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Editor
Mark Zerdin

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THE LIFE SCIENCES LAW REVIEW

THE MERGER CONTROL REVIEW

THE MERGERS AND ACQUISITIONS REVIEW

THE MINING LAW REVIEW

THE OIL AND GAS LAW REVIEW

THE PATENT LITIGATION LAW REVIEW

THE PRIVACY, DATA PROTECTION AND CYBERSECURITY LAW REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE PRIVATE EQUITY REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE PRODUCT REGULATION AND LIABILITY REVIEW

THE PROFESSIONAL NEGLIGENCE LAW REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

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CONTENTS

PREFACE

Despite a slight decrease in overall activity compared with 2016, 2017 was a strong year for global M&A activity as, for the fourth consecutive year, global deal-making activity exceeded US$3 trillion with announced transaction volumes reaching US$3.7 trillion. Even though 2017 did not replicate the record-breaking number of mega-deals in 2015 nor the high volume seen in 2016, market participants in a number of sectors took advantage of continued access to cheap capital globally to engage in M&A activity.

The United States remained the most active region, although aggregate deal value decreased by 16 per cent year on year. However, deal volume surged with a record 12,400 individual deals, largely due to an increase in transactions with a value of less than US$1 billion. The relative decline in mega-deals in 2017 is largely attributable to continued regulatory uncertainty, particularly in the United States, where President Donald Trump's electoral rhetoric on antitrust has led to an increase in scrutiny for M&A deals. In Europe, however, continuing uncertainty arising out of the stuttering progress in the Brexit negotiations and a number of significant elections within the European Union did little to halt the momentum of the M&A market as aggregate deal value in Europe increased by 12.1 per cent in 2017 to reach a post-financial crisis high of more than €830 billion. Notably, the industrials and chemicals M&A sector flourished, with record high aggregate deal value and deal volume. Chinese outbound M&A was limited during 2017 by both a new capital-controls regime and increased scrutiny from the US and European governments.

On the back of tax reform in the United States and encouraging economic growth in Europe, the first quarter of 2018 has displayed record-breaking deal-making activity. However, global political uncertainty presents a threat to global M&A in 2018. Although there were positive signs from the European M&A market in 2017 and Europe registered the largest year-on-year increase in deal volume in the first quarter of 2018, the rise of anti-EU populist parties threatens to derail the buoyant global M&A market. Notably, the election of an anti-EU populist government in Italy, formed from a coalition of the Five Star Movement and the League, threatens to unnerve foreign investors and increase uncertainty about the integrity of the eurozone.

In addition, President Trump's imposition of tariffs and protectionist instincts have raised concerns about the possibility of a global trade war. It is hoped that a resolution to Brexit-related uncertainty and a settling of trade worries will foster an environment in which markets can thrive. All that being said, markets have shown during the past two years that despite an ever-evolving geopolitical landscape, there are numerous opportunities for those market participants who are keen to pursue them.

I would like to thank the contributors for their support in producing the 12th edition of *The Mergers & Acquisitions Review*. I hope the commentary in the following 50 chapters will provide a richer understanding of the shape of the global markets, and the challenges and opportunities facing market participants.

Mark Zerdin
Slaughter and May, London
July 2018

Chapter 45

UKRAINE

Viacheslav Yakymchuk and Olha Demianiuk[1]

I OVERVIEW OF M&A ACTIVITY

Ukraine has been experiencing adverse economic and geopolitical conditions since 2014, which have had a negative effect on overall M&A activity in the country. In 2016, the Ukrainian M&A market continued to be greatly affected by Ukraine's macroeconomics and the conflict in the east of Ukraine, which reduced Ukraine's attractiveness for foreign investors. As a result, M&A activity dropped in terms of volume and value of deals, and the majority of transactions that have closed in recent years were mainly of a distressed nature. Following recent economic and political stabilisation, deal activity significantly picked up in 2016. Starting from 2017, the market has shown signs of gradual recovery after having past the worst of the downturn.

A significant portion of recent M&A activity has been concentrated in Ukraine's agricultural sector, which was the sector most resilient to the crisis. It has been partially driven by large Ukrainian agricultural companies that, after many years, have been able to again access the world's capital markets through the issuance of eurobonds. These companies have used eurobond proceeds to finance outbound investments and to build up of their land banks though the acquisition of smaller agricultural enterprises. At the same time, the world's largest agricultural processing companies have been divesting their non-core assets and actively investing in Ukraine ports' infrastructure by building or acquiring grain terminals for the export of their products. There has been a lot of M&A activity involving land banks, processing and infrastructure facilities.

In 2016 and 2017, the domestic financial market saw a substantial remapping due to the continued clearing up by the National Bank of Ukraine of failing banks that have been hard hit by non-performing loans. As a result, many recent M&A deals in Ukraine involved some element of distress: either Ukrainian banks were required to clear up their balance sheets and sell their assets with great discounts; or foreign investors, in particular in the banking sector, were exiting the Ukrainian market to concentrate on their core markets, and were selling their Ukrainian subsidiaries at discounted prices to local investors.

In the energy sector, DTEK group, owned by the Ukrainian business people, consolidated its stakes in Ukrainian energy companies by buying out the minority stakes from the State Property Fund of Ukraine through an action process in 2017. Foreign investors have also shown increased interest in investing in Ukraine's oil and gas sector through acquisition of an equity interest in a company awarded the production sharing agreement.

1 Viacheslav Yakymchuk and Olha Demianiuk are partners at Baker McKenzie.

Another trend that has continued during the past few years is the exit of Russian companies from Ukraine due to Western sanctions imposed on Russia in relation to Ukraine and for political reasons. In most such cases, the buyers are local Ukrainian investors. At the same time Asian investors, in particular from China, are currently actively exploring investing into various Ukrainian industries, mainly in the agricultural and renewable energy sectors.

The renewable energy sector offers opportunities for high-growth investment. To stimulate the operation and development of renewable energy sources in Ukraine, a 'green' tariff, or special feed-in tariff as this may be known in other jurisdictions, was introduced in 2009. The feed-in tariff for green projects in Ukraine is one of the highest in the world, which makes investment into this sector very attractive. With numerous green energy projects now launched and operating in Ukraine, there are many opportunities open for high-growth investment into the country's green energy sector, where the tariff is guaranteed until 2030.

There has also been a rise in M&A activity in technology, media and telecoms. Ukraine is world-renowned for its IT outsourcing industry, and last year there was an increase in acquisitions by foreign investors in this sector.

With healthcare remaining the most active sector in M&A globally, we have seen increasing M&A activity in healthcare due to the consolidation of the local market and large local pharmaceutical companies seeking outbound investments, as well as increased M&A activity and investments in healthcare facilities. The positive outlook on the ongoing healthcare reform in Ukraine has triggered investment into private healthcare hospitals.

A lot of M&A activity is currently ongoing in the retail sector. One of the largest retail supermarket chains in Ukraine has sold its five supermarkets in Ukraine in non-core markets.

Ukraine's private equity industry has also seen recovery, with several Ukrainian private equity funds announcing new investments from international financial institutions like EBRD, IFC and OPIC. While some private equity funds with a focus on Ukraine have been actively fundraising in order to explore distress opportunities, and to acquire new stakes or build up their stakes in existing portfolio companies, other private equity funds with a focus on other markets have been seeking to exit Ukraine at any cost just because they have stayed in the country for too long and their Ukrainian investments have exceeded their normal investment life cycle.

The government also planned to play an active role in the M&A market by scheduling for 2016 the privatisation of several large state enterprises, including Ukraine's largest producer of nitrogen fertiliser, the state-owned Odessa Portside Plant, referred by many as the crown jewel of Ukraine's privatisation. Unfortunately, both attempts to auction off the Plant failed to attract any bids from strategic investors. Many investors were deterred by risks and scandals surrounding the Plant. The government, however, cited bad market conditions to explain the failure. For 2018, the State Property Fund has announced plans to privatise nine regional energy distribution companies and four heat-and-power plants, including Centerenergo. Turboatom, one the world's biggest manufacturers of steam turbines for power plants, was included in the privatisation plan for 2017 to 2020. Moreover, on 7 March 2018, the new privatisation law became effective, which simplifies and clarifies the procedures applicable to the sale of state and municipal property and improves the privatisation process. If the privatisation programme is implemented, it should boost M&A activity in Ukraine.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

The Civil Code,[2] the Commercial Code,[3] the Company Law,[4] the Limited and Additional Liability Companies Law (the Law on LLCs),[5] the Joint-Stock Company Law (the JSC Law),[6] the Law on the Securities Law[7] and the Law on State Registration[8] constitute the legal framework for M&A in Ukraine. The merger control rules and merger notification thresholds are set out in the Competition Law.[9]

A corporate merger or an acquisition involving a JSC would also trigger the application of the Depository System Law[10] and the Securities Market Law.[11] Moreover, there are a number of additional rules and principles that are to be taken into account when preparing or conducting an acquisition of a JSC, such as:

a the rules relating to the disclosure of significant shareholdings in JSCs and ultimate beneficial owners;
b the rules relating to insider dealing;
c the rules relating to the public offer of securities and the admission to trading of these securities on a regulated market; and
d the general rules on the supervision of and control over the financial markets.

The Securities Commission[12] supervises compliance with the takeover and JSC-specific regulations.

At the same time, JSCs have become less popular as a vehicle for conducting business activities in Ukraine. As of 1 May 2018, only 14,597 JSCs were registered in Ukraine according to the official statistics. In contrast, the statistics show that there were 590,957 companies in the form of limited liability companies (LLCs) in Ukraine on 1 May 2018, which is the most common vehicle for conducting business activities in Ukraine. Legal entities in Ukraine may also be established in the form of a general partnership, a limited partnership and an additional liability company.

Acquisitions of businesses and companies are usually carried out through the purchase of the participatory interests of an LLC or through the acquisition of the shares of a JSC. The majority of M&A deals are privately negotiated deals, as Ukrainian companies usually have one or several significant shareholders. JSCs may be 'public' or 'private': the shares of a public JSC may be both privately and publicly placed, whereas the shares of a private JSC are privately placed among its shareholders. Asset acquisitions are also common, but they are technically more burdensome and time-consuming, and involve the imposition of VAT.

2 The Civil Code of Ukraine, adopted on 16 January 2003, effective from 1 January 2004.
3 The Commercial Code of Ukraine, adopted on 16 January 2003, effective from 1 January 2004.
4 Law of Ukraine No. 1576-XII 'On Companies', dated 19 September 1991.
5 Law of Ukraine No. 2275-VIII 'On Limited and Additional Liability Companies', dated 6 February 2018.
6 Law of Ukraine No. 514-VI 'On Joint-Stock Companies', dated 17 September 2008.
7 Law of Ukraine No. 3480-IV 'On Securities and Stock Market', dated 23 February 2006.
8 Law of Ukraine No. 755-IV 'On the State Registration of Legal Entities, Individual Entrepreneurs and Public Organisations', dated 15 May 2003.
9 Law of Ukraine No. 2210-III 'On Protection of Economic Competition', dated 11 January 2001.
10 Law of Ukraine No. 5178-VI 'On Depository System of Ukraine', dated 6 July 2012.
11 Law of Ukraine No. 448/96-VR 'On State Regulation of the Securities Market in Ukraine', dated 30 October 1996.
12 The National Securities and Stock Market Commission of Ukraine.

Because of the mandatory provisions of Ukrainian law and an imperfect court system, shareholders and participants in Ukrainian companies have traditionally preferred to set up holding companies in foreign jurisdictions such as Cyprus or the Netherlands, and to choose foreign law (mainly English) as the governing law of the transaction documents. While recent developments in corporate and takeover law are intended to increase the attractiveness of structuring M&A deals in Ukraine and expose them to Ukrainian law, we do not expect a major change in deal structuring in the near future. In those cases where an investment has already been structured as a joint venture on the Ukrainian level, shareholders may choose to benefit from the new legislation and conclude Ukrainian law-governed shareholders' agreements.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

The corporate and takeover laws in Ukraine have been significantly amended between 2016 and 2018 in the course of the ongoing corporate reform.

i New takeover rules for JSCs and escrow accounts, and other important changes

On 23 March 2017, Parliament approved important amendments to Ukraine's corporate laws regarding the improvement of corporate governance of JSCs (the Corporate Governance Law),[13] which became effective on 4 June 2017. The new takeover rules, which are based on EU Directive 2004/25/EC of 21 April 2004 on takeover bids, changed the rules for the acquisition of controlling stakes, and introduced the concepts of 'squeeze-out' and 'sell-out'. The amendments also increased the disclosure requirements and thresholds for approval of interested party transactions.

Investors and shareholders should consider the new takeover rules when structuring M&A transactions that may result in the direct or indirect acquisition of shares in Ukrainian JSCs (even if such JSCs are not the direct acquisition targets). From now on, the direct or indirect acquisition of shares in a JSC is subject to stricter regulation, including:

a disclosing information on acquiring different stakes (for public JSCs: 5 per cent and more, 50 per cent and more, 75 per cent and more, 95 per cent and more; for private JSCs: 10 per cent and more, 50 per cent and more, 95 per cent and more);

b disclosing information on the highest acquisition price for controlling stakes (50 per cent plus one share, 75 per cent and more, 95 per cent and more);

c complying with the procedure for submitting other notices on acquisitions of shares;

d complying with the obligation to make a mandatory bid to the remaining shareholders to purchase their shares at a fair price in cases of acquisition of the controlling stakes (50 per cent plus one share, 75 per cent and more), including the timing of the irrevocable mandatory bid and the formula for determining the fair price (i.e., the price to be paid by the majority shareholder for the shares of the minority shareholder);

e squeeze-out: that is, the right of the dominant stakeholder (95 per cent and more) to require the holders of the remaining shares to sell him or her their shares; and

f sell-out: that is, the right of minority shareholders to require the dominant stakeholder to buy their shares at a fair price.

13 Law of Ukraine No. 1983-III 'On Amendments to Certain Legislation of Ukraine Regarding Improvement of Corporate Governance of Joint-Stock Companies', dated 23 March 2017.

The long-awaited squeeze-out procedure entitles a shareholder that acquired the dominant controlling stake of 95 per cent and more of shares to require the holders of the remaining shares to sell him or her their shares within 90 days following the date of disclosure of the information on the acquisition of the shares. The dominant stakeholder intending to exercise its right to squeeze-out should first comply with the mandatory bid procedure. The price for the mandatory purchase of shares of minority shareholders should be determined according to the formula set out in the Corporate Governance Law. The Corporate Governance Law provides for a two-year transitional period until 4 June 2019 during which the existing dominant stakeholders (stakeholders acting in concert) may exercise their right to squeeze-out according to the terms and conditions set out in the transitional provisions.

An important highlight of the Corporate Governance Law is the introduction of the concept of escrow accounts into Ukrainian law. Escrow accounts are a commonly used instrument for securing payments among parties. Settlement of payment of the purchase price to minority shareholders as a result of the squeeze-out procedure should be made via escrow accounts without engaging a securities broker. This mechanism allows the elimination of 'dead souls' (i.e., minority shareholders (often deceased persons)) with whom any connection has been lost. As a result of the introduction of the concepts of squeeze-out and escrow accounts, dominant stakeholders will be able to consolidate 100 per cent of the shares in their hands.

According to information publicly available as of 30 May 2018, 69 JSCs have already launched squeeze-out procedures in Ukraine. Several court and administrative proceedings have also been initiated disputing the squeeze-out price, while the respective court practice is yet to be formed.

Another revolutionary development in Ukrainian corporate law is the introduction of the sell-out procedure. Minority shareholders now have the right to require a dominant stakeholder to buy their shares at a fair price to be determined similarly to the squeeze-out price. According to the transitional provisions, minority shareholders may exercise their sell-out right at any time following the acquisition of at least one additional share of a JSC by the dominant stakeholder after 4 June 2017. The absence of a deadline for the minority shareholders to exercise their sell-out right may serve as an additional ground for the dominant stakeholder to exercise its squeeze-out right before the end of the two-year transitional period (until 4 June 2019).

At the same time, the Corporate Governance Law allows private JSCs to disapply rules or to establish different rules in their charters regarding acquisitions of controlling stakes, squeeze-out and sell-out procedures, subject to having complied with the majority voting requirements set out in law.

Additionally, the materiality thresholds in excess of which interested party transactions should be approved by the respective corporate body of a JSC were changed from 100 minimum wages (320,000 hryvnias as of the date of writing) to 1 per cent of the assets value, based on the latest financial statements of a JSC.

The implementation of the Corporate Governance Law has facilitated changes in the types of JSCs from public to private, and clear the market of 'quasi-public JSCs', particularly because the acquisition of shares in private JSCs is subject to less stringent regulation. In addition, private JSCs may disapply rules or establish different rules in their charters regarding the acquisition of controlling stakes, and squeeze-out and sell-out procedures.

ii New rules for JSCs

Further to the Corporate Governance Law, the Parliament adopted the Law on Business Simplification[14] on 16 November 2017 aimed at reloading the Ukrainian stock market, mainly through clearing it of 'quasi-public JSCs' and aligning the requirements regarding public JSCs to the EU regulations.

According to the Law on Business Simplification, all JSCs in Ukraine are considered to be private JSCs as of 6 January 2018, except for public JSCs whose shares are listed at a stock exchange or who make a public announcement that they shall remain public.

Public JSCs are now required to be more transparent by, *inter alia*, disclosing more extensive information, maintaining a supervisory board with independent members (while the new requirements on such independence were introduced), and establishing supervisory board committees on appointments, remuneration and audit. On the other hand, wholly owned private JSCs are exempt from disclosure requirements, while other private JSCs shall disclose less information in comparison to public JSCs. Moreover, private JSCs may choose whether to elect independent members to the supervisory board or establish supervisory board committees, or both.

Public JSCs and banks must align their charters and by-laws with the Law on Business Simplification by 1 January 2019, while other JSCs shall make the respective changes by 1 January 2020, unless a JSC's charter is amended earlier.

The Law on Business Simplification also improves corporate governance in JSCs by, *inter alia*, prohibiting general shareholders' meetings to decide any matter about a company's activities falling under the exclusive competence of the supervisory board by virtue of law or a JSC's charter. This rule may be disapplied in a private JSC. The new corporate governance rules are expected to provide foreign investors with more comfort when investing into Ukraine.

The Law on Business Simplification also introduces the possibility for legal entities to provide services of disclosure of information on behalf of the stock market participants, including JSCs, disseminate information on financial instruments and stock market participants, and submit reports or administrative information, or both, to the Securities Commission. The legal entities wishing to provide these services need authorisation from the Securities Commission, enabling them to provide these services from 1 January 2019.

The Law also implements the major requirements of the EU Prospectus Directive[15] into Ukrainian law.

iii Introduction of corporate agreements into Ukrainian law

Another recent development in corporate law is that concluding corporate agreements among the shareholders of JSCs and participants in LLCs is now expressly permitted by the Corporate Agreements Law[16] and the Law on LLCs, respectively. The Laws allow the participants (founders) in LLCs and the shareholders of JSCs to conclude corporate (shareholders') agreements. Corporate agreements may establish, *inter alia*, an obligation for

14 Law of Ukraine No. 2210-VIII 'On Amendments to Certain Legislative Acts of Ukraine Regarding Simplifying Business Activity and Attraction of Investments by Securities Issuers', dated 16 November 2017.

15 Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC.

16 Law of Ukraine No. 1984-VIII 'On Amendments to Certain Legislation of Ukraine Regarding Corporate Agreements', dated 23 March 2017.

parties to vote at general meetings in the manner determined by such agreement, to approve the acquisition or disposal of participatory interests or shares in a company according to the pre-determined price, and to undertake other actions related to the company's management. The parties may include in the corporate agreements transfer instruments common in other jurisdictions such as tag-along rights, drag-along rights, call options and put options.

While information on the content of a corporate agreement is confidential under both Laws, the JSC Law requires a party to a corporate agreement to notify a JSC on the conclusion of the corporate agreement within three business days of its conclusion, and in the case of a shareholder acquiring voting rights attached to more than 10, 25, 50 or 75 per cent of shares under a corporate agreement. A public JSC must also publicly disclose information on concluding a corporate agreement. If a shareholder concludes an agreement in breach of the terms of a corporate agreement, such agreement will be null and void if the third party knew or ought to know about such breach.

In addition, the creditors of a company shall have the right to conclude a corporate agreement with the participants and shareholders of such companies. The Laws also provide for a possibility to issue an irrevocable power of attorney to ensure the fulfilment of the obligations of participants and shareholders.

The express permission and regulation of corporate agreements is important for Ukrainian M&A deals. The use of this instrument by market participants will greatly depend on subsequent court practice.

iv Increased investor protection rules

The Investor Protection Law,[17] which came into effect on 1 May 2016, introduced important developments, *inter alia*, as to the liability of corporate officers of companies and the ability of minority shareholders to bring a lawsuit against a corporate officer on behalf of a company. According to the Investor Protection Law, corporate officers are responsible for damage they cause to the company through their actions. Such damage will be compensated if incurred by:

a actions committed by officers in excess of their authority or through an abuse of their powers;

b actions committed by officers in violation of the procedure of their prior approval or other decision-making procedures as established by the constituent instruments of the company;

c actions committed by officers in line with the procedure of their prior approval or other decision-making procedure where such officer has filed false information to obtain such approval or decision;

d omissions of the corporate officer when such officer was obliged to take certain actions in accordance with his or her duties; and

e other abusive actions of corporate officers.

Before these changes, the liability of corporate officers was limited in most cases by the amount of their monthly salary.

Moreover, the notion of a derivative action has been introduced into Ukrainian law. A minority shareholder (participant) holding at least 10 per cent of all shares (participatory interests) in a company may file a claim with a commercial court on behalf of a company

17 Law of Ukraine No. 289-VII 'On Amendments to Certain Legislative Acts of Ukraine Regarding Protection of Investors', dated 7 April 2015.

against a corporate officer for recovery of damages caused by such corporate officer to the company. The derivative action may be brought against individuals falling under the definition of a corporate officer. For JSCs, the corporate officers are the head and the members of the supervisory board, executive body, audit commission, auditor of a JSC, and the head and members of other bodies if the creation of such body is envisaged by a company's charter. In LLCs, the members of the executive body, the supervisory board and any other individuals occupying a post named in the company's charter are considered to be the corporate officers. If a derivative action was brought against a corporate officer, he or she may neither represent the company in the proceedings nor appoint a representative to participate in the proceedings on behalf of the company.

v Simplified M&A for banks

Starting from 29 April 2017 and until 1 August 2020, banks in Ukraine may benefit from the simplified procedure for the capitalisation and reorganisation of banks according to the Simplified Bank Reorganisation Law.[18] Under the Law, banks may either use the simplified procedure to merge with another bank or withdraw a banking licence without liquidating the company. The second option will enable banks to exit the banking market and continue their operation in the financial or other sector.

The duration of the capitalisation and reorganisation procedures was shortened by way of accelerated terms for regulatory and corporate approvals, as well as a reduction in the paperwork to be submitted to the regulators: the National Bank of Ukraine, the Antimonopoly Committee, the State Fiscal Service and the Securities Commission. The Simplified Bank Reorganisation Law also disapplies the list of rules in cases of the capitalisation and reorganisation of banks under simplified procedures, for example:

a the requirements to notify all creditors of decisions of the general assembly on mergers;
b the satisfaction of creditors' claims;
c the obligatory purchase of shares upon the request of participants in banks participating in a merger; and
d determining the market price.

vi The new Law on LLCs

On 17 June 2018, the long-awaited Law on LLCs became effective, changing fundamentally the legislator's approach to the regulation of LLCs. Previous regulation of LLCs was very restrictive, and mandatory provisions left little room for participants to adjust the rules on LLC operation to their business needs. The Law on LLCs provides participants with wide discretion in establishing the rules on LLC corporate governance and transfers of participatory interests.

The Law on LLCs expressly permits the establishment of a supervisory board for the purpose of controlling and supervising the management of the LLC. This change means that LLCs are now able to follow the two-tier corporate governance model, which has historically been widely used in JSCs in Ukraine. Moreover, LLC participants may appoint independent members to the supervisory board and determine requirements for such independence. The establishment of the audit commission is no longer required.

18 Law of Ukraine No. 1985-VIII 'On Simplified Procedures of Bank Capitalisation and Restructuring', dated 23 March 2017.

The Law introduces a number of changes to the rules on conducting general participants' meetings, including the following developments:

a the new majority vote requirements instead of quorum. The decisions of the participants may be adopted by unanimous vote of all LLC participants, by three-quarters of all LLC participants or by a simple majority of all LLC participants;

b limitations to decisions, which can be adopted by written polling;

c the ability to conduct meetings through video conference, provided all participants have the ability to see and hear all other participants;

d the introduction of absentee voting (i.e., the ability of an LLC participant to take part in a meeting by providing his or her written decisions on the matters on the meeting's agenda; and

e simplified rules for conducting meetings where the LLC is wholly owned. In this case, the sole LLC participant prepares a written decision without complying with the rules on holding the meeting.

The Law on LLCs also establishes new duties and obligations of a corporate officer, namely the duties to declare a conflict of interest and of confidentiality, and non-compete obligations. Breaching any of these obligations is a ground to terminate the respective corporate officer without payment of compensation. In addition to the duties of a corporate officer, the executive body members will also be responsible for monitoring the LLC's net assets, while the LLC's obligation to maintain positive net assets no longer exists.

The Law on LLCs provides participants with discretion in establishing the rules for transfers of participatory interests, including the ability to:

a modify or disapply the pre-emptive right of participants;

b restrict the disposal of a participatory interest;

c improve the procedure for the exit and expulsion of participants; and

d introduce an anti-dilution mechanism in the LLC's charter.

The Law on LLCs has also introduced the notion of significant and interested party transactions to the regulation of LLCs. LLC participants may modify the default rules on significant transactions in a company's charter, while the rules on interested party transactions will not apply to an LLC unless such mechanism is expressly established by a company's charter.

Other important changes introduced by the Law on LLCs include:

a abolishment of the anti-chaining rule;

b abolishment of restrictions on the number of LLC participants;

c new restrictions on dividend payments;

d abolishment of the prohibition on debt-for-equity swaps; and

e changes to the charter capital increase procedure.

Formally, LLCs are not required to align their charters with the provisions of the Law on LLCs. Current provisions of the LLC charter will remain effective until the earlier of 17 June 2019 or the date when any amendments to the charter are introduced by the participants. After such date, the provisions of the Law will override the conflicting provisions of the LLC charter.

Since an LLC is the most commonly used type of company in Ukraine, many businesses should benefit from the Law on LLCs.

vii Other changes

Another development in foreign investment regulation in Ukraine is the adoption of the Law on Attraction of Foreign Investments.[19] The Law has been submitted to the President for signing, which is expected to occur soon. The Law simplifies the procedure of acquiring and storing securities (including shares of JSCs) by foreign investors by providing an alternative to opening a securities account in Ukrainian depository institutions. Foreign investors may use the services of a global custodian (a 'nominal holder'), who shall, in turn, open a nominal holder securities account with a Ukrainian depository institution and disclose information on the foreign investor for financial monitoring purposes.

Among other positive developments in corporate M&A regulation aimed at facilitating the conducting of business in Ukraine by both local and foreign investors are the cancellation of the registration of foreign investments in Ukraine, which was previously required for the application of guarantees under Ukrainian law, the final abolishment of the requirement for a legal entity to use a corporate seal and improvements in corporate governance in state-owned companies. We also expect a new law to be adopted governing the establishment, maintenance and liquidation of representative offices in Ukraine.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

According to a statistical report prepared by the Ministry of Economic Development and Trade of Ukraine,[20] in 2017 foreign investments into the Ukrainian economy came mainly from Cyprus, the Netherlands and Russia. Since Cyprus and the Netherlands are popular jurisdictions for setting up holding companies for large Ukrainian groups, investments coming from these countries are most likely to be the return of Ukrainian capital that flowed out of the country at the outset of the crisis in 2014. This is a good sign, proving that Ukrainian investors believe that the economy is past the worst of the downturn. This positive trend has also become possible because of the gradual relaxation by the National Bank of Ukraine of certain temporary capital control and foreign currency restrictions relating to the repatriation of dividends, repayment of cross-border loans, and import and export transactions in foreign currency.

Investment coming from Russia does not represent real new foreign investments, since the money inflow is directed at meeting recapitalisation requirements by banks with Russian capital through increasing their charter capitals in order to offset the effect of non-performing loans as a result of huge losses suffered by the banks. That said, Asian investors, in particular from China, have shown increased interest in the financial, energy, infrastructure and agricultural sectors in Ukraine.

As for outbound investment, Ukrainian companies, leaders in their respective industries, are currently looking at possible acquisition targets abroad, in particular within the European Union and in Gulf countries.

19 The Draft Law of Ukraine No. 2351-VIII 'On Amendments to Certain Legislation of Ukraine Regarding Assistance in Attraction of Foreign Investments'.

20 Ministry of Economic Development and Trade of Ukraine: Investment Activities in Ukraine.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

The hottest industries of 2017 and 2018 have been the financial, agricultural, healthcare, consumer goods and retail, and renewable energy sectors.

As a general trend in the financial sector, foreign banks exiting the Ukrainian market, including banks with Russian capital, are struggling to find buyers for their assets. This trend has been caused primarily by recapitalisation requirements and the general clear-up process launched by the National Bank of Ukraine and, in the case of banks with Russian capital, by the sanctions imposed by the government.[21] The sanctions imposed on five Ukrainian subsidiaries of Russian state-owned banks (Sberbank, VS Bank, Prominvestbank, VTB Bank and BM Bank) have caused these banks to commence the disposal of their Ukrainian subsidiaries. VS Bank has already been sold to TAS Group (owned by a Ukrainian businessman), while several are in various stages of negotiations regarding their sale.

Russian companies have also been actively leaving the industrial sector, in particular, Evraz Plc sold its metals and mining company Evraz DMZ to a Ukraine-based management company, while Severstal sold the metal company Dneprometiz to TAS Group.

In light of Ukraine's obligations to the IMF and the recent nationalisation of Privatbank, the largest Ukrainian bank, the National Bank of Ukraine has been actively enforcing recapitalisation requirements. This has caused many foreign banks that are reluctant to make new investments into their Ukrainian subsidiaries to consider exiting. Thus, several significant disposals took place in 2017. Greek Eurobank Ergasias sold its Ukrainian subsidiary, Universal Bank, to TAS Group in order to focus on its specific markets and pursue a restructuring plan agreed upon with the European Commission. Cyprus Popular Bank Public Co Ltd has also exited Ukraine by selling PJSC Marfin Bank to Ukrainian investors. On the other hand, several Ukrainian and Kazakh investors are consolidating their stakes in Ukrainian banks.

There have been a number of major M&A developments in the agricultural sector involving land banks, processing and infrastructure facilities. In 2017, Kernel, a leading agricultural company, announced the completion of the acquisition of the farming business of Ukrainian Agrarian Investments Ltd, with more than 190,000 hectares of leasehold farmland and approximately 200,000 tonnes of grain storage capacity. The acquisition price was US$155 million in cash. The world's largest agricultural processing companies have been divesting their non-core assets and actively investing in Ukraine ports' infrastructure by building or acquiring grain terminals for the export of their products. There has been a lot of M&A activity involving land banks, processing and infrastructure facilities, with the purchasers being large Ukrainian companies building up their land banks and processing facilities.

Dragon Capital Investments Limited, a private equity fund, has been actively acquiring assets in Ukraine. In 2017, it acquired the remaining 67.27 per cent stake in Dragon-Ukrainian Properties and Development Plc, a company focusing on the development of commercial and residential real estate properties. The fund has also expanded its presence in the media sector by acquiring radio station Radio-Era TRC, and in the e-commerce sector by entering into an agreement to buy the minority stake in ShipNext, an online maritime shipping marketplace.

21 On 15 March 2017, the President enacted the decision of the Ukrainian National Security and Defence Council 'On Application of Special Personal Economic and Other Restrictive Measures (Sanctions)' and on 14 May 2018, the President enacted the decision of the Ukrainian National Security and Defence Council 'On Application and Cancellation of Special Personal Economic and Other Restrictive Measures (Sanctions)'.

The headline M&A deal of 2018, highlighting the renewed interest of strategic investors in Ukraine, is the acquisition of a 90 per cent stake in LLC Ergopack by a Greek-based company, Sarantis SA, for US$18 million. LLC Ergopack is engaged in the production and distribution of household goods in Ukraine.

M&A activity in healthcare is picking up due to the consolidation of the local market, with large local pharmaceutical companies seeking outbound investments, as well as increased M&A activity and investments in healthcare facilities.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

Financial institutions such as the European Bank of Reconstruction and Development, the International Finance Corporation and the Overseas Private Investment Corporation have been actively investing into Ukraine-focused private equity funds.

Other than international financial institutions investing in private equity funds, no foreign commercial banks have been financing acquisitions in Ukraine. Current risks would make the cost of acquisition financing impermissibly high. Furthermore, no bank would lend money over the long term. For example, since 2014, the Ukrainian hryvnia lost more than 60 per cent of its value. This sharp depreciation has significantly inflated all foreign currency-denominated loans. Accordingly, most M&A deals are financed by acquirers from their own funds. In those cases where big multinational companies with access to cheap financing abroad acquire a company in Ukraine, they may use foreign financing to refinance expensive Ukrainian debt upon completion. This financing is not available to most Ukrainian investors.

VII EMPLOYMENT LAW

The Code of Laws on Labour of Ukraine, dated 10 December 1971, remains the principal legislative act governing employment relationships in Ukraine. Despite numerous amendments to the Code of Laws, the document retains its extremely pro-employee approach and does not correspond to current business needs. For this reason, developments in employment legislation are not usually seen as the hottest topic in an M&A context in Ukraine.

On 27 September 2017, a law simplifying the procedure for obtaining work permits and temporary residence permits came into effect.[22] The law should inevitably lead to more foreign-trained managers and employees being engaged in the process of serving Ukrainian companies by establishing clear, transparent and foreigner-friendly work permit and temporary residence permit procedures. The adopted law contains a number of novelties. In particular, it:

a extends the list of grounds to apply for a temporary residence permit;

b introduces clear rules for parallel employment of foreign employees by two or more Ukrainian companies;

c simplifies the procedure for obtaining a work permit by reducing the number of documents to be submitted to the state authorities;

d extends the term of the work permit from one to three years for certain categories of foreign employees, including highly paid foreign professionals, founders and beneficial owners of Ukrainian companies, and IT professionals;

22 Law of Ukraine No. 2058-VIII 'On Amendments to Certain Legislative Acts of Ukraine On Eliminating Barriers to Foreign Investments', dated 23 May 2017.

e establishes the minimum salary that must be paid to certain categories of foreign employees; and

f establishes an employer's obligation to amend a work permit in certain cases.

In addition, in recent years the minimum monthly salary has been increased significantly, from 1,600 hryvnias in December 2016 to 3,723 hryvnias in January 2018.[23] This change may affect the purchase price of target companies with a significant amount of low-paid employees, especially in the agricultural and manufacturing sectors.

A new Labour Code of Ukraine is expected to be adopted to make Ukrainian labour law more 'investor-friendly'. The Parliament is expected to consider the draft in a second reading and then adopt it by the end of 2018.

VIII TAX LAW

The Tax Code of Ukraine, dated 2 December 2010, as amended, remains a comprehensive legal act regulating tax matters in Ukraine. There have been no significant changes to the Tax Code in recent years that are relevant to M&A transactions.

Ukraine has enlarged its double tax treaty network to 70 jurisdictions, with treaties with Luxembourg and Malta being the most recent.[24] While historically Luxembourg, and in certain cases Malta, were used in multilayer group structures, ratification of these double tax treaties will have a positive effect on the structuring of M&A deals in Ukraine.

The Ukrainian Ministry of Finance has also started to gradually review the existing tax treaty network, specifically targeting those offering the full exemptions from withholding tax (WHT). This issue should be taken into account while structuring M&A deals.

Among the most significant developments, mention should be made of the Ministry:

a signing a Protocol amending the Ukraine–Netherlands Double Tax Treaty with the domestic ratification procedures still in progress;

b signing a Protocol amending the Ukraine–UK Double Tax Treaty with the domestic ratification procedures still in progress;

c commencing negotiations to amend the Ukraine–Switzerland Double Tax Treaty;

d commencing negotiations to amend the Ukraine–Belgium Double Tax Treaty; and

e signing a Protocol amending the Ukraine–Cyprus Double Tax Treaty with the domestic ratification procedures still in progress.

The Ministry of Finance also declared its intention to commence negotiations with France, Germany and the United States to align WHT rates on passive income with those recommended by the OECD Model Tax Convention on Income and Capital.

23 Law of Ukraine No. 2246-VIII 'On the State Budget of Ukraine for 2018', dated 7 December 2017, which became effective on 1 January 2018.

24 Convention between the Government of Ukraine and the Government of the Grand Duchy of Luxembourg 'On Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital' No. 1918-VIII, signed on 6 September 1997, as amended by the Protocol of 30 September 2016. Convention between the Government of Ukraine and the Government of the Republic of Malta 'On Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income', No. 2018-VIII, signed on 4 September 2013.

As a recent trend, Ukraine has also committed to implementing the de-offshorisation package, which will affect corporate aspects of structuring Ukrainian M&A transactions. More specifically, in April 2016, the President established a working group with a view to transposing anti-BEPS measures into Ukrainian legislation. Its mandate includes, *inter alia*, introducing controlled foreign company rules, improving transfer pricing rules and adopting rules on combating aggressive tax planning. In addition, the automatic exchange of financial account information will also be introduced as a part of the de-offshorisation package (Ukraine has declared the implementation of the Common Reporting Standard by 2020). Anti-BEPS recommendations have not yet been implemented into Ukrainian domestic legislation.

Additionally, in November 2016, Ukraine became a member of the Inclusive Framework on the OECD/G20 base erosion and profit shifting project, thus committing to implementing four minimum standards of the BEPS package:

a Action 5 (countering harmful tax practices);
b Action 6 (prevention of treaty abuse);
c Action 13 (implementation of country-by-country reporting); and
d Action 14 (enhancing dispute resolution mechanisms).

Note that Action 6, among other things, proposes the introduction of a limitation-on-benefits rule into tax treaties, which is expected to combat treaty-shopping practices.

It is worth mentioning that currently, Ukraine is considering reforming its currency control legislation with an aim to harmonise the Ukrainian rules on the movement of capital with the EU standards (the undertaking prescribed in the EU–Ukraine Association Agreement). This step, which generally should liberalise the Ukrainian currency control rules, is also conditioned on the implementation of the OECD BEPS Actions by Ukraine, namely, Action 3 regarding the controlled foreign company rules, as well as the international standards for automatic exchange of financial information.

IX COMPETITION LAW

Although the economic crisis has slowed down M&A activity, the Antimonopoly Committee of Ukraine (AMCU) has demonstrated its strong desire to adjust merger control rules in line with the best practices of other European countries. As a result, a number of significant and long-awaited reforms to competition law have taken place during the past few years. Following the recommendations of the OECD and the United Nations Conference on Trade and Development, in January 2016, Parliament amended the rules on merger control.[25] The changes increased the merger notification thresholds that had been in effect for over 14 years. In particular, since May 2016, transactions are subject to prior approval of the AMCU if:

a the parties' combined worldwide turnover or assets exceeds the hryvnia equivalent of €30 million, and the domestic turnover or assets of either of the two parties exceeds the hryvnia equivalent of €4 million;
b the target's domestic assets or turnover exceeds the hryvnia equivalent of €8 million and the buyer's worldwide turnover exceeds the hryvnia equivalent of €150 million; or

25 Law of Ukraine No. 935-VII 'On Amendments to the Law of Ukraine 'On Protection of Economic Competition', dated 26 January 2016, which became effective on 18 May 2016.

c in the case of the establishment of a business entity, the domestic assets or turnover of one of the parties exceeds the hryvnia equivalent of €8 million and the worldwide turnover of the other party exceeds the hryvnia equivalent of €150 million.

All thresholds are to be calculated on a group level.

While initially the increase of thresholds resulted in a significant decrease in the number of applications for merger control, during 2017, the number of merger control applications reviewed by the AMCU increased to 666 (as compared to 547 applications in 2016).[26]

In addition to amending the rules on merger control, the merger control procedures have been simplified by allowing parties to conduct preliminary consultations with the AMCU. Furthermore, the new merger control procedures have significantly simplified the disclosure requirements for parties during the course of filing preparation, but at the same time they require profound economic analysis for transactions that may impact competition in Ukraine. A further sign of liberalisation has been the introduction of a fast-track procedure for certain cases with decisions to be issued within 25 calendar days instead of 45 calendar days.

As part of the reform in the antitrust sphere, the AMCU's transparency has been enhanced. Previously, AMCU decisions did not have to be published; however, a law adopted in November 2015 requires the publication of all decisions on the AMCU's official website within 10 working days from the adoption of the decision.[27]

In September 2015, the AMCU approved fining guidelines that make its process of calculating fines more predictable and transparent.[28]

In November 2017, the Parliament adopted changes to the Ukrainian competition and sanctions laws, which allow the AMCU to deny merger clearance of transactions involving entities included in the sanctions list.

The completed reforms represent a broader effort to harmonise Ukrainian competition law with that of the European Union, and generally make Ukraine a more business friendly place. In addition to these initiatives, a number of legal changes are making their way through the legislative process. Several are responses to recommendations cited in reviews carried out by the OECD and the United Nations Conference on Trade and Development. These legislative proposals address, for example, a revision of the concerted actions regulation, the AMCU's increased discretion in determining which cases to investigate and the establishment of a specialised court chamber for hearing antitrust-related disputes.

X OUTLOOK

The Ukrainian M&A market is certainly showing signs of recovery, and we expect positive developments in future years. While the majority of purchasers on the M&A market are domestic investors, foreign investors are once again showing interest in the Ukrainian M&A market and considering Ukraine as a prospective investment opportunity.

26 Report of the Antimonopoly Committee of Ukraine for 2017, approved by Order No. 5-rp of the Antimonopoly Committee of Ukraine, dated 28 February 2018.

27 Law of Ukraine No. 782-VIII 'On Amendments to Certain Legislative Acts of Ukraine Concerning Transparency of the Antimonopoly Committee of Ukraine', dated 12 November 2015, which became effective on 3 March 2016.

28 Recommendation No. 16-pp approved by the Antimonopoly Committee of Ukraine on 15 September 2015.

Appendix 1

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