International
Comparative
Legal Guides

Practical cross-border insights into mergers and acquisitions

Mergers & Acquisitions 2022

16th Edition

Contributing Editors:
Lorenzo Corte & Scott C. Hopkins
Skadden, Arps, Slate, Meagher & Flom LLP

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Bulgaria

Ilko Stoyanov

Katerina Kaloyanova-Toshkova

Schoenherr (in cooperation with Advokatsko druzhestvo Stoyanov & Tsekova)

1 Relevant Authorities and Legislation

1.1 What regulates M&A?

Mergers (including *takeovers*) and de-mergers (*spin-offs and splits*), share transfers and business (*going concern*) transfers are regulated, on a general level, by the Commerce Act. A number of other statutes, such as the Obligations and Contracts Act, the Competition Protection Act, the Ownership Act, the Labour Code, etc., may also apply to certain aspects of M&A transactions.

Where the target is a public company, the specific rules set forth in the Public Offering of Securities Act ("**POSA**") need to be observed. Takeover bids with respect to public companies are extensively regulated under Ordinance No. 13/2003 enacted by the Financial Supervision Commission ("**FSC**") by delegation under the POSA.

Special laws are in place for mergers and de-mergers of certain categories of companies; for example: pension funds are subject to the Social Insurance Code; banks and other financial institutions – the Credit Institutions Act; privatisation funds – the Privatisation Funds Act; insurance companies – the Insurance Code; and special purpose vehicles – the Special Purpose Investment Companies and Securitization Companies Act.

Acquisitions and reorganisations of companies that are fully or partially municipality-owned or State-owned are governed by the Privatisation and Post-Privatisation Supervision Act.

1.2 Are there different rules for different types of company?

Generally, different and more complex rules govern M&A transactions that involve joint-stock companies ("**ADs**") compared to those that involve limited liability companies ("**OODs**"). The principal differences concern the form of M&A documentation, required approvals and registrations, and voting majorities. Please also see our answer to question 2.11 below.

Furthermore, M&A transactions and, in particular, takeover bids in respect of shares in public companies (which may be ADs only) are subject to special rules. Takeover bids are supervised by the FSC, provided that the public companies:

- have a registered seat in Bulgaria and their shares are admitted to trading on a regulated market in Bulgaria or in another country;
- have shares admitted to trading on a regulated market in Bulgaria, provided that their shares are not admitted to trading on a regulated market in the EU Member State where their registered seat is located;
- have shares admitted, for the first time, to trading on a regulated market in Bulgaria; or
- have shares admitted simultaneously to trading both on a regulated market in Bulgaria and in another EU Member State, but the issuer has chosen the FSC as the competent authority to supervise the takeover bid.

Special rules are in place for cases where the shares have been admitted to trading on a regulated market in another EU Member State, in addition to their admission on a regulated market in Bulgaria. The bid in such cases also has to be made accessible to the shareholders in the other EU Member State where the shares are traded on a regulated market.

Once a company has ceased to be "public" in the meaning of the POSA and this circumstance is duly registered with the Trade Registry, the M&A transactions in respect of such a company fall under the regime of the Commerce Act.

Furthermore, the general regulations on takeover bids do not apply to bids relating to securities issued by collective investment schemes.

Lastly, as mentioned above, foreign target companies in M&A transactions are affected by Bulgarian legislation as long as: (i) they have a registered seat in another EU Member State and are admitted to trading on a regulated market in Bulgaria; or (ii) they have subsidiaries or branches in Bulgaria, in which case, certain registration requirements may apply.

1.3 Are there special rules for foreign buyers?

As a general rule, investments by foreign entities are governed by the same provisions that are applicable to Bulgarian investors. Therefore, all investor-friendly provisions applicable to Bulgarian companies apply likewise to foreign investors. Furthermore, if an international agreement provides for more favourable provisions towards entities from certain countries, these provisions have priority over the local Encouragement of Investments Act ("**EIA**").

Similarly, restrictions on investments also apply on an equal footing to Bulgarian and foreign entities. By way of example, such restrictions apply to companies that are in the process of liquidation or in bankruptcy proceedings. In accordance with Commission Regulation (EU) No. 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, there are investment restrictions towards certain sectors (i.e. activities in the coal and steel industry; shipbuilding and synthetic fibres sectors; activities in fisheries and aquaculture; processing and marketing of agricultural products; and the closure of uncompetitive coal mines). Furthermore, there are investment restrictions for investors from countries that treat Bulgarian investors in a discriminative manner. These countries are listed in an official list adopted by the Council of Ministers.

1.4 Are there any special sector-related rules?

Transactions within certain regulated sectors (i.e. banking, insurance, pension assurance, media, telecommunications, etc.) may trigger compliance with various special rules in addition to the general rules governing the transaction under the Commerce Act. Typically, before execution of the transaction, an approval must be obtained from the relevant supervising body. As an example, an acquisition or sale of a shareholding in a Bulgarian bank, whereby the thresholds of 20%, 33% or 50% shareholdings are reached or exceeded, triggers the requirement to obtain the prior approval of the Bulgarian National Bank.

1.5 What are the principal sources of liability?

In addition to the contractual liability and liability in tort, participants in M&A transactions must consider the administrative liability for non-compliance with any notification/approval requirement, such as those described under question 1.4 above, or similar restrictions under regulatory statutes (i.e. insider dealing, market manipulation, etc.). The consequences of non-compliance with regulatory provisions include suspension of the voting rights of the acquired shares (where a transaction required a regulatory approval), suspension of the voting rights of all shares in a company (where a mandatory takeover was not made), and severe fines.

For example, the completion of an M&A transaction without the prior approval of the Competition Protection Commission (where this is required) may trigger a penalty in the amount of up to 10% of the aggregate turnover of a company. However, the acquirer will be entitled to exercise all rights (including voting rights) pertaining to the acquired shares.

The fines for infringement of the POSA may be equally harsh, i.e. a breach of the rules regarding takeover bid procedures may reach up to BGN 4 million (*ca.* EUR 2,045,167) or the amount of twice the profit realised, or the loss avoided, as a result of the violation, whichever amount is higher, or where the defaulting person is a legal entity – BGN 20 million (*ca.* EUR 10,225,837) or up to 5% of the total annual turnover according to the most recent annual financial statement. In both cases, the violation of POSA rules in relation to the takeover bid procedure leads to suspension of the voting right of all shares in a company.

2 Mechanics of Acquisition

2.1 What alternative means of acquisition are there?

Acquisition of a Bulgarian company may occur not only by way of an outright purchase of its shares (completed, in the case of a public company, by registration of the share transfer with the central register of securities maintained by the Central Depository), but also through a purchase of its business (*going concern*), merger or de-merger.

The Commerce Act regulates in detail the merger/de-merger procedure, including the mandatory steps that should be followed, documentation that must be prepared, granting the shareholders access to information, and the publication and registration of the relevant decisions. Additional and more complex rules and procedures are set forth in the POSA in respect of the takeover and merger/de-merger of a public company.

2.2 What advisers do the parties need?

In a customary M&A transaction, the parties must be advised by local legal, financial and tax consultants. With regard to specific industry sectors, additional specialist advisers may be necessary for certain aspects, such as technical, environmental and construction issues. Professional investment advice must be obtained where the target is a public company.

2.3 How long does it take?

The timeframe of an M&A transaction depends on its structure and the approvals/notifications that might be required.

Takeover bid procedures under the POSA involve a prior examination of the bid by the FSC. The FSC has 20 business days to approve (explicitly or tacitly) or suspend the bid. Following this, the bid must stay open for a minimum of 28 days and a maximum of 70 days as of the date of publicising the takeover bid. The takeover bid must be publicised in one national daily newspaper or on the website of a news agency or other media that can ensure the effective dissemination of the regulated information to the public in all Member States.

If the transaction requires a prior merger clearance from the Competition Protection Commission, a fast-track investigation takes up to 25 business days from opening of the case, the latter being done once all documents and information have been collected and clarified by the Competition Protection Commission. An in-depth investigation may be launched by the Commission if the latter has established (within the fast-track investigation) that a dominant position would be enhanced and, as a result, a threat on competition would be posed. Such an in-depth investigation may take up to four months, but in cases of factual complexity, the term may be further extended by 25 business days.

2.4 What are the main hurdles?

M&A transactions may be delayed where a prior notification must be served, an administrative approval must be obtained or a tax certificate (in the case of merger, de-merger or transfer of business) must be issued. Apart from these formalities, another hurdle, on a practical level, might be the lack of established guidelines or case law for more specific or novel circumstances. A new requirement for completion of the transfer of shares in an OOD or transfer of business is that all due but unpaid liabilities for salaries or compensation payable to the employees or social security contributions for the employees of the target company (including for ex-employees) for a period of up to three years prior to the transfer must be paid before the transfer or alternatively, the acquirer must have undertaken in the share/business transfer agreement to pay them following the transfer.

2.5 How much flexibility is there over deal terms and price?

As a rule, the price and other transaction terms can be freely negotiated between the parties.

When the target is a public company, the price in a takeover bid is subject to the restrictions provided by the POSA. The price may not be lower than the highest of the following three: (1) the fair price of the shares, supported by a detailed reasoning following the application of appraisal methods that are regulated in detail in a part of the regulations enacted by the FSC; (2) the average weighted market price of the shares within the last six months; or (3) the highest price paid for the shares by the bidder during the last six months.

Moreover, specific rules regulate the investment activities of a special type of company called Special Investment Purpose

Joint-Stock Companies ("**SIPJSC**"). The purpose of these companies is to create investment incentives for small investors, which allows them to benefit from tax exemptions. Before a SIPJSC acquires or disposes of receivables or real estate property (including in another EU Member State), it must assign one or more independent experts to determine the price of the respective asset. This procedure is subject to a detailed regulation under the Special Investment Purpose Companies and Securitization Companies Act. The price at which the SIPJSC actually acquires receivables or real estate property may not be higher by more than 5%, and the price at which it sells such assets may not be lower by more than 5%, of the expert valuation price, unless there are exceptional circumstances. As an exception to the above rule, the acquisition of land with a value of less than BGN 20,000 does not require an expert valuation.

2.6 What differences are there between offering cash and other consideration?

In the prevailing number of cases, M&A transactions in Bulgaria are based on a cash or cash and debt consideration. If consideration other than cash is offered (e.g. shares or receivables), the rules regulating the effectiveness of such other consideration will also apply (e.g. endorsement of the transferred shares, notification of the debtor under a transferred receivable, and consent of the creditor under an assumed debt).

In a takeover bid scenario, a share exchange bid must always include, as an alternative, the option for cash consideration.

2.7 Do the same terms have to be offered to all shareholders?

As mentioned above, the transaction terms may be freely negotiated between the parties; for example, different terms for the different target companies' shareholders.

However, where the target is a public company and a takeover bid has been launched, the POSA provides that all shareholders in that company have to be treated equally. There is no court practice fleshing out whether this principle applies only towards the price or if it can be interpreted as a general prohibition on discriminative terms.

2.8 Are there obligations to purchase other classes of target securities?

Generally, each purchase envisages only a specific (single) class of target company securities.

However, where the target is a public company and a takeover bid has been launched, the POSA provides that the offer must be geared to all shareholders with voting rights. Therefore, if there are different classes of shares carrying voting rights, all of these classes will be covered by the takeover bid.

2.9 Are there any limits on agreeing terms with employees?

The employment contracts concluded by the target company remain in force irrespective of an M&A transaction. The latter may not serve as a basis for the transferee to amend employees' rights and obligations resulting in worse working conditions for the employees, except by mutual agreement with the employees.

Employment rules would only affect an M&A transaction in cases of a change of employer as a result of a merger, de-merger, business transfer, etc. No change of employer occurs in a share transfer scenario. In the case of a merger, de-merger or another company reorganisation, the transferee is liable for the employer's obligations assumed under employment contracts entered into before the transaction. In the case of a transfer of the whole or part of the business of the company, both parties to the transaction are jointly and severally liable. This is how Article 3, Paragraph 1 of Council Directive No. 2001/23/EC (couched in permissive terms) has been transposed in Bulgaria.

2.10 What role do employees, pension trustees and other stakeholders play?

Firstly, certain notification obligations exist affecting a wide range of transactions, including a merger, de-merger, change in the legal form of the company, change in the company's owner, transfer or lease, rent or concession of a business (*going concern*) or parts of it. In any of those cases, the employment agreements of the affected employees are transferred automatically, as they are, to the new employer. However, both the transferor and the transferee have an obligation to inform the trade union/employees' representatives or, if there are no such bodies, the individual employees, of the details of the change.

Secondly, in cases where any measures towards the employees are being contemplated (i.e. a relocation, redundancy cuts, change of employment terms and conditions, etc.), there is a further obligation to consult the trade union/employees' representatives/individual employees, and to make efforts to reach an agreement with them on those measures.

The information and/or consultation process should be completed within two months before the occurrence of the change of employer (completion of the transaction).

In a takeover bid scenario, one of the mandatory requisites of the bid is to include information about any intention to make important changes in the labour agreements, as well as information about strategic plans that might have an impact on the employees of either the bidder or the target companies.

The management boards of both the bidder and the target must present the takeover bid to the representatives of their employees or to the employees themselves (if there are no representatives). The law has now introduced clarification on the material terms of the takeover bid that should be notified to the employees of the target.

Additionally, the management board of the target company must present to the representatives of the employees or the employees themselves a reasoned opinion about the impact on employees of the contemplated transaction. Should the management board receive in advance an opinion by the representatives of the employees, it must attach the latter to its opinion, which must be presented to both the FSC and the employees.

Other stakeholders of the target company, such as creditors, must be notified in the case of mergers and de-mergers (*spin-offs and splits*) as well as business (*going concern*) transfers. Generally, these stakeholders may not block a transaction but are entitled to certain statutory protection of their rights. For example, the seller may remain liable for creditors' claims that have been transferred to the purchaser as a result of a merger, de-merger or business transfer.

2.11 What documentation is needed?

The Commerce Act provides for certain mandatory documentation to be executed in cases of corporate reorganisations, i.e. mergers and de-mergers; such documentation shall include a reorganisation plan, agreements, reports of the management

body, reports of the controller (auditor), minutes of the general meeting of the shareholders of each company participating in the reorganisation, and certificates of good standing for each company participating in the transaction, etc.

The transfer of shares in an OOD requires: (i) the minutes of the general meeting of the shareholders, setting out the shareholders' resolution to accept a new shareholder and transfer the shares to a new shareholder and, if applicable, appointment of a new managing director, such resolutions being with notary certification of the signatures and content (unless the articles of association permit simple signatures), and also a resolution to adopt/amend the articles of association in a simple written form (transfer of shares among existing shareholders does not require the approval of the general meeting of shareholders); (ii) a share purchase agreement with notary certification of the signatures and content; (iii) new articles of association of the target company (to reflect the transfer); and (iv) a certificate of good standing of each of the target company's shareholders (if legal entities).

The transfer of shares in an AD requires, generally, endorsement of the materialised shares only or – if the shares are de-materialised (electronic) – registration of the transfer with the central register of securities maintained by the Central Depository. The transfer of business (*going concern*) requires a business transfer agreement with notary certification of the signatures and content. Also, a transfer of shares in an OOD or transfer of business (*going concern*) requires a declaration by the transferor and the managing director of the target company that there are no due but unpaid liabilities for salaries or compensation payable to the employees or social security contributions for the employees of the target company (including for ex-employees) for a period of up to three years prior to the transfer.

The implementation of a bid procedure under the POSA requires, as a minimum, the following documents: a bid offer (including details about the offer that may affect the shareholders – for example, a strategic plan of the bidder, the mandatory elements of which, in turn, are laid down in detail); a declaration that the bidder has informed the management board of the target about the offer, in addition to the employees and the regulated market where the shares have been admitted to trading; a certificate of good standing of the bidder; evidence of the financial stability of the bidder in view of the bid that has been made; and sample forms of the bid acceptance, etc.

2.12 Are there any special disclosure requirements?

In cases of mergers and de-mergers, a licensed auditor's report must be prepared on the contemplated transaction and made public, along with other key transaction documents, for a period of at least 30 days prior to the merger or de-merger. Where prior accounting/financial assessments are required by law, those are to be made by an accounting/financial expert. In most M&A transactions, the target company must present a recent financial report and, in particular, the statutory M&A rules usually refer to the annual financial report. Furthermore, each company that is being terminated as a result of a merger or de-merger transaction must produce a final financial report, while each newly created company as a result of such a transaction must produce an initial financial report.

Where the M&A transaction involves a public company, either as a target, a buyer or a seller, such public company must disclose to the regulated market where its shares are traded, in addition to the general public, any specific information, including any key progress in the M&A negotiations, which may reasonably be expected to affect the price of its shares (inside information).

Moreover, any acquisition or disposal, or any binding commitment for an acquisition or a disposal, of at least 5% (or a multiple of 5%) of the votes in a public company must be disclosed to the public company and the FSC (see our answer to question 5.3). In turn, the public company must disclose such information to the general public. There is no longer an obligation on the parties to repurchase (repo) transactions to notify the company and the FSC with regard to the relevant volumes entered in the relevant register of repurchase (repo) transactions.

2.13 What are the key costs?

The State fees due to the Trade Registry for compulsory promulgation are nominal. Advisory and investment professionals' fees (if applicable) depend on the individual arrangements with the specific adviser/investment professional.

In cases that require prior notification to the Competition Protection Commission, a State fee of the BGN equivalent of approximately EUR 1,000 must be paid upon filing of the notification. Provided that the transaction is approved, the State fee due is 0.1% of the total turnover of the undertakings concerned for the previous year, but not exceeding the BGN equivalent of approximately EUR 30,600.

2.14 What consents are needed?

If the transaction takes place in an industry sector regulated by special rules, it may require the prior approval/permission of the relevant State supervision authority. Please see the information provided in our answer to question 1.4.

In the case of a bid procedure under the POSA, the bid offer must be registered with the FSC and could be made public only if there is no prohibition imposed by the FSC within a period of 20 business days following the registration. See also our answer to question 4.4 below.

In compliance with the Competition Protection Act, an M&A transaction requires the prior approval of the Competition Protection Commission if the aggregate turnover on the territory of Bulgaria for the preceding year of all the undertakings concerned exceeds the BGN equivalent of approximately EUR 12.8 million, and either the turnover of each one of at least two undertakings concerned exceeds, for the preceding year on the territory of Bulgaria, the BGN equivalent of approximately EUR 1.53 million, or the turnover of the target entity exceeds, for the preceding year on the territory of Bulgaria, the BGN equivalent of approximately EUR 1.53 million.

2.15 What levels of approval or acceptance are needed?

The general meeting of an OOD or AD is required to approve, in advance, an intended merger, de-merger or a business transfer (in the case of a business transfer, an approval is required only if the transfer concerns the entire business of a company), or in case of an OOD, acceptance of new shareholders. The required minimum majority is three-quarters of the shareholders (in an OOD), and two-thirds of the shareholders (in an AD).

A transfer/acquisition of shares in other companies must be approved at the general meeting of an OOD by more than half of the shareholders. No such statutory requirement exists in the case of an AD.

See also our answers to questions 7.3 and 7.4 below.

2.16 When does cash consideration need to be committed and available?

The parties to an M&A transaction are free to negotiate the consideration and the payment terms, i.e. advance payments, deferred payments, and escrow payments.

Nevertheless, the payment terms are strictly regulated in the case of a takeover bid procedure under the POSA. Prior to launching the bid procedure, the bidder must demonstrate to the FSC that it is capable of making the payment. In the case of a successful bid procedure, the payment must be completed within seven business days from the expiration of the bid term.

If, prior to the expiration of the bid term, the shareholder who filed a bid acquires shares at a higher price, the transactions with all shareholders who have accepted the bid offer have to be executed at this higher price and not at the one initially proposed in the bid.

3 Friendly or Hostile

3.1 Is there a choice?

The POSA provides for some specific rules relating to hostile transactions. In particular, the general meeting of the target company must approve in advance any steps that the board intends to take in order to undermine the transaction (such as sales of assets or issue of shares), except for steps geared at encouraging competing bids.

3.2 Are there rules about an approach to the target?

In the case of a takeover bid procedure under the POSA, there is a long list of principles that must be observed. For example: all shareholders should be treated equally, including the shareholders who have not accepted the bid offer; all shareholders should be provided with sufficient time and information to make an informed decision; and the target should not be placed in a position that may impede its normal course of business for an unreasonably long period, etc.

Furthermore, there are certain mandatory requisites that the bid must contain.

3.3 How relevant is the target board?

Practically, the cooperation of the target board is of great importance in the due diligence and negotiation process.

Apart from the above, the management bodies of the companies participating in the merger/de-merger are obliged to prepare a written report on the transaction explaining its legal and economic rationale. This report must be filed with the Trade Registry and must be made public for at least 30 days before the date of the general meeting convened to resolve on the transaction. Ultimately, however, it is the general meeting that has to approve the transaction, and also the management body's report. If the transaction is approved by the general meeting, the management body is obliged to complete it. In cases of takeover bids, the management body of the target public company must produce a reasoned opinion on the proposed transaction, including the consequences for the company and its employees if the offer is accepted, the strategic plans of the bidder and their impact on the employees, and the location where the company's business is carried out.

In hostile transactions, the board's tactics to resist the transactions require the prior approval of the general meeting of shareholders (please see our answer to question 8.1 below).

3.4 Does the choice affect process?

In practice, the transaction negotiations and execution processes run more efficiently if the cooperation of the target board has been secured in advance. In general, the management body cannot turn down the transaction if the general meeting has approved it. However, it may delay or constitute a hurdle to it.

4 Information

4.1 What information is available to a buyer?

The law does not require that any information about the target is provided to the buyer. Therefore, in cases where the access to information is impeded by the target's board, the investor may at least obtain information that is publicly available. For example, the actual legal status of Bulgarian companies, including their main corporate documentation (e.g. articles of association) and annual financial statements, are publicly accessible and may be obtained (online) from the Trade Registry. If the transaction involves real estate property, the legal title over it or the existence of any encumbrances may be searched at the Real Estate Registry.

Any information that is not publicly available may be obtained only with the cooperation of the target company. The investor must bear in mind that certain internal rules may be in place to impede information disclosure.

Apart from this, in cases of takeover bids with respect to public companies, the POSA requires that certain minimum information is provided to the buyers, such as information concerning the target shares that are already possessed directly or indirectly by the bidder, the term of the bid, the amount of compensation that will be paid to the other shareholders in the target if some of their rights are not observed, the plan for the future of the target company's business, etc.

4.2 Is negotiation confidential and is access restricted?

Please see our answers to question 2.12 regarding the obligation of public companies to disclose inside information, including any key progress in the M&A negotiations.

In the case of a bid procedure under the POSA, the bid has to be presented firstly to the FSC for approval before its publication. After publication of the bid, there is no legal requirement to reveal information concerning the negotiations. The negotiations are considered internal information. The results of the bid, however, must be reported to the FSC and published by the bidder.

Apart from the above mandatory disclosure rules, the parties are free to undertake an obligation to keep any information concerning the details of the transaction confidential. Under the Protection of Competition Act, however, companies are generally not allowed to aggravate their competitors' position by, for example, disclosing trade secrets.

4.3 When is an announcement required and what will become public?

In respect of share transfers in a public AD, please see our answer to question 2.12.

In the case of share transfers in a private AD, there is no legal obligation for public registrations or notification. Thus, all information will remain available only to the participating parties and the target company. A share transfer in a public AD must be registered with the central register of securities maintained by the Central Depository, which must keep the target company's shareholders' structure confidential. However, the bid to acquire shares in a public company and any changes therein are public (please see our answer to question 4.2).

The transfer of shares in an OOD requires registration of the transfer agreement with the Trade Registry (which makes it public). The same applies to merger and de-merger transactions. It is common practice for the parties to present only a brief extract of the final agreement before the Trade Registry without disclosing the main parameters of the transaction or the price.

There are special regulations on the information that must be revealed in the process of public offering of securities, the most important of which relates to the obligation to publish a prospectus and to disclose certain information on an ongoing basis. For example, within seven days from receipt of the takeover bid, the board of the target must present to the FSC, the representatives of the employees, if any, or to the employees themselves, a reasoned opinion on the proposed transaction. According to the latest amendments of the POSA, in line with Regulation (EC) No. 2017/1129 on the prospectus to be published, when securities are offered to the public or admitted to trading on a regulated market, in the case of a public offering of securities in Bulgaria where the total value of the offer over a period of 12 months is below EUR 3 million, the prospectus is replaced by: (i) a document for public offering; or (ii) where admission to trading on a multilateral trading facility is sought, a document in accordance with the rules of the multilateral trading facility.

If the transaction requires the prior notification/approval of the Competition Protection Commission, certain information about the transaction would become public. Such information is usually limited to the corporate details of the parties to the transaction, the economic purpose of the transaction and whether the buyer would acquire sole or joint control over the target company.

4.4 What if the information is wrong or changes?

As mentioned above, in the case of bid procedures under the POSA, the bid is subject to the FSC's prior approval. If the information provided in the bid is insufficient or incorrect, the FSC must prohibit the publication of the bid and the bidder has 20 business days to rectify it. After submission of necessary documents, the bidder may publicise the bid if within 10 business days the FSC has not explicitly prohibited the publication of the bid.

Once the bid has been published, the POSA imposes no prohibition on its further amendments; the latter, however, being subject to the FSC's prior approval. No approval is required if the amendment concerns an increase in the price or the offer term up to the maximum term provided under the statute, i.e. 70 days. In any case, amendments to the bid can be made no later than 10 days before the offer's expiration.

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

Under the POSA, shares in a public company may be bought up to the threshold triggering a mandatory offer without initiating a bid procedure. The thresholds triggering mandatory takeover bids include acquisitions of (i) more than one-third of the voting rights, (ii) more than 50% of the of the voting rights, and (iii) more than two-thirds of the voting rights. If a shareholder acquires one-third but no more than two-thirds of the voting shares in the target, he may not acquire, within each subsequent annual period, such number of the shares that exceeds 3% of the total shares, without making a bid.

5.2 Can derivatives be bought outside the offer process?

Yes, as long as the derivatives do not entitle the acquirer and/or its related parties to exercise the voting rights under the underlying shares. However, such derivatives may trigger disclosure requirements – see our answer to question 5.3.

Any exercise of rights under the derivatives that leads to the acquisition of voting rights under the underlying shares may trigger a bid procedure.

5.3 What are the disclosure triggers for shares and derivatives stakebuilding before the offer and during the offer period?

Any person is obligated to notify the FSC and the public company if they have acquired or disposed of, directly or indirectly:

- voting rights in a public company, provided that, following the acquisition or disposal, its voting rights reach, exceed or fall below 5% or a multiple of 5% of the total number of the voting rights; and
- derivatives which give the right to acquire voting rights in a public company, provided that, following the exercise of the derivatives, its voting rights (from shares and/or derivatives in total) may reach, exceed or fall below 5% or a multiple of 5% of the total number of the voting rights.

The above rule applies before and during the offer period.

5.4 What are the limitations and consequences?

If the stakebuilding has not triggered a bid procedure (see our answer to question 5.1), the failure to make a disclosure will result in a fine.

If the stakebuilding has triggered a bid procedure, the failure to make a disclosure will result in a fine and the voting rights under the acquirer's shares will be deemed automatically suspended until the initiation of a bid procedure.

6 Deal Protection

6.1 Are break fees available?

Bulgarian law does not provide explicitly for break/inducement fees to be payable by the target or the bidder. There is no legal obstacle for the parties to agree on those types of fees, but such arrangements are not very common.

Nevertheless, the parties are entitled to fair compensation should the opposite party fail to negotiate and enter into an agreement in good faith – *culpa in contrahendo*.

6.2 Can the target agree not to shop the company or its assets?

The Bulgarian law of contracts permits such agreements between the parties. It is common for the target company's

board not to shop the target or its assets for a certain period of time. For that purpose, the parties may sign a letter of intent indicating the exclusivity period.

However, the target company's board has a principal obligation to manage the company in the shareholders' interest. This is why the board must evaluate very carefully the competing proposals before entering into any lock-out agreement.

6.3 Can the target agree to issue shares or sell assets?

There is no legal rule preventing the target company from issuing shares or selling assets, e.g. crown jewel assets. Such actions, however, might require the prior approval of the general meeting – the latter is necessary for a capital increase in all types of companies, disposing of real property rights by an OOD, and certain high-value transactions of a public company, which are specified in detail in the POSA.

Furthermore, prior approval from the general meeting is required if the issue of shares or the sale of assets could be considered as an action, the primary purpose of which is to undermine the acceptance of the bid offer or to create considerable difficulties or costs for the buyer. Please also see the information provided in our answer to question 3.1.

6.4 What commitments are available to tie up a deal?

It is not customary practice to use commitments other than those indicated in questions 6.1 to 6.3 in order to tie up a deal.

7 Bidder Protection

7.1 What deal conditions are permitted and is their invocation restricted?

As a general rule, Bulgarian legislation requires that the parties negotiate in good faith. Any further conditions on carrying out the negotiations may be agreed between the parties in advance without breaching the good faith principle. Due regard must also be paid to the public companies' takeover bid restrictions.

With respect to public companies, the bidder is not entitled to withdraw a mandatory bid after it has been published. Exceptions are permitted where the bid cannot be executed due to circumstances beyond the control of the bidder, provided that the time limit for its acceptance has not expired, and the FSC has granted its approval on the withdrawal. In certain cases, where the bid is voluntary, it may be withdrawn without being subject to the above conditions.

7.2 What control does the bidder have over the target during the process?

There is no legal basis for the bidder to exercise any control over the target during the takeover bid process. Therefore, the bidder may not avoid defensive measures initiated by the target company's board.

However, should the defensive steps be taken in bad faith or in violation of the rules on negotiations (please see questions 7.1 and 6.3 above), the target company's shareholders may claim damages.

7.3 When does control pass to the bidder?

To acquire control over most of the decisions in the general meeting, i.e. the body deciding on the most important matters concerning a company, the investor should acquire at least 50%+1 of the voting shares. Unless the minority shareholders have been given special veto rights, this level of control would allow the bidder to appoint the entire management of the company. A more efficient level of control (which would guarantee the passing of a broader spectrum of resolutions in the general meeting of an AD, including termination of the company, increasing/reducing the capital, and amending its articles of association) may be gained by the acquisition of two-thirds of the shares. Total control (over all decisions to be taken by the general meeting, including decisions on merger/de-merger of a company and decisions on certain high-value transactions involving public companies listed in the statute) may be obtained by holding three-quarters of the voting shares, except in the case of an OOD, where increase/reduction of capital requires unanimity of all voting shares.

The title to shares in a public company passes to the bidder as of the transfer registration in the central register of securities. In the case of a share transfer in a private AD, the shareholders' rights pass upon endorsement of the shares, coupled with the registration of the share transfer in the company's shareholders' books. In the case of a share transfer in an OOD, the shareholders' rights pass upon execution of a share transfer agreement with notary-certified signatures and content and registration with the Trade Registry, which may occur after the selling shareholder and managing director of the target company have declared that there are no due-but-unpaid liabilities for salaries or compensation payable to the employees or social security contributions for the employees of the target company (including for ex-employees) for a period of up to three years prior to the transfer. In the case of merger and de-merger reorganisations (irrespective of the type of company that is being reorganised), the control passes to the bidder after registration with the Trade Registry.

7.4 How can the bidder get 100% control?

According to the POSA, the bidder who has acquired at least 95% of the voting shares in a public company as a result of a takeover bid is entitled to buy the remaining shares (squeeze-out). The remaining shareholders are obliged to sell their shares to the bidder. There is no squeeze-out procedure in respect of a private company.

8 Target Defences

8.1 What can the target do to resist change of control?

The internationally known practice of resisting a change of control may be applied in Bulgaria, but there are some restrictions in relation to this. If the target is a public company, the target company's board is not allowed to frustrate the acceptance of the offer by, for example, issuing new shares or selling the target company's assets, unless such steps have been approved in advance by the target company's general meeting. The board is, however, permitted to search for a competitive offer.

Furthermore, general meeting approval would be required for some of the target company's defences, regardless of whether the target is a public company or not.

In view of the measures that may concern the target company's capital structure, Bulgarian law permits the company to acquire its own shares but sets a limit on such acquisitions of up to 10% of the share capital. A public company may acquire its own shares subject to compliance with a bid procedure under the POSA.

8.2 Is it a fair fight?

Under the POSA, in a takeover bid procedure, all shareholders in the target company must be treated equally. Bulgarian law does not provide for further specific rules in this regard.

Apart from the takeover bid procedure and in cases where the prospective buyer is not a shareholder in the target, the target company's board is not restricted to treat certain companies in a more favourable manner than others.

9 Other Useful Facts

9.1 What are the major influences on the success of an acquisition?

The cooperation of the target company's board has significant importance for the success of an M&A transaction. The board can exercise influence over the major shareholders and the employees. The employees may constitute an influential group, particularly in former State companies that have been privatised and where the employees still possess a significant number of shares.

Depending on the particular industry sector, the State authority responsible for supervision may also affect the transaction whenever its prior approval is required.

Furthermore, the investor should be wary about possible changes in the legislation during the negotiation period, especially for tax changes and changes in the regulatory framework of the relevant industry sector, i.e. concerning requisite permissions, licences or registrations.

9.2 What happens if it fails?

The participants are free to agree in advance on the consequences should the transaction fail, including the liability of each party. If the buyer or the seller is a public company, certain special regulations and procedures might need to be observed.

10 Updates

10.1 Please provide a summary of any relevant new law or practices in M&A in your jurisdiction.

A recent judgment of the Bulgarian Supreme Administrative Court clarifies the requirements under Article 149 of the POSA in relation to the mandatory takeover bid. In case No. 2444/09.03.2015, the court held that in cases where an indirect change of control is effected, the controlling shareholder is not obliged to launch a mandatory bid towards the minority shareholders. The case in question involved a change of control at the level of the shareholder, not at the level of the target company. Such change of control does not fall within any of the three types of takeover triggering the mandatory bid rule – a direct takeover, a takeover through related persons, or indirect takeover (all defined in the POSA). Moreover, the Supreme Administrative Court concludes that the controlling shareholder is not required to launch a mandatory bid because there is no real and effective change of the percentage of its shareholding, i.e. before and after the indirect change of control in which the shareholder possesses the same percentage of the shares in the target company.

This court judgment has been considered controversial by lawyers and investors. It is believed that such court practice would undermine the protection of the minority shareholders guaranteed by the POSA and would create a basis for law circumvention.

The most recent changes in the Commerce Act concern the requirement for notary certification of both the signatures and content of the agreement for a transfer of shares in OODs, as well as various resolutions of the general meeting of shareholders relating to the transfer of shares, appointment of a managing director, and transfer/acquisition of real properties. Failure to comply with the new rule would render the shareholders' resolution void. However, there is some leeway where the articles of association explicitly provide for simple signature resolutions on such matters. Also, any transfer of business by any company should now comply with this stricter form of execution. In addition, since the beginning of 2018, the completion of any transfer of shares in an OOD or transfer of business requires that there are no due but unpaid liabilities for salaries or compensation payable to the employees or social security contributions for the employees of the target company (including for ex-employees) for a period of up to three years prior to the transfer – such circumstance being declared before the Trade Registry by the transferor and the managing director of the target company, or the acquirer of the shares/business undertakes in the transfer agreement that they will pay such liabilities.

Since October 2018, Bulgarian ADs may no longer issue bearer shares and the companies that have issued such shares must, until 23 July 2019, replace them with registered shares.

There has been a substantial number of changes in the POSA effective from August 2017. Among others, the deputy chairman of the FSC may now suspend definitively the sale of or entry into transactions involving certain securities of a public company in a number of breaches of the POSA if, for example: for a period of more than six months, the number of the members of the management or supervisory body of the public company is below the minimum number prescribed by law; for a period of more than one year, the company cannot be found at the publicly announced registered address and address for correspondence, or by other means of communication; or the company does not publish its audited financial accounts or convene a regular general meeting once a year in accordance with the law. Public companies should, therefore, now be more alert regarding their compliance with the POSA in order to prevent a suspension of sale of their shares or other securities.

Lastly, the Competition Protection Act now allows that any legal or physical persons may claim damages they have suffered as a result of breaches of the Competition Protection Act. Such persons may claim the damages actually suffered and the loss of profits. There are detailed provisions in the Act regarding such claims, including procedural rules.

Since 23 April 2020, there has been a central register of securities, which is maintained by the Central Depository. By the latest amendment of the POSA dated 22 October 2019, the function of maintaining a central register of securities will be separated from the other functions of the Central Depository. Any dematerialised securities and transfers of dematerialised securities will be registered with the central register of securities.

Effective from 21 August 2020, substantial changes have been made to the POSA reflecting the new Regulation (EC) No. 2017/1129. The POSA has, for example, introduced a threshold of EUR 3 million as a total consideration of the offer over a period of 12 months, below which threshold no prospectus is required. Also, no prospectus is required in other cases, e.g. in employee-share schemes.

Effective from 2 June 2021, subject to certain exceptions, the Contracts and Obligations Act provides for an absolute limitation period of 10 years for payment liabilities of individuals, unless such liabilities are deferred.

A new Act on Special Investment Purpose Companies and Securitization Companies was adopted in 2021. The new Act

implements Regulation (EU) No. 2017/2402, laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation. The new Act introduces and regulates the activities of a new type of special purpose companies, namely securitisation special purpose companies and the figure of an STS (simple, transparent, standardised) compliance verification agent, who will assess the compliance of the securitisations with the requirements for simplicity, transparency and standardisation under Regulation (EU) No. 2017/2402.

Ilko Stoyanov has been a partner with Advokatsko druzhestvo Stoyanov & Tsekova in cooperation with Schoenherr since 2007, where he specialises in corporate/M&A and competition law. Ilko regularly acts for clients on multinational acquisitions and corporate restructurings in the telecommunications, technology, media and advertising, insurance, manufacturing and energy industries. In addition, he advises clients on matters of antitrust (including investigations) and merger control, and regularly instructs companies on competition compliance. Ilko graduated in Law from Sofia University and has an LL.M. degree from Columbia University Law School, where he was also an editor of the *Columbia Journal of East European Law*. He is a member of the Sofia Bar Association. Ilko is a regular speaker at conferences regarding M&A, foreign investments and competition law. He is the author of various publications and manuals in the field of M&A and merger control (*ICLG – Mergers & Acquisitions* and *ICLG – Merger Control* (Global Legal Group, 2008–2018) and *International Cartel and Merger Enforcement Law* (Giese King, 2008)).

Schoenherr (in cooperation with Advokatsko druzhestvo Stoyanov & Tsekova)
56, Alabin Str.
BG–1000 Sofia
Bulgaria

Tel: +359 2 933 1072
Email: i.stoyanov@schoenherr.eu
URL: www.schoenherr.eu

Katerina Kaloyanova-Toshkova is an attorney at law who joined Schoenherr's Sofia team in 2011 following her qualification as an English solicitor with Hogan Lovells International LLP, London. She is mainly active in Corporate/M&A. While at Hogan Lovells, and during her six-month secondment at SABMiller plc, she gained further experience in international M&A transactions. Katerina graduated from Sofia University in 2001, gained a Master's degree in International Business Law at the Central European University, Budapest in 2004, and completed an English law course and legal practice course at BPP Law School, London in 2008. She is admitted to the Bulgarian Bar Association and the Law Society of England and Wales. Katerina's working languages are English and Bulgarian.

Schoenherr (in cooperation with Advokatsko druzhestvo Stoyanov & Tsekova)
56, Alabin Str.
BG–1000 Sofia
Bulgaria

Tel: +359 2 933 1074
Email: k.kaloyanova@schoenherr.eu
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