

大成 DENTONS

Manufacturing in Ukraine



Foreword

Dear Readers,

The Dentons Europe offices cover a legendary territory for manufacturing and industrial projects, including Spain and France to the west, Russia, Kazakhstan and Uzbekistan to the east, Germany, Poland, Hungary and other Central European countries in the middle and from Italy to Turkey to the south. This territory offers a vast population with strong purchasing power and excellent infrastructure, combined with vast workforce resources and industrial expertise.

Dentons Europe has been at the forefront of the first industrial projects going east after the fall of the Berlin wall, actively advising on greenfield and brownfield projects as well as on acquisitions and joint ventures when Central European countries—Romania, Czech Republic, Slovakia and Poland—joined the European Union. We are now actively witnessing Asian investors' interest for manufacturing in Europe.

The legal environment in the countries we cover has greatly evolved. It is a strong advantage to have been present in some of the emerging economies of Eastern Europe, Caucasus and Central Asia for the past 20 to 30 years, as the legacy legal systems in these countries can still be felt, in particular with regard to land acquisition and environmental norms. Today many jurisdictions, including in Western Europe, offer state aid and tax incentives to attract the best manufacturing projects.

We are well placed to help you choose your entry doors to the European Union and to Eurasia.

We hope the Manufacturing Guide you have selected will be of interest. It aims to give you a general overview of key checkpoints for this jurisdiction. Do not hesitate to contact me or the authors of this guide for any further information.



Pirouzan Parvine

Partner Manufacturing Sector

Leader for Dentons Europe

pirouzan.parvine@dentons.com

+33 6 42 24 07 25

Credentials in Ukraine

- **Concern AVK**, the largest confectionary manufacturer in Ukraine: Advising in connection with the sale of shares of the company to the Finnish company Orkla Foods ASA.
- **Europe Virgin Fund L.P.**: Advising on its acquisition of a majority stake in Tissico Limited, a Cyprus-based holding company for VGP, Ukraine's leading manufacturer of hygiene products (TM "RUTA").
- **Bonduelle Group**: Advising in relation to the investment in the construction of a factory producing canned and frozen vegetables in the Cherkasy region, Ukraine.
- **Monsanto**: Advising in connection with the acquisition of De Ruiters Seeds, a producer of seeds.
- **Groupe Lactalis**: Advising in relation to the acquisition of the controlling stake in the Fanni Corporation, the leading producer of dairy products in Ukraine.
- **International Steel and Tube Industries Limited (ISTIL)**: Advising on the sale of a major steel business located in Ukraine and related trading operations.
- **Diebold, a global manufacturer of ATMs, software and security systems for global financial and commercial markets**: Advising on its acquisition of a legal entity in Ukraine and related corporate, tax and antitrust advice.
- **An investment capital firm and other shareholders of Rogan Brewery**: Advising on the sale of shares to Interbrew.
- **Western NIS Enterprise Fund**: Representing in its acquisition of shares in the leading Ukrainian confectionery manufacturer.
- **Wielton S.A.**: Advising on obtaining merger control clearance from the Antimonopoly Committee of Ukraine for the acquisition of shares of Fruehauf, France's leading trailer brand.
- **Nestlé, a Swiss multinational manufacturer of a variety of food products**: Advising in respect of a potential competition violation in Ukraine.
- **David Smith International and Rubezhnoye Cardboard & Package Mill (JSC RKTK)**: Advising in connection with the acquisition of SCA Packaging Kuban.
- **Henkel**: Conducting competition law trainings and providing the ancillary competition law advice. Competition law trainings covered various issues, including competition compliance; market dominance, abuse of market power; unfair competition - misleading information, false advertising; competition investigations and dawn raids.
- **Dow Europe**, a global leader in the chemical industry: Providing legal assistance with the incorporation of a subsidiary in Ukraine.
- **Citibank N.A.**: Advising on two syndicated and secured loans (US\$55 million and US\$20 million) to a leader in Ukraine's confectionary market.
- **UniCredit Bank Ltd., DEG** – Deutsche Investitions- und Entwicklungsgesellschaft mbH and Nederlandse Financierings-Maatschappij Voor Ontwikkelingslanden N.V. (FMO): Advising on a €62.5 million syndicated loan to PJSC Lutsk Automobile Plant (LuAZ) in Ukraine.
- **Dr. Falk Pharma GmbH**, a German pharmaceuticals company and market leader in the field of gastroenterology and hepatology: Advising in connection with establishing a corporate entity in Ukraine.
- **Solvay Pharmaceuticals**, a multinational pharmaceutical firm: Advising on various corporate matters in Ukraine.
- **Brown & Forman Corporation**, one of the leading global producers of alcoholic beverages: Advising in connection with distribution agreements in Ukraine.
- **BNP Paribas (Suisse) and Bayerische Hypo und Vereinsbank AG**: Advising in relation to a participated loan agreement with one of the leading Ukrainian producers of coal, coke and steel as the borrower for a total amount of US\$300 million.
- **Air BP Ltd**, a specialized aviation fuels and lubricants division of BP: Advising in connection with due diligence on forming a joint venture in Ukraine.

Contents

09 ... Ukraine and the European Union

10 ... Preparing to manufacture: greenfield and brownfield projects

- A. Corporate Vehicles
- B. Real Estate, Construction and Insurance
 - Acquisition of land in Ukraine and long term leases for manufacturing projects
 - Permits, specifics of construction contracts
- C. Administrative law – dealing with authorities – including anti-bribery laws
- D. Employment
 - Forms of employment and regulation of the employment relationship
 - Basic obligations of the employer
 - Termination of employment
- E. Tax and State Aids
- F. Protecting your intellectual property and complying with data privacy obligations

16 ... Operating

- A. Connecting to utilities
- B. Health and Safety
- C. Trade Unions
- D. Industrial Risk & Insurance
- E. Commercial and Insolvency related risks related to suppliers
- F. Defending your intellectual property
- G. Regulation compliance
- H. Competition law investigations
- I. Compliance monitoring – anti-bribery, anti-money laundering and whistle blowing rules in France

20 ...	Acquiring and selling a plant (buy side & sell side key check points) <ul style="list-style-type: none">A. Share deals & Asset dealsB. Real EstateC. Third party suretyship on the plantD. Employment & Trade UnionsE. Specifics for distressed assetsF. Merger control
24 ...	Closing down – moving away manufacturing from Ukraine
27 ...	Contacts



Ukraine and the European Union



Ukraine is yet to become an EU member state and its relations with the EU—Ukraine’s largest trading partner—are governed by the Association Agreement (AA). The economic part of AA [“Deep and Comprehensive Free Trade Agreement”] provides for the mutual opening of internal markets by gradually reducing tariffs and eliminating technical trade barriers.

Pursuant to Article 57 of the AA, it is planned that the Agreement on Conformity Assessment and Acceptance of Industrial Goods (ACAA) will be implemented as Minutes to the AA within the 10-year transition period upon harmonization of Ukrainian laws with EU legislation.

In Ukraine, there is no single competent authority in charge of compliance for all products sold in Ukraine with all applicable regulations and laws. Rather, various authorities are vested with powers to carry out state supervision functions – i.e., run scheduled and off-schedule inspections, demand that revealed violations be cured, collect product samples, seek explanations, arrange for expert examination of products, impose sanctions, etc.

Preparing to manufacture: greenfield and brownfield projects





A. Corporate Vehicles

Joint stock companies (public or private) are generally used only where expressly required by law (e.g., insurance companies, banks, etc.) due to the complicated and burdensome securities regulations. Public joint stock companies are set up only if the shareholders intend to list shares on the stock exchange, which is prohibited, with a few exceptions, for private joint stock companies. The main characteristics of JSCs are:

- Governance: the General Shareholders' Meeting, the Supervisory Board (optional for private JSCs with less than 10 shareholders), the CEO/Management Board.
- Liability: a joint stock company is independently liable for its obligations with all its property.

Limited liability companies: most common and best fitted vehicle because of its flexibility and limited liability. Its main characteristics are:

- Governance: the General Participants' Meeting, optional Supervisory Board, and the executive body (either CEO or the Management Board).
- Liability: a limited liability company is liable for its obligations with all the property it owns.

Simple partnership, though not strictly a corporate form, may be useful for certain types of manufacturing activities, because it allows for the running of a business without the need to establish a separate legal entity. A partnership agreement (commonly referred to as a 'joint activity agreement') is entered into between the parties, and tax authorities view joint activity as a separate taxpayer. Main characteristics of a simple partnership are:

- Governance: All parties to a joint activity agreement jointly decide all matters.
- Liability: The parties to a joint activity agreement, if such 'joint activity' is engaged in doing business, shall be jointly and severally liable for obligations arising out in connection with such joint activity.
- Relations with third parties: the authority of one of the parties to the joint activity agreement to represent all parties to the joint activity agreement shall be confirmed by a POA issued by all other parties or by the joint activity agreement itself.



B. Real Estate, Construction and Insurance

Acquisition of land in Ukraine and long term leases for manufacturing projects

The acquisition of an existing building or a land plot, including for construction purposes, is subject to mandatory notarization and state registration. State- and municipally-owned manufacturing facilities (enterprises) may be acquired through privatization, land may be purchased from respective state or municipal authorities on a competitive basis only (auctions), with few exceptions.

The lease (other use rights) for construction purposes of state- and municipally-owned land is possible, but the applicable procedure is burdensome and time-consuming.

The term of a lease agreement may not exceed 50 years; leases with a term of three or more years are subject to mandatory registration. After the completion and commissioning of a construction, a good-faith lessee has a priority right to enter into an agreement for the lease of a land plot granted for construction purposes.

Permits, specifics of construction contracts

Construction of manufacturing premises (CC2 or CC3) is a licensable type of business activity. In

addition, certain works (services) must be performed by duly accredited subcontractors/employees.

Construction of manufacturing premises is subject to approval at a local level through developing a Detailed Territory Plan for a construction site and having it approved by a local authority.

Construction contracts must contain a number of legislatively prescribed essential terms and conditions. To use a FIDIC contract in Ukraine, said essential terms and conditions must be incorporated therein.

Specifics of Insurance before and during the construction phase

Construction must be insured by one of the parties to a construction agreement (usually by the contractor). An insurance contract must be in writing and must contain all essential terms and conditions under Ukrainian law.

C. Administrative law – dealing with authorities – including anti-bribery laws

Ukrainian anti-corruption and anti-bribery laws are rather strict, and the giving and taking of an unfair benefit (Ukrainian legalese for a bribe) is a criminal offence. Unlike the UK's Bribery Act 2010, Ukrainian law does not envisage liability for acts of corruption committed by agents or subsidiaries outside Ukraine.

D. Employment

Forms of employment and regulation of the employment relationship

It is possible to establish indefinite-term employment relations with regular employees via (i) the execution of an employment agreement followed by a hiring order or (ii) a prospective employee's application seeking employment followed by a hiring order.

A fixed-term employment agreement is possible only in limited cases. An employment contract (a special type of employment agreement with a fixed term and additional termination grounds) may be executed with CEO and certain categories of employees).

It is also possible to hire personnel through outsourcing agencies, where such personnel are formally employed by the agency but receive their instructions from a company using the services of the agency under a civil law agreement concluded between the employer and the agency.

The Labor Code, the Law on Salaries, the Law on Vacations and other legal regulations regulate employment relationships. Employment agreements and collective bargaining agreements can only diverge from the rules set forth in law to the advantage of the employee. In respect of certain matters that can be decided by the employer (e.g., voluntary health insurance, additional benefits), the employer can also issue internal regulations.

While it is common practice to engage personnel under civil law agreements – i.e., as contractors rather than as employees, a threat always exists that authorities may reclassify such civil law agreement as an employment agreement, impose penalties for this violation and assess additional taxes.



Basic obligations of the employer

- Ensure that each employee is properly employed and registered with the Tax Authority;
- Ensure that each employee is informed in writing of main employment conditions (e.g., working time, salary payment date) against such employee's signature;
- Ensure that personal data of an employee is processed on legitimate grounds or subject to such employee's consent;
- Observe working time and holiday allocation rules and keep records of working time and holidays;
- Hire disabled individuals - at least four percent of the total workforce;
- Pay salaries as well as statutory premiums; and
- Obtain work permits for foreign employees (non-Ukrainian citizens), if necessary.

Monthly gross (statutory) minimum salary (in 2019)

Basic monthly gross minimum salary for full-time employees	UAH 4,173 (approx. €137)
--	-----------------------------

Social security burden of employer (in 2019)

Personal income tax (deducted and paid by employer as tax agent on behalf of employee)	18%
Military charge (deducted and paid by employer as tax agent on behalf of employee)	1.5%
Public levies payable by an employer	22% uniform social contribution

Termination of employment

The employee may be dismissed only on the grounds provided for by the Labor Code of Ukraine. Most frequently used grounds are (i) by mutual agreement between the parties (the execution of an employment termination agreement); (ii) expiry of a fixed-term employment agreement; (iii) at the employee's initiative; (iv) at the employer's initiative; (v) on grounds provided by the labor contract (if an employment contract was entered into), (vi) dismissal of the director, CEO or members of the management bodies for 'no cause'. An employer is required by law to serve two months' termination notice and pay severance pay ranging from two to six months' salaries. An employee is required to give two weeks' notice if employment is terminated at the employee's initiative;

Certain categories of employees (e.g., single mothers, pregnant women, women with children under three years of age and some other categories) are protected – i.e., they cannot be dismissed at the employer's initiative, unless the employer is liquidated, and even in this case an alternative employment must be secured for such protected categories.



E. Tax and State Aids

Under the AA, Ukraine is obliged to implement an EU-compliant state aid system. The State Aid Law is in effect as of June 1, 2017, and the Antimonopoly Committee of Ukraine is a government authority in charge of state aid matters. The setting up of a register of state aid is in progress. By definition, state aid is viewed as anticompetitive and requires prior notification.

F. Protecting your intellectual property and complying with data privacy obligations

In Ukraine, the EU manufacturers should seek IP protection regardless of whether or not their IP is protected in the EU. Ukraine is the first to file country and protection of industrial property, such as trademarks, inventions, utility models and industrial designs, primarily obtained through registration.

Information of a technical, organizational, commercial, industrial or other nature, may be considered a trade secret should it meet the following criteria: (i) it is not known and easily accessible by the public; (ii) it has commercial value due to its secrecy; and (iii) it was subject to adequate efforts to maintain secrecy.

Personal data may be processed upon the data subject's prior consent or on legislatively prescribed grounds. Ukrainian personal data law is modeled after EU Directive 95/46/EC. Failure to comply with personal data protection requirements constitutes administrative liability.

Operating





A. Connecting to utilities

Connecting newly built manufacturing facilities to the grid is highly regulated and takes up to six months, provided that sufficient capacity is available. It is practically impossible to connect to the utility grids if the manufacturing premises are owned directly by a non-Ukrainian legal entity/national.

B. Health and Safety

Ukraine has ratified only a few of the ILO's 'Safety and Health' related conventions to date.

On the national plane, buildings (production facilities) must comply with the requirements of state sanitary norms, technical standards and other applicable regulations.

Employers are required to ensure that employees work in a safe and healthy [i.e. compliant with all applicable requirements] environment. An internal labor safety division is set up on a mandatory basis, if more than 50 persons are employed by a company.

C. Trade Unions

Employees have an unalienable right: (i) to set up a trade union / a division of the trade union (at least two employees are required) and/or (ii) to elect a workers' council (no set minimum number of employees). Foreign employees and stateless persons cannot set up a trade union/ a division of a trade union, but can join one.

Employers are required by law to (i) support creation of appropriate conditions for functioning of trade unions and (ii) allocate certain funds (not less than 0.3% of the payroll fund) for cultural, recreational and health-improving activities of their employees.

D. Industrial Risk & Insurance

All employees are insured against industrial accidents and occupational diseases on a mandatory basis.

An industrial incident must be reported immediately by either a victim of such accident, any other employee or any witness to such accident to a work supervisor or other authorized person.

The work supervisor or other authorized person is required (i) to make sure that first aid is provided to a victim and, if necessary, transport him/her to a medical facility; and (ii) report the accident to the employer.

The employer notifies all competent authorities and sets up a commission to investigate the accident.

Upon investigation, the commission draws up and signs an act to confirm or deny that the accident was industrial. Such act, if the accident is found to be industrial, triggers insurance coverage against industrial accidents and occupational diseases.

E. Commercial and Insolvency related risks related to suppliers

Apart from apparent commercial risk relating to unavailability of stock with the supplier, please note specific features relating to risks related to a supplier's insolvency:

- A 'creditor' in a Ukrainian company's insolvency proceeding shall be only a company having monetary claims against the debtor (which claims have to be duly proved). I.e., claims to supply goods, as a general rule, shall not be considered in the bankruptcy procedure and shall not be subject to moratorium in bankruptcy.
- There is a legal procedure for "debtor's rehabilitation prior to commencement of bankruptcy proceedings". The leading parties shall be creditors under monetary claims, though other creditors take a part in the rehabilitation plan.
- Contractual restructuring of any kind of obligations is possible and depends on an agreement of the parties involved.



F. Defending your intellectual property

Any manner of spreading false, inaccurate and incomprehensive statements about a legal entity and/or its business activity that hurts or could have hurt the reputation/goodwill of the subject of the statement may be viewed as defamation. A defamatory statement can be refuted based on a court ruling. The statute of limitation for the false statement published in the press constitutes one year from the date the statement was made or the person has known or should have known about such statement.

The recently adopted changes to the legislation, i.e. the Constitution and the Law "On the Judiciary and Status of Judges," has envisaged the creation of a specialized court—the High Court for Intellectual Property (the HCIP)—to hear the IP-related cases. The process has been launched officially. In the meantime, in the transition period, IP cases should be filed either in courts of general jurisdiction or in Ukraine's commercial courts. The courts of general jurisdiction review cases involving individuals, while the commercial courts deal with disputes between legal entities.

G. Regulation compliance

Products must comply with applicable technical regulations and Ukrainian market surveillance bodies are vested with authority to run scheduled and off-schedule inspections, demand that revealed violations be cured, collect product samples, seek explanations, arrange for expert examination of products, impose sanctions, withdraw products, etc.

H. Competition law investigations

The Anti-Monopoly Committee of Ukraine has extensive investigating powers in the areas that fall within its purview when they investigate suspicions of anticompetitive practices. It may carry out scheduled inspections, unscheduled inspections, unimpededly enter office and/or industrial premises, access documents and other materials required for the purposes of carrying out inspections, seek explanations from companies' officers and ordinary people and request that documents—even documents with limited access—be provided in the course of exercising its authorities.

On the first day of inspection, the investigative commission is required to provide all necessary paperwork to the CEO of a respective company, including the scope of investigation. The company's employees must cooperate and assist the investigative commission to inspect the matters within the scope fully. The CEO may add his comments to the inspection report if he disagrees with its findings. Actions of members of an investigative commission may be challenged in court.

I. Compliance monitoring – anti-bribery, anti-money laundering and whistle blowing rules in France

Anti-bribery compliance: Ukraine is committed to fighting corruption Ukrainian Parliament passed the Law of Ukraine No. 1700-VII “On Preventing Corruption” dated October 14, 2014 (the “Anti-Corruption Law”) whereby:

- State-owned companies as well as companies involved in state procurement are required to adopt an anti-corruption program. All other companies are encouraged to adopt anti-corruption programs.
- A number of anti-corruption authorities, including a special anti-corruption court, are being established in Ukraine and, once duly established and operational, will be instrumental in combating corruption in Ukraine.

Whistleblowing system: the identity of a whistle blower may not be disclosed without such whistle blower's consent, but as of now, there is no efficient system in place for protecting whistle-blowers.

The National Agency on Prevention of Corruption and other governmental authorities are required to ensure ways for people to report potential violations of the law.

Anti-money laundering compliance (AML): Most AML obligations under Ukrainian law result from the Law of Ukraine No. 1702-VII “On prevention and counteraction of legalization (money laundering) of the proceeds from crime, financing of terrorism and financing of proliferation of mass destruction of weapons.” Manufacturing corporations are not required to conduct financial monitoring, but they may be subject to scrutiny by banking and financial institutions as well as other subjects of financial monitoring under Ukrainian law.

Acquiring and selling a plant

(buy side & sell side key check points)





A. Share deals & Asset deals

Both share and asset deals are possible in Ukraine.

Share deal is considered a more convenient vehicle, but all tax liabilities and other financial liabilities of a target company be passed on to an acquirer along with the title to shares in a joint stock company/equity interests in a limited liability company. A permanent establishment in Ukraine is not required for a non-Ukrainian purchaser in order to acquire shares/equity interests.

Asset deals allow to limit (sever) liability of the selling entity, but is less tax favorable, i.e. it is subject to the corporate profit tax on a surplus, 20% VAT, the 1% state duty, and the 1% pension fund charge. A non-Ukrainian purchaser needs a permanent establishment in Ukraine in order to acquire assets.

An asset deal is to be structured as a purchase of relevant tangible and intangible assets via a series of agreements for the sale and purchase of respective types of assets. Commercial contracts, licenses and other operational permits and certain use rights are non-transferable in principle, while employees must be transferred separately and always subject to such employees' consent.

Statute of limitations is in general three years.

B. Real Estate

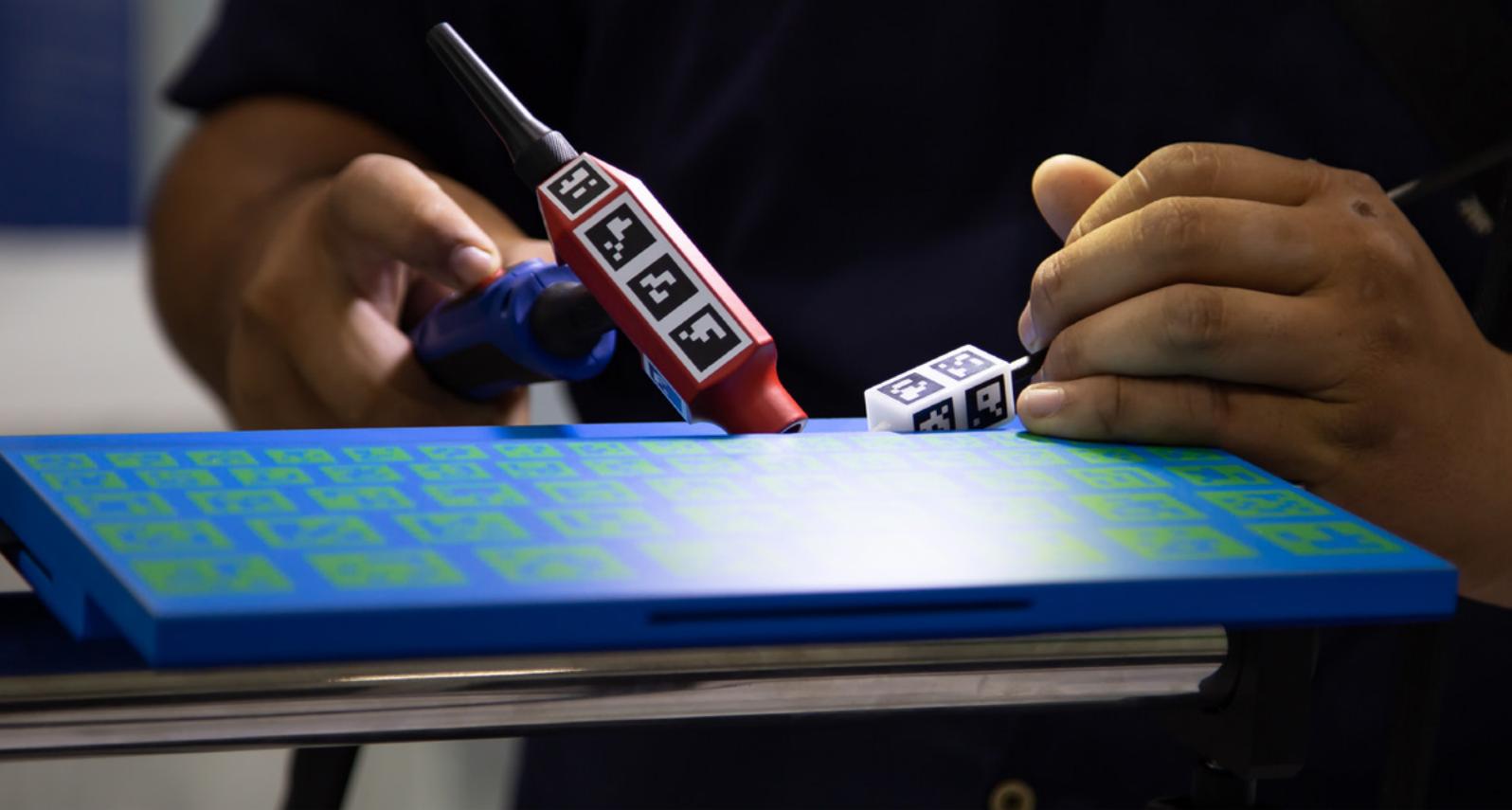
All rights in immovable property (encumbrances, rights of way, etc.) are required to be registered with the respective register and become valid upon registration only.

Statute of limitations is in general three years.

C. Third party suretyship on the plant

Security instruments where third parties are guarantors/suretors, plegors (for movable property) or mortgagors (for real estate) are provided for by Ukrainian legislation. However, we must note that securing payments of dividends has not been tested in practice.

Mortgages over real estate (e.g., over buildings of the plant) are subject to notarization, which requires the physical presence of authorized signatories before a Ukrainian notary.



Obligations secured by pledged/mortgaged assets may be discharged by the current owner of such assets in order to have respective assets released.

D. Employment & Trade Unions

The workers councils and trade unions play no role in the context of an acquisition/divestment. In share deals, employees remain employed by the target; in asset deals, employees remain employed by the selling company and may be transferred to a new company in compliance with the requirements of Ukraine's labor laws.

E. Specifics for distressed assets

In the course of an insolvency proceeding, it is possible to provide for the debtor's assets at an auction sale as a 'united property complex,' which is an approximate Ukrainian law equivalent of a 'business,' and the seller of such 'united property complex' automatically takes over the employer's obligations in respect of the employees who worked at such 'united property complex.'

F. Merger control

Acquisitions in excess of legislatively prescribed thresholds will require prior consent from the Anti-Monopoly Committee of Ukraine.

The key thresholds that would trigger the requirement to seek prior AMC approval:

- global aggregate assets or revenues of all parties to the concentration exceeded €30 million, and Ukrainian aggregate assets or revenues of at least two parties to the concentration exceeded €4 million for the preceding financial year; or
- Ukrainian aggregate assets or revenues of the target entity, seller of the assets, or of at least one of the founders of the entities that will be established exceeded €8 million, and global aggregate revenues of at least any other party to the concentration exceeded €150 million for the preceding financial year.



Closing down

– moving away
manufacturing
from Ukraine



Voluntary liquidation requires that a legislatively prescribed procedure be followed:

1. The highest management body of a company resolves to go into voluntary liquidation and appoints a liquidation commission.
2. A notice of liquidation is filed with the registration authority.
3. Required documents are filed with a number of government authorities for the purpose of de-registering a company.
4. An interim liquidation balance sheet is compiled and approved by the liquidation commission.
5. Creditors' claims are settled – if not, this triggers initiation of a bankruptcy proceeding.
6. A liquidation entry is made in the respective register,

Remaining assets are returned to former shareholders/participants.

Withdrawal by a foreign investor of its investment (both in-kind and in cash) as well as proceeds from such investment from Ukraine within six months after the termination of its investment activity in Ukraine is exempt from the customs duty.



Contacts



Contacts

Sector Leader



Pirouzan Parvine
Manufacturing Sector
Leader Europe/Partner
D +33 6 42 24 07 25
pirouzan.parvine@dentons.com

Key contact



Oleg Batyuk
Ukraine Managing Partner
D +380 44 494 47 74
oleg.batyuk@dentons.com

LLC Dentons Europe

41 Naberezhno-Khreshchatytska Street
9th floor
Kyiv, 04070
Ukraine

Contributors



Oksana Horban
Counsel
D +380 44 494 47 74
oksana.horban@dentons.com



Nikolay Zhovner
Senior Associate
D +380 44 494 47 74
nikolay.zhovner@dentons.com



Natalia Levchuk
Senior Associate
D +380 44 494 47 74
natalia.levchuk@dentons.com



Roman Mehedynyuk
Associate
D +380 44 494 47 74
roman.mehedynyuk@dentons.com

