



by Gudrun STANGL



by Eva BAUMGARTNER



by Artem V. SOKUROV

Gudrun Stangl is a partner with Schönherr Rechtsanwälte GmbH (Vienna)

Eva Baumgartner is a senior associate with Schönherr Rechtsanwälte GmbH (Vienna)

Artem V. Sokurov is a senior associate with Schoenherr Ukraine LLC (Kiev)

Austrian and Ukrainian Anti-corruption Legislation

Companies are often forced to acquire the services of a local partner or intermediary when starting or conducting their business abroad, particularly in CIS countries. If such local partners use corrupt practices, such as bribery, this can cause significant damage to the reputation and finances of the company.

The risks are not only of a legal nature; there may also be commercial implications, such as the risk of debarments and the loss of key investment, employees and customers, not to mention large fines.

When facing allegations of corrupt practices, a company must be able to quickly demonstrate various things. First, that it has used the highest degree of diligence and care when acquiring the services of a local partner or intermediary. Second, that it has sufficient knowledge and has installed safeguards to ensure that the local partner or intermediary is carrying out the contracted services in a transparent and acceptable manner. And third, that policies, codes of ethic and procedures designed to prevent bribery and corruption are in place.

Liability of individuals and companies: Austria

The *Austrian Criminal Law Amendment Act*¹ (*Strafrechtsänderungsgesetz 2008*) contains new anti-corruption provisions, implementing the *UN Convention against Corruption*², the *OECD Convention*³, the

*Criminal Law Convention on Corruption of the Council of Europe*⁴ and EU standards⁵. In 2009, Austria introduced a new special prosecutor for corruption and a special prosecution service for corruption cases with central jurisdiction. The risk of being held responsible for foreign bribes paid via local partners or intermediaries will increase as the enforcement of anti-corruption laws in Austria becomes more effective.

The new anti-corruption provisions penalize employees and agents of private and public companies requesting or accepting bribes; public officers serving *foreign* states or international organizations, if accepting a bribe, may be prosecuted in Austria. Individuals offering or granting a bribe to employees, agents of public and private companies may be sentenced to up to two years in prison; individuals bribing public officers can be penalized by a jail term of up to three years. Furthermore, legal entities can be penalized for offences under the *Austrian Criminal Act* (including bribery) by a fine of up to EUR 1.8 million; the actual fine is, however, calculated based on a legal entity's profitability and financial means.

Irrespective of the nationality of the individual/legal entity committing a *Criminal Act*, Austrian courts are deemed competent provided (i) the act

¹ *Criminal Law Amendment Act 2008* (*Strafrechtsänderungsgesetz 2008*), Official Gazette (BGBl) I 2007/109, which entered into force on 1 January 2008.

² 2003 *United Nations Convention against Corruption*, *United Nations Resolution: A/RES/58/4*.

³ 1999 *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, OECD Doc. DAF/IME/BR(97)20, reprinted in 37 I.L.M. 1(1998).

⁴ 1999 *Criminal Law Convention on Corruption of the Council of Europe*, ETS No. 173.

⁵ 1997 Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, Official Journal C 195, 25 June 1997.

constituting the criminal offence (in the present case: the bribe) is committed on Austrian territory, or (ii) the result of criminal actions takes place on Austrian territory.

The anti-corruption provisions of the *Austrian Criminal Act* are currently under review by the Austrian Ministry of Justice. Pursuant to press reports, the introduction of a new provision by which an individual who has received a bribe may be exempted from punishment in case (i) he/she discloses the identity of the individual/corporate who has granted the bribe and (ii) he/she pays the bribe to the Austrian prosecution authorities is considered.

Liability of individuals and companies: Ukraine

Corruption remains a serious challenge in Ukraine. In 2008 Transparency International⁶ rated Ukraine⁷ 2.5 on a 10 point scale, a decrease from 2.7 in 2007 and 2.6 in 2006.⁸

Ukraine's anti-corruption legislation derives from various laws. The Criminal Code penalizes accepting bribes, giving bribes and provocation/instruction to give bribes, with various penalties attached. Foreigners may be held liable on the same grounds as Ukrainians. A number of new anti-corruption bills have been submitted to the Ukrainian Parliament. Unfortunately, mainly due to reasons of a political nature – including the coming presidential election – a lot of bills were rejected recently or not even considered by Parliament.

However, many positive legislative steps have been taken. In June-July 2009, the Ukrainian Parliament adopted the *On Measures to Prevent and Fight Corruption, No.1506-VI, On Amending Certain Laws re Liability for Corruption Offences, No.1508-VI* and *On Liability of Legal Entities for Corruption Offences, No.1507-VI*, which were subsequently approved by President V. Yushchenko.

⁶ http://www.transparency.org/news_room/in_focus/2008/cpi2008/cpi_2008_table.

⁷ See e.g. USAID, 'Final Report on Corruption Assessment: Ukraine', February 2006.

⁸ Such ranking corresponds to position 134 worldwide; Austria ranks on place 12 (2008).

All these Acts will come into force on 1 January 2010. The laws define measures to prevent corruption, and set out the types of responsibility for corruption: criminal, administrative, disciplinary and civil. The acts are generally aimed at introducing stricter penalties for offences of corruption.

by its management, shareholder of participant or other authorized representative. However, the *On Liability of Legal Entities for Corruption Offences Act* does not apply to companies of public law which are entirely financed from the state or local budgets, and to international organizations.

Choosing and working with intermediaries in Ukraine

Initially, a company aiming to acquire the services of a local Ukraine partner or intermediary has to understand the activities for which a local intermediary will be used. A precise determination of the scope of work should be made by the relevant intermediary. A due diligence review of the candidate should be undertaken. Ideally, the due diligence review will be carried out by someone other than those selecting the intermediary (i.e., the legal in-house team). The company might also consider using an external adviser⁹.

Potential conflicts of interest with a possible intermediary should be documented. If an intermediary works with a competitor or other companies or institutions which constitute a risk for the intended business operation, the company should not collaborate with the intermediary.

Before selecting an intermediary, the contractor should pay special attention to certain "red flags" that require further investigation and could be deal killers. These include: (i) agents with close family relationships to key official figures; (ii) agents who want to be paid in cash via a third party or a numbered bank account; (iii) agents recommended by officials with whom the company is negotiating; (iv) agents who wish to remain anonymous; and (v) agents who want to be paid large amounts of money in advance.

In order to be transparent and legally compliant, a consultancy agreement with the intermediary should ideally include: (i) a precise definition of the scope of work; (ii) fees and payment conditions; (iii) a code of ethics or an anti-corruption policy;¹⁰ (iv) no right to assign the agreement; and (v) extraordinary termination rights related to corrupt practices. ■

“Before selecting an intermediary, the contractor should pay special attention to certain "red flags"”

In addition, the abovementioned acts amend the *Ukrainian Codes of Criminal Procedure* and of *Administrative Violations*.

To date, Ukrainian anti-corruption legislation and the *Criminal Code* do not provide for corporate criminal liability, but this will be introduced starting from 1 January 2010. A legal entity may be held liable for bribery on its behalf and in its interest when it is committed

⁹ External legal advisors or service providers specialized in this type of due diligence investigation, e.g. TRACE; www.traceinternational.org. For a detailed description of the trace guidelines and working proceedings in relation to intermediaries in foreign countries also see A. Timothy Martin, 'Using Consultants in Foreign Lands', 59 Inst. On Oil and Gas Law 501 (2008) by the Center of American and International Law.

¹⁰ For the adoption of a company ethics code please refer to the ICC Rules of Conduct to Combat Extortion and Bribery (http://www.iccwbo.org/uploadedFiles/ICC/policy/anti-corruption/Statements/ICC_Rules_of_Conduct_and_Recommendations%20_2005%20Revision.pdf) and the Business Principles for Countering Bribery published by Transparency international (http://www.transparency.org/global_priorities/private_sector/business_principles).