ICLG

The International Comparative Legal Guide to:

Mergers & Acquisitions 2018

12th Edition

A practical cross-border insight into mergers and acquisitions

Published by Global Legal Group, with contributions from:

Aabø-Evensen & Co Advokatfirma
Advokatfirman Törngren Magnell
Alexander & Partner
Ashurst Hong Kong
Astrea
Atanaskovic Hartnell
Bär & Karrer Ltd.
BBA
Bech-Bruun
Bonn Steichen & Partners
Corpus Legal Practitioners
Cyril Amarchand Mangaldas
Debarliev, Dameski & Kelesoska Attorneys at Law
Dittmar & Indrenius
E & G Economides LLC
ENSafrica
Ferraiuoli LLC
G. Elias & Co.
Gjika & Associates Attorneys at Law
HAVEL & PARTNERS s.r.o.
Houthoff
Indrawan Darsyah Santoso
Maples and Calder
Matheson
Mehrteab Leul & Associates Law Office
MJM Limited
Motta Fernandes Advogados
Nader, Hayaux & Goebel
Nishimura & Asahi
Nobles
Oppenheim Law Firm
Popovici Nițu Stoica & Asociații
Ramón y Cajal Abogados
SBH Law Office
Schoenherr
SEUM Law
Skadden, Arps, Slate, Meagher & Flom LLP
Škubla & Partneri s.r.o.
Slaughter and May
SZA Schilling, Zutt & Anschütz Rechtsanwaltsgesellschaft mbH
Ughi e Nunziante Studio Legale
VCI Legal
Villey Girard Grolleaud
Vukić and Partners
Wachtell, Lipton, Rosen & Katz
WBW Weremczuk Bobeł & Partners Attorneys at Law
WH Partners
Zhong Lun Law Firm

global legal group

global legal group

Contributing Editors
Scott Hopkins and Lorenzo Corte, Skadden, Arps, Slate, Meagher & Flom (UK) LLP

Sales Director
Florjan Osmani

Account Director
Oliver Smith

Sales Support Manager
Toni Hayward

Editor
Nicholas Catlin

Senior Editors
Suzie Levy
Caroline Collingwood

Chief Operating Officer
Dror Levy

Group Consulting Editor
Alan Falach

Publisher
Rory Smith

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd
March 2018

ISBN 978-1-911367-97-0
ISSN 1752-3362

Strategic Partners

General Chapters:

Country Question and Answer Chapters:

Continued Overleaf →

global legal group

Country Question and Answer Chapters:

Ukraine

Volodymyr Yakubovskyy

Nobles

Tatiana Iurkovska

1 Relevant Authorities and Legislation

1.1 What regulates M&A?

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

- the Commercial Code of Ukraine of 16 January 2003;
- the Civil Code of Ukraine of 16 January 2003;
- the Law of Ukraine 'On Companies' of 19 September 1991;
- the Law of Ukraine 'On Joint-Stock Companies' of 17 September 2008;
- the Law of Ukraine 'On Protection of Economic Competition' of 11 January 2001;
- the Law of Ukraine 'On State Registration of Legal Entities, Private Entrepreneurs and Non-governmental Organisations' of 15 May 2003;
- the Law of Ukraine 'On Securities and Stock Market' of 23 February 2006;
- the Law of Ukraine 'On Re-establishment of Debtor's Solvency or Declaring it Bankrupt' of 14 May 1992; and
- the Labour Code of Ukraine of 10 December 1971.

1.2 Are there different rules for different types of company?

The procedures and mechanisms for mergers and acquisitions do differ due to corporate laws (e.g. those governing the takeover of a limited liability company (LLC) or joint-stock company (JSC)) and sector-specific regulations (e.g. those covering the takeover of a bank, insurance company, etc.).

1.3 Are there special rules for foreign buyers?

Non-resident undertakings registered in offshore zones (as defined by the Cabinet of Ministers of Ukraine), as well as undertakings registered in the offending states (as defined by the Parliament of Ukraine) and undertakings whose shares are held at any level of ownership chain by the undertakings registered in the offending states, may be neither founders nor participants in local TV and radio broadcasting companies or software service providers.

In news media (information agencies), non-resident companies may not hold more than 35 per cent in the authorised capital of a Ukrainian information agency.

Additionally, a number of Russian-controlled businesses are currently subject to tough sanctions imposed in response to the annexation of Crimea and the backing of separatist forces in Eastern Ukraine. These sanctions cover, *inter alia*, the freezing of assets and a ban on financial transactions, including the repatriation of capital and dividends.

1.4 Are there any special sector-related rules?

Strategic industries

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

TV, radio, software service providers and news media (information agency).

Please see also question 1.3 above.

Banking and finance

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

As regards banks, the acquisition or increase of a substantial shareholding in a Ukrainian bank (10 per cent or more of the share capital or voting rights), as well as any reorganisation process (including merger) within a bank in Ukraine, requires approval from the National Bank of Ukraine (NBU). NBU also approves business reorganisation plans.

Approval from the National Commission for the Regulation of Financial Services Markets is also required in case of acquisition or increase in a substantial shareholding (10, 25, 50 and 75 per cent of the share capital or voting rights) in other financial institutions rendering financial services, e.g., insurance companies, leasing companies, investment funds, etc.

1.5 What are the principal sources of liability?

As a general rule, a legal entity (party to the transaction or a target) or its officials can be held responsible, *inter alia*, for violations of competition law (e.g. merger without prior merger clearance, if applicable), stock market and securities law (insider trading, market manipulation, misrepresentation, disclosure requirements, failure to obtain necessary regulatory approval, etc.).

The parties to the transaction may define any liability and penalty for breaking contractual or pre-contractual arrangements, as far as is practicable.

Further, Ukraine has adopted a concept of criminal liability for 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.

2 Mechanics of Acquisition

2.1 What alternative means of acquisition are there?

There are essentially four common forms of business combination in Ukraine. The respective legal schemes may be classified as follows:

- statutory mergers;
- share purchases;
- asset acquisitions (which also include a concept specific to Ukraine: the purchase of an integrated property complex); and
- debt-to-equity swaps.

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 which is the only one surviving the merger.

Share purchases

Given the complexity and long-lasting procedures associated with statutory mergers in Ukraine, the most common mechanism for business combinations is acquisition though share purchase. Share purchases may take a form of a direct purchase of shares or, as is quite often the case, a purchase of shares in a non-resident special-purpose vehicle holding control over a Ukrainian target company.

Asset acquisitions

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

Debt-to-equity swaps (DESs)

Due to imperfect legal regulation, DESs are not widespread in Ukraine. At the same time, Ukrainian law contemplates minimum legal requirements for DESs in LLCs. Therefore, the DES concept is more often used in LLCs compared to JSCs. As to JSCs, only at the end of 2016 was it allowed for a JSC to convert its debts into equity by way of an increase in share capital, and the right of claim became a valid method of payment for the newly issued shares of a JSC.

2.2 What advisers do the parties need?

The parties usually employ financial and legal advisers to study the compliance and good standing of the target company and its assets, as well as tax advisers to develop a tax-conscious solution for the acquisition. Other advisers (e.g. technical, construction, environmental, HR, etc.) are required on a case-by-case basis, depending on the type of the target's business.

2.3 How long does it take?

The timeline for completion of an M&A transaction depends primarily on the transaction structure, the organisational type of the target, and the necessity to obtain certain regulatory approvals.

In addition to the negotiations and due diligence/audit time expenditure (which can greatly vary depending on the complexity of the deal and the target), the duration of acquisition may also include the obtainment of merger and/or regulatory clearance, if applicable.

Before the actual acquisition, the parties must make sure that all legal requirements regarding disclosure of information (as described in questions 2.12, 4.3 and 5.3) and observance of pre-emptive rights of other shareholders or participants (as described in question 2.7) were duly performed.

Once transactional documentation is ready, the title to the shares or participatory interest is usually transferred (registered) within one working day.

If applicable, the regulatory approvals may take the following additional time (and shall be done prior to the closing of the deal):

- Merger clearance – 45 days (standard procedure Phase I) or 25 days (expedited procedure, as applicable).
- Approval of the NBU (in case of acquisition of a substantial shareholding of a bank) – three months.
- Approval of the National Commission on Financial Services Markets (in case of acquisition of a substantial shareholding in a financial institution) – one month.

2.4 What are the main hurdles?

In early 2014, the NBU imposed severe restrictions on cross-border currency transactions in order to mitigate the consequences of the country's political and financial crisis. They included a complete ban on dividend and investment repatriation abroad (e.g., by a decrease of the charter capital or a share sale/withdrawal from the entity) and on early loan repayment to non-resident lenders (with some exceptions).

The restrictions were partly lifted in 2016–17 due to the overall macro-economic stability achieved in Ukraine. However, the monthly amount of repatriated investments and dividends is limited to USD 5 million; the restriction of early loan repayments is also still in place.

2.5 How much flexibility is there over deal terms and price?

Price and deal terms are agreed at the discretion of the parties, except for mandatory regulations such as currency control and tax.

2.6 What differences are there between offering cash and other consideration?

Consideration and payment terms are agreed at the discretion of the parties. For non-cash considerations, an evaluation by a certified appraiser might be required.

2.7 Do the same terms have to be offered to all shareholders?

Yes, all target shareholders/participants should be treated equally in terms of enforcement of pre-emptive rights, access to information and consideration.

The shareholders in certain cases do have the right to buy out shares or participatory interest on the terms that are offered to a third party.

A shareholder of a private JSC shall notify other shareholders having the pre-emptive right to purchase shares, as to his or her intention to sell its shares. The company charter may set a notification period. The waiting period for exercising the said pre-emptive right may range from 20 calendar days to two months. A similar rule is applicable for LLCs, and the participants are generally entitled with their pre-emptive rights, in proportion to each participant's share.

If shares are to be purchased through an additional issue, the JSC has to make a notification thereon at least 30 days prior to its start. The waiting period for the existing shareholders to exercise their pre-emptive purchase right is set forth by the charter.

2.8 Are there obligations to purchase other classes of target securities?

There is no statutory obligation to do so.

2.9 Are there any limits on agreeing terms with employees?

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 in Ukraine.

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.

2.10 What role do employees, pension trustees and other stakeholders play?

The employees generally have no impact on the acquisition transaction. The employment issue arises in case of potential staff redundancy, change of essential employment conditions (e.g. remuneration, benefits and working time, etc.) or golden parachute payment. In such a case, the employer must observe certain statutory procedures, such as a notice period to notify redundant employees and state authorities, negotiate with the local trade union and, in certain instances (such as lay-offs), 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.

It is not common practice for pension trustees to play a role in acquisitions in Ukraine.

2.11 What documentation is needed?

Documents related to the merger are usually as follows: (a) a confidentiality (non-disclosure) agreement; and (b) a letter of intent, which shall contain basic terms regarding the proposed transaction. When the negotiations are finished, the parties sign the main (acquisition) agreement and supportive documentation – usually it is connected with collateral and protective mechanisms, employment of top management, disclosures and other related documentation.

Further, the parties taking part in the merger shall ensure compliance with their corporate procedures. Irrespective of the type of company, the minutes of the shareholders must be in order.

For LLCs, the amended charter reflecting the new participants should be registered with the State Registrar.

For JSCs, in case of an acquisition of a shareholding of 10 per cent or more (a substantial shareholding), a potential acquirer shall file prior written notice to the target and notify the National Securities Commission thereof, as well as all stock exchanges where the target JSC is listed, and announce it in the official print media.

In case of acquisition of the control shareholding in a JSC, the acquirer shall file notification on execution of the sale and purchase agreement (SPA) to the National Securities Commission and the target within one business day. Further, after the title to the controlling shareholding is registered, the acquirer shall file to the National Securities Commission information about the highest price at which it acquired the shares of the target during the 12 months preceding the date of acquisition. This is needed to determine the acquisition price for the remaining shareholders. After the acquisition price is defined, the acquirer shall make a public, irrevocable offer to all remaining shareholders to acquire ordinary unrestricted shares of the target.

2.12 Are there any special disclosure requirements?

Disclosure of ultimate beneficiaries

All companies are obliged to disclose their ultimate beneficial owners. To this end, an ultimate beneficial owner is considered an individual 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. However, this requirement does not extend to non-governmental organisations (NGOs), religious organisations, state-owned companies, government bodies, registered law societies, chambers of commerce and industry, etc.

Disclosure of substantial shareholders

JSCs are obliged to make public certain information on shareholders with a substantial shareholding (10 per cent or more, for both private and public JSCs).

Additionally, if an undertaking, whether jointly or individually, intends to acquire a shareholding that will result in holding directly or indirectly more than 10 per cent of the company's shares, it shall, no later than 30 days before the date of acquisition, submit a written notice of its intention to the target, to the National Securities Commission and to each stock exchange where the target's shares are listed (if applicable).

Disclosure of all participants

LLCs disclose their participants upon registration and acquisition of any further membership. Information regarding participants in LLCs is contained in the company's charter and can be found in the online Unified State Register of Legal Entities, Individual Entrepreneurs and NGOs, which is freely accessible at https://usr.minjust.gov.ua/ua/freesearch (in Ukrainian). It is possible to obtain information regarding identification data of the participant (name, address, identification code) and the amount of the equity share.

2.13 What are the key costs?

The costs of acquisition of participatory interest in an LLC will consist of notary fees (notarisation of signatures on the minutes of the general shareholders' meeting and the charter) and a statutory fee of UAH 480 (*ca.* €15).

The costs of acquisition of shares in a JSC will consist of the fee of the securities broker (execution of the share transfer) and custodian (serving the securities account).

Both the acquisition of a participatory interest in an LLC and shares in a JSC will require additional expenses for notarisation of document copies, apostille, translation, etc.

The official filing fee for merger notification of the Antimonipoly Committee of Ukraine (if appropriate) makes up UAH 20,400 (*ca.* €660).

2.14 What consents are needed?

For LLCs, Ukrainian law foresees the preemptive purchase right of the other participants and mandatory disclosure of all participants in the company's charter. Accordingly, amendments to the LLC charter (including those introducing new participants as a result of any SPAs) require the approval of the general meeting of participants (i.e., shall be approved by the participants having more than 50 per cent of all votes in the LLC).

Statutory mergers require the approval of both the general meeting of shareholders in a JSC and the general meeting of participants in an LLC.

2.15 What levels of approval or acceptance are needed?

Competition clearance with the Antimonopoly Committee of Ukraine (AMCU)

If a business combination (treated broadly as almost all possible types of change-in-control transaction) reaches the financial thresholds below, notification and formal approval of such a business combination by the AMCU is required. The thresholds mentioned are set forth in the 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.

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 1.4). As a side note, in practice, getting certain approvals can be a highly bureaucratic and formalistic process.

2.16 When does cash consideration need to be committed and available?

Ukrainian laws do not explicitly govern the issue of financing in M&A transactions. To this end, conditions of payment of cash consideration can be agreed between the parties at their discretion, considering the limitations for JSCs set forth below. In particular:

- an acquirer is not allowed to pay for the shares by undertaking obligations to provide some services;
- shares may not be paid by debt-issuable securities, the issuer of which is the acquirer;
- the placed shares must be fully paid before approval of the results of the share placement by the target JSC;
- if the property deposit is introduced as a payment for the shares, the value of such property should correspond to the market value determined in accordance with statutory procedures;
- a JSC is not allowed to grant a loan for an investor to acquire its shares or provide a guarantee for loans granted by a third party to acquire its shares; and
- the charter of the JSC may also set forth additional restrictions on the forms of payment of securities, except for a restriction or prohibition on paying for shares with monetary funds.

3 Friendly or Hostile

3.1 Is there a choice?

Ukrainian law does provide some limited regulation on unsolicited takeover bids. However, given that there are very few companies that are truly public (with disseminated ownership) and most companies are privately held, such types of transaction are extremely rare.

Generally, as in some other post-Soviet jurisdictions, hostile transactions in Ukraine have become rather associated with certain illegal corporate raiding schemes. Lately, however, Ukrainian laws have been updated to counteract these types of illegal transaction more effectively.

3.2 Are there rules about an approach to the target?

In Ukraine, there are no specific rules or statutory limitations with regard to a potential acquirer approaching the target. It is advisable to proceed with due regard to confidentiality and reasonableness.

3.3 How relevant is the target board?

The board members (directors) of both JSCs and LLCs must act in the best interests of the company.

In JSCs, board members (directors) 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 after such conflict arises.

Under the general prohibition, during takeovers of JSCs, board members (directors) are not allowed to take any measures to preclude takeover bids.

3.4 Does the choice affect process?

The acquisition mechanism generally remains the same; however, cooperation between the parties may ensure the prompt closing of the transaction.

4 Information

4.1 What information is available to a buyer?

The buyer can obtain various pieces of information regarding the companies (the target and other connected entities) online, for free or for a minor fee.

Information about a company in the Unified State Register of Legal Entities, Individual Entrepreneurs and NGOs that is available online includes:

- Name.
- Address.
- Identification code.

- Shareholders (excluding JSCs).
- Ultimate beneficial owners.
- Director and authorised officials.
- Main activities.
- Initial registration date.
- Data on ongoing liquidation/insolvency proceedings.
- Data on registration with state authorities (as a taxpayer, etc.).
- Indication as to open enforcement procedures.

Information in the Informational Database of the National Securities Commission that is available online includes (applicable only for JSCs):

- Registration data.
- Shareholders owning more than 10 per cent (5 per cent for public JSCs).
- Annual issuer reports (financial statements, information on corporate changes, etc.).
- News feed (management change, general shareholders' meeting time and agenda, other information that shall be published according to the law).

Information in the VAT-payer database that is available online includes:

- Date of registration as a VAT-payer.
- Indication about special VAT-payer status (for agricultural producers, etc.).

Information in the register of court cases that is available online includes:

- Full text of court rulings. Personal data on individuals (names, passport details and addresses) is anonymised.

Information in the Register on Real Estate Rights that is available online includes:

- Title and other property rights to a real estate object (including mortgages and other encumbrances).
- Identification data on the real estate object and its owner/user (including total area and description of the object).
- Date and grounds of rights registration (including reference details of purchase, mortgage, lease agreements or authority decisions, etc.).

Additionally, through a notary or the public service provider, the buyer can obtain an extract from the Register on Encumbrances of Movable Property, where the buyer can see currently existing encumbrances on the target's movable property that were registered in the Register.

4.2 Is negotiation confidential and is access restricted?

There is no statutory regulation as to confidentiality or access to negotiations.

4.3 When is an announcement required and what will become public?

There are special disclosure requirements that are applicable only to JSCs.

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

- change in shareholders who own 10 per cent or more voting shares (including as a result of a takeover) upon obtaining the respective notification from the depositary;
- decisions of the competent body of the JSC or the court on termination (including through a merger) after such decision has been approved; or
- change in officers (directors) of the JSC (including as a result of a takeover) after such a decision has been approved by the competent corporate body.

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

- decisions on the issue of shares for an amount exceeding 25 per cent of the share capital;
- decisions to repurchase its own shares;
- facts of listing or delisting of shares on the stock exchange;
- obtaining a loan or credit for an amount exceeding 25 per cent of the assets of the JSC;
- decisions of the JSC to reduce the share capital; and
- initiation of bankruptcy proceedings against the JSC, 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 National Securities Commission (http://stockmarket.gov.ua), publication of a statement in the official printed edition, publication on the company's own web page, and submission of the respective notification form to the National Securities Commission.

The disclosure must be made within the following terms:

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

4.4 What if the information is wrong or changes?

If any of the information disclosed by the target company, as mentioned in question 4.3, is incorrect, it shall disclose (publish) a correction in the same way and during the same period which is applicable to the respective category of information. If the information changes, the company shall disclose updated information in the manner and time period defined by the law.

In case of a deliberate disclosure of wrong information, or non-disclosure, the target company can be fined up to UAH 17,000 (*ca.* €550).

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

Shares in public JSCs can be bought outside the offer process without limitations.

Shares in private JSCs also can be bought outside the offer process, but with due regard to pre-emptive rights of all shareholders.

5.2 Can derivatives be bought outside the offer process?

Yes, derivatives can be bought outside the offer process. It is worth mentioning that legal regulation of derivatives in Ukraine is rather superficial.

5.3 What are the disclosure triggers for shares and derivatives stakebuilding before the offer and during the offer period?

If an undertaking intends, whether jointly or individually, to acquire a shareholding that will result in it holding directly or indirectly more than 10 per cent of the company's shares, it shall, no later than 30 days before the date of acquisition, submit a written notice of its intention to the target, to the National Securities Commission and to each stock exchange on which the target's shares are listed (if applicable).

Additionally, the new majority shareholder (owning more than 50 per cent of the shares) shall inform both the JSC and the regulatory authority, and also make a public announcement of (publish online) the facts of (i) concluding the share purchase agreement, and (ii) becoming the (majority) shareholder, within one day therefrom.

5.4 What are the limitations and consequences?

If someone purchases a controlling shareholding (i.e., more than 50 per cent of all the shares) in a JSC, such new majority shareholder (acting alone or with its affiliates) is obliged to offer to buy out the shares of the remaining minority shareholders.

Furthermore, during the acquisition of a controlling shareholding in a public JSC, the new majority shareholder will have to disclose the potential effects of such acquisition on employees and management of the JSC, as well as future plans.

Until the new majority shareholder has fulfilled all requirements of the buy-out procedure, the number of its votes on general shareholders' meetings is limited to 50 per cent (for public and private JSCs) or 75 per cent (only for public JSCs in case of a purchase of 75 per cent or more) of the JSC shares.

6 Deal Protection

6.1 Are break fees available?

There are no specific regulations with regard to break-up fees. Therefore, general commercial and civil law principles apply to this provision. Generally, there are no limitations on a company's ability to protect deals from third-party bidders. However, it is advisable for the parties to have a genuine intention to conclude a fair deal and act reasonably and in good faith, otherwise such deal can be declared null and void by a court.

6.2 Can the target agree not to shop the company or its assets?

Yes, such option is available.

6.3 Can the target agree to issue shares or sell assets?

It is possible to use any of the commitments mentioned above in the deal.

6.4 What commitments are available to tie up a deal?

The parties can use a great variety of means to secure the deal. The most common under civil law are the forfeit/penalty that is applied in case of a breach of the agreement, guarantee of a third party or a bank, pledge (security) and deposit (down payment).

7 Bidder Protection

7.1 What deal conditions are permitted and is their invocation restricted?

When drafting deal conditions, it is important to pay attention to antitrust regulations. Except for merger clearance, the bidder shall make sure that the deal conditions do not envisage provisions that can qualify as anticompetitive concerted actions. For example, certain restrictive covenants (e.g., seller's exit from the market upon closing) may require the approval of the Antimonopoly Committee of Ukraine.

7.2 What control does the bidder have over the target during the process?

The parties are free to choose any form of control over the target, with due regard to merger control requirements.

7.3 When does control pass to the bidder?

The parties are free to decide the moment of passing control to the bidder at any practicable time, with due regard to merger control requirements. Control is defined under Ukrainian competition law as decisive influence of one or several related undertakings over the commercial behaviour of another undertaking which is ensured directly or indirectly, *inter alia*, due to the availability of: (a) rights which ensure decisive influence over formation, voting results and decisions of governing bodies of an undertaking; (b) rights to conclude agreements/contracts/deeds, which allow the terms of commercial activity to be defined, mandatory instructions to be issued, or functions of governing bodies of an undertaking to be performed; (c) the imposition of obligations, including trade obligations/financial obligations/obligations on financial assistance; and (d) rights to take decisions or block decisions related to, *inter alia*, definition of the scope of investments.

7.4 How can the bidder get 100% control?

In LLCs and JSCs, it can be done through the acquisition of all participatory interests or shares. Additionally, the Ukrainian legislation was recently updated with a squeeze-out procedure. This is triggered if a dominant shareholding (i.e., 95 per cent of the shares or more) 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 5.4). Until the new dominant shareholder fulfils all requirements of the squeeze-out procedure, its number of votes on general shareholders' meetings shall be limited to 95 per cent minus one share of the JSC shares.

8 Target Defences

8.1 Does the board of the target have to publicise discussions?

There is no statutory obligation for the target's board to publicise discussions.

8.2 What can the target do to resist change of control?

The target usually does not resist change of control. It is possible only during hostile takeovers. As mentioned in question 3.1, hostile takeovers are extremely rare in Ukraine and tend to be viewed as connected with illegal corporate raiding schemes.

8.3 Is it a fair fight?

Unfortunately, fighting the raiding schemes in Ukraine usually requires the involvement of law enforcement and publicity.

9 Other Useful Facts

9.1 What are the major influences on the success of an acquisition?

There are no specific tools that may guarantee the success of an acquisition. Generally, the rules are simple: all the parties shall have a genuine intention to conclude a fair deal and act reasonably and in good faith. The parties shall avoid acting on the basis of any oral agreements. To minimise the risks of an unfair acquisition, the parties shall make all the agreements in writing, making all the essential conditions understandable. In addition, it is strongly advisable to draw up an optimal settlement and guarantee scheme, which should be included in the share purchase contract.

9.2 What happens if it fails?

Failure of the deal happens from time to time. It is important that the parties have agreed in advance on their obligations and responsibilities as to the deal's closing and compensation procedure in case of failure.

10 Updates

10.1 Please provide a summary of any relevant new law or practices in M&A in your jurisdiction.

Return of notarisation requirement

In October 2016, the Ukrainian Parliament reintroduced the requirement to notarise statutory documents of legal entities, any amendments thereto, in particular, pertaining to the change of shareholders, as well as respective shareholders' meeting resolutions submitted to state registrars. In the previous period, when this notarisation requirement had been abolished, statutory documents were often forged and this was misused for numerous 'raider attacks' (illegal takeovers) on Ukrainian companies. Currently, state registrars accept only documents properly certified by notaries; this arrangement is designed to reduce unlawful corporate raiding activities.

Tax changes

Another relevant change concerns the sphere of taxation; in particular, the ongoing reform of the tax office into a servicing rather than controlling agency, and the transformation in 2017 of tax reporting and communication with the tax office into an electronic rather than paper-based service.

In addition, the rules on the transfer of an accrued VAT credit in case of a business combination have been clarified. Such transfer of the VAT credit to a taxpayer's successor(s) shall occur in a reporting period immediately following the execution of a handover report (for merger, accession or transformation) or a division balance sheet (for division), provided that the indicated tax credit amount is confirmed by a tax audit.

Draft Law on Limited Liability Companies

During 2016–17, the competent government agencies and the legal community actively discussed the highly anticipated draft Law on Limited Liability Companies. Among the most crucial and long-expected changes for the statutory framework governing business combinations of limited liability companies are: the introduction of discretional participant agreements; the possibility to establish a supervisory board with independent members; and the introduction of a debt-to-equity conversion mechanism and a concept of significant and interested party transactions.

Improvement of corporate governance is on the way

Effective from 4 June 2017, the Ukrainian Parliament has passed Law No. 1983-VIII 'On Amending Certain Legislative Acts of Ukraine on Increasing the Level of Corporate Governance in Joint-Stock Companies', which was developed to upgrade the Ukrainian corporate regulations in line with the common standards applied in the Western corporate world. Among other changes, the new law alters the mandatory buy-out procedure and introduces new squeeze-out rights for majority shareholders of JSCs, as well as an escrow account as a contract arrangement previously unknown to Ukrainian law.

Volodymyr Yakubovskyy
Nobles
7/11 Khreshatyk St.
Kyiv, 01001
Ukraine

Tel: *+380 44 495 3080*
Email: *V.Yakubovskyy@nobles-law.com*
URL: *www.nobles-law.com*

Volodymyr Yakubovskyy is a partner at Nobles. Mr. Yakubovskyy's practice focuses on representing and advising international companies in mergers and acquisitions and other cross-border investment and financing matters with reference to Ukraine and other countries in the CIS. Mr. Yakubovskyy's areas of particular expertise include such industries as retail, e-commerce, telecommunications, IT, media, agriculture, pharmaceuticals, and financial/insurance institutions.

Mr. Yakubovskyy has an LL.M. in corporate and commercial law from the University of Cambridge (2010), an LL.M. in American and international business law from Boston University (2009) and degrees in law and international law from Lviv University (2005).

Mr. Yakubovskyy speaks Ukrainian, Russian, English and German.

Tatiana Iurkovska
Nobles
7/11 Khreshatyk St.
Kyiv, 01001
Ukraine

Tel: *+380 44 495 3080*
Email: *T.Iurkovska@nobles-law.com*
URL: *www.nobles-law.com*

Tatiana Iurkovska is a partner at Nobles. She has substantial experience in complex due diligence, drafting and negotiating agreements on cross-border mergers and acquisitions as well as obtaining respective regulatory approvals. Mrs. Iurkovska focuses on M&A projects, as well as providing consultancy to clients on corporate, employment, banking and competition law.

Mrs. Iurkovska graduated from King's College London and Kiev National Taras Shevchenko University.

Mrs. Iurkovska speaks Ukrainian, Russian and English.

NOBLES

Nobles is a leading full-service Ukrainian corporate law firm that advises public and private companies, banks, financial institutions, private equity firms, funds, investment banks, government entities and private high-net-worth individuals in multiple industrial sectors and practice areas of Ukrainian and international business law.

Current titles in the ICLG series include:

- Alternative Investment Funds
- Anti-Money Laundering
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Investigations
- Corporate Recovery & Insolvency
- Corporate Tax
- Cybersecurity
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Family Law
- Fintech
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Outsourcing
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Investment Funds
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks
- Vertical Agreements and Dominant Firms

glg global legal group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: info@glgroup.co.uk

www.iclg.com