
THE MERGERS & ACQUISITIONS REVIEW

FOURTH EDITION

EDITOR
SIMON ROBINSON

LAW BUSINESS RESEARCH

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THE MERGERS & ACQUISITIONS REVIEW

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SIMON ROBINSON

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EDITOR'S PREFACE

In response to the financial crisis, the past year has been spent cutting costs and restoring balance sheets while governments have set about overhauling the regulatory landscape. Whether as a result of this approach or in spite of it, we have seen the first signs of a recovery in the second half of 2009. During the financial meltdown, many strong businesses focused on assessing their strategy and restructuring. As the signs of recovery began to emerge, such businesses tentatively started to re-engage in M&A transactions as a means of achieving growth.

Currently, buyers are conscious of scrutiny from shareholders with regards to how much is being paid for assets and whether the deals that are going ahead represent value for money (particularly in light of Warren Buffett's publicly voiced concerns during the course of Kraft's bid for Cadbury and shareholder reaction to the proposed acquisition of part of AIG by Prudential). Consequently, most potential buyers are treading carefully. On the other hand, there were also a number of quick deals in 2009 where a speedy resolution was necessary to allow distressed sellers to obtain cash promptly but the number of these should decrease throughout 2010 if we continue through to recovery.

Many are still cautious about the outlook for M&A activity for the remainder of 2010 and beyond. A rise in M&A activity is hugely dependent on the willingness of banks to increase lending. Access to credit plays a vital role in supporting the economy by helping businesses to create jobs and growth, both of which are necessary if we are to find our way out of recession and towards recovery. In the short term, M&A activity will depend heavily on boardroom confidence and such confidence will only be achieved if boards perceive that the few new M&A deals around have proven profitable for shareholders. Such confidence and optimism is slow to build; therefore,

while pockets of activity suggest that the worst of the financial crisis is behind us, the signs of recovery are tentative with buyers urging caution. The journey to recovery will be slow and difficult, but as lending increases and confidence rises, economists expect the sluggish growth of 2010 to develop into greater stability into 2011. That said, the recent problems of the euro, European government finances and the European banking sector could yet bring a renewed lapse into recession or worse. Only time will tell which progression turns out to be correct.

I wish again to thank all the contributors for their continued support in producing this book – one would hope that in this uncertain time the following chapters should at least provide some food for thought.

Simon Robinson

Slaughter and May

London

July 2010

Chapter 58

UKRAINE

*Denis Lysenko and Anna Babych**

I OVERVIEW OF RECENT M&A ACTIVITY

Despite some big deals in 2009 and early 2010, the Ukrainian M&A market has not changed dramatically compared to 2008.

At the beginning of 2009, it was estimated that the total value of M&A transactions in Ukraine in 2009 would be approximately \$8 billion; it turned out that in the first half, the value was only between \$1.5 and \$1.8 billion with 15 transactions, and in the second half, the M&A market in Ukraine rose to \$2.61 billion with nearly 20 transactions. The total value of transactions in 2009 was therefore approximately \$4.41 billion, which is slightly higher than in 2008 (approximately \$3.7 billion).

The notable trend of the Ukrainian M&A market was that a number of transactions in 2009 became possible only as a result of the reduction of the initially offered price. Another trend was that 2009 became a buyer's year: according to experts, one investor in 2009 had up to five offers.

In general, this situation was caused by the following factors: a decrease of national GDP by 15 per cent; an inflation rate of 17 per cent *per annum*; devaluation of the hryvna by 30 per cent against foreign currencies. In addition, there was an unstable political environment before the Presidential elections held at the beginning of 2010.

The majority of transactions in 2009 and the first half of 2010 involved the sale and purchase of small and medium-sized businesses. However, after the elections, the trends moved towards acquisition of larger businesses (e.g., in the steel sector).

Foreign investors participated in the majority of significant transactions in the Ukrainian M&A market in 2009; at the same time, outbound M&A transactions (acquisitions of foreign targets by Ukrainian players) were not visible. If concluded, they were not public and aimed mainly at intra-group restructuring.

* Denis Lysenko is a partner and Anna Babych is a counsel at Vasil Kasil and Partners.

No IPOs were carried out by Ukrainian companies in 2009. In the first half of 2010 (to April), only one IPO was announced: the Avangard group listed the shares of its holding company on the main market of the London Stock Exchange.

In 2009, capital outflow increased up to \$414 million in the first half of 2009. In 2009, roughly 35 per cent of foreign investors have either left the Ukrainian market or intend to leave in the near future. About 26 per cent of foreign investors put their projects in Ukraine on hold due to a shortage of liquidity and other reasons deriving from by the financial crisis. In general, the expectations that a significant number of new foreign investors would enter the Ukrainian market in 2009 and in the beginning 2010 have not materialised.

Key M&A sectors in Ukraine in 2009 and first half of 2010 were steel, oil and gas, agriculture, food and beverage, retail and telecommunications.

II GENERAL INTRODUCTION ON THE LEGISLATIVE M&A FRAMEWORK

The Civil Code of Ukraine 2004, the Economic Code 2004 and the Law of Ukraine' on Companies' 1991 ('the Companies Act') provide the fundamental legislative framework for regulating M&A activity in Ukraine. While the Civil and Economic Code cover the issues of M&A transactions from a predominantly general legal perspective, the Companies Act states more specific regulations for the purchase and sale of Ukrainian legal entities.

Apart from the aforementioned fundamental legislative acts, M&A transactions also fall under specific regulations.

The Law of Ukraine on Securities and Stock Market 2006 ('the Securities Act') governs the relations in the sphere of issuance and circulation of securities and performance of the professional activities at the stock market.

The Securities Act covers five distinct areas, such as the securities themselves (definitions, classifications, transfer of rights derived from the securities etc.), professional activities at the stock market (their categories, issues related to stock exchange operations), the securities issuance both through public and private offerings (a step-by-step procedure, prospectus and other regulatory requirements), information disclosure requirements by the stock market (information about issuer, insiders and insider information), and fundamentals of the securities market regulation (e.g., self-regulating organisations).

On 30 April 2009 the Law of Ukraine on Joint Stock Companies ('the JSC Law') entered into effect, except for the provision related to the shares circulation in electronic form, which will become effective on 30 October 2010. The JSC Law established the fundamentals for joint stock companies' ('JSCs') incorporation and activity in Ukraine by substituting the underdeveloped and outdated provisions of the Companies Act relating to JSCs. The transition provisions of the JSC Law require all JSCs established before the said Law became effective to revise their respective articles of association and by-laws in compliance with the Law's requirements within two years (i.e., by 30 April 2011). In case of a JSC's failure to do so, upon expiry of the said period any JSC shareholder will be entitled to file a court claim requiring the articles of association and by-laws (if any) to be brought in line with the JSC Law.

The fundamentals of economic concentration regulation in Ukraine are established in the Article 42 of the Constitution of Ukraine that provides for the protection of fair competition by the state and prohibits abuse of monopolistic standing, and Chapter 3 of the Commercial Code. Furthermore, there are two special legislative acts that govern the state economic concentration policy: the Law of Ukraine on Protection of Economic Competition 2001 ('the Economic Competition Act'), and the Law of Ukraine 'on Antimonopoly Committee of Ukraine' 1993. In addition, said issues are covered by several regulations issued by the Antimonopoly Committee of Ukraine ('the ACU'), the state body authorised to supervise the said sphere. The mentioned acts together aim to set forth the principal features of anti-competitive concerted actions by companies, abuse of dominant position in the market and restrictive as well as discriminatory activities by companies in Ukraine.

Following the declared objectives the Economic Competition Act envisages the transactions which require the prior approval by the Antimonopoly Committee of Ukraine (merger clearance) subject to the satisfaction of certain thresholds. According to the Economic Competition Act certain transactions might be considered as a concentration provided such transactions result in direct or indirect acquisition of assets, participation interest (shares) in a company, establishment of a new company by merger or acquisition, appointment or election to top executive positions, acquisition of direct or indirect control over the company as well as any other coordinated conduct of business entities.

Ukrainian legislation generally provides equal opportunities for both domestic and foreign investors. There are only few restrictions on foreign investments (e.g., foreign companies cannot hold ownership title to farmland, even when the currently effective moratorium on sale of farm land is lifted).

Foreign investments are governed by the Law 'on Investment Activity' 1991, which appears to be outdated. Nevertheless, it is still effective and establishes the general principles for investment activity in Ukraine irrespective of the nationality of the investor. The particularities of making the foreign investments to Ukraine are governed by the Law of Ukraine on the Foreign Investment Regime 1996 ('the Foreign Investment Act') and by the Resolution on regulation of foreign investment matters in Ukraine issued by the National Bank of Ukraine 2005.

According to the Foreign Investment Act foreign investment covers all forms of securities invested by foreign investors into objects of investment activity in accordance with the applicable Ukrainian legislation for purposes of making profit or achieving social effects.

The Foreign Investment Act provides guarantees for foreign investors, such as prohibition of nationalisation of foreign investments, protection from subsequent changes in regulation, the right to claim damages suffered as a result of acts or omissions by the state bodies and guarantees for repatriation of foreign investments.

Ukraine is a party to over 40 bilateral agreements on cooperation and mutual protection of investments, which provide certain additional protection for foreign investments, including internationally recognised dispute resolution mechanisms (e.g., ICSID).

The principal legislative act in Ukraine in the area of foreign currency regulation is the Decree of the Cabinet of Ministers of Ukraine on the System of Currency Regulation and Currency Control 1993 ('the Currency Act'), which sets forth the general

rules for use of foreign currency in Ukraine by both residents and non-residents. In its implementation the National Bank of Ukraine has adopted numerous regulations and other normative acts.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

In 2009 the biggest achievement of corporate law in Ukraine was the long-awaited JSC Law, which entered into effect on 30 April 2009. In spite of the two-year transition period, if after the JSC Law became effective the shareholder meeting of a JSC resolved on changing the amount of the registered capital, denomination of shares or securities issue, such JSC shall bring its activities in compliance with the Law and revise the articles of association accordingly. If the shareholders' meeting failed to approve such amendments, the State Securities and Stock Market Commission ('the Commission') will be entitled to refuse the state registration of the shares issue of such JSC if the JSC articles of association have not been amended as required.

The JSC Law significantly developed the existing regulation of JSCs activity in Ukraine and introduced numerous novelties aimed, *inter alia*, at protecting shareholders' (investors') rights through the number of corporate tools already implemented in European legislation. Namely, the JSC Law provided for sophisticated rules of corporate governance that would ensure the existence of transparent relationships between the shareholders and the governing bodies of the company, protection of the rights of minority shareholders, protection of the company from hostile takeovers by unlawful means, and numerous other similar corporate governance issues.

First, JSC Law does not divide JSCs into two forms – closed and open – but provides for two types of JSCs: public and private. A number of shareholders in private JSC may not exceed 100 shareholders. Public JSCs must go through the listing procedure and shall be kept with the register of at least one stock exchange. This requirement is not applicable to private JSCs, whose shares may not be purchased or sold at a stock exchange, except for sales through auctions at a stock exchange. Currently, the subordinated legislation regulating listing and related matters is being reconsidered by the Securities Commission.

Public JSC may offer its shares either through public or private offering. Private JSC, in contrast, is permitted to allocate its shares solely through a private offering. If private JSC resolves to offer its shares through public offering, then its articles of association shall be amended as related to the type of such JSC. Conversion of private JSC into a public one will not be treated as transformation of a legal entity.

JSC may be incorporated by one entity, notwithstanding the type of JSC. However, JSCs are expressly prohibited from being incorporated by one legal entity that, in its turn, is incorporated by one or more entities having the same parent participant.

All JSC shares (notwithstanding the type of JSC) shall be issued as registered shares. Shares may exist in the non-documentary (electronic) form only (such requirement becomes effective on 30 October 2010).

The Law provides no pre-emptive right for shareholders in public JSCs. A pre-emptive right vested in shareholders of a private JSC and JSC itself to purchase the shares

sold by other shareholders of such JSC may be established by articles of association of a private JSC, but it is not mandatory under the Law. If such right is provided in the articles of association, then the procedure for its exercise as laid down in JSC Law shall be applied.

Shares of JSC, irrespective of its type, may be initially offered to a pre-defined group of persons (i.e., as a private offering).

If the change of control over a JSC has occurred (when one or more affiliates acquire a stake in the JSC of 50 per cent or more), such entity shall offer to the remaining JSC shareholders to buy their shares (except where the said controlling stake is acquired in the course of privatisation).

The Law introduces the concept of 'material transaction'. A transaction is treated material if according to annual financial statements of the JSC the market value of property or services that are the subject of the transaction, are equal to or exceeds 10 per cent of the value of the JSC's assets. Where the transaction value varies from 10 per cent to 25 per cent, the JSC Supervisory Board may decide whether or not to proceed with such transaction. If the transaction value exceeds 25 per cent of the asset value of the JSC, only the shareholders meeting is entitled to decide on the transaction (in the case of 25-50 per cent, the decision will be made by a simple majority of votes of shareholders present at the meeting; in the case of more than 50 per cent, by an affirmative vote of three-quarters of total number of shareholders).

The Law also provided the concept of 'transaction with interested parties' and establishes criteria to an entity that may be treated as an interested party with respect to certain transaction executed by JSC. If a transaction falls within the established criteria, the preliminary approval of such transaction from JSC bodies shall be received under the procedure provided by Law. The key test for transaction with interested parties is the potential infringement of JSC interests. Failure to go through the approval procedure makes the interested party liable for indemnification of any damages caused to JSC. Furthermore, the transaction shall be voidable provided that the parties intentionally disregarded the need to obtain said approval.

According to the new Law, dividends of JSC (notwithstanding the type of JSC) can be paid in cash only. The Law also provides for instances where JSC may not resolve on pay out dividends or pay out dividends on either ordinary or preference shares of JSC. As amended in April 2010, the JSC Law requires obligatory payment of dividends applicable to all JSCs, irrespective of their ownership structure (no less than 30 per cent of profits).

Under the new JSC Law the JSC articles of association may provide for entering into a shareholders agreement that may stipulate for additional shareholders obligations and envisage liability for their non-performance; however, the Law does not elaborate on their subordination to or prevalence over articles of association of the JSC and the applicable laws of Ukraine.

On 28 December 2007 the Supreme Commercial Court of Ukraine by its Recommendations in respect of execution of agreements between the shareholders and governing such agreements by foreign law stated that if the shareholders agreement is governed by a foreign law (in particular, any matters of corporate governance), it is to be treated as void and may not be enforced in Ukraine for the reason of its alleged inconsistency with public policy. Also, the said Recommendations state, even though

only meant to serve as guidelines, that shareholders may not decide on settlement of corporate matters related to activity of a Ukrainian company in an international commercial arbitration forum. Considering this, the possibility of execution of shareholders agreements under the JSC Law and its governance by foreign law most likely will be further interpreted by the competent authorities or as a result of jurisprudence in similar cases.

Currently, the Securities Commission elaborates the subordinate regulations for the purpose of JSC Law implementation (both new and those amending the existing regulations of Securities Commission).

To sum up, it is expected that the new JSC Law will have positive influence on the investment environment of Ukraine offering foreign investors well-known and safe corporate instruments and, thus, making Ukraine a more attractive country in which to invest.

Limited liability companies are still regulated by the Companies Act (1991) currently in force, which does not fully meet current needs of the market players in Ukraine. It is expected that the new law on limited liability companies (and, most likely, also regulating other company forms except for JSCs) will follow shortly.

There is no specific act regulating the public or private takeovers and mergers in Ukraine. The concept of public bids is underdeveloped in the Ukrainian legal framework as well (the applicable laws do not set aside the recommended and hostile bids).

No specific corporate law and regulations have been adopted or amended in light of the financial crisis or as a measure to decrease its adverse effect on the Ukrainian business environment (with some limited exceptions in the regulatory environment for Ukrainian banks).

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

As in previous years cross-border M&A deals made up most of the aggregate volume of M&A transactions in Ukraine. Some of the major investors in the Ukrainian market during the past year were Canada, Russia, Poland, the UK, Sweden and Switzerland.

Although the number of transactions decreased, Ukraine still remains a promising market for foreign investors. However, the volume of foreign investments in 2009 was mainly focused on the acquisition of distressed businesses or assets.

Ukrainian-based groups were involved in M&A transactions searching for investors. Many domestic M&A transactions were aimed at business restructurings, a change of assets and other settlements between the parties caused by financial crisis and were not made public.

V SIGNIFICANT TRANSACTIONS, KEY DEVELOPMENTS AND HOT INDUSTRIES

Most of the significant transactions of the past year in the Ukrainian M&A market appeared to involve foreign investors.

In 2009, the M&A market was still hit hard by the financial crisis, causing both the number of transactions and their value to substantially drop in relation to pre-crisis times

(however, showing slightly more in value compared to 2008). In particular, according to reputable experts there were only between 30 and 32 M&A transactions in 2009 (subject to certain thresholds criteria applied by the experts), compared to 36 in 2008. However, the value of 2009 transactions was approximately \$4.4 billion, which is almost 16 per cent higher than the total value for 2008.

During the period from January to May 2010, at least 10 M&A transactions, valued at \$1.6 billion, were noted in Ukraine.

The list of 'hot' industries in 2009 and early 2010 is set out *infra*.

i Financial sector – banking segment

Many banks and insurance companies are now for sale; there is a demand, however, only for those with no financial problems. Investors are reluctant to buy companies with debts as they may have difficulties with estimations of their actual losses.

While limited in number of transactions, the banking segment in 2009 was highlighted by two major deals:

- a* 2009's largest transaction in the financial sector was the purchase of a 75 per cent stake plus three shares in JSC AKB Prominvestbank by the Russian state corporation Vneshekonombank ('VEB'), alongside a 12 per cent investment by Slav AG, the Austrian holding of Messrs Kluyev, Ukrainian businessmen, in January 2009; total value of the transaction was \$160 million; and
- b* the acquisition of 30 per cent of the shares in MegaBank OJSC by the European Bank for Reconstruction and Development (United Kingdom) jointly with KfW Entwicklungsbank (Germany). The total value was €28.9 million.

Furthermore, three private Ukrainian banks (Rodovid Bank, Kiev Bank and Ukrgazbank) successfully completed the state recapitalisation programme, as a result of which the state of Ukraine became the majority shareholder of the said banks (stakes ranging from 86 to 99 per cent).

ii Financial sector – insurance segment

- a* The largest deal in the insurance sector in 2009 was the acquisition of 45 per cent of the shares in Oranta National Joint-Stock Insurance Company by Mykola Lagun (owner of Deltabank) in April 2009. The total value of the deal was 348.8 million hryvnas.
- b* Also, more than 50 per cent of the shares in the leading Ukrainian stock exchange PFTS were acquired by Moscow Interbank Currency Stock Exchange. The value of this transaction was \$10 million.

iii Oil and gas

This sector represented the substantial proportion of M&A transactions in Ukraine in 2009, primarily involving foreign investors. The significant transactions included the following deals:

- a* the acquisition of a minority stake (18 per cent) in Ukrtatnafta (the biggest downstream company in Ukraine) by Corsan, affiliated with PrivatBank (Ukraine) – the total deal value was 2.1 billion hryvnas;

- b* the acquisition of 100 per cent stake in Vik Oil group by TNK-BP (Russia) in May 2010 – the deal was valued at \$313 million;
- c* the purchase of 20 per cent in Galnaftogas by EBRD (United Kingdom) in July 2009 – the total value of this transaction was 160 million hryvnas;
- d* the acquisition of 70 per cent in Cub-Gas by Kulczyk Holding SA (Poland), with completion expected in mid-2010 – the total deal value was \$45 million;
- e* the acquisition of Bohorodtchanyftogas SCI by Svenska Capital Oil AB, jointly with Sadkora Energy AB (Sweden) in January 2009; and
- f* the purchase of Shelton Canada (Canada) (the major private company active in the sphere of Ukrainian sea shelf development in 2007 to 2008) by Sibir Energy (Sweden) in 2009.

iv Steel

In 2009, M&A activity in this sector was comparatively low and there were no significant transactions. However, in the first half of 2010 the activity of foreign investors in this sector increased rapidly as follows:

- a* the main transaction was acquisition of 50 per cent plus one share in the Industrial Union of Donbass by an undisclosed group of Russian investors fronted by Alexander Katunin the owner of Carbofer (Switzerland), former co-owner of Evrazholding (Russia) acting through Vnesheconombank (Russia) in January 2010 – the deal value is approximately \$2 billion;
- b* the purchase of 100 per cent shares in Finprofil by Macring Oy (Finland) in March 2010 – the value of the deal was \$10 million; and
- c* the acquisition of Donetsk Electro Steel Mill (DEMZ) by Mechel Group (Russia) in March 2010.

The expected sale of two major Ukrainian steel producers is the hot topic of 2010. There are two potential targets: Zaporizhstal Integrated Steel Works (Zaporizhstal) and Mariupol Illich Steel Works (MMK Illich). The latter most probably will be merged with Metinvest, controlled by SCM group and Smart Holding (with Metinvest holding 75 per cent and CEO Vladimir Boyko and the management holding 25 per cent).

v Food and beverage industry

In 2009 the Ukraine's food and beverage industry was highlighted by the following transactions:

- a* the acquisition of a 99 per cent stake in Ukrroszerno by Sugar Union Ukrros OJC owned by Serhiy and Oleksander Fedorenko (Ukraine) in December 2009 – the transaction was valued at 42 million hryvnas;
- b* the merger of Dakor Western Company (one of the biggest sugar producers in Ukraine) and Land West Company into one group controlled by Dakor Agro Holding (Ukraine) in September 2009 – the value of Dakor Agro holding is approximately \$300 million;
- c* the acquisition of 99 per cent stake in the Odessa Champagne Plant LLC by Campari Group (Italy) in March 2009, valued at \$18 million;

- d* the acquisition of a 25 per cent stake in Ukraine Sugar Company LLC by ED&F Man (United Kingdom) in February 2009;
- e* the acquisition of 91.9 per cent in Zhytomyr Sweets LLC by investment company Delta Capital SA (Switzerland) in April 2009;
- f* the acquisition of 90.5 per cent stake in Poltavapyvo (Poltava Beer Plant) by Sarmat-Yug (Russia) in September 2009;
- g* the acquisition of a 30 per cent stake in RoAgro (agricultural producer) by Investment Company Kinnevik (Sweden) in June 2009, valued at \$4 million; and
- h* the acquisition of 80 per cent stake in Ukrainian Vodka Company Nemiroff by CEDC (Poland). Completion of the deal is expected in 2010 – the approximate value is \$400 million.

Ukraine's food and beverage sector remains one of the most promising markets for foreign investors. The experts forecast that it will keep its leading position in the next years.

vi Media and telecommunications

In 2009 the media and telecommunications sector has shown high activity compared to 2008. The main transactions were the following:

- a* the acquisition of 100 per cent stake in Studio 1+1 Group by Ihor Kolomoiskiy (Ukraine) in April 2010, valued at \$278 million;
- b* the buyout of the remaining 40 per cent of NTN Channel by UA Inter Media Group (Ukraine) in July 2009 – total value €98 million;
- c* the acquisition of up to 100 per cent in Sitronics IT by Melrose Holding Company, valued at \$50 million in April 2010;
- d* the acquisition of 50 per cent stake in MTV Ukraine by UA Inter Media Group (Ukraine) in October 2009 – the approximate value was \$10 to \$12 million; and
- e* the acquisition of Music Radio (May 2009) and Radio 4U (September 2009) by Business Radio Group (Ukraine), total valued at \$1.5 million.

vii Other sectors

In the real estate sector, which demonstrated high M&A activity in 2007 to 2008, no significant M&A transactions were noted from 2009 to the first half of 2010.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

The domestic capital market remains largely illiquid for the purpose of financing any substantial M&A transactions. In light of the global shortage of liquidity, equity capital remains the key source of financing M&A transactions. Due to devaluation of the national currency and an unstable banking system in Ukraine, debt financing (both in hard currencies and in hryvnas) appears very expensive and difficult to obtain for market players.

However, it is worth mentioning that a number of private equity funds still remain active and declare their ability to invest into Ukraine mainly searching for distressed assets and turnaround investing at a low price.

There has not been much progress in financing Ukrainian business through IPOs in the international capital markets. As previously mentioned, only the Ukraine-based Avangard group recently listed the shares of its holding company on the London Stock Exchange.

VII EMPLOYMENT LAW

Currently the Ukrainian authorities are increasing their supervision over the activities of foreign commercial entities, particularly representative offices. Therefore in addition to typical tax and currency regulation issues, strict compliance with labour laws also required the close attention of the foreign investors.

The key statute regulating the employment relations in Ukraine is the Labour Code of Ukraine. In spite of the numerous alterations, the said act and the supplementing legislation remains obsolete and is still based on the old Soviet employee-oriented approach, often failing to reflect the current requirements of the Ukrainian market and business environment.

As a general rule, employers may employ a foreigner if the latter has an employment permit. Employment of foreigners in Ukraine is regulated by the Labour Code of Ukraine, Law of Ukraine on Population Employment 1991 and Law on Legal Status of Foreign Citizens and Stateless Persons 1994.

The procedure for issuing a permit, terms of its validity and other matters were substantially modified in 2009 (comparing to the Resolution of the Cabinet of Ministers of Ukraine on the Procedure of Granting Employment Permit to Foreigners and Stateless Persons 1999). On 8 April 2009 the Cabinet of Ministers of Ukraine approved the Resolution on the Rules of Issue, Prolongation and Annulment of Employment Permits for Foreigners and Stateless Persons No. 322 that entered into effect on 14 May 2009. The new Rules envisage a more complicated and time-consuming procedure of obtaining employment permits. In particular, it provides a list of additional documents that can essentially delay the process, increases the amount of the state fee, and stipulates grounds for annulment of an employment permit.

However, some positive new features have also been implemented. A foreign employment permit in respect of workers categorised as intracorporate assignees (i.e., foreign individuals shifted (seconded) to Ukrainian subsidiaries within the same companies group) or individuals providing services without a commercial presence in Ukraine may be issued for up to three years (the standard term being limited to one year).

In addition, employment of foreign citizens and stateless persons by domestic employers falls within a specific procedure consisting of insurance payments to the State Insurance Fund against Unemployment; records to be submitted to the State Employment Centre; certain tax obligations imposed on the employer. Furthermore, the employer's registration as a tax payer is an obligatory requirement for issuing a permit.

However, currently there is no legal provision for issuing more than one work permit to foreigners occupying part-time jobs. A foreigner needs to obtain a certificate of permanent residence in Ukraine providing the right to be employed within two or more companies without obtaining work permit.

The Ukrainian law contains some restrictions on employing foreign citizens. In particular, citizens of foreign states may not be appointed to some positions or be involved in certain work, such as state service, the judicial system, etc.

VIII TAX LAW

The Law on Corporate Profit Tax allows taxpayers not to include within their gross income the amount of share premium (the margin obtained by the issuer as a result of sale of the securities or other shares issued by it at a price exceeding their nominal value during initial subscription). Thus, the issuer has an additional possibility for more flexible terms and conditions in the process of formation of its own capital and obtaining some financing free of corporate profit tax.

The most topical issue for foreign investors with regard to Ukrainian taxation policy is still the investment into Ukraine with minimum tax consequences, and at the same time with a guarantee of profits return to non-residents and optimisation of taxation on these profits in Ukraine.

The general rules applicable to taxation of profits of non-residents that have income from Ukraine are set in the Corporate Profit Tax Act. Except for some kinds of profit, the common rate of tax on income for non-residents is 15 per cent from the sum of the paid profit. This tax is deducted from the sum paid to the non-resident (and therefore, represents a withholding tax).

The aforementioned tax can be legitimately avoided upon application of international treaties on avoidance of double taxation concluded and ratified by Ukraine. In 2009 treaties with Iceland, Jordan and Morocco came into force and as of 2009 Ukraine is a party to more than 60 double taxation treaties. Certain international treaties signed by the USSR remain in force on the territory of Ukraine (e.g., Cyprus, Spain).

The term for receiving export proceeds in foreign currency or importing goods (services) that were prepaid established by the Law on the Procedure of Settlements in Foreign Currency was extended to 180 days (instead of 90 days in the previous years). This rule provides for an obligation to sell proceeds received in foreign currency or import goods prepaid to foreign suppliers in foreign currency within the said term.

The draft Tax Code of Ukraine remains the biggest uncertainty of 2010. The said draft code passed through its first reading by the Ukrainian Parliament and may be finally passed in mid-2010.

IX COMPETITION LAW

No substantial developments in competition legislation in Ukraine during 2009 can be observed.

However, in 2008, the ACU prepared draft legislation to amend the thresholds for merger clearance set forth in the Economic Competition Act. The draft legislation proposes to increase the existing thresholds (four times higher than at present), which are currently among the lowest of any national competition laws, including the CIS states. Currently, the said draft Law has passed through its second reading by the Ukrainian Parliament.

X OUTLOOK

In line with global expectations, in 2010 to 2011 the Ukrainian M&A market will most probably mirror certain key trends in the European M&A market. In addition, Ukrainian market players may expect the following:

- a* In 2010 the total value of M&A deals in Ukraine may be \$3 to \$3.5 billion.
- b* In general, the M&A market in Ukraine will still depend on the macroeconomic situation and investors' interest in several sectors that were affected by the crisis less than. At the same time, many industries might see a certain amount of revival in 2010. The M&A deals most probably will increase in value as soon as stable recovery trends appear and the number of deals consequently increases.
- c* A number of distressed domestic assets or businesses will still be offered by domestic market players in many industry sectors seeking financing.
- d* Experts believe that at least half of all transactions will be leveraged. As a result, Russian-based banks and some European financing institutions will become the main lenders.
- e* Debt financing in hard currencies will not be the major M&A tool for the next year.
- f* Medium-sized businesses might be more attractive for foreign investors in light of their liquidity balance and debt risk policies compared to large businesses.
- g* Analysts consider that the likely targets in 2010 to 2011 will be businesses in the financial, steel, retail (in particular food retail), agriculture and TMT sectors. The crisis forced those industries to start consolidation back in 2009 and this process will continue in 2010. Activity in the telecommunications and energy sectors will depend on the new government's privatisation policy.
- b* Among foreign investors still continuing their expansion into the Ukrainian market, the majority will be represented by private equity funds focused on distressed debt or turnaround investments.
- i* Two Ukrainian companies Agroliga (agriculture) and Ukrgazbank (finance) are expected to carry out IPOs by 2011; in 2011, IPOs may also be planned by several Ukrainian companies (Dakor Agro Holding, OstChem, Galnaftogaz, UDC Holding, Baiadera, Volia, Raiffaisen Bank Aval, Interpipe, DTEK and Metinvest Holding).
- j* Considerations offered for Ukrainian assets remains lower compared to those offered before the financial crisis.
- k* Ukrainian business groups (both large and medium-sized) will continue the processes of restructuring their assets or business divisions aimed at optimisation of group structure as well as cutting down administrative and management expenses.

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Denis Lysenko has been a partner with Vasil Kisil & Partners since 2006; he joined the firm in 1999. His practice focuses on mergers and acquisitions, banking and corporate law, antitrust law, investments and privatisation.

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