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The latest on compliance, sanctions and trade restrictions in Ukraine

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Risks in the past and now

New Anti-corruption bodies

National Anti-Corruption Bureau

Special Anti-Corruption Procuratura

[Anti-Corruption Courts] – legislation pending

National Anti-Corruption Agency

State Investigations Bureau – in process of creation

Risks in the past and now

Old (and current) challenges

- excessive government regulation (**improving**) and vast bureaucracy with established habits
- repressive practices of Tax, Customs, issuers of licenses and permits (Ministry of Health, land allocation, building permits)
- fragile culture of resisting illegal demands of bureaucracy
... State or municipal bodies cannot accept free services or property (donations)!
- malfunction of law enforcement and courts
- low business culture in B2B and poor employee training

Risks in the past and now

Gift (*and hospitality?*)

One time value: max 1 times subsistence allowance for a working person as of the date received (Y2017 – UAH 1,762 or \$63)

From one person (group) within year: max 2 times subsistence allowance for a working person as of 01 January of the relevant year (Y2017 – \$126)

...money, property, privileges, benefits, services, non-material assets

Decisions concerning the person from which decisionmaker or its close persons received gift:

are deemed made in the conflict of interests circumstances and must be cancelled by the higher competent body/person or can be declared void by court.

Transaction (contract) made in violation of the AC Law is challengeable.

Risks in the past and now

Criminal liability of LEs

since 1 September 2014

fine: - double amount of illegitimate benefit OR
- 5,000 – 75,000 Untaxable Minimum Amounts (\$3,036 - \$75,893),
but *only if not possible to determine illegitimate benefit*

... court may allow to pay in tranches within 3 years

dissolution (crimes in Art. 258-258⁵ of Criminal Code)

confiscation (only auxiliary to dissolution)

Risks in the past and now

Criminal liability of LEs - grounds

- (1) authorized person (officer, employee, or other person empowered to act)
- (2) acting **on behalf and in the interest** of company
- (3) convicted of crime (*money laundering, bribery of government or public official, commercial bribery, use of funds from illegal turnover of poisonous or potent medicines*)

or

failure of company officer (CEO, compliance officer or other) to perform their duty to ensure that measures are implemented to prevent above crimes.

Risks in the past and now

Who may let your company down?

Officers - persons who temporarily or permanently occupy positions related to performance of organizational-managerial or administrative-economic duties, or specially authorized for performance of such functions

Other persons employed (i.e., **any employee**)

Other persons acting on behalf of company under contract:

- suppliers, contractors, service providers
- **distributors (customs, competition law issues, especially in pharma)**
- consultants (land allocation, building permits)
- **lawyers (especially, litigators)**

Risks in the past and now

Criminal liability of LE - issues

- anti-bribery program not a defence!
 - ... but may be a mitigating factor for sanction (if not just on paper)
- curtailed rights under the Criminal Procedure Code
- likely conflict between interests of the indicted employee and of the company (need separate representation)

Risks in the past and now

Interaction with AC bodies

Reports on corruption or offenses related to corruption - as in the Anti-Corruption Program of company

Replies to information requests of National AC Bureau

Orders from National AC Agency to rectify violations, approve dismissal of AC Officer

Criminal, administrative, disciplinary, civil proceedings

Risks in the past and now

Dawn raids – emerging risk

National AC Bureau may:

- request information (3 work days for reply; may be extended by 2 days)
- seal premises for up to 10 days (pursuant to court decision), take away documents and objects as per the Criminal Procedure Code
- challenge agreements
- property arrest
- bank accounts monitoring

Key new concepts (Anti-Corruption Law of 2014)

- Violation related to corruption

criminal, administrative, disciplinary or civil liability for violations of the Law other than corruption activities (e.i., **conflict of interest, unlawful gifts, restrictions on concurrent employment**)

-**potential** vs. **real** conflict of interest

-**private interest** – property or non-property personal interest, incl. by virtue of membership in political party

-**gift** – for free or below minimal market value

-**illegitimate benefit** – promised, offered, given or received

Enforceability of policies

Anti-corruption program

- obligatory for companies participating in state/municipal tenders of >UAH20 mln (appr. \$714, 285) – [what about your distributor?](#)
- must be discussed with employees – [what about your subsidiary/branch?](#)
- wording on mandatory compliance with AC Program **must be** included in **employment agreements** and internal regulations (employee manuals) – [what about your subsidiary/branch?](#)
- **may be** included in commercial contracts – [what about your subsidiary's suppliers and service providers?](#)

Enforceability of policies

Anti-Corruption Program ≠ compliance policy

Must always be accessible to employees

- list of anticorruption measures, standards, procedures and their execution
- ethics rules
- rights and obligations of employees
- rights and obligations of company owners to prevent of corruption
- rights and obligations of compliance officer, procedure for appointment
- procedure for regular reporting by compliance officer to company owners
- reporting and resolving conflict of interests

Anti- Corruption program (2)

- remedies in case of violations of AC program
- internal investigations
- reporting to authorities
- means for confidential reporting to compliance officer
- measures for protection of whistleblowers
- individual consulting of employees by compliance officer
- disciplinary measures against employees who violated AC program
- procedures for monitoring compliance with, and evaluation of effectiveness of AC, trainings

Enforceability of policies

Compliance officer

Official job title in Ukrainian: “Person Responsible For Implementation of AC Program”

- Able to perform these functions by: moral qualities, professional level, health
- company officer and employee
- appointed according to AC Program
- dismissal notifiable to National AC Agency within 2 work days;
- **dismissal approval needed** by participants of tenders of >UAH20 mln (appr. \$714, 285)

Enforceability of policies

Enforceability of policies (on any subject)

Enforceable policy (and/or update) is:

- in the local language
- localised (text adjusted to local laws and practices)
- exists in paper copy
- formally approved by the CEO (Director) of the local office
- acknowledged by employees in writing (ink signatures!)

Intranet uploads, e-mailed copies, links to updates, online trainings, etc.
ARE NOT equivalent substitutes and are NOT USABLE.

Disciplinary actions against employees

- (1) collect evidence (internal investigation)
- (2) observe timeframes
- (3) written explanation from the employee (or Witness Certificate (Act) confirming refusal to provide)

- (4) decision based on all information collected
 - ...must take into account prior performance when determining the sanction

- (5) Order on Reprimand (Order on Termination)
 - ...obtain written acknowledgement of employee (or send to registered and actual address by registered mail, or Witness Certificate)

Timeframes for disciplinary sanctions

(1) Within 6 months of committing offense and

(2) within 1 month after the officer authorised to impose a sanction learned of the offense

...**what is “learning”?** (when learned of event, or when investigation confirmed that the action/ommission was a violation)?

Internal Investigations

Procedure:

Order on Investigation by the CEO of local entity

Authorised persons (Commission members, Head of Commission)

Notify employees, get written acknowledgment

Privacy and data protection documents (**check these, rectify any deficiencies as the very first step!**)

Verify **current actual and registered addresses** of employees!

Ensure there is written procedure for internal investigations (in AC program)

Investigations and disciplinary sanctions

Due diligence of counterparties

not expressly required by law, but recommended

better if envisaged by policy (AC Program) and criteria and methods are defined and universally applied (competition law considerations)

data protection/privacy considerations if individuals involved

preferably, use open sources, or monitor contractors closely and discuss methods beforehand (private investigators/detectives have just received legal status)



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2.	Compliance with Ukrainian Sanctions and Trade Restrictions against Russia, Restrictions on Operations in the Crimea and Occupied Territories in the East of Ukraine	
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2.1

Ukrainian Sanctions

Ukrainian Sanctions: Regulatory Acts



Decree of the
President
16 September
2015

Decree of
the
President
29 March
2016

Sanction
Law
No.1644-18
14 August
2014

Decree of the
President
27 May 2016

Decree of the
President
15 March
2017

Decree of
the
President
17 October
2016

Ukrainian Sanctions: Scope of Application

- Sanctions imposed against 682 individuals and 276 legal entities
- No sectorial sanctions have been introduced
- No extraterritorial effect
- Apply to any activities on the territory of Ukraine and cross-border transactions with Ukraine
- Apply only to the particular persons on the list – **BUT** certain sanctions extend to affiliates

Persons Subject to Sanctions

Individuals

- Ukrainian citizens
- Foreign citizens

Russian legal entities and their subsidiaries in Ukraine

- **Industrial complex:** Rusal, Rostovtopprom, Donalians, Binom-D, Monolit Impeks and others
- **Gas, machine-building and energy:** Kamaz, Bashneft, Novocherkaska GRES, Spezneftegaz, Transmashholding, Diakont, Hidropres, Rysneftedobycha and others
- **Aviation and navigation:** Uktus, Ikar, Alrosa, Jet Air Group, Ladoga, V.F. Tanker – Invest and others
- **Payment services:** Zolota Korona, Kolibri, Unistream, Anelik, Blizko and others
- **Russian banks:** Bank of Moscow, Gazprombank, Genbank, Adelantbank, Smartbank and others
- **Ukrainian banks with Russian-state capital:** Sberbank PJSC; VS Bank PJSC; Prominvestbank PJSC; VTB Bank PJSC; and BM Bank PJSC

Certain illegal organizations threatening the national security of Ukraine

- “New Russia Community”
- Radical Organization “Sobol”

Types of Sanctions

Freeze of assets

Prevention of capital outflow from Ukraine/
Prevention of capital outflow from Ukraine in favour of any affiliated entities

Restriction of trade operations

Suspension of any financial transactions
(including any foreign currency conversion transactions)

Ban on issuing permits/licenses allowing for export/import of foreign exchange assets

Suspension of performance of economic and financial obligations
(granting loans, credits, financial aid, guarantees, purchase of securities)

Liability for Sanctions Violation

- No special liability for violating sanctions restrictions
- Liability for special types of violation
- Criminal Liability:
 - ❖ **Individuals:** imprisonment up to 12 years; prohibition against holding certain positions or engaging in certain activities up to three years; property forfeiture
 - ❖ **Legal entities:** fine up to USD 45,770; property forfeiture; liquidation
- Generally applicable provisions on the liability for violations of Ukrainian legislation governing foreign economic activities may apply, including individual licensing for cross-border operations and temporary suspension of cross-border operations
- Invalidity of transactions as contravening the public order of Ukraine (including the "state interests") - all income obtained by any party may be confiscated



2.2

Trade Restrictions against Russia

Trade Bans between Russia and Ukraine



1 January 2016 - Suspension of application of CIS FTA with regard to Ukraine

Ban on import into Russia of a wide range of goods from Ukraine (including dairy products, milk, salt)

2 January 2016 - Import duties on goods from Russia (no duty free regime)

Ban on import into Ukraine of a wide range of goods from Russia (including dairy products, milk, alcohol)



Prohibition against entities controlled by Russian residents in obtaining licences for certain activities (annulment of such licences), e.g. certain foreign economic activities, provision of financial services, banking activities



2.3

Operations in the Crimea and in the Territories outside of the Control of the Ukrainian Authorities

Operations in the Crimea and on the Territories outside of Control of the Ukrainian Authorities



- Both the Crimea and the territories outside of control of the Ukrainian authorities are the territory of Ukraine
- Ukrainian law applies to all operations in/with the Crimea and the territories outside of control of the Ukrainian authorities

Operations in the Crimea

March/April
2014

- Crimea annexed by Russia
- Special status of the occupied territories

August
2014

- Free Economic Zone of the Crimea for 10 years: special tax and customs clearance regime - violation of the customs clearance rules may result in fine in the amount of 100% of the value of the transported goods, as well as their forfeiture

December
2015

- Temporary ban on supply of goods to/from the Crimea
- Exception from the ban for electricity, humanitarian aid and certain strategic goods

Operations in the Territories outside of the Control of the Ukrainian Authorities

Area of anti-terrorist operation

Donetsk People's Republic and Luhansk People's Republic - terrorist organizations

Have an open border with Russia

Starting from 15 March 2017, Ukraine suspended cargo traffic with territories outside of the control of the Ukrainian authorities ("total ban"), except for humanitarian aid



Liability for Violation of Transfer Rules: Territories outside of Control of the Ukrainian Authorities

Administrative offence

- Fine up to USD 130
- Confiscation of the goods transferred in violation of the rules

Criminal offence

(if it is related to financing
of terrorism)

- **Individuals:** imprisonment up to 12 years; prohibition to hold certain positions or engage in certain activities up to 3 years; property forfeiture
- **Legal entities:** fine up to USD 45 770; property forfeiture; liquidation



2.4

Conclusion

How to Mitigate the Risks? (1)

- screen your Ukrainian counterparties on compliance with the Ukrainian sanctions
- avoid using the same template of distribution contract for Russia and Ukraine
- restrict operations with the uncontrolled territories in the East of Ukraine in distribution contract for Russia
- revise trade compliance policy to address Ukrainian sanctions and trade restrictions
- revise regulation on Ukrainian representative offices

How to Mitigate the Risks? (2)

- review and revise all material contracts with Ukrainian counterparties to provide:
 - ❖ general law compliance clause + obligation to comply with Ukrainian sanctions and restrictions on supply to the Crimea and territories outside of the control of Ukrainian authorities; and
 - ❖ right to suspend performance under contract and unilaterally terminate the contract in case of:
 - violation of the sanctions and trade restrictions by a counterparty, or
 - if performance of the contract by either of the parties violates the sanctions and trade restrictions

Thank you!



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Mariana Marchuk is a Counsel in the Kyiv Office of Baker McKenzie. Mrs Marchuk has over 20 years of practical experience in the areas of compliance and anti-corruption, labor and migration, as well as in M&A, corporate law, commercial and international trade law. In the field of compliance, Ms. Marchuk advises Ukrainian and international clients on various issues, including on anti-corruption regulations of Ukraine and other countries, personal data protection, privacy of correspondence and private life, as well as on relevant aspects of labor and migration legislation. Ms. Marchuk also has advised on, or participated in, a number of internal investigations, pre-acquisition compliance due diligence reviews, compliance trainings, establishing enforceable compliance policies and procedures, terminations for violations of compliance policies and related projects.



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Hanna held a number of training and presentations for Ukrainian banks and corporate clients on compliance with Ukrainian sanctions and special trade regimes with the Crimea and uncontrolled territories in the East of Ukraine. She is one of the contributors to Baker McKenzie sanctions blog.



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