrictions on conversion into Ukrainian or foreign currency, and may be repatriated abroad under the terms and conditions of the PSA; any requirements for the mandatory sale of foreign currency are not applicable to such funds.
- The investor enjoys a flexible regime for use of foreign currency for PSA purposes, which includes exemption from restrictions on settlements under export and import contracts, commonly referred to as the “365 days rule”; and transfer of foreign currency to the account of other investors in Ukraine.
- Compulsory withdrawals of funds from bank accounts, opened by the investor in Ukraine to finance its operations under the PSA, are not permitted.
- The state will issue the permits to utilize foreigner’s labor or to the foreign employees of an investor’s contractors solely upon the investor’s application with an attached list of the relevant foreign employees; the requirements for submission of any other documents required by Ukrainian legislation shall not apply.

During the period of the PSA, the rights and obligations of an investor will be regulated under the legislation in force at the time of signing the PSA (except for legislation that reduces taxes or fees or cancels them, simplifies the regulation of economic activity for exploration and development operations, reduces state supervision over business activity, including procedures for customs, currency, tax and other state control, or reduces the responsibility of an investor, legislation of which shall be applied from its date of enactment); however, the above-mentioned stabilization rules do not apply to changes in legislation relating to defense, national security, public order and environmental protection.

## 27.5 Use and transfer of geological information

The principles of use and transfer of geological information are set out in the Subsurface Code of Ukraine. Since 2018,<sup>5</sup> Ukrainian rules on use and transfer of geological information have undergone significant improvements to facilitate its systematization and digitalization of the legacy data, as well as to improve its availability to business.

The subsurface users must notify the State Service for Geology and Subsoil of Ukraine of the creation, acquisition or transfer of ownership or use rights to the geological information, which shall be recorded in the catalog of data on geological information maintained by the state-owned company "Geoinform of Ukraine." The notification shall be made no later than 10 business days prior to the intended transfer.

Access for investors to the state-owned source geological information (core and rock samples, well testing logs, etc.) is contract-based and paid. The terms of use and transfer of derivative geological information (interpretation materials, maps, etc.) produced on the basis of the said initial geological information are to be defined in the relevant contract. Access to and use of the state-owned derivative geological information is free of charge, except where the subsurface user that was granted a relevant special permit is to reimburse the state for the cost of the associated exploration works. Privately owned derivative geological information may be used subject to its owner's consent.

## 27.6 Special exemptions for oil and gas upstream operations

Since April 2018,<sup>6</sup> a number of beneficial legislative improvements aimed at simplifying the regulatory environment in the area of oil and gas production have been effective. When carrying out exploration and production activities, the subsurface users are subject to the following special rules:

- Mining Allotments for oil and gas projects are not required.

<sup>5</sup> Article 39 of the Subsurface Code provides for the right of the subsoil user to dispose of (sell or transfer use rights to) the geological information created or acquired at its expense to both Ukrainian residents and non-residents subject to the Laws of Ukraine "On State Secret Information" and "On Sanctions." The procedure for transfer of and mandatory reporting on the geological information is set out in the Resolution of the Cabinet of Ministers of Ukraine No. 939 dated 7 November 2018 "Issues of Geological Data Transfer."

<sup>6</sup> Reference is made to the Law of Ukraine No. 2314-VIII dated 1 March 2018 "On Amending the Laws of Ukraine to Deregulate the Oil and Gas Industry" which took effect on 1 April 2018.

- The oil and gas special permits enjoy an increased protection of their validity: their suspension is only possible after application of geological control measures.
- Amendments to oil and gas special permits are free of charge.
- Special easements are available to access most types of land (including agricultural) to operate oil and gas production and linear facilities without changing the land designation.
- Well drilling and hook-up operations, as well as granting land for installation of pipelines and other linear facilities, are still allowed in case of absence of zoning of the territory or detailed plan.
- The subsurface users developing oil and gas blocks enjoy a grace period for accessing land by virtue of a simple land access agreement without changing land designation to transition from pilot to commercial production until full formalization of land use rights.

### **27.7 Pipeline transportation**

The pipeline transportation system of Ukraine consists of the mainstream pipeline (high-pressure) transportation system and the industrial (access) pipelines (low-pressure) transportation system.

The trunk pipeline transportation system is of paramount importance to the national economy and security, and is run by the state. The state-owned mainstream pipeline transportation companies are not subject to privatization or any other actions leading to the private use of such enterprises. However, mainstream pipelines constructed at the expense of municipal or private commercial entities are owned by such companies.

The following activities are subject to licensing:

- Transportation of oil and oil products via a mainstream pipeline
- Transportation of natural, oil and coalbed gas (methane) by pipeline, as well as its distribution
- Supply of natural and coalbed gas (methane) at regulated or non-regulated tariffs
- Storage of natural and coalbed gas (methane) in volumes exceeding the threshold determined by the licensing terms

Licenses are issued by the National Commission for State Regulation in the Energy Sphere and Utility Service of Ukraine (NKREKP).

The Code on Gas-Distribution System is aimed at regulating the relations between the operator of the gas-distribution system and market

participants as to the use of the system, accounting of gas, access to and joining of the system with construction objects, access for factual supply/distribution of natural gas, etc.

The Code on Gas-Transportation System determines the legal, technical and economic grounds for the operation of Ukraine's gas-transportation system, as well as the procedure for granting access to the system to suppliers, producers and consumers of natural gas.

A number of obligatory standard agreements were approved by the NKREKP; namely, on transportation of gas via mainstream pipelines, distribution of natural gas, storage (pumping-in, storage and pumping-out) of natural gas, supply of natural gas to public and other activities related to operating elements of the Unified Gas-Transportation System of Ukraine. No such obligatory agreement is approved for the sale and purchase of natural gas between "traders" (i.e., those who do not supply natural gas to consumers).

Moreover, the Law of Ukraine "On the Legal Status of Land in the Safety Zones of Mainstream Pipelines" dated 17 February 2011 sets the legal regime for the safety zones of trunk pipelines with a view to ensuring their smooth operation, rational use of land within the established safety zones, the regime for economic and other activities, environmental safety and protection, as well as protection of mainstream pipelines from the effects of possible accidents.

A separate section of the Tax Code of Ukraine regulates royalty payments for payers operating mainstream pipelines and rendering services for transportation of oil, oil products and gas via mainstream pipelines in Ukraine. For the transportation of oil and oil products, the taxable object shall be the actual amount of transported oil and oil products during the taxable period (calendar month). For natural gas and ammonia, the amount of tax shall depend on the type of product (natural gas or ammonia), the amount of it and the distance it has to be transported.

The Law of Ukraine "On the Natural Gas Market" establishes the principles of operation for the natural gas market, limits the permitted state control in Ukraine's gas sector and regulates relations between natural gas suppliers and consumers.

**Baker  
McKenzie.**



**28** PHARMACEUTICALS  
AND HEALTHCARE



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### 28.1 General overview

The production and circulation of pharmaceuticals and medical devices in Ukraine is subject to strict control. The statutory framework for the regulation of pharmaceutical products and medical devices in Ukraine is complex and comprises a network of specific laws and regulations. The following are the major laws in the healthcare industry:

Name of the Law	Scope of Regulation
The Law of Ukraine "On the Fundamentals of Ukrainian Laws on Healthcare" (" <b>Fundamentals</b> "), dated 19 November 1992	Lays out the formal basis of the Ukrainian healthcare system
The Law of Ukraine "On Pharmaceuticals" (" <b>Pharmaceuticals Law</b> "), dated 4 April 1996	The principal legislative act setting forth the basic requirements for the development, registration, production, quality control and sale of pharmaceuticals in Ukraine
The Law of Ukraine "On State Financial Guarantees of Providing Medical Services and Pharmaceuticals" dated 19 October 2017	Lays out the framework for state financing of medical services, pharmaceuticals and medical devices in Ukraine
The Law of Ukraine "On Technical Regulations and Assessment of Conformity" (" <b>Law on Technical Regulations</b> "), dated 15 January 2015	Governs the development, adoption and implementation of technical regulations and conformity assessments
The Law of Ukraine "On Advertising," dated 3 July 1996 (" <b>Advertising Law</b> ")	Governs advertising of pharmaceuticals and medical devices
The Law of Ukraine "On Licensing of Types of Economic Activity" (" <b>Licensing Law</b> "), dated 2 March 2015	Governs licensing activities in Ukraine

The reform of healthcare financing has been ongoing in Ukraine since 1 July 2018. The reform is based on the following laws:

- The Law of Ukraine No. 2168-VIII "On State Financial guarantees of Providing Medical Services and Pharmaceuticals" dated 19 October 2017
- The Law of Ukraine No. 2233-VIII "On Amending the Budget Code of Ukraine" dated 7 December 2017
- The Law of Ukraine No. 2206-VIII "On Enhancing Affordability and Quality of Medical Services in Rural Areas" dated 14 November 2017

The main objectives of healthcare financing reform in Ukraine include the following:

- "Money follows the patient" principle: payments to healthcare organizations for services provided (patients enrolled at primary level or treated at secondary and tertiary level) based on unified tariffs instead of allocating fixed amounts of financing to each healthcare organization
- Guaranteeing patients' free choice of medical service suppliers
- Paying for medical services based on agreements between healthcare organizations and the centralized public payer for healthcare services - the National Health Service of Ukraine ("**NHS**")
- Paying for medical services to both private and public healthcare organizations as opposed to only public healthcare organizations
- Setting out the list of medical services, medical devices and pharmaceuticals to be financed from the state budget funds under a specific budget program and provided to patients free of charge ("**Program**"). Medical services, medical devices and pharmaceuticals outside the Program may be financed under other state budget programs, with funds from local budgets, medical insurance or using other permitted sources of financing
- Enhancing technical infrastructure and financial capabilities of healthcare organizations in rural areas
- Introducing the eHealth technologies: registries of patients, healthcare organizations, doctors, e-prescriptions, development of telemedicine, etc.

The healthcare financing reform was launched on the primary care level on 1 July 2018. As of this date, healthcare organizations at primary level started receiving payments from the NHS based on (i) number of enrolled patients (i.e., patients who chose their physician in the relevant healthcare

organization by signing a declaration with him/her) and (ii) unified tariff paid for each enrolled patient at primary care level.

The healthcare financing reform at secondary level of medical care was implemented as a pilot project in Poltava region 2019. Starting from 1 April 2020, the healthcare financing reform will be fully implemented on secondary and tertiary levels of medical care.

The main regulatory authority for the healthcare system, pharmaceuticals and medical devices in Ukraine is the Ministry of Health of Ukraine (“**MOH**”). The pharmaceutical sector is also administered, regulated and supervised by the Cabinet of Ministers of Ukraine (“**CMU**”), the State Service of Ukraine on Pharmaceutical Products and on Control of Narcotics (the activities of which are directed and coordinated by the CMU through the MOH) (“**State Service for Pharmaceuticals**”), the SEC of the MOH (“**SEC**”), the Anti-Monopoly Committee of Ukraine, and a number of other state agencies.

## **28.2 Regulatory requirements concerning pharmaceuticals**

### ***28.2.1 Placement of pharmaceuticals into circulation***

The Pharmaceuticals Law defines “pharmaceuticals” as “substances or combinations of substances (of one or more active pharmaceutical ingredients (“**API**”) and excipients) that have therapeutic properties and are aimed at the treatment or prophylaxis of illnesses of humans, or substances or combinations of substances (of one or more APIs and excipients) that can be used for preventing pregnancy, restoration, correction or alteration of a physiological function in a human by way of pharmacological, immunological or metabolic impact or for reaching a diagnosis.” The above definition includes APIs, in-bulk, ready-to-use pharmaceuticals, homeopathic products, products used for the detection and removal of pathogens or vermin and cosmetics with medicinal properties.

Pharmaceuticals may be used in Ukraine only after their official state registration by the MOH (i.e., marketing authorization). The above rule exempts from the mandatory registration regime those pharmaceuticals that are prepared in pharmacies in accordance with medical prescriptions for individual patients or in accordance with orders placed by healthcare institutions, provided that such pharmaceuticals are prepared from active and auxiliary substances allowed for use in Ukraine.

Official state registration is generally preceded by pre-clinical research and clinical trials.

*Pre-clinical research*

Pre-clinical research is mandatory for APIs, auxiliary substances, finished pharmaceutical products (except immunobiological pharmaceuticals), including herbal medicines, medicinal cosmetics, disinfective, diagnostic and radioactive pharmaceuticals. Pre-clinical research is designed to study the specific potency and safety of pharmaceuticals. The results of the pre-clinical research are submitted to the MOH, which decides whether clinical trials of a pharmaceutical product may be permitted.

Ukrainian legislation requires that, in order to determine the specific activity and safety of a given pharmaceutical product, the pre-clinical research (including chemical, physical, biological, microbiological, pharmacological, toxicological and other scientific studies) be carried out by specialized research establishments. The detailed requirements for the conduct of the pre-clinical research are determined by the MOH under Order No. 944 "On the Approval of the Procedure for Conducting the Pre-Clinical Research of Pharmaceuticals and of the Review of Materials for the Pre-Clinical Research of Pharmaceuticals," dated 14 December 2009. There is no statutory requirement for establishments conducting pre-clinical research to be authorized or licensed, but they must be able to demonstrate an appropriate scientific and methodological level, and ensure the humane treatment of any animals used in the tests.

*Clinical trials*

Under the Pharmaceuticals Law, a pharmaceutical product may be admitted for clinical trials if its pre-clinical research showed positive results, and the expected benefits of using the pharmaceutical significantly outweigh the risks of side effects. Clinical trials are conducted by specialized medical institutions determined by the MOH based on its decision on conducting the clinical trial. The MOH can approve the decision on conducting the clinical trial based on a positive conclusion of the SEC issued as result of clinical trial materials' evaluation. Clinical trials are conducted after evaluation of ethical as well as moral and legal aspects of the clinical trials' program by the ethics committees under the healthcare institutions conducting the clinical trials. The results of the clinical trials are evaluated during state registration of the pharmaceutical product. The procedures for clinical trials are set forth in the "Procedure for Conducting Clinical Trials of Pharmaceuticals and the Examination of Materials on Clinical Trials and Model Regulation on the Ethics Commission" approved by MOH Order No. 690 on 23 September 2009, as restated by Order No. 523, dated 12 July 2012.

The purpose of clinical trials is to determine the safety of a given pharmaceutical, its therapeutic effectiveness, optimal dosage, short-term and long-term side-effects, and, after registration and market entry, its therapeutic significance, the strategy for its further use, the incidence of side effects, and its action when combined with other pharmaceuticals. The application for clinical trials must be accompanied by, among others, the dossier of the investigational pharmaceutical product, the results of its pre-clinical research (if available), and the clinical trial protocol. The sponsor of the clinical trial is required to obtain insurance policies to cover the lives and health of patients (volunteers) before the commencement of the clinical trials.

The MOH will order clinical trials to be suspended in cases of danger to the health and life of a patient or volunteer, the ineffectiveness of a pharmaceutical, or a breach of any ethical norms. The clinical trial can also be temporarily suspended or terminated (subject to MOH approval) by the SEC in case the conditions stated in the application for clinical trials are not complied with, in case there is data which compromises the safety of study subjects or the scientific feasibility of the clinical trial, or in case of falsification. Clinical trials of pharmaceuticals for treatment of illnesses of children and the mentally disabled are expressly permitted in Ukraine, provided that certain warranties for such patients' interests are complied with.

#### *Registration of pharmaceuticals*

The state registration of a pharmaceutical product requires the filing of an application with the MOH. The procedure of the state registration is set out in the Pharmaceuticals Law, and it is further detailed in Resolution No. 376 of the CMU "On the Approval of the Procedure for the State Registration (Re-Registration) of a Pharmaceutical Product and the Fees for the State Registration (Re-Registration) of a Pharmaceutical Product" ("Registration Resolution") dated 26 May 2005.

Currently, legislation of Ukraine provides for a standard procedure of state registration and three different simplified procedures of state registration of pharmaceuticals.

Under the standard procedure, materials submitted for state registration of pharmaceutical are examined by the SEC. The examination of materials submitted for state registration of pharmaceuticals is regulated by the "Procedure of Examination of Registration Materials for Pharmaceuticals, Which are Submitted for State Registration (Reregistration), as well as Examination of Materials on Amending Registration Materials While

Registration Certificate is in Force,” approved by MOH Order No. 426, dated 26 August 2005, as amended.

Under a simplified procedure, pharmaceuticals which were registered in countries with strict regulatory authorities, in particular in Canada, USA, Australia, Japan, Switzerland and the EU under the centralized procedure, are reviewed by the SEC without expert examination thereof. The review of materials submitted for state registration of pharmaceuticals is regulated by the order of the Ministry of Health of Ukraine of 17 November 2016 No. 1245 “On approval of the Procedure for Consideration of Registration Materials on Pharmaceuticals which Move on State Registration (Re-Registration), and Materials about Modification of Registration Materials throughout Action of the Registration Certificate on the Pharmaceuticals Registered by Competent Authorities of the United States of America, Switzerland, Japan, Australia, Canada, Pharmaceuticals which according to the Centralized Procedure are Registered by Competent Authority of the European Union” as amended. This procedure was introduced on 31 May 2016 by way of amending the Pharmaceuticals Law.

Pharmaceuticals purchased under the state procurement through specialized procurement agencies (“**SPAs**”) as detailed in section 18.8.9 (a) are also subject to a specific registration procedure established by the “Procedure of Examination of Authenticity of Registration Materials for Pharmaceutical Which is Submitted to State Registration for its Procurement by Specialized Agency” established by MOH Order No. 721, dated 3 November 2015. Materials submitted for registration within this procedure are only checked for authenticity by the SEC without expert examination thereof.

Innovative pharmaceuticals registered by the European Medicines Agency are also subject to simplified state registration procedure provided by the Registration Resolution. No expert examination by the SEC is required within this procedure either; only the information on quality control methods and instruction for use of the pharmaceutical are verified for compliance with the registration dossier. This type of simplified registration was introduced prior to introduction of the simplified state registration procedure of pharmaceuticals which were registered in countries with strict regulatory authorities.

Based on the results of registration materials’ review by the SEC, the MOH adopts the order on registration of/refusing registration of the pharmaceutical.

The details on types of pharmaceuticals falling under each type of state registration procedure, required documents, scope of the SEC review of submitted materials as well as general timelines of registration for each type of the procedure are summarized below.

	Type of State Registration Procedure			
	Standard Procedure	Simplified Procedure for Products Registered by Strict Regulatory Authorities	Simplified Procedure for Pharmaceuticals Procured by SPAs	Simplified Procedure for Pharmaceuticals Registered by EMA
<b>Pharmaceutical products, which fall under the registration procedure</b>	<ul style="list-style-type: none"> <li>■ APIs;</li> <li>■ ready-to-use pharmaceuticals;</li> <li>■ in bulk pharmaceuticals;</li> <li>■ medical immunobiological products;</li> <li>■ medical devices that contain substances transferred into systemic blood circulation during their use.</li> </ul> <p>Depending on the type of the pharmaceutical, there are certain sub-categories within this procedure, e.g., pharmaceuticals within full (independent) dossier (i.e., innovative products), generic, hybrid pharmaceuticals or biosimilars etc.</p>	Pharmaceuticals which were registered in countries with strict regulatory authorities, in particular in Canada, USA, Australia, Japan, Switzerland and the EU under the centralized procedure.	Pharmaceuticals which are submitted to state registration based on results of procurement by a SPA.	Innovative pharmaceuticals registered by EMA.
<b>Scope of application materials review</b>	Full examination of the registration dossier materials	The expedited review (without examination of the registration dossier materials)	An authenticity check (without examination of the registration dossier materials)	The verification of compliance of information on quality control methods and instruction for use of the pharmaceutical to the registration dossier

	Type of State Registration Procedure			
	Standard Procedure	Simplified Procedure for Products Registered by Strict Regulatory Authorities	Simplified Procedure for Pharmaceuticals Procured by SPAs	Simplified Procedure for Pharmaceuticals Registered by EMA
<b>Required documents</b>	<p>Application for state registration accompanied by the supporting documentation, including:</p> <ul style="list-style-type: none"> <li>■ documents required for <b>all</b> types of registration procedures, in particular: <ul style="list-style-type: none"> <li>○ information on quality control methods;</li> <li>○ a copy of a valid patent or a license agreement permitting the manufacture and sale of the registered pharmaceutical and the letter stating that the third party's rights protected by the patent or granted by the license are not violated due to the registration (if a pharmaceutical is related to an item of intellectual property registered in Ukraine); and</li> </ul> </li> <li>(ii) the specific documents within separate types of registration procedures.</li> </ul>			
<b>Duration of registration</b>	<p>Up to 220 business days:</p> <ul style="list-style-type: none"> <li>■ up to 210 business days for examination by the SEC (for certain pharmaceuticals, the timelines may be shorter); and</li> <li>■ up to 10 business days for the MOH to render the decision on state registration.</li> </ul>	<p>Up to 17 business days:</p> <ul style="list-style-type: none"> <li>■ up to 10 business days for review by the SEC; and</li> <li>■ up to 7 business days for the MOH to render the decision on state registration.</li> </ul>	<p>Up to 14 business days:</p> <ul style="list-style-type: none"> <li>■ up to 7 business days for authenticity check by the SEC; and</li> <li>■ up to 7 business days for the MOH to render the decision on state registration.</li> </ul>	<p>Up to 55 business days:</p> <ul style="list-style-type: none"> <li>■ up to 45 business days for verification of submitted materials to by the SEC; and</li> <li>■ up to 10 business days for the MOH to render the decision on state registration.</li> </ul>

General grounds for refusing registration of pharmaceutical within all types of registration procedure, as well as specific grounds for refusing registration of pharmaceutical within separate types of registration procedure are presented below.

## Grounds for Refusing Registration of a Pharmaceutical Product

For Standard Procedure of Registration	For Simplified Procedure of Registration for Products Registered by Strict Regulatory Authorities	For Simplified Registration Procedure of Pharmaceuticals Procured by SPAs	For Simplified Registration Procedure of Pharmaceuticals Registered by EMA
Registration violates the intellectual property rights of a third party that are protected by patent			
The effectiveness and quality of the given pharmaceutical product are not proven	<ul style="list-style-type: none"> <li>■ Incomplete package of documents.</li> <li>■ Inaccurate or incomplete information.</li> <li>■ Discrepancies in the manufacturer's name, address and address of its manufacturing facilities, which were indicated in the application for registration and in the information on the basis of which such pharmaceutical was registered by a competent authority in reference country.</li> </ul>	<ul style="list-style-type: none"> <li>■ Failure to submit required documents.</li> <li>■ Incomplete package of documents.</li> <li>■ Inaccurate or incomplete information in the submitted documents.</li> <li>■ Unauthenticity of translation of the text of package labelling or instruction on medical use of a pharmaceutical product.</li> </ul>	The effectiveness and quality of the given pharmaceutical product are not proven.

If registration is approved, the MOH will issue a registration certificate for five years (unless the applicant requests a reduced validity term of the registration certificate). The validity of registration certificates for pharmaceuticals which are subject to public procurement pursuant to procedures conducted by the SPA is limited to 31 March 2022. After state registration, the pharmaceutical product is included in the State Register of Pharmaceuticals, at which time an applicant also receives a registration certificate. Throughout the term of the validity of the registration certificate, the certificate holder will be responsible for the quality of the pharmaceutical product and must report any proposed change of the product registration materials to the MOH, stating the reasons for the change and its effect on the product. The State Service for Pharmaceuticals may prohibit, fully or temporarily, the marketing of a

registered pharmaceutical product if the product causes previously unknown dangerous effects or otherwise fails to comply with applicable Ukrainian requirements, including the quality parameters set out in the registration dossier.

For pharmaceutical products registered based on the standard registration procedure and pharmaceuticals registered based on the simplified registration procedure of pharmaceuticals registered by EMA, upon expiry of the registration certificate, the pharmaceutical product may be authorized for further use in Ukraine, provided that the application for its re-registration is submitted within one year before the expiration date, but not later than 90 calendar days before the expiry date of the previous registration certificate (in which case some test data will not be required). If the application is filed less than 90 days before the expiration date, the re-registration will entail the same procedure as the initial registration.

The re-registration of pharmaceuticals registered by strict regulatory authorities is performed based on the procedure set out in the "Procedure of Examination of Registration Materials for Pharmaceuticals, Which are Submitted for State Registration (Reregistration), as well as Examination of Materials on Amending Registration Materials While the Registration Certificate is in Force," approved by MOH Order No. 426, dated 26 August 2005, as amended. Re-registration is not applicable to pharmaceuticals procured by SPAs due to the temporary nature of this registration procedure.

Marketing of a pharmaceutical after the first renewal of its registration is not limited in time. After such renewal, the MOH issues the registration certificate for unlimited period of time. Further, any product supplied to the market during the period when the respective pharmaceutical is allowed to be marketed in Ukraine may continue being offered until the expiration date indicated on its packaging.

#### *Data exclusivity*

If an original pharmaceutical product is registered in Ukraine for the first time through the procedure of submission of the full dossier, then the state registration of another pharmaceutical with the same active substance(s) is possible no earlier than five years from the date of the registration of the original product, unless the second applicant has submitted its independently developed full dossier for an original product or has received the right to refer to or use the data from the first applicant's dossier.

The data exclusivity period applies solely if the application for state registration in Ukraine was submitted within two years from the date of the first ever registration of the original pharmaceuticals product in any country in the world. The five-year data exclusivity period may be extended to six years, if, within the first three years after registration of the original product, the relevant Ukrainian authority approves the use of this product for one or more indications that have a special advantage over the previously known (and registered) indications (however, the criteria for indications that have a special advantage have not yet been defined by the MOH).

In exceptional cases, to protect the health of the people of Ukraine, the CMU may allow the use of the information by a generics manufacturer without the consent of the original applicant.

The intellectual property rights of the owner of the original pharmaceutical will be recognized (and protected from the generics manufacturers under IP, administrative and criminal laws) only if it has obtained a patent in Ukraine or has a patent that is valid in Ukraine. The owner of the original pharmaceutical may use the existence of such patent to object to registration of a generic on the grounds that such registration will violate the patent.

### ***28.2.2 Licensing of activities in the healthcare area***

The Licensing Law and the Pharmaceuticals Law provide for the mandatory licensing of the below activities with respect to pharmaceuticals, narcotics, psychotropic substances, precursors, blood products as well as other human tissues and cells.

The details regarding the types of licensed activities, licensing authorities, timelines for issuing licenses and validity periods of licenses are presented in the table below.

	Product category			
	Pharmaceuticals	Narcotics, psychotropic substances, precursors	Donor blood and its components, pharmaceuticals manufactured therefrom (save for the cord blood, other human tissues and cells)	Cord blood, other human tissues and cells
<b>Activities requiring a license</b>	<ul style="list-style-type: none"> <li>■ manufacturing</li> <li>■ wholesale trade</li> <li>■ retail trade</li> <li>■ import (save for APIs)</li> </ul>	<ul style="list-style-type: none"> <li>■ developing</li> <li>■ manufacturing</li> <li>■ storing</li> <li>■ transportation</li> <li>■ purchasing</li> <li>■ sale</li> <li>■ importing</li> <li>■ exporting</li> <li>■ use</li> <li>■ destruction</li> <li>■ cultivation of narcotic plants defined in the list approved by the CMU</li> </ul>	<ul style="list-style-type: none"> <li>■ processing and storage of donor blood and its components</li> <li>■ sale of pharmaceuticals manufactured therefrom</li> </ul>	<ul style="list-style-type: none"> <li>■ processing</li> <li>■ labelling (coding)</li> <li>■ conservation</li> <li>■ testing</li> <li>■ storage</li> <li>■ supply (sale)</li> <li>■ clinical use</li> </ul>
<b>Licensing authority</b>	The State Service for Pharmaceuticals		The MOH	
<b>Pre-license audit</b>	Required	Not required	Not required	Not required
<b>Timelines for issuing licenses</b>	Ten business days upon receipt of application for issuing a license			
<b>Term of the license</b>	Indefinite			

Upon issue of a license, the license holder is subject to control by various state authorities as to its compliance with the licensing conditions. Failure to comply with the licensing conditions may lead to the cancelation of the license.

The license holder is required to apply for the reissuance of the license in the case of changes to its name (if the change of name is not related to the reorganization). Such application must be filed within one month after the

relevant changes take place. Additionally, the license holder is obligated to notify the licensing authority of any changes to the information that was submitted in its licensing application not later than within one month after the changes took place.

Compliance with the licensing conditions for the manufacture, import and wholesale or retail sale of pharmaceuticals is verified by planned or ad hoc audits conducted by the State Service for Pharmaceuticals, including through its branches in various regions of Ukraine. Following an audit, a report is produced identifying any violations (with reference to specific provisions of licensing conditions). Within five business days from the last day of the audit the auditors must issue an instruction to rectify any identified violations. The State Service for Pharmaceuticals may suspend or terminate a business entity's activities only on the basis of a court decision.

### ***28.2.3 Manufacturing of pharmaceuticals***

Pharmaceutical products may not be manufactured without a license for the manufacture of pharmaceuticals issued by the State Service for Pharmaceuticals. Detailed licensing requirements are set forth in the "Licensing Conditions for the Production, Wholesale, Retail Sale and Import of Pharmaceuticals (Except Active Pharmaceutical Ingredients)" ("**Licensing Conditions**"), approved by Resolution No. 929 of the CMU dated 30 November 2016.

To obtain a manufacturing license, an applicant must possess the necessary material and technical resources, employ qualified specialists and establish quality control procedures for pharmaceutical products. Prior to issuing the license, the State Service for Pharmaceuticals inspects the compliance of the applicant's material and technical resources, the qualifications of its personnel, and the conditions for quality control with the applicable requirements. The appendices to the manufacturing license specify the forms of pharmaceuticals that the applicant is licensed to manufacture, as well as any special conditions for carrying out production.

The industrial manufacture of pharmaceuticals can be carried out, provided that the manufacturer has an approved manufacturing unit and processes which comply with the requirements of the valid State Pharmacopoeia of Ukraine and/or other regulations applicable to the pharmaceutical product, its packaging, the terms and conditions of storage and quality control methods.

The industrial manufacture of pharmaceuticals must be carried out in compliance with the GMP requirements, including those for the bulk manufacture of pharmaceuticals. Compliance with GMP has been a pre-condition to obtaining a license to manufacture pharmaceutical products in Ukraine since 2011. The Licensing Conditions also contain further specific and detailed requirements applicable to the manufacture of pharmaceuticals.

#### **28.2.4 Wholesale and retail sale of pharmaceuticals**

Under the Pharmaceuticals Law, pharmaceuticals may be sold in Ukraine either pursuant to a doctor's prescription or over-the-counter, that is, without a prescription. The lists of the various categories of prescription pharmaceuticals and the rules for issuing prescriptions are approved by the MOH. The current regulations provide that prescriptions should be made using the INN, rather than a brand name, apart from biosimilars and pharmaceuticals for which an INN is not available.

Wholesale and retail sales of pharmaceutical products are subject to licensing, save for the sale by manufacturers of pharmaceuticals of their own production which is done on the basis of their manufacturing license. Detailed licensing requirements are set forth in the Licensing Conditions. To obtain a license for wholesale and/or retail trade in pharmaceuticals, an applicant must possess the necessary material and technical resources and qualified specialists. The State Service for Pharmaceuticals checks compliance with the applicable requirements prior to issuing the license.

The wholesale distribution of pharmaceuticals must be carried in compliance with the effective good distribution practices (GDP) and storage practices, which are harmonized with EU legislation.

The wholesale distribution of pharmaceuticals may only be done through a pharmaceutical warehouse and retail sales through pharmacies and their structural units, save in exceptional cases in rural areas without any pharmacies. Any form of distance selling, such as via the Internet, by post or through any other organizations, is prohibited. The owners of such pharmacies must ensure they observe the proper conditions for storage, production and sale of pharmaceuticals.

Under the Pharmaceuticals Law and the Licensing Conditions, a given pharmaceutical product may be admitted for sale in Ukraine only if its quality is certified by its producer, as confirmed by the State Service for Pharmaceuticals. Such a certificate of quality confirms the compliance of each batch of the pharmaceutical product with the requirements set

during its state registration. Quality of pharmaceuticals during wholesale and retail sale is also subject to control as set out in Order No. 677 of the MOH "Procedure for the Control of the Quality of Pharmaceuticals During Wholesale and Retail Sale" dated 29 September 2014.

The Pharmaceuticals Law requires that the following information appear on the label and the outer and inner packaging of pharmaceutical products: the name of the product, the name and address of the manufacturer, the registration number, the batch number, the consumption method, the dosage of the active ingredient in each product unit, the number of units per package, the use by date, the storage conditions, and restrictions on use.

In addition, all pharmaceuticals in circulation must be accompanied by appropriate instructions for medical use containing the required information.

As a rule, all labels and instructions for medical use of pharmaceuticals distributed in the territory of Ukraine must be in Ukrainian and in a regional language (that is, another language which is recognized as traditionally used in the relevant region of Ukraine (if any)). At the discretion of the manufacturer, the label or the accompanying leaflet may additionally contain a translation into another language. Labels and instructions for medical use of pharmaceuticals procured by SPAs may be in their original language. The external packaging of pharmaceutical products must provide the following information in braille for sightless individuals: the name of the product, the dosage, and the form of the product. For some pharmaceuticals the MOH may require that only the name of the product be indicated in braille.

### ***28.2.5 Import and export of pharmaceuticals***

Only pharmaceuticals registered in Ukraine may be imported into Ukraine, subject to the receipt by an importer of an import license and the availability of a quality certificate issued by the manufacturer for every batch of a pharmaceutical (batch release). Unregistered pharmaceuticals may be imported into Ukraine for the purpose of conducting pre-clinical research and clinical trials, pharmaceutical development, state registration in Ukraine, exhibitions, conferences, and similar purposes without the right of distribution, for personal use by individuals, for use by foreign military units stationed in Ukraine, or as technical assistance and humanitarian aid in the case of disasters, catastrophes or epidemics. Any import of unregistered pharmaceuticals requires a special permit of the MOH. The import of unregistered pharmaceuticals is regulated by Order No. 237 of the MOH

“On the Procedure for Import of Unregistered Pharmaceuticals, Standard Samples and Reagents into the Territory of Ukraine,” dated 11 August 2011, as amended.

The procedure for quality control of imported pharmaceuticals is established by Resolution of the CMU No. 902, dated 14 September 2005, as amended. In particular, a quality certificate (certificate of analysis) is required (batch release), in addition to the confirmation of compliance of the manufacturer with the GMP requirements issued by the State Service for Pharmaceuticals.

A license for the import of pharmaceuticals into Ukraine has been required since 1 March 2013, while the import of APIs is exempt from the licensing requirement starting from 1 February 2015.

Obtaining the import license and undergoing state quality control procedure are not required for the import of pharmaceuticals procured by the SPAs. For import of such pharmaceuticals only a quality certificate issued by the manufacturer for every batch of a pharmaceutical (batch release) is required.

The issuance of the import license is performed based on the Licensing Conditions. The Licensing Conditions set forth the requirements for licensees, including the obligation of importers to implement (a) controls over the preparation of internal documents, including the process of drafting, approval, review, archiving and the format of its documents, and (b) an internal audit system. The importers must maintain (and disclose in the event of any audit) a Site Master File detailing the quality management system policy, including procedures for the storage and quality testing of imported medicines at various stages of their importation and policies on personnel, premises, equipment, storage, product recalls and handling customer complaints. Importers, among other things, must: (i) have agreements with manufacturers and/or suppliers, and/or marketing authorization holders of imported pharmaceuticals, which should comply with GMP requirements; (ii) store archive and reference specimens; (iii) have written agreements and technical specifications for the outsourcing activities related to the import of pharmaceuticals; (iv) conduct GMP-compliant stability tests after the product has been released into the market; (v) have an elaborated pharmaceutical quality system which includes elements of GMP, GDP, GSP and risk management; (vi) conduct quality control which includes collecting samples, specifications, conducting testing and batch release; and (vii) conduct quality risk management. To obtain an import license,

an applicant must possess the necessary material and technical resources, employ qualified personnel and establish quality control procedures for pharmaceutical products. The State Service for Pharmaceuticals checks compliance with the applicable requirements prior to issuing the license. The importer must compile and maintain an "importer's dossier." The import license contains a list of the pharmaceuticals which the license holder is permitted to import, and any special conditions for carrying out its activities. If any additional products need to be imported, the license holder must apply for an amendment to the license.

No license is required for the export of pharmaceuticals from Ukraine, except for the export of pharmaceuticals from donor blood and its components, which may be exported from Ukraine only after having obtained a special permit which is issued by the CMU.

### **28.3 Regulatory requirements concerning medical devices**

Beginning from 1 July 2015, the state registration of medical devices is no longer effective. It has been replaced by the procedure of the national conformity assessment to technical regulations and marking with the national conformity sign.

The conformity assessment procedure for medical devices is regulated by the following technical regulations (together, "**Technical Regulations**"): (i) the Technical Regulation for Medical Devices approved by CMU Resolution No. 753 dated 2 October 2013; (ii) the Technical Regulation for in vitro Diagnostic Medical Devices approved by CMU Resolution No. 754 dated 2 October 2013; and (iii) the Technical Regulation for Active Implantable Medical Devices approved by CMU Resolution No. 755 dated 2 October 2013. The Technical Regulations are based on EU Directives 93/42/EEC, 98/79/EC and 90/385/EEC, respectively.

Medical devices must undergo conformity assessment procedures under the Technical Regulations before being placed on the Ukrainian market.

The Technical Regulations divide medical devices into various classes and the conformity assessment procedure significantly differs for each class of medical devices, ranging from self-declaration applicable to medical devices of class I (e.g., non-sterile and not measurement tools) and most in vitro devices (e.g., analyzers, certain calibrators and in vitro devices for self-control) to conformity assessment procedures involving authorized bodies through on-site inspections or batch certification.

Based on the Technical Regulations, the manufacturers of medical devices or their authorized representatives (for non-resident manufacturers) are responsible for introducing medical devices, active implantable medical devices and medical devices for in vitro diagnostics into circulation. These persons are obliged to submit a notification to the State Service for Pharmaceuticals with their contact details and details of the relevant medical devices. The form and content of the notification are set out in the Procedure for Maintaining the Register of Persons Responsible for Introducing Medical Devices, Active Implantable Medical Devices and Medical Devices for In Vitro Diagnostics into Circulation, approved by MOH Order No. 122 dated 10 February 2017. This obligation is only imposed in respect of class I medical devices, custom-made medical devices, medical devices for in vitro diagnostics and custom-made active implantable medical devices. If the State Service for Pharmaceuticals, State Service of Ukraine on Control of Safety of Foodstuffs and Consumer Protection or tax authorities establish that the product was marked in violation of specific requirements or was not marked contrary to the obligation to do so under technical regulations, the manufacturer or its representative must bring into compliance the medical devices. Moreover, the person importing and/or distributing such device may be subject to an administrative fine of 150 – 1,500 times the non-taxable minimum income amount (UAH 2,550 to UAH 25,500, i.e., approx. USD 108 to USD 1077) or up to 30% of the cost of the relevant product batch. If the violation is not eliminated, the circulation of medical device on the market can be restricted or abolished.

Before 28 February 2018, there was a statutory requirement set forth in the Law of Ukraine “On Principles of the State Language Policy” that labels and instructions for medical use of products distributed in the territory of Ukraine, including medical devices, must be in Ukrainian and in a regional language (that is, another language which is recognized as traditionally used in the relevant region of Ukraine (if any)). At the discretion of the manufacturer, the label or the accompanying leaflet could additionally contain a translation into another language. On 28 February 2018, the Constitutional Court of Ukraine held that the Law of Ukraine “On Principles of the State Language Policy” was unconstitutional. However, on 25 April 2019, the Parliament of Ukraine adopted the Law of Ukraine No. 2704-VIII “On Ensuring the Functioning of the Ukrainian Language as a State Language”. This law sets forth that as of 16 January 2021 labels and instructions for medical use of products distributed in the territory of Ukraine, including medical devices, must be in Ukrainian.

## 28.4 Promotion of pharmaceuticals and medical devices

The only type of promotion of pharmaceuticals and medical devices that is currently specifically regulated by Ukrainian law is “advertising.” Ukrainian legislation contains few provisions that specifically regulate practices (other than simple advertising) aimed at the promotion or marketing of pharmaceuticals and medical devices.

Pursuant to the Advertising Law dated 3 July 1996, the advertising of pharmaceuticals and medical devices on the territory of Ukraine may be carried out provided that the relevant products have been authorized for use in Ukraine. Furthermore, advertising of a pharmaceutical is allowed provided that it is an over-the-counter product (“**OTC**”) and it is not on the list of OTCs whose advertisement is prohibited. Advertising of prescription pharmaceuticals (“**Rx**”) and pharmaceuticals included in the list of pharmaceuticals which may not be advertised is prohibited. The MOH has established criteria for prohibition of the advertisement of pharmaceuticals in Order No. 422, dated 6 June 2012, pursuant to which the following pharmaceuticals may not be advertised, among others: Rx, pharmaceuticals containing narcotic and psychotropic substances and precursors, pharmaceuticals aimed exclusively at pregnant or breastfeeding women or children under the age of 12, as well as pharmaceuticals for treating tuberculosis, cancer, insomnia, and diabetes. The MOH decides whether or not to put a given pharmaceutical on the list of pharmaceuticals which may not be advertised when the pharmaceutical is registered for use in Ukraine (or when the registration is renewed). Information on whether a pharmaceutical can be advertised should be entered into the State Register of Pharmaceuticals (which is available online). Additionally, on 21 November 2012 in Order No. 876 the MOH approved the list of the OTCs whose advertisement is prohibited (the list is regularly revised). The requirements to the content of the advertisement of pharmaceuticals and medical devices are set forth below.

Advertisement of pharmaceuticals and medical devices **must** contain:

- Objective information on the relevant product which makes it clear that the relevant information is an advertisement.
- A requirement to consult a doctor before using the product.
- A recommendation to review the instructions for the pharmaceutical.
- At least 15% of the text (or of the duration, as the case may be) of an advertisement must contain a warning that self-treatment could be dangerous to health.

Advertisements of pharmaceuticals and medical devices may **not** contain, among other things:

- Comparisons with other products intended to enhance the advertising effect.
- References to actual cases of successful application.
- Recommendations or references to the recommendations of medical professionals, scientists or medical establishments.
- Images and/or names of popular personalities, movie, TV or cartoon characters, or well-known organizations.
- Images or recordings of physicians or people resembling physicians.
- Any information that may imply that there is no need to consult a doctor if the product in question is consumed.
- Suggestions that the eventual medical effect of the product is guaranteed.
- An advertisement of a pharmaceutical product may not contain information that it is generally accepted as a food or cosmetic product or other consumable product.

Certain other restrictions apply when placing advertisements on television, radio, in the printed media, over the telephone, and other electronic means of communications. Sale of pharmaceuticals and medical devices the usage of which requires special knowledge and training via television is prohibited. Manufactures and distributors of pharmaceuticals and medical devices may sponsor television and radio programs by providing information of a promotional nature regarding the name and trademark of the relevant product. However, prescription pharmaceuticals and medical devices the usage of which requires special knowledge and training may not be the subject of any such promotion. There is no specific regulation on the advertising of pharmaceuticals on the Internet; as a result, the general legislative provisions governing the types of information allowed for dissemination must be observed (that is, those applicable to advertisement of pharmaceuticals as set out in the first paragraph of this section).

The above requirements of the Advertising Law are not applicable to the advertising of pharmaceuticals and medical devices which is placed in specialized publications targeting hospitals and doctors and which is distributed at seminars, conferences and symposia on medical topics.

## 28.5 State procurement and price regulation concerning pharmaceuticals and medical devices

### *State procurement*

The public procurement of pharmaceuticals and medical devices is carried out on the following three levels:

- Centralized procurement by the MOH.
- Regional procurement by regional state administrations or councils.
- Local procurement by individual healthcare organizations.

### *Centralized procurement*

On 19 March 2015, the temporary procedure of pharmaceuticals procurement by the SPAs was introduced based on the Law of Ukraine “On Amending Certain Laws of Ukraine for Securing Prompt Patients’ Access to Necessary Pharmaceuticals and Medical Devices Through State Procurement Involving Specialized Agencies Which Conduct Procurement” No. 269-VIII. This Law, as amended, provides for the possibility of temporary transfer of the procurement function from the MOH to SPAs until 31 March 2022. SPAs are defined as specialized foundations, organizations and mechanisms of the United Nations, International Dispensary Association, Crown Agents, Global Drug Facility, Partnership for Supply Chain Management, which provide services to state governments and/or central state executive bodies of organizing and conducting procurement procedures of pharmaceuticals, medical devices and related services under respective agreements and according to internal rules and procedures of these organizations.

Procurement conducted by SPAs is excluded from the scope of the Law of Ukraine “On Public Procurement” dated 25 December 2015 No. 9222-VIII. Such procurement is governed by the rules and procedures of the respective SPAs.

The list of pharmaceuticals procured by SPAs is adopted by the CMU annually and is specified in the agreements between the MOH and respective procurement organizations. Starting from 2016, all centralized state procurement of pharmaceuticals and medical devices has been transferred from the MOH and has been conducted through SPAs (specifically, Crown Agents, UNDP and UNICEF). The list of pharmaceuticals and medical devices which may be purchased on the basis of the procurement agreements with SPAs is approved by the CMU annually.

As described in sections 18.8.2 (c) and 18.8.7, pharmaceuticals and medical devices purchased under state procurement through SPAs are

subject to special regulations. For instance, the amendments to the Registration Resolution provide for a specific registration procedure of such pharmaceuticals, which is further regulated by the "Procedure of Examination of Authenticity of Registration Materials for Pharmaceutical Which is Submitted to State Registration for its Procurement by Specialized Agency" established by MOH Order No. 721, dated 3 November 2015.

Pharmaceuticals and medical devices are also exempt from regulations under provisions of CMU Resolution No. 240, which establishes an obligation to declare the wholesale prices and CMU Resolutions No. 862 "On State Regulation of Prices for Pharmaceuticals" and No. 426 "On Reference Pricing for Certain Pharmaceuticals Procured Using Budget Funds" which establish state price regulation through reference pricing mechanism and setting the maximum mark-ups for pharmaceuticals. In addition, such pharmaceuticals are not subject to state quality control pursuant to CMU Resolution "On Approval of the Procedure for Carrying Out State Quality Control of Pharmaceuticals Imported into Ukraine" No. 902 dated 14 September 2005.

After 31 March 2022, when the Law of Ukraine "On Amending Certain Laws of Ukraine for Securing Prompt Patients' Access to Necessary Pharmaceuticals and Medical Devices Through State Procurement Involving Specialized Agencies Which Conduct Procurement" expires, the procurement function will not be transferred back to the MOH. Instead, this function will be transferred to the centralized healthcare procurement agency, state enterprise "Medical Procurements of Ukraine" ("**Agency**") established in October 2018. The transitional period during which the Agency should procure medical products in parallel with SPAs should last until 2021.

#### *Regional and local procurement*

Based on the Law of Ukraine "On Public Procurement" No. 922-VIII dated 25 December 2015, purchase of products the value of which equals or exceeds UAH 200,000 (approx. USD 8,444) from state funds generally should be carried out pursuant to the procedure stipulated in the respective law. This threshold will be decreased to UAH 50,000 (approx. USD 2,111) as of 19 April 2020, when the new wording of the Law of Ukraine "On Public Procurement" will be enacted in accordance with the Law of Ukraine No. 114-IX "On Amending the Law of Ukraine "On Public Procurement" and Certain Other Legislative Acts to Enhance Public Procurement" dated 19 September 2019.

Budget healthcare organizations are entitled to procure primarily pharmaceuticals listed in the National Essential Medicines List ("**NEML**"). If, after calculation of the full demand of NEML-listed pharmaceuticals, there

is sufficient budget financing, budget healthcare organizations are entitled to procure non-NEML pharmaceuticals. The procurement must be made taking into consideration healthcare industry standards (clinical protocols, formularies).

The procurement procedure established by the Law of Ukraine "On Public Procurement" encompasses three possible procurement options: (i) open bidding, (ii) competitive dialogue, and (iii) direct contracting. As of 19 April 2020, when the new wording of the Law of Ukraine "On Public Procurement" will be enacted, this list will be supplemented with two more procedures - (iv) selective bidding and (v) simplified bidding procedure.

Open bidding is the main and most frequently used procedure for procurement of pharmaceuticals and medical devices. This procedure is carried out in the form of an online electronic auction (using the so-called Prozorro system) during which the bidders may consequently reduce the prices for the proposed goods in three stages. The processes of bid submission, opening and assessment of bids are carried out in electronic form. The Prozorro system does not allow for identification of the bidder by the customer during bid submission, electronic auction and price assessment of the bid.

The direct contracting procedure may be used, inter alia, when there is no competition on the respective market and the procurement contract can be signed only with one supplier or if the customer has previously cancelled the tender twice due to insufficient number of bidders (less than two). In such case the procurement contract is signed after price negotiation with the bidder.

Selective bidding may be used when a customer needs to make a bidders' pre-qualification assessment. Selective bidding may only be conducted if not less than four bidders submit their bids.

Simplified bidding procedure is conducted if the value of goods/services makes from UAH 50,000 (approx. USD 2,111) to 200,000 (approx. USD 8,444) and the value of works makes from UAH 50,000 (approx. USD 2,111) to UAH 1,500,000 (approx. USD 63,328).

#### *Price regulation*

Certain pharmaceuticals and medical devices, both imported and domestically produced, are subject to price regulation by the CMU by way of setting maximum permitted wholesale prices, maximum permitted wholesale and

retail mark-ups and by way of declaration of changes in prices. The details of the relevant price regulation mechanisms are set forth below.

*"Accessible pharmaceuticals"*

The so-called "Accessible Pharmaceuticals" reimbursement program is implemented based on CMU regulation No. 862 "On the State Regulation of Prices for Pharmaceuticals" and No. 152 "On Ensuring Accessibility of Pharmaceuticals", as amended ("**Reimbursement Regulation**"), which provide for the introduction of reimbursement, reference pricing and limitation of maximum mark-ups for certain pharmaceuticals used for treatment of cardiovascular diseases, type II diabetes and asthma. The Reimbursement Regulation applies to pharmaceuticals meeting all of the following requirements:

- registered in Ukraine;
- included into the NEML;
- included into the register of reimbursable pharmaceuticals ("**Reimbursement Register**"); and
- used for treatment of cardiovascular diseases, type II diabetes and asthma. The precise list of INNs covered by the Reimbursement Regulation is indicated in the annex thereto.

Inclusion into the Reimbursement Register is made by the MOH on the basis of an application filed by the marketing authorization holder or its representative. A pharmaceutical can be included into the Reimbursement Register if its price does not exceed the maximum wholesale price. The procedure for calculating maximum wholesale prices for pharmaceuticals based on reference prices is adopted by Order of the MOH No. 1423 dated 29 December 2016. The maximum wholesale price cannot exceed the median of the registered prices of the respective pharmaceuticals in reference countries (Poland, Slovakia, Czech Republic, Latvia and Hungary) based on the daily defined dose established by the World Health Organization.

The reimbursement amount is calculated based on the Procedure for Calculating the Reimbursement Amount for Reimbursable Pharmaceuticals approved by Regulation of the CMU No. 152 dated 17 March 2017. Based on this procedure, the reimbursement amount is calculated based on an internal reference pricing mechanism, i.e., the reimbursement amount is equal to the lowest price of the pharmaceutical with the same INN in the Reimbursement Register increased by maximum wholesale and retail mark-ups and VAT. If the price of the reimbursable product in the pharmacy is higher than the reimbursement amount, the difference should be covered by patient co-payment.

Based on CMU Resolution No. 955 "On Measures to Stabilize Prices for Pharmaceuticals and Medical Devices" dated 17 October 2008, the maximum wholesale and retail mark-ups are established for pharmaceuticals included in the list of INNs approved by the Reimbursement Regulation, i.e., 23 INNs of pharmaceuticals for treatment of cardiovascular diseases, type II diabetes and asthma. Such mark-ups apply to all pharmaceuticals included in the abovementioned regulation, irrespective of their inclusion in the reimbursement system and/or their procurement with public funds. The maximum wholesale mark-up should not exceed 10% of the wholesale price (including taxes), and the maximum retail mark-up for these pharmaceuticals should not exceed 15% of the purchase price (including taxes).

#### *NEML-listed pharmaceuticals*

Based on CMU Resolution No. 955 "On Measures to Stabilize Prices for Pharmaceuticals and Medical Devices" dated 17 October 2008, pharmaceuticals included into the NEML (save for narcotics, psychotropic substances, precursors, active ingredients (substances) and medical gases) are subject to regulation of maximum wholesale and retail mark-ups. The maximum wholesale mark-up is up to 10% of the wholesale price (including taxes and levies), and the maximum retail mark-up should be calculated based on the purchase price of a pharmaceutical as follows:

Purchase price, UAH	Retail mark-up
Up to 100 (inclusive)	25%
101 – 500 (inclusive)	20%
501 – 1,000 (inclusive)	15%
1,001 and more	10%

#### *Pharmaceuticals procured with budget funds*

According to Resolution of CMU No. 426 "On Reference Pricing for Certain Pharmaceuticals Procured Using Budget Funds" dated 3 April 2019, for certain pharmaceuticals procured using state/municipal budget funds the MOH should establish maximum wholesale prices based on external reference pricing ("**Listed Pharmaceuticals**"). The list of covered pharmaceuticals is established by the MOH in accordance with Order of the MOH No. 1600 "On Certain Issues of Reference Pricing for Pharmaceuticals Included into the National Essential Medicines List and Procured Using Budget Funds". As of the date of this publication, this

list includes 47 INNs. Healthcare institutions which are fully or partially financed by state or municipal budgets may purchase the relevant pharmaceuticals at prices which do not exceed maximum wholesale prices and the maximum mark-ups approved by CMU Resolution "On Measures to Stabilize Prices for Pharmaceuticals and Medical Devices" No. 955 dated 17 October 2008. Based on this Resolution, the maximum wholesale mark-up for the abovementioned pharmaceuticals should not exceed 10% of the wholesale price (including taxes and levies), and the maximum retail mark-up should not exceed 10% of the pharmacy purchase price (including taxes). The maximum wholesale prices are calculated by the MOH based on median of three lowest prices for same pharmaceutical in reference countries (Slovakia, Czech Republic, Latvia, Poland and Hungary,) multiplied by 0.9.

Pursuant to CMU Resolution No. 240 "On Declaring a Change in Wholesale Prices for Pharmaceuticals and Medical Devices," dated 2 July 2014 (as amended), changes in prices (excluding taxes and levies) for other (Non-Listed) pharmaceuticals purchased and/or reimbursed using state or municipal funds (save for narcotics, precursors, active pharmaceutical ingredients, medical gases and pharmaceuticals manufactured in pharmacies and based on hospitals' orders), must be declared pursuant to the procedure established by this resolution.

Maximum mark-ups for other (Non-Listed) pharmaceuticals purchased and/or reimbursed using state or municipal funds (save for narcotics, precursors, active pharmaceutical ingredients, medical gases and pharmaceuticals manufactured in pharmacies and based on hospitals' orders) are the same as for Listed Pharmaceuticals, as approved by CMU Resolution "On Measures to Stabilize Prices for Pharmaceuticals and Medical Devices" No. 955 dated 17 October 2008.

#### *Insulin preparations*

Based on CMU Resolution No. 73 "Issues of Implementation of Pilot Project for State Regulation of Prices for Insulin Preparations" dated 5 March 2014, all registered insulin preparations are reimbursable. The marketing authorization holder does not need to apply for reimbursement. Based on Order of the MOH No. 359 on the Register of Reference (Reimbursement) Prices for Insulin Preparations dated 13 April 2016 ("**Order No. 359**"), the MOH includes all registered insulin preparations in the Register of Reference (Reimbursement) Prices for Insulin Preparations ("**Insulin Register**"). The Insulin Register sets out the full or partial reimbursement price for each insulin preparation.

The reimbursement price is calculated in accordance with the Procedure for Calculating Reference (Reimbursement) Price for Insulin Preparations approved by Order No. 359. The reimbursement price is based on the average price of the same pharmaceutical in reference countries. The reference countries are Bulgaria, Moldova, Poland, Slovakia, Czech Republic, Latvia, Serbia and Hungary. If the price of an insulin preparation in a pharmacy is higher than the reimbursement price, the difference should be covered by patient co-payment.

Different patient categories are eligible for reimbursement of different types of insulin preparations. Furthermore, for different categories of patients, full or partial reimbursement may be applicable (e.g., adults prescribed with insulin in vials may receive insulin in cartridges on the basis of partial reimbursement, while minors may receive insulin in cartridges on a full reimbursement basis).

The maximum wholesale and retail mark-ups for insulin preparations are up to 10%.

**Baker  
McKenzie.**



**29** **POWER AND  
RENEWABLE ENERGY  
SECTORS**



**EXPERT**

**Victoria  
Ischenko**  
Senior  
Associate



**PARTNER**

**Serhiy  
Chorny**  
Managing  
Partner

## **29.1 Introduction**

Prior to the reforms introduced to the Ukrainian power sector by the President of Ukraine in 1994-1995, the Ukrainian power sector was exclusively state-owned. It operated through integrated utility companies responsible for generation, transmission and distribution, and was administered accordingly.

Ukraine's power sector is structured along the lines of the following major business activities: generation, transmission, distribution and supply of electricity to the customers.

**NUCLEAR POWER PLANTS**

account for the largest share of electricity generation.

The operator of all Ukrainian NPPs is the state enterprise Energoatom, which is responsible for the production of the electricity at four nuclear power plants – Zaporizhzhya, Rivne, South-Ukraine and Khmelnytsky – that are situated in different regions of Ukraine. Energoatom is the largest electricity generator in Ukraine, generating more than 50% of the total volume of Ukraine’s electricity. Energoatom is not subject to privatization.

**THERMAL GENERATING COMPANIES**

Second largest electricity producers in Ukraine

TPPs are grouped into five large thermal generating companies:

1. Centrenergo
2. DTEK Donbasenergo
3. DTEK Dneproenergo
4. DTEK Zahidenergo
5. DTEK Shidenergo

At the moment, four thermal generating companies (DTEK Donbasenergo, DTEK Shidenergo, DTEK Zahidenergo and DTEK Dneproenergo) are privately controlled.

**Power Generation**

**HYDRO POWER PLANTS**

Large Ukrainian HPPs are concentrated in the Dnipro Hydro Cascade and Dniester reservoir.

All HPPs of Dnipro Hydro Cascade and Dniester HPP-1, as well as Kyiv HPSP and Dniester HPSP, belong to public JSC Ukrhydroenergo, which is protected from privatization.

Ukrhydroenergo is a key player in the hydroelectric generation segment, providing around 95% of total hydroelectric generation.

**COMBINED HEAT AND POWER PLANTS (“CHPS”)**

Some CHPs are operated by local power distribution companies and other institutions while others became separate enterprises.

In addition, small electricity producers (small hydroelectric and wind power plants) operate in Ukraine, but their share of total electricity production is insignificant.

**RENEWABLE ENERGY SOURCES (“RES”) PRODUCER**

RES represent a rapidly rising share in Ukraine’s power sector, mainly due to the recently introduced incentives for the stimulation and development of renewable energy sources, which are discussed in more detail in sub-section 19.5.4 (“Green Energy: Incentives for Stimulation and Development in Ukraine”).

*Transmission*

The transmission of electricity via main and interstate electricity networks is unbundled from the generation, distribution and supply of electricity, and is performed by the national transmission system operator (the “TSO”) which

is also responsible for the centralized dispatch management. The TSO's functions are performed exclusively by state enterprise, the Private Joint Stock Company "National Power Company "UKRENERGO" ("UkrenergO"). The Ministry of Finance of Ukraine as a single shareholder of UkrenergO, exercises the state management of UkrenergO.

### *Distribution and supply*

Prior to 1 January 2019 regional distribution and supply companies ("Oblenergos") carried out the distribution of electricity in Ukraine.

Supply of electricity was carried out by oblenergos (suppliers at regulated tariff) and independent suppliers (non-regulated tariff).

Currently all oblenergos have unbundled their supply activity from the distribution activity. Unbundling was achieved by means of establishing of a new electricity supply company. The newly established electricity supply companies were obliged to obtain the new electricity supply license before 1 January 2019 (the "**Universal Services Suppliers**").

Effective from 1 January 2019 to 31 December 2020 the Universal Services Suppliers will provide the services of the supplier of universal services on its licensed territory. The licensed territory is the oblast in Ukraine on which oblenergo has carried out its activity on distribution of electricity by local networks and supply of electricity at the regulated tariff prior to unbundling.

The Universal Services Suppliers provide the universal services only to household customers and small non-household customers (i.e., non-household customers having the capacity of up to 50 kW) ensuring that the electricity is supplied to the customers throughout the whole territory of Ukraine.

Effective from 1 January 2019 the distribution of electricity will be carried out by the distribution system operators ("the **Distribution System Operators**") (i.e., former oblenergos) provided however that the Distribution System Operators have obtained the electricity distribution licenses prior to 1 January 2019.

Effective from 1 January 2019 the NEURC has annulled the earlier issued licences to the Distribution System Operators, i.e., on distribution of electricity by local electricity networks and supply of electricity at the regulated tariff.

*The sector's regulation and management*

Regulation of the sector is performed by the National Commission for State Regulation in the Energy and Utilities Sectors (the "NEURC" or the "Regulator") on the basis of Law of Ukraine No. 1540-VIII "On the National Commission for State Regulation in the Energy and Utilities Sectors" adopted on 22 September 2016.

**NEURC performs state regulation in the power sector by means of:**

Issuing licenses for:	Forming the tariff policy, including:	Exercising monitoring and control over the business activity of energy companies in the power sector.
<ul style="list-style-type: none"> <li>■ electricity generation</li> <li>■ electricity transmission</li> <li>■ electricity distribution</li> <li>■ electricity supply to customers</li> <li>■ trade activity</li> <li>■ performing the functions of market operator</li> <li>■ performing the functions of guaranteed buyer</li> </ul>	<ul style="list-style-type: none"> <li>■ electricity prices (tariffs)                             <ul style="list-style-type: none"> <li>○ tariffs for electricity distribution services</li> <li>○ tariffs for electricity supply</li> <li>○ tariffs for electricity transmission</li> <li>○ tariffs for distribution of electricity</li> <li>○ tariffs for wholesale supply of electricity</li> <li>○ tariffs for universal service providers</li> </ul> </li> <li>■ tariffs for the production of thermal energy for power generating companies</li> <li>■ gas price limits for entities generating heat for domestic needs</li> </ul>	

The Ministry of Energy and the Coal Industry (the "MECI") is the principal management body of the Ukrainian power sector that is responsible for the implementation of state policy in the sector. The MECI currently acts on the basis of the Regulation of the Ministry of Energy and the Coal Industry of Ukraine approved by the Resolution of the Cabinet of Ministers of Ukraine No. 208 on 29 March 2017. The MECI manages NEC Ukrhydroenergo and Energoatom.

## **29.2 Electricity market**

Ukraine has undertaken to implement the *acquis communautaire* on energy to comply with its obligations under the Treaty Establishing the Energy Community and the Association Agreement between the European Union and its Member States, European Atomic Energy Community and Ukraine.

Adopted by the Parliament of Ukraine on 13 April 2017, the law of Ukraine No. 2019-VIII "On Electricity Market" (the "Electricity Market Law") aims to implement the Third Energy Package related to the creation of a single EU electricity market, namely, the Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003, Directive 2005/89/EC of the European Parliament and of the Council of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment.

The Electricity Market Law calls for the full-scale liberalization of the wholesale electricity market of Ukraine by way of the gradual transition from the earlier existing "Single Buyer" model to the bilateral contracts market, the "day ahead" and intra-day market, the balancing market, which will regulate the imbalances caused in the result of trade of electricity by electricity market players, the ancillary services market and the retail market. It also introduces private traders to the electricity market, who will trade in and resell electricity without selling it to retail customers.

The Electricity Market Law lays down the main rules for the organization and functioning for each of the mentioned above segments of the electricity market.

Under the Electricity Market Law, the new liberalized electricity market has become operational on 1 July 2019 in Ukraine.

## **29.3 Privatization**

The privatization of power companies in Ukraine began in 1995. Privatization covered both power generation companies (ie, thermal power generation companies) and power distribution companies.

In an attempt to reduce Ukraine's considerable external debt, privatization of power companies was initiated at the end of 1999. Decree of the President of Ukraine No. 944/99 "On Certain Issues Concerning the

Privatization of Facilities in the Electricity Sector,” dated 2 August 1999, provided for the sale of controlling stakes in power distribution companies and blocking stakes in power generation companies through tenders.

Further privatization in the electricity sector of Ukraine was promoted by Presidential Decree No. 1169/2001 “On Additional Measures for Reforming the Electricity Sector” of 3 December 2001. Accordingly, in 2002, controlling shareholding packages (ie, more than 50%) of 12 power distribution companies and blocking shareholding packages (ie, more than 25%) of seven power distribution companies were identified to be sold through open tenders.

The outstanding indebtedness of nine of these power distribution companies was one of the obstacles to be resolved prior to the privatization tenders. On 31 July 2002, the Cabinet of Ministers approved unified conditions for holding tenders on the sale of blocks of shares of these power distribution companies. These conditions stipulated a number of qualifying criteria (aimed at ensuring the stability of the power industry) to be met by potential bidders.

New steps in the privatization process were taken on 3 November 2010 when the Cabinet of Ministers of Ukraine adopted Resolution No. 999, by which the Ukrainian government reconsidered the list of objects in state ownership that are strategically important for the economy and security of Ukraine. Pursuant to these changes, all Oblenergos can now be privatized.

Moreover, according to Decree of the President of Ukraine No. 1118/2010 “On Decisions of the National Security Council,” dated 22 October 2010, and “On the Status of Privatization of State Property,” dated 10 December 2010, the ban on the privatization of the largest producers of electric energy was lifted.

In April 2011, the Cabinet of Ministers of Ukraine adopted Decree No. 310-p “On Approving of List of Energy-Generating and Supply Companies, State Shares of which are Subject to Sale in 2011-2012,” pursuant to which the shares of 13 Oblenergos were to be sold for private ownership. In 2012, this list was supplemented with three more companies.

During 2012, tenders for the sale of seven more Oblenergos were announced. However, only 75% of the shares of Volynoblenergo were sold in 2013. A large-scale sale of shares in Oblenergos was planned for 2014, however only 25% of the shares of Zakarpattiaoblenergo, Vinnytsiaoblenergo and Chernivtsioblenergo were sold in November 2014.

In the course of August-September 2017, the State Property Fund sold minority stakes (25%) in Dniproenergo, Dniprooblenergo, Kyivenergo, Zakhidenergo and Donetskoblenergo.

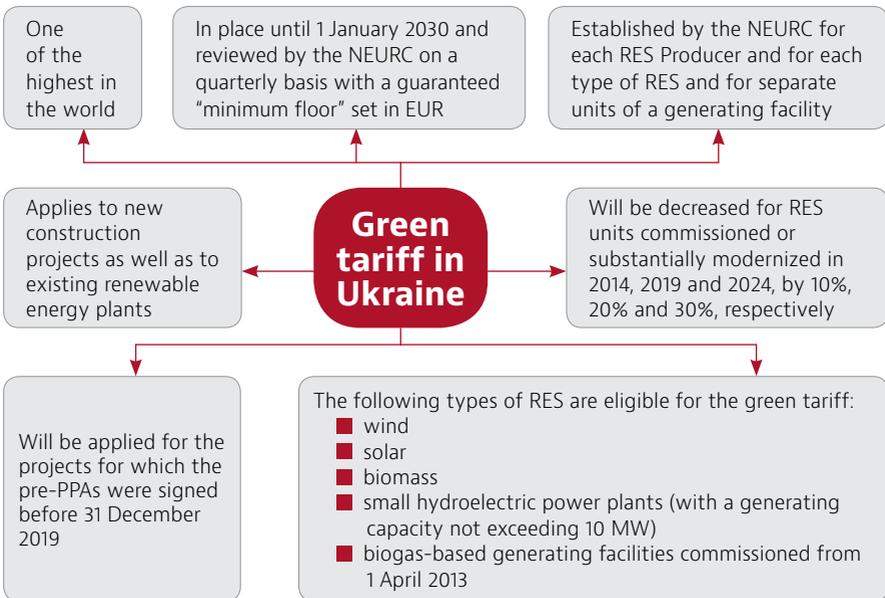
The State Property Fund of Ukraine has announced its plans to sell the stakes in the below listed energy companies in the course of 2020:

- 78.3% of the Centrenergo state-owned electricity generating company,
- 50.999% of Ternopiloblenergo,
- 60.2475% of Zaporizhiaoblenergo,
- 65.001% of Kharkivoblenergo,
- 70% of Mykolaivoblenergo,
- 70% of Khmelnytskyoblenergo.

### 29.4 Green Energy: Incentives for Stimulation and Development in Ukraine

The new legal framework recently adopted in Ukraine establishes certain incentives for the operation and development of renewable energy sources in Ukraine.

One of the most important incentives for the development of renewables was the introduction in 2009 of the “green” tariff or feed-in tariff (as this term may be known in other jurisdictions).



Below is a table showing green tariff rates by types of RES and date of commissioning of RES

**Table: Green tariff rates by types of RES and date of commissioning of the RES**

Type of renewable energy source	Category /Installed capacity	Minimal green tariff rate (EUR cent per kWh) for the power plants commissioned					
		Between 1 January 2017 and 31 December 2019	Between 1 January 2020 and 31 December 2020	Between 1 January 2021 and 31 December 2021	Between 1 January 2022 and 31 December 2022	Between 1 January 2023 and 31 December 2024	Between 1 January 2025 and 31 December 2029
Solar installations Housetop	Ground	15.02	11.25	10.87	10.50	10.12	9.74
	Roof/housetops	16.37	12.27	11.84	11.47	11.03	10.66
Wind installations	Not exceeding 600 kW	6.46	6.46	6.46	6.46	6.46	6.46
	From 600 up to 2000 kW	7.53	7.53	7.53	7.53	7.53	7.53
	Exceeding 2000 kW	11.30	11.30	11.30	11.30	11.30	11.30
Wind installations with single installed capacity	Not exceeding 600 kW	5.81	5.16	5.06	4.95	4.90	4.52
	From 600 up to 2000 kW	6.78	6.03	5.92	5.81	5.70	5.27
	Exceeding 2000 kW	10.17	9.04	9.04	9.04	9.04	7.91
Micro, mini, small hydro installations	Micro hydro (less than 200 kW)	17.44	15.72	15.72	15.72	15.72	13.94
	Mini hydro (from 200 up to 1000 kW)	13.94	12.54	12.54	12.54	12.54	11.14
	Small hydro (more than 1000 kW)	10.44	9.42	9.42	9.42	9.42	8.34
Biomass/ biogas		12.38	12.38	12.38	12.38	12.38	12.38
Geothermal energy		15.02	13.51	13.51	13.51	13.51	12.00

### *Local content incentive*

To benefit from the green tariff, RES Producers are no longer required to use a certain amount of raw materials, equipment, work or services of Ukrainian origin. However, the use of equipment of Ukrainian origin by RES Producers is stimulated by the premium added to the green tariff, provided the respective RES units are commissioned between 1 July 2015 and 31 December 2024.

The Ukrainian origin of equipment shall be confirmed by the appropriate certificate issued by the Ukrainian Chamber of Commerce. If equipment of Ukrainian origin is used at a level of at least 30%, the premium added to the green tariff will be 5%. If equipment of Ukrainian origin is used at a level of at least 50%, the premium will be 10%. The level of use of equipment of Ukrainian origin at RES units is defined as the sum of specific percentages of respective items of equipment. The list of equipment for each type of RES that qualifies for the green tariff premium and its specific percentages are prescribed by law, ie, for blades and towers such indicator is established at a rate of 30%, and at 20% for gondolas and main frames.<sup>1</sup> Thus, by using blades of Ukrainian origin the RES Producer can expect a premium added to the green tariff of 5%, as the specific percentage for blades is 30%. To calculate the level of use of equipment of Ukrainian origin, the RES producer should apply to the NEURC requesting it to confirm the calculated amount of the equipment of Ukrainian origin by the required amount for the relevant RES object. The NEURC considers the application within 30 calendar days of the date of submission of the required documents and takes a decision on adding a premium to the green tariff established for such RES producer.<sup>2</sup>

The premium added to the green tariff is effective for the same period as the green tariff if the RES Producer uses the Ukrainian original equipment at the levels specified above.

Private households generating wind and solar energy with a generating capacity not exceeding 30 kW are not eligible for a premium to the green tariff.

### *Guarantees provided to RES producers*

The state provides RES Producers with certain guarantees if they do not manage to sell the electricity produced from RES directly to customers or to electricity supply companies:

<sup>1</sup>Law of Ukraine No. 555-IV dated 20 February 2003 "On Alternative Energy Sources."

<sup>2</sup>NEURC Resolution No. 2932 dated 10 December 2015.

- the Guaranteed Buyer is obligated to purchase the electricity produced from RES at the green tariff rate established for the relevant RES Producer, including the premium added to the green tariff; and
- the Guaranteed Buyer is obligated to pay the full price for such electricity produced from RES when due.

#### *Development of RES projects on industrial lands*

Effective from 1 January 2019 RES objects may be developed not only on land designated as “land for energy” but also on land designated within the generic category “land for industry, transport, telecommunications, energy, defense and other designation (e.g., land for machine building industry) with no need to change the targeted use of land.

#### *VAT exemption for import RES equipment*

Effective from 1 January 2019 and up to 31 December 2022 the RES equipment imported under the following codes of the Ukrainian Classification of Goods of Foreign Economic Activity (UCGFEA) will be exempt from the VAT:

- wind power generation units (UCGFEA code 8502 31 00 00);
- pv cells, modules and panels, light emitting diodes (UCGFEA code 8541 40 90 00); and
- invertors with capacity exceeding 7.5kVA (UCGFEA code 8504 40 88 00).

To be exempt from VAT, the classification of imported RES equipment under the UCGFEA codes must be confirmed by the Ukrainian customs authorities.

#### *Changes for RES producers introduced by the Electricity Market Law*

The Electricity Market Law imposes specific obligations on the Guaranteed Buyer, universal suppliers and system operator aimed at increasing the share of renewables in the electricity market. Such obligations are effective until 1 January 2030 and relate to purchasing and dispatching of electricity generated from RES units on a priority basis.

The Electricity Market Law envisages that RES Producers are entitled to sell the electricity generated from the RES under bilateral agreements either on the day-ahead market, the intra-day market or the balancing market at the prices set on the respective market segments or at the green tariff.

RES Producers are also entitled to sell electricity to a Guaranteed Buyer specifically designated by the Government of Ukraine. The Guaranteed Buyer is obligated to purchase the electricity from the RES Producers who participate in a specially created balancing group at the green tariff

established for such RES Producers plus the premium added to the green tariff as the case might be. For this purpose, the Guaranteed Buyer and the RES Producer should conclude a PPA valid for the whole period of effectiveness of the green tariff, ie, until 1 January 2030. The Guaranteed Buyer then resells the electricity generated from the RES on the day-ahead and intra-day markets.

RES Producers can sign the PPA with the Guaranteed Buyer even before the RES unit has been commissioned at the presence of land title documents for the RES project, a construction permit (or equivalent document) and a signed grid connection agreement with the system operator. If the solar power unit is not commissioned within two years and other types of RES unit within three years from the date it has executed the PPA with the Guaranteed Buyer,, the agreement with the Guaranteed Buyer would be deemed terminated.

The Electricity Market Law imposes specific obligations on the Guaranteed Buyer, universal suppliers and system operator aimed at increasing the share of renewables in the electricity market. Such obligations are effective until 1 January 2030 and relate to purchasing and dispatching of electricity generated from the RES units on a priority basis.

The Guaranteed Buyer is entitled to compensation for the difference between the price paid to the RES Producers and the price of electricity resold on the day-ahead and intra-day markets as payment for its services for the increase of the share of electricity generated from the RES. The amount of such compensation is to be approved by the NEURC. The compensation to the Guaranteed Buyer shall be made by Energoatom, Ukrhydroenergo and by the transmission system operator (Ukrenergo) until 1 January 2030.

The part of compensation to the guaranteed purchaser covered by RES Producers who participate in a specially created green tariff balancing group will increase by 10% annually reaching 100% in 2030.

Up to 31 December 2029, the industrial plants generating wind, solar and hydro electricity that are members of the specially created green tariff balancing group must compensate the guaranteed purchaser only in case if the hourly imbalances of the RES Producer (the difference between the actual and scheduled production) exceed 20% for wind energy units, 10% for solar energy units and 5% for hydroelectric energy units.

RES Producers commissioned prior to 11 June 2017 (the date the Law came into the effect) are released from paying any imbalances compensation to the guaranteed purchaser up until 31 December 2029.

Starting from 31 December of the year the output of electricity generated by all RES Producers reaches 5% or more of the annual energy balance of Ukraine, RES Producers must compensate the guaranteed purchaser if their hourly imbalances exceed 10% for wind energy units, 5% for solar energy units and 5% for hydroelectric energy.

The other rules for the application of the green tariff, including the guarantees applicable to RES producers as mentioned herein, remain the same.

#### *New support system for RES objects*

On 25 April 2019, the Parliament of Ukraine has adopted Law of Ukraine No. 2712-VIII "On Introduction of Certain Changes to Laws of Ukraine regarding Ensuring Competitive Conditions for Generation of Electricity from Alternative Energy Sources" (the "AES Law") which became effective on 22 May 2019. The AES Law calls for the implementation of a quota auction system starting from 1 January 2020.

As prescribed by the AES Law, the state support to the renewables under the auction support scheme will be provided through the guaranteed purchase of all electricity produced by the RES Producers within the limits of the quota purchased at the auction at the established fixed tariff.

The auction model is designed as single stage static sealed bid auction. Bidders will submit sealed bids that should contain a technical proposal (size of the capacity sought) and price proposal. The sealed bids will be opened simultaneously with the winning bids. The only criterial for selection of the winner is the lowest price.

Duration of fixed tariff support for the auction winner is 20 years.

Auctions are mandatory for:

- the RES wind objects with capacity exceeding 5 MW (except for objects that have three wind turbines),
- the RES solar objects with capacity exceeding 1 MW, and
- all other RES objects of any capacity and type of RES.

The Feed-in-Tariff support system can be used by:

- projects of any capacity and type of RES technology that have been commissioned before 2020;
- projects of any capacity and any type of RES technology that have executed pre-PPA by 31 December 2019, provided the project company has:
  - land lease or land purchase agreement;
  - grid connection agreement;
  - permit for construction of the power plant for CC2-CC3 projects, or declaration on commencement of construction works for CC1 projects.

Thus, to be eligible for the FiT, the RES Producer must execute the pre-PPA prior to 31 December 2019 and commission the solar power plant within 2 (years), and the other type of renewables plant within 3 (three) years from the date it has executed the pre-PPA with the Guaranteed Buyer.

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# **30** PERSONAL DATA PROTECTION



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Partner

The Law of Ukraine On Personal Data Protection adopted in 2010 (“PDP”) outlines the general requirements and obligations related to the collection, processing and use of Personal Data by private bodies and by the government of Ukraine.

The PDP applies to the processing of Personal Data, i.e., any information about an individual who is identified or can be specifically identified (the “Data Subject”).

The Constitutional Court of Ukraine, in its decision N 2-rp/2012 dated 20 January 2012, held that “Personal Data” constitutes confidential personal information, access to which is limited by a person himself/herself. Such confidential personal information may include data about the individual’s nationality, education, marital status, religious beliefs, health, current address, date and place of birth, and property status. The list of confidential personal information is not exhaustive.

Under the PDP, the processing of Personal Data is not restricted under the following circumstances (i) individuals processing Personal Data for their own personal or domestic activities, and (ii) processing Personal Data solely for journalistic and artistic purposes, provided that the balance between the right to respect for private life and the right to freedom of expression are

secured. In addition, the PDP does not apply to archived information from repressive totalitarian organizations within the territory of Ukraine from the period 1917-1991.

In addition, the main sources of Personal Data Protection in Ukraine are: The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data and the Additional Protocol ratified by Ukraine in 2010; a number of regulations approved by the Commissioner; and relevant provisions of the Code of Ukraine on Administrative Offenses and the Criminal Code establishing liability for Personal Data offenses.

In July 2013, the Ukrainian Government adopted a draft law that introduced amendments to the Personal Data Protection Law in Ukraine. As a result, all Personal Data Protection functions were transferred from the State Service of Personal Data Protection to the Ukrainian Parliament Commissioner for Human Rights (the "Commissioner"), effective 1 January 2014.

The Commissioner was tasked with developing all Personal Data Protection procedures, recommendations and enforcement practices that regulate matters related to Personal Data Protection. To date, the Commissioner has drafted and approved: Model Rules on Personal Data Processing; Rules on Exercising Control by the Ukrainian Parliament Commissioner for Human Rights over Compliance with the Laws on Personal Data Protection; Rules for Notification of the Ukrainian Parliament Commissioner for Human Rights on the Processing of Personal Data that Constitutes a Special Risk for the Rights and Freedoms of Data Subjects, On the Structural Department or Designated Individual Responsible for Work-Related Processing of Personal Data and the Publication of Such Information.

In addition, registration of databases containing Personal Data is no longer mandated. Instead, data controllers are required to notify the Commissioner of the processing of certain types of sensitive information.

Sensitive data includes Personal Data on: racial or ethnic origin, national origin, political, religious or philosophical beliefs, membership of political parties and/or organizations, trade unions, religious organizations or community organizations with an ideological orientation, health, sex life, biometric data, genetic data, location and or means of transportation, facts related to administrative or criminal liability, criminal investigation measures related to a preliminary investigation and the measures envisaged by the Law of Ukraine "On investigation activity," and instances of violence against a person.

The PDP prohibits the processing of sensitive Personal Data unless certain conditions are met, including:

- a valid express consent obtained by the data collector from the Data Subject
- an employer-employee relationship between the data collector and Data Subject
- the data processing is necessary for protecting the life of the Data Subject or a third party when the Data Subject is physically or legally incapable of giving consent
- the data has evidently been made public by the Data Subject
- the data is necessary to assert, exercise or defend legal claims
- the data is processed by a religious organization, NGO, political party or trade union with respect to their members in the course of regular activities and such data will not be transferred to third parties
- the data processing is necessary to establish a medical diagnosis, or to provide healthcare services or medical treatment, under the condition that the data processed is protected by medical confidentiality rules

In 2018 the Ukraine Government has published a plan of measures on the implementation of the EU–Ukraine Association Agreement approved on 25 October 2017. Para. 11 of this plan requires the Ukrainian Parliament Commissioner for Human Rights, the government entity responsible for data protection in Ukraine, to take action for the implementation of Article 15 of the EU–Ukraine Association Agreement and to revise legislation on the protection of personal data to bring it into compliance with Regulation (EC) 2016/679 (GDPR) by 25 May 2018.

The detailed action plan for the introduction of the GDPR-like regime in Ukraine includes:

- Drafting and submitting to the Cabinet of Ministers of Ukraine a bill on the introduction of appropriate amendments to the Law of Ukraine “On Protection of Personal Data”
- Elaborating on the bill with EU experts
- Providing support during consideration of the draft law by the Parliament of Ukraine
- Building necessary resources to support the implementation of the amended law
- Strengthening the institutional capacity of the Ukrainian Parliament Commissioner for Human Rights as an independent institution monitoring compliance with personal data protection legislation

While the established deadline for the adoption of the GDPR in Ukraine seems unrealistic and the Ukrainian Government is no stranger for missing deadlines it has established, it is clear that the adoption of the GDPR-like regime in Ukraine is inevitable and we can expect this to happen later in 2020.

On 25 October 2018 Twinning project No. EuropeAid/137673/DD/ACT/UA in cooperation with the Ukrainian Parliament Commissioner for Human Rights carried out a Round Table Strengthening the Ukrainian Ombudsperson institution: recommendations regarding approximation of the law on Personal Data Protection to the new EU General Data Protection Regulation, where presented a new draft law aiming to introduce the GDPR-like regime in Ukraine.<sup>1</sup>

Based on our information, the Committee on Digital Transformation of the Parliament and several other government agencies are working now on another draft law aiming to implement the GDPR in Ukraine, however, there is no official draft available yet for public review.

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<sup>1</sup>Draft Law On Personal Data Protection as of 30.10.2018





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