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Marina Kahiani and Dilbar Kassymova

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Contributed by:

Marina Kahiani and Dilbar Kassymova

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1. Trends

1.1 M&A Market

M&A market in Kazakhstan remained strong in 2019, as it was in 2018. Activity was largely driven by ongoing consolidation of Kazakh banks because of the increased capitalisation requirements of the financial regulator, consolidation in the telecommunications sector and acquisitions in the IT sector.

Banking Sector

In Kazakhstan, there is currently a trend for consolidation of banks which has resulted in increasing numbers of M&As in the banking sector. This trend is explained by various factors, including inability of Kazakh banks and their controlling shareholders to meet prudential requirements and expected competition from the foreign banks due to the acceding of Kazakhstan to the WTO.

Consolidation of banks

In 2018, JSC Halyk Bank, the largest Kazakh bank, acquired JSC Kazkommertsbank, the second largest Kazakh bank. JSC HalykBank also sold 60% of its subsidiary, JSC Altyn Bank, to Chinese investors China CITIC Bank Corporation Limited and China Shuangwei Investment Co Ltd.

In 2019, JSC First Heartland Securities acquired 99.8% in JSC Tsesnabank that was close to default situation. After recapitalisation by the new controlling shareholder, JSC Tsesnabank has merged with JSC First Heartland Bank, another Kazakh bank. The surviving bank is called JSC First Heartland Jýsan Bank. In May 2019, JSC Forte Bank, a bank from top five in Kazakhstan, acquired 100% in another Kazakh bank, JSC Bank Kassa Nova. Following the purchase in June 2019 of JSC Asia Credit Bank by Mr Orifdzhan Shodiyev, it was planned that JSC Asia Credit Bank will be merged with JSC Capital Bank Kazakhstan, also owned by Mr Shodiyev, and JSC TengriBank. However, in February 2020, the major shareholder of JSC Tengri Bank announced that the deal will not be closed.

Reorganisation of the financial regulator

In 2019, the decision was made by the Kazakh government to reorganise the financial regulator, the National Bank of Kazakhstan (NBK). The Agency for Regulation and Development of the Financial Market (AFM) was separated from the NBK and now is the main regulator of corporate issues, securities and the financial market, including various aspects of M&A transactions. Last year, the NBK initiated an asset quality review (AQR) program in order to identify key risks applicable to the customers of Kazakh banks and the ways to address them. One of the recommendations, following the completion of the AQR in January 2020, was additional capitalisation of Kazakh banks by their shareholders with their own funds, this time without

the involvement of budget funds, as has regularly occurred throughout the last ten years following the world financial crisis.

It is expected that not all shareholders of Kazakh banks will be able or willing to meet additional capitalisation requirements. As a result, consolidation in the banking sector will continue, and there will be a number of mergers and/or acquisitions of middle and small-size banks. Investments are expected not only from local but also from international investors. According to public sources, the European Bank for Reconstruction and Development is monitoring the Kazakh market for equity investments in the banking sector.

Looking forward

In addition to further consolidation of Kazakh banks, more M&A transactions are expected in the microfinance sector. Microfinance organisations are real competitors to the banks, and even left some of them behind in terms of expansion growth. Accordingly, microfinance organisations are considered interesting targets for foreign and local investors. In 2019, Bopa pte (Singapore) acquired controlling stake in Asian Credit Fund Mircofinance Organization LLP, one of largest Kazakh microfinance organisations. Before the transaction, Bopa pte was already one of the existing participants of the target. Following the closing, Bopa pte accumulated 98.1% of participatory interests.

Telecommunication Sector

In December 2018, JSC Kazakhtelecom, the national telecommunications operator in Kazakhstan, acquired 75% in the largest Kazakh mobile operator, JSC KCell, from Telia Company and Fintur Holdings. The transaction was considered a key M&A transaction, influencing the whole telecommunication market in Kazakhstan, and won an international TMT M&A Award for “Telecom M&A Deal of the Year – Asia”. Interestingly, following the transaction, a number of minority shareholders of JSC Kazakhtelecom claimed buy out of their shares by JSC Kazakhtelecom as they disagreed with JSC KCell acquisition. The dispute had public resonance and was then closed by amicable settlement.

In 2019, JSC Kazakhtelecom acquired the remaining 49% in another large Kazakh operator, Tele2, and became a 100% shareholder (prior to the transaction, JSC Kazakhtelecom owned 51% in Tele2). As a result of these acquisitions, JSC Kazakhtelecom became a telecommunications conglomerate in Kazakhstan with two thirds of the mobile market share. These deals are controversial since they clearly affect competition in Kazakh telecommunication sector, which may lead to a deterioration of the quality of telecommunication services.

IT Sector

In 2019, Chocofamily, the largest internet holding in Kazakhstan, acquired 47% in the merged travel company Aviata.kz and Chocotravel.kz from two individual shareholders. As a result, Chocofamily became 100% shareholder of the mentioned travel services. Later in 2019, Kazakh businessman Mr Aidyn Rakhimbayev acquired 10% in Chocofamily.

1.2 Key Trends

Privatisation

In 2015, the Kazakh Government announced a privatisation programme for state and quasi state assets for 2016-20 that continues to boost the M&A market in Kazakhstan. The aim of the privatisation programme is to decrease the state's stake in the economy. Privatisation can be conducted in various ways, including private M&As and IPOs.

According to the public sources, 739 out of 1197 objects have been sold to private hands, with the remaining deals yet to come. In January 2020, the Ministry of National Economy announced that the list of objects that are subject to privatisation, will be increased.

The list of the companies subject to privatisation with the current status is available at: <https://privatization.gosreestr.kz/en?Filter=top65>.

Privatisation programme M&As

One example of M&A through privatisation programme in 2019 was Petro-Retail LLP's purchase of KMG Retail LLP, the owner of republic networks of petrol stations, from JSC NC KazMunaiGas, the national oil and gas company in Kazakhstan. It was also recently announced that Ramada Plaza Hotel located in Nur-Sultan city, the capital of Kazakhstan, will be sold within the privatisation programme.

Privatisation programme IPOs

The pipeline IPOs to be conducted in the course of privatisation programme included major blue chip companies such as JSC Kazakhtelecom, JSC Kazakhstan Temir Zholy (Kazakh railways), JSC NC Kaz Munai Gaz (oil and gas), JSC Samruk-Energy, JSC Tau-Ken Samruk (a mining company), JSC Kazpost, JSC Air Astana and others.

Belt and Road Initiative

Another trend that may boost the M&A market in Kazakhstan is the Belt and Road initiative which aims to improve trade relations between China and other countries, including Kazakhstan. In 2015, the governments of Kazakhstan and China signed investment agreements worth USD14 billion. In 2017, COSCO Shipping (PRC) and Lianyungang Port Holdings Group Co Ltd jointly acquired, from national railways operator JSC Kazakh-

stan Temir Zholy, a 49% stake in the dry port KTZE-Khorgos Gateway. The facility is located on the border between China and Kazakhstan and is an important transportation hub connecting China and Europe by rail.

This acquisition is one of the most significant acquisitions concluded within the Belt and Road initiative. In 2018, China CITIC Bank Corporation Limited and China Shuangwei Investment Co Ltd acquired 60% stake in JSC AltynBank from JSC HalykBank. One of the drivers for the transaction, according to the seller's management, was the desire of Kazakh customers to develop their business in China within the Belt and Road initiative. In 2019, JAC Motors and China National Machinery IMP and EXP Corporation jointly acquired 51% of Allur Group, the large automobile producer in Kazakhstan. We expect more acquisitions by Chinese investors in Kazakhstan as a part of the Belt and Road implementation.

AIFC

Modelled on the Dubai International Financial Centre, the Astana International Financial Centre (AIFC) was officially launched in 2018, established with the aim of bridging the gap between the world's major financial centres and a regional gateway for capital and investments. The AIFC aims to become a financial hub not only for Kazakhstan, but for the whole of Central Asia, the Eurasian Economic Union, the Caucasus, West China and Mongolia.

To date, more than 400 companies have registered as participants in the AIFC and, in the last year, IPOs of JSC NC Kazatomprom (uranium company) and JSC Halyk Bank, the largest Kazakh bank, were successfully closed on LSE and AIFC stock exchange (AIX). IPOs of other Kazakh blue-chip companies planned within the framework of privatisation programme, are also expected to take place on AIX due to the mandatory 20% local placement requirement of Kazakh law.

The AIFC has its own laws and regulations and even its own court and facility for arbitration (in effect, a "one country, two systems" arrangement has been introduced despite the fact that Kazakhstan is a unitary state). The key feature and siren call of the AIFC is, therefore, a new jurisdiction based on English law principles, as English law is familiar and convenient for investors. The AIFC is, however, a civil law jurisdiction because the AIFC's court lacks authority to act if there is no statute (ie, a court precedent is not a source of law in the AIFC). Moreover, unlike DIFC law, the AIFC's fall-back legislation is Kazakh law, rather than English law, which will apply to any cases governed by AIFC law where the AIFC is otherwise silent on a given issue.

The establishment of the AIFC may encourage foreign and local investors to use AIFC law instead of Kazakh law or foreign laws

(including English law) and foreign jurisdictions (ie, offshore jurisdictions) for structuring M&A transactions in Kazakhstan, for the following reasons:

- AIFC law contains certain concepts that are common for English law jurisdictions but are not expressly recognised and regulated by Kazakh law (such as option, fiduciary duties, netting, misrepresentation, injunction, specific performance etc); and
- sale and purchase of the legal entities established within AIFC or securities listed on AIX, are exempt from capital gain tax until 2066.

Though the interplay between AIFC law and Kazakh law is yet to be seen and tested, and as there are no court precedents, a gradual increase in the popularity of the AIFC law as applicable law and the AIFC court as proper forum for structuring M&A transactions in Kazakhstan and, maybe, even throughout the whole of Central Asia, is expected.

1.3 Key Industries

As mentioned, the banking, telecommunication and IT sectors experienced significant M&A activity in the past 12 months.

In the upcoming years, further M&A transactions in these and other sectors of Kazakhstan's economy, including microfinance, transport, renewable energy and agriculture, are expected.

The renewable energy sector in Kazakhstan grows annually; it has grown from six renewable energy facilities in 2017 to 23 facilities in 2019 with a forecast of 108 facilities by the end of 2020. Kazakhstan law is favourable to investors focused on renewable energy, offering the guaranteed energy purchase at a price determined by way of public auction. A recent auction showed an interest of local investors, as well as those from Russia, China and Europe.

The agricultural sector in Kazakhstan has a huge potential. Kazakhstan is one of the top five countries in the world by pasture; 45% of population lives in the countryside. In 2019, American agribusiness titans, Tyson Foods, Kusto Group and Valmont Industries, signed agreements with the Kazakh Government for investments in a new meat processing plant and a new plant to produce irrigation systems in Kazakhstan.

2. Overview of Regulatory Field

2.1 Acquiring a Company

Under Kazakh law, both share deals and asset deals are possible. However, businesses prefer to structure M&A transactions as share deals due to the complexity of transfer and registration

procedures in the transfer of various assets (eg, in Kazakhstan different types of assets, such as land plots, movable property, vehicles, etc, are subject to different legal regimes and each type is subject to registration with a separate state authority). In practice, therefore, it is easier and faster for the parties to transfer shares (participatory interests) rather than assets.

Share deals are concluded based on sell and purchase agreements and settled either privately or on a stock exchange (the Kazakhstan Stock Exchange (KASE) or AIX). It is worth noting that, even if a deal is settled on the stock exchange, a common practice is that the deal is pre-agreed between the acquirer and the seller directly. Sale through the stock exchange is used to optimise taxation (generally, transactions settled through the stock exchange are exempt from capital gain tax).

2.2 Primary Regulators

In 2019, the decision was made by the Kazakh government to reorganise the financial regulator, the NBK by splitting off the AFM from the NBK; see **1.1 M&A Market**. The AFM is now the main regulator of corporate issues and the securities and financial market, including various aspects of M&A transactions. Following the split, the NBK remained responsible for currency regulation and control over currency transactions, including cross-border M&A transactions.

Apart from the AFM and the NBK, the Committee for Protection and Development of Competition (CPC), the anti-monopoly authority, is the primary regulator of competition in Kazakhstan, providing antimonopoly consent for so called "economic concentration".

Under Kazakh law, generally, two types of consents are required for M&A transaction: anti-monopoly consent issued by the CPC if the M&A transaction is an "economic concentration", ie, meets certain thresholds as described in **2.4 Antitrust Regulations**; and consent issued by the relevant state body if target company performs activity in a field of significant importance (eg, subsoil use, telecommunications, air space, financial sphere, etc).

Namely, M&A transactions in the following fields require prior consent of the relevant authorised body.

Strategic Assets

Under Kazakh law, the sale of strategic assets to any party (including foreign investor) is subject to the prior consent of the Government of Kazakhstan and pre-emptive purchase rights of the Republic of Kazakhstan. Strategic assets are those that may affect national security of Kazakhstan and include, inter alia, railroads, gas pipelines, national electric network, international airports, seaports, etc, and shares (participatory interests) in the

legal entities that own strategic assets or that may otherwise affect decisions taken in respect of strategic assets. The list of strategic assets is established by the relevant decree of the Government of Kazakhstan.

Subsoil Use

Generally, the sale of 1% or more of shares (participatory interests) in a company that is a subsoil user in Kazakhstan or a company that has possibility to directly or indirectly determine the decisions taken by the subsoil user to any party (including foreign investor), is subject to prior consent of either the Ministry of Energy (in the case of oil, gas and uranium) or the Ministry of Industry and Infrastructural Development (in the case of other minerals).

In the case of strategic deposits, pre-emptive purchase rights of the Republic of Kazakhstan shall also apply to the proposed sale of shares (participatory interests) of a subsoil user or the company that may influence a subsoil user. The list of strategic deposits is established by the relevant decree of the Government of Kazakhstan and includes, broadly, major oil and uranium deposits.

Finance

Generally, acquisition of 10% or more of voting stock in a Kazakh bank, insurance company by any investor (including a foreign investor) or group of investors is subject to the prior consent of the AFM, the financial regulator in Kazakhstan.

Telecommunications

Acquisition by any investor (foreign or not), either directly or indirectly, itself or in a group, of more than 10% of voting stock in an organisation that owns or exploits a communication lines as an intercity or international communication operator, is subject to the prior consent of the authorised state body in the communications sphere and national security bodies.

2.3 Restrictions on Foreign Investments

Kazakh law contains certain restrictions on investments (including foreign investments) in key spheres of the economy.

Finance

Generally, a person established in one of the offshore jurisdictions listed by the NBK (eg, Cyprus, Hong Kong, etc), is prohibited from being shareholder in a Kazakh bank, insurance company or microfinance organisation. In addition, foreign persons are prohibited from being shareholders of a Kazakh investment fund.

Telecommunications

A foreign person is prohibited (either itself or in a group with other persons) to acquire (directly or indirectly) 49% or more of

the voting stock of an operator of intercity or international communications that owns land communication lines, without the prior consent of the Government of the Republic of Kazakhstan.

Air Space

It is prohibited for a foreign person (either an individual or a legal entity) to, directly or indirectly, itself or together with affiliates, possess, use or dispose of more than 49% of voting stock of a Kazakh air company or otherwise execute effective control over Kazakh air company.

Mass Media

It is prohibited for a foreign subject (individual or legal entity) to, directly or indirectly, possess, use or dispose of more than 20% out of voting stock (participatory interests) of a Kazakh company that owns a mass media source or performs activity in the sphere of mass media.

Security Agencies

Foreign persons are prohibited from being shareholders (participants) in the security agencies and relevant specialised training centres.

2.4 Antitrust Regulations

Under Kazakh law, each of the following transactions (“economic concentration”) are subject to approval of the anti-monopoly body, the CPC, provided that a transaction’s value meets certain thresholds:

- reorganisation of a legal entity by the way of merger or accession;
- acquisition, by a person or group of persons, of more than 50% out of voting stock (participatory interests) in a legal entity or another number of shares (participatory interests) that provides to a person (or group of persons) the right to dispose of more than 50% out of voting stock (participatory interests) in a legal entity; or
- acquisition by a person or group of persons of the fixed assets and/or non-material assets of another person if the balance sheet value of the above assets is more than 10% out of balance sheet value of the total assets of the seller.

Anti-monopoly consent is required if the certain threshold is met.

Namely, in case of non-financial companies, anti-monopoly consent is required if either the total balance sheet value of the assets or the total volume of realised goods for the last financial year of the reorganised entities or of the acquirer and the target exceeds 10 million monthly calculation indexes (approximately USD60.9 million).

In case of financial companies, the threshold depends on the assets held by and the “own capital” value of the target.

There are certain exceptions from the above requirement to obtain prior anti-monopoly consent, including if the transaction is concluded within one group of persons.

Generally, anti-monopoly consent shall be obtained prior to execution of the transaction, save for the transactions that are executed through a public tender, in which case anti-monopoly consent can be sought no later than 30 days from the date of the announcement of the winning tender.

It shall be noted that the above provisions have extraterritorial effect, ie, the prior consent of the CPC is required in case of the above transactions even if they are executed outside of Kazakhstan, provided that the relevant transactions affect, directly or indirectly, fixed assets and/or non-material assets or shares (participatory interests) of market subjects and/or rights in relation to Kazakh legal entities, and/or limits competition in Kazakhstan.

The CPC shall check, within ten days, the completeness of application and accept/reject the application if any information required by law is missing. Following this, the CPC has, generally, a month to review the application, although this can be prolonged pending the provision of any additional information or the conclusion of decisions required by the CPC or the court on an application or one related to it. In practice, the whole process can take from three to six months. Anti-monopoly approval can be conditional upon the fulfilment of certain actions by market subjects and is valid for one year from the moment of issuance.

Failure to obtain anti-monopoly consent can lead to an administrative fine (a maximum of approximately USD9,750) and/or an invalidation of the transaction through the courts on the basis of a claim, filed by the CPC, if the transaction in question led to a restriction of competition or establishment of monopoly position of a subject (or group of subjects).

2.5 Labour Law Regulations

Generally, a non-competition arrangement shall be enforceable under Kazakh law. Article 29 of the Labour Code specifically provides for a possibility to conclude non-competition agreement, whereby an employer can establish a compensation for breach of non-competition obligations of an employee and claim for damages caused by the breach.

However, court practice on the subject differs. In a number of cases, the courts refused to enforce non-competition agreements notwithstanding that they are expressly provided by the law saying that such agreements contradict the constitutional

“freedom of labour”. Accordingly, there is a risk that non-competition agreements will, in practice, not be enforceable in Kazakhstan.

2.6 National Security Review

In certain cases (eg, acquisition of strategic objects, subsoil users and telecommunication operators), the acquisition of a company in Kazakhstan is subject to a national security review.

3. Recent Legal Developments

3.1 Significant Court Decisions or Legal Developments

Recent Legal Developments

Right to squeeze out minority shareholders

The most significant legal development in M&As of joint stock companies (JSC) was an introduction of right of a shareholder who purchased (itself or together with its affiliates) 95% or more out of voting stock of a JSC, to squeeze out the remaining minority shareholders; see **6.10 Squeeze-Out Mechanisms**.

Moment of participatory interests transfer

The most significant amendment related to M&As of limited liability partnerships (LLPs) was clarification of the moment when the buyer becomes the owner of the participatory interests in LLP. The law clarified that it shall be the moment of state registration of the buyer as the new participant of LLP in the state database of legal entities, and not the moment of signing of sale and purchase agreement (SPA) as it was suggested before.

Previously, the law was silent on this issue and it was not clear when the ownership was transferred. The amendment created additional risks for the buyers that shall be addressed in the SPA, for example, what will happen if the buyer pays the purchase price but the seller as existing participant of LLP will delay state registration, etc.

The proposed amendment re deadlock issue

The Majilis (the lower chamber of the Kazakh parliament) is now considering a draft law that is aimed at dealing with, inter alia, deadlocks among LLP participants. Deadlocks occur when participants disagree on certain issues but cannot come to a decision at the general meeting of participants because they have equal participatory interests (and votes).

The draft law suggests that, in the case of a deadlock, the participants shall conduct a closed tender among themselves. The participant who wins the tender (suggests the higher price for the right to vote on the issue) receives a termless right to decide on this particular issue. The price paid is distributed to the participant(s) who lost the tender.

The suggested amendment seems controversial. For example, it is not clear if the termless right to vote on an issue means that the winning participant can vote on the same issue (eg, distribution of dividends) every time until the liquidation of an LLP, which may discourage potential investors from acquiring participatory interests in such LLP.

Significant Court Decision

In Kazakhstan, there was a recent court case that created bad precedent for minority participants of Kazakh LLPs - Autodorservice LLP case.

According to the public sources, Autodorservice LLP had two participants (individuals), with 51% and 49%, respectively. 51% participant decided to change director of LLP, whereas 49% participant was against the change. Under the charter of Autodorservice LLP, the change of director required qualified majority (75% participatory interests), so neither of participants had enough votes to take a decision.

At the general meeting, a 51% participant voted for change of director and 49% participant voted against. The 51% participant, based on the resolution of the general meeting, changed the director of the company. The 49% tried to challenge the resolution with the main argument that 51% was not enough to change the director because the charter required 75%.

The Special Interdistrict Economic Court of Almaty city, in its decision dated 24 August 2016, invalidated the mentioned provision of the charter and confirmed that the change of director by 51% was valid. The reasoning was that “such provision did not allow 51% participant to exercise its right to manage the company because, notwithstanding their 51%, 51% participant cannot fully realise its voting rights in relation to the matters connected with the company’s activity”.

Thus, the court ignored the provision of Kazakh law that expressly permits participants of a company to establish number of votes/participatory interests required for taking a decision and the fact that, in this case, participants did use such a right by adopting the charter that expressly required 75% votes/participatory interests to change the director.

The decision is a disappointing precedent that may decrease the number of M&As and investment activity in Kazakhstan generally, since investors may be discouraged from acquiring minority stakes in Kazakh LLPs due to the risk of being deprived of their rights by major participants.

3.2 Significant Changes to Takeover Law

There have been no significant changes to takeover law in the past 12 months in Kazakhstan, and we are not aware of any

review of takeover legislation that could result in significant changes in the coming 12 months.

4. Stakebuilding

4.1 Principal Stakebuilding Strategies

Stakebuilding is, generally, the accumulation of as large a stake in the target company as possible by the potential acquirer (directly or together with its affiliates), in order to facilitate a subsequent acquisition of the target. In Kazakhstan, stakebuilding is not customary because of the standard shareholding structure of the Kazakh companies. Kazakh companies are, as a rule, closely held and have at least one “strategic shareholder” who holds a significant stake.

4.2 Material Shareholding Disclosure Threshold Notification on 30% Purchase

Generally, a person that (solely or together with its affiliates) intends to acquire 30% or more out of voting stock or another number of shares that would increase its existing stake to 30% or more out of voting stock, shall send relevant notification to a JSC, the shares of which such person (solely or together with its affiliates) intends to acquire. Notification shall contain information about the number of purchased shares and the proposed price.

General Shareholding Disclosure

Under Kazakh law, shareholding disclosure requirements apply to the issuers, ie, companies that issued securities (mainly shares or bonds) and are generally established in a form of JSC or LLP.

All issuers (whether listed or not) shall disclose their shareholders (in case of LLP, participants) that own 10% or more out of voting stock and any changes to the list of such shareholders, and information about organisations in which the issuer holds 10% or more out of voting stock, and any changes to the list of such organisations.

Such information shall be disclosed to the public on the website depository of financial statements (DFO), a public source of information about Kazakh issuers. If the issuer is a listed company, the information shall also be disclosed on the website of KASE, the local stock exchange.

There can be additional shareholding disclosure requirements for the issuers listed on KASE or AIX.

4.3 Hurdles to Stakebuilding

In practice, Kazakh companies do not generally introduce higher or lower reporting thresholds in the articles of incorporation or otherwise. Under Kazakh law, any rules included in

the articles of incorporation or other internal documents of the company shall, at a minimum, be as strict as applicable legislation so a company cannot establish a higher reporting threshold.

Theoretically, a company can introduce a lower reporting threshold in its articles of incorporation, however, such cases are rarely seen in practice.

4.4 Dealings in Derivatives

Dealings in derivatives are generally allowed in Kazakhstan. Under Kazakh law, derivatives include options, futures, forwards, swaps and others, including combinations thereof. Regulation of derivatives is provided for in the Civil Code, the Securities Market Law and the applicable regulations of the NBK and the AFM. However, in practice, derivatives are used mainly for hedging purposes and are not commonly used in M&A transactions.

4.5 Filing/Reporting Obligations

The issuer shall disclose information on taking a corporate decision to issue derivatives within ten business days from the date of such decision. The information shall be disclosed by the issuer on the DFO website and, if the issuer is a listed company, on KASE website. The disclosure shall contain the date of the decision on issuance of derivatives, number of derivatives, their type, nominal price, currency of the nominal price, size of the issuance and any other information the issuer deems necessary to disclose.

There can be additional requirements for the issuers listed on KASE or AIX.

4.6 Transparency

Under Kazakh law, there is no requirement for existing or potential shareholders to disclose the purpose of their acquisition and their intention regarding control of the company.

However, an antitrust authority is authorised to request any information from the acquirer during the consideration of its application for antitrust consent regarding the acquisition transaction, including the purpose of acquisition and the intention of the acquirer regarding control of the company.

5. Negotiation Phase

5.1 Requirement to Disclose a Deal

Under Kazakh law, in case of a mandatory offer (see **6.2 Mandatory Offer Threshold**), upon receipt, the target shall publish the offer on the DFO website within three business days.

5.2 Market Practice on Timing

The legal requirements in relation to disclosure obligations are imperative, and violation thereof can entail an administrative liability. Therefore, general market practice on the timing of disclosure is within the deadlines established by the law.

5.3 Scope of Due Diligence

In an acquisition transaction, the buyer is generally interested in identification of legal risks associated with the capacity of the seller and its title to the shares (participatory interests) in the target, the acquired company itself, its property and business activities, and recommendations to address identified legal risks prior to closing of the transaction.

In addition, in the course of due diligence, the buyer expects that an external legal counsel conducting due diligence will, generally, advise on the structure of the transaction and approvals required to be obtained from the authorised state bodies and creditors of the target in relation to such acquisition.

5.4 Standstills or Exclusivity

Standstills and exclusivity provisions are sometimes demanded in M&A transactions where parties are more sophisticated and well familiar with international M&A practice. However, enforceability of such provisions can be questioned by a court since a waiver of rights is not specifically recognised by the Kazakh law and, accordingly, can be non-enforceable in Kazakhstan.

5.5 Definitive Agreements

A mandatory tender offer shall contain information on the bidder's name, address, number of voting shares in the target owned by the bidder and offered shares price. If the offer is accepted, the acquisition shall be conducted based on the terms of the offer, and there is no mandatory requirement to conclude a definitive agreement and such agreement is not common in practice.

6. Structuring

6.1 Length of Process for Acquisition/Sale

The length of the process for acquiring/selling a company in Kazakhstan can vary depending on the requirement to obtain governmental and creditors' approvals, type of the target and its shareholders (eg, for JSCs, more time may be required to obtain corporate approval for the transaction as compared to LLP), size of the target, due diligence process, sophistication of the parties and other factors.

The standard timeline for an average M&A transaction would be:

- one month for the signing of a term sheet or analogous non-binding document;
- two to four months for the completion of due diligence;
- one to three months for agreeing and signing an SPA (in practice, an SPA is negotiated in parallel with due diligence) and other legal documents, if any (eg options, security documents, post-acquisition versions of the target's constitutional documents, etc); and
- one to three months after signing for satisfaction of conditions precedent, payment of the purchase price and registration of acquisition with the relevant authority.

Registration is made by changing of target's shareholders' (participants') names either: if target is a JSC, in the system of JSC Central Securities Depository (organisation authorised, inter alia, to perform registration of transactions with securities in Kazakhstan); if target is a LLP, with state corporation "Government for Citizens" (organisation authorised to register commercial legal entities in Kazakhstan); or if target is a non-commercial organisation, with the Ministry of Justice.

This timeline may be significantly affected if a transaction is subject to anti-monopoly approval (which takes approximately three to six months) and/or the approval of another authority in Kazakhstan.

6.2 Mandatory Offer Threshold

Mandatory tender offers apply in Kazakhstan only in relation to JSC.

A person that has acquired (solely or together with its affiliates) 30% or more of voting stock in a target JSC (either public JSC or not) or increased its existing stake to 30% or more (the "offeror"), shall make a mandatory offer to other shareholders of the JSC to sell their remaining shares. The mandatory offer shall contain information on the offeror and its affiliates that jointly acquired 30% or more out of voting stock of the target JSC, including their names, address, number of the shares owned and the share price.

The mandatory offer shall be sent to the JSC itself within 15 days from the moment of acquisition mentioned above, and published by the JSC on the DFO website. The other shareholders can accept the mandatory offer no later than 30 business days from the moment of publication on the DFO website. The other shareholders shall transfer the shares, and the offeror shall pay within 30 business days from the moment of such acceptance.

The JSC itself can make its own offer to the offeror and other shareholders to buy out the remaining shares for a price higher than indicated in the mandatory offer, and make the offer to the offeror and other shareholders that the remaining shares are

acquired by a third party for the price higher than indicated in the mandatory offer.

The mandatory offer rule is subject to certain exceptions. Failure to comply with a mandatory offer obligation leads to the obligation for the offeror to sell the number of voting shares that exceeds 29% out of total voting stock ("extra shares") and contains a prohibition to vote with any of its shares or otherwise influence activity of the target JSC until the "extra shares" are sold.

6.3 Consideration

In most M&A transactions in Kazakhstan, the money transferred to the bank account of the seller is used as consideration. Exchange of shares is possible under Kazakh law, but is not popular in practice.

6.4 Common Conditions for a Takeover Offer

Kazakh law does not prescribe the conditions that shall be contained in a takeover offer, save for the mandatory offer described in **6.2 Mandatory Offer Threshold**.

In Kazakhstan, M&A transactions are most often agreed directly between the potential acquirer and the shareholder(s) of the target company. Commonly, the takeover offer contains the number of shares (participatory interests) to be acquired, the share (participatory interests) price and conditions upon which the acquisition will be closed (including anti-monopoly and other approvals). Other conditions are agreed by the parties in the SPA.

6.5 Minimum Acceptance Conditions

There are no minimum acceptance conditions established under Kazakh law.

Generally, the acquirers tend to acquire more than 50% out of voting stock (participatory interests) or more than 75% out of voting stock (participatory interests) as these thresholds give control over the company as described below.

Differing levels of control are provided by certain stakes in a Kazakh company.

In the Case of an LLP

A stake of more than 50% of participatory interests in LLP gives the purchaser general control over the target company's business and day-to-day affairs (eg, appointment of the management bodies, decision making on distribution of dividends, approval of certain major transactions, etc).

A stake of more than three quarters (effectively 75%) of participatory interests in a LLP effectively gives full control over any

matter of LLP. 75% (so called qualified majority) is generally required for the following decisions:

- changes to the charter of LLP including change of the charter capital, legal name and address of LLP and any other matters fixed in the charter (such as, for example, competence of corporate bodies of LLP, etc);
- reorganisation and liquidation of LLP;
- compulsory buy-out of a stake of the participant that caused sufficient damage to LLP or other participants; and
- pledge over all assets of LLP.

In the Case of a JSC

A shareholding stake of 50% plus one share gives the acquirer general control over the target JSC's business and day-to-day affairs (eg, appointment of the management bodies, decision making on distribution of dividends, approval of certain major transactions, etc).

A shareholding stake of three quarters (effectively, 75% out of voting stock) additionally enables the shareholder to make decisions on the following matters:

- approval of corporate governance code and amendments thereto;
- reorganisation and liquidation of JSC;
- decision in increase of announced (issued but not placed to shareholders) shares of JSC or change of type of announced shares of JSC (from common shares to privileged shares and vice versa); and
- approval of methodology for determination of shares price in case of shares buy-out by JSC itself in the non-organised market and amendments thereto.

The charter may contain other thresholds that give control over the company (eg, it may require unanimous approval of all shareholders/participants for any matter), so it is recommended to check the charter prior to acquisition for any non-standard provisions.

6.6 Requirement to Obtain Financing

Kazakh law does not prohibit making a transaction conditional upon certain circumstance. An M&A transaction can be conditional on the bidder obtaining financing. Acquisition finance is common in Kazakhstan.

6.7 Types of Deal Security Measures

Under Kazakh law, unilateral termination of an agreement generally is prohibited, save for the limited cases established by law (eg, material breach of one of the parties) or if unilateral termination is permitted by the agreement itself. Under Kazakh law, it is possible to establish a penalty (*neustoika*) should one of the

parties breach its obligations under the agreement that can be used as a break – up fee.

It is worth noting that Kazakh courts have a right to reduce the amount of such penalty if it considers such amount to be excessive as compared to the harm caused to the non-defaulting party.

In Kazakhstan, match rights, force-the vote provisions and non-solicitation provisions are not specifically recognised by law, and their enforcement is questionable. This is one of the reasons why the parties to an M&A transaction may consider structuring the deal through the acquisition of a holding company established offshore and govern such transaction with English law.

Generally, the main legal remedy available under Kazakh law is compensation of damages.

6.8 Additional Governance Rights

As a general rule, the corporate rights of shareholders (participants) in a Kazakh company are exercised proportionally to the number of shares (participatory interests) they each hold.

Shareholders' agreements are not prohibited by Kazakh law. However, governance rights of shareholders (participants) are established by the law and the charter of the company and the enforceability of any provisions of a shareholder agreement that do not comply with those established rights is questionable.

Article 14.2 of the JSC Law (that, theoretically, can apply to both JSC and LLP by analogy of law) expressly prohibits any limitation of shareholders' rights (eg, a right to vote at its own discretion, a right to receive dividends, etc), save for certain exceptions.

6.9 Voting by Proxy

In Kazakhstan, shareholders can vote at the general meeting of shareholders, either themselves or through their representative (by proxy). The relevant power of attorney (PoA) shall comply with mandatory requirements of Kazakh law.

It is worth noting that, generally, PoA cannot be issued to the members of the Management Board of JSC or LLP. In case of JSC, PoA cannot also be issued to employees of a JSC, unless the PoA contains specific directions as to how an attorney shall vote on behalf of the shareholder who issued PoA.

6.10 Squeeze-Out Mechanisms

In the case of JSC, a person that has acquired (solely or together with its affiliates) 95% or more of the voting stock or increased its existing stake to 95% or more out of voting stock of a target JSC (either public or not) by purchasing of not less than 10%

out of voting stock in total, has a right to squeeze out minority shareholders.

Such a person is entitled to demand the minority shareholders to sell their voting shares to such a person at a market price, and minority shareholders are obliged to do so within 60 calendar days upon publication of such demand by a JSC on the website of DFO.

The right to squeeze out minority shareholders is valid within 60 business days from the moment of acquisition of 95% or more out of voting stock in a target, and minority shareholders are prohibited from any transactions with their voting shares during this period.

This mechanism is not available for LLPs.

6.11 Irrevocable Commitments

Irrevocable commitments to tender or vote by principal shareholders of the target company are not common in Kazakhstan.

7. Disclosure

7.1 Making a Bid Public

Under Kazakh law, in case of mandatory offer (see **6.2 Mandatory Offer Threshold**), the target shall publish the offer on the DFO website within three business days upon receipt from the bidder.

Though there is no direct obligation to publicly disclose a bid by the bidder, if the bidder is a JSC, they may be indirectly required to publicly disclose the bid. For example, if the bid is a major transaction, the bidding JSC will have to disclose information on its approval on the DFO website and, if the bidder is listed, on KASE website within three business days from approval, within its general statutory obligation to disclose information on all major transactions.

7.2 Type of Disclosure Required

Under Kazakh law, there is no specific requirement to disclose the issuance of new shares of a company.

However, there are other requirements that may indirectly require a JSC to disclose the issuance of new shares. For example, the issuance of shares by the JSC can be subject to publication on the DFO website and, if the JSC is listed, on the KASE website within the general statutory obligation of a JSC to disclose information on so called “corporate events”.

7.3 Producing Financial Statements

Bidders are not required under Kazakh law to produce financial statements specifically in the context of a M&A transaction.

However, there is general (not related to a bid) obligation of any JSC to disclose its financial statements on the website of DFO and, if the JSC is listed, on KASE.

In Kazakhstan, large companies shall prepare financial statements in accordance with IFRS, whereas smaller companies can choose between IFRS and national accounting standards.

7.4 Transaction Documents

It is not a requirement to disclose any of the transaction documents in full. Kazakh law requires JSCs to disclose the mandatory offer only. Generally, under Kazakh law, disclosure requirements are of a general nature, ie, the companies shall just inform the public of certain actions or events, and there is no need to disclose transaction documents in full.

Please note, however, that if disclosure is required in the context of obtaining relevant approval for an M&A transaction (eg, anti-monopoly approval), generally, the authorised state body requires the full version of an SPA.

8. Duties of Directors

8.1 Principal Directors’ Duties

Under Kazakh law, members of the Board of Director, Management Board and CEO of a JSC (the “Directors”) shall perform their obligations in good faith and using the means that serve the JSC’s and its shareholders’ interests to the maximal extent possible. The Directors shall not, inter alia, use the JSC’s property or allow use of the JSC’s property in contradiction with the charter and resolutions of the general meeting of shareholders and Board of Directors, or do this for their own personal interest, nor commit misuse in conclusion of transactions with their affiliates.

Directors’ duties are owed to a JSC itself and its shareholders. However, there is no specific fiduciary duty owed to the JSC’s creditors or employees.

Directors bear liability to the JSC and its shareholders for any harm or damages caused to the JSC. It shall be noted that Directors are liable not only in case of improper actions, but also with regard to inactions (eg, if they refrained from voting for a resolution that lead to harm/damages of the JSC or did not attend the meeting without a good reason).

However, a Director can be released of the liability if they voted against a relevant transaction, did not attend a relevant meeting for a good reason, or acted properly and in compliance with Director's fiduciary duties, based on actual information valid as of the date of relevant resolution, and if they reasonably believed that such resolution serves the JSC's interests.

Under Kazakh law, Directors do not have competence to take decisions on a sale of shares by the existing shareholders. Such decision shall be taken individually by each existing shareholder as owner of the shares.

8.2 Special or Ad Hoc Committees

Under Kazakh law, JSC shall establish committees of the Board of Directors for consideration of the most important questions and preparation of recommendations to the Board of Directors. The committees shall be established for consideration of questions in relation to strategic planning, HR and remuneration, internal audit and social issues.

Other committees, including ad hoc committees, can also be established for consideration of any other matters, as provided for in the internal documents of a JSC. Such committees can be used, inter alia, when directors have a conflict of interest.

8.3 Business Judgement Rule

Under Kazakh law, the business judgement rule is not a recognised concept. In any situation, the board of directors shall act in good faith and using the means that serve the JSC and its shareholders' interests to the greatest extent possible. Failure to act accordingly may lead to liability; see **8.1 Principal Directors' Duties**.

8.4 Independent Outside Advice

In Kazakhstan, it is common for companies to engage independent auditors, appraisers, external legal and financial consultants. In some cases, it is mandatory to engage consultants, eg, in case of a mandatory offer, share price shall be determined by an independent appraiser if the shares are not listed on a stock exchange, all JSCs shall conduct independent audit of their annual financial statements, etc. Yet it is uncommon in Kazakhstan for directors to engage separate independent advisers.

8.5 Conflicts of Interest

Generally, the conflict of interest issue is subject to review by the court in the context of major transactions and interested party transactions of JSCs. Kazakh law establishes mandatory rules for approval of major transactions and interested party transactions. Namely, such transactions shall be approved by the relevant resolution of the Board of Directors or, in certain cases, General Meeting of Shareholders.

According to the available court practice, failure to comply with the mandatory rules for the approval normally leads to invalidation of such transactions in the court. Importantly, non-consent of shareholders with major and interested party transactions provides the rights to demand buy-out of their shares by the JSC.

9. Defensive Measures

9.1 Hostile Tender Offers

The concept of hostile takeover is not recognised in Kazakhstan. Under Kazakh law, there is no such legal definition or regulation. Whether the tender offer is hostile or not, mandatory offer provisions described above shall be complied with. It also shall be noted that under Kazakh law, directors do not have competence to take decision on a sale of shares by the existing shareholders and, accordingly, cannot effectively block the takeover.

9.2 Directors' Use of Defensive Measures

Under Kazakh law, directors do not generally have the competence to decide on sale of shares by the existing shareholders and, accordingly, cannot apply any defensive measures in case of a hostile takeover.

9.3 Common Defensive Measures

Since Kazakhstan does not recognise the concept of a hostile takeover, there are no specific defensive measures available under Kazakh law.

9.4 Directors' Duties

As mentioned above, directors of a target company may not enact defensive measures during a takeover. In any situation (eg, in giving its recommendations, if required by the shareholders), the board of directors shall act in good faith and using the means that serve the JSC and its shareholders' interests to the maximum extent possible.

9.5 Directors' Ability to "Just Say No"

As mentioned, under Kazakh law, directors of the target company do not generally have the competence to decide on sale of shares by the existing shareholders and, accordingly, cannot "just say no" and take action that prevents a takeover.

10. Litigation

10.1 Frequency of Litigation

Litigation in relation to M&A transactions is quite common in Kazakhstan. However, since court precedent is not a formal source of law (Kazakhstan is a civil law jurisdiction) and the court practice in Kazakhstan is generally inconsistent, it is dif-

difficult to predict with certainty the outcome of a particular case based on previously issued court judgements.

10.2 Stage of Deal

Litigation in respect of an M&A transaction in Kazakhstan is generally brought after the deal is completed.

11. Activism

11.1 Shareholder Activism

Shareholder activism is not an important force in Kazakhstan, though there are some examples of shareholder activism of minority shareholders. Under Kazakh law, if a shareholder disagrees with certain decisions of JSC (eg, decision on a major or interested party transaction), the shareholder has a right to claim a buy-out of its shares by the company.

The price of the shares in such a buy-out is the main focus of activists in Kazakhstan. For example, in a recent acquisition of JSC KCell, a Kazakh mobile operator by JSC Kazakhtelecom, minority shareholders who disagreed with the acquisition claimed the buy-out and managed to agree on a price of buy-out with JSC Kazakhtelecom through an amicable settlement.

11.2 Aims of Activists

Activists do not seek to encourage companies to enter into M&A transactions, spin-offs or major divestitures.

11.3 Interference with Completion

Generally, in Kazakhstan, activists do not constitute a real force that can interfere the completion of announced transactions.

KAZAKHSTAN LAW AND PRACTICE

Contributed by: Marina Kahiani and Dilbar Kassymova, GRATA International

GRATA International was founded in 1992 and is one of the largest law firms providing a complete spectrum of legal services in Kazakhstan. It is recognised as one of the largest regional independent law firms focusing on Eurasia and the former USSR region in particular. The firm consists of more than 17 partners and over 80 professionals working from offices and associated law firms in Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Mongolia, Russia, Tajikistan, Turkey, Turkmenistan and Uzbekistan. GRATA's corporate and

finance practice includes cross-border and local M&A, M&A finance, project finance, public-private partnership (PPP) and infrastructure transactions and capital markets. GRATA's recent experience in M&A includes advising China CITIC Bank Corporation Limited in the acquisition of a stake in JSC "Altyn Bank", a Kazakh subsidiary of JSC "HalykBank", the largest bank in Kazakhstan; and advising on the acquisition by an international investor of a stake in "Microfinance Organization Asian Credit Fund" LLP.

Authors



Marina Kahiani focuses her practice on a wide range of M&A and finance transactions, including project finance and capital markets, infrastructure transactions as well as financial services regulation and workouts and debt restructurings in many industries. She has over 12 years of

experience in the Kazakhstani legal services market as well as experience in matters dealing with the former Soviet Union. Her clients include international finance institutions such as the Asian Development Bank, the China Development Bank, the European Bank for Reconstruction and Development, the International Finance Corporation, the Islamic Corporation for the Development of the Private Sector and major local financial institutions, including banks and microfinance organisations.



Dilbar Kassymova focuses her practice on a wide range of finance transactions, including project finance and capital markets, infrastructure transactions as well as M&A transactions and financial services regulation. She has over three years of experience in the Kazakhstani legal

services market. Her clients include international finance institutions such as the Asian Development Bank, the China Development Bank, the European Bank for Reconstruction and Development and major local financial institutions, including banks and microfinance organisations.

GRATA International

104, Ospanov Str
Almaty
050020
Kazakhstan

Tel: +7 727 2445 777
Fax: +7 727 2445 777
Email: finance_securities@gratanet.com
Web: www.gratanet.com

