GETTING THE DEAL THROUGH

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Casey Cogut
Simpson Thacher & Bartlett LLP

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Marketing manager (subscriptions)
Rachel Nurse
Subscriptions@GettingTheDealThrough.com

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Harry Phillips
Tim Beaver

Editor-in-chief
Callum Campbell

Publisher
Richard Davey

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CONTENTS

CONTENTS

Ukraine

Galyna Zagorodniuk and Dmytro Tkachenko

DLA Piper Ukraine

1 Types of transaction

How may businesses combine?

Mergers

In accordance with Ukrainian law, mergers may be performed in two ways: as a consolidation and as a joining. Both types of merger entail termination of at least one merging company by means of transfer of all its assets, rights and obligations to its legal successor.

Consolidation is a merger when two or more companies merge, creating a new one. In this case the companies that merge cease their legal existence and all their assets, rights and obligations are transferred to a new company established as a result of the merger.

Joining is a merger when one company joins another existing company. In this case a company, which is joining to the existing company, ceases its legal existence and all its assets, rights and obligations are transferred to the existing company.

Acquisitions

Mergers are rather rare in Ukraine and in most cases the parties prefer to combine business through acquisitions. Ukrainian legislation does not provide for a definition of 'acquisition'; however, in practice it means one company's gaining control of the shares or assets of another company. There are three common models of acquisition:

- acquisition of shares, where the buyer acquires control over the company together with all its assets, liabilities and obligations by means of acquisition of shares of this company;
- acquisition of assets, where only the assets and liabilities acquired are those that the buyer agrees to obtain and which are identified; and
- acquisition of debts, where, in accordance with the Law on Bankruptcy, the insolvency plan enables an exchange of the creditor's demands into the shares or assets of the target company (the debtor).

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

Th principal laws governing business combinations include the following:

- The Civil Code of Ukraine No. 435-IV of 16 January 2003;
- The Commercial Code of Ukraine No. 435-IV of 16 January 2003;
- The Law of Ukraine on Joint-Stock Companies No. 514-VI of 17 September 2008;
- The Law of Ukraine on Business Entities No. 1576-XII of 19 September 1991;
- The Law of Ukraine on State Registration of Legal Entities and Private Entrepreneurs No. 755-IV of 15 May 2003;
- The Law of Ukraine on Securities and Stock Market No. 3480-IV of 23 February 2006;
- The Law of Ukraine on Protection of Economic Competition No. 2210-III of 11 January 2001;
- The Law of Ukraine on Holding Companies in Ukraine No. 3528-IV of 15 March 2006;
- The Law of Ukraine on the National Depositary System and Electronic Circulation of Securities in Ukraine No. 710/97 of 10 December 1997;
- The Law of Ukraine on Banks and Banking Activity No. 2121-III of 7 December 2000; and
- The Law of Ukraine on Re-establishment of Debtor's Solvency and Declaring it Bankrupt No. 2343-XII dated 14 May 1992

3 Governing law

What law typically governs the transaction agreements?

Merger agreements are typically governed by Ukrainian laws and in case of business combinations of joint-stock companies, must include certain mandatory clauses provided for in the Law of Ukraine on Joint-Stock Companies.

Pursuant to established court practices the relations of the shareholders in respect of activity and corporate governance of Ukrainian legal entities may not be governed by any law other than Ukrainian law. Therefore, shareholders' agreements that are governed by a law other than Ukrainian law may be declared null and void by Ukrainian courts.

Share purchase agreements are typically governed either by Ukrainian law or English law. It should be noted, however, that Ukrainian laws do not expressly recognise certain concepts that are widely accepted in international corporate practice such as representations, warranties, and indemnities. Choice of law other than Ukrainian law is only available if there is a 'foreign' element in the transaction, for example parties to the agreement are located in different jurisdictions.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

The following filing may be required in connection with effecting business combinations:

- competition clearance by the Antimonopoly Committee of Ukraine;
- any form of business combination requires filing with the Unified State Register of Legal Entities;
- a listed company is required to make relevant filings with the stock exchanges;
- transactions involving issuance of shares must be filed with the National Commission for Securities and the Stock Market; and

- business combinations of banks require filing with the National Bank of Ukraine.

There is no state duty or similar transfer tax in Ukraine. In some cases filing fees must be paid in connection with the above filings. The amount of such fees is generally insignificant. For example, the amount of fees for competition clearance is about US$630 and the amount of fees for registration of the data in the Unified State Register of Legal Entities is about US$20.

Please also note that some transactions and documents must be notarised, which requires payment of a notary duty.

5 Information to be disclosed

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

In case of a merger of joint stock companies the following information must be disclosed: the date of the shareholders' decision on the merger; reasons for merger; date of shareholder's meeting as well as results of the voting that must specify the exact number of shares 'for' and 'against'; full name of the parties to the merger; terms and conditions of the merger; full name and address of the legal entity to be established; the value of parties' contributions to the charter capital of the legal entity to be established; and parties' shares in the charter capital of the legal entity to be established.

The information must be published on the official website of the National Commission for Securities and the Stock Market (www.stockmarket.gov.ua) before 10am on the day following the date of the shareholders' adopting a decision on the merger, and in the official media within five business days after the date the shareholders' adopting a decision on the merger.

In addition, the information must be submitted with the National Commission for Securities and the Stock Market within 10 business days after the date of the shareholders' adopting a decision on merger.

For limited liability companies, the decision of the participants in the merger must be registered with the Unified State Register of Legal Entities. Upon review of the decision, the state registrar enters into the Unified State Register of Legal Entities information on the dissolution of one or more companies as a result of the merger.

Acquisition of a participatory interest in a limited liability company must be registered in the Unified State Register of Legal Entities. Information on participants in a limited liability company may be obtained from the Unified State Register of Legal Entities by any third party.

Please also note that if the Antimonopoly Committee of Ukraine issues a positive decision, information on competition clearance is usually published on the official website of the Antimonopoly Committee of Ukraine in Ukrainian.

6 Disclosure of substantial shareholdings

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

Notification requirements for substantial shareholding apply only to joint-stock companies.

Anyone who intends to acquire shares that would ensure shareholding equal to or exceeding 10 per cent of the total number of outstanding shares is required to inform the joint-stock company about such intent at least 30 days before the date of acquisition of shares. In addition, the respective notification must be published in the official media, and filed with the National Commission on Securities and the Stock Market and every stock exchange on which shares of the joint-stock company are listed.

The information on owners of large shareholdings is publicly available in the online database of the National Commission for Securities and the Stock Market (www.stockmarket.gov.ua) in Ukrainian language.

7 Duties of directors and controlling shareholders

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

The directors owe a duty of loyalty to a company and in all cases must act reasonably and in the best interests of the company. In the context of a business combination, the members of the board of directors must provide to shareholders economic justification for the business combination as well as a list of methods that were used to evaluate the assets and determine the share-swap ratio.

Specific duties of the shareholders are usually set out in the charter of the company. In particular, it is possible to set out in the charter the duties of the controlling shareholder that are triggered by a business combination.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

A combination of companies must be approved by the shareholders of all companies participating in the business combination (both the acquiring and the acquired company).

If a shareholder dissents when asked to approve a merger, and if the business combination is approved by the requisite number of shareholders, the dissenting shareholders may demand that the company repurchase its shares at market value. The dissenting shareholders must file with the company the demand for repurchase of shares within 30 days after the shareholders' adopting a decision on merger. The company is required to repurchase shares within 30 days from the date of receipt of the shareholders' demand for repurchase.

Participants of limited liability companies and shareholders of private joint-stock companies may have, under the charter of the company, pre-emptive rights to purchase shares or participatory interest of the selling shareholder or participant. In practice, the sale of shares or participatory interest as well as the waiver of pre-emptive rights is approved at the meeting of shareholders or participants.

The participant of the limited liability company may withdraw from the company at any time and require repayment of the value of the assets of the company equal to participant's share in the charter capital of the company.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

Ukrainian laws do not provide for specific regulations that govern hostile takeovers. The only aspect of hostile takeovers that is regulated is the need for competition clearance for such transactions. In order to obtain competition clearance in Ukraine both the acquiring company and the target company must provide certain information and documents to the Ukrainian competition authorities. If the management of the target company that is subject to a hostile takeover refuses to volunteer such documents, the competition authorities may order that they do so.

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 company's ability to protect deals from third-party bidders?

Ukrainian laws enable parties to agree on any fine that may be payable in connection with the breach of the agreement. Though there is

no specific regulation governing issues of contractual fines in a business combination context, the participants of a business combination may provide fees in the agreement for break-up and reverse break-up. Please note that Ukrainian courts may decrease the amount of break-up and reverse break-up fees should they find that the amount of fees significantly exceeds suffered damages.

11 Government influence

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

The government does not have the authority to order companies not to effect a business combination. In the case of hostile takeovers, the Interagency Commission on Issues Related to Counteracting Unlawful Consolidations and Corporate Raiding was established by the cabinet of ministers to coordinate state agencies when takeovers are implemented in violation of Ukrainian law.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

Ukrainian law does not provide for specific regulations governing tender or exchange offers. In general, any such offers are made as an invitation to make offers to purchase shares and may be withdrawn at any time. Moreover, the company that intends to acquire shares through the tender or exchange offer may acquire fewer shares than was stated in the offer. Obtaining financing may be provided as a condition precedent to closing in the share purchase agreement.

13 Financing

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

In Ukraine, business combinations are usually funded using working capital of the acquiring company or borrowed funds. In case of use of borrowed funds, the merger or share purchase agreement must specifically state that the implementation of business combination is conditional on obtaining outside capital. Though the seller company is not required under the law to assist the acquiring company in obtaining financing to implement a business combination, it is possible to provide for such obligation in the merger or share purchase agreement.

14 Minority squeeze-out

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

Under Ukrainian laws minority shareholders cannot be squeezed 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 structured as an acquisition of shares in an offshore holding company. In this case the shareholders of the target company transfer shares to the offshore holding company and then obtain shares in the offshore holding company. There are no specific regulations that apply to acquiring companies in cross-border transactions.

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?

Joint-stock companies must inform their creditors in writing about shareholders' positive decision on a merger within 30 days from the date of the shareholders' decision of the last of the companies participating in the merger. Creditors of the company that will cease to exist after implementation of the merger within 20 days after receiving such notification may require early fulfilment of the company's obligations. The merger may not be effected until all the demands asserted by the company's creditors have been satisfied. In case of mergers of limited liability companies, creditors of the company that will cease to exist after implementation of merger must be personally notified about the merger and within two months from the date of publication may provide to the company a demand for early fulfilment of obligations.

17 Sector-specific rules

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

The effective Ukrainian legislation provides for specific rules applicable to mergers and acquisitions in specific sectors. In particular, there are certain restrictions with regard to companies recognised as monopolies, including natural monopolies. For example, certain restrictions are imposed by the Law of Ukraine on Electrical Energy Industry and the Law of Ukraine on Communication, etc. Also, special rules are established with regard to specific business sectors.

Banking

The activity of commercial banks in Ukraine is regulated by the Law of Ukraine on Banks and Banking, according to which the National Bank of Ukraine is entitled to regulate the activity of commercial banks. Any type of reorganisation of commercial banks, including mergers and acquisitions, is subject to approval by the National Bank of Ukraine.

Anyone who intends to increase charter capital of a bank or acquire shares in a bank that would ensure a shareholding equal to or exceeding 10, 25, 50 and 75 per cent or more shares in charter capital of the bank is required to inform the National Bank of Ukraine about such intent and provide certain supporting documents. The National Bank of Ukraine within three month of submission of notification and supporting documents may prohibit the acquisition of shares or increase of the charter capital of the bank. The acquisition of shares or an increase of charter capital may be carried out after expiry of a three-month term provided that no prohibition was imposed by the National Bank of Ukraine.

Media

The main laws regulating television and radio broadcasting are the Law of Ukraine on Television and Radio Broadcasting and the Law of Ukraine on Telecommunications. These laws provide for special rules as to the establishment and operation of TV and radio broadcasting organisations.

Only Ukrainian citizens, Ukrainian legal entities, the Verkhovna Rada and the president of Ukraine have the right to establish TV and radio broadcasting companies in Ukraine. Foreign legal entities and citizens of other states cannot establish TV and radio broadcasting companies in Ukraine. However, foreign investor may acquire shares of the existing broadcasting companies.

Printed media

Printed media companies can be established by Ukrainian and foreign citizens, as well as by Ukrainian and foreign companies. However, the share of foreign investors' participation in Ukrainian publishing houses is limited to 30 per cent. Neither individuals nor

Update and trends

The amount of investment in Ukraine as well as the number of M&A transactions has dropped significantly in recent years, except for in certain industries. In particular, in the past year we have seen significant consolidation in the banking and media sectors as well as in the oil and gas industry. In the banking sector, consolidation was primarily carried through purchase by Ukrainian investors of banks owned by foreign investors. Also, because of the cancellation or suspension of a large number of M&A transactions, parties are more active in employing such mechanisms as break-up fees and failure costs agreements.

The Ukrainian parliament is currently considering amendments to the law that would enable majority shareholders to squeeze out minority shareholders. In addition, the parliament is considering several drafts of the Law on Limited Liability Companies, which will significantly change the regulatory framework of Ukrainian limited liability companies. Adoption of the above amendments would likely lead to the reorganisation of many joint-stock companies into limited liability companies.

companies may establish or control more than 5 per cent of socio-political printed mass media in Ukraine.

18 Tax issues

What are the basic tax issues involved in business combinations?

Capital gains realised by Ukrainian companies on the sale of share are subject to corporate tax. The current corporate tax rate is 19 per cent and will be reduced to 16 per cent in 2014. Ukrainian laws do not provide for any type of participation exemption that may be applicable to capital gains. Capital gains realised by non-residents of Ukraine are subject to withholding tax at the rate of 15 per cent. The double taxation treaties entered into by Ukraine may provide for withholding tax exemption or a reduced rate of withholding tax. Acquisition of shares are not subject to VAT. Please note that acquisitions of Ukrainian companies are mostly structured as a purchase of shares in a foreign holding that owns shares of Ukrainian companies.

Transfer of the assets from the target company to an acquiring company in the case of a merger is exempt from VAT. Because of the ambiguity of Ukrainian tax legislation, a number of tax issues may arise upon transfer of tax assets such as accumulated input VAT, VAT refund, tax losses, limits for deduction of fixed assets repair and modernisation expenses, and deferred interest expenses. All these issues should be carefully considered on a case-by-case basis.

Shareholders of a target company that exchanged their shares for shares in the acquiring company carry over the tax basis of the target's shares to the received shares of the acquiring company.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

Under Ukrainian law, acquisition of a company does not terminate labour relations with employees. After merger, the surviving company becomes the employer of the employees of the merged companies.

20 Restructuring, bankruptcy or receivership

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

Under Ukrainian law companies that are in bankruptcy or similar restructuring may not be subject to a merger. Before effecting a merger, such companies must pay off or restructure their indebtedness and stop bankruptcy procedures.

Ukrainian laws also provide for the procedures of reorganisation that enable debtors to restore their solvency through the restructuring of debt and the sale of all or part of their assets to an investor in return for repayment of the debtor's restructured debt. An investor may also acquire a stake in the charter capital of the debtor in return for repayment of restructured debt.

The obligations of the investor as well as rights to a debtor's assets are set out in the reorganisation plan, which is developed by the reorganisation manager and approved by the committee of creditors.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

Legal entities, their officials and officers must also take part in preventing, detecting and stopping corrupt offences, restoring infringed rights or interests of individuals and legal entities and interests of the state.

In particular, if a corrupt offence is detected, or information is received pertaining to commission of such offence by employees of the respective legal entities or their structural subdivisions, officials and officers of legal entities or their structural subdivisions shall be obliged within the limits of their powers to apply measures to stop such offences and to immediately inform a public prosecutor, in writing, of commission of the offence.

Galyna Zagorodniuk **galyna.zagorodniuk@dlapiper.com**
Dmytro Tkachenko **dmytro.tkachenko@dlapiper.com**

77A Chervonoarmiyska Street
Kiev, 03150
Ukraine

Tel: +380 44 490 95 75
Fax: +380 44 490 95 77
www.dlapiper.com

Taking into account the above, it is highly advisable to carry out anti-corruption due diligence before effecting any business combination.

In addition, Ukrainian anti-corruption laws recognise commercial bribery as a criminal offence. In particular, offering, providing, or transfering to an officer of a private legal entity an illegal benefit for the performance or non-performance of actions, for the use of an entrusted authority in the interests of those who provide or transfer such benefit, or in the interests of third parties, shall be punishable by a fine of between 100 and 700 tax-exempt minimum wages, or by restriction of freedom for a term of up to four years, or by imprisonment for a term of up to four years.

Anti-corruption laws also provide that any decisions adopted as a result of the corruption offence may be recalled or cancelled by the relevant authority. In such case a legal entity may face an adverse impact on its activities. In particular, if such decision relates to business combination matters, the merger may be suspended or cancelled.

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