Bulgaria

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1 Form

How may businesses combine?

The most common methods for achieving the combination of two or more businesses used in Bulgarian legal practice are:

- the acquisition of a majority or all of the shares or the stocks of a company – the acquirer would assume control over the target by acquiring the majority of its voting rights;
- the transfer of the going concern of one entity to another – the transferor shall transfer all of its assets, liabilities and goodwill to the acquirer through a single transaction;
- the transfer of all the assets and contracts piece by piece by one company to another – the transferor shall transfer all or some of its assets and contracts via series of transactions. Normally this procedure is used in case of uncertainty about undisclosed or hidden liabilities on the transferor's side;
- the merger by way of acquisition (one or more entities are absorbed into another entity and the absorbed entities cease to exist) or by way of incorporation (two or more entities combine to establish a new one and all of the combined entities cease to exist);
- the demerger by way of acquisition – a portion of the assets and liabilities of an entity are split off and pass onto another entity; and
- the entering into of various contractual arrangements leading to the establishment of consortia or similar non-formal structures.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

Not all forms of business combination are governed by specific legislation.

- The Commerce Act of 1991 as amended is the main legislative act regulating the legal status of companies, mergers, acquisitions, sale of shares in limited liability companies and stocks in joint-stock companies, transfer of going concerns, etc.
- The Contracts and Obligations Act of 1950 as amended applies to all issues not covered by the Commerce Act, as well as to the transfers of assets, transfers or novation of contracts, etc. It also governs general issues such as the nullity of the civil contracts.
- The Public Offering of Securities Act regulates the legal status and the special requirements applicable to publicly-traded joint-stock companies, the procedures for the acquisition of their non-physical shares, the obligations for the launch of tender offers once certain shareholding thresholds are exceeded, etc.
- The Privatisation and Post-privatisation Control Act regulates the special procedures applicable with respect to the privatisation of state and municipal companies and assets.

The legislation specifically governing the regulated industries should also be considered when a merger or acquisition is made within that industry, for example:

- The Banking Act and its regulations set up special permit requirements of the banking regulator with respect to the acquisition of shares in a banking institution or the transformation of banks.
- The Telecommunications Act sets forth special permit requirements with respect to the acquisition of shares in a public telecommunications operator.
- The Public Offering of Securities Act and its regulations set forth special permit requirements with respect to the acquisition of shares in investment brokers, etc.

Certain Bulgarian laws may affect the procedures for the payment of the acquisition price, like:

- the Foreign Exchange Act regulating the declaration of transactions involving sums over certain amounts for national statistics purposes;
- the Corporate Income Tax Act, which may impose a withholding tax obligation, respectively the various double tax treaties to which Bulgaria is a party and which may alter the said obligation and the Tax and Social Security Procedure Code, which establishes the procedure for the application of the double tax treaties; and
- the Measures Against Money Laundering Act, regulating specific obligations of the banks to identify the entities that effect certain payments, etc.

With respect to general administrative law, the Protection of Competition Act regulating concentration clearances by the Bulgarian Commission for the Protection of the Competition (the Competition Commission) is also relevant.

3 Governing law

What law typically governs the transaction agreements?

On many occasions the parties may choose a foreign law to govern their contractual relations. In those cases the applicability of the Bulgarian laws may not be derogated from with respect to material elements of the deal such as:

- the form of the agreement – especially if the agreement is subject to registration or enforcement in Bulgaria;
- corporate requirements with respect to the adoption of corporate decisions by the Bulgarian participants in the deal;

- administrative requirements such as the registration of the deal and the fees associated therewith, getting of the necessary permits for the deal, etc; and
- due taxes – withholding tax (in the case of sale of shares in a Bulgarian company), local taxes (in the case of sales of real estate located in Bulgaria), VAT, etc.

If the transaction is governed by Bulgarian law, then the following legislation would apply in most cases:

- The Commerce Act governs the forms of the agreements for the transfer of shares, physical stocks or going concerns, the procedures for the adoption of the relevant corporate decisions, the procedures for the effective assumption of control after the deal closes, the deal registration requirements, the procedures for the companies' transformation, like mergers or demergers, etc.
- The Contracts and Obligations Act – according to the Commerce Act the provisions of civil legislation shall apply to matters of commercial transactions not regulated by it. The main law regulating the transactions in the civil sector is the Contracts and Obligations Act.
- The Public Offering of Securities Act applies to acquisitions or transformations involving publicly traded companies or to acquisitions of investment brokers, etc.

4 Filings and fees

Which governmental or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other governmental fees in connection with completing a business combination?

- Commercial registration – most business combinations require registration on the Commercial Register. At present, the Commercial Register is kept by the regional courts but as of 1 October 2006 responsibility will be assigned to a special administrative authority – the Registry Agency. Commercial registration is required with respect to all of the transformation procedures (ie, mergers and demergers), transfer of going concerns, transfer of shares in a limited liability company, etc. The making of these registrations is normally associated with a fee the amount of which is relatively low.
- Assets deal registrations – if such a deal is implemented, then registrations must be made with respect to all assets that are subject to special registration (eg, real estate, trademarks, motor vehicles, securities, etc). The fees payable depend on the nature of the asset and are in most cases minimal.
- Auxiliary registrations – normally a business combination is associated with changes in the constituent documents of the target, its management bodies, address of management, trading name, etc. Those changes are also subject to commercial registration. In addition, and depending on the form of the M&A transaction, registrations may have to be made with respect to all assets that are subject to special registration (please see above). The making of those registrations is also conditional upon the payment of a fee which in most of the cases is minimal.
- Concentration clearance – required if the turnover of the participants in the concentration for the last 12 months exceeds 15 million levs (approximately €7.5 million). The fee payable for the issuing of the clearance is 0.1 per cent of the combined turnover, but no more than 60,000 levs (approximately €30,000).
- Regulatory permits – required depending on the nature of the transaction and the industry sector in which the target operates. Usually the issuing of the permit incurs a fee.
- Announcements in the State Gazette – various elements of the business combination might need to be announced in the State Gazette. The fees payable for such announcements are relatively low.

It should be noted that whenever fees are collected in connection with the performance of a business combination their amount is either fixed in advance in a special tariff or can be calculated on the basis of rules contained in such a document and does not depend on the judgement or discretion of the relevant officials.

5 Information to be disclosed

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

The information that shall be made public depends primarily on the type of business combination as well as on the legal form of the participants. In certain cases there is no requirement for public announcement (eg, acquisition of less than 100 per cent of the shares in a non-publicly-traded joint-stock company). In other cases, the parties may have to disclose material amounts of information to the general public, the regulators or the Competition Commission.

In the case of a planned transformation of non-publicly-traded companies, the public will be informed about the planned merger through the advance announcement in the State Gazette for the deposition of the merger documents with the court and the invitation for the general meeting. Given that the commercial register kept with the court is public, any person (not just the shareholders) may learn all of the details with respect to the transformation, such as its form, the participants therein, the proposed exchange of shares, the amount of cash payments, if any have been envisaged, and the time period within which payment must be made, etc. An announcement about the completion of the transformation shall also be published in the State Gazette.

Each person acquiring 5 per cent or more of the shares in a publicly traded company should make an announcement. A similar requirement applies with respect to subsequent acquisitions where the total shareholding would exceed 10 per cent, 15 per cent and other percentages divisible by 5.

In addition, a disclosure to the regulated market is to be made when a potential acquirer enters into confirmed negotiations for the acquisition of control over the publicly traded company.

In the case of acquisition of control over a company, the shares of which are publicly traded, the acquirer should launch a tender offer to the minority stockholders. The minimum content of the tender offer is determined by law and includes, inter alia, information about the acquirer, its business plans for the future, plans with respect to the employees, offer to acquire the minority shares and indication of the price at which this will be done, etc. A notice about the tender offer and the text of the tender offer are to be published in at least two national daily newspapers.

The information disclosed to the Competition Commission usually covers a wide range of commercially sensitive information, therefore, the parties may indicate in their filings the data that they consider covered by commercial secrecy. The Competition Commission may then disclose the non-confidential information to the public via announcements on its official website. The decision of the Competition Commission will be also published in the State Gazette. In general the Competition Commission will officially disclose only the fact of the concentration and the participants.

For the purposes of obtaining the regulatory permit (if required) the applicants may also need to disclose to the regulator a material amount of information, including on their business plans; however, this information will not be made public.

The Privatisation Agency must publish reports on its activity in the State Gazette. According to the law, those reports should include information on transferred shares or assets, the name of the acquirer, the purchase price and the additional obligations assumed by the acquirer, such as the obligation to make investments or the obligation to maintain certain number of employees.

6 Disclosure requirements for shareholders

What are the disclosure requirements for major shareholders in a company? Are the requirements affected if the company is a party to a business combination?

According to the Commerce Act, the names of the shareholders in a limited liability company are public and are to be published in the State Gazette but their shareholding is not subject to such disclosure. However, any interested party may examine the public Commercial Register and discover their exact interest in the company.

The shareholders in a non-publicly traded joint-stock company are not required to be announced in the State Gazette or entered in the Commercial Registry. However, if a person acquires 100 per cent of the capital of such company, then his or her name shall be recorded in the registry.

As mentioned above, each person acquiring 5 per cent or more of the capital of a publicly-traded joint-stock company should disclose this to the regulated market on which the acquisition took place, as well as to the company itself and to the Commission for Financial Supervision (the commission).

7 Duties of directors and controlling shareholders

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

Managers and directors play different roles depending on the type of the business combination that is to be implemented.

In the case of mergers and demergers, the role of the managing bodies is fundamental for the successful completion of the planned combination, as they are responsible for the entire procedure, including the merger agreement and the reports of the management bodies, securing the proper auditing of the merger documentation and the disclosure of information to the shareholders, then for convening the general meeting of the shareholders to vote on the requisite resolutions.

Without the assistance of the management bodies the preparation of a competition clearance filing would be impossible. However, it is up to the selling shareholder to secure their assistance. The same is valid with respect to the regulatory permit filings.

The Commerce Law provides that the members of the managing bodies of the companies participating in a merger or demerger will be liable to the partners and shareholders in the companies for any damages resulting from a failure to fulfil their duties in preparing and effecting the combination.

The management of the surviving or acquiring company (in cases of mergers, demergers or acquisitions of a going concern) is obliged to secure the separate management of the assets for six months after the business combination is complete. Should they fail to observe this requirement they shall be liable to the creditors for the resulting damages.

No specific obligations exist with respect to the controlling shareholders.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

Certain business combinations do require approval by the general meeting of shareholders, whereas others may be implemented by a resolution of the management or jointly by the management and supervisory bodies.

- Transformation of the company (merger or demerger) – resolution of the general meeting is needed to be passed with a majority of three-quarters of: the entire capital when transforming a limited liability company; or the presented voting shares when transforming a joint-stock company. In case of stocks from different classes, the decision shall be taken by the stockowners from each class. To transform a partnership limited by stocks, it is necessary to have a decision of the unlimited liability partners taken unanimously in writing with notarisation of the signatures, and a decision of the general meeting of the shareholders taken by a majority vote of three-quarters of the represented shares. A transformation of a general partnership or a limited partnership shall be done upon the agreement of all partners given in writing with notarisation of the signatures.
- Transfer of the entire going concern – resolution of the general meeting is needed, however, this power may be delegated to the management or the management and supervisory bodies jointly by the statute of the joint-stock company.
- Transfer of over one-half of the assets by value as per the last audited balance sheet – resolution of the general meeting is needed, however, this power can be delegated to the management or management and supervisory bodies jointly by the statute of the joint-stock company.
- Entering into consortia or similar arrangements – may be delegated to the management bodies.

9 Hostile transactions

What are the special considerations for unsolicited (hostile) transactions?

In general, in the case of a transfer of shares in a limited liability company, the new shareholder needs to be approved by all of the shareholders. There is no such legal rule for the transfer of shares in a non-publicly traded joint-stock company but the shareholders could implement similar protective mechanisms though 'right of first refusal' or similar clauses in the statute of the company. However, this is not applicable with respect to publicly traded joint-stock companies, the shares of which are supposed to be freely transferable.

The Bulgarian stock market is still underdeveloped and has seen no hostile takeovers to date. Furthermore, the free-float of Bulgarian public companies is usually small which makes hostile takeovers practically impossible.

As a rule, any person possessing 5 per cent or more of the capital of a public company and wishing to acquire more than one-third of the capital may register a tender offer addressed to all of the shareholders.

The said tender offer (as well as any other tender offer – please see question 12) is to be based on the following general rules:

- all of the shareholders should be treated equally;
- the shareholders should be given sufficient time to assess the

offer and take a grounded decision;
- the management must act in the interests of the target company, its shareholders and employees; and
- no market manipulations of the shares of the target company or other affected companies are allowed.

The management of the target company has to be requested to provide an opinion on the tender offer.

During the tender offer, the target company may not issue shares, rights, warrants or other securities convertible into voting shares or enter into transactions that would materially alter its property, redeem shares or take any other steps to prevent the acceptance of the tender offer, or create material difficulties or inflict additional expenses to the offeror.

The law does not provide for any specific measures that the management of the target company may take to prevent a hostile takeover. However, it may provide a negative opinion on the tender offer as long as such opinion could be backed with arguments. Due to the reasons explained above there is no court practice on such cases.

10 Break-up fees – frustration of additional bidders

What type of break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders? Describe any 'financial assistance' restrictions and how they can affect business combinations.

The law requires that all pre-contractual relations and negotiations should be conducted in good faith. Since this wording is quite broad prudent investors prefer to settle issues like the exclusivity for negotiations, break-up fees, and the possibility to negotiate with more than one party in advance through written instruments. Those documents would also regulate the possible break-up fee payable to the buyer should third parties interfere successfully in the planned transaction. The break-up fees could be included in those documents also as a penalty for breaching the pre-contractual obligation not to negotiate with a third party.

The law contains no limitation with respect to break-up fees and it may be freely negotiated between the parties. However, if the seller is an individual and the break-up fee is negotiated as a 'penalty' then the seller can claim its amount is excessive if it is materially higher than the damages actually suffered by the potential buyer.

Although the break-up fee is more often intended to protect the potential buyer, there is no legal prohibition on agreeing a fee in favour of the seller too.

It should be noted that even without a break-up fee arrangement, there may be pre-contractual liability if one party leaves the negotiations without just grounds and in bad faith.

The Commerce Act prohibits joint-stock companies from granting credits or providing security for the acquisition of their own shares. The wording of the 'financial assistance' prohibition is quite broad and still there is no court practice on its application.

11 Governmental influence

Other than through relevant competition (antitrust) regulations, or in specific industries in which business combinations are regulated, can governmental agencies influence or restrict the completion of business combinations?

If all the prescriptions of the law are complied with, no government agencies may influence or restrict the completion of business combinations.

12 Conditions permitted

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, can the financing be conditional?

The Bulgarian Public Offering of Securities Act regulates three types of tender offers:
- Compulsory – any person, who acquires, whether directly or through connected persons, more than 50 per cent of the votes in the general meeting of any public company, must either register with the Commission for Financial Supervision a tender offer to the rest of the voting stockowners for the purchase of their stocks or for exchange with stocks to be issued by the offeror for this purpose, or transfer the requisite number of shares so as to hold, whether directly or through connected persons, less than 50 per cent of the votes in the general meeting. Similar requirements apply to persons acquiring, directly or together with related persons, two-thirds of the voting shares of a listed company.
- Voluntary (usually to delist the company) – persons who own more than 90 per cent of the voting capital of a listed company may address a tender offer to the remaining minority shareholders. As a result thereof the company could be delisted.
- Voluntary (usually to take over the company) – a shareholder in a listed company owning 5 per cent of the shares or more may address a tender offer to the other shareholders if he or she wishes to acquire more than one-third of the voting capital.

As a rule the tender offer is unconditional and may not be withdrawn with the following exceptions:
- a voluntary tender offer aimed at acquiring more than one-third of the voting capital may be withdrawn freely; and
- mandatory tender offers and voluntary tender offer by a shareholder with more than 90 per cent of the capital may be withdrawn after its publication exceptionally if its completion has become impossible owing to reasons beyond the control of the offeror and provided that the period for acceptance of the tender offer has not expired. The withdrawal is subject to approval by the Commission for Financial Supervision.

The tender offer documentation, to be filed with the Commission for Financial Supervision, should contain, inter alia, evidence that the offeror is in possession of the funds needed to pay for the acquired shares, and details of the securities that shall be transferred in exchange for the acquired shares. The offeror may finance the acquisition through its own funds or through a loan.

13 Minority squeeze-out

Can minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

Neither the Commerce Act nor the Public Offering of Securities Act allow the squeeze-out of minority shareholders by the majority shareholder, irrespective of the percentage held by the latter.

It would not be unthinkable, however, to implement a mechanism for the separation of an existing company into two or more entities, where one of the successors would receive the entire business while the other(s) would receive, for exaxmple, only cash. The majority shareholder interested in squeezing out the minority shareholders would then receive shares in the operational company, whereas the minority shareholders would become shareholders in the cash compan(ies).

So far, this mechanism has not been tested in practice, but

it is theoretically possible as long as the shareholders would receive shares with a value equivalent to those they held before the transformation.

14 Cross-border transactions

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

The specific structure of a cross-border combination would depend primarily on the intentions of the parties. It is highly disputable whether all of the typical forms of business combination, as indicated in question can be achieved cross-border (ie, the merger of a Bulgarian company into a foreign company). Therefore the most typical forms of cross-border transaction include:

- acquisition of shares in a Bulgarian company; and
- acquisition of the going concern of a Bulgarian company by a Bulgarian special purpose vehicle or branch of the foreign investor.

As a rule, foreign entities enjoy the same economic rights as Bulgarian ones. However, the involvement of an international element affects in most cases the structure of the business combination. The following should be mentioned:

- In most cases of cross-border transactions the parties would choose a foreign law to govern their relations, provided however, that certain mandatory provisions of the Bulgarian laws shall equally apply.
- In the case of sale of shares in a Bulgarian company by a foreign seller, the withholding tax requirements of the Bulgarian laws should be complied with.
- The parties to a cross-border transaction prefer to choose foreign courts or arbitral institutions as the forum competent to settle their disputes.
- The Private International Law Code provides that the foreign company shall be duly registered and validly existing under the laws of the relevant country. Such registration and existence can be proved by presenting a certificate issued by the proper authority keeping the commercial registries in the relevant country.

The Public Offering of Securities Act provides additional requirements for the public offering in Bulgaria of stocks issued by non-resident persons and for public offering abroad of stocks issued by resident persons.

If a non-resident company wants to perform public offering in Bulgaria it must secure that the following requirements are met:

- the stocks must satisfy the requirements of the Public Offering of Securities Act;
- the issuer shall present evidence of conformity with the law of the place of his registration; and
- realisation of the rights of resident investors shall be guaranteed.

If the stocks are physical, they may be offered to the public after being immobilised at the Central Depository.

The Commission for Financial Supervision shall be notified of any public offering abroad of stocks issued by resident persons. Upon submission of documents for public offering abroad to the competent foreign institutions, the issuer or the investment intermediary shall submit to the Commission for Financial Supervision:

- the draft prospectus and any other documents as may be required according to the foreign law;
- a declaration pledging to submit to the Commission for Financial Supervision copies of all documents as may be published or presented abroad according to the foreign law;
- any other documents as may be prescribed by ordinance.

The Foreign Exchange Act provides that transactions of money between foreign and residential persons exceeding the amount of 5,000 levs (approximately €2,500) shall be declared before the Bulgarian National Bank with special forms for the purposes of the national statistics.

15 Waiting or notification periods

Other than competition laws, what are the relevant waiting or notification periods for completing business combinations? Are companies in specific industries subject to additional regulations and statutes?

The time for completing a business combination depends mainly on the form chosen. Generally mergers and demergers are completed within a period of six to eight months (including the waiting period for the concentration clearance and regulatory permits). The procedures for transfer of going concerns are slightly shorter, if associated with concentration clearance and regulatory permits. Otherwise, the transfer of the going concern, once the agreement is executed, could be registered within 15 to 20 days.

It is expected that the new Commerce Registry Act (entering into force on 1 October 2006) would drastically reduce the time needed for registration of the combinations.

It must be noted that after registering a business combination in the commerce registry and promulgating it in the State Gazette, a six month period starts to run within which the assets of the companies shall be managed separately.

The combinations involving companies from regulated industries are normally subject to regulatory permits (banking, insurance, investment brokerage, telecommunications, companies operating under concessions for subsoil resources, etc).

16 Tax issues

What are the basic tax issues involved in business combinations?

The tax implications shall depend primarily on the chosen form of the business combination.

- Corporate tax – in case of merger, the surviving or newly incorporated company should pay the final corporate tax of the terminated companies calculated as of the date of registration of the merger in one month following such registration.
- Withholding taxes – become due with respect to incomes of Bulgarian sources paid or payable to foreign persons. Typically the withholding taxes issue arises with respect to share acquisitions, although theoretically this could happen in asset deals too. The standard rate applicable to incomes from the sale of shares is 15 per cent but may be reduced by operation of various double tax treaties to which Bulgaria is a party.
- Local taxes – are due in the case of asset deals involving real estate and motor vehicles. No local taxes are charged in merger or demerger combinations or transfers of going concerns.
- VAT – the transfers of shares or going concerns and the transformation of companies are not subject to VAT. However, in case of merger the terminated entity will be deregistered for VAT purposes and its successor would have to charge VAT over the acquired assets except if the successor is VAT registered or becomes VAT registered.

Update and trends

The new rules regulating the main forms of business combinations were enacted only in 2003. Since they were much more complicated than the previous rules, businesses were reluctant to use these, for instance, to improve their structures, consolidate markets, make new acquisitions, etc. However, this situation is about to change with several large consolidations expected to take place in 2006 and 2007.

It is also anticipated that the new Commerce Registry Act, to enter into force on 1 October 2006 shall materially improve the commercial registration and shall make the business combinations registration process easier to manage.

17 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

The obligations of the companies participating in a business transaction are regulated primarily by the Labour Code of 1987 (as amended).

As a rule, the relationship with the employee shall not be terminated in case of merger or demerger of companies, transfer of going concerns or autonomous parts thereof. However, such changes could occur at a later stage after the organisation and the structure of the new employer is optimised, provided that the employment can be terminated on grounds and subject to compliance with the requirements and procedures laid down in the Labour Code.

In the above cases, the legal successor or the new owner shall become employers by direct operation of the law.

Prior to putting into effect a business combination of the type described above (or of any of the most common types of business combinations listed in question 1) the employer shall be bound to notify the employees about: the anticipated changes and the date of their effect; the reasons for the changes; the possible legal, economic and social consequences of the changes for the employees; the measures planned in respect of the employees. The notification shall be given at least two months before the occurrence of the consequences for the employment and the working conditions of the employees.

Where the business combination could lead to the implementation of certain measures with respect to the employees, the employer is obliged to conduct in due time consultations and to try to achieve agreement with the representatives of the trade unions and with representatives of the employees before giving the notification.

18 Restructuring, bankruptcy or receivership

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

If a company is in bankruptcy then it may participate in a business combination (eg, merger or demerger) only if the approved reorganisation plan so provides.

Alternatively, the approved reorganisation plan may provide for the transfer of the entire going concern of the bankrupt company to a third party.

It should be also noted that the reorganisation plan may provide for the conversion of the receivables of a creditor or creditors into capital as a result of which such creditor or creditors could acquire control over the company.

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