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Ukraine's New Anti-Corruption Law: Will it Really Stop Corruption in Ukraine?

JAMES T. HITCH, III AND YULIYA KUCHMA¹

Abstract

On July 1, 2011, the new Ukrainian Anti-Corruption Law entered into force. After years of criticism of the corruption pervading all levels of its government, and recommendations for political and legislative reforms by international compliance experts, including in particular the Council of Europe's Group of Countries against Corruption ("GRECO"), Ukraine has finally introduced modern anti-corruption legislation.

While the new law has gone a long way toward approximating international norms and incorporating western best practices, it still has many fundamental defects and shortcomings, such as failing to provide for the liability of corporate legal entities for corruption offenses, which can only be remedied by new legislation.

Nonetheless, the nagging question remains as to whether the Ukrainian government authorities and business oligarchs will demonstrate the political will required to fully implement the new law in practice—and whether it will truly mitigate, much less eliminate, corruption in Ukraine.

Introduction

On July 1, 2011, the new Law of Ukraine "On the Prevention of and Counteraction against Corrupt Practices" (the "New Law") entered into force.² The Verkhovna Rada (the "Parliament") of Ukraine adopted the New Law on April 7, 2011,³ and Ukrainian President Victor Yanukovich signed it on June 7, 2011.⁴ By enacting the New Law,

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2. Law of Ukraine on the Prevention of and Counteraction against Corrupt Practices, *Oficijnyj Visnyk Ukrainy* [OVU] [Official Gazette of Ukraine] 2011, No. 44, Item 1764, available at <http://ovu.com.ua/articles/10905-pro-zasadi-zapobigannya-i-protidiyi-koruptsiyi>.

3. *Id.*

4. *Yanukovich Signs Package of Anti-Corruption Laws*, KYIVPOST.COM, June 8, 2011, <http://www.kyivpost.com/news/politics/detail/106293/>.

Ukraine has demonstrated that it is making a serious effort to deal with one of the country's greatest problems: corruption.

Corruption is considered "problem number one for Ukraine,"⁵ which creates "absolutely, incredibly difficult, onerous, and continuous problems."⁶ A "culture of corruption" persists in Ukraine,⁷ which is "wide-spread" and "permeates a significant part of Ukrainian politics, business, and society."⁸ Even President Yanukovich has called corruption in his country "a shameful phenomenon," which has become "a form of existence of the bureaucratic machinery and is the reason for the large-scale transition of the economy into the shadow."⁹

Ukrainian corruption is seen as having become "a threat to the country's democratic future and economic prosperity."¹⁰ A more rigorous fight against corruption is considered "a precondition for Ukraine's aspirations to develop a stable democracy, build a fair and flourishing economy, and fully participate in European, Western and global institutions."¹¹

Unfortunately, in 2010, Transparency International's Corruption Perception Index ranked Ukraine 134 out of 178 countries, which is far from satisfactory by any standard.¹² Only a significant reduction in the levels of corruption will enable Ukraine to provide "the sort of investment climate that would generate large and consistent flows of foreign capital, and prepare the country for its stated ambition of drawing closer to the European Union."¹³ Sadly, Ukraine is "already losing opportunities," as foreign investors have been looking to "less corrupt countries with more transparent economies and a more stable political setting."¹⁴

I. Earlier Anti-Corruption Legislation

Notwithstanding a centuries-long tradition of bribery and other corruption in the Russian Empire, no anti-corruption legislation existed during the Soviet Era when Ukraine was a Soviet Socialist Republic of the former USSR. It can be argued that corruption in

5. Andriy Fialko, Foreign Policy Advisor to the President of Ukr., Conference at the Peterson Institute for International Economics, *Ukraine's Future: The Challenges and Impact of Governance in Ukraine*, Panel Discussion: *Impact on the Economy and Foreign Policy 11* (July 7, 2011) (transcript available at www.piie.com/events/event_detail.cfm?EventID=189).

6. Adrian Karatnycky, Atlantic Council, Conference at the Peterson Institute for International Economics, *Ukraine's Future: The Challenges and Impact of Governance in Ukraine*, Panel Discussion: *The Challenges of Governance in Ukraine 11* (July 7, 2011) (transcript available at www.piie.com/events/event_detail.cfm?EventID=189); *see also id.* at 16 (audience comment by James Sherr "that corruption is rather "the symptom of the main problem; it is the princip[al] means by which the objective of concentrating power is realized").

7. JAN NEUTZE & ADRIAN KARATNYCKY, *THE ATLANTIC COUNCIL OF THE UNITED STATES, CORRUPTION, DEMOCRACY, AND INVESTMENT IN UKRAINE*, at v (2007), *available at* <http://www.acus.org/publication/corruption-democracy-and-investment-ukraine>.

8. *Id.* at i.

9. *Yanukovich Signs Package of Anti-Corruption Laws*, *supra* note 4.

10. NEUTZE & KARATNYCKY, *supra* note 7, at v.

11. *Id.* at i.

12. *Corruption Perceptions Index 2010 Results*, TRANSPARENCY INTERNATIONAL, http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results.

13. NEUTZE & KARATNYCKY, *supra* note 7, at vi.

14. *Id.* at 3.

Ukraine today is “the cumulative effect of a system that over time bred corruption” when Ukraine was “part of a larger entity, in which certain patterns of conduct were institutionalized and became pervasive.”¹⁵

After declaring its independence in 1991, newly-independent Ukraine’s initial anti-corruption legislation was the Law “On the Prevention of Corruption” (the “Law of 1995”),¹⁶ which became effective as of November 16, 1995.¹⁷ This rather undistinguished legislation prevailed during the terms of Ukraine’s first three presidents—an era marked by its lack of transparency and myriad accusations of corruption at all levels of government administration in Ukraine. The vast majority of anti-corruption efforts during this period proved to be ineffective.¹⁸

On July 18, 2009, the Law “On the Prevention of and Counteraction against Corrupt Practices”¹⁹ and the Law “On the Liability of Legal Entities for Corruption Violations,”²⁰ as well as a law enacting certain amendments of the Criminal, Administrative Violations, and Criminal Procedural Codes concerning liability for corruption offenses²¹ (together the “Anti-Corruption Package”), were enacted during the presidency of Victor Yushchenko and the prime ministership of Yuliya Tymoshenko. The Anti-Corruption Package introduced a number of significant changes from the Law of 1995, which were intended to bring the legislation to a new level of effectiveness in the campaign against corruption. A very important and long-awaited innovation in the Anti-Corruption Package was the designation of a legal entity as a subject of liability for the corruption offenses of its authorized representatives.²²

But due to the destructive political infighting between then-Prime Minister Tymoshenko and her supporters and the current president, Viktor Yanukovich, and his Party of Regions, the Anti-Corruption Package never practically entered into force. Its effective date was postponed twice, from January 1, 2010 until April 1, 2010, and then again until January 1, 2011, when, upon its finally coming into effect, the Law of 1995 was simultaneously terminated. After he became president, Yanukovich announced that combating corruption was to be one of the top policy priorities of his new administration.²³ On December 21, 2010, pursuant to a decision of the Constitutional Court of Ukraine,

15. Zbigniew Brzezinski, former US Nat’l Sec. Advisor, Conference at the Peterson Institute for International Economics, Ukraine’s Future: The Challenges and Impact of Governance in Ukraine, Keynote Address (July 7, 2011) (transcript available at www.piie.com/events/event_detail.cfm?EventID=189).

16. Law of Ukraine on the Prevention of Corruption, Vidomosti Verkhovnoi Rady [VVR] [Official Bulletin of the Supreme Council] 1995, No. 34, Item 266, available at <http://zakon.rada.gov.ua/cgi-bin/laws/annot.cgi?nreg=356%2F95-%E2%F0>.

17. *Id.*

18. NEUTZE & KARATNYCKY, *supra* note 7, at v.

19. Law of Ukraine on the Prevention of and Counteraction against Corrupt Practices, Vidomosti Verkhovnoi Rady [VVR] [Official Bulletin of the Supreme Council] 2009, No. 45, Item 691.

20. Law of Ukraine on the Liability of Legal Entities for Corruption Violations, Vidomosti Verkhovnoi Rady [VVR] [Official Bulletin of the Supreme Council] 2009, No. 45, Item 692.

21. Law of Ukraine on Amending Some Legislative Acts of Ukraine Concerning Liability for Corruption Offenses, Vidomosti Verkhovnoi Rady Ukrainy [VVR] [Official Bulletin of the Supreme Council], 2009, N 46, 699 [hereinafter 2009 Law on Amendments].

22. Law of Ukraine on the Liability of Legal Entities for Corruption Violations, Vidomosti Verkhovnoi Rady [VVR] [Official Bulletin of the Supreme Council] 2009, No. 45, Item 692, art. 1.

23. Alina Pastuhova & Aleksandr Michelson, *Tak Kazav Yanukovich [So Said Yanukovich]*, UKRAINIAN WEEK, Feb. 24, 2011, <http://www.ut.net.ua/Politics/17234>.

stating that some aspects of the Anti-Corruption Package were contrary to the Constitution, President Yanukovich proposed to the Parliament the text of the New Law for its consideration and enactment.²⁴ The Parliament, then dominated by the Party of Regions, adopted a law abrogating the Anti-Corruption Package as of January 5, 2011, before it could be implemented in practice, thereby “creating legislative gaps” and leaving Ukraine for a time—until the entry into force of the New Law—with no effective anti-corruption legislation.²⁵

II. Ukraine’s Membership in International Anti-Corruption Treaties

While Ukraine was adopting the above described anti-corruption legislation, it also became a party signatory to several international treaties aimed at reducing corruption. Ukraine signed and ratified the Council of Europe’s Civil Law Convention on Corruption²⁶ and became a member of its implementation body, the Group of States against Corruption (GRECO), in January 2006.²⁷ Ukraine also signed and ratified the United Nations Convention against Corruption²⁸ and the Council of Europe’s Criminal Law Convention on Corruption.²⁹ Nonetheless, Ukraine still needed to enact its own domestic legislation to bring it into compliance with the international norms embodied in those treaties.

III. Third Party Assessments of Ukraine’s Anti-Corruption Legislation and Practices

Ukraine’s anti-corruption legislation and practices have long been the subject of many commentaries, where objective third parties, *e.g.*, anti-corruption compliance organizations, NGOs, and private “think tank” institutions, have made assessments of the situation in Ukraine and have offered recommendations for improvements of its legislation and its practices in the sphere of combating corruption. In particular, in 2007, the Atlantic Council convened a task force of distinguished experts to assess the situation of “widespread corruption” in Ukraine “to wrestle with the disease and make policy prescriptions

24. COUNCIL OF EUROPE’S GROUP OF STATES AGAINST CORRUPTION (GRECO), JOINT FIRST AND SECOND EVALUATION ROUND ADDENDUM TO THE COMPLIANCE REPORT ON UKRAINE 4 (2011), available at [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoRC1&2\(2009\)1_Add_Ukraine_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoRC1&2(2009)1_Add_Ukraine_EN.pdf) [hereinafter GRECO ADDENDUM REPORT 2011].

25. *Id.* at 4, 17.

26. Civil Law Convention on Corruption, Council of Europe, Nov. 4, 1999, E.T.S. No. 174, available at <http://www.unhcr.org/refworld/docid/47fdfb1fd.html>. Ukraine signed the Convention on Nov. 4, 1999, and passed a law ratifying it on Mar. 16, 2005, which entered into force on Jan. 1, 2006. See also NEUTZE & KARATNYCKY, *supra* note 7, at 4, 37.

27. NEUTZE & KARATNYCKY, *supra* note 7, at 4. Additionally, note that GRECO has its website at <http://www.coe.int/greco>.

28. United Nations Convention Against Corruption, G.A. Res. 58/4, U.N. Doc. A/RES/58/4 (Nov. 21, 2003).

29. Criminal Law Convention on Corruption, Council of Europe, Jan. 27, 1999, E.T.S. No. 173, available at <http://www.unhcr.org/refworld/docid/47fdfb1ed.html>. Ukraine signed the Convention on Jan. 27, 1999, and passed a law ratifying it on Nov. 27, 2009, which entered into force on Mar. 1, 2010.

for the cure,” including the formulation of a list of specific recommendations to be introduced into Ukraine’s anti-corruption legislation and practice.³⁰

Likewise, GRECO has issued numerous “compliance reports” on the anti-corruption efforts and legislation of many of the European nations that are parties to the Council of Europe and members of GRECO, including Ukraine.³¹ GRECO adopted its first Joint First and Second Round Evaluation Report on Ukraine on March 19-23, 2007, and addressed twenty-five recommendations to Ukraine, which it encouraged the Ukrainian government to adopt.³² On May 11-13, 2009, GRECO adopted its Joint First and Second Round Compliance Report, in which it concluded that Ukraine had “implemented satisfactorily” or “dealt with in a satisfactory manner” eight of its twenty-five recommendations, with the remaining seventeen recommendations having been only “partly implemented” by Ukraine.³³

Most recently, on May 23-27, 2011, GRECO adopted its Addendum to the First and Second Round Compliance Report (the “Addendum Report”), in which it assessed a number of newly adopted and pending laws and regulations, including the New Law (which, at that time, had been passed by the Parliament, but had not yet been signed by the President or entered into force), and determined whether they enabled Ukraine to comply with the seventeen outstanding “partly implemented” recommendations.³⁴ GRECO’s conclusion was that, during the two years since its prior assessment report, only four of those seventeen recommendations had been “implemented satisfactorily” or “dealt with in a satisfactory manner;” ten recommendations remained “partly implemented;” and, amazingly, three recommendations, which previously had been considered to be “partly implemented,” were now found to have been “not implemented.”³⁵

Clearly, Ukraine’s President and Parliament have known of GRECO’s recommendations on dealing with corruption in Ukraine, as well as those of other commentators from various international organizations and private research institutions, since as long ago as 2007.³⁶ As will be explained in more detail below, it is clear from the following analysis of the New Law that Ukraine’s highest authorities have only ineffectively and begrudgingly taken note of and attempted to implement these recommendations in their drafting and enactment of the New Law.

30. NEUTZE & KARATNYCKY, *supra* note 7, at i.

31. See Council of Europe, Evaluation Reports/Compliance Reports Adopted by GRECO, [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/reports\(round2\)_en.asp](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/reports(round2)_en.asp) (last visited Sept. 24, 2011) (listing the numerous countries on which GRECO has issued “evaluation reports”).

32. COUNCIL OF EUROPE’S GROUP OF STATES AGAINST CORRUPTION (GRECO), JOINT FIRST AND SECOND EVALUATION ROUND ADDENDUM TO THE COMPLIANCE REPORT ON UKRAINE 47-50 (2007), available at [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoEval1-2\(2006\)2_Ukraine_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoEval1-2(2006)2_Ukraine_EN.pdf).

33. COUNCIL OF EUROPE’S GROUP OF STATES AGAINST CORRUPTION (GRECO), JOINT FIRST AND SECOND EVALUATION ROUND ADDENDUM TO THE COMPLIANCE REPORT ON UKRAINE (2009), available at [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoRC1&2\(2009\)1_Ukraine_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoRC1&2(2009)1_Ukraine_EN.pdf) [hereinafter GRECO ADDENDUM REPORT 2009].

34. See GRECO ADDENDUM REPORT 2011, *supra* note 24, at 16.

35. See *id.* On June 29, 2011, the Cabinet of Ministers of Ukraine officially allowed the GRECO Addendum Report to be translated into Ukrainian and published. Press Release, Ukrainian Ministry of Justice, Ukraine has Provided Consent to the Publication of the Report on the Status of the Anti-Corruption GRECO Recommendations (June 29, 2011), available at http://www.knu.gov.ua/control/uk/publish/article?art_id=244359996&cat_id=244277212.

36. See GRECO ADDENDUM REPORT 2009, *supra* note 33, at 2.

IV. The New Law on Preventing and Counteracting Corrupt Practices

As noted above, President Yanukovich submitted the New Law to the Parliament on December 17, 2010, and, after its Second Reading and numerous revisions, the Parliament passed it on April 7, 2011. But, on May 12, 2011, after the New Law had been passed, but before it had been signed by the President, the Parliament introduced several “clarifications” of the text into a repeated Second Reading.³⁷ The official purpose of such clarifications was to eliminate certain “contradictions” that had been discovered during the final review and revision of the New Law in preparation for the President’s signing. One of these “clarifications” included raising by 300% the threshold financial amount, only in excess of which government officials would be obliged to declare their personal financial operations.³⁸

Coincidentally, the New Law came into force on the same date, July 1, 2011, that the new Bribery Act 2010 (the “U.K. Bribery Act”) came into effect in the United Kingdom.³⁹ Using this new anti-corruption legislation, as well as the long-established comparable U.S. 1977 Foreign Corrupt Practices Act (the “U.S. FCPA”),⁴⁰ both the U.K. and U.S. governments will prosecute the corruption not only of U.S. and U.K. companies and individuals, but also of companies listed on the U.S. and U.K. stock exchanges, their subsidiaries and affiliates, and other companies and individuals with business connections with the United Kingdom and the United States—including Ukrainians. This makes it even more urgent for Ukraine to improve quickly its corruption environment for the sake of its own domestic business and investments, as well as its ability to attract foreign investments.

The New Law sets forth the main principles for combating corruption.⁴¹ It defines corruption and corruptive offense; it determines the circle of relevant persons who may be held liable for corruption offenses; and it imposes restrictions on the activities of such persons, while establishing liability for their corruptive offenses.⁴²

The New Law also requires, under another new law “On Amendments of Some Laws of Ukraine in Connection with Liability for Corruption Offenses,”⁴³ which was enacted and entered into force at the same time as the New Law, the introduction of (1) certain amendments of the Criminal, Administrative Violations, and Criminal Procedural Codes of Ukraine and (2) the law “On the State Service” to further implement the provisions of the New Law.

37. *Id.*

38. The threshold was increased from UAH 50,000 (approximately US \$6,250) to UAH 150,000 (approximately US \$18,750). *See id.* All approximate values of U.S. dollars, which are used in this paper, are based on the official exchange rate of the National Bank of Ukraine in effect on July 1, 2011, which was US \$797.17/UAH 100.00. Nat’l Bank of Ukraine, Official Exchange Rate for July 1, 2011, http://www.bank.gov.ua/kurs/engl/last_kurs1.htm.

39. Bribery Act, 2010, c. 23 (U.K.).

40. Foreign Corrupt Practices Act of 1977, 15 U.S.C.A. §§ 78m, 78dd-1 to 78dd-3, 78ff (2011).

41. *See* Law of Ukraine on Preventing and Counteracting Corrupt Practices, *Oficijnyj Visnyk Ukrainy* [OVU] [Official Gazette of Ukraine] 2011, No. 44, Item 1764, available at <http://ovu.com.ua/articles/10905-pro-zasadi-zapobigannya-i-protidiyi-koruptsiyi>.

42. *See id.* § I, arts. 1, 4; § II, arts. 6-17; § IV, arts. 21-22.

43. Law of Ukraine on Amendments of Some Laws of Ukraine in Connection with Liability for Corruption Offenses, *Oficijnyj Visnyk Ukrainy* [OVU] [Official Gazette of Ukraine] 2011, No. 44, Item 1765, available at <http://ovu.com.ua/articles/10906-pro-vnesennya-zmin-do-deyakh-zakonodavchih-aktiv>.

V. "Corruption" and "Corruptive Offense" Defined

The New Law defines "corruptive offense" as an intentional act, which has the features of corruption, performed by a person covered by the New Law,⁴⁴ who is subject to criminal, administrative, civil, or disciplinary liability.⁴⁵ Like the new U.K. Bribery Act,⁴⁶ the New Law covers not only corruptive offenses involving government officials, but also the corruptive offenses of officials of private law legal entities (*e.g.*, commercial bribery).⁴⁷

"Corruption" itself is defined as (i) the use of the authority, and the relevant possibilities therefrom, granted to a covered person due to his/her occupying a certain position, to receive improper benefits, or to accept an offer/promise of such improper benefits for himself/herself or for other persons; as well as (ii) an offer/promise of, or the actual granting of, improper benefits to the particular covered person or, upon the request of such covered person, to other persons, to facilitate such covered person for the improper use of his/her authority and the relevant possibilities therefrom.⁴⁸

The above definition of a corruptive offense also includes the granting of improper benefits to a person covered by the New Law either directly or through intermediaries,⁴⁹ which is consistent with the corresponding principle declared by the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Instruments.⁵⁰ But the New Law, while requiring annual mandatory declarations by covered persons, does not require such declarations by persons related to them.⁵¹ In practice, this makes it more complicated to implement the principle of including the activities of intermediaries into the definition of corruptive offense.

As follows from its definition, a corruptive offense under the New Law requires that the offering, granting, or receiving of improper benefits must involve a certain undue monetary or other advantage. As a result, other ways of influencing a covered person to facilitate his/her improper use of his/her authority, such as "friendly relationships" or influence through using "connections" with high-level officials, remain uncovered. In contrast, the U.S. FCPA prohibits "influencing any act or decision," which covers any and all methods of improper influence.⁵²

44. See *infra* Parts VI-IX for a discussion of which individuals the new law covers.

45. See Law of Ukraine on Preventing and Counteracting Corrupt Practices § I, art. 1.

46. Bribery Act, 2010, c. 23, art. 6 (U.K.).

47. See Law of Ukraine on Preventing and Counteracting Corrupt Practices § I, art. 4.1.3.

48. *Id.* § I, art. 1.1.

49. *Id.* § I, art. 4.1.4.

50. Organization for Economic Co-operation and Development (OECD), Convention on Combating Bribery of Foreign Public Officials in International Business Transactions art. 1, Dec. 17, 1999, S. TREATY DOC. No. 105-43 (1998), available at <http://www.oecd.org/dataoecd/4/18/38028044.pdf>.

51. Law of Ukraine on Preventing and Counteracting Corrupt Practices § I, art. 4 (not listing "relatives" as covered individuals).

52. See Foreign Corrupt Practices Act of 1977, 15 U.S.C.A. §§ 78dd-1(a)(1)(A)(i), 78dd-2(a)(1)(A)(i), 78dd-3(a)(1)(A)(i) (2011).

VI. Expanded Scope of Subjects of Liability for Corruptive Offenses

The New Law considerably expands the scope of persons who are subject to liability for corruptive offenses compared to the Law of 1995.⁵³ In addition to Ukrainian government officials, meaning civil servants, individuals covered by the New Law now include persons equivalent to government officials, public services providers, foreign civil servants, and officials of legal entities and their authorized representatives.⁵⁴ It is the inclusion of this last group of company officers and managers that, as noted above,⁵⁵ expands the scope of the New Law to cover commercial bribery as well as the bribery of government officials.

As noted above,⁵⁶ in 2009 there appeared a very important and long-awaited innovation contained in the Anti-Corruption Package, namely the designation of a legal entity as a subject of liability for the corruptive offenses of its authorized representatives. Under this provision, a legal entity could be found liable for any corrupt act that was taken on its behalf and in its interest by its manager, founder, participant, or any other authorized person if this act was prohibited by a relevant anti-corruption provision of the Criminal Code of Ukraine.⁵⁷

Unfortunately, the New Law, unlike the Anti-Corruption Package, the new U.K. Bribery Act⁵⁸ and the U.S. FCPA,⁵⁹ does not include legal entities as subjects of liability or “address corporate liability for corruption offenses,” which was one of the recommendations of GRECO in its Joint First and Second Round Evaluation Report on Ukraine published in March 2007.⁶⁰ GRECO considers this omission to be a serious defect of the New Law; it is “clearly a step backwards compared to the situation at the time of the adoption of [the Anti-Corruption Package].”⁶¹ GRECO encouraged the Ukrainian authorities to put the issue of corporate liability for corruption misconduct “high on the agenda again, without further delay.”⁶²

VII. Ukrainian Government Officials

The New Law contains an extensive listing of positions held by government officials, *i.e.*, persons empowered to perform the functions of the state or local authorities.⁶³ These include, but are not limited to, the President of Ukraine, the Cabinet of Ministers, the Prosecutor General, the Governor of the National Bank, the members of the Parliament,

53. Compare Law of Ukraine on the Prevention of Corruption, Vidomosti Verkhovnoi Rady [VVR] [Official Bulletin of the Supreme Council] 1995, No. 34, Item 266 *with* Law of Ukraine on Preventing and Counteracting Corrupt Practices § I, art. 4.

54. See Law of Ukraine on Preventing and Counteracting Corrupt Practices § I, art. 4.

55. See *supra* Part V.

56. See *supra* text accompanying note 22.

57. Law of Ukraine on the Prevention of and Counteraction against Corrupt Practices, Vidomosti Verkhovnoi Rady [VVR] [Official Bulletin of the Supreme Council] 2009, No. 45, Item 691, at art. 2.

58. Bribery Act, 2010, c. 23, § 1 (U.K.).

59. Foreign Corrupt Practices Act of 1977, 15 U.S.C.A. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a) (2011).

60. GRECO ADDENDUM REPORT 2011, *supra* note 24, at 15.

61. *Id.*

62. *Id.*

63. Law of Ukraine on Preventing and Counteracting Corrupt Practices, Oficijnyj Visnyk Ukrainy [OVU] [Official Gazette of Ukraine] 2011, No. 44, Item 1764, at § I, art. 4.1.1, *available at* <http://ovu.com.ua/articles/10905-pro-zasadi-zapobigannya-i-protidiyi-koruptsiyi>.

public officials and officials of local authorities, military officials, judges, personnel of the bodies of internal affairs, officers and officials of the public prosecution bodies, the State Security Service, the diplomatic service, the customs service, the state tax service, members of the Central Election Commission, and “officials and officers of other bodies of state authority.”⁶⁴

VIII. Persons Equivalent to Ukrainian Government Officials

The New Law also includes as subjects of liability for corruption offenses “persons who for the purposes of this Law, have been conferred the status of persons authorized to perform the functions of state or local authorities,” *i.e.*, persons equivalent to government officials.⁶⁵ These include, but are not limited to, officers of public law legal entities, who get their wages from the state or local budget; persons who provide public services but who are not considered to be government officials, such as auditors, notaries, experts, evaluators, judges of arbitration courts, and other persons who provide public services; officers in a legislative, executive, or judicial body of a foreign country, including persons performing the functions of the state for a foreign country, “in particular . . . on behalf of a state agency or a state enterprise,” as well as foreign arbitrators; and officers of international organizations.⁶⁶

While all of the provisions of the New Law apply to government officials, only certain provisions also apply to “public officials,” *i.e.*, “persons equivalent to government officials” who are not civil servants.⁶⁷ In its reports, GRECO noted that it has recommended that Ukraine should “introduce a reform process covering an appropriate range of all public officials—and not only civil servants”⁶⁸ GRECO emphasized that “a much broader reform” than that enacted by the New Law is still required.⁶⁹

IX. Officers of Private Law Legal Entities

As noted above, while the New Law does not make legal entities themselves liable for corruption misconduct, it does provide for the liability of officers of private law legal entities for corruption misconduct committed by them or their authorized representatives.⁷⁰ Consequently, liability for corruption misconduct under the New Law applies to both the bribery of government officials and commercial bribery.⁷¹

64. *Id.*

65. *Id.* § I, art. 4.1.2.

66. *Id.*

67. These articles of the New Law include, *inter alia*, improper exercise of official position (art. 6), acceptance of gifts (art. 8), conflicts of interests (art. 14), and transparency of information (art. 16); in addition, “public officials” who are officers of public law legal entities are subject also to the provisions on the work of relatives in direct subordination (art. 9) and financial control (art. 12). *See generally id.*

68. GRECO ADDENDUM REPORT 2011, *supra* note 24, at 12.

69. *Id.*

70. Law of Ukraine on Preventing and Counteracting Corrupt Practices § I, art. 4.1.3.

71. *Id.* § I, art. 3.

X. Restrictions on Government Officials

The New Law imposes a number of restrictions on government officials as “measures aimed at preventing and counteracting corruption.”⁷² These include restrictions on a government official’s exercise of his/her official position for the purposes of obtaining an unlawful benefit. They also include restrictions on a government official’s holding of more than one office and the overlapping of his/her official position with other activities, meaning government officials are prohibited from concurrently engaging in any other paid activities, except for artistic, teaching, and scientific activities, medical practice, and sports instruction and judging.⁷³

Entrepreneurship by government officials is also prohibited by the New Law, including being a member of a company’s governing body or supervisory board.⁷⁴ The New Law also imposes restrictions on government officials with respect to the work of their relatives, meaning government officials may not have their relatives directly subordinated to them, nor may they be directly subordinated to their relatives.⁷⁵

Finally, the New Law imposes restrictions on government officials who have resigned or terminated their official activities, meaning for one year after the resignation or other termination of a government official from his/her official position, such former government official may not be hired by any entity that fell within the ambit of his/her supervisory powers during the year that preceded such former government official’s departure from government service.⁷⁶ Also, within one year of his/her departure, a former government official may not be a representative of anyone in any legal action where the other party is the government body from which the former government official has departed.⁷⁷

XI. Gifts and Hospitalities

The New Law prohibits a person covered by it from receiving a gift in exchange for any decision, act, or non-act that is committed in the interest of the person who is giving the gift, or where the giver of the gift is subordinated to the covered person receiving the gift.⁷⁸

Having said this, the New Law expressly allows a person covered by it to receive, where none of the above-mentioned factors are involved, a one-time gift with a value not exceeding fifty percent of one official minimum monthly salary, provided that the cumulative value of all gifts received by a covered person from the same source during one year does not exceed one (entire) official minimum monthly salary in the amount in effect as of

72. *Id.* § II, art. 6.

73. *Id.* § II, art. 7.

74. *Id.*

75. *Id.* § I, art. 9.

76. *Id.* § II, art. 10.

77. *Id.* § II, art. 10.1.3.

78. *Id.* § II, art. 8.1.

January 1 of the relevant year.⁷⁹ These amounts are considerably higher than the amount of a gift to a government official that was allowed under the Anti-Corruption Package.⁸⁰

The New Law expressly provides that government officials may accept gifts that fall within the generally accepted notions of hospitality.⁸¹ Because the New Law contains no express provisions on the providing or acceptance of hospitalities,⁸² such as paying for travel, accommodations, meals, and entertainment of government officials, the currently existing Ukrainian legislation on the giving and acceptance of such hospitalities must be followed when a permitted gift under the New Law is given to or accepted by a government official.

Nonetheless, the New Law also expressly provides that government officials at the state and local levels are prohibited from receiving services and property free of charge from individuals and legal entities, except as provided by law.⁸³

XII. Special Screening

The New Law requires that the special screening of applicants for government office must be conducted by certain "specially authorized subjects in the sphere of counteracting corruption."⁸⁴ Every applicant is required to submit information about having a criminal record, especially for corruption offenses; having been subject to administrative sanctions for corruption offenses; the accuracy of the annual declaration⁸⁵ of his/her property, income, expenses, and financial obligations; having any corporate rights (*i.e.* being the owner or official of a legal entity); and the status of his/her health, education, and professional improvement.⁸⁶

Quite interesting is the fact that expressly excluded from this mandatory screening are candidates for the positions of the President of Ukraine, members of the Parliament of Ukraine and the parliament of the Autonomous Republic of Crimea, members of local councils, and the heads of villages, towns, and cities.⁸⁷ Moreover, the New Law expressly provides that this provision of the New Law will not become effective until January 1, 2012, meaning six months after the remainder of the New Law's provisions enter into force.⁸⁸

XIII. Financial Control

In addition to the requirement of special screening, the New Law requires that a government official must file an annual declaration of his/her property, income, expenses, and

79. *Id.* § II, art. 8.2. One official minimum monthly salary was equal on July 1, 2011 to UAH960 (or approximately US\$120); 50% of that amount was UAH480 (or approximately US\$60).

80. Law of Ukraine on the Prevention of and Counteraction against Corrupt Practices, Vidomosti Verkhovnoi Rady [VVR] [Official Bulletin of the Supreme Council] 2009, No. 45, Item 691, art. 5.2.

81. Law of Ukraine on Preventing and Counteracting Corrupt Practices § II, art. 8.2.

82. *See id.* § II, art. 8.

83. *Id.* § II, art. 17.

84. *Id.* § II, art. 11.1.

85. *See infra* Part XIII.

86. Law of Ukraine on Preventing and Counteracting Corrupt Practices § II, art. 11.2.

87. *Id.*

88. *Id.* § VIII (1).

financial obligations.⁸⁹ This information will be subject to public disclosure in the official printed media of the relevant governmental and local authorities within thirty days of its submission.⁹⁰ The New Law also requires that a government official who opens a foreign currency account with a non-resident bank must disclose the account to the relevant state tax authorities within ten days of opening it.⁹¹

The financial control provisions of the New Law also enter into effect on January 1, 2012.⁹² It appears that the members of Parliament wanted to give the individuals covered by the New Law—themselves included—advance notice of these requirements and adequate time to comply with them. In addition, government officials filing their annual declarations that require information about a government official's expenses need only provide those expenses incurred from the date on which the New Law became effective.⁹³

The financial control of and disclosure by government officials of their personal financial information is very much in line with the best practices recommended by anti-corruption compliance experts. One of the recommendations of the Atlantic Council's October 2007 task force was to require the publication of annual declarations of assets and income of public officials, because "[p]ublic officials enjoy a public trust . . . [and] they must observe the highest standards of transparency and integrity."⁹⁴ Moreover, the task force urged that such declarations "must be treated seriously and false declarations should be subject to criminal sanctions."⁹⁵ Nonetheless, there is concern currently among many anti-corruption experts that Ukraine's "politicians, [including] members of parliament of the ruling party . . . refuse to publicize, [and] to publish their declarations" even after the adoption of the New Law.⁹⁶

XIV. Transparency Requirements

The New Law prohibits government officials from refusing to provide, or from providing untimely, inadequate, or incomplete information that "is stipulated by law."⁹⁷ The New Law further provides that the following information cannot be claimed as being "restricted information" not subject to disclosure:

- the amounts and types of charitable and other help provided to or received from individuals or legal entities by government officials; and
- the amounts and types of remuneration obtained by government officials in connection with their employment, as well as any gifts received by them under any transactions subject to mandatory state registration.⁹⁸

Notably, the relevant provision in the Anti-Corruption Package, which required the disclosure of the income, profits, etc. of relatives of government officials (such as a spouse,

89. *Id.* § II, art. 12.1.

90. *Id.*

91. *Id.* § II, art. 12.3.

92. *Id.* § VIII (1).

93. *Id.* § VIII (2).

94. NEUTZE & KARATNYCKY, *supra* note 7, at 32-33.

95. *Id.* at 31.

96. Fialko, *supra* note 5, at 18.

97. Law of Ukraine on Preventing and Counteracting Corrupt Practices § II, art. 16.1.

98. *Id.* § II, art. 16.2.

parents, and children), was excluded by the New Law, which only requires the disclosure of the income, profits, etc. of the government officials themselves.⁹⁹

XV. Conflicts of Interests

The New Law expressly requires that a government official must take active measures to prevent any conflict of interests from arising.¹⁰⁰ If such a conflict arises, then the government official is required to disclose it immediately to his/her superior.¹⁰¹ The laws and regulations that determine the powers of the relevant government body, the procedure for its providing of certain types of public services, and the performance of its activities are required to envisage the procedure for and the ways of settling conflicts of interests.¹⁰²

This provision of the New Law is very much in line with the best practices envisioned by international anti-corruption law experts. The Atlantic Council task force recommended that Ukraine should “raise awareness of the concept of conflict of interest among public officials,”¹⁰³ with the further admonition that the Ukrainian “national leaders should make ethical standards—including avoidance of conflict of interest—a requirement for all high and mid-level government decision-makers.”¹⁰⁴

XVI. Codes of Conduct

The New Law provides, in a very general and rather unspecific way under the heading of “Codes of Conduct”, that the “general requirements” for government officials, “by which they are obliged to be guided in the course of the performance of their official powers,”¹⁰⁵ shall be “established by law.” Similarly, the New Law provides that the general laws and other regulations that determine the functioning of other public officials, local authorities, public services providers, and others, “may establish special requirements” with respect to the conduct of such officials. Finally, the New Law prescribes that “the state shall assist” in the fixing of standards of professional ethics and other requirements in “the codes of conduct of entrepreneurs and representatives of the respective professions.”¹⁰⁶

While this article of the New Law complies with one of the express recommendations of GRECO, it clearly does so in only a formalistic and begrudging way because it provides no specifics and does not even clearly focus on anti-corruption concerns. In this regard, GRECO criticized the Ukrainian authorities for “using legislation . . . for establishing codes of conduct, which should rather be ‘soft law’, living and evolving instruments . . . as part of a pedagogical approach.”¹⁰⁷ Such instruments should include, instead of laws and

99. Law of Ukraine on the Prevention of and Counteraction against Corrupt Practices, Vidomosti Verkhovnoi Rady [VVR] [Official Bulletin of the Supreme Council] 2009, No. 45, Item 691, art. 14.

100. Law of Ukraine on Preventing and Counteracting Corrupt Practices § II, art. 14.1.1.

101. *Id.* § II, art. 14.1.2.

102. *Id.*

103. NEUTZE & KARATNYCKY, *supra* note 7, at ix, 32.

104. *Id.* at 31.

105. Law of Ukraine on Preventing and Counteracting Corrupt Practices § II, art. 13.1.

106. *Id.* § II, art. 13.3.

107. GRECO ADDENDUM REPORT 2011, *supra* note 24, at 14.

orders, general rules of conduct for public servants, which would “offer useful instructions and guidance regarding the prevention of conflicts of interest.”¹⁰⁸

XVII. Duty to Report and Prevent Corruption Misconduct

The New Law requires all government officials it covers to “implement measures of the prevention of and counteraction against corrupt practices.”¹⁰⁹ It creates “special authorized entities for corrupt practices counteraction” that are to directly implement measures aimed at the discovery, termination, and investigation of corruptive offenses.¹¹⁰ Moreover, if individuals covered by the New Law discover a corruption offense or obtain information about one, then they are obliged to take measures to discontinue the offense and to promptly notify the relevant special anti-corruption entity.¹¹¹

Furthermore, the general public is entitled under the New Law to inform the relevant special anti-corruption entity about facts discovered with respect to corruptive offenses, to request information from government officials about activities related to the prevention of and counteraction against corrupt practices, and generally to participate in the public control of compliance with the applicable laws in the anti-corruption sphere.¹¹²

The New Law obliges these “special authorized entities for corrupt practices counteraction” to publish an annual report on the prior year’s results of the implementation of anti-corruption measures.¹¹³ Moreover, it also expressly provides that persons assisting in the prevention of and counteraction against corrupt practices “shall be protected by the state.”¹¹⁴ While the New Law does not explain in any detail the nature of this state protection, it does provide that the law enforcement authorities must use “legal, administrative, technical, and other measures” that are aimed at protecting against “an unlawful attack on the life, health, home, and other property” of persons and their relatives who are involved in the fight against corrupt practices.¹¹⁵

These provisions of the New Law are, once again, directly in line with the recommendations of third party anti-corruption compliance organizations. One of the recommendations of the Atlantic Council task force was that the Ukrainian authorities should “report annually on results of the fight against corruption and take responsibility.”¹¹⁶ They must not only “take responsibility for ensuring anti-corruption measures,” but must also “establish and regularly comment on progress toward meeting anti-corruption timetables and bench marks.” In this way, they “would demonstrate to the public and to officials that the state is seriously attacking the problem.”¹¹⁷

Similarly, GRECO recommended that the Ukrainian authorities should “introduce clear rules/guidelines for all public officials to report suspicions of corruption and to introduce protection of those who report in good faith (whistleblowers) from adverse conse-

108. *Id.* at 14.

109. Law of Ukraine on Preventing and Counteracting Corrupt Practices § I, art. 5.

110. *Id.*

111. *Id.*

112. *Id.* § III, art. 18.

113. *Id.* § III, art. 19.

114. *Id.*

115. *Id.* § III, art. 20.

116. NEUTZE & KARATNYCKY, *supra* note 7, at ix, 32.

117. *Id.* at 33.

quences.”¹¹⁸ GRECO reported that it “welcomes” the above-mentioned provisions of the New Law, because they “introduce a clear duty upon public officials to report suspicions of corruption and stipulate that those persons have to be protected from adverse consequences of their report.”¹¹⁹ GRECO further urged that “concrete arrangements for the actual whistleblowers” still need to be established.¹²⁰

XVIII. Anti-Corruption Experts’ Prior Review of Draft Laws and Regulations

The New Law provides that the Ministry of Justice of Ukraine must conduct “an anti-corruption expert review” of draft laws and regulations to discover any provisions “which may encourage the commission of a corruption offense,” and to provide recommendations for the removal of such provisions from draft legislation.¹²¹ Both acts of the President of Ukraine and regulations developed by the Cabinet of Ministers and other central executive authorities are also subject to review.¹²²

This provision of the New Law appears to have been introduced to deal with corruption within the Parliament itself, particularly in cases where members of Parliament “pursue their own business interests.”¹²³ Apparently in several cases, laws passed by the Parliament were being delivered to the President for signature in versions which differed substantially from the versions actually passed, for example, without significant amendments of the final version adopted by the Parliament. A precedent for this provision of the New Law was a 2007 directive, by which the Cabinet of Ministers of Ukraine introduced a specialized anti-corruption check for draft laws “at the stage of their legal review, with the aim of preventing possible corruption risks.”¹²⁴

XIX. Sanctions

As noted above, because both the New Law and other applicable existing Ukrainian legislation do not provide for the criminal liability of legal entities, a legal entity itself cannot be subject to any fines or other sanctions for corruption misconduct. On the other hand, the New Law expressly provides that “criminal, administrative, civil, and disciplinary proceedings shall be instituted in the manner established by law” against the persons covered by it “for the commission of corruption offenses.”¹²⁵

An individual who has been charged with a criminal corruption offense must be removed from the performance of his/her official duties pending the consideration of the case by a court. Where an individual has been charged with an administrative corruption

118. GRECO ADDENDUM REPORT 2011, *supra* note 24, at 13.

119. *Id.*

120. *Id.*

121. Law of Ukraine on Preventing and Counteracting Corrupt Practices, *Oficijnyj Visnyk Ukrainy* [OVU] [Official Gazette of Ukraine] 2011, No. 44, Item 1764, at § I, art. 15.1, *available at* <http://ovu.com.ua/articles/10905-pro-zasadi-zapobigannya-i-protidiiyi-koruptsiyi>.

122. *Id.* § II, art. 15.2.

123. *Id.*

124. NEUTZE & KARATNYCKY, *supra* note 7, at 17-18; the directive referred to was Cabinet of Ministers Directive #657, adopted on 15 Aug. 2007.

125. Law of Ukraine on Preventing and Counteracting Corrupt Practices § IV, art. 21.1.

offense, he/she may be removed from his/her position by a decision of the head of the agency in which he/she works, pending the completion of the consideration of the case by a court. If a court determines that the individual is guilty of a criminal or administrative corruption offense, he/she will be subject to dismissal from his/her official position within three days after the relevant court decision.¹²⁶

Importantly, the New Law provides generally that any losses or damages caused by corruption misconduct must be duly compensated to the state and/or to any other injured party in accordance with the general provisions of Ukrainian law.¹²⁷ Likewise, the amount of such losses or damages, as well as any compensation owed for services obtained as a result of corruption misconduct, must be determined by a court in accordance with the general provisions of Ukrainian law.¹²⁸ The state must confiscate all income and other property gained as the result of corruption misconduct. The recipient of any undue benefits or services must pay to the state budget the value as determined by a court in accordance with the general provisions of Ukrainian law.¹²⁹

Finally, all regulations or decisions of a state body, including the issuances of permits, licenses, registrations, and similar rights that are issued or adopted as the result of a corruption offense, may be cancelled by a superior body or challenged directly in court at the request of an interested party. The New Law provides that any transaction that is entered into as the result of a corruption offense is invalid.¹³⁰

XX. Conclusion

As demonstrated above, while the New Law could be better in many significant ways, it nonetheless provides several effective tools for use by President Yanukovich in his official anti-corruption campaign. After the New Law took effect, President Yanukovich issued a new decree¹³¹ revising the main tasks of the National Anti-Corruption Committee of Ukraine (“the Committee”), which had been previously established by the President on February 26, 2010.¹³² The tasks of the Committee include conducting systematic analyses of the effectiveness of the country’s anti-corruption strategy, as well as of the reasons for corruption in small and mid-sized businesses, and developing the relevant anti-corruption measures. The President is the head of the Committee, and the Minister of Justice of Ukraine is its secretary; the remaining members are approved by the President from a list submitted by the Minister of Justice.

Unfortunately, in the opinion of GRECO, the Committee only partly satisfies GRECO’s recommendation for “a body . . . with the responsibility of overseeing the implementation of the national anti-corruption strategies and related action plans . . . [and

126. *Id.*

127. *Id.* § V, art. 23.

128. *Id.* § V, art. 25.

129. *Id.* § V, art. 26.

130. *Id.* § V, art. 24.

131. *President Approves Instruction on National Anti-Corruption Committee*, INTERFAX-UKRAYINA INFORMATSIONNOYE AGENTSTVO, Sept. 1, 2011, <http://www.interfax.com.ua/eng/main/78180/>.

132. *Ukaz Prezidenta Ukrainy Pro Utvorennya Natsionalnogo Antikoruptsiynogo Komitetu* [The Decree of the President of Ukraine on the Establishment of the National Anti-Corruption Committee], *Oficijnyj Visnyk Ukrainy* [OVU] [Official Gazette of Ukraine] 2010, No. 16, Item 732.

with] the necessary level of independence to perform an effective monitoring function.”¹³³ Instead, the Committee “does not appear to offer sufficient guarantees of independence, since it is established directly under the President of Ukraine, who appoints its members and chairs its meetings.”¹³⁴

Even despite a generally poor rating of the New Law and Ukraine’s overall anti-corruption compliance by GRECO, Ukraine has evidenced by its enactment of the New Law that it recognizes well-established and generally accepted international anti-corruption norms and that it has taken a very important step forward in its fight against corruption. It is clear that eradicating corruption is necessary to create the confidence of the citizenry in their government, for building democracy and democratic institutions, and for enabling the economy to prosper and flourish. Likewise, “foreign investment will not be forthcoming in the future if ownership rights and profits are placed under a cloud of corrupt practices.”¹³⁵ Moreover, many anti-corruption law specialists consider corruption to be “the leading national security challenge to Ukraine . . . because in many respects it makes government officials vulnerable to manipulation from nefarious actors [including organized crime], whether domestic or foreign.”¹³⁶

Many other commentators believe that “the question in Ukraine is obviously not about the legislation in place, or even [about the] institutions in place, but about its implementation, the possibility to challenge [its] non-implementation in the courts.”¹³⁷ Nonetheless, “even with public support, anti-corruption efforts will not succeed unless there is strong and sustained support at the top, from the president, the prime minister, and the speaker of parliament.”¹³⁸

The question of whether the New Law will stop corruption in Ukraine will continue to remain an open question until Ukraine’s government authorities and civil servants, as well as its various political and business elites, demonstrate the necessary political will to implement the anti-corruption measures taken on paper. With its strong desire to improve its internal living standards, its standing in the international business community, and its position vis-à-vis its neighbors and as part of Europe, there is hope that Ukraine’s leading politicians and dominating business oligarchs will gradually start to change their modus operandi and work toward transparency, a level playing field, and the rule of law in their country’s fight against corruption.

133. GRECO ADDENDUM REPORT 2011, *supra* note 24, at 102.

134. *Id.* at 3.

135. NEUTZE & KARATNYCKY, *supra* note 7, at 31.

136. Fialko, *supra* note 5, at 15 (Welcome and Introduction and Conversation by Damon Wilson, Executive Vice President, Atlantic Council).

137. *Id.* at 4 (Panel 2).

138. NEUTZE & KARATNYCKY, *supra* note 7, at ix.

