

New Anti-Corruption Legislation Changes the Landscape for Business in Ukraine

Executive Summary

Ukraine recently revamped its anti-corruption laws in order to enhance its ability to combat corruption and to address its commitments to the EU and GRECO. While the new legislation will enhance the government's ability to combat corruption and will likely result in a more transparent business environment, it will also make businesses more vulnerable to criminal prosecution and asset seizure.

In summary, the new legislation includes the following:

- Corporate criminal liability for certain corruption offenses, including both public and commercial bribery;
- Asset forfeiture as a penalty for certain corruption offenses;
- Whistleblower protection laws, including an amendment that prohibits employers from terminating employees for reporting information about corruption to state authorities;
- Disclosure of information about corrupt government officials and others in a “State Unified Register” of Corruption Offenders;
- Other revisions and clarifications in existing law which will make it easier to prosecute corruption.

These various provisions are contained in different pieces of legislation which enter into force at different times. Here are the relevant details of each:

Corporate Criminal Liability

The most significant aspect of the new legislation is the introduction of corporate criminal liability via a law entitled “On the Amendment of Certain Legislative Acts of Ukraine (Concerning Fulfillment of the Action Plan for the Liberalization by the European Union of the Visa Regime for Ukraine, Related to the Liability of Legal Entities)” which will take effect in September 2014. Specifically, the law provides that corporations can be held criminally liable when their authorized representatives:

- (i) offer or provide an improper benefit directly to an officer of a “private law legal entity” (i.e., a private company) or through a third party in order to encourage such officer to act, or fail to act, by using his/her authority for the benefit of the party offering or giving the benefit;
- (ii) offer or provide an improper benefit to auditors, notaries, evaluators, experts, commercial court judges and other persons who provide public services but who are not technically considered to be public officials, in order to encourage such official to act, or fail to act, by using his/her authority for the benefit of the party offering or giving the benefit;
- (iii) offer or provide an improper benefit directly to a public official, or through a third party, in order to encourage such official to act, or fail to act, by using his/her authority for the benefit of the party offering or giving the benefit;
- (iv) offer or provide an improper benefit to a person who offers or promises (agrees) to influence a decision to be made by a person “empowered to perform state functions” or to receive improper benefits to influence a decision of a person “empowered to perform state functions”;
- (v) offering to influence a decision of a person “empowered to perform state functions” in exchange for improper benefits or receive improper benefits in order to influence a decision of a person “empowered to perform state functions”.

Liability attaches if the offense was committed “on behalf of” and “in the interest of” a legal entity, defined as acts committed with the goal of (a) attempting to obtain improper benefits for the legal entity, (b)

creating an environment for the receipt of illegal benefits or (c) avoiding liability (i.e., paying a bribe so that the company can avoid the legal consequences of a misdeed).

Asset Forfeiture

Another important aspect of the new anti-corruption legislation is the introduction of asset forfeiture, termed “special confiscation,” as a penalty for certain offenses related to corruption. These provisions are contained in a law entitled “On Amendment of the Criminal and Criminal Procedure Codes of Ukraine (Concerning Fulfillment of the Action Plan for the Liberalization by the European Union of Visa Regime for Ukraine)” and will take effect in December 2013.

Specifically, the law provides that a court may order confiscation of property, money or other valuables, which were obtained as a result of certain corruption offenses, or which were used or intended to be used as instrumentalities in the commission of any of the following offenses:

- (i) abuse of authority by a civil servant;
- (ii) forgery of official documents by a civil servant;
- (iii) acceptance by a civil servant of improper benefits for himself/herself or for another person for an act or omission in connection with his/her official for the benefit of the giver or another person;
- (iv) unjust enrichment by a civil servant;
- (v) offering or providing improper benefits to a civil servant or another person, in order to encourage such civil servant to act or refrain from acting in connection with his/her official duties for the benefit of the offeror/giver or for other persons;
- (vi) offering or providing improper benefits to a person, who offers or promises (agrees) to influence a decision to be made by a person “empowered to perform state functions,” or to another specified individual (i.e., an individual designated by the such person to receive the bribe on his behalf); and
- (vii) obtaining improper benefits in order to influence a decision of a person “empowered to perform state functions”, or receiving improper benefits (for oneself or for another person) in order to influence a decision by a person “empowered to perform state functions”.

The law also provides that “special confiscation” can be imposed only upon a judicial finding that the party from whom the money, property or other values is to be confiscated knew or should have known about their illegal origin and/or use.

Whistleblower Protection

In order to encourage the exposure of corruption, the new legislation includes a provision prohibiting employers from firing or disciplining an employee, or forcing an employee to voluntarily terminate his/her employment, because the employee provided information about corruption to state authorities. This provision is contained in a law entitled “On the Amendment of Certain Legislative Acts of Ukraine in Connection with the Realization of the State Anti-Corruption Policy” took effect on June 9, 2013. This provision does not provide for any penalties beyond the remedies already contained in Ukrainian employment law. For example, if an employee is terminated for whistleblowing, he/she can seek damages for wrongful termination.

Disclosure of Personal Information about Corrupt Individuals

In order to deter corruption, the new legislation also includes a requirement that certain information about individuals who are found to have committed violations of Ukrainian anti-corruption law be entered in the “Unified State Register” of corruption offenders and published on the web-site of the Ministry of Justice. Information to be disclosed will include personal information such as name, place of work, the nature of their violation and the punishment imposed. This requirement is contained in the law “On Amendment of Certain Legislative Acts of Ukraine in Connection with the Realization of the State Anti-Corruption Policy.”

Recommendations

Corporate criminal liability is a blunt instrument which gives law enforcement tremendous power over companies. The simple fact of criminal charges, regardless of a case's ultimate resolution, is often enough to put a company out of business. Although it is limited to certain corruption offenses, the form of corporate criminal liability adopted by Ukraine is quite broad and promises to be a potent weapon in the hands of prosecutors. For example, liability will attach to acts committed "on behalf of" or "in the interests of" the company, vaguely defined concepts which do not require proof that the company's board of directors or management participated in the offense, approved it, or even knew about it.

In order to protect themselves against such risks, companies operating in Ukraine should ensure that they have robust anti-corruption compliance programs.

It is most important that such policies are in the Ukrainian language, are formally endorsed by the CEO of the Ukrainian subsidiary (or branch), exist in hard copy, and the employees' written acknowledgement of such policies are available in the HR/Compliance officer's file. Otherwise, it will be impossible to discipline (or terminate) the offending employee for even most serious offenses (unless such offenses are formally investigated and the employee is convicted to prison by court).

While these measures will not provide an absolute guarantee against violations, if implemented in a serious manner that demonstrates true commitment by management, they can reduce the risks to a minimal level.