

Public M&A

Contributing editor
Alan M Klein



2018

GETTING THE
DEAL THROUGH 

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Public M&A 2018

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Alan M Klein

Simpson Thacher & Bartlett LLP

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Preface

Public M&A 2018

First edition

Getting the Deal Through is delighted to publish the first edition of *Public M&A*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Alan M Klein of Simpson Thacher & Bartlett LLP, for his assistance in devising and editing this volume.

GETTING THE
DEAL THROUGH 

London
May 2018

Bulgaria

Ivan Gergov and Dimitar Zwiatkov

Pavlov and Partners Law Firm in cooperation with CMS Reich-Rohrwig Hainz
Rechtsanwälte GmbH

1 Types of transaction

How may publicly listed businesses combine?

Acquisition of shares

Any natural person or legal entity without limitations of nationality may acquire shares in Bulgarian public companies.

By way of exception, the Bulgarian Offshore Companies Act prohibits any acquisitions of shares by offshore companies in Bulgarian legal entities active in sensitive public sectors such as media, public-private partnerships, energy, insurance, banking, etc.

In the case of a public company (listed joint stock companies), further rules apply for share transfers. Since public companies may only issue dematerialised securities in the form of shares and bonds, only members of the Bulgarian Central Depository (banks, investment intermediaries, regulated market operators, etc) may register transactions with them.

Reorganisations

The Bulgarian Commercial Act and the Bulgarian Public Offering of Securities Act regulate the different reorganisation forms under Bulgarian law, namely:

- merger – transfer of the business of two or more legal entities into one new company, followed by the (automatic) liquidation of the merging parties;
- acquisition – transfer of the business of one or more legal entities into one existing company, followed by the (automatic) liquidation of the transferring company;
- split-up – transfer of all the business of one company into two or more other legal entities, followed by the (automatic) liquidation of the distributing party; and
- spin-off – transfer of only part of the business of an enterprise into one or two already existing companies, without liquidation of the former.

Joint venture enterprise

Joint venture enterprise agreements are contractual cooperation agreements by a public company and another company, without establishment of a separate legal entity. With a joint venture agreement, the public company undertakes to perform its main activity (or part of it) in the joint interest of another company that (i) owns directly or indirectly 25 per cent of the voting shares in the public company, (ii) controls the public company, or (iii) is related to the public company. There are specific reporting requirements in respect of the shareholders of the public company and the Financial Supervision Authority.

2 Statutes and regulations

What are the main laws and regulations governing business combinations and acquisitions of publicly listed companies?

General legislation

- The Commercial Act;
- the Contracts and Obligations Act;
- the Commercial Registry Act;
- the Public Offering of Securities Act;
- the Special Purpose Investment Companies Act; and
- the Anti-Money Laundering Act.

Special legislation applying to companies in different sectors

This includes:

- the Credit Institutions Act;
- the Markets in Financial Instruments Act;
- the Medical-Treatment Facilities Act;
- the Public Procurement Act;
- the Commodity Exchanges and Wholesale Markets Act; and
- the Insurance Code.

3 Transaction agreements

Are transaction agreements typically concluded when publicly listed companies are acquired? What law typically governs the agreements?

In a regular case, the transaction agreements are under Bulgarian law. If a foreign party is involved, the choice of alternative governing law is also possible.

It is also very common for local and foreign parties to conclude the sale-purchase agreement under a foreign jurisdiction, and agree all of the commercial terms between them therein. Parties may also keep Bulgarian law as governing law, but agree on a foreign court authority to be competent for any disputes arising out of the agreement (ie, where a foreign party is involved).

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination or acquisition of a public company? Are there stamp taxes or other government fees in connection with completing these transactions?

Financial Supervision Commission

In general, an acquisition of voting shares in a public company requires filings with the Bulgarian Financial Supervision Authority. The obligation for notification to the regulator is triggered upon the acquisition of more than 5 per cent of the voting shares in a public company, whereby certain qualifications apply. The notification to the commission shall contain a specific list of documents and information, as per the Public Offering of Securities Act. In case a person acquires more than one-third of the voting shares in a public company, an obligation may occur on it to make an offering to the remaining shareholders for their shareholding.

Merger control filings and fees

According to the Bulgarian Law on Protection of Competition, concentrations resulting from mergers or acquisitions must be notified to the Bulgarian Commission for Protection of Competition if:

- the aggregate turnover of all undertakings concerned generated on the territory of the Republic of Bulgaria during the last financial year exceeds €12,780,000; and
- the turnover of each of at least two of the undertakings concerned generated on the territory of Bulgaria during the last financial year exceeds €1,530,000; or
- the turnover of the target undertaking generated on the territory of Bulgaria during the last financial year exceeds €1,530,000.

An initial fee of €1,030 is paid in advance by the buyer. If the Bulgarian Commission for Protection of Competition clears the transaction, there

is an additional state fee of 0.1 per cent (but no more than €30,810) of the combined turnover of the undertakings concerned, generated in Bulgaria during the last financial year.

Transfer tax and fees

Fees due in connection with business combinations are usually prefixed or calculated according to applicable special tariffs

5 Information to be disclosed

What information needs to be made public in a business combination or an acquisition of a public company? Does this depend on what type of structure is used?

Disclosure of information with the Commercial Register

The Bulgarian Commercial Register is centralised and public source of information for the structure, management, seat and registered address, registered capital and shareholding of any company in Bulgaria. Third parties may undertake checks with the Commercial Register and therefore any filings of share transfers and reorganisations will be made automatically public. However, it should be noted that all documents filed with the Commercial Register are accessible only for persons with authorised access, eg, electronic signatures.

Public companies

Public companies are obliged to disclose on a regular basis information about any substantial circumstances, which are expected to materially influence the financial results of the company as well as any significant related-party transactions. Public companies are also required to pre-emptively disclose with the Bulgarian Financial Supervising Authority any planned reorganisations and management changes. The deputy of the Chief Executive Officer of the Bulgarian Financial Supervising Authority is authorised to approve or refuse these changes.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a public company? Are the requirements affected if the company is a party to a business combination?

Material disclosure requirements apply to public companies (listed joint stock companies). A person acquiring 5 per cent or more of the capital of a public company is under the obligation to disclose this to the company itself and to the Bulgarian Financial Supervising Authority. Specific rules apply also for banks, insurance companies, pension funds, financial institutions, etc.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a publicly traded company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination or sale? Do controlling shareholders have similar duties?

The management of the public company shall give enough time and information to the shareholders for evaluating any offers. In presenting its opinion on the offer, the management body of the company shall present its view on the consequences of the acceptance of the offer over the employees, the employment agreements in place and the location of the performance of the activity.

In addition, the behaviour of the management body shall be in line with the interests of the company as a whole and shall not hinder the shareholders from the opportunity to undertake a decision under the tender offer. Furthermore, the public company shall not be put in a position that may hinder the performance of its activity for an unreasonable period of time.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations or sales of a public company? Do shareholders have appraisal or similar rights in these transactions?

The shareholders shall approve all actions undertaken by the management body of the public company, following the receipt of a public tender, related to searching for alternative tender offers. Actions to which

they may object is the creation of serious hindrances or additional expenses for the offeror, such as the issuance of new shares or the conclusion of agreements that may lead to a substantial change in the property of the company.

9 Hostile transactions

What are the special considerations for unsolicited transactions for public companies?

In relation to public companies, takeover bids must be followed by an offer to the other shareholders of the target, who have voting rights, to purchase or exchange their shares. The offer needs to be simultaneously submitted to the Bulgarian Financial Supervision Commission for approval and to the managing body of the target. In such case, the managing body may not take, without the general meeting's prior approval, any measures (other than encouraging competitive bids) that aim at compromising the transaction.

The target's managing body must present the offer to the attention of the target's employees and present a reasoned opinion to the Bulgarian Financial Supervision Commission. The target's employees are allowed to present to the Bulgarian Financial Supervision Commission their own reasoned opinion on the bidder's offer, as an attachment to the one prepared by the managing body.

The Bulgarian Financial Supervision Commission may only refuse the offer by a reasoned decision where the offer is non-compliant with regulatory requirements. New offers to the other shareholders could still be made.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a public company's ability to protect deals from third-party bidders?

Break-up fees and reverse break-up fees are generally permitted under Bulgarian law. They are usually structured as penalties to be paid by the party backing out of the transaction. There are no limits on the amount of the fees.

Companies may use a wide range of deal protection methods and the law do not specify any particular limitations on them. However, the directors must assess whether agreeing to such clause is in the best interest of the company and its shareholders or not. Should the directors agree to such a provision in the latter case, they could breach their duty of professional care and be liable for any damages.

Financial assistance rules apply generally to public companies – the company cannot provide loans, credits or securities to third parties in connection with the acquisition of its own shares.

11 Government influence

Other than through relevant competition (antitrust) regulations, or in specific industries in which business combinations or acquisitions are regulated, may government agencies influence or restrict the completion of such transactions, including for reasons of national security?

Generally, government officials are not in a position to influence private transactions, which are not in an explicitly regulated industry. However, the parties' failure to comply with Bulgarian laws will constitute a reason to restrict a business combination.

12 Conditional offers

What conditions to a tender offer, exchange offer, mergers, plans or schemes of arrangements or other form of business combination are allowed? In a cash transaction, may the financing be conditional? Can the commencement of a tender offer or exchange offer for a public company be subject to conditions?

A tender offer may only be made after the full payment of the prices is secured. In addition, the tender offer shall explicitly contain the conditions, under which the offeror shall finance the acquisition of the shares, and shall include evidence for the availability of the funds required to complete the transaction.

13 Financing

If a buyer needs to obtain financing for a transaction involving a public company, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

There are in general no statutory limitations to the financing of private acquisitions. Conditions precedent requiring evidence of available funds at a certain point in the transaction are admissible and could apply based on the free will of the negotiating parties.

The seller would normally not be required to assist with the buyer's financing, however, the financing institution may require an access to the seller's business documentation in order to perform a preliminary due diligence check and evaluate the possible risks of the financed transaction as well as the introduction of further securities after the completion of the transaction.

Bulgarian joint stock companies (ie, public companies) may not provide loans or securities for the acquisition of their own shares.

14 Minority squeeze-out

May minority stockholders of a public company be squeezed out? If so, what steps must be taken and what is the time frame for the process?

Minority stockholders of Bulgarian public companies may be squeezed out only by a stockholder holding 95 per cent or more of the target's registered capital and voting rights. The squeeze-out must be for all of the remaining shares and must be executed within three months of the takeover bid. Squeeze-out is subject to approval by the Bulgarian Financial Supervising Authority, which shall be issued within 14 days after receiving the required notification. The transfer of the shares and the payment of the purchase price is performed simultaneously within seven business days following the publication of the invitation for the squeeze-out.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Cross-border transactions are usually structured in accordance with the applicable law, chosen by the parties. In case the governing law is not Bulgarian, the mandatory provisions of the Bulgarian corporate law will still apply.

The Commercial Act contains special provisions on cross-border re-organisations. A cross-border reorganisation involves at least one company based in a different member state of the European Union or the European Economic Area and at least one Bulgarian limited liability company or joint stock company.

The Public Offering of Securities Act provides for the possibility for foreign persons or entities to perform a public offering in Bulgaria and vice versa – Bulgarian persons or entities to perform public offering abroad. These activities are limited by numerous restrictions and require the involvement of the Bulgarian Financial Supervising Authority.

See question 3 for further information.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations or acquisitions involving public companies?

Tender offers are registered with the Financial Supervision Commission and can be published, in case that within a period of 20 business days the regulator does not issue a temporary prohibition. If the Commission does not issue an opinion within the said terms, this is considered as confirmation of the tender offer.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Business combinations in certain industry sectors such as the financial sector (including insurance, capital markets, banking, investment

Update and trends

Currently, the existing AML framework in the country is expected to undergo a significant overhaul. The Bulgarian parliament is reviewing and about to adopt an entirely new Measures Against Money Laundering Act, which will implement the requirements of the fourth Anti-Money Laundering Directive. The new bill will increase the scope of application of the legislation, will lay down a number of new measures for prevention of money laundering, will establish a central ultimate beneficial owner register, and shall significantly increase the sanctions imposed by the act. Furthermore, MiFID 2 was implemented in the country.

intermediaries), require additional approvals or notifications from different regulatory bodies for the acquisition of a certain percentage of voting rights or share capital, or both, for execution of a shareholders' agreement, etc. The regulatory bodies are, among others, the Bulgarian Financial Supervision Commission, Bulgarian National Bank, etc.

18 Tax issues

What are the basic tax issues involved in business combinations or acquisitions involving public companies?

Corporate income tax

Disposal of shares or assets located in Bulgaria by foreign individuals triggers Bulgarian income tax obligation, in the form of a withholding tax. Where an entity acts as a selling party, the participation exemption will apply for EEA registered companies (if certain EU legislation conditions are met).

Currently, Bulgarian corporate income tax is 10 per cent.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination or acquisition involving a public company?

The Bulgarian Labour Code and the Commercial Act regulate the implications arising out of business combinations, whereas the employer has a general obligation to inform representatives of the employees and trade union representatives about any significant economic changes.

In general, any kind of reorganisation leads to an automatic transfer of the employment relationships with a company to its legal successor. However, some applications are to be observed. The employer is required to inform the employees' and the trade union representatives on certain matters (eg, the exact kind of planned reorganisation, the expected date of the reorganisation, the expected effect on the employees, the planned measures with regard to the staff, etc), not later than two months prior to the anticipated reorganisation. Specific informational and consultation procedures are applicable to the employees in multinational undertakings.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations or acquisitions involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

If a public company is declared as insolvent, the Financial Supervision Commission shall take a decision, by virtue of which the company will cease to be a public one and shall be deregistered as such from the respective register.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations with, or acquisitions of, a public company?

Under Bulgarian law, commercial bribery is defined as offering or receiving of a bribe with regard to the fulfilment or non-fulfilment of regular business obligations. The sanctions for this crime are a fine of up to €7,500 or imprisonment for up to three years.

In addition, the Anti-Money Laundering Act provides for strict obligations on a large number of entities or persons, such as: financial institutions, investment intermediaries, pension funds, public notaries, legal consultants, etc, to identify the clients if entering into a commercial relationship with them. Identification of the client refers to the identification of its ultimate shareholder. Furthermore, the purpose and the financing (in some cases) of the anticipated transaction must also be verified. Origin of funds has to be established for transactions in the amount of €15,000 and more. A lower threshold in the amount of €5,000 applies to certain entities subject to the application of the act (eg, financial institutions). Please note that at the time of this publication, a new Anti-Money Laundering Act is in the process of being adopted by the Bulgarian parliament.

EU, US and UN sanctions apply respectively in Bulgaria.

C/M/S/

Law . Tax

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