# Public M&A

*Contributing editor*
**Alan M Klein**

2018

GETTING THE DEAL THROUGH

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# Public M&A 2018

*Contributing editor*
**Alan M Klein**
**Simpson Thacher & Bartlett LLP**

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# Preface

## Public M&A 2018

First edition

**Getting the Deal Through** is delighted to publish the first edition of *Public M&A,* which is available in print, as an e-book and online at www.gettingthedealthrough.com.

**Getting the Deal Through** provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

**Getting the Deal Through** titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

**Getting the Deal Through** gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Alan M Klein of Simpson Thacher & Bartlett LLP, for his assistance in devising and editing this volume.

GETTING THE DEAL THROUGH

London
May 2018

# Ukraine

**Volodymyr Yakubovskyy and Tatiana Iurkovska**
**Nobles**

## 1 Types of transaction

**How may publicly listed businesses combine?**

Basically, publicly listed businesses may combine in one of the following common ways in Ukraine:

- a statutory merger,
- a share purchase or exchange; and
- an asset acquisition (which also includes a country-specific purchase of an integrated property complex).

**Mergers**

Ukrainian laws envisage two main forms of mergers: amalgamation and absorption. Amalgamation is a merger of two or more companies into a new company. Under amalgamation, the merging legal entities cease to legally exist, whereas all their property and liabilities are transferred to a newly established company. Merger by absorption occurs when the undertaking, property and liabilities of one or more companies are transferred to another existing company that is the only one surviving the merger.

**Share purchases or exchanges**

Another possible structure for business combinations is that of takeovers. Such share purchases may take a form of purchase of shares either for cash or for shares.

**Asset acquisitions**

Under Ukrainian law, it is also quite common for business combinations to be structured through acquisition of the target's particular assets. In addition, Ukrainian law envisages a specific possibility to acquire the target company integrated property complex – a specific form of real estate common in post-Soviet jurisdictions that usually includes buildings, facilities, equipment and related liabilities.

## 2 Statutes and regulations

**What are the main laws and regulations governing business combinations and acquisitions of publicly listed companies?**

There is no separate takeover statue in Ukraine. The main laws and regulations that govern various aspects of business combinations, including takeovers, in Ukraine are as follows:

- Commercial Code of Ukraine of 16 January 2003;
- Civil Code of Ukraine of 16 January 2003;
- Law of Ukraine 'On Joint-Stock Companies' of 17 September 2008;
- Law of Ukraine 'On Protection of Economic Competition' of 11 January 2001;
- Law of Ukraine 'On State Registration of Legal Entities, Private Entrepreneurs and Non-governmental Organisations' of 15 May 2003;
- Law of Ukraine 'On Securities and Stock Market' of 23 February 2006;
- Law of Ukraine 'On Regime of Foreign Investments' of 19 March 1996;
- Law of Ukraine 'On Re-establishment of Debtor's Solvency or Declaring it Bankrupt' of 14 May 1992;
- Labour Code of Ukraine of 10 December 1975;
- Decision of the National Securities and Stock Market Commission of Ukraine No. 520 of 09 April 2013 'On the procedure for issuance and registration of shares issued by joint stock companies, which are created by merger, division, separation or transformation or to which the accession is made';
- Regulation on the Procedure for Filing and Consideration of Applications with the Antimonopoly Committee of Ukraine for Obtaining Merger Approval No. 33 of 19 February 2002; and
- Guidelines on the Assessment of Horizontal Mergers No. 49-pp of 27 December 2016.

## 3 Transaction agreements

**Are transaction agreements typically concluded when publicly listed companies are acquired? What law typically governs the agreements?**

Transaction agreements are typically concluded for all types of business combinations in Ukraine. The peculiarity of the Ukrainian stock market is that transactional documents with regard to shares must be concluded with the engagement of a licensed securities broker, with some exceptions.

Transaction agreements are typically governed by Ukrainian law. At the same time, Ukrainian rules for conflict of laws allow parties to choose other applicable law when at least one of such parties is qualified as a foreign person. Foreign investors and the biggest local business groups tend to choose other laws, in particular, English, German or Swiss laws, in combination with submission of the agreement to the jurisdiction of international arbitration tribunal, which provides more flexibility and comfort to such investors in terms of enforcement of the agreed contract terms.

In any case, it is mandatory to apply Ukrainian law, among other things, to the provisions on legal capacity of the Ukrainian contract party, transfer of securities, internal corporate matters of the Ukrainian target company, merger essential conditions, transfer of real estate located on the territory of Ukraine.

## 4 Filings and fees

**Which government or stock exchange filings are necessary in connection with a business combination or acquisition of a public company? Are there stamp taxes or other government fees in connection with completing these transactions?**

**Competition clearance with the Antimonopoly Committee of Ukraine (the AMCU)**

If a business combination (treated broadly as catching almost all possible types of change-in-control transactions) reaches the financial thresholds below, then notification and formal approval of such a business combination by the AMCU is required. The thresholds mentioned are set forth in Law of Ukraine 'On Protection of Economic Competition' as follows:

- worldwide sales or assets of all parties exceed €30 million and sales or assets in Ukraine of at least two parties exceed €4 million; or
- sales or assets in Ukraine of the target exceed €8 million and sales of either party exceed €150 million worldwide.

The official filing fee for merger notification is approximately €615.

**Notifying a public company, a stock exchange and the National Securities and Stock Market Commission**

An acquirer of 10 and more per cent of public company's shares is obliged to notify in writing the public company itself, National Securities and Stock Market Commission and each stock exchange where the company's shares are traded, as well as publish a respective announcement notice in the official online database (http://stockmarket.gov.ua). All these notifications shall be properly made at least 30 days prior to acquisition of shares.

The notice shall include the following information:

- name of the target company and its registration code;
- if applicable, the number, type or class of the target's shares already belonging to the potential buyer (each buyer) and each of its affiliates; and
- the number of shares potential acquirer (acquirers) intends to acquire.

If a current or future shareholder of a public company acquired or sold the company's shares and as a result his share becomes equivalent or more or less then threshold amount of 5, 10, 15, 20, 25, 30, 50, 75, 95 per cent of public company's shares, such shareholder is obliged to notify in writing the public company itself and National Securities and Stock Market Commission. Such notification shall be made within three business days after the shareholder is acknowledged he reached the threshold. Later the public company ensures the publication of this notification in the online database (http://stockmarket.gov.ua).

The notice shall include the following information:

- aggregate amount of shares;
- its shareholding structure (of current or future shareholder); and
- date when reaching the threshold appeared.

An acquirer of more than 50, 75 or 95 per cent of public company's shares shall inform both the public company and the National Securities and Stock Market Commission and, also, make a public announcement (publish online in the online database (http://stockmarket.gov.ua) and on public company's website) of the facts of (i) concluding the share purchase agreement and (ii) becoming the [majority] shareholder within one day therefrom.

**Other filings**

There could be other additional filings or mandatory submissions depending on the peculiarities and industry where the business combination takes place (as discussed in question 17). As a side note, in practice, getting certain approvals can be a highly bureaucratic and formalistic process.

## 5 Information to be disclosed

**What information needs to be made public in a business combination or an acquisition of a public company? Does this depend on what type of structure is used?**

There are special disclosure requirements that are applicable only to companies that have issued securities (the issuer), including public companies.

In accordance with respective by-laws, the target company must disclose certain details of the following events relevant to business combinations:

- change in shareholders who own 5, 10, 15, 20, 25, 30, 50, 75, 95 per cent of voting shares (including as a result of takeover);
- a decision of the competent body of the issuer or the court on termination (including through a merger) upon such decision being approved; or
- change in officers (directors) of the issuer (including as a result of a takeover) upon such a decision being approved by the competent corporate body.

In addition, the company must also disclose information on the following events that may be relevant to particular structures of business combinations:

- a decision on issue of securities for an amount exceeding 25 per cent of the share capital;
- existence, term of validity and parties to the shareholders agreement;
- changes to the charter related to the change of shareholder rights;
- a decision to repurchase its own shares;
- facts of listing or delisting of securities on the stock exchange;
- the number of voting shares and the size of the authorised capital as a result of its increase or decrease;
- a decision of the issuer to reduce the share capital; and
- initiation of bankruptcy proceedings against the issuer, ruling on its reorganisation.

The company management must make a disclosure of information by way of publication on a special publicly available web database administered by the Commission (http://stockmarket.gov.ua), publication on the company's own website and by submission of a respective form to the Commission.

The disclosure must be made in the following terms:

- at http://stockmarket.gov.ua – within one business day after the date of a respective event, but not later than 10am on next business day following the date of such event;
- page on the internet – within five business days from the date of a respective event; and
- submission to the Commission – within seven business days from the date of a respective event.

## 6 Disclosure of substantial shareholdings

**What are the disclosure requirements for owners of large shareholdings in a public company? Are the requirements affected if the company is a party to a business combination?**

**Disclosure of substantial shareholders**

As indicated above (see question 5), public joint stock companies (JSCs) are obliged to make public certain information on shareholders with substantial shareholding (5 per cent or more).

Additionally, if there is an undertaking, whether jointly or individually, intending to acquire a shareholding that will result in holding directly or indirectly more than 10 per cent of company's shares, a written notice of intention shall be submitted not later than 30 days before the date of acquisition to the company, to the National Securities and Stock Market Commission and to each stock exchange. The acquirer of 10 or more per cent of public company's shares is obliged to notify in writing the public company itself, the National Securities and Stock Market Commission and each stock exchange where the company's shares are traded, as well as publish a respective announcement notice in the official online database (http://stockmarket.gov.ua).

**Disclosure of ultimate beneficiaries**

All companies (including public companies) are also obliged to disclose their ultimate beneficial owners. To this end, an ultimate beneficial owner is an undertaking that owns directly or indirectly 25 per cent or more of the registered capital or that can exercise significant influence or control over the company.

## 7 Duties of directors and controlling shareholders

**What duties do the directors or managers of a publicly traded company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination or sale? Do controlling shareholders have similar duties?**

The directors and managers must act in the best interests of the company. The controlling shareholders are generally free to act in their best interests or under shareholders agreement.

The directors and managers and controlling shareholders (holding 25 per cent or more shares) have a duty to disclose any conflict of interest (personally or through the members of their respective families) that they may have in a business combination (if any) within three business days of such conflict arising.

In addition, shareholders holding 10 per cent or more shares can file a lawsuit on behalf of the company against directors and managers who caused damage to the company owing to their unlawful actions (exceeding of power, conflict of interest, etc).

Under general prohibition, during takeovers of a public company, the directors and managers are not allowed to take any measures to preclude the takeover bids.

## 8 Approval and appraisal rights

**What approval rights do shareholders have over business combinations or sales of a public company? Do shareholders have appraisal or similar rights in these transactions?**

**Approval rights**
Acquisition of shares in a public company does not requires a formal approval of shareholders, unless otherwise is set in the shareholders agreement. A sale of assets if their market value exceeds 25 per cent of overall assets value of a company and a merger both require approval of the general shareholders meeting. A sale of assets if their market value exceeds 25 per cent of overall assets value of a company requires approval of its supervisory board.

**Appraisal rights**
Shareholders in a public company shall have the right to claim from the company to buy out their shares at market value, if they registered at the general meeting and voted against a decision on:

- a merger or (going private);
- acquisition of another company (if such acquisition constitutes a substantial transaction under the law – with a value of more than 25 per cent of the company's assets – or as additionally defined so according to the charter of the company);
- sale or acquisition of assets (if, also, such acquisition constitutes an interested-party transaction or a substantial transaction under the law – with a value of more than 25 per cent of the company's assets – or as additionally defined so according to the charter of the company);
- change (decrease or increase) of the share capital; or
- refusal to use the pre-emptive shareholder's right to purchase shares of additional issue in the process of their placement.

Such shareholders can excise their right within 30 days from the day when the relevant general shareholders meeting took place, and the company shall buyout the shares within 30 days of the receipt of the respective shareholder's request.

**Rights of shareholders during takeovers**
In the case of a purchase of the controlling shareholding (ie, more than 50 per cent of the shares) in a public company, the new majority shareholder (acting alone or with its affiliates) is obliged to offer to remaining minority shareholders to buy out their shares at the market value. The offer shall be made within 20 days following the acquisition, and the minor shareholders may exercise the right to sell their shares within a specified period (not less than 30 days).

## 9 Hostile transactions

**What are the special considerations for unsolicited transactions for public companies?**

Ukrainian law provides quite limited regulation on unsolicited takeover bids. As mentioned above, under general prohibition, the directors and managers are not allowed to take any measures to preclude the takeover bids. Other common defences are generally not practicable under the Ukrainian securities regulation framework either. However, given that there are very few companies that are truly public (with a disseminated ownership) and most of joint-stock companies are privately held, hostile takeovers (in its common understanding) are extremely rare in Ukraine.

At the same time, as in some other post-Soviet jurisdictions, hostile transactions in Ukraine have rather been associated with some illegal corporate raiding schemes. Recently, Ukrainian laws have been updated to counteract these types of illegal transactions more effectively.

## 10 Break-up fees – frustration of additional bidders

**Which types of break-up and reverse break-up fees are allowed? What are the limitations on a public company's ability to protect deals from third-party bidders?**

There is no specific regulations with regard to break-up and reverse break-up fees. Therefore, parties should be able to rely on the freedom of contact and general principles apply. These kind of agreements have not yet been tested in the Ukrainian courts.

## 11 Government influence

**Other than through relevant competition (antitrust) regulations, or in specific industries in which business combinations or acquisitions are regulated, may government agencies influence or restrict the completion of such transactions, including for reasons of national security?**

Except for competition and industry regulations (banks, etc), government agencies are generally not empowered to restrict legitimate business combinations. However, to some extent, business combinations that involve Russian companies, citizens (or companies controlled by them, or both) as buyers are restrained. For example, Russian companies and citizens as well as companies controlled by them cannot participate in privatisations of state companies, be founders or participants of local broadcasting organisations, or when a Ukrainian company performs a licensed activity and its ultimate beneficial owner is changed to another with a Russian registration, the licence will be revoked. Also, the Ukrainian authorities shall grant no merger permit if the acquirers are Russian companies or Russian citizens (or companies controlled by them).

## 12 Conditional offers

**What conditions to a tender offer, exchange offer, mergers, plans or schemes of arrangements or other form of business combination are allowed? In a cash transaction, may the financing be conditional? Can the commencement of a tender offer or exchange offer for a public company be subject to conditions?**

Ukrainian laws do not provide regulation of tender offers or exchange offers in the sense that is common in the US or EU approaches. In particular, in Ukraine there is an equivalent to the tender offer, which is statutorily limited to the following: in public JSCs the shareholder who acquired more than 50 per cent of the shares (directly or indirectly) is obliged to make a public offer to the remaining minority shareholders to buy out their shares. The price is determined by the Supervisory Board and based on the share price that must be offered to the remaining JSC shareholders for buying out their shares and communicate such a price to the new majority shareholder. Such a price shall be (depending on which is higher) either the market price calculated by a certified appraiser, or the highest price the new majority shareholder has paid for the shares of the JSC within the past 12 months (both in case of direct and indirect acquisition). The offer to the minority shareholders shall be made within two working days following the price approval, and the minor shareholders may exercise the right to sell their shares within a period determined by the new majority shareholder (10-50 working days). The public offer is irrevocable and binding, and the majority shareholder is obliged within the specified period to buy out the shares of minority shareholders who accepted the offer. In such a case, financing may not be conditional. In other cases, financing in a cash acquisition may be made conditional (eg, the availability of financing may be a condition precedent a share-purchase agreement).

Other forms of business combination may be contingent on any condition the parties may agree apart from cases when such agreements contradict the principles of good faith according to the Civil Code of Ukraine. The most common conditions are obtaining corporate approvals or merger clearance from the national competition authority or clearance from the authorised state bodies in regulated areas (financial, insurance, etc).

## 13 Financing

**If a buyer needs to obtain financing for a transaction involving a public company, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?**

As mentioned above, the buyer (ie, majority shareholder) is obliged to buy out the shares of minority shareholders who accepted the offer after expiration of the term for acceptance of the offer. The same approach is applied in case of squeeze-out procedure. In such cases, Ukrainian laws do not contemplate any options to make financing conditional.

In all other cases, Ukrainian laws do not explicitly govern the issue of financing in mergers and acquisitions transactions, except for some restrictions set forth by the law of Ukraine 'On Joint-Stock Companies' for newly issued shares, such as:

- shares shall be paid for with money or if the parties agree so, with property or moral rights, having monetary value, or with some securities or other property;
- the investor is not allowed to pay for shares by undertaking obligations to provide some services; and
- public companies are not allowed to grant a loan for investors to buy their shares.

Formally, there is also no obligation on the seller to assist the buyer in this process. As a rule, the buyer either finances the transaction from his or her own capital or uses borrowed funds for this purpose. The method of deal financing should be indicated in the transaction documents. Although the seller is not obliged to assist in the buyer's financing, the parties, while structuring the deal, may agree that the seller provide financial support or that the buyer pay the purchase price in instalments over certain periods. Such deal structure usually provides for additional guarantees (security) on the part of the buyer.

## 14 Minority squeeze-out

**May minority stockholders of a public company be squeezed out? If so, what steps must be taken and what is the time frame for the process?**

The squeeze-out procedure is triggered if a dominant shareholding (ie, 95 and more per cent of the shares) is acquired. It ensures the right of the new majority shareholder (acting alone or with its affiliates) to demand an obligatory sale of shares by the remaining minority shareholders. The squeeze-out can be initiated after the completion of a buy-out procedure (see question 12).

Within one day, the new dominant shareholder shall inform the JSC and the regulatory authority on becoming the dominant shareholder. The notice must also be published on the JSC's website. Not later than 25 days after notification, the supervisory board of the JSC shall approve the price for which the shares will be bought, and communicate it to the new majority shareholder. Such price shall be determined according to the rules applicable in a buyout procedure (see answer on question 12). Within 90 calendar days of the completion of a buy-out procedure, the dominant shareholder may send an obligatory request to sell the shares by the remaining minority shareholders, and inform the regulatory authority about starting a squeeze-out procedure. If the dominant shareholder fails to finish the buyout procedure in time, the price of the shares must be doubled.

All payments under a squeeze-out procedure shall be made through an escrow account, which shall be opened by the new dominant shareholder. The shares of the remaining minority shareholders are blocked on their depository accounts starting receipt of the notice on squeeze-out by the regulatory authority. Any encumbrance that was imposed on the shares will not obstruct the exercising of the squeeze-out.

## 15 Cross-border transactions

**How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?**

Cross-border transactions are usually subject to strict Ukrainian currency control and financial monitoring regulations. Ukrainian law in force has imposed severe restrictions with respect to currency transactions and cross-border payments that have slowly been ratcheting down during the past few years. Pursuant to these restrictions, certain payments in hard currency made by Ukrainian residents to non-residents are strictly regulated (including payment for the shares) and are subject to special scrutiny, monitoring and limitations. It is, however, possible for foreign investors to perform a wide range of investment activities in Ukrainian currency (without or with only partial repatriation of profits abroad at this point) through special investment accounts opened with Ukrainian banks.

Due regard must be paid to the cross-border taxation issues, as Ukrainian withholding tax is applicable to Ukraine-source income of non-resident companies from cross-border M&A transactions (as discussed below).

## 16 Waiting or notification periods

**Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations or acquisitions involving public companies?**

Each transaction is specific and may imply different structures and combinations which in turn affect relevant waiting and notification periods; however, the basic ones can be limited to those listed below.

**Period for exercise of certain creditors' rights, in case of reorganisation of a local entity**

In a merger procedure, the JSCs participating therein and ceasing to exist as the result of the merger, shall notify their creditors and the stock exchange on which they are listed within 30 calendar days after the respective decision is taken by the general shareholders' meeting of the last participating company. Such creditors may, within 20 calendar days thereafter, request the early fulfilment of the company's obligations or granting a security. The merger may not be accomplished until all the creditors' raised claims are satisfied. Generally, the creditors shall have at least two months after the publication of merger notification to file their demands.

**Approval of relevant state authorities**

In case of purchase of a Ukrainian bank, the notification period of the National Bank of Ukraine (NBU) about the intention to purchase a substantial shareholding (10, 25, 50, or 75 per cent) is three months. Within this period, the NBU shall issue its approval or disapproval of the intended purchase.

As regards purchase of shareholding in other financial institutions, the respective period is one month (the competent authority is the Financial Markets Commission).

## 17 Sector-specific rules

**Are companies in specific industries subject to additional regulations and statutes?**

**Strategic industries**

There are specific industries where only Ukrainian state enterprises can operate. Those include railways, security services to strategic state-owned objects, forensic activities and the manufacture and launching of spacecraft.

**TV, radio and media**

In TV and radio broadcasting, non-resident companies may not be direct founders of local broadcasting companies. Nevertheless, they can either set up another local company, which, in its turn, would be a founder of a new broadcasting company, or acquire shares and become shareholders (participants) in already existing companies. Non-residents registered in offshore jurisdictions and in Russia or those controlled by Russian residents cannot be participants (shareholders) in Ukrainian TV and radio broadcasting companies. In the news media, non-resident companies may not hold more than 35 per cent in the authorised capital of a Ukrainian information agency.

**Banking and finance**

Ukrainian law sets specific rules for M&A in the banking and financial sectors.

As regards banks, any reorganisation process (including merger) within a bank in Ukraine shall be approved by the NBU. The latter also approves the plan of such business reorganisation. If someone intends to acquire or increase a substantial shareholding in a Ukrainian bank (10 and more per cent of the charter capital or voting rights), this person must obtain consent from the NBU.

It is also required to obtain the relevant approval for acquiring or increasing a substantial shareholding (10, 25, 50 and 75 per cent of the charter capital or voting rights) in other financial institutions that provide certain financial services (eg, insurance companies, leasing companies, investments funds). A potential investor is obliged to obtain a written consent from the National Commission for the Regulation of Financial Services Markets.

**Update and trends**

**General changes regarding joint-stock companies regulation**
The end of 2017 brought long-anticipated legal changes in the area of governing stock market and joint-stock companies. The lawmakers followed the global model of share trading, which had not been common in Ukraine. Previously in legislation, private and public joint-stock companies were distinguished only on formal grounds. The current plan is that in the very near future public companies will go public in a way that is familiar to western investors and market players. Public companies will now disclose much more information about themselves, and private ones will have more relaxed regime of publicity. Another long-awaited introduction is the possibility to conclude shareholder agreements and use escrow accounts, which would greatly facilitate M&A transactions.

**Newly introduced procedures: buy-out and squeeze-out**
In mid-2017, lawmakers adopted major changes to upgrade Ukrainian corporate regulations in line with common standards applied in the Western corporate world. The new law amends the mandatory buyout procedure and introduces new squeeze-out rights for majority shareholders of joint-stock companies and escrow accounts as a contract arrangement, previously not known to Ukrainian law. Within two years (until 3 June 2019), existing dominant shareholders of joint-stock companies will be able to initiate a squeeze-out procedure with only minor differences from the standard procedure. It has taken quite a while to introduce changes to applicable by-laws, so far several big international holdings have applied a squeeze-out procedure with regards to their Ukrainian assets.

**Loosening currency regulations**
A tough regulatory framework, in particular, the currency control restrictions regarding the repatriation of dividends and investments, has been loosened. Foreign investors now have the possibility to return their investments in the hard currency, though it may require certain time and effort owing to highly bureaucratised procedures. In the larger picture, the investment climate in Ukraine generally improved throughout 2017, especially in the field of green energy, IT and agriculture.

**Tax on withdrawn capital**
The idea of substituting the existing corporate profit tax with a new tax on withdrawn capital is being actively discussed by both government and business. Instead of taxing the corporate profit of a company, it is suggested to provide for taxation of dividends payable to its shareholders. The supporters of the proposal, including the President and Cabinet of Ministers of Ukraine, claim that in the long run, the reform can help combat the shadow economy, capitalise companies, as well as stimulate business and investment activities. The opponents, among which is the IMF, point to potential huge budget losses resulting from the abolition of the traditional corporate profit tax. So far, the government has not worked out a sole approach and no draft law has yet been registered with the Parliament (initially expected at the beginning of 2018).

## 18 Tax issues

**What are the basic tax issues involved in business combinations or acquisitions involving public companies?**

**VAT**
The sale of shares (or the purchase of those during an emission) is not subject to Ukrainian VAT. However, if an investor makes an in-kind contribution to the capital of a company (as opposed to a cash contribution) in exchange for its shares, it will trigger Ukrainian VAT payable by the target company (subject to VAT credit and refund). The same applies to an acquisition structured as an assets deal (as opposed to a share deal), in which case the purchase transaction is subject to (refundable) VAT.

Mergers of companies do not trigger any additional VAT obligations, either to the shareholders or to the companies themselves that consolidate their assets.

**Repatriation taxes**
Profit derived by a foreign investor from the sale of shares in a Ukrainian company is considered its Ukrainian-source income. Therefore, such profit (calculated as a positive difference between the investor's income from the sale and its expenses for the initial purchase of the shares) is subject to Ukrainian withholding tax (15 per cent) if the seller is a legal entity, or personal income tax (18 per cent plus 1.5 per cent of temporary war tax) if the seller is an individual. The existing double taxation treaties may provide for lower applicable tax rates.

**Pre-merger tax audit**
Any merger procedure in Ukraine (fusion, amalgamation) is placed under special scrutiny and merging companies are subject to an extraordinary audit by Ukrainian tax authorities. Although the company established as the result of merger generally takes over all the tax liabilities, profits and losses of the merged companies, it should be noted that outstanding tax liabilities of the latter might potentially impede the transaction in certain cases, since prior approval of the tax authorities may be required.

## 19 Labour and employee benefits

**What is the basic regulatory framework governing labour and employee benefits in a business combination or acquisition involving a public company?**

Under Ukrainian law, employees generally do not enjoy any formal approval rights as regards a business combination. Theoretically, a collective bargaining agreement may stipulate some duties of the target company's management to consult a local trade union. In practice, this is rather uncommon and unusual.

The change of control in the target company during a takeover does not per se affect the existing labour relationships, unless it is accompanied with or followed by justified organisational and structural changes in the company. During acquisition of a controlling shareholding in a public JSC, the new majority shareholder has to disclose the potential effects of such acquisition on employees and management of the JSC as well as future plans for the company's development.

If two companies merge into a new company or one company merges with another (surviving) company, employees of the merging companies automatically become employees of the new or surviving company, unless they are made redundant due to reorganisation. Their consent to such 'transfer' is generally not required. In an assets deal, that is, when a manufacturing facility is entirely sold to another entity that also intends to take over the employees working there, it has to procure their consent to the transfer.

If during organisational or structural changes in the company, the latter lays off employees or makes alterations of essential labour conditions, such as remuneration, social benefits and working time, such company must respect the statutory procedures and collective bargaining agreement. In particular, the management must observe the respective notification periods with regard to employees and public authorities (which is at least two months prior to the effective date), negotiate with the local trade union and, in certain instances (such as layoffs), procure its consent; and it must ensure statutory guarantees, such as severance payments, to redundant employees.

Lastly, the change of control causes the existing collective bargaining agreement to expire within one year after the change occurs. Meanwhile, the parties shall negotiate the terms of a new agreement.

## 20 Restructuring, bankruptcy or receivership

**What are the special considerations for business combinations or acquisitions involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?**

The general rule of Ukrainian insolvency law provides that as soon as a competent commercial court opens a bankruptcy procedure, the affected target entity-debtor may no longer enter into a business combination without prior consent of an appointed administrator or creditors' committee (meeting) or both. Certain peculiarities exist for banks and other financial institutions, where the insolvency procedure is largely administered and directly run by the Individual Deposits Guarantee Fund, the NBU and administrators appointed by these bodies.

The first stage of a bankruptcy proceeding opened by a competent commercial court is receivership, which entails a moratorium

with respect to creditors' claims; the receiver appointed by the court is authorised to administer the debtor's assets, give consent to all major transactions, including M&A and additional emissions of shares. Interested investors may submit to the receiver their proposals as to the rehabilitation of the debtor, including a rehabilitation plan, which is subject to approval by the creditors' meeting and the court.

As soon as the court approves the rehabilitation plan, the next stage – rehabilitation – commences. The court appoints an administrator (with the functions similar to those of the receiver) who runs the company in accordance with the plan. Interested foreign investors can also be invited to take part in rehabilitation according to the plan, to which they must consent. Their functions are quite limited, though. Possible measures to restore debtor's solvency, include its reorganisation, as an investor may buy shares or assets of the debtor in return for the repayment of its debts, or capital increase and additional contributions to the authorised capital by the existing shareholders or new investors or both.

If receivership or rehabilitation fail, a liquidation procedure of the debtor is started and no further business combinations are possible.

## 21 Anti-corruption and sanctions

**What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations with, or acquisitions of, a public company?**

The general rule provides that any transaction or legal act, including business combinations, entered into or issued in violation of the anti-corruption legislation, may be declared null and void, with the total restitution and compensation of caused damages being legal consequences thereof. Due to this, special attention should be paid to business combinations in which senior Ukrainian public officials and politicians (who generally may not combine their official capacity with any business function and are therefore under scrutiny of anti-corruption agencies) or companies or assets under their control participate.

All Ukrainian legal entities shall conduct regular assessment of corruption risks in their business and take the necessary anti-corruption measures. Each employee of a legal entity is obliged to inform the CEO and respective corporate officers within the legal entity of any breach (or its attempt) of anti-corruption laws as well as of any conflict of interests. Business combinations involving the public sector (ie, legal entities in which the state or a local community has a controlling share or those participating in public procurement) shall also adopt these anti-corruption programmes and employ compliance officers.

It should be noted that relatively recently Ukraine has adopted a concept of criminal liability of legal entities. Such liability may be applied additionally to criminal liability of corporate officers of a company for certain white-collar crimes committed in the interests or for the benefit of that company, including commercial bribery. The sanctions that may be imposed on the company include fines, the confiscation of assets and forced liquidation.

Over the past several years, sanctions have been imposed by the government against a number of Russian individuals and companies, as well as their Ukrainian subsidiaries, in the context of the annexation of Crimea, Russian support of separatist movements in Eastern Ukraine, and persecution of Ukrainian political prisoners in Russia. The sanctions include, in particular, an entrance ban, the suspension of financial transactions, freezing of assets and cancellation of licences.

In addition to this, Ukrainian law has set some specific restrictions for companies owned (wholly or partly) or controlled by Russian investors. Such companies may not hold licences to conduct certain trading activities (banking, insurance, stock exchange) and shall forfeit the existing licences; neither can they act as buyers in the course of a privatisation of state property.

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