

# Ukraine

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## M&A changes in uncertain times

Armen Khachatryan  
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As in many other countries, the global financial crisis significantly affected cross-border M&A transactions in Ukraine. The overall value of M&A declined substantially in 2008 and 2009. According to M&A-Intelligence, 87 major M&A transactions with a total value of \$21.49 billion were announced in 2007.

In 2008 this figure dropped to 36 transactions with a total value of \$3.69 billion, rising again in 2009 with 37 deals valued at \$13.94 billion. The 2009 increase was primarily due to the acquisition of shares in a leading Ukrainian mobile telecom operator, Kyivstar, by the Russian VimpelCom for \$13.08 billion. This deal was a part of a larger transactional restructuring between ultimate owners of Kyivstar and VimpelCom, Norway's Telenor and Russia's Alfa Group.

Another major deal was the acquisition in early 2010 of one of the major industrial groups, Industrial Union of Donbas (ISD), by a group of Russian investors funded by Vnesheconombank, which reportedly valued ISD group at approximately \$2 billion.

Given that the Ukrainian economy shows signs of substantial improvement in 2010, with GDP growing in the first quarter at 4.8% and international business groups (with Russia taking the lead) showing keen interest in Ukrainian assets, especially in the energy and metallurgy sectors, it is reasonable to expect a substantial rise in M&A activity in 2010.

### Legislative changes

In April 2009 the new Joint-Stock Companies Act (the JSC Act) became law. Generally, the Act is regarded as a serious step forward in the development of Ukrainian corporate law. However, the new law suffers from a number

of inconsistencies which businesses and the State Securities and Stock Market Commission (the SEC) are still in the process of ironing out. There are also a number of unreasonably stringent provisions, for example the requirement that all joint-stock companies with more than 100 shareholders be listed on a stock exchange. The Act introduces major and mostly positive changes in all aspects of organisation and corporate governance of joint-stock companies (JSC), including protection of minority shareholders and regulation of M&A transactions.

The JSC Act prescribes detailed procedures for statutory mergers, demergers, and spin-offs. Any merger plan has to be approved by the supervisory boards of all participating companies, audited by an independent consultant, and approved by general shareholder meeting of each participant. A JSC can only merge with another JSC and not with a company incorporated in any other form. Similar limitations apply to demergers and spin-offs. Among other changes relevant to M&A, the Act for the first time in Ukrainian law explicitly prohibits the management of a JSC which is the acquisition target to create obstacles for the buyer. However, the exact scope of this prohibition remains to be clarified.

The JSC Act no longer recognises pre-emptive rights of existing shareholders in public offerings of new shares. Under the new law, pre-emptive rights are only recognised in new private placements.

### New protections for minority shareholders

Protection of minority shareholders is a perennial problem in Ukrainian corporate governance and the new JSC Act makes an effort to improve their situation. Under the Act any person who has acquired at least 50% of common stock in a JSC must make an offer to all remaining shareholders to buy-out their shares. The offer is made through the target company's supervisory board, while the SEC and the stock exchange where the shares are listed must be notified about the offer.

It is important to stress that even though this mandatory buy-out is triggered by the acquisition of 50% of the common stock, in fact a person possessing such a share will not always be in full control of the company under Ukrainian law.

The JSC Act requires a 60% quorum for a general meeting of shareholders to proceed. This means that in practice a shareholder or a group controlling more than 40% of the voting stock can block the company from holding GMSs indefinitely. Some shareholders do in fact use this power as a way of blocking effective control over JSCs by majority shareholders. Importantly, some decisions, such as making amendments to the company's charter, change of the share capital amount, issue of shares, liquidation of the company etc. require a qualifying majority (75%) vote.

Another new rule introduced by the JSC Act provides that shareholders who voted in a GMS against a material transaction (a transaction is considered material, if its value exceeds 25% of the company's assets) against a merger, demerger or spinoff or against any change of the stated capital of the JSC, can demand that the JSC repurchase their shares. To benefit from this right, a shareholder has to affirmatively participate in the GMS where such matters are discussed and vote "against" the proposed transaction.

In Ukraine only the shareholders of joint-stock companies, both public and private, have these rights granted by the JSC Act. Members of other forms of business associations do not enjoy equivalent protections.

### Disclosure requirements

The JSC Act requires potential buyers of at least 10% of shares in a joint-stock company to notify the target JSC, the SEC and the stock exchange where the shares of their intended acquisition are listed. The potential buyer must also publish a notice of the proposed acquisition in one of the official government publications. The notice must be

sent and published at least 30 days prior to the proposed acquisition.

There are no similar notification requirements for companies established in forms other than JSC. However, where any change of membership occurs in such a company, it has to be reflected in amendments to the company charter and filed with the State Registry of Legal Persons.

## Banking and finance

### Recommended firms

#### Tier 1

Baker & McKenzie  
Sayenko Kharenko

#### Tier 2

Asters  
Magisters

#### Tier 3

Chadbourne & Parke  
Clifford Chance  
CMS Cameron McKenna  
DLA Piper  
Salans  
Vasil Kisil & Partners

#### Tier 4

Andriy Kravets & Partners  
BC Toms & Co  
Beiten Burkhardt  
Gide Loyrette Nouel  
Grischenko & Partners  
Schoenherr

"This situation was always going to happen," says a leading banking lawyer. "The financial crisis was merely a catalyst for the problems that we face today."

Following the financial crisis, in which the Ukraine was one of the worst hit mainly because of the large sums of money it had borrowed during the boom years, the country's economy has been in turmoil with people across all walks of business life wondering how it will make a recovery.

"The amount of loans that were handed out to the regular guy on the street was insane, banks were just handing out loans at 100% debt without even thinking about how the clients were going to pay the money back," says one lawyer. "People were buying cars and apartments at ridiculous prices."

When the crisis really hit, funding for the banks dried up and all of a sudden they faced a huge problem with liquidity. They considered different ways of borrowing through sophisticated financial instruments such as

derivatives, but, as one lawyer points out, "banks here really don't understand how it all works so refuse to go down that route."

The economy, therefore, has been waiting for a sector to lead the way. "Agribusiness has really been increasing [and] people are hoping that this can get money into the economy, get banks lending and get things moving again," says a partner.

With the problems in the economy big law firms such as Baker & McKenzie, Magisters, DLA Piper and Asters have all sustained losses to their teams as individual lawyers look to make their fortunes elsewhere.

The one positive bit of news from the country has been the success of the election in bringing stability following years of conflict between the previous president, Viktor Yushchenko, and prime minister, Yulia Tymoshenko. According to a partner: "Prior to the election no one wanted to do anything, [but] now the president has been elected the country will be stable over the next five years."

The new incumbents have so far been positive for the nation as it continues to recover from the recession. President Viktor Yanukovich and his pro-coalition government led by Prime Minister Mykola Azarov have outlined their intention to work together, realign with Russia and consider Russian business a necessary source of investment into the country.

Lawyers have since speculated about the new approach and whether or not it will be good for the country, with some saying that Russia treats Ukraine "like its little brother", expecting the country to follow in its older brother's footsteps. "If you look at the history between the two countries Russia is just interested in taking over the businesses in the Ukraine," says one partner.

On the project finance side, the UEFA European Football (soccer) Championship 2012 is being touted as a possible avenue to raise some much needed finances for the country. "There is still a lot of infrastructure to be built and developed ahead of the tournament," says one partner. "Banks are looking to lend however on a 50-50 split with debt and equity. They are closely looking at the business models for each project making sure the numbers add up. In the words of Sean Connery 'we're going back to sensible banking'".

### Baker & McKenzie

Baker & McKenzie sustained some key losses to its banking and finance team over the past year but still maintains its tier one spot after the market deemed the firm as "one of the best" in the jurisdiction. The firm did have some departures this year, with capital mar-

kets partner Glib Bondar and Mykola Stetsenko leaving to head up the banking and finance team at Avellum Partners. One peer says: "Only time will tell how important these losses will be for the firm."

The loss of personnel has not detracted from the firm's quality, however, which draws on the international training of all its lawyers. "One of the most important aspects of what they do is their in-house training," says one competitor.

Upon being asked on the losses to the team, one client says: "For me I prefer to work with Serhiy Chorny and he is still in place. They are well qualified and are one of the most experienced and knowledgeable law firms. During our work together we always receive good legal opinions."

Chorny led a banking team advising Standard Bank on restructuring \$500 million of financial obligations, to be issued as eurobonds in the capital markets, to Ukrainian gas company Naftogas.

In another stand-out deal, the firm advised the steering committee of international creditors, led by Standard Bank, on First Ukrainian International Bank's \$237 million master facility to refinance an existing facilities agreement provided by international creditors. This was the first successful restructuring of a Ukrainian bank's international loans portfolio since the financial crisis.

### Leading lawyers

Serhiy Chorny

### Sayenko Kharenko

Sayenko Kharenko is still number one in banking and finance having had an impressive year focusing mainly on the debt capital markets and restructurings thanks to a string of high-value deals that have grabbed the attention of the market and media alike. One competitor says the firm's lawyers are "young and aggressive."

One client says: "Ukraine has a very rigid and inflexible law but Sayenko Kharenko were excellent at finding the gaps and the loopholes to complete the transaction."

On the firm's stand-out deal, partner Michael Kharenko advised a syndicate of international banks including Bank of America Merrill Lynch, BNP Paribas and Deutsche Bank on Central European Media Enterprises (CME)'s €200 million eurobond placement.

In another highlight the firm advised HSBC and UBS on a \$1 billion debt restructuring plan for Alfa Bank.

"The managing partners were extremely competent and clever and help me finalise the deal," says a client.

**Leading lawyers**

Michael Kharenko  
Vladimir Sayenko

**Asters**

Asters has been very much involved in the market, boasting a particularly good relationship with the European Bank for Reconstruction and Development (EBRD).

"Asters are one of the top two or three in the jurisdiction," says one client. "We worked with Armen [Khachaturyan] who was technically very good, didn't waste time and very thorough." Associate Gabriel Aslanian impressed one client: "He was always around and helped with the deal on a ground level".

On one deal with the EBRD, the firm advised on a \$100 million subordinated loan to UkrSibbank, owned by BNP Paribas, to boost its liquidity and allow it to begin lending again.

Aslanian and Khachaturyan also teamed up to advise the EBRD on a \$27 million loan to Euroterminal to finance the construction of a logistics service centre in Odessa. The deal represented a much needed investment from the private sector in the infrastructure of Ukraine.

**Leading lawyers**

Armen Khachaturyan

**Magisters**

Magisters continued to provide a solid banking practice through the crisis with head of department Olga Khoroshylova receiving special praise for her precision in her leadership of the firm. "Olga is excellent," says a client, "she was very much on top of issues and was always in control."

On one deal led by Khoroshylova, Magisters represented Naftogas in connection with the restructuring of debt owed to foreign lenders. This was achieved through an exchange of \$500 million of loan participation notes and debt under bilateral loan facilities.

In another deal, the firm advised WestLB and Caterpillar with regards to a secured financing raised by Ferrexpo Group, one of the largest financial groups in Ukraine.

**Leading lawyers**

Olga Khoroshylova

**Other ranked firms**

US firm **Chadbourne & Parke** has a strong presence in central and eastern Europe and has enjoyed a successful year in Ukraine, with a series of mandates both domestically and

from abroad. The firm has hired two senior associates, Olga Prokopovych and Olga Vorozhbyt, with the latter joining from Baker & McKenzie.

Leading lawyer Oleg Mazur advised Turkcell in two financing deals amounting to \$360 million. The transactions composed of a \$285 million financing of 2G and 3G equipment for Turkcell in Turkey, and a \$75 million financing of 2G equipment for the Ukrainian subsidiary of Turkcell, Astelit.

*Leading lawyers:* Oleg Mazur

**Clifford Chance** is Ukraine's most improved firm after the banking and finance team won a large quantity of restructuring mandates which received accolades from the market. Jared Grubb has been its star man, with one competitor saying: "I like the guy. He's got time in the region for people and businesses."

While some peers note that the firm has been very competitive on pricing to try to get a foothold in the market, clients have nothing but praise for the team. "Our principal advisor in Ukraine is Clifford Chance. They are very fundamental in their approach to legal matters. They are easily the firm to talk to for financial issues," says one.

*Leading lawyers:* Jared Grubb and Olexiy Soshenko

**CMS Cameron McKenna** has a very strong banking practice in central and eastern Europe and has begun to make inroads into the Ukrainian market under the leadership of Adam Mycyk and Peter Malecek.

The duo this year has led the firm in a series of restructuring and finance deals valued at around \$100 million with a number of European banks. "CMS has been getting a few deals from the UK as well as Ukraine," says a peer.

*Leading lawyers:* Adam Mycyk

**DLA Piper** has expanded across most of central Europe and is steadily making a name for itself as a leading and knowledgeable banking firm. The team built on last year's mandates to have another successful time in the banking market.

On one deal, the firm is advising one of the country's largest industrial groups in steel and coal on the restructuring of its debt portfolio in a deal valued at approximately \$1 billion. The work included the drafting of various UK and Ukrainian law documents and participating in negotiations with lenders.

One law firm to have made an impression on the market has been Salans which, as one competitor describes, "is a resolute law firm with lots of work at the moment".

On the restructuring side, the firm is representing the domestic bank Nadra in connection with its debt restructuring deal with 70 bank lenders and 30 eurobond holders.

*Leading lawyers:* Natalia Selyakova

**Vasil Kisil & Partners** remains a strong law firm in Ukraine.

In the firm's stand-out deal, partner Denis Lysenko advised Swedbank on the restructuring of its non-performing subsidiary in Ukraine and on solvency and liquidity issues.

One client says: "I found Denis [Lysenko] to be responsive and thorough and his advice generally to be pragmatic rather than recitations of laws and requirements."

**Gide Loyrette Nouel** has managed to maintain a good book of clients largely thanks to its connections with its office in France.

On one deal, the firm advised Trade House EvrazResource on its \$90 million loan from one of Ukraine's largest banks, Prominvestbank, in one of the few new money lending deals in the market in 2009.

**Beiten Burkhardt** has been active this year, particularly on new money deals. Partner Oleg Zagnitko led the finance team advising a Ukrainian bank on its €100 million loan from an EU institution for energy and environment projects.

*Leading lawyers:* Oleg Zagnitko

Partners Alexander Popp, Denys Sytnyk and Yaroslav Kostyuchenko led **Schoenherr** in its stand-out deal of 2009 advising Erste Bank on the \$78.4 million financing to GLD for the development of logistics centre West Gate, near Kiev.

**Other notable firms**

**Astapov Lawyers** is beginning to make its mark on the market after being likened by peers to Clifford Chance in terms of both quality and price.

In one of its stand-out deals the firm advised Rodovid Bank in an asset transfer from Ukrprombank for \$800 million. Both Andrey Astapov and Oleh Malskyy led the deal which involved complex negotiations due to the indemnity surrounding the transaction.

## Mergers and acquisitions

### Recommended firms

#### Tier 1

Baker & McKenzie  
CMS Cameron McKenna  
Sayenko Kharenko

#### Tier 2

Asters  
Magisters

#### Tier 3

Chadbourne & Parke  
DLA Piper  
Grischenko & Partners  
Salans  
Sergiy Koziakov & Partners  
Vasil Kisil & Partners

#### Tier 4

Avellum Partners  
BC Toms  
Beiten Burkhardt  
Clifford Chance  
Frishberg & Partners  
Gide Loyrette Nouel  
Ilyashev & Partners  
Konnov & Sozanovsky  
Salkom

The politically motivated decision to realign the Ukraine with Russia has been a significant one for the M&A market. Where the country has been desperately looking for some activity from a shrinking Western market, Russian investors have held on to their assets and have thus sustained a high level of liquidity.

But the rise of interest from Russian oligarchs in the former satellite state has worried some corporate lawyers. One partner says: "Will foreign investors feel comfortable with Russian investment? Will there be equal rights for Westerners as there will be for Russians? Will there be political pressure to make sure there will be equals of equals?"

There is still a significant amount of hesitation and caution in the market following the recession and investors are anxious to wait until the opportune moment to make investments. "No one has any great deal of certainty," says one partner.

Similar to last year, many law firms have been focused on due diligence as opposed to fully completed deals.

Ukraine is often called the breadbasket of Europe as it has very good soil and with the prices dropping as they have been, investors "couldn't afford to ignore the food market" according to one partner. With Ukrainian farmers looking to cash in on their assets and with Asian and Arab countries interested in the market, the sector is the one gleaming ray

of sunshine in an otherwise torrid M&A market.

Of those sectors to have done well in the crisis, pharmaceuticals, telecoms and energy have all maintained a fairly consistent dynamism. One partner says: "Traditional banks are still being restrictive but there are some new lending transactions on the market. Big international investors are looking around at how to invest their cash in sectors such as healthcare and consumer goods."

Deals have also been made in preparation for UEFA Euro 2012 in terms of infrastructure and real estate, but even on this prestigious once-in-a-lifetime tournament, banks are being extremely cautious at how to lend their money. "Banks are looking at the business model beyond the tournament to make sure the project is viable," says one partner. "[They] are more likely to spend money on a 200 room three-star hotel than a five-star masterpiece."

### Baker & McKenzie

Baker & McKenzie has once again led the way in M&A with another strong year, landing a number of strong roles largely thanks to its European network. The firm did sustain the loss of Mykola Stetsenko, who left in the summer of 2009 to establish Avellum Partners. Nevertheless, the firm maintained its deal level and received praise from competitors and clients alike.

"Baker & McKenzie is one of the best practices," says one competitor. "They are managing to get a great deal of work flow from their other offices."

On one deal, a team led by partner Viacheslav Yakymchuk advised Technocom on the sale of its assets to Nestlé. Closing in February 2010, the deal was the first of its size since the financial turmoil began in Ukraine in 2008.

Another highlight saw the team advise the Odessa Sparkling Wine Company in its 99% sale to Gruppo Campari, an Italian drinks group, for \$18.1 million. This was a landmark transaction as it showed that despite the economic slow-down strategic investors are still looking for a good deal. The deal involved several lawyers from Kiev and London.

#### Leading lawyers

Serhiy Chorny

### CMS Cameron McKenna

CMS Cameron McKenna obtained high accolades from its counterparts over the last year with market opinion advocating that the firm should be ranked in the top tier. While one client notes that the firm could improve

its ability to be proactive, peers are full of praise for the team. "They have a really good team, Adam Mycyk and Olexander Martinenko are great lawyers," says one.

The firm's M&A highlight came in advising Nestlé in what was the first acquisition in the consumer products sector in 2010. Led by head of department Mycyk, the firm led the consumer goods giant on its acquisition of ready meals producer Technocom.

On the private-equity side the firm advised Swisscom on the disposal of its internet service provider businesses to private-equity fund Euroventures Ukraine in August 2009.

#### Leading lawyers

Olexander Martinencko  
Adam Mycyk

### Sayenko Kharenko

The leading domestic law firm in Ukraine managed to not only hold together its original M&A team but make two additions to boost its manpower following an increase in work in the practice area. The firm has been praised by its clients for having an "excellent local M&A knowledge with vast expertise in the area".

Managing partner Michael Kharenko led a team advising Central European Media Enterprises (CME), as well as the Studio 1+1 and Kino channels on its sale to Harley Trading in a deal valued at \$300 million.

On the domestic front the firm advised the Commerzbank Group on the acquisition of an additional 26.3% shareholding in the Ukrainian Bank Forum.

Another client says: "They have a good local angle. They are exactly the same quality of other international law firms like Baker & McKenzie and CMS Cameron McKenna, but at a cheaper price".

#### Leading lawyers

Michael Kharenko  
Vladimir Sayenko

### Asters

Asters is no stranger to handling the big clients and the big deals in the Ukrainian M&A market, with Coca-Cola and Swedbank appearing on its client list. One client says: "Generally speaking we are very happy with the firm."

On one deal, the firm is advising Sopharma regarding an acquisition of the majority share in Ukrainian pharmaceutical company Vitaminy. The deal, led by partners Oleksandr Padalka and Igor Svechkar, involved due diligence, structuring and documentation of the transaction.

On the merger side, the firm, led by senior partner Armen Khachatryan, is advising Swedbank on a merger with its Ukrainian subsidiaries and Swedbank Invest. This is the final step of Swedbank's integration into the Ukraine which will allow the bank to consolidate two more Ukrainian banks.

#### Leading lawyers

Armen Khachatryan

### Magisters

Andrew Mac, the M&A head of department at Magisters, was the "pick of the bunch", according to one competitor, who adds that "he was a great M&A lawyer". The firm hired four new associates over the last year, boosting its manpower in an effort to cope with the extra demands on its M&A practice. One client notes that the firm is very good at process, but adds that it could improve its problem-solving skills.

Magisters is typically known for having strong connections with the government, leading to a strong deal flow. However peers note that its connections aren't as strong with the new government, and has been less visible in the market as a consequence.

However the firm's deal list is still very impressive. Andrew Mac is acting as the Ukrainian law counsel to Altimo in the \$24 billion consolidation of Russian and Ukrainian telecom assets, jointly controlled by Altimo and Telnor.

On another deal, the firm advised Boris Fuchsmann and Alexander Rodnyansky on a 50% share acquisition of a project that involves the construction of a new five-star Hilton hotel in Kiev. The acquisition had to be approved by the Ukrainian competition authority as well as Hilton International, and was completed in March 2010.

#### Leading lawyers

Andrew Mac

### Other ranked firms

**Chadbourne & Parke** has maintained a steady service to its M&A clients during the recession, advising on small- to mid-range deals focused primarily on the food industry.

On one deal, the firm advised Gruma International Foods in its acquisition of Altera and Altera 2 in a deal valued at \$9 million. Led by Jaroslawa Johnson, Gruma will now become leader on the Ukrainian market for corn flour.

**DLA Piper** has received a steady amount of praise from its peers and is considered to be "up and coming" by one partner. The firm has a useful network in central and eastern Europe

which has helped it win a substantial number of deals over the past year.

In one of its stand-out deals, Oleksandr Kurdydyk advised an international oil and gas company in its acquisition of a chain of petrol stations in Ukraine.

The addition of partner Markian Silecky to the **Salans** M&A team will give the French firm a much-needed boost following the crisis period with the former counsel member leading the firm to some strong mandates.

Silecky this year advised CHS in connection with its acquisition of an ownership interest in a grain terminal in the port of Odessa, Ukraine. The deal, closed in September 2009, means that CHS and its Ukrainian partner GN Terminals will jointly operate the terminal.

**Vasil Kisil & Partners'** stand-out deal from the last 12 months was advising Vypel Communications on the sale of a 20% minority stake in its Ukrainian subsidiary Golden Telecom to a confidential company. The deal, led by partner Denis Lysenko, involved the application of newly established investment rules in the Ukraine.

**Avellum Partners** is one firm that has gripped the market and that many lawyers are saying will be the "next Sayenko Kharenko". Former Baker & McKenzie partner Mykola Stetsenko set up the firm a year ago with Glib Bondar. One client says: "They are excellent. I pushed hard for my company to use the law firm and we have no regrets whatsoever."

The firm has hired nine associates and two other partners, all of whom have at some point worked with Stetsenko. On one deal the firm advised the shareholders of Vik Oil Group on the sale of shares to the TNK-BP joint venture.

*Leading lawyers:* Glib Bondar and Mykola Stetsenko

**Gide Loyrette Nouel's** recent highlight has been its representation of the leading subscription French TV service Canal+ in its acquisition of a Ukrainian media group. The deal, still in progress, is being led by Karl Hepp de Sevelinges.

**Ilyashev & Partners** had a solid year, with one highlight advising Antonov Design Bureau on M&A matters including its merger with Aviant Kyiv State Aircraft Plant. Led by partner Roman Marchenko, the deal was valued at \$2 billion.

The firm has also acted as corporate counsel for ProCredit Bank, PZU and Eli Lilly.

**Konnov & Sozanovsky** has been strong on the private-equity front with a series of deals. Yevgeniya Derbal led a team advising the owner and CEO of Ukraine Holding, Leonid Kryuchkov, on the transfer of assets and corporate rights to a Russian investor.