



ICLG

The International Comparative Legal Guide to:

Mergers and Acquisitions 2015

9th Edition

A practical cross-border insight into mergers and acquisitions

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EDITORIAL

Welcome to the ninth edition of *The International Comparative Legal Guide to: Mergers & Acquisitions*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of mergers and acquisitions.

It is divided into two main sections:

Four general chapters. These are designed to provide readers with an overview of key issues affecting mergers and acquisitions, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in mergers and acquisitions in 55 jurisdictions.

All chapters are written by leading mergers and acquisitions lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Michael Hatchard of Skadden, Arps, Slate, Meagher & Flom (UK) LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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1 Relevant Authorities and Legislation

1.1 What regulates M&A?

Mergers and acquisitions in Ukraine are regulated by a number of legislative acts. Although elaborate regulation is rather scarce, the general rules are established by the following legislative acts: the Civil Code of Ukraine; the Commercial Code of Ukraine; the Law of Ukraine “On Business Entities”; the Law of Ukraine “On Joint-Stock Companies”; the Law of Ukraine “On State Registration of Legal Entities and Individual Entrepreneurs”; and the Law of Ukraine “On Protection of Economic Competition”. At the same time there is no special law on takeovers.

Certain specific rules are established in various areas.

1.2 Are there different rules for different types of company?

Ukrainian law provides for different types of companies. The most commonly used types are the limited liability company (the “LLC”) and the joint-stock company (the “JSC”). The law establishes different rules and procedures for the transfer of title to share(s) in the mentioned companies.

1.3 Are there special rules for foreign buyers?

Ukrainian law declares equal conditions for conduct of investment activities by Ukrainian and foreign investors.

However, in certain areas Ukrainian law establishes restrictions or thresholds for allowed foreign investments (see below).

1.4 Are there any special sector-related rules?

There are certain areas where foreign investments are prohibited. In particular, foreign investors having their place of registration in one of the offshore zones (listed by the Cabinet of Ministers of Ukraine in special regulations) cannot establish television and radio broadcasting companies in Ukraine.

In certain areas the law also provides a maximum shareholding threshold, e.g. foreign investors are not allowed to hold more than a 35% share in information agencies.

1.5 What are the principal sources of liability?

In the absence of the special law on takeovers, the liability of the parties to a transaction is regulated by the general rules of Ukrainian law (primarily the Civil, Commercial and Criminal Codes). Under certain circumstances, special rules would also apply. For example, the law establishes monetary sanctions for manipulations by a legal entity of the stock market (e.g. affecting the value of shares), using insider information for its own benefit, corrupt practices, etc.

2 Mechanics of Acquisition

2.1 What alternative means of acquisition are there?

Control over a company may be gained via acquisition of shares from existing shareholders or via acquisition of newly issued shares.

If the corporate structure of the company is overly complicated or has defects, the deal may be structured through acquisition of the company’s assets by either a newly established ‘clean’ company, or by one of the buyer’s existing entities.

Amalgamations are very rare in reality, although allowed by the law. Amalgamation procedure is excessively complicated and time-consuming.

2.2 What advisers do the parties need?

Acquisition of a company in Ukraine normally requires engagement of legal and financial advisers for the purpose of the target assessment, structuring and documenting the deal.

Depending on the target activities (mining, agribusiness, real estate development, etc.) the parties may want to hire specialised advisors for different technological audits (e.g. taking samples of soil) or properties’ assessment.

Where transactional documents are governed by foreign law, foreign legal advisers should also be hired. Large-scale M&A projects are often managed by investment consultants.

2.3 How long does it take?

The duration of the acquisition procedure normally depends on: (1) the size of the target (having effect on the time required for due diligence of the target); (2) the agreed transaction structure (including possible pre-sale restructuring); and (3) the necessity

to obtain all applicable regulatory approvals (from the National Bank of Ukraine, National Commission for Regulation of Financial Services Markets, Antimonopoly Committee of Ukraine, etc.).

In case of friendly and uncomplicated acquisition, the transaction can be closed within one to six months.

2.4 What are the main hurdles?

Among the main hurdles are: the necessity of obtaining the relevant regulatory approvals (including consent for concentration from the Antimonopoly Committee of Ukraine); imperfect and still evolving corporate law; corporate conflicts; and various limitations from time to time introduced by the regulator.

For example, as of the date of this publication, any payments in foreign currency for shares in Ukrainian LLCs are temporarily prohibited by the National Bank of Ukraine (the “NBU”). This temporary measure leads to additional transaction pre-structuring exercise.

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

Ukrainian law allows freedom of agreement to parties to a transaction. However, where transactional instruments are governed by foreign law, the enforceability of certain provisions thereof is often questionable, if not impossible in Ukraine in relation to Ukrainian targets (e.g. warranties, repurchase options, etc.).

Furthermore, as indicated under question 2.4 above, certain currency control limitations affect the deal terms in Ukraine.

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

Cash is the most frequently used type of consideration, if not the only. There is no common practice of use of other types of consideration.

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

Acquisition of shares from shareholders is usually conducted as over-the-counter deals. The price is negotiated between the parties at their own discretion. In certain cases, the purchaser must offer other shareholders to purchase their shares.

In particular, a person or a company having acquired a 50% or more share in a JSC (irrespective of whether it is listed or not) must, within 20 days after acquisition, offer to purchase other shareholders' shares at a price not lower than market price. The way of market price determination depends on whether the shares of the target are circulated on the stock exchange.

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

Ukrainian law does not establish an obligation to purchase other classes of target shares.

2.9 Are there any limits on agreeing terms with employees?

According to Ukrainian law, employees of the target are not consulted or notified in the acquisition process.

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

Ukrainian law does not provide for any role of employees or any other stakeholders in the process of company acquisition. Moreover, the “stakeholders’ theory” as it exists in Western literature is unknown to Ukrainian law.

However, according to Ukrainian labour law, in case of a change of owner of the company, the collective bargaining agreement shall remain in force only for a period of no more than one year. Within this period, the parties to the collective bargaining agreement should start negotiations in order to renew or amend such agreement. Collective bargaining agreements most often exist at large industrial enterprises, with many employees organised into unions.

Where loan agreements concluded by the target contain “change of control” clauses, acquisition of the company may trigger default under such loan agreements. As a matter of practice, waivers from creditors are normally obtained in such case.

2.11 What documentation is needed?

Apart from the share sale-purchase agreement, the parties may enter into other agreements and execute other documents depending on the structure and specifics of the transaction, namely, share blocking agreement, escrow agreement, security documents, etc. At the same time, Ukrainian law does not recognise escrow agreements. Therefore, they are most often concluded with foreign escrow agents and under foreign law. Sometimes the parties may achieve arrangements analogous to escrow with Ukrainian banks.

Depending on the type of the target company, the parties may require execution of case-specific corporate resolutions (e.g., minutes of the shareholders’ general meetings, amendments to the charters) and technical transfer documents in order to register the change of the shareholders in the relevant registration system (i.e., instructions to the depositary institution, application to the state registrar).

2.12 Are there any special disclosure requirements?

Generally, Ukrainian law does not require disclosure of the negotiations or the fact of intended acquisition. The only exception is the acquisition of a share in the JSC that would result in holding 10% or more shares in the company. An individual or a company intending to acquire such share shall, not later than 30 days prior to acquisition, notify the target about such intended acquisition and publicly disclose its acquisition intention. The disclosure is made by means of submission of a notice to the National Securities and Stock Market Commission, the stock exchange where the shares of the target are listed (if applicable), and publication in official printed media.

2.13 What are the key costs?

As a matter of practice, the parties bear the costs of legal services, financial audit, technical audit, appraisers’ fees, state registration duties and duties for obtaining regulatory approvals (if required).

2.14 What consents are needed?

An M&A transaction may require the following regulatory consents and approvals.

Merger clearance

Concentrations require prior consent of Antimonopoly Committee of Ukraine if either the financial or market thresholds are met by the parties thereto:

Financial thresholds:

- (1) the aggregate worldwide value of assets or sales for all parties to the transaction, including their related-by-control persons (i.e., total assets or sales of both the purchaser and the target together with their related persons), exceeds EUR 12 million; and
- (2) the aggregate worldwide value of assets or sales for each of at least two parties to the transaction, including their related-by-control persons (i.e., of each the purchaser and its related persons on the one hand, and the target and its related persons on the other), exceeds EUR 1 million; and
- (3) the value of assets or sales in Ukraine of at least one party to the transaction, including its related-by-control persons (i.e., purchaser and its related persons, or target and its related persons), exceeds EUR 1 million.

Market share thresholds:

If the market share of any party, or combined market share of all parties to the transaction, including their related-by-control persons, on any product market, exceeds 35 per cent, and the transaction takes place on this or an adjacent product market.

Area specific consents

Direct or indirect acquisition of 10%, 25%, 50%, 75% or more share in a bank requires the consent of the NBU. The notification shall be filed no later than three months before the acquisition and supplemented with a set of documents. The NBU has three months to review and consider the submitted documents and, if no prohibition is issued, the acquisition is deemed approved.

Direct or indirect acquisition of more than a 10% share in the non-banking financial institution must be approved by the National Commission for Regulation of Financial Services Markets or the National Securities and Stock Market Commission, depending on the area of the target company's activities.

2.15 What levels of approval or acceptance are needed?

In case of a JSC, no shareholders' approval of the transaction is required. However, in charters of private JSC as well as LLCs, one may find provisions on pre-emptive rights of the shareholders to acquire the share from the selling shareholder.

Furthermore in LLCs, change of the charter as a result of a change of the shareholders needs approval by shareholders holding more than 50% of the total votes.

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

Ukrainian law does not set forth any requirement to confirm the availability of funds. Consideration settlement procedure is agreed by the parties in the relevant share sale-purchase agreement.

3 Friendly or Hostile

3.1 Is there a choice?

In the absence of the special law on takeovers, the concept of friendly or hostile takeover is unknown to Ukrainian law. In case of

a company's acquisition there is no need for management's approval of such acquisition, nor any cooperation in that respect.

3.2 Are there rules about an approach to the target?

Usually the purchaser approaches the shareholder with the offer to buy shares. There is no need or requirement to approach the target company. The notice on the planned acquisition is given to the target only under circumstances described in question 2.12.

3.3 How relevant is the target board?

The target board does not take part in the acquisition process.

3.4 Does the choice affect process?

There is no distinction between friendly and hostile takeovers under Ukrainian law.

4 Information

4.1 What information is available to a buyer?

Ukrainian law does not establish the scope of information to be made available to a buyer. The scope of the buyer's due diligence is agreed by the parties.

4.2 Is negotiation confidential and is access restricted?

As a matter of practice the parties prefer to keep negotiations confidential. Ukrainian law does not establish rules on confidentiality in this respect.

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

The only announcement required by Ukrainian law is on contemplated acquisition of a share in a JSC that may result in ownership of 10% or more shares in the JSC (described in question 2.12). Such announcement contains information on the number, type and/or class of shares already owned by the buyer, and the number of shares such buyer plans to acquire.

4.4 What if the information is wrong or changes?

Ukrainian law does not require updating the information in the announcement described in question 4.3 above. At the same time, Ukrainian law provides for monetary sanctions for submission of false information to the National Securities and Stock Market Commission.

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

The buyer may be in the process of acquisition of shares from several shareholders at the same time. Ukrainian law does not provide restrictions in this respect as long as the buyer complies with requirements for obtaining relevant approvals, consents and disclosures.

5.2 Can derivatives be bought outside the offer process?

The legislation on derivatives in Ukraine is quite poor and derivative transactions are performed in only very limited instances.

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

Please see questions 2.12 and 4.3.

5.4 What are the limitations and consequences?

Ukrainian law does not provide for any limitations or consequences of accumulation shareholding outside the general bid process.

6 Deal Protection

6.1 Are break fees available?

The parties may agree to break fees in the sale-purchase agreements.

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

This option is not available under Ukrainian law.

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

Under Ukrainian law the target's consent is not required for acquisition by one or another buyer.

6.4 What commitments are available to tie up a deal?

Conclusion of a preliminary agreement setting out the material terms of a future deal is the only option available under Ukrainian law to bind the parties. The term of such preliminary agreement, however, is limited to one year only.

The target has no involvement in this arrangement.

7 Bidder Protection

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

Ukrainian law does not contain any specific regulations as to the conditions of the offer, and they are normally worded at the discretion of the buyer.

At the same time, as described in question 2.7, in case of acquisition of 50% or more shares in the JSC, the buyer shall offer other shareholders of the target the chance to acquire their shares. Such offer should include the following information and conditions:

- information on the buyer, the number, type and/or class of shares acquired;
- the price and the way of its determination;
- the terms for the offer acceptance; and
- the order of price payment.

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

The buyer does not enjoy control over the target before transfer of the title to the shares.

7.3 When does control pass to the bidder?

If the target is a JSC, the control is transferred together with the title, i.e. from the moment of receipt of shares at the buyer's securities account opened with a depository institution. If the target is an LLC, the control is transferred after the state registration of the buyer as a shareholder in the state register. At the same time, the parties may agree on the particular moment of transfer of title to share (prior to registration).

7.4 How can the bidder get 100% control?

The only way to obtain 100% control is to acquire 100% shareholding. Currently, Ukrainian law does not contain any rules for squeeze-outs – although there is a broad discussion on this topic among corporate law experts and a number of draft laws have already been submitted to the Ukrainian Parliament to this effect.

8 Target Defences

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

No publication of discussions is required.

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

According to the law, the JSC where essential shareholding (i.e. 10% or more shares) is acquired shall not prevent such acquisition. However, the target may file a claim to court if acquisition is performed in violation of law.

8.3 Is it a fair fight?

Ukrainian law does not set out any rules in this respect.

9 Other Useful Facts

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

The acquisition may be successfully completed once all the appropriate regulatory approvals are issued.

9.2 What happens if it fails?

If the acquisition fails the target may be sold to another buyer, unless the parties have agreed to make further efforts to obtain regulatory consents, amend transaction documents, etc. No liability should attach to the parties in case of a failed acquisition under Ukrainian law, unless the transaction is predated by a preliminary agreement which has binding character for the parties.

10 Updates

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

- On 14 October 2014, the Ukrainian Parliament adopted the Law of Ukraine "On Amending Certain Laws of Ukraine Regarding the Determination of Ultimate Beneficiaries of Legal Entities and Public Officials" that entered into force on 25 November 2014. Ukrainian legal entities have become obligated to disclose information on their ultimate beneficiaries to the state registrar. The "ultimate beneficiaries" are individuals capable of exercising direct or indirect decisive influence on the management or business activities of a legal entity, regardless of the establishment of formal control, including by means of direct or indirect ownership of 25% or more share in a legal entity. Agents, nominal holders (nominal shareholders) or intermediaries holding relevant rights are expressly excluded. The information on ultimate beneficiaries must be disclosed to the state registrar during the initial registration of a legal entity and in the event of a change in ultimate beneficiaries. At the same time, all other legal entities must submit information on their ultimate beneficiaries to the state registrar by 25 May 2015. The law also requires disclosure of information on any changes in the holders of substantial interest in a legal entity (direct or indirect holding of 10% or more shares).
- On 13 January 2015 the Ukrainian Parliament adopted changes to the Law of Ukraine "On Joint-Stock Companies", reducing the quorum for general meetings of shareholders in JSCs to "more than 50%" (instead of "not less than 60%"). This means that the general meeting of shareholders shall be quorate if the shareholders holding in aggregate more than 50% of the voting shares (50%+1) are present at such meeting. For JSCs where the state holds a share, these changes come into force after promulgation. For all other JSCs the changes shall take effect on 1 January 2016.

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Maria is recommended for Corporate and M&A by Chambers Europe and Chambers Global 2014. Clients say: "She has well-established communication skills. She understands our thinking and approach, and could translate our desires into the local business environment."

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