



UKRAINE

# Investment rules of the world



## About

At DLA Piper, we have one of the largest finance and projects teams in the world with more than 600 dedicated lawyers and an established local law firm network. We share knowledge and skills in debt instruments, debt securities, funds, derivatives and portfolios, as well as energy, infrastructure and other projects, across Europe, the Middle East, Africa, Asia Pacific and the Americas.

When and wherever we work for you on finance and investment deals and projects, you can rely on our international platform; we are backed by the network and resources of one the largest and most-connected business law firms in the world.

We enjoy being part of your team, bringing experience across sectors, borders and financial products, supporting you on first-of-a-kind deals, in new markets and to grow.

With global perspective, we can help you to realize your financial strategy in whichever markets you do business.

## Investment Rules of the World

With input from across our global network, this guide covers key legal topics for different financial activities and projects and gives you an overview of the points you may consider when initially looking at financing or investing in particular jurisdictions. Please [contact us](#) if you would like to discuss any legal issues or solutions for your business. We also welcome your feedback about this guide via [investmentrules@dlapiper.com](mailto:investmentrules@dlapiper.com).



# Ukraine

*Last modified 24 January 2020*

## Capital markets and structured investments

### Issuing and investing in debt securities

#### *Are there any restrictions on issuing debt securities?*

It is unlawful to offer debt securities to the public in Ukraine, or to request that they are admitted to trading on a stock exchange operating in Ukraine, unless an approved prospectus has been made available to the public. A prospectus should include information on the issuer, its financial and economic position and the securities being issued.

*Last modified 24 Jan 2020*

#### *What are common issuing methods and types of debt securities?*

The following debt securities are commonly used in Ukraine:

- corporate bonds;
- sovereign bonds of Ukraine (issued by the state);
- municipal bonds (securities issued by local authorities);
- treasury bills of Ukraine;
- certificates of deposit (securities to be issued by the National Bank of Ukraine with redemption right on a redemption date);
- promissory notes; and
- bonds of international financial organizations (such as the European Bank for Reconstruction and Development).

In practice, the issuance of local securities is usually documented as a standalone offering. Program offerings are in place but are uncommon.

*Last modified 24 Jan 2020*

#### *What are the differences between offering debt securities to institutional / professional or other investors?*

Ukrainian law does not yet have sophisticated regulation in respect of institutional/ professional investors. There is, however, the draft law 'On Amending Certain Legislative Acts of Ukraine in relation to Investment Attraction and Introducing of New Financial Instrument' approved by the Ukrainian Parliament in the first reading relating to investor (client) categorization. In particular, investors will be distinguished between qualified and non-qualified investors in line with Markets in Financial Instruments Directive II 2014/65/EU (MiFID

II). The nature of the investor, their experience in the financial market and awareness about market products are relevant to the determination of the category. As a result, the different protection regimes will apply to investors. Non-qualified investors will be protected with the highest degree of regulatory protection, while qualified investors will have less protection.

*Last modified 24 Jan 2020*

### *When is it necessary to prepare a prospectus?*

An offer would not be deemed to have been made to the public if it is addressed to fewer than 100 persons.

*Last modified 24 Jan 2020*

### *What are the main exchanges available?*

There are four principal markets on which debt securities are traded:

- the [Ukrainian Exchange](#);
- the [Ukrainian Stock Exchange](#);
- the [PFTS Ukraine Stock Exchange](#); and
- the [Ukraine Interbank Currency Exchange](#).

*Last modified 24 Jan 2020*

### *Is there a private placement market?*

Ukraine has a non-active private placement market. Generally, shareholders use private placement as a means of funding companies' needs.

*Last modified 24 Jan 2020*

### *Are there any other notable risks or issues around issuing or investing in debt securities?*

#### **Issuing debt securities**

Issuers are responsible for prospectuses for debt securities. Offering documentation shall not contain any misrepresentation, omission or misstatement which may give rise to civil, administrative and criminal liability under Ukrainian legislation. The Criminal Code of Ukraine prescribes criminal liability for deliberate misrepresentation (fraud) in the documents submitted for registration.

#### **Investing in debt securities**

Once issued and placed, debt security terms cannot be modified.

*Last modified 24 Jan 2020*

### **Establishing and investing in debt / hedge funds**

#### *Are there any restrictions on establishing a fund?*

The Law of Ukraine 'On Collective Investment Funds' dated 5 July 2012 determines the different procedures for establishing corporate and unit funds.

#### **Corporate funds**

A corporate investment fund is incorporated as a legal entity. It may be created only by way of establishment (no merger, division or transformation is permitted as a method of creating a fund). Members of governing bodies of such funds, for example the supervisory board and board of directors, have to comply with certain requirements.

A fund shall be established in accordance with the process set out by law. A failure to comply with the pre-determined stages may give grounds for the Security Commission to refuse to grant a registration certificate for a corporate fund's shares or to register a fund's rules.

## Unit funds

A unit investment fund does not have legal entity status under Ukrainian law. Such funds are established and operated by asset management companies.

Asset management companies are commonly incorporated in the form of limited liability companies or joint-stock companies and are entitled to render asset management services to institutional investors only after having obtained a license from the National Securities and Stock Market Commission. Members of governing bodies of asset management companies have to comply with certain requirements.

*Last modified 24 Jan 2020*

## What are common fund structures?

Common forms of funds under Ukrainian law include:

- open-ended funds (redemption is possible at any time);
- interval funds (redemption is possible at periods set out in the prospectus); and
- closed-end types (redemption is only possible upon termination).

Depending on the duration of operation, a fund may be either fixed-term or perpetual.

Collective investment funds may also take the following forms:

- diversified funds (funds created to meet diversification criteria based on asset types);
- specialized funds (money market funds, government securities funds, bond funds, equity funds, index funds or bank metal funds);
- qualified funds (funds dealing with particular classes of assets, for example, pools of loans, real estate or securities funds); and
- non-diversified funds (any other funds which do not fall in the above categories).

*Last modified 24 Jan 2020*

## What are the differences between offering fund securities to professional / institutional or other investors?

Ukrainian law makes a distinction between retail and institutional investors, but despite this statutory distinction, there is no sophisticated legislation which sets out different legal regimes for the marketing and selling of debt securities to professional or retail investors.

The Ukrainian draft law 'On Amending Certain Legislative Acts of Ukraine in relation to Investment Attraction and Introducing of New Financial Instrument' which has been pre-approved by Parliament, contains the Markets in Financial Instruments Directive II 2014/65/EU (MiFID II) approach to client categorization. In particular, investors will be distinguished between qualified and non-qualified investors depending on the nature of the investor, their experience in the financial market and awareness about market products, among other factors. In general, qualified investors require less regulatory protection, while non-qualified investors are protected with the highest degree of regulatory protection.

*Last modified 24 Jan 2020*

## Are there any other notable risks or issues around establishing and investing in funds?

## Establishing funds

Investment funds are generally held in separate accounts subject to the discretionary authority of the fund manager who shall acquire and dispose of assets using the funds in accordance with a pre-determined strategy set out in a management agreement entered into between the fund and the fund manager.

Managing investments is a regulated activity under Ukrainian law, therefore asset management companies are subject to authorization from the National Securities and Stock Market Commission.

*Last modified 24 Jan 2020*

## Managing and marketing debt / hedge funds

### *Are there any restrictions on marketing a fund?*

There are no selling restrictions applicable to offering securities under Ukrainian law.

*Last modified 24 Jan 2020*

### *Are there any restrictions on managing a fund?*

Fund management is a regulated activity carried on by an asset management company on the basis of a management agreement. An asset management company has to obtain a license from the National Securities and Stock Market Commission.

Various restrictions apply to fund managers and their operations in the course of managing funds:

- independent custodian (a non-related party to the fund's participants);
- independent valuator of assets (a non-related party to the fund's participants); and
- independent auditor (a non-related party to the fund's participants).

*Last modified 24 Jan 2020*

## Entering into derivatives contracts

### *Are there any restrictions on entering into derivatives contracts?*

A person entering into a derivative contract as a dealer in Ukraine will commonly be authorized under Ukrainian law, although the licensing procedure is not clear as the legislation on this is fragmented.

There is not yet sophisticated legislation governing the regulatory, insolvency and other aspects of derivative transactions. However, note that comprehensive amendments introducing European Market Infrastructure Regulation (EMIR), Markets in Financial Instruments Directive II (MiFID II) and Markets in Financial Instruments Regulation (MiFIR) standards into local statutory law are now being considered by the Ukrainian Parliament and are expected to be adopted soon.

*Last modified 24 Jan 2020*

### *What are common types of derivatives?*

Derivatives may be traded over-the-counter or on an organized exchange.

The most common types of underlying assets seen in Ukraine are commodities and foreign currencies.

As other types of assets, including equity, credit events and fixed income instruments, are less developed in Ukraine, Ukrainian counterparties tend to document these transactions via offshore entities and subject to foreign law.

*Last modified 24 Jan 2020*

### *Are there any other notable risks or issues around entering into derivatives contracts?*

Ukrainian law lacks a number of derivative-related concepts, including: close-out netting, novation of trades, margin requirements (in relation to title security) and effective disclosure rules. There is not sufficient legal regulation in respect of title security or escrow arrangements, reporting requirements, trade repository and central counterparty. However, the aforementioned concepts have been addressed in the draft law 'On Amending Certain Legislative Acts of Ukraine in relation to Investment Attraction and Introducing of New Financial Instrument' already approved by the Ukrainian Parliament in the first reading.

*Last modified 24 Jan 2020*

## Debt finance

### Lending and borrowing

#### *Are there any restrictions on lending and borrowing?*

##### Lending

Generally, lending is a regulated activity only in relation to consumer lending. Lending made available to borrowers by financial institutions at the expense of attracted funds are also regulated. The lender (being a bank or financial institution) must be authorized by the National Bank of Ukraine or Financial Authority. Corporates and individuals may rely on statutory exemption.

##### Borrowing

Borrowing is generally not a regulated activity but note that consumer borrowers are afforded more beneficial legal protection than other borrowers.

*Last modified 24 Jan 2020*

#### *What are common lending structures?*

Lending may be structured in a number of different ways depending on various factors.

##### Number of parties

- Bilateral loans (one lender to one or several borrowers)
- Syndicated loans (multiple lenders)

Note that syndicated structures are rarely seen between local banks and borrowers, however, it is quite common for Ukrainian borrowers to structure their borrowings as syndicated deals with foreign lenders outside Ukraine.

##### Loan security

- Secured loans
- Unsecured loans

##### Types of facility

- Term loan facility
- Revolving term facility
- Overdraft facility
- Bridging loan

## Repayment profiles

- Amortizing payment
- Balloon payment
- Bullet payment

*Last modified 24 Jan 2020*

## *What are the differences between lending to institutional / professional or other borrowers?*

Ukrainian law does not contain sophisticated regulation in relation to lending to institutional/professional borrowers. Generally, the regulation is less onerous on lenders to institutional/professional borrowers.

*Last modified 24 Jan 2020*

## *Do the laws recognize the principles of agency and trusts?*

For a long time, Ukraine as a civil law jurisdiction did not recognize trust structures. The Law of Ukraine 'On Amendments to Certain Legislative Acts in relation to Stimulation of Investment Activity in Ukraine' dated 20 September 2019 introduced the concept of security trust in Ukrainian law. The fulfilment of debtor's obligations may be secured by way of transferring to the creditor, acting as a trustee, of the property owned by a debtor or a third party. A trustee receives an ownership right to the secured property, however, cannot alienate it, except for the enforcement purposes.

A trust shall be documented by a trust agreement in writing. A trust over immovable property must be notarised and becomes legally binding upon its state registration with the State Register of Proprietary Rights to Immovable Property. It is important that the trust property shall not be included into the liquidation estate neither of a trustee, nor a trustor. Furthermore, there is a carve-out for the trust property ringfencing it from moratorium under the insolvency law.

*Last modified 24 Jan 2020*

## *Are there any other notable risks or issues around lending?*

### Cross-border loans

After liberalization of the Ukrainian currency market, effectiveness and validity of the cross-border loans (and amendments thereto) between foreign lenders and Ukrainian borrowers is no more linked to their registration with the National Bank of Ukraine. Instead, the bank servicing the cross-border loan notifies the National Bank of Ukraine on the loan in the automatic information system. The mandatory interest cap rates were also cancelled, so the parties have more flexibility in agreeing terms of financing.

### Specific types of lending

Ukrainian legislation provides special requirements for specific types of lending, for example, consumer lending.

The Law of Ukraine 'On Consumer Lending' dated 10 June 2017 introduced specific requirements in respect of the following.

#### PROMOTION AND ORIGINATION OF LOANS



- Advertisements for consumer lending must indicate all service fees and expenses.
- Consumers must be informed of fees and costs of third parties, including insurance companies and valuers.
- Compulsory assessment of borrower's affordability is also a requirement.

#### ADMINISTRATION AND REPAYMENT OF LOANS

- Outstanding principal amounts shall be repaid first.
- Outstanding interest and principal payments shall be repaid second.
- Default interest and penalty amounts shall be repaid third.

### Standard form documentation

Loan Market Association (LMA) standard documentation is predominantly used for cross-border lending, but this is uncommon in local transactions.

### Bail-in

Ukrainian legislation sets out bail-in arrangements which give a regulator special powers to make a conversion or writing down of a bank's liabilities to its related parties (and in some circumstances to non-related entities) by way of exchange of additionally issued shares in the amount of unencumbered monetary liabilities owed by the bank to its related parties. Bail-in legislation applies only to banks under local law.

*Last modified 24 Jan 2020*

### *Are there any other notable risks or issues around borrowing?*

Borrowing is generally unregulated activity under Ukrainian legislation.

*Last modified 24 Jan 2020*

## Giving and taking guarantees and security

### *Are there any restrictions on giving and taking guarantees and security?*

Some of the key areas affecting the giving of security are as follows.

### Capacity

It is important to check the constitutional documents of a company giving security to ensure it has power to do so and there are no restrictions on the directors' powers. Ukrainian law does not recognize the 'corporate benefit' concept. Under corporate law, certain transactions (including the granting of security) are subject to corporate approval by a company's shareholders/participants or the board of directors at a general meeting.

### Insolvency

Security may be at risk of being set aside under Ukrainian insolvency law if the security is granted by a company within a certain period of time prior to the onset of insolvency. This would be the case if the company giving the security received considerably less consideration, and as such, the transaction was at an undervalue. For such transactions to be set aside, certain statutory criteria needs to be met, including the requirement that security has been given within three years prior to the onset of insolvency of the affected company. Security may also be challenged on other grounds relating to insolvency.

### Financial assistance

This applies to certain types of legal entity including banks and joint-stock companies. For example, banks are not allowed to extend loans to third parties for the purposes of acquiring the bank's shares or any third party bank's shares (this includes subordinated loans to banks). Joint-stock companies are also not allowed to lend funds (including the granting of security) for the purposes of acquiring their shares or securities.

*Last modified 24 Jan 2020*

## *What are common types of guarantees and security?*

### Common forms of guarantees

Ukrainian law distinguishes between guarantee (*garantiya*) and suretyship (*poruka*).

A guarantee is a security which can only be granted by a regulated entity (a bank or other financial institution), whereby the guarantor is under a primary obligation to the creditor to pay upon a debtor's default. A guaranteeing obligation is independent to the validity and existence of the principal obligation.

A suretyship can be provided by corporates or individuals. Under suretyship a surety undertakes to perform the principal obligation secured by suretyship, for and instead of the defaulting debtor. Under Ukrainian law a suretyship is a secondary obligation, meaning that its validity and existence is entirely dependent on the validity and existence of the principal obligation.

### Common forms of security

There are three basic types of security interest that can be created under Ukrainian law:

- a pledge;
- a suretyship; and
- a mortgage.

Different types of security are suitable for securing different types of assets.

Under Ukrainian law it is possible to grant security over all of the assets of an Ukrainian company or individual assets. Granting security over all of a company's assets will tend to be achieved by way of mortgage over a business unit (an integral property complex) which will include:

- a mortgage over real estate; and
- a mortgage over fixed assets and equipment (except for movable equipment).

*Last modified 24 Jan 2020*

## *Are there any other notable risks or issues around giving and taking guarantees and security?*

### Giving or taking guarantees

To be valid, a guarantee needs to be in writing and signed by the guarantor.

### Giving or taking security

A security document may need to be executed as a notarial deed if it contains:

- a mortgage over land;
- a mortgage over immovable property; or
- a mortgage over space facilities.

Parties may elect to have any security contract notarized. Generally, notarization gives the lender:

- additional comfort in terms of the counterparty's capacity to enter the contract; and
- additional enforcement benefits (a notary writ may be an out-of-court remedy available to the lender).

Certain types of assets cannot be pledged or mortgaged. For example, assets which have a cultural heritage cannot be pledged. Agricultural land can only be mortgaged to banks.

## Perfection and registration requirements

- Encumbrance of immovable property with a mortgage is subject to a mandatory registration with the State Register of Proprietary Rights to Immovable Property.
- Encumbrance entries recording ranking and priority against third parties' claims over pledged movable assets, and prohibiting the disposal of pledged (movable) assets, shall be registered at State Register of Pledges over Movable Properties.
- An absence of state registration affects the validity of a mortgage.

Failure to comply with perfection and registration requirements means that the ranking or enforceability of the movable pledge can be undermined and the creditor's claims will rank alongside unsecured creditors.

Security is at risk of being set aside in certain circumstances under insolvency laws. For more information, see [Giving and taking guarantees and security – restrictions](#).

*Last modified 24 Jan 2020*

## Financial regulation

### Law and regulation

*What are the main laws and regulations that apply to entities that are involved in finance and investments generally?*

#### Generally

Civil Code of Ukraine (No.435-IV, 16.01.2003) (general contractual principles)

Commercial Code of Ukraine (No.436-IV, 16.01.2003) (general principles governing business to business transactions)

Law of Ukraine 'On Financial Services and State Regulation of Financial Services Markets' dated 12 July 2001 (No. 2664-III, 12.07.2001) (financial services other than banking activity)

Law of Ukraine 'On Protection of Foreign Investment in Ukraine' dated 10 September 1991 (No.1540a-XII, 10.09.1991) (principles of state protection of foreign investments)

Law of Ukraine 'On the Foreign Investment Regime' dated 19 March 1996 (No.93/96-BP, 19.03.1996) (protection of foreign investments, change in law and effective compensation)

#### Consumer credit

Law of Ukraine 'On Protection of Consumers' Rights' dated 12 May 1991 (No.1023-XII, 12.05.1991) (consumer rights)

Law of Ukraine 'On Consumer Lending' dated 10 June 2017 (No.1734-VIII, 10.06.2017) (consumer lending)

#### Mortgages

Law of Ukraine 'On Pledge' dated 2 October 1992 (No.2654-XII, 02.10.1992) (general provisions on pledges, including mortgage transactions)

Law of Ukraine 'On Mortgage' dated 5 June 2003 (No.898-IV, 05.06.2003) (mortgages and mortgage notes)

Law of Ukraine 'On Mortgage Lending, Operations with Consolidated Mortgage Debt and Mortgage Notes (Certificates)' dated 19 June 2003 (No. 979-IV, 19.06.2003) (mortgage lending)

Law of Ukraine 'On Mortgage Bonds' dated 22 December 2005 (No.3273-IV, 22.12.2005) (issuance, placement and circulation of mortgaged bonds)

## Business entities (banks, financial institutions)

Law of Ukraine 'On Joint-stock Companies' dated 17 September 2008 (No.514-VI, 17.09.2008) (incorporation, operation and liquidation of joint-stock companies)

Law of Ukraine 'On Banks and Banking Activity' dated 7 December 2000 (No.2121-III, 07.12.2000) (banks and banking services)

Law of Ukraine 'On Credit Unions' dated 20 December 2001 (No. 2908-III, 20.12.2001) (incorporation of credit unions and their operation)

## Funds and platforms

Law of Ukraine 'On Collective Investment Funds' dated 5 July 2012 (No.5080-VI, 05.07.2012) (establishment, operation and termination of collective investment funds)

## Other key market legislation

Law of Ukraine 'On Securities and Stock Market' dated 23 February 2006 (No.3480-IV, 23.02.2006) (issuance and circulation of securities and professional activities in the securities market)

Law of Ukraine 'On State Regulation of Securities Market in Ukraine' dated 30 October 1996 (No.448/96-BP, 30.10.1996) (principles of state regulation of the securities market)

Law of Ukraine 'On Currency and Currency Operations' 21 June 2018 (No.2473-VIII, 21.06.2018) (general principles governing currency transactions regime)

Decision No. 1688 'On Approval of Regulation on Functioning of Stock Markets' approved by the National Securities and Stock Market Commission dated 22 November 2012 (No.1688, 22.11.2012) <http://zakon3.rada.gov.ua/laws/show/z2082-12> (principles and requirements for trading on the stock exchanges)

Law of Ukraine 'On Financial Leasing' dated 16 December 1997 (No.723/97-BP, 16.12.1997) (financial leasing regulation)

Law of Ukraine 'On Payment Systems and Money Transfer in Ukraine' dated 5 April 2001 (No.2346-III, 05.04.2001) (payment systems regulation)

Law of Ukraine 'On Prevention and Counteraction to Legalization (Laundering) of the Proceeds from Crime, Terrorist Financing and Financing of Proliferation of Mass Destruction Weapons' dated 14 October 2014 (No.1702-VII, 14.10.2014) (anti-money laundering regulation)

*Last modified 24 Jan 2020*

## Regulatory authorization

### *Who are the regulators?*

There are three independent state authorities which supervise financial markets and financial products:

- The [National Bank of Ukraine](#) (NBU) oversees banks and the bank lending market.



- The [National Securities and Stock Market Commission](#) (Securities Commission) is responsible for supervision of securities, regulated markets and derivatives.
- The [National Commission for Regulation of Financial Services Markets of Ukraine](#) (Financial Market Commission) is the regulator for non-banking financial lending, for example, peer-to-peer lending and lombard lending.

*Last modified 24 Jan 2020*

## ***What are the authorization requirements and process?***

Depending on the type of financial institution, a firm shall apply for authorization from either the National Bank of Ukraine, the National Securities and Stock Market Commission or the National Commission for Regulation of Financial Services Markets of Ukraine. The relevant regulator will assess the application on the terms set out in statutory law.

### **Banking activity**

The application fee for a banking license amounts to GBP1,134 (UAH 35,890) and the procedure takes two months following receipt of the full set of application documents.

### **Financial services**

The application fee for a license for carrying on financial services, including factoring, financial leasing and asset management, amounts to GBP64 (UAH 2,027) and the procedure takes thirty days following receipt of the full set of application documents.

The application fee for a license for carrying on particular types of professional activities in the capital market amounts to GBP95 (UAH 3,000) and the procedure takes three months following receipt of the full set of application documents for Ukraine residents, and six months for non-Ukraine residents.

### **Staff requirements**

There may be certain requirements for key individuals, including senior management, to be employed in banks, funds and financial institutions. The regulator will assess whether or not they meet the applicable requirements.

### **Registers**

Authorized firms, banks and individuals are listed in the following registers:

- [State Register of Financial Institutions](#);
- [State Register of Financial Institutions that Provide Financial Services in the Securities Market](#);
- [Register of Payment Systems](#);
- [List of Operating Banks](#); and
- Unified State Register of Collective Investment Funds (publicly unavailable but information may be provided on charged basis).

*Last modified 24 Jan 2020*

## ***What are the main ongoing compliance requirements?***

Compliance requirements may be applicable to banks, funds and financial institutions. Ukrainian law sets out general compliance and prudential requirements depending on the type of financial activity, such as lending, asset management, securities trading or fund investment.

Failure to comply with the threshold conditions and more detailed regulatory rules can result in sanctions for a bank, fund or financial institution and regulated individuals, as well as loss of regulated status.

*Last modified 24 Jan 2020*

## *What are the penalties for failure to be authorized?*

### Banking activity

Carrying on banking activity, banking transactions or other financial services without the appropriate license or in violation of such license may be subject to fines ranging from GBP54 (UAH1,700) to GBP1,610 (UAH51,000) depending on the size of profit received from unauthorized transactions, among other factors.

### Financial services

Carrying on financial services without the appropriate license or in violation of such license may be subject to fines ranging from GBP537 (UAH17,000) to GBP2,685 (UAH85,000) depending on the size of profit received from unauthorized transactions, among other factors.

The National Securities and Stock Market Commission may impose penalties on participants in financial markets for an unauthorized activity (without a license) in amounts ranging from GBP537 (UAH17,000) to GBP5,369 (UAH170,000).

*Last modified 24 Jan 2020*

## Regulated activities

### *What finance and investment activities require authorization?*

Generally, financial services shall be provided by an authorized entity included in the local registry of financial institutions. Some specific types of services require additional licenses.

The below services are deemed to be financial services:

- banking and associated transactions;
- capital market transactions;
- issuance and/or servicing and clearing of payment documents, payment cards, travellers' cheques and other forms of payment provision;
- transactions relating to mortgage assets for the purpose of issuing mortgage-back securities;
- fiduciary management of financial assets;
- money transfer and remittance;
- lending (including financial facilities);
- currency exchange activity;
- financial leasing;
- provision of guarantees and suretyship;
- insurance services and fully funded pension provision;
- factoring;
- asset management for construction finance or real estate finance; and
- others.

*Last modified 24 Jan 2020*

### *Are there any possible exemptions?*

Generally, financial services may only be provided by funds, banks and financial institutions, unless an exemption applies.

Corporates and individuals are exempt and are able to give loans and suretyships for their commercial needs.

*Last modified 24 Jan 2020*

## *Do any exchange controls or other restrictions on payments apply?*

### General restrictions

The new Law of Ukraine 'On Currency and Currency Operations' and secondary legislation of the National Bank of Ukraine effective as of 7 February 2019 liberalised Ukrainian currency control regulation and set out new core principles for currency transactions. The new regulation introduced significant changes and simplifications in the currency market which give more freedom to both business and individuals.

Permanent currency control and exchange restrictions include:

- settlements within the territory of Ukraine shall be made in Hryvna (UAH);
- financial monitoring for transactions in excess of UAH 150,000 equivalent; and
- import or export of foreign currency (in excess of EUR10,000) shall be declared in custom declarations.

### Temporary restrictions

NBU Regulation No. 5 'On Approval of the Regulation on Protective Measures and Determination of the Procedure for Carrying out of Particular Foreign Currency Transactions' dated 2 January 2019 introduced protective measures which will remain effective for an indefinite period until cancelled by the National Bank of Ukraine. Key protective measures include:

- E-limits for individuals (EUR100,000 equivalent per year) and corporates (EUR2,000,000 equivalent per year) on the outgoing payments in foreign currency abroad;
- 365-day limitation period for conducting settlement under export and/or import contracts.

### Cashless payment restrictions

The National Bank of Ukraine limits cash payments in same day transactions:

- between legal entities – to GBP305 (UAH10,000); and
- between individuals/individuals and legal entities – to GBP1,527 (UAH50,000).

All payments on amounts exceeding the above thresholds shall not be paid in cash and shall be made by way of bank transfer.

### Anti-money laundering restrictions

If any payment in a financial transaction appears to be suspicious or relates to money laundering or terrorism financing, such settlements may be stopped or suspended by a bank, financial institution or state authority. The screening period will range from two to 30 days (unless extended). The payments will be blocked during that period.

*Last modified 24 Jan 2020*

## *What are the rules around financial promotions?*

### Rules

Financial institutions are not allowed to disseminate misleading advertising about financial services and products, for example, deposits, consumer credits, investments and mortgages.

In marketing or offering financial services, a financial institution must inform a client about certain matters, including:

- details of proposed financial services and their actual cost;
- terms and costs of additional financial services;
- payment of applicable taxes and duties; and
- consequences of acceleration or early termination under the agreement.

It is prohibited under Ukrainian law to advertise securities offerings, including specifying the amount of returns under debt securities, predicting the increase in value of debt securities (except for fixed rate securities), advertising prior to the registration of the issuance of debt securities, and promoting information about returns without stating that this does not guarantee an expected return.

*Last modified 24 Jan 2020*

## Entity establishment

### *What types of legal entity are generally used to undertake financial or investment activity?*

#### Banks

In Ukraine, banks are commonly formed as public joint-stock companies.

#### Funds

Investment funds (corporate funds) are incorporated as joint-stock companies.

Unit investment funds do not have legal entity status under Ukrainian law, however, their operating fund managers shall be established in the form of asset management companies that are either limited liability or joint-stock companies.

*Last modified 24 Jan 2020*

### *Is it possible to conduct lending or investment business through a branch or establishment?*

Yes.

#### Banks

Ukrainian law allows foreign banks to establish branches in Ukraine, however, such branches are only entitled to carry on lending and banking services upon special accreditation being given by the National Bank of Ukraine. Such branches act on behalf of foreign banks and are not deemed to be legal entities.

#### Funds

Unlike banks and insurance companies, foreign investment funds cannot operate in Ukraine via a branch or other permanent establishment. Ukrainian law requires that funds are incorporated in Ukraine and licensed by the National Securities and Stock Market Commission.

*Last modified 24 Jan 2020*

## FinTech



## FinTech products and uses

### *What are the most common technology products and FinTech applications used or being developed in the finance and investment marketplace?*

#### Peer-to-peer funding platforms and marketplace lending

There is no strict definition for marketplace lending given the wide variety of entrants and financing techniques involved. The principal characteristics of new marketplace lenders, however, would include:

- operating from or through a non-bank lending platform established as a special purpose vehicle (SPV) based structure;
- applying technology to leverage and optimize the lending platform and user experience; and
- connecting borrowers and lenders through the platform rather than applying funding arising from a wider deposit-based relationship.

Marketplace lending is available to address most forms of traditional bank funding products. Recently products have included:

- consumer loans; and
- small and medium-sized enterprises lending;

It is likely that the volume of lending in these product areas as well as further and additional product areas will significantly increase over the coming years, as financing becomes more readily available to support the marketplace lending sector.

#### HOW ARE MARKETPLACE LENDING PLATFORMS FUNDING THEMSELVES?

Marketplace lending includes peer-to-peer (P2P)-type structures often operated through an electronic platform provider as well as crowdfunding and also direct-to-retail financing mechanisms. The increase in demand for credit through these marketplace platforms has also been appealing to larger pools of available capital, such as private equity and venture capital funds as well as institutional sponsors. Funding platforms will now often be backed by institutional finance in addition, to or rather than, individual investors on a traditional P2P basis.

#### ISSUES FOR STARTUP MARKETPLACE LENDERS

Following the initial incorporation and startup funding for a new marketplace lending business, there will be a need to establish funding lines which can accommodate growth of the ongoing lending activities of the platform. As the startup lender will not have an established track record, deposit base or asset pools, the funding structure will often follow the format of a warehouse securitization structure. Origination of new assets will be funded through drawings on a note issuance facility backed by security over the new assets. Each of the new assets will be subject to eligibility criteria determined by reference to the nature of the underlying asset. In order to provide an efficient financing structure, the assets will typically be held through a SPV with origination and servicing provided by the marketplace lender. In order to cover expected losses on the asset pool, the senior facility will be subject to the lending platform maintaining sufficient subordinated capital in the form of equity, or a combination of equity and subordinated debt.

Ukrainian law does not regulate securitization. If the funding of the marketplace lending is structured through a revolving loan and includes tranching of the debt, this will not result in the platform being treated as a securitization for the purposes of regulation. Thus, it would neither be required to have risk retention nor provide appropriate reporting and disclosures.

## Blockchain, smart contracts and cryptocurrencies

#### WHAT IS BLOCKCHAIN?

Blockchain provides a new approach to holding and authenticating data. It is a database operating through distributed ledger technology in which data is recorded on computers, by way of a P2P mechanism, based on pre-agreed consensus algorithms in the applicable participating network. It is a form of database where data is stored in the chain in either fixed structures called 'blocks' or algorithm functions called 'hashes'.

Each block includes unique features such as its unique block reference number, the time the block was created and a link back to the previous block. Each block is reviewed by a number of nodes and the block is only added to the database if the node reaches consensus

that the block only contains valid transactions. Content includes digital assets and instructions which reflect the transactions and parties to those transactions. The ability to track previous blocks in the chain makes it possible to identify transactions back to the first ever transaction completed, enabling parties to verify and establish the authenticity of the assets in the latest block. This makes blockchain exceptionally accurate and secure.

Specialist users on the system apply advanced computing software to identify time stamped blocks, verify the accuracy of the blocks using sophisticated algorithms and add the verified blocks to the chain. As the number of participants increases, the replication of the data over a wider base makes it harder for any person to alter the data in the chain. Any attempted addition or modification to the information on a block needs to be approved by all users in the network and verification of any block can only happen through a 'proof of work' process. This process requires vast amounts of computing power, making it practically impossible to insert fake transactions into a block.

As a result, the data is identified and authenticated in near real-time, providing a permanent and incorruptible database sufficiently robust to operate as a store of value (eg in the case of cryptocurrencies such as bitcoin) or providing an indisputable record for example relating to securities transfer.

Blockchain is a decentralized system, created and maintained by users of the network rather than being dependent on any central or third-party intermediary. It may be public and open ('permissionless' or 'unpermissioned') or structured within a private group ('permissioned').

Permissionless blockchains include bitcoin and ethereum, in which anyone can set up a node that once authorized, can validate, observe and submit transactions. The identities of the participants are not known (other than the unique and random identities known as an 'address'). Permissioned ledgers restrict participation in the network and only the specific participants are given access and are known within the network. The network is private, and only organizations that have been authorized can participate and view transactions.

#### **WHAT ARE SMART CONTRACTS AND DECENTRALIZED AUTONOMOUS ORGANIZATIONS (DAOS)?**

Developments in blockchain are also providing an ability to transfer and rely on instructions verified within the electronic system in the form of so called 'smart contracts'. These contracts have been converted into code and are then executed and enforced by the blockchain network on the occurrence of an event. This reduces the need for intermediaries to collect, store and act on communicated information.

Smart contracts are essentially pre-written computer codes which are stored and replicated on distributed ledger platforms such as blockchain. Execution takes place over the network, eliminating the need for intermediary parties to confirm the transaction, leading to self-executing contractual provisions. These contracts can be as simple as moving a balance from one account to another, or advanced, more-complex interactions with the outside world using so called 'Oracles'. With Oracles, the contract code consults with a service outside of the blockchain network to make a decision. This may entail receiving a confirmation that an event has occurred, such as payment, which automatically executes a further step in the contract, such as the transfer of an asset, which might be in digital form or by delivering instructions to a person or warehouse to release the asset for delivery.

DAOs are essentially online, digital entities that operate through the implementation of pre-coded rules. These entities often need minimal to zero input into their operation and they are used to execute smart contracts, recording activity on the blockchain. DAOs can be particularly challenging to regulate, depending on their software engine, the nature of transactions they are completing or other unique features. Questions of ownership and responsibility for resulting acts of DAOs can also be brought to question if any technical issues arise with their operation.

#### **WHAT IS A CRYPTOCURRENCY?**

The European Central Bank definition of a cryptocurrency is that it is a digital representation of value that is neither issued by a central bank or public authority nor necessarily attached to a fiat currency, but is issued by natural or legal persons as a means of exchange and can be transferred, shared or traded economically. The oldest and best-known cryptocurrency is bitcoin (itself based on the bitcoin platform) although many other cryptocurrencies now exist. For example, the most widely-known alternatives to bitcoin include ether based on the ethereum platform and litecoin (these cryptocurrencies are now actively traded with a large developing infrastructure for holding, pricing and exchanging currency).

Although there were several bills registered in the Ukrainian Parliament aimed at creating the regulatory framework for virtual assets and currencies, Ukrainian law still lacks regulation on cryptocurrency. At the same time, use of cryptocurrency is not prohibited or restricted by the state, so Ukraine can be considered a jurisdiction with a neutral approach.

In November 2019 the Ministry of Digital Transformation of Ukraine and Binance, a global cryptocurrency exchange, signed Memorandum of Understanding. The parties agreed to cooperate in the determining of legal status of cryptocurrency and virtual assets in Ukraine and creating of the legal framework that would meet the requirements of the industry.

The Ministry of Digital Transformation also signed Memorandum of Cooperation with Belarusian company Currency.com on developing Ukrainian legislation in the field of IT and crypto regulation using the Belarusian experience.

## Initial coin offerings and token-based products

### WHAT IS AN INITIAL COIN OFFERING (ICO)?

ICOs are a form of digital currency or token using blockchain technology. ICOs are often a means by which funds are raised for a new blockchain or cryptocurrency venture (the market for ICOs is currently booming). ICOs come in a wide variety of forms and may be used for a wide range of purposes. Some forms of ICOs may be directed at customers or suppliers as a form of loyalty program or a form of access or purchasing power (preferential or otherwise) in respect of assets of the issuer's business. Other forms may be more focused on raising initial funding. It is essential to examine the legal and regulatory basis for any ICO, as an unauthorized offering of securities is illegal and may result in criminal sanctions in a number of jurisdictions. Legal analysis of the underlying token will determine if it should be treated as a specified investment or form of regulated security or is more appropriately a form of asset that is not itself subject to the regulatory regime.

Typical attributes provided by tokens will include:

- access to the assets or features of a particular project;
- the ability to earn rewards for various forms of participation on the platform; and
- prospective return on the investment.

Key aspects to consider will include the:

- availability and limitations on the total amount of the tokens;
- decision making process in relation to the rules or ability to change the rules of the scheme;
- nature of the project to which the tokens relate;
- technical milestones applicable to the project;
- basis and security of underlying technology;
- amount of coin or token that is reserved or available to the issuer and its sponsors and the basis of existing rights;
- quality and experience of management; and
- compliance with law and all regulatory requirements.

The nature of the business and the purpose and structure of the token offering will typically be set out in a white paper available to potential purchasers.

## Artificial intelligence and robo advisory systems

Automated financial advice tools, also known as 'robo advisors' are software tools driven by artificial intelligence (AI) that provide a variety of investment advice services, from portfolio selection to personal finance planning. The systems are generally operated on a platform /personal dashboard basis; a user can input a set of personalized data to be processed by the AI algorithms which produce optimized outcomes around specified parameters. Although generally of application in the asset management sector, AI and automated advice tools also impact in the banking and private wealth advisor sectors; the implications include decreased human involvement, although recent trends have included a growth in popularity of hybrid structures which combine AI and human inputs.

## Data analysis and cloud computing

Cloud computing enables delivery of IT services through internet-based tools and applications, rather than direct connection to a physical server. Cloud-based storage makes it possible to save masses of data to remote servers, accessible through the internet rather than by way of a physical connection. With the vast data processing and storage capabilities offered by cloud computing technology and virtually no infrastructure barriers to entry, there are a number of applications in building and running FinTech businesses and the technology has had a significant impact in recent years.

*Last modified 24 Jan 2020*

## *Are there any restrictions, specific laws, regulations or procedures that apply to FinTech products?*

### General financial regulatory regime

The National Commission for Regulation of Financial Services Market (NCRFSM) is the conduct regulator for firms providing financial products and services in both retail and wholesale markets. In order to operate, the firms have to be incorporated as a non-banking financial institution under Ukrainian law.

#### GENERAL

A person must not carry on a regulated activity in Ukraine unless authorized or exempt. A financial activity requires regulatory authorization when it:

- is identified as a specified activity in relation to a specified investment;
- is carried on by way of business in Ukraine; and
- does not fall within any of the available exemptions.

Where FinTech products and applications involve financial activity which requires regulatory authorization, the firms providing such products and applications must be authorized by the NCRFSM.

#### INNOVATION

In the past few years, Ukraine has been actively demonstrated its focus on promoting a blockchain system.

On 13 April 2017, the state agency for e-governance of Ukraine partnered with Bitfury Group, a US-based global technology company, to launch what is probably the largest project on transferring government data on a blockchain platform. This technology initiative was launched to increase the transparency of government data and efficiency of its use by both local and global customers.

The project has three blockchain initiatives:

- **State Register of Proprietary Rights to Immovable Property** – This involves putting data on all ownership, lease titles and other *in-rem* rights including encumbrances records on blockchain platforms to improve data protection, transparency and security.
- **State Land Cadastre** – This is a pilot blockchain-based project aimed at improving data storage on legal titles to land in Ukraine. This technology will phase in a web-based auction platform whereby local and international customers will be able to lease Ukrainian state-owned land plots.
- **SETAM** – This provides businesses with access to the public auction platform built on blockchain technology, enabling users to buy assets of the Ukrainian distressed and insolvent entities.

In 2018 the Blockchain Association of Ukraine was established. It is a non-profit organisation which unites blockchain and crypto industry specialists and promotes the integration of blockchain technology into the economy of Ukraine. The Association launched BlockchainHub Academy, a free course for preparation of specialists for the blockchain industry, and practical course for developers. Members of the Association are also working on elaboration of the necessary regulatory basis for the industry and lobby its implementation in Ukraine.

Furthermore, there is an inter-factional association called “blockchain4Ukraine” in the Ukrainian Parliament which is working on blockchain related draft laws.



## REGULATORY DEVELOPMENTS ON INVESTMENT PLATFORMS

In September 2017, the payment systems regulator (NBU) published an initiative to support FinTech development in Ukraine, recognizing the increasingly important role of investment platforms in the retail distribution landscape. This initiative will focus on the impact of investment platforms providing digital lending (both peer-to-peer (P2P) and business-to-peer (B2P)) as well as non-banking lending to small and medium-sized enterprises.

In January 2020, the Strategy of Ukrainian Financial Sector Development until 2025 approved by the National Bank of Ukraine and all other financial market regulators was presented. The Strategy is aimed at reforming and development of Ukraine's financial sector in line with international best practices and the EU-Ukraine Association Agreement. Among the major priorities are introducing innovations in the financial sector and development of financial markets.

## Electronic payments platforms and regulation of peer-to-peer lenders

### ELECTRONIC PAYMENT PLATFORMS

The NBU is the payment systems regulator and it currently regulates 78 payment systems, including MasterCard, Visa, American Express and PivatMoney. All participants in a designated payment system will fall under the remit of the payment systems regulator, including operators that manage or operate the systems, the payment service providers using the system and the infrastructure providers to the payment system.

The NBU Regulation No. 481 'On Amendments to Certain Legislative Acts of the National Bank of Ukraine in respect of the E-Money Issuance and Circulation' dated 4 November 2010, contains a number of electronic money-related rules, directions and guidance aimed at businesses that are issuing or considering the issuing of electronic money (e-money). E-money is defined as electronically (including magnetically) stored monetary value, represented by a claim on the issuer, which is issued on receipt of funds for the purpose of making payment transactions. E-money must be accepted by a person other than the electronic money issuer and include pre-paid cards and electronic pre-paid accounts for use online. Generally, an issuer of e-money must be registered as a bank under Ukrainian law and must have a banking license granted by the NBU.

### PEER-TO-PEER LENDERS

A person carries out a regulated activity (requiring authorization by the NCRFSM) if they facilitate lending and borrowing between two individuals or between individuals and businesses. According to NBU P2P activity is not a banking activity under Ukrainian banking law, and that P2P lenders are to be notified in advance by marketplaces that they are not eligible for any deposit protection scheme. In light of this, all P2P marketplaces require authorization from the NCRFSM and are subject to supervision of the NCRFSM as non-banking financial institutions.

## Regulation of payment services

Where a Ukrainian business provides payment services as a regular occupation or business activity in Ukraine, it will require authorization by the NBU to become an authorized payment institution under Ukrainian law 'On Financial Services and State Regulation of Financial Services Markets'. Under Ukrainian law, an authorized payment institution may be incorporated only in a form of either a bank or a financial institution. Failure to obtain the required authorization is an administrative offence.

In order to become authorized by the NBU, a payment services business will need to meet certain criteria, including in relation to its business plan, initial capital, processes and procedures in place for safeguarding relevant funds, sensitive payment data and money laundering and other financial crime controls.

## Application of data protection and consumer laws

The Personal Data Protection Law (PDPL) regulates the processing of personal data in Ukraine. Where a business determines the purposes and manner in which any personal data is processed, it will be regulated by the PDPL and have certain notification and compliance obligations. The PDPA implements the European Data Protection Directive 95/46/EC.

The Ukrainian law 'On Electronic Commerce' 2015, regulates unsolicited direct marketing by electronic means, in addition to sector specific regulations, for instance, financial promotion rules established by the Ukrainian law 'On Advertising' 1996.

Finally, the Ukrainian law 'On Consumer Lending' 2015, sets out certain provisions and procedures to protect consumers. A lender must follow and comply with these statutory requirements while making available loans to consumers.

## Money laundering regulations

The Ukrainian law 'On Prevention and Counteraction to Legalization (Laundering) of the Proceeds from Crime or Terrorism Financing, and Financing Proliferation of Weapons of Mass Destruction' 2014 gives the NCRFSM responsibility for supervising the anti-money laundering controls of businesses that offer certain services, such as non-banking lending, providing payment services and issuing and administering other means of payment.

Generally, the NSRFSM authorizes and supervises a company for complying with anti-money laundering requirements. Electronic currencies such as bitcoin and other cryptocurrencies tend to represent a higher money-laundering risk. It is worth noting that in those cases where Ukrainian banks issue e-money, the NBU may also supervise them for compliance with anti-money laundering requirements.

*Last modified 24 Jan 2020*

## What type of funding arrangements and incentives are available to FinTech businesses?

### Early stage

#### SEED INVESTMENT

Initial investment in FinTech businesses may be provided by family and friends of the founders and other high-net-worth individuals (often known as business angels) in return for an equity stake. Such seed investment is often used to fund the establishment and early growth of the business before larger investment is available. The investing individuals may also provide know-how and expertise to assist in the company's development. The seed investors would typically not require the same controls over the business as, for example, venture capital providers.

#### CROWDFUNDING

The crowdfunding sector is well established, and may be appropriate for a FinTech business in the early stages. It involves members of the public investing in a business by pooling their resources through an intermediary platform.

There are two main types of crowdfunding: equity and reward-based.

- Equity crowdfunding involves company shares being given in exchange for investment in the business.
- Reward-based crowdfunding provides investors with a tangible benefit, such as early access to a platform or application that the business is developing.

Crowdfunding offers a large number of private investors an opportunity to make small-scale investments in early-stage businesses to which they may otherwise not have had access.

#### ACCELERATORS

There are various incubators or accelerators in the Ukrainian market which offer support, facilities and funding for startups, often in return for an equity stake. For example, Kyivstar, a major mobile operator, has an accelerator program which offers investment, and mentoring from industry experts. There are also Borsch Ventures, Polyteco, GrothUP, Founder Institute, Happy Farm and EastLab.

## Venture capital and debt

Venture capital funding is a type of equity investment usually targeted at early stage FinTech companies with an established business and some trading history. Venture capital provides a viable alternative to traditional lending given that the business is unlikely to have the tangible asset base or long track record needed to attract traditional debt funding from financial institutions.

Corporate venture capital (CVC) is a type of venture capital and involves an equity investment by a corporate fund. The benefit of having a CVC as an investor for a FinTech startup is that the fund is able to share its knowledge and expertise of the FinTech sector with the company and act as an advisor.

An additional funding option is venture debt, which is typically structured as a three-year term loan (or series of loans), which is secured against a company's assets and includes an equity element allowing the debt provider to purchase shares in the company. However, venture debt providers will usually only invest into companies that have already received investment through venture capital.

## Warehouse and platform funding

Warehouse financing may be suitable for FinTech companies which own a portfolio of assets. Funding is often provided by way of a loan from a small number of lenders to a special purpose vehicle (SPV). The loan is secured on the assets acquired by the SPV from the originator. The lenders will only fund a portion of the assets, with the remainder being financed by way of subordinated lending from the originator.

Another alternative form of funding is by way of peer-to-peer (P2P) lending platforms, which bring individual borrowers and lenders together without the involvement of traditional banks. In 2016, UAH 5 billion was originated through P2P platforms in Ukraine. P2P lending does not involve equity investments, and instead interest is paid on the money borrowed.

## Senior bank debt and capital markets funding

### SENIOR BANK DEBT

Once a FinTech company is established and has a track record, bank debt becomes a more viable source of funding, either on a secured or unsecured basis depending on the creditworthiness and asset base of the business. Bank funding will generally involve the imposition of financial covenants and controls that will apply over the life of the facility. Bank finance may be particularly important for working capital, overdraft and general liquidity purposes.

### CAPITAL MARKETS FUNDING

The capital market in Ukraine is in a state of development. So far, funding in both debt and equity capital markets is uncommon and typically inaccessible to businesses.

## Incentives and reliefs

Ukrainian legislation does not provide for any special tax incentives for FinTech companies and activities related to FinTech. However, there are certain tax incentives which may be potentially applicable to FinTech companies.

For example, small and medium-sized enterprises can benefit from 0% of income tax rate if they meet certain criteria.

Also, a supply of program products (including software) within the territory of Ukraine is temporarily exempted from VAT until 1 January 2023. This incentive may be applicable to the supply of special FinTech software.

*Last modified 24 Jan 2020*

## Portfolio sales

## Loan transfers and portfolio sales

### *What are common ways of buying and selling loans?*

The Civil Code of Ukraine sets out the grounds for selling and buying loans.

The most common ways of selling loans are:

- assignment; and
- novation.

A loan transfer is commonly documented under a factoring contract. However, note that a loan purchaser shall be an authorized entity (being a factoring company and holding a license from the National Commission for Regulation of Financial Services Markets of Ukraine).

Loan Market Association (LMA) secondary market documentation is used by Ukrainian banks for transferring commitments under loans with foreign parties.

*Last modified 24 Jan 2020*

## *What are the main considerations when transferring a loan and related security?*

Key considerations include:

- **confidentiality** – consent is usually required for disclosure except for by banks which are permitted under banking law to disclose information relating to loans;
- **bank secrecy restrictions** – consent for disclosure of information constituting such secrecy is required;
- **data protection** – personal data shall not be disclosed without the consent of the holder of such data;
- **contractual restrictions** – the contract may stipulate some restrictions on transferee parties (black list or white list);
- **consent and/or notification** – novation requires mutual consents (borrower, lender and any third party security provider) whereas an assignment requires a notice to be given to the borrower; and
- **assignment restrictions** – contractual prohibition on assignment to third parties contained in the underlying debt obligation can be an issue except for instances where a factoring company is the purchaser of the debt.

Note that a factoring contract is valid irrespective of the existence of a prohibition on assignment of a monetary claim and other restrictions between the primary lender and the borrower.

*Last modified 24 Jan 2020*

## Projects

### Financing / investing in energy / infrastructure

#### *To what extent are energy and infrastructure assets publicly or privately owned?*

##### Generally

The ownership of energy and infrastructure assets in Ukraine varies according to the asset class and sector. The main asset classes are usually considered to be:

- economic infrastructure (energy, aviation, rail, telecommunications, roads and waste); and
- social infrastructure (education, health and justice/prisons, housing).

Key sectors are considered below.

##### Energy

The gas and electricity industries in Ukraine are partially privatized. Gas producers and gas distribution companies are privately owned, however, transmission, distribution grids and infrastructure are owned and operated by the state via public companies (*Ukrtransgaz*). The state is also present in other areas in the gas market such as gas production (*NAK Naftogas*, *UkrGasVydobuvannya*) while supply services are provided by a number of private sector companies. The Ukrainian gas market is heavily regulated.

Ukraine intends to reduce gradually the number of state-owned objects and launched privatization of state-owned companies. Every year the Ukrainian government approves the list of state-owned enterprises for privatization, including regional electricity supply companies.

The National Energy and Utilities Regulation Commission is responsible for the regulation of the electricity market in Ukraine.

## Telecoms infrastructure

The telecommunications networks (mobile and fixed) in Ukraine are mostly privately owned by a number of service providers.

The National Commission for the State Regulation of Communications and Informatization is the regulator for the Ukraine telecommunications sector. The State Committee for Television and Radio Broadcasting of Ukraine also regulates the television broadcast services and wireless communication services.

## Rail infrastructure

### LIGHT RAIL

Typically, light rail assets (such as trams and associated track) are owned by local public sector promoting bodies.

### HEAVY RAIL

The rail market in Ukraine involves both public and private entities. The principal elements to the rail sector in Ukraine are as follows:

- **Ukrzaliznytsia**, a state-owned public joint-stock company, which is on the public sector balance sheet and owns, operates and maintains rail tracks, signaling and station infrastructure. It is responsible for improving most of the regulated national rail infrastructure and for operating some of the stations on the national rail network). Ukrainian energy authorities have been conducting a corporate restructuring over the assets of *Ukrzaliznytsia* and foreign management has been employed to operate the company and increase business efficiency.
- **Freight Operating Companies** are wholly commercial entities.
- **Project finance** – There has been a number of project finance models dealing with and on that deal it is the private sector which owns the trains and will continue to do so following the expiry of the main contract with the public sector.

The rail sector is regulated by the Ministry of Infrastructure.

## Other infrastructure

### ROADS, BRIDGES AND TUNNELS

A government entity, the State Agency of Automobile Roads of Ukraine, operates, maintains and improves the motorways and major roads (ie the strategic road network) in Ukraine. The State Agency of Automobile Roads of Ukraine is regulated by the Ministry of Infrastructure and receives funding from the government for investment in the strategic road network (including additional road capacity). Local roads in Ukraine are the responsibility of local authorities. The public sector may outsource the construction, operation and maintenance (sometimes on a project financed basis) of such assets to the private sector (on a concession basis or otherwise). This year the government announced that it would be sponsoring a lot of tender procurement on the construction of the strategic road network.

### AVIATION

Aviation in Ukraine is (for the most part) privatized. As regards airport infrastructure, there are a number of ownership structures in Ukraine, including public ownership, local government ownership and various forms of public-private ownership (airports in the cities of Odessa and Kyiv). All models are heavily regulated by the government and the State Aviation Administration is the aviation regulator in the Ukraine.

### PORTS

The Ukrainian ports sector is mostly publicly owned, however, the government is considering different options to attract private investors (on a concession, lease or other model). Operating commercial companies, which operate in major Ukrainian ports are privately owned.

### EDUCATION, HOSPITALS, DEFENSE AND WASTE

Typically, these assets are mostly owned by the public sector.

*Last modified 24 Jan 2020*



## *Are there special rules for investing in energy and infrastructure?*

### Generally

There is no specific regime restricting investment in energy or infrastructure projects in Ukraine for investors and funders but a particular proposed investment may be subject to legislative or regulatory control (eg merger control rules, authorizations, currency control restrictions).

In the course of the planning and implementation of an underlying energy or infrastructure project (in which the investment is to be made), the legal/regulatory position relevant to that project must be considered. For example, a project involving development on land will require planning permission or a development consent order, and a project may require environmental authorizations/permits and /or sector specific regulatory consents or licenses. If a public body is procuring a project using private finance, and the public body is to benefit from central government funding towards the cost, the project will be subject to central government approval.

The gas and energy markets in Ukraine have a complex system of arrangements between suppliers, generators, transmitters and distributors which are heavily regulated. In particular, there are complex arrangements in respect of licensing, environmental permits, dangerous work performance permits, charging mechanisms with suppliers and customers and access to the local grid system.

*Last modified 24 Jan 2020*

## *What is the applicable procurement process?*

Public procurement in Ukraine is in most instances governed by the Law of Ukraine 'On Public Procurement' dated 25 December 2015 which is based on EU Directives and EU best practice. In addition, note that the new Law 'On Concession' dated 3 October 2019 and the Law 'On Public Private Partnership' dated 1 July 2010 contain some specifics on procurement process.

Additionally, there is established Model Contract on Lease of State Owned Property.

### Investing in energy and infrastructure

The Law of Ukraine 'On Public Procurement' dated 25 December 2015 sets out the following procedures:

- **Open bidding procedure** – This is suitable for easy-to-evaluate projects and tenderers simply submitting a tender offer in response to a notice. The pricing element will be a decisive factor for awarding a contract and announcing the winner.
- **Competitive dialogue** – There is a shortlisting of at least three tenderers following an expression of interest stage and tenderers submit a bid. The public authority will hold negotiations on the contract terms with each of the three tenders.
- **Negotiation procedure** – This procedure allows dialogue with one or a number of bidders. It can only be used in specific circumstances prescribed by the Law of Ukraine 'On Public Procurement' dated 25 December 2015.

### Financing energy and infrastructure

On a publicly procured contract, the public sector may have prescribed requirements on the funding arrangements. Investors must ensure that they are fully familiar with the funding requirements set out in the specific tender documentation.

*Last modified 24 Jan 2020*

## *What are the most common forms of funding / investing in energy and infrastructure?*

The principal forms of private sector funding/investment in energy and infrastructure in Ukraine (including in relation to public-private partnerships) are as follows.

### Funding

Common forms of funding in energy and infrastructure include:

- loans made on a corporate finance basis (balance sheet debt);
- loans made on a project-finance basis (to a special purpose project company) on medium to long-term basis – such loans may be made by international financial institutions (such as the European Bank for Reconstruction and Development, the World Bank and the International Finance Corporation);
- loans made by export credit agencies; and
- asset financing (particularly relevant in the rail sector).

## Investing

Common forms of investing in energy and infrastructure include:

- 'equity' investment through special purpose vehicles and subordinated sponsor loans; and
- secondary market investment in operational projects (acquisition of 'equity').

*Last modified 24 Jan 2020*

## Restructuring

### Enforcement and sanctions

#### *When can there be regulatory investigations?*

Where an authorized or regulated individual has breached an ongoing compliance requirement, the Regulator solely or jointly with the other respective authority is entitled to launch a formal investigation. If criminal liability is applicable, the Regulator will submit the documentation to the law enforcement bodies.

*Last modified 24 Jan 2020*

#### *What regulatory penalties may apply?*

The National Bank of Ukraine, the National Securities and Stock Market Commission or the Financial Services Market Commission may impose administrative sanctions (suspension or termination of a license, exclusion from the relevant registries of authorized entities), penalties and criminal liability on the firms and/or regulated individuals. The penalty may vary from GBP54 (UAH 1,700) to GBP5,369 (UAH 170,000), depending on the breach.

*Last modified 24 Jan 2020*

#### *What criminal penalties may apply?*

Formal investigation may result in criminal liability being imposed on a regulated entity and personnel in certain cases, including:

- insider dealing and manipulation, misleading statements and practices;
- violations of the money laundering regulations; and
- conducting regulated activities when not authorized.

Generally, the criminal liability may be punishable by:

- penalty which may vary from £415 (UAH 13,697) to £7,787 (UAH 257,006) depending on the breach;
- imprisonment for three to 15 years; and/or

- loss of regulatory status and right to occupy positions or engage in business activities for a term of up to three years.

*Last modified 24 Jan 2020*

## Tax

### Tax issues

#### *Are stamp, registration, transfer or other similar taxes applicable?*

#### **Are there stamp, registration, transfer or other similar taxes payable on the advance, transfer or assignment of a loan?**

No stamp, registration, transfer or other similar taxes are payable in Ukraine on the advance, transfer or assignment of a loan.

#### **Are there stamp, registration, transfer or other similar taxes payable on the taking, transfer or assignment of a mortgage, debenture or other security?**

Registration of a mortgage (and the transfer or assignment of a mortgage) is subject to stamp duty at the rate of 0.01% of the value of the mortgaged property, as indicated in the mortgage agreement.

Notary fees may also apply and their amount may vary.

#### **Are there stamp, registration, transfer or other similar taxes payable on the issue, transfer or assignment of a debt security (eg a bond)?**

##### ISSUE OF DEBT SECURITIES

The issue of debt securities is subject to stamp duty at the rate of 0.1% of the nominal value of the debt securities being issued. The maximum amount of stamp duty is capped at the level of UAH 80,000.

The issue of derivative securities is subject to stamp duty in the amount of UAH 850.

*Last modified 24 Jan 2020*

#### *Do tax authorities take priority on enforcement?*

#### **On the enforcement of security, do tax authorities take priority over secured lenders or secured debt security holders (eg secured bond holders)?**

The State Fiscal Services of Ukraine does not have a priority over secured lenders or secured debt security holders, provided the security is registered in accordance with Ukrainian legislation prior to the emergence of any tax lien.

*Last modified 24 Jan 2020*

#### *Is withholding tax on interest payments applicable?*

#### **Is there withholding tax on interest payments under a loan?**

Generally, Ukraine-source interest payable by Ukrainian corporate borrowers under loans provided by lenders not resident in Ukraine is subject to Ukrainian withholding tax.

Other payments (eg fees and commissions) under a loan agreement may not fall within the scope of Ukrainian withholding tax if they qualify as in return for services.

If so:

### What is the rate of withholding?

The following tax rates apply to payments of interest by Ukrainian corporate borrowers under loans granted by lenders not resident in Ukraine:

- 15% – for loans provided by corporate lenders not resident in Ukraine; and
- 19.5% – for loans provided by individual lenders not resident in Ukraine.

### What are the key exemptions?

A full or partial exemption from Ukrainian withholding tax on interest payable by Ukrainian corporate borrowers may be granted under double tax treaties in force in Ukraine.

Special withholding tax rules apply to interest payable by Ukrainian corporate borrowers to corporate lenders not resident in Ukraine under loan agreements, where the funds advanced were obtained by corporate lenders not resident in Ukraine from the issue of debt securities on exchanges outside of Ukraine (eg Eurobonds or LPNs). Under these types of structures, the rate of Ukrainian withholding tax on interest under such loan agreements with corporate lenders not resident in Ukraine is:

- completely eliminated – for loans provided before 2018; or
- reduced to 5% – for loans provided after 2019.

### Would the same analysis apply to interest payments under a debt security (eg a bond)?

Yes, the same analysis applies to interest payments under a debt security.

*Last modified 24 Jan 2020*

### *Are foreign lenders and debt security holders subject to tax on interest payments?*

**Will the lender be taxed on interest payments under a loan in the jurisdiction of the borrower (other than by way of the application of withholding taxes (if any)), assuming the lender is not otherwise resident in that jurisdiction for tax purposes (eg by virtue of incorporation, residence or local branch)?**

No.

### Would the same analysis apply to interest payments under a debt security (eg a bond)?

Yes.

*Last modified 24 Jan 2020*

## Disclaimer

DLA Piper is a global law firm operating through various separate and distinct legal entities. Further details of these entities can be found at [www.dlapiper.com](http://www.dlapiper.com).

This publication is intended as a general overview and discussion of the subjects dealt with, and does not create a lawyer-client relationship. It is not intended to be, and should not be used as, a substitute for taking legal advice in any specific situation. DLA Piper will accept no responsibility for any actions taken or not taken on the basis of this publication.

This may qualify as 'Lawyer Advertising' requiring notice in some jurisdictions. Prior results do not guarantee a similar outcome.

Copyright © 2019 DLA Piper. All rights reserved.