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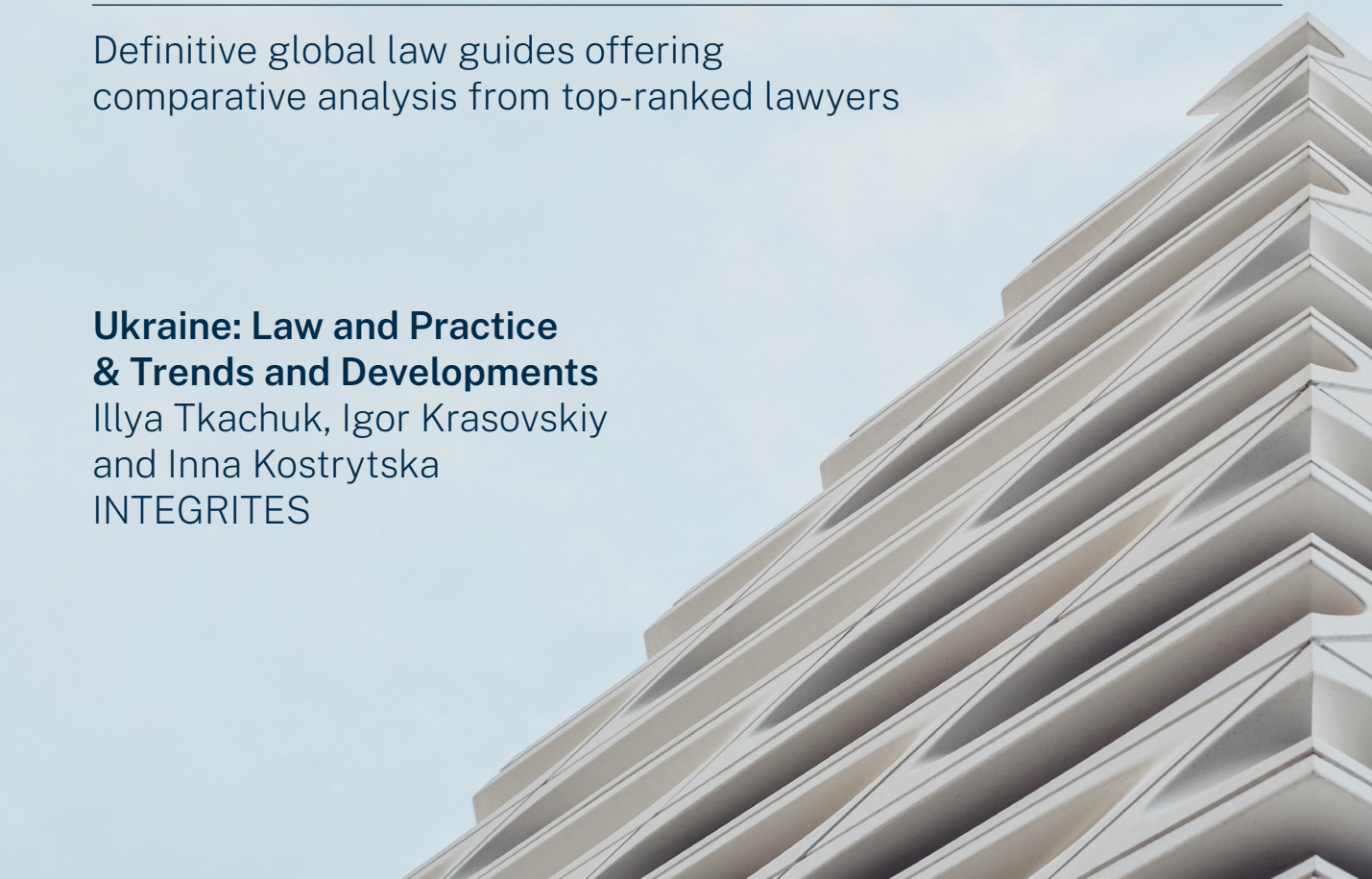

Ukraine: Law and Practice & Trends and Developments

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INTEGRITES

UKRAINE

Law and Practice

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INTEGRITES

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1. Market Trends

1.1 Technology M&A Market

Impacted by the war and the global market slowdown, the technology M&A market in Ukraine has gone through the first year of martial law with a considerable decline in the investment volume which reached 74% as compared to 2021. The total private equity and venture capital investments constituted almost USD220 million, as the recent DealBook report by AVentures shows. The biggest drop occurred in the Growth and Secondary deal market while Series D level deals keep the momentum of the previous years.

On international level, Ukrainian technology companies continue to prove their sustainability. More specifically, in 2022 airSlate (documents workflow) raised USD51.5 million from G Squared and UiPath Ventures. This allowed airSlate to become the unicorn with the global valuation of USD1.25 billion.

The trend of 2021 continues to develop and almost all funding at Series A level in 2022 came from international players and reached approximately 94%. At the same time, the shares of the Ukrainian and international fundings at the levels of seeds and grants is almost equal (51% came from international investors and 49% from Ukrainian).

In 2022 we also saw a number of successful exits in Ukrainian product companies. The most noticeable among them was the acquisition by Mythical Games of Ukrainian DMarket.

The market has high expectation from the new USD250 million fund of Horizon Capital which is the biggest technology-oriented fund in Ukraine.

1.2 Key Trends

The majority of IT companies in Ukraine in 2022 and part of 2023 were busy with the relocation of business and teams and their adaption to the new reality. Ultimately, export-focused business managed to keep afloat, just as service companies did, which currently, despite a certain fall during the initial phase of war, have resumed business activities almost at the pre-war level.

Most key pre-war trends are still there now, in 2023. Among them are the following.

- As before the war, corporate structuring remains the issue for most start-ups, as well as proper arrangement of labour relations, founder's agreements and holding companies in place.
- IP rights issues are often not settled properly, while the relevant regulation which has undergone significant changes over the past ten years must be taken into account. Among the key issues are the transferring of IP rights from developers to the company, as well as transferring the title to IP rights under the employment agreement and the services agreement.
- Ukrainian data protection regulation remains less rigorous then the GDPR, which still may impact transactions where a Ukrainian entity deals with personal data of foreigners.
- Diia City, the special regime for tech businesses introduced by Ukraine's government, keeps boosting the IT and tech in Ukraine by providing its residents with many benefits.

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 tendency continued in 2023 as well.

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.

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 2022–23. 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 USD5 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.

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. This trend intensified in 2023, following war-related migration of the Ukrainian staff to other countries.

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 cases of joint-stock companies; 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, 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 three 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 (more than 50%), significant controlling stake (more than 75%) or a dominant controlling stake (more than 95%) 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 (more than 50%) or a significant controlling stake (more than 75%) 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 Stakebuilding**).

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, or where all shares of the company are acquired (including the shares already owned by the acquirer(s) and their affiliates).

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 and 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 and/or some additionally established criteria.

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 (more than 95%) of shares in a joint stock company entitles the acquirer – or group of acquirers acting jointly – to request 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 or has not been applicable.

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 demand to the company;
- the regulator and shareholders must be notified of this by the company;
- minority shareholders are given 20 business days to file a competing demand if they want;
- funds in consideration for minority shares must be transferred by the shareholder(s) whose demand was the last one 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.

An instrument of a competing demand is a novelty introduced by the new Law "On Joint Stock Companies", which entered into force on 1 January 2023. The purchase price offered in a competing demand must be at least 5% higher than the price of the initial public irrevocable demand. The competing demands may be submitted by shareholders under the same procedure until there are no counter offers anymore.

The minority shareholders are given five 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 (up to 5% or more), 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 and entered into force on 1 January 2023, except for some provisions. 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 (more than 50%), a significant controlling stake in shares (more than 75%) or a dominant controlling stake in shares (more than 95%) 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%, or 95% of voting shares). For private joint stock companies, the same obligation applies in respect of the thresholds of 5%, 50% and 95% of voting shares.

10.2 Prospectus Requirements

A prospectus is mandatory only for issuance of securities by a public (listed) joint stock company in case of public offering. 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;
- provide documents related to company's business and financial activities to the auditor; 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 companies. 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.

Trends and Developments

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INTEGRITES

INTEGRITES is a full-service law firm with offices in Ukraine and Kazakhstan, and representative offices in Germany and the UK. For 18 years INTEGRITES has served more than 1,650 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. Clients recommend the firm for its cross-border work – investment deals, sophisticated transactions, complex dispute resolution, and for projects which require in-depth industrial expertise. 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 for Law Firm of the Year: Ukraine by Chambers Europe Awards.

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The Year 2022 Tested the Technology M&A Market of Ukraine on Its Sustainability

2022 in figures

According to the DealBook report published by AVentures, the total private equity and venture capital investments fell by 74% as compared to 2021 and constituted almost USD220 million. Needless to say, that apart from the martial law, such a drop can also be explained by the global market slowdown.

Importantly, in the segment of Seed – Series D the Ukrainian technology market showed the figures comparable to 2020 and far better than the figures of 2018–2019. The drop has hit the growth and secondary deals which constituted the major part in the overall statistics of previous years.

On an international level, Ukrainian technology companies continue to prove their sustainability. More specifically, in 2022 airSlate (document workflow) raised USD51.5 million from G Squared and UiPath Ventures. This allowed airSlate to become the unicorn with the global valuation of USD1.25 billion.

Other noticeable international deals involved Preply (education marketplace), Fintech Farm (neobank), and Spin.ai (cybersecurity) which in 2022 and early 2023 raised almost USD90 million in cumulative funding.

The trend of 2021 continues to develop and almost all funding at Series A level in 2022 came from international players and reached approximately 94%. At the same time, the shares of the Ukrainian and international fundings at the levels of seeds and grants were almost equal (51% came from international investors and 49% from Ukrainian).

The market has high expectation from the new USD250 million fund of Horizon Capital which is the biggest technology-focused private equity firm in Ukraine.

In 2022 we also saw a number of successful exits in Ukrainian product companies. The most noticeable among them was the acquisition by Mythical Games of Ukrainian DMarket. The latter, evaluated at USD50 million, is the cross-chain marketplace to trade NFTs and virtual items.

IT sector still at war

Since 24 February 2022, IT business has been adopted to the new reality, as well as the entire country.

Most IT companies managed to relocate their employees to safer regions during 2022. Indeed, the cities with a high level of concentration of IT business, such as Kyiv and Kharkiv, were in the first wave of relocation, whereas Odesa and Dnipro joined the movement in the second wave. As a result, March and April showed substantial slowdown in activity.

Even in 2023 we still see the relocation campaigns, although not that massive and mostly from regions suffering from missile attacks.

At the same time the general picture looks like the IT business, with the employees being quite independent in terms of workplace, has adapted to the new conditions of work.

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

During the first month of the war, the firm heard from the representatives of the export-oriented companies of several cases when they lost work-

load due to the uncertainty about the capacity to complete the assignment. However, in 2023 this segment managed to recover and remained rather strong.

At the initial stage of war, the companies providing services mostly to Ukrainian customers suffered much more. This, in particular, relates to marketplaces, ride-sharing, logistics applications, classifieds and others which should have implemented the cost reduction policies, including the staff redundancy. However, in 2023 a substantial part of these companies adapted their activity to the new reality, whereas some of them even showed growth.

At the same time, many IT companies faced another challenge which is drafting of their employees to the Armed Forces. This includes those who voluntarily joined the military, as well as those conscripted to the army.

In order to minimise the impact of this risk, numerous IT companies applied for the reservation of employees from the military mobilisation. In view of the strong support of the Ministry of Digital Transformation and the pressure from business associations, most IT companies succeeded in reserving a part of their employees. Since the general rule allows reserving up to 50% of employees, this risk has decreased by half but has not been mitigated entirely.

The reservation of employees also allows them to travel to other countries which facilitates the business activity of such companies. However, the general rule of the martial law in Ukraine still restricts the possibility for men aged between 18 and 60 to cross the border.

Defence tech

Defence tech is currently experiencing an unprecedented boom. Indeed, many IT specialists channeled their efforts into the development of defence projects.

For example, start-ups which before the war used to develop drone management software for peaceful purposes like delivery of goods or fields aeration, switched to the use of drones for military purposes.

As a result, a number of defence tech companies reached the next level of development in a different specialisation, including aero vehicles of different types and purposes, anti-drone technologies, robotic systems, and software systems aimed at operating the above mechanisms.

Fintech

Fintech and cryptocurrency start-ups have shown a remarkable growth in Ukraine over recent years which has been driven by macroeconomic reasons and various government incentives for providers of digital and innovative products.

A relatively new law on virtual assets (which is 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 benefits of fintech and cryptocurrency technologies. The law establishes the legal framework for transacting in cryptocurrencies and, more generally, regulates all types of virtual assets.

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

Naturally, individuals and companies being under pressure of local currency devaluation, on one hand, and limited in their ability to transact with the use of traditional payment instruments, on the other hand, have turned to real-time digital payments, digital banking platforms, e-money, crypto assets and crypto cards. Not to say that individual entrepreneurs who left Ukraine prefer to be paid by crypto rather than fiat money due to the Ukrainian exchange controls.

As a result, the authors observe an unprecedented 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 is ranging from digital payments, P2P & C2P 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 almost definitely will bring very lucrative return in the future.

Special support for the IT sector

Despite the war, the government of Ukraine allocated up to UAH2.8 billion (approximately USD67 million) for the support and development of the IT sector. The funds will be administrated by the Ukrainian Startup Fund and will be used to support the most vulnerable sector – start-ups.

In addition, the European Commission 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 allow support for at least 200 Ukrainian start-ups with up to EUR60,000 grants. The programme will also include advisory services aimed at integration into the European innovation ecosystem, opening new markets and attracting new financing.

In addition, a number of private companies and associations offered their support to Ukrainian IT start-ups. More specifically, Google created a special fund accumulating USD5 million of financial support and mentorship; the 7Wings fund issues grants of USD50,000 to finance Ukrainian start-ups which maintain their teams in Ukraine; and UA Founders marketplace was launched to connect Ukrainian start-ups with foreign donors.

IT deals at war

Although the war caused a dramatic impact on the technology M&A market, in 2023 we see the signs of recovery of the deals.

The new deals are being discussed in a way that is much more precautious and reserved. Some of the peculiarities can already be noticed.

First of all, the structuring of deals returned back to the "outside of Ukraine level". This entails creation of a non-Ukrainian holding company (if there is none yet), transfer of IP rights and products to the ownership of such holding company and even the transfer of the clients (if possible).

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

Before the war, the MAC clauses were mostly attributed to deals where the target fully or substantially relied on the Ukrainian undeveloped legislation or legislative loopholes. An example can be made with regard to the fintech projects where the development of technologies goes ahead of the statutory regulation.

After the war started, the MAC clause governed by Ukrainian law became much more complex and covers not only the local regulation, but also martial law, conscription and relocation of employees, functioning of governmental authorities, banks, state registers, etc. In the absence of practice, it remains unclear how the practice of use of the MAC clauses will go for the contracts concluded after February 2022.

A similar approach applies to force majeure clauses, the provisions of which have been tested during martial law. The provisions which used to be mostly template clauses before the war now have become extremely important. At the same time, the practice of implementation of the force majeure clauses during martial law has not dramatically changed compared to the COVID-19 cases. More specifically, the fact of war has not become a universal force majeure event, and the impossibility to perform certain provisions needs to be proven in each particular case. Moreover, the war has not become an excuse for non-performing of the payment obligations, unless there is no physical access to the bank account.

Although the practice has not yet proven the efficiency of these trends, the negotiations in potential M&A are often addressing the questions on different deferral conditions. This applies to the transfer of the title after certain dates; the payment conditions linked to certain events. Evidently, such a trend is mostly caused by the will of the parties to hedge the risks of the country at war.

Pre-war trends

The trends which were in place before the war with regard to M&A deals in the IT sector will most probably remain the same and include the following.

Corporate structuring

The corporate structuring is often a weak point for Ukrainian IT companies, especially for start-ups. Indeed, historically, IT businesses commonly use the private entrepreneur's status to benefit from the favourable tax regime. In most cases, the services agreements are concluded with IT specialists instead of employment agreements.

However, the founders and owners of IT companies also often use this model for themselves, especially at the initial stages of the corporate history. Thereafter, the company is growing and building a new structure without a clear separation from the founders. As a result, certain key elements of the business, like IP rights or business processes, are divided between the company and its founders.

Another common issue to be checked during the due diligence is the absence of the holding company. It happens quite often that an IT business encounters several companies, sometimes in different jurisdictions, but does not have proper relations established between them.

IP rights

"IP rights" is classically a key asset of product IT companies and considering this, it is crucial to ensure their transfer to the company.

A common case observed during the due diligence is when the transfer of IP rights from developers to the company is not properly formalised. Indeed, the IP objects can be created either by the employees, or by an IT specialist under services agreements, or by the founders without any written agreements (which would still constitute a verbal services agreement). Despite the differences in the regulation for employees and contractors, the absence of the clear provi-

sion in the agreement on the transfer of IP rights creates a risk of challenging the company's title to IP by the author.

It is important to note that the Ukrainian legislation which regulates the transfer of IP rights has undergone several significant changes over the past ten years. One of the points to pay attention to is the basic principle as to whom the IP created by the employees/contractors belongs.

In August 2021, the specific rule was introduced for software which was created by employees of the company. Before these changes, the basic rule stated that the proprietary right to such objects belongs to the employee unless otherwise prescribed by the employment agreement, whereas after the changes – on the contrary – to the employer.

Therefore, it is important to consider the different regulations in transferring the title to IP rights under the employment agreement and the services agreement, as well as to consider differences in regulation of these relations at different points in time.

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

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

Personal data

It happens rather often that an IT company collects, uses or discloses personal data. In this regard it is important to note that Ukraine has not taken 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 as compared to the GDPR. This may create difficulties in cases when a Ukrainian IT company deals with the personal data of foreigners.

Since the GDPR follows the owner of the personal data, in cases when a Ukrainian IT company, for example, deals with the personal data of EU citizens, it should comply not only with the Ukrainian Personal Data Regulation, but also with the GDPR.

Employees' retention bonuses

Following the international trend, the Ukrainian M&A market developed the practice of special bonuses to key employees aimed at protecting the customer from the risk of losing the most important developers after the deal is done.

IT market transformation

Historically, the Ukrainian IT market uses the model of private entrepreneurs for structuring the relations with IT specialists by concluding services agreements with them. This model bears a number of benefits, mostly from the tax perspective.

Since the IT market has significantly grown in Ukraine over the past decade, the government tried to change this model several times.

In 2022, Ukraine launched the new initiative called Diia City which was specifically developed for IT businesses. A company which corresponds with all criteria can become a resident of Diia City. The residency regime provides IT companies with many benefits. In particular, the

companies engaged in the following types of activities may become Diia City residents.

- Software development and testing, including GameDev.
- Publishing and distribution of software, in particular SaaS.
- eSports.
- Training in computer literacy, programming, testing and technical support of software.
- Cybersecurity.
- R&D in IT and telecoms.
- Digital marketing and ads using software developed by residents.
- Supply of services related to the circulation of virtual assets.
- Robotics.
- Development, implementation and support of products of international card payment systems.
- Development of technological products in defence, industrial, and domestic sectors.
- Cloud data centres.
- Design, production of UAVs, their maintenance and repair, and UAV control training services.

Diia City aims at solving several important issues, including the following.

- 1. It provides for a smooth transfer from private entrepreneur mode to a mixed model combining both services agreements and special form employment agreements (so called GIG contracts).
- 2. It introduces many important instruments specifically for the residents of Diia City, namely, convertible loans, liquidation preferences, options and employee stock ownership plans, warranties and indemnities, and liquidated damages.

Considering the above, Diia City may turn out to become a start-up incubator and a booster for the whole technology sector in Ukraine.

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