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Technology M&A 2023

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Ukraine: Law & Practice
and
Ukraine: Trends & Developments

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UKRAINE

Law and Practice

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Contents

1. Market Trends

1.1 Technology M&A Market

The technology M&A market in Ukraine can be viewed from two different angles – that is, before and after the outbreak of war in February 2022.

2021 was one of the best years in the history of Ukrainian technology M&A. The total amount of private equity and venture capital investments made that year exceeded USD830 million, which is a 45% increase compared with 2020.

Three Ukrainian IT companies were very active on the international front during 2021. Grammarly, GitLab and People.ai generated 58% of the total annual amount of funding, including via opening IPOs.

However, the technology M&A market has slowed down dramatically since the war began. Most of the M&A deals that had not been completed before February 2022 were either put on hold or dropped. Negotiations in new M&A transactions are now moving very slowly, with numerous conditions and precautions.

The authors observed the following trends in 2021 and early 2022:

- an increase in the number of venture capital transactions led both by Ukrainian and international venture capital funds;
- significant effort made by large Ukrainian IT companies to scout for potential targets;
- substantial increase in transactions at the early-stage funding level;
- increase in fintech projects boosted by the recent development of statutory regulation; and
- launch of Diia City as a special regime for the IT market.

After February 2022, the number of M&A transactions declined markedly. However, the following trends stand out:

- structuring transactions outside Ukraine as a result of uncertainty;
- developing the material adverse change and force majeure clauses in order to minimise the risks relating to the war and martial law; and
- introducing deferral payments for the equity in the IT companies.

2. Establishing a New Company, Early-Stage Financing and Venture Capital Financing of a New Technology Company

2.1 Establishing a New Company

Before the war, new technology companies in Ukraine were set up using one of the following two models:

- the route typically used to establish a local start-up company (usually in the form of a limited liability company); or
- the private entrepreneur model, in which a foreign company is created that then enters into direct services agreements with Ukrainian IT specialists.

A special legal and tax regime, known as Diia City, was launched in order to increase the appeal of the first model.

Generally, Ukraine has been quite an attractive jurisdiction for start-ups, owing to:

- the ease with which a limited liability company can be established (ie, up to three working days once all required documents have been submitted) and managed;

- no minimum requirements to the share capital amount;
- the dispositive nature of the Ukrainian corporate law; and
- a beneficial tax regime for Diia City residents.

However, after the war began, the related risks forced some investors to reconsider the benefits of creating a holding company or operational company outside Ukraine. This is not so much a general market tendency as more of a risk mitigation remedy applied during wartime, though.

2.2 Type of Entity

Entrepreneurs are typically advised to choose a limited liability company for the initial incorporation. Joint stock companies – both private or public (listed) – have some advantages, such as squeeze-out procedures and how impossible it is for participants to leave the company at any time. However, owing to the complexity and higher cost of their establishment and running, joint stock companies are not often chosen.

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2.3 Early-Stage Financing

Both Ukrainian and foreign private equity and venture capital funds – as well as large Ukrainian IT companies with access to international financing – provided early-stage financing to start-ups throughout 2021–22. Various aggregators also became more active in providing additional funding opportunities for start-ups in Ukraine during the past year.

Ukraine has not yet developed properly standardised documentation for early-stage financing, so the set of documents used mostly depends on the templates used by the investor. The standard set may include the term sheet, investment and shareholders' agreements, and the articles of association.

After the war started, a number of sources of exceptional funding became available for start-ups. Specifically, Ukraine allocated up to USD67 million for the support and development of the IT sector. The funds will be administered by the Ukrainian Start-up Fund and used to support start-ups, which are the most vulnerable sector in the IT industry.

In addition, the EC launched a EUR20 million support programme for the IT community in Ukraine. This will enable the support of at least 200 Ukrainian start-ups with grants of up to EUR60,000 each.

Finally, a number of private companies and associations pledged their support to Ukrainian IT start-ups:

- Google created a special fund that accumulated USD 5 million of financial support and mentorship;
- the 7Wings fund issues grants of USD50,000 to support Ukrainian start-ups that maintain their teams in Ukraine; and
- the UA Founders marketplace was launched to connect Ukrainian start-ups with foreign donors.

2.4 Venture Capital

Both Ukrainian and foreign venture capital funds are rather active in Ukraine, although foreign funds still tend to dominate Series A and later rounds of financing. Moreover, new foreign funds came to Ukraine in 2020–21, which increased the accessibility of venture capital investments.

The government also participates in sponsoring the technology sector through the specially

created Ukrainian Start-up Fund (see **2.3 Early-Stage Financing**). However, for the time being, its share in the market is rather insignificant.

2.5 Venture Capital Documentation

Ukraine has not yet developed properly standardised documentation for venture capital investments and is using National Venture Capital Association (NVCA) or British Private Equity and Venture Capital Association (BVCA) templates instead.

At the same time, Ukrainian corporate regulations provide for a number of imperative provisions that should be considered in venture capital documents if the deal is structured at the Ukrainian level.

2.6 Change of Corporate Form or Migration

Usually, a start-up remains in the form of a limited liability company even during the advanced stages of its development. Indeed, owing to the undeveloped local market, Ukrainian technology companies seek financing outside Ukraine in most cases. As a result, at a certain stage of its development, a Ukrainian technology company begins to expand into foreign markets by creating companies in different jurisdictions.

At the same time, the Ukrainian part of the business continues to function in the form of a limited liability company, as this is relatively easy to create and manage.

3. Initial Public Offering (IPO) as a Liquidity Event

3.1 IPO v Sale

As the Ukrainian stock market is in the initial stages of development, it is rare for an IPO to be chosen as a liquidity event; as a rule, a sale or other transactions that eventually result in share transfers are chosen. Dual-track processes (including an IPO) are not market practice in Ukraine.

At the same time, it is worth noting that successful Ukrainian technology companies often choose to create a foreign holding company/project company that then goes on to an IPO.

3.2 Choice of Listing

The general practice for Ukrainian technology companies is to go on IPO at a foreign stock exchange rather than a Ukrainian stock exchange. The reason for this is the different level of stock market development and, thus, the level of access to funding.

3.3 Impact of the Choice of Listing on Future M&A Transactions

Ukrainian legislation is quite liberal in terms of choice of listing, as a foreign listing does not – as a rule – directly affect stakeholders' rights and responsibilities. The Ukrainian squeeze-out rules apply to all Ukrainian joint stock companies, both private and public, irrespective of any listing either in Ukraine or abroad. A squeeze-out mechanism does not apply to a limited liability company.

Also, it is more common for Ukrainian technology companies to go on IPO through a holding company or a special project company rather than directly by a Ukrainian company.

4. Sale as a Liquidity Event (Sale of a Privately Held Venture Capital-Financed Company)

4.1 Liquidity Event: Sale Process

If the sale of the privately held company is chosen as a liquidity event, the sale process is typically run as a bilateral negotiation with the chosen buyer. As a rule, only state-owned or forcibly alienated shares are sold in an auction. However, this does not exclude a selection process that involves the participation of several bidders.

4.2 Liquidity Event: Transaction Structure

Typically, the sale of a privately held technology company with several shareholders is usually structured as the sale of the entire share capital (or at least a controlling stake of 50% or more).

The standard transaction structure includes a combination of the following steps:

- preliminary negotiations with the venture capital investors (if any) about the preferred terms and conditions of a contemplated transaction;
- direct negotiations or a private bidding process;
- notifications to the National Securities and Stock Market Commission in case of joint stock company; and
- signing of transaction documents with a standard conditions precedent, including – but not limited to – the merger clearance, corporate approvals, etc.

In limited liability companies and private joint stock companies with up to 100 shareholders, a pre-emptive right of other shareholders must be observed unless the company's articles of association provide for no pre-emptive right. A shareholder of the company intending to sell its share (or part of the share) to a third party must notify other shareholders in writing and inform them about the terms and conditions of such sale. The share can be sold to a third party only if other shareholders do not exercise their pre-emptive right.

Where there are minority shareholders present in a joint stock company, the acquirer (or affiliated person) of the controlling stake equal to or exceeding 50% of ordinary shares must make a mandatory offer to purchase minority shareholders' shares at a fair price.

4.3 Liquidity Event: Form of Consideration

Cash is the predominant form of consideration in Ukraine. Occasionally, the conversion of debt into equity or stock exchange can be used by parties in the sale transaction.

4.4 Liquidity Event: Certain Transaction Terms

In general, founders and venture capital investors are expected to stand behind representations and warranties and certain liabilities after closing.

At the same time, there is no well-established court practice for holding the breaching party liable if the representations and warranties appear to be untrue and incorrect under Ukrainian law. Escrow and holdback are used occasionally – although, as with representations and warranties insurance, they are not customary in Ukraine yet.

This is not the case for transactions involving Ukrainian technology companies structured abroad, however, in which case the use of representations and warranties is rather common (as are indemnification obligations).

5. Spin-Offs

5.1 Trends: Spin-Offs

Although legally possible, the practice of spin-offs is rather undeveloped. On one hand, such practice is down to the absence of a sufficiently sophisticated market. On the other hand, the spin-off procedure is quite complicated and requires dealing with creditors. Moreover, once the spin-off is completed the companies remain co-liable for liabilities that existed before the spin-off.

Therefore, considering that the asset structure of technological companies is relatively simple and comprises the IP rights and personnel, if a spin-off is necessary one option may be to simply create a new company and subsequently transfer the required assets/liabilities.

5.2 Tax Consequences

The spin-off is a tax-neutral operation at both the corporate and shareholders' levels. There are no particular requirements that should be adhered for entering the tax-free regime; however, the following general issues require attention. First, the spin-off should be "validated" by the tax authority, which will inspect the entire operation before its completion. Second, the spin-off provides the creditors with the right to claim for additional guarantees, early performance or even compensation of damage.

5.3 Spin-Off Followed by a Business Combination

There are no specific restrictions on a business combination following a spin-off. However, any business combination should be considered in light of the potential tax requirements.

5.4 Timing and Tax Authority Ruling

The procedure for the spin-off depends on the form of the company. Generally, the spin-off in a limited liability company is a much easier process compared with a joint stock company, as there is no need to deal with the share issuance.

In any case, a spin-off procedure requires the completion of a tax inspection, which can be unreasonably delayed in practice. As a result, the length of the entire process may vary from a couple of months to even a year.

6. Acquisitions of Public (Exchange-Listed) Technology Companies

6.1 Stakebuilding

It is not customary in Ukraine to acquire a stake in a public company before making an offer.

Most technology companies are registered as limited liability companies. In this respect, the law does not provide for any reporting obligations as they are private companies.

As for the joint stock companies, Ukrainian law only specifies the procedure for a mandatory offer, which is designed as a post-acquisition step. Thus, an acquirer (or group of acquirers acting together) of a controlling stake (50% or more) or significant controlling stake (75% or more) of shares in a public joint stock company is obliged to make an offer to purchase minority shareholders' shares once the acquisition is completed.

The reporting obligations for an acquirer of a stake in a public joint stock company include the following, in particular.

- Notification of the company about the intention to acquire 5% or more of shares and making such notice public by reporting it to the National Securities and Stock Market Commission (and all stock exchanges where the companies' shares are allowed for trading) and placing it in the database of a special disclosing agency. Such notification must be made at least 30 days before the acquisition.
- Pre- and post-notification requirements apply in connection with the acquisition of a controlling stake (50% or more), significant controlling stake (75% or more) or a dominant controlling stake (95% or more) of shares.
- Notification of the company and the National Securities and Stock Market Commission about any acquisition of shares that results in reaching or exceeding the thresholds of 5%, 10%, 15%, 20%, 25%, 30%, 50%, 75% or 95% of voting shares.

The purchaser is not obliged to state the purpose of the acquisition of the stake and its plans or intentions with regard to the company.

6.2 Mandatory Offer

Direct or indirect acquisition of a controlling stake (50% or more) or a significant controlling stake (75% or more) of the ordinary shares of a joint stock company – solely or in concert with other persons – obligates the acquirer(s) to make a mandatory offer to minority shareholders to purchase their ordinary shares (see **6.1 Stake-building**).

There are, however, certain exemptions from the mandatory offer obligation – for example, where a controlling stake is inherited or acquired in the course of the establishment or the liquidation of a legal entity.

6.3 Transaction Structures

Shares in a public joint stock company are typically acquired in a number of different ways, including:

- during the placement of newly issued shares (with or without public offering);
- by acquiring shares earlier redeemed by the company;
- on a stock exchange; or
- through corporate merger.

The most popular way, however, is straightforward acquisition based on bilateral negotiations with the seller. In this case, intermediation of an investment firm providing brokerage services is mandatory.

Merger is not a common transaction structure, owing to the complexity of the procedure and how long it takes.

6.4 Consideration; Minimum Price

There is no particular market for public technology companies in Ukraine. However, based on common trends in the acquisition of public companies, cash is the predominant form of consideration.

Occasionally, the conversion of debt into equity or stock exchange can be used by the parties involved in the sale transaction. For some specific acquisitions, the form of settlement is prescribed by the law – for example, cash, securities or a combination of cash and securities are allowed as forms of consideration in mandatory offers.

In the case of mergers, it is unusual (albeit not prohibited) to use any form of consideration. As such, shareholders tend to just convert their shares to the shares of the successor company.

Generally, the parties are free to determine the sale price. However, a specific requirement has been established in order to determine the sale price in certain share acquisitions – for example, the purchase of newly issued or redeemed shares, or the acquisition of squeeze-out and sell-out rights, or in mandatory offers. In all such cases, the sale price cannot be lower than the market value of the shares.

6.5 Common Conditions for a Takeover Offer/Tender Offer

Certain legal requirements are in place only for mandatory offers or some other specific share acquisitions. In mandatory offers, for example, there are statutory requirements with regard to:

- how the purchase price is determined;
- forms of consideration (cash, securities or a combination of cash and securities);
- the term within which minority shareholders can accept the offer; and
- the deadline for payment of the purchase price by the offeror.

In all other aspects, the parties are free to determine the takeover/tender offer conditions.

6.6 Deal Documentation

Typically, takeover and business combination transactions imply entering into an agreement. However, it is unusual for the target company to undertake the obligation and give representations and warranties thereunder. Normally, this is done by the selling party.

6.7 Minimum Acceptance Conditions

Ukrainian law does not establish minimum acceptance conditions for tender offers.

6.8 Squeeze-Out Mechanisms

The acquisition of a dominant controlling stake (95% or more) of shares in a joint stock company requires the acquirer – or group of acquirers acting jointly – to ask minority shareholders to sell their shares at a fair price. Subject to certain exceptions, launching the squeeze-out procedure is only allowed once the mandatory offer procedure has been exercised.

The squeeze-out mechanism entails the following main steps:

- the acquirer must notify the company and the regulator (National Securities and Stock Market Commission) about the acquisition of the dominant controlling stake of shares;
- the company must disclose the notice on its website and in the database of a certified disclosing agency;
- the company must evaluate and approve the market value of the shares, and notify the acquirer accordingly;
- the acquirer must determine the purchase price;
- the acquirer must file the public irrevocable commitment to the company;
- the regulator and shareholders must be notified of this by the company;
- funds in consideration for minority shares must be transferred to the escrow account opened by the acquirer; and
- the National Depositary of Ukraine must transfer the shares to the securities account of the acquirer.

The minority shareholders are given three years to receive money from the escrow account.

6.9 Requirement to Have Certain Funds/ Financing to Launch a Takeover Offer

It is not necessary to prove the availability of certain funds or financing to launch a takeover offer. Usually, the buyer makes the offer even if the transaction is financed by a bank or another financial institution.

At the same time, proof that financing is available might be requested by the terms and conditions of the auction.

6.10 Types of Deal Protection Measures

Privately negotiated deals may provide for certain deal protection measures, such as break-up fees or matching rights. The usual practice is to reserve exclusivity for a certain period of time. However, providing for deal protection measures in auction deals is not that common.

6.11 Additional Governance Rights

The scope of the governance rights granted by law to bidders varies according to shareholding level. In most cases, strategic and operational control can be achieved by acquiring more than 75% of shares. Therefore, even if a bidder cannot obtain a 100% share in the target company, they would be entitled to exercise control of the strategic management of the company, as long as they hold the majority (or better-qualified majority) of the shares in the target company.

Although the law provides minority shareholders with some rights, the scope of which depends on the share owned (5% or 10%), they cannot usually obstruct the management powers exercised by the majority shareholder.

6.12 Irrevocable Commitments

The irrevocable commitments can be given and enforced only based on a shareholders' agreement. As a result, this is not a common remedy for supporting the transaction.

6.13 Securities Regulator's or Stock Exchange Process

As a rule, no prior approval from the regulator (National Securities and Stock Market Commission) or a stock exchange should be sought to make an offer. However, in case of a mandatory offer, the regulator may – either on its own initiative or following a complaint from the interested persons – request documents proving adherence to the offer procedure and determination of the purchase price of shares.

6.14 Timing of the Takeover Offer

Statutory offer duration is established only for mandatory offers. As a rule, such an offer is made after the acquisition of the controlling stake of shares, and necessary regulatory and antitrust approvals are obtained at this stage. No extension of mandatory offers is provided for by the law.

For voluntary takeover offers, the possibility of extending the offer is typically something that is negotiated with the other party.

7. Overview of Regulatory Requirements

7.1 Regulations Applicable to a Technology Company

Generally, the creation and/or operation of a new technology company in Ukraine does not require any specific permit/licence. In certain cases, the technology company may fall within the sectorial regulation. If a fintech company is recognised as a financial institution, for example, it will be subject to the regulations by the National Bank of Ukraine (NBU).

Specific regulation also applies to technology companies created in the form of a joint stock company. Their activity will be supervised by the National Securities and Stock Market Commission.

7.2 Primary Securities Market Regulators

The National Securities and Stock Market Commission acts as the primary securities market regulator for M&A transactions in Ukraine.

If the M&A is done through the stock exchange, the latter will also exercise certain supervising powers.

The National Depositary of Ukraine will also be involved in any transfer of shares but its function is rather formal.

Additional control can be exercised by the sectorial regulator, such as the NBU in the case of fintech companies that are financial institutions.

Finally, the M&A transaction may require merger clearance, as defined in more detail in **7.5 Antitrust Regulations**.

7.3 Restrictions on Foreign Investments

There is no specific regulations or authorities for permitting foreign direct investment. As a general rule, foreign investments are given the status of national investments unless specific restrictions are introduced in the laws of Ukraine or international treaties.

It is worth mentioning that there are some sectorial restrictions under Ukrainian law. However, they seem to be somewhat standard – for example, the laws of Ukraine provide for certain restrictions on foreign investment in telecommunications, insurance, the military and some other sectors.

7.4 National Security Review/Export Control

There is no national security review of acquisitions in Ukraine, nor any specific restrictions or considerations for investors/buyers based in a particular part of the world.

Notably, since the beginning of the war, Ukraine has gradually introduced limitations and restrictions relating to Russian businesses in Ukraine. However, this reflects the global trend towards imposing sanctions on Russian businesses.

7.5 Antitrust Regulations

The following types of transaction require prior merger clearance/anti-monopoly approval:

- merger of companies or takeover of one company by another;
- direct or indirect acquisition of control over a company or a part of it;
- creation of a joint venture by two or more companies; and
- direct or indirect acquisition of shares if such acquisition results in obtaining either 25% (or more) or 50% (or more) of votes in the highest governing body of a company.

The acquisition of less than 25% of shares in a company does not require merger control clearance, if such minority interest does not transfer control to the acquirer. (This includes the transfer of negative control via veto rights under a shareholders' agreement or other similar instruments.)

Under Ukrainian competition law, control refers to a decisive influence over a company's business activity - irrespective of the form that such influence takes (including informal de facto control). The test for control is based on the ability to veto important decisions relating to the business activity of a company, such as:

- approval of the budget;
- business, strategic and development plans;
- appointment of senior management and key employees; and
- entering into certain types of agreements.

Even if a minority interest (25%-49%) is acquired, which does not ensure control, such transaction is still reportable to the Anti-Monopoly Committee of Ukraine.

Ukrainian competition law provides for a "double-decker" thresholds system – ie, two alternative thresholds. Merger control clearance is required if:

- the aggregate worldwide value of assets or turnover of parties to the concentration exceeds EUR30 million, and the value of Ukrainian assets or turnover of at least two parties to the concentration exceeds EUR4 million each; or
- the aggregate value of Ukrainian assets or turnover of the target (or at least one of the founders of a joint venture) exceeds EUR8 million, and the worldwide turnover of at least one other party to the concentration exceeds EUR150 million.

There is no market share threshold.

All thresholds are calculated on a group-level basis (taking into account the relations of control). All companies that are directly or indirectly controlled by the parent company form a group of companies, which constitutes a single undertaking from a merger control standpoint. The thresholds test is applied for the acquirer group and the target group (including the seller group).

The thresholds refer to the whole turnover and assets of the parties, rather than only those related to the relevant product/service market. The thresholds are the same for all industries and sectors involved.

7.6 Labour Law Regulations

The M&A transaction does not require any consultations with or approvals from the works council or trade union, unless it is associated with the lay-off of employees. In cases where the company's principal shareholder changes, the collective bargaining agreement remains in force for no more than a year (unless the parties agree otherwise).

7.7 Currency Control/Central Bank Approval

Generally, technology companies involved in M&A are not subject to currency control regulations (apart from those that apply to settlements rules). They do not require approval from the NBU, either.

However, for banks and financial institutions involved in M&A, reaching or exceeding 10%, 25%, 50% or 75% of share capital or voting rights (direct or indirect ownership or control) or divestment below the above thresholds requires prior approval from the NBU. The NBU considers the documents within three months of receiving the complete package – therefore, submission must be three months before the date of the anticipated acquisition.

For investment firms (ie, traders in financial instruments and asset management companies) involved in M&A, reaching or exceeding 10%, 25%, 50% or 75% of share capital or voting rights (direct or indirect ownership or control) or divestment below the above thresholds requires prior approval from the securities regulator (the National Securities and Stock Market Commission).

8. Recent Legal Developments

8.1 Significant Court Decisions or Legal Developments

No specific law or court decision concerning technology M&A in Ukraine has been made in the past three years.

However, during the past three years Ukraine has adopted numerous laws and regulations aimed at bringing local regulation in line with EU standards. Specifically, these legislative changes make it easier to open a new company, improve corporate governance and provide more remedies for structuring M&A.

The introduction of Diia City as a unique space for IT companies is another example of an important legislative effort to regulate the technology sector.

Finally, the new Law on Joint Stock Companies was adopted by the Ukrainian Parliament on 27 July 2022. It enters into force on 1 January 2023, except for some provisions, and is going to replace the 2008 law of the same name. The new law aims to improve and further harmonise Ukrainian legislation with EU company law.

In light of this, the authors note the positive impact of the recent legislative developments in Ukraine on the regulation of technology companies, as well as M&A transactions involving such companies.

9. Due Diligence/Data Privacy

9.1 Technology Company Due Diligence

In Ukraine, there are no specific regulations concerning the scope of due diligence information provided to bidders. Therefore, the board of directors may allow any level of technology due diligence, provided that data privacy requirements are met.

In privately negotiated transactions, the scope of due diligence information provided to different bidders can be adjusted at company's discretion, whereas identical information must be provided to all bidders in public auctions.

9.2 Data Privacy

There are no special data privacy restrictions regarding the due diligence of a technology company. General rules of data protection apply. Confidential information and commercial secrets can be disclosed only with the data owner's permission.

Issues of personal data processing are regulated by the Law of Ukraine "On Personal Data Protection". Generally, personal data may not be included in the scope of due diligence and used without the permission of personal data subjects.

It is worth mentioning that Ukraine has not undertaken any obligation to apply the General Data Protection Regulation (GDPR) and, therefore, the local regulation should apply. However, given that the GDPR applies to the owner of personal data, a Ukrainian technology company should comply with the GDPR as well as Ukrainian personal data regulation when dealing with the personal data of EU citizens.

10. Disclosure

10.1 Making a Bid Public

In Ukraine, there is no requirement to make a bid to acquire a share in a limited liability company public.

When acquiring shares in a joint stock company, however, an acquirer is required to:

- notify the company, the National Securities and Stock Market Commission and all stock exchanges where the company's shares are allowed for trading; and
- place in the database of a special disclosing agency the notice of its intention to acquire 5% or more of the company's shares.

Additional pre- and post-notification requirements apply in cases where either a controlling stake in shares (50% or more), a significant controlling stake in shares (75% or more) or a dominant controlling stake in shares (95% or more) is acquired.

For public joint stock companies, both the purchaser and the seller must also notify the company and the National Securities and Stock Market Commission about any acquisition or disposal of shares that leads to reaching, exceeding or falling below any of the thresholds (5%, 10%, 15%, 20%, 25%, 30%, 50%, 75%, 95% of voting shares).

10.2 Prospectus Requirements

A prospectus is mandatory only for issuance of securities by a public (listed) joint stock company. Normally, a prospectus is not required for the issuance of shares in a stock-for-stock takeover offer or business combination. There is also no requirement for the buyer's shares to be listed on a specified exchange in the home market or other identified markets.

10.3 Producing Financial Statements

In Ukraine, there is no requirement for bidders to produce financial statements, unless the sale process takes place via auction.

10.4 Disclosure of Transaction Documents

A draft agreement must be filed to the Anti-Monopoly Committee of Ukraine if merger clearance is required.

In case of the merger of a joint stock company, a merger agreement must be made available to the shareholders of each company participating in the merger before holding the general shareholders' meeting.

Apart from the aforementioned exceptions, there are no rules requiring the disclosure of the transaction documents.

11. Duties of Directors

11.1 Principal Directors' Duties

Generally, members of the company's executive body and the supervisory board are obliged to:

- act reasonably and in good faith;
- act in the interests of the company;
- notify the company about conflicts of interest; and
- refrain from disclosing confidential information and commercial secrets.

Although there are no directors' duties that relate specifically to technology M&A transactions, any conflict of interest created for a director by such a transaction should be declared.

11.2 Special or Ad Hoc Committees

It is unusual for special or ad hoc committees to be established in business combinations.

In Ukraine, special or ad hoc committees are usually established only within the supervisory board of banks and public joint stock compa-

nies. They can participate in the development of an ethics code to regulate conflicts of interest and consider other issues delegated to them by the company's articles of association and other by-laws.

11.3 Board's Role

The management board and other governing bodies of the company act within the authority established by the company's articles of association. It is more customary to assign day-to-day management to the management board, whereas decisions related to M&A transactions are within the remit of the general shareholders' meeting or – as is mainly the case for joint stock companies – the supervisory board. As a rule, management of the target company is not actively involved in negotiations.

In certain cases, there are statutory requirements obliging the management board to perform some support functions with regard to potential or ongoing M&A transactions, such as:

- notifying the shareholders and/or the controlling authority;
- making a report or disclosure of information; and
- filing for the share issuance registration.

The Law of Ukraine "On Joint Stock Companies" also obliges the governing bodies of a company not to obstruct the acquisition of a significant stake (5% or more) in the company.

11.4 Independent Outside Advice

During a takeover or a business combination, parties usually involve tax, financial and legal advisors. It is also mandatory in some cases (eg, issuance of shares, sell-out or squeeze-out procedures) to engage:

- a certified auditor to audit the financial statements of the company; and/or
- an appraiser for the valuation of shares.

Integrites is a full-service law firm with offices in Ukraine and Kazakhstan, and representative offices in Germany and the UK. For 17 years INTEGRITES has served more than 1,350 clients from around the globe, including Fortune 500 companies and international financial institutions. The firm's clients are recognised leaders in various industries, ranging from manufacturing, pharmaceuticals and retail to agriculture, logistics and renewables. The firm is highly recommended for its cross-border work – whether sophisticated transactions or complex dispute resolution – and for large projects in energy (in particular, renewables). In addition to its presence in the aforementioned countries, INTEGRITES makes its legal expertise available to clients from other jurisdictions through two foreign desks – comprising teams of qualified lawyers with exceptional German and French language skills. The firm closely co-operates with a well-established partner network of more than 100 international law firms. In 2022 INTEGRITES was shortlisted as Law Firm of the Year: Ukraine by Chambers Europe Awards.

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Trends and Developments

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Introduction: A Year in Figures

2021 turned out to be the best year for Technology M&A in Ukrainian history.

The publicly available statistics published by AVentures Capital show that total private equity and venture capital investments increased by 45% compared to 2020 and exceeded USD830 million. This includes more than USD80 million in seed grant deals, which have doubled in 12 months. The amount of Series A funding reached USD158 million, representing a 30% year-to-year increase.

In addition, 2021 was very fruitful for Ukrainian companies on an international level. Grammarly raised USD200 million, bringing its total valuation to USD13 billion and thus becoming the first Ukrainian decacorn. Together with two other Ukrainian-founded companies (Firefly and People.ai), they made 58% of the total volume of annual financing.

Another Ukrainian company, GitLab, opened an IPO on Nasdaq in 2021 and raised more than USD800 million.

As per the previous year, in 2021 most of the funding at Series A level came from international players and reached approximately 77%. However, unlike in 2020 and 2019, the share of Ukrainian seed grant funding exceeded the rest in 2021 and reached 54%, compared with 46% from foreign funds.

2021 also saw a number of successful exits for Ukrainian-formed companies – for example, Nasdaq-listed Qualcomm and Vistaprint acquired Augmented Pixels and Depositphotos respectively.

Additionally, successful Ukrainian companies such as GitLab, Genesis and Ciklum were rather active on the buy-side, scouting for new technologies, talents and client portfolios.

2022: The IT Sector at War

The Russian invasion of Ukraine on 24 February 2022 changed the life of the entire country in general, and the IT industry was no exception.

First, IT companies faced the need to relocate their employees to safer regions. Cities with a high concentration of IT business – for example, Kyiv and Kharkiv – were in the first wave of relocation, whereas Odesa and Dnipro joined the second wave of movement. As a result, March and April 2022 experienced a substantial slowdown in activity.

However, the IT industry began to return to pre-war levels of sustainability from May 2022 onwards, owing to the relative independence of employees in terms of workplace.

Second, the war increased the difference between export-oriented IT companies and IT companies servicing the local customers.

During the first month of war, representatives from export-oriented companies reported several instances where they lost work owing to doubts about their capacity to complete the assignment. However, overall, this sector

remained rather strong and has already returned to its pre-war level.

For companies that provide services mostly to Ukrainian customers, this is far from the case - particularly for marketplaces, ride-sharing and logistics applications, classifieds and others, which should have implemented cost reduction policies such as staff redundancy.

Third, many IT companies reported cases of losing employees due to the ongoing mobilisation in Ukraine. This includes those who voluntarily joined the military forces, as well as those conscripted to the army.

In order to minimise the impact of this risk, numerous IT companies applied to reserve employees from the military mobilisation. Despite strong support from the Ministry of Digital Transformation and pressure from business associations, only a few IT companies succeeded in reserving their employees.

Finally, the introduction of martial law in Ukraine made it impossible for men aged between 18 and 60 to exit the country. This prevented IT companies from relocating their staff abroad once the war had begun.

Fintech

Fintech and cryptocurrency start-ups in Ukraine have shown a remarkable growth during the past few years. This has been driven by macroeconomic factors and various government incentives for providers of digital and innovative products.

A newly adopted law on virtual assets (which has yet to take effect) is another remarkable step taken by the government in its effort to shine light on the shadow crypto-economy and embrace all the benefits of fintech and cryptocurrency technologies. The law establishes a legal framework for transacting in cryptocurrencies and, more generally, regulates all types of virtual assets.

Fintech platforms and services have penetrated the Ukrainian economy and market even deeper recently, after the central bank tightened capital and exchange controls in response to Russia's invasion of Ukraine.

Individuals and companies are simultaneously feeling the pressure from local currency devaluation and limited in their ability to transact using traditional payment instruments. It is natural, therefore, that they have turned to real-time digital payments, digital banking platforms, e-money, crypto-assets and crypto cards. Not to mention the fact that individual entrepreneurs who left Ukraine prefer to be paid in crypto rather than fiat money, thanks to the tightened Ukrainian exchange controls.

As a result, the authors have noticed an unprecedented level of interest in global crypto exchanges and payment systems in the Ukrainian fintech ecosystem. The ambit of financial services offered by local players to Ukrainian customers ranges from digital payments, peer-to-peer (P2P) and customer-to-customer (C2C) lending, crypto exchange and crypto-payment cards to investments in foreign securities via crypto platforms.

At present, foreign investors have a unique opportunity to invest in the fast-growing and expanding Ukrainian fintech market, which will almost definitely bring a very lucrative return in the future.

Defence Tech and Social Initiatives

Despite the slowdown in certain IT spheres, the war spurred development in military area. Indeed, many IT specialists channelled their efforts into developing defence and social projects. Start-ups that developed drone management software for peaceful purposes such as field aeration or delivery of goods before the war, for example, switched to the use of drones for military purposes.

The same approach was used by many IT companies that managed to adapt their technology to the current needs of the country. This includes reporting on the damage caused, delivery of humanitarian aid and medicine, delivery of food (including for pets), informing about civil defence alarms, promoting Ukrainian goods and services, job searches for the internally displaced persons, etc.

Special Support for the IT Sector

Despite the war, the Ukrainian government allocated up to UAH2.8 billion for the support and development of IT sector. The funds will be administered by the Ukrainian Start-up Fund and will be used to support the most vulnerable sector – ie, start-ups.

Additionally, the EC launched a EUR20 million support programme for the IT community in Ukraine. This initiative will be implemented by amending the European Innovation Council work programme. It will enable the support of at least least 200 Ukrainian start-ups with grants of up to EUR60,000 each. The support will also include advisory services aimed at integration into the European innovation ecosystem, opening new markets, attracting new financing, etc.

In addition, Ukrainian IT start-ups were offered support by a number of private companies and organisations, including:

- Google, who created a special fund that accumulated USD5 million worth of financial support and mentorship;
- 7Wings, which issues grants of USD50,000 to support Ukrainian start-ups that maintain their teams in Ukraine; and
- UA Founders, which is a platform that was launched to connect Ukrainian start-ups with foreign donors.

IT Deals at War

The war caused a dramatic impact on the Technology M&A market. Most of the deals that hadn't been closed before February were put on hold or dropped.

The new deals are being negotiated in a way that is much more precautious and reserved. Some peculiarities are already becoming noticeable.

First of all, the structuring of deals reverted back to an "outside Ukraine level". This entails the creation of a non-Ukrainian holding company (if there is not one already), transfer of IP rights and products to the ownership of such holding company, and even the transfer of the clients (where possible).

Second, the material adverse change (MAC) clause and the force majeure clause became more important than ever.

Indeed, before the war, MAC clauses were mostly confined to deals where the target was fully or substantially relayed on the Ukrainian undeveloped legislation or legislative loopholes. One example would be fintech projects in which the

development of the technologies preceded the statutory regulation.

Once the war started, MAC clauses governed by Ukrainian law became much more complex. The MAC clause now not only covers the local regulation but also covers martial law, conscription and relocation of employees, and the function of governmental authorities, banks, state registers, etc. In the absence of practice, it remains unclear how the MAC clause will be applied to contracts signed after February 2022.

A similar approach applies to force majeure clauses, the provisions of which were tested during the period of martial law. Provisions that were once mostly template clauses have become extremely important now. At the same time, the practice of implementing force majeure clauses under martial law has not changed dramatically compared with their implementation in relation to the COVID-19 pandemic. More specifically, the ongoing war has not become a universal force majeure event and the impossibility of performing certain provisions must be proven in each particular case. Moreover, the war has not become an excuse for failing to perform payment obligations – unless there was no physical access to the bank account.

Although practice has not yet proven how effective this is, negotiations in potential M&As frequently address questions about different deferral conditions – for example, the payment conditions linked to certain events and the transfer of title after certain dates. Evidently, such a trend is mostly down to the willingness of parties to hedge their risk while the country is at war.

Pre-war Trends

The trends that existed before the war with regard to M&A deals in the IT sector are likely to continue and include the following.

Corporate structuring

Corporate structuring is often a weak point for Ukrainian IT companies, especially start-ups. Indeed, historically, the IT industry has tended to use the private entrepreneur model to benefit from the favourable tax regime. In most cases, services agreements are signed with IT specialists instead of employment agreements.

However, the founders and owners of IT companies also often use this model for themselves, especially in the initial stages of the company's existence. Thereafter, the company continues to grow and build the new structure without a clear separation from the founders. As a result, certain key elements of the business – such IP rights or business processes – are divided between the company and its founders.

Another common issue to be checked during the due diligence process is the absence of a holding company. It happens rather often when IT business deals involve several companies – sometimes in different jurisdictions – but without proper relations between them.

IP rights

IP rights are classically a key asset of IT product companies and, as such, it is crucial to ensure their transfer to the company.

The first issue that commonly arises during the due diligence process is the lack of formal transfer of IP rights from developers to the company. Indeed, the IP objects can be created either by the employees, by IT specialists under services agreements or by founders without any written

agreements (although this would still constitute a verbal services agreement). Despite the differences in regulation for employees and contractors, the absence of a clear provision in the agreement on the transfer of IP rights creates a potential challenge to the company's title to IP by the author.

It is important to note that Ukrainian legislation regulating the transfer of IP rights has undergone several significant changes during the past ten years. One point that deserves attention is the fundamental question of to whom the IP created by the employees/contractors belongs.

In August 2021, a specific rule was introduced for software that is created by employees of the company. Before these changes the basic rule stated that the proprietary rights to such objects belong to the employee unless otherwise prescribed by the employment agreement. However, following the changes, the rights belong – on the contrary – to the employer.

Therefore, it is important to consider the difference in regulation between transferring the title to IP under the employment agreement and under the services agreement, but also to consider differences in regulation of these transfers at different moments in time.

Also, in light of this, post-validation of the transfer of IP rights is a common clause in transaction documents.

It is important to note that in Ukraine the intangible IP rights are not transferrable and belong to the authors. As such, the transaction documents should include special statements from the authors regarding the use of the intangible IP rights.

Personal data

It is common for an IT company to collect, use or disclose personal data. In light of this, it is important to note that Ukraine has not undertaken any obligation to apply the General Data Protection Regulation (GDPR) and, therefore, the local regulation should apply. In most cases, the Ukrainian data protection regulation is less rigorous and formalistic compared to the GDPR, and this may create difficulties if the Ukrainian IT company deals with the personal data of foreigners.

Given that the GDPR applies to the owner of personal data, if a Ukrainian IT company deals with personal data of EU citizens it should comply not only with Ukraine's Data Protection Law but also with the GDPR.

Employees retention bonuses

The Ukrainian M&A market followed the international trend by adopting the practice of offering special bonuses to key employees in order to protect the customer from the risk of losing the most important developers once the deal is done.

IT market transformation

Historically, the Ukrainian IT market uses the private entrepreneur model to structure relations with IT specialists by reaching services agreements with them. This model offers a number of benefits, mostly from a tax perspective.

Since the growth of the IT market in Ukraine, the government tried to change this model several times.

In 2022, Ukraine launched a new initiative called Diia City, which was developed specifically for IT business activities. A company that fulfils all the criteria can become a resident of Diia City. The

residency regime provides IT companies with a number of benefits. In particular, companies engaged in the following types of activities may become Diia City residents:

- software development and testing, including GameDev;
- publishing and distribution of software (particularly SaaS);
- esports;
- training in computer literacy, programming, testing and technical support of software;
- cybersecurity;
- research and development in IT and telecommunications;
- digital marketing and advertising using software developed by residents;
- supply of services related to the circulation of virtual assets;
- robotics;
- development, implementation and support of products for international card payment systems;
- development of technological products in the defence, industrial and domestic sectors;
- cloud data centres.

Diia City aims to solve several important issues by:

- providing a smooth transfer from private entrepreneur mode to a mixed model that combines both services agreements and a special form of employment agreement (so-called GIG contracts);
- introducing many important instruments specifically for the residents of Diia City, such as:
  (a) convertible loans;
  (b) liquidation preferences;
  (c) employee stock ownership plans;
  (d) warranties and indemnities; and
  (e) liquidated damages.

In light of all this, Diia City may end up becoming a start-up incubator and a boost for the whole technology sector in Ukraine.

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INTEGRITES is a full-service law firm with offices in Ukraine and Kazakhstan, and representative offices in Germany and the UK. For 17 years INTEGRITES has served more than 1,350 clients from around the globe, including Fortune 500 companies and international financial institutions. The firm's clients are recognised leaders in various industries, ranging from manufacturing, pharmaceuticals and retail to agriculture, logistics and renewables. The firm is highly recommended for its cross-border work – whether sophisticated transactions or complex dispute resolution – and for large projects in energy (in particular, renewables). In addition to its presence in the aforementioned countries, INTEGRITES makes its legal expertise available to clients from other jurisdictions through two foreign desks – comprising teams of qualified lawyers with exceptional German and French language skills. The firm closely co-operates with a well-established partner network of more than 100 international law firms. In 2022 INTEGRITES was shortlisted as Law Firm of the Year: Ukraine by Chambers Europe Awards.

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