The Legal 500 & The In-House Lawyer
Comparative Legal Guide
Bulgaria: Mergers & Acquisitions

This country-specific Q&A gives an overview of mergers and acquisition law, the transaction environment and process as well as any special situations that may occur in the Bulgaria.

It also covers market sectors, regulatory authorities, due diligence, deal protection, public disclosure, governing law, director duties and key influencing factors influencing M&A activity over the next two years.

This Q&A is part of the global guide to Mergers & Acquisitions. For a full list of jurisdictional Mergers & Acquisitions Q&As visit http://www.inhouselawyer.co.uk/index.php/practice-areas/mergers-acquisitions/

Country Author: Deloitte Legal Law Firm

The Legal 500

Reneta Petkova, Partner, Legal services

rpetkova@deloittece.com

The Legal 500

Kaloyan Yordanov, Managing Associate

kyordanov@deloittece.com

The Legal 500

Nicola Kolev, Associate

nickolev@deloittece.com

Hristo Milushev, Senior Legal Assistant

hmilushev@deloittece.com

1. What are the key rules/laws relevant to M&A and who are the key regulatory authorities?

The primary rules for M&A transactions are laid out by the Commercial Act, which governs transfers of shares, quota, going concern, etc. The law also regulates mergers, de-mergers, spin-offs and reorganizations. Contracts, which typically facilitate M&A transactions, are governed by the Obligations and Contracts Act, which provides the general civil law rules for validity, performance, default, provision of security, etc. Corporate post-transactional registration requirements are regulated by the Commercial Register Act, which mandates certain changes of ownership (e.g. in a limited liability company, a solely owned joint-stock company) to be registered with the Bulgarian Commercial Register. Acquisition of shares in a public company is also subject to the rules of the Public Offering of Securities Act. Transactions of considerable economic significance fall within the scope of the Competition Protection Act and are subject to notification to and approval by the Competition Protection Commission.

In addition to the legislative framework, laid out above, transactions involving the acquisition of companies in certain regulated sectors, such as credit institutions, insurance undertakings, pension funds, investment undertakings, financial institutions, etc. must also conform to the special legislation with regards to regulatory permissions and approvals, as necessary (e.g. the Credit Institutions Act, Markets of Financial Instruments Act, Insurance Code, Social Security Code, etc. would apply). Employment law aspects are regulated by the Labour Code, which sets out employment safeguarding rules, notification and protective mechanisms for employees in certain cases, such as takeovers, going concern transfers, reorganizations and in other significant changes.

A number of other rules may apply depending on the nature of the transaction, as well as the specifics of the sector (to name a few: the Energy Act, the Foods Act, the Environmental Protection Act, Companies with Special Purposes Act, Privatization and Post-Privatization Act etc.).

2. What is the current state of the market?

The past year saw a significant acceleration of the M&A market, both in terms of number of transactions and their value. Stable GDP growth, relative political stability and low interest rates (which suggest cheap capital) are all expected to support the positive

momentum of the M&A market. The return of foreign investment, following several years of reluctance and mistrust, is viewed as a very positive sign, while the increasing potential of local players in some sectors provides reinforces the positive outlook for the market.

3. Which market sectors have been particularly active recently?

Traditionally strong sectors, such as commercial real estate, which have stagnated significantly after the 2008 global financial crisis, have experienced substantial and increasing activity. At the same time, younger sectors, such as IT, have grown exponentially.

In terms of deal value, the commercial real estate sector is dominating the overall M&A market. The highest value deal amounted to nearly EUR 253 million, involving a shopping mall acquisition and a total sector deals value of nearly EUR 800 million. A large proportion of the announced deals being made in acquisition of shopping centres, office buildings, and other commercial real estate. A trend of reorganizations is also felt throughout the real estate sector, as significant distressed corporates are moving to be refinanced by private equity funds and new investors.

A significant merger in the financial sector have been made, with a reported deal value of more than EUR 600 million, where one of the biggest banks in Bulgaria was merged with another bank, forming a new institution, which should be able to rival the third biggest bank in terms of assets. Consolidations between the banks are expected to keep an active financial sector. The leasing sector was particularly active with sales of several leasing companies, while the insurance sector is in the focus after the local balance sheet review exercise. Significant growth is registered in the IT sector, where local companies, have reached some great potential bringing foreign investment interest. The sector has boasted the largest numbers in terms of volume of transactions, although values remain relatively low for now.

The largest bottled water producer in Bulgaria was also acquired by a strategic foreign investor for a reported EUR 120 million. In the same sector, the purchase of the exclusive Pepsi beverages and Prisun juices producer and distributor by a leading water and beverage player. British American Tabaco acquired the most popular local cigarettes brands for the country for a price of EUR 100 million.

The TMT sector has also been active with deals for some of the largest cable operators, telephone operators and national networks in the past years.

The purchase of one of the leading car distributors in Bulgaria through a competitive tender could be also distinguished as one of the largest and substantial for the sector and the market as a whole.

4. **What do you believe will be the three most significant factors influencing M&A activity over the next 2 years?**

The improving economic conditions and the increasing GDP are likely to have a positive effect on the M&A market, as local businesses try to expand and new foreign investors seek entry to the Bulgarian market. This positive outlook is substantiated by the relatively stable political environment and overall optimistic investment climate for the region. The market is likely to be positively impacted by the increasing level of M&A activity at the global and regional levels. However, stricter regulations, adopted domestically and at the EU level can be viewed as potential market growth deterrents.

5. **What are the key means of effecting the acquisition of a publicly traded company?**

Acquisition of a publicly traded company is effected by way of a tender offer. Rules for tender offers are governed by the Public Offering of Securities Act and the relevant EU legislation. A mandatory tender offer should be launched by any prospective shareholder upon acquisition of more than (i) one third (only where no single shareholder holds a majority of the voting power), (ii) half) or (iii) two thirds of the voting power in the general shareholders' meeting of a publically traded company. Shareholders cannot exercise their voting rights prior to publication of such mandatory tender offer.

The law also provides the right to launch a tender offer to a new shareholder, who acquires more than 90% of the voting power, or an existing shareholder with at least 5% voting power, who acquires more than a third of the voting power in the publically traded company. Tender offers are registered with the Financial Supervision Commission and may be published if the Financial Supervision Commission has not issued a temporary ban.

6. What information relating to a target company will be publicly available and to what extent is a target company obliged to disclose diligence related information to a potential acquirer?

The publicly available information depends on whether the target is a public or private company. Public companies must disclose on a regular basis various categories of information, including info about significant circumstances, which are expected to materially influence the financial results of the company, as well as material related party transactions. The scope of information that can and cannot be disclosed or used with regard to a public company in Bulgaria is regulated by EU Regulation 596/2014, under which certain rules with regards the provision of insider information have to be followed.

The publicly available information for private companies is more limited in comparison to the public companies. Usually, the seller discloses information to the acquirer, based on a due diligence request list, sent by the acquirer.

General information regarding any company (public or private) is available in the Bulgarian Commercial Register, including the corporate form entity (limited liability company, joint-stock company, etc.), seat and management address, governing bodies and their composition, representatives, registered share capital, type of shares (if the capital is divided in shares), shareholders (in some cases), all published annual financial statements, in-kind contributions to the capital, going concern pledges, quota pledges, initiated insolvency/liquidation proceedings, etc. The register is accessible electronically.

Information can also be extracted from the Property Register with respect to any real estate property, owned by the target. The register showcases the respective property's ownership status, existing mortgages, enforcement proceedings, etc. This register is also available online.

The Central Register of Special Pledges contains all established special pledges over assets of an entity (including basis for the pledge, term of the pledge, etc.). The register is publically available, however it is not electronic yet (legislative changes have been adopted but have not entered into force and implemented at this point).

The Bulgarian Patent Office contains information on all registered intellectual property rights and any pledges established over them. The register of the BPO is electronic and public and can be used to extract information regarding an entity's registered intellectual property rights, including the type of rights, any granted licenses, established pledges, date of expiration of the registration, etc.

Online checks for pending litigation, concerning the target company, may also be accessed to some degree, depending on the court involved.

Depending on the industry, in which the target operates, other public institutions may be utilized to obtain information. Such institutions include the Bulgarian National Bank (regarding credit institution and financial institution licenses), the Personal Data Protection Commission, etc.

7. To what level of detail is due diligence customarily undertaken?

The scope and level of detail of the due diligence would depend on the structure of the transaction, the size of the acquired business and the specific sector regulations among others. Typically, the legal due diligence could cover general corporate information, title to shares, title to real estate and material assets, financial agreements and related security, other material agreements, IP, regulatory matters, employment, and pending litigation proceedings. Tax, financial and technical (if needed) is also performed.

Due diligence customarily focuses on the target's current state of affairs, as well as historic overviews, especially where primary focus is real estate ownership or the acquisition of regulated businesses. Depending on the magnitude of the contemplated transaction and the size of the target's business, law firms may set up materiality and quantitative thresholds for the review of contracts, ongoing disputes, real estate properties, etc.

8. What are the key decision-making organs of a target company and what approval rights do shareholders have?

Key decision-making organs vary, depending on the type of company:

1. limited liability company – ongoing business decisions are taken by the

manager(s). If two or more managers are appointed, they will not constitute a collective management body. The general meeting of the shareholders or the sole owner, as the case may be, is the superior management body of the limited liability company. The general meeting of shareholders/the sole owner is statutorily vested with the resolution of issues of higher importance, such as changes in the company's articles of association, approval of annual financial statements, decrease/increase of capital, appointment of manager(s), disposal or acquisition of real estate, etc.

2. joint-stock company – decision-making organs may take the form of a board of directors (in a one-tier management system) or a management board and supervisory board (in a two-tier management system). The board of directors, respectively the management board with the approval of the supervisory board, can appoint one or more of its members as legal representatives of the company. In any case, the general meeting of shareholders/sole owner is vested with the powers to approve certain decisions of significant importance for the company, including resolution on changes in the company's articles of association, reorganization of the company, decrease/increase of capital, appointment of board members, issuance of debentures, etc.

9. What are the duties of the directors and controlling shareholders of a target company?

These, again, vary, based on the type of company:

1. limited liability company – shareholders are required to pay the price of the quota they hold, participate in the management of the company, assist in facilitating the company's business and carry out the decisions of the general shareholders' meeting. Limited liability companies are managed by their manager(s). The manager has the duty to organize and manage the business of the company in accordance with the law and the decisions of the general shareholders' meeting. The manager also has the right and the duty to represent the company. The manager is liable for damages, caused to the company.
2. joint-stock company – the law does not impose imperative duties on shareholders beyond payment of the full price of the acquired shares. Directors are obligated to carry out their functions with the duty of a prudent businessman and must operate in the interest of the company and its shareholders. They cannot disclose information, which they acquired in the capacity of director, if such information

would impact the business and the development of the company. Prior to their election to the board, a director must disclose to the shareholders their participation in companies when such participation constitutes (i) ownership of over 25% of the capital, (ii) being an unlimited shareholder, (iii) having management functions (i.e. director, procurator, etc.). Such participations must also be disclosed if they arise after election to the board. Directors cannot carry out commercial activity, which is in competition to the activity of the company, unless this is explicitly allowed under the company's articles of association or by the respective company's body, responsible with appointment of the director. Additionally, they cannot participate in companies, which carry out such commercial activities. When assuming the position, a director must provide a guarantee for their mandate in an amount, determined by the general shareholders' meeting (but not less than three times their gross remuneration). Directors are also under obligation and are liable to file for administration if the company becomes insolvent.

10. Do employees/other stakeholders have any specific approval, consultation or other rights?

The Bulgarian Labour Code sets out requirements for pre-notification of the employees in the event of merger, transfer of going concern or a specific part thereof, reorganization, distribution of the entity's activity between two or more entities, among other protective mechanisms for the employees in case of change of the employer.

Recent legislative changes require transfer of shares in a limited liability company, transfer of going concern or a specific part thereof, to be carried out only if there are no due and unpaid payments to the employees (up to three years back), which must be proved with declarations by the transferor and the company's management (and checks by the authorities can be performed). In the event of a mandatory tender offer in a public company, the management must submit a report on the consequences of the acceptance of the tender offer to the employees.

Transfer of shares in a limited liability company to a new shareholder must be approved by the general meeting of shareholders with a majority of ¾ of the capital by way of a written minutes of resolutions, certified by a public notary.

Generally, shareholders in a joint-stock company can freely transfer their shares without need of approval by the other shareholders. However, the articles of association of the target company, and/or any shareholders' agreement among its shareholders, may contain conditions and restrictions for share transfers.

11. To what degree is conditionality an accepted market feature on acquisitions?

Conditionality is quite common in M&A transactions, taking the form of conditions precedent, inserted in share-purchase agreements. The conditions precedent typically include obligations of both parties, to be completed prior to conclusion of the transaction, such as: (i) actions of the seller to remedy issues related to the target company discovered during the due diligence; (ii) fulfilment of mandatory requirements under Bulgarian law (e.g. corporate approvals, merger clearance, other regulatory consents, etc.) and (iii) obtainment of required contractual consents (e.g. change of control consents under facility agreements).

12. What steps can an acquirer of a target company take to secure deal exclusivity?

The parties could enter into an exclusivity agreement or introduce exclusivity clauses to the terms sheet/ letter of intent, preliminary agreement or SPA. Usually, the aim is to prevent the seller from selling and negotiating the sale of the shares with third parties. Non-compliance by the seller would enable the acquirer to seek damages and/or penalty for the breach of the exclusivity clauses if such has been agreed.

13. What other deal protection and costs coverage mechanisms are most frequently used by acquirers?

Such mechanisms generally include payment of the whole or portion of the purchase price into an escrow account, usually opened by a bank, deferred or retained payment of the purchase price, as well as corporate or bank guarantees.

14. Which forms of consideration are most commonly used?

The most common type of consideration used in M&A transactions is cash. In rare

instances consideration may also be provided by way of shares or debentures. It is not uncommon that in some particular sectors other financial instruments or mechanisms are used (e.g. debt restructuring and refinancing).

15. At what ownership levels by an acquirer is public disclosure required (whether acquiring a target company as a whole or a minority stake)?

Acquisition of any stake in a limited liability company will require publication in the Commercial Register. The transfer of materialized shares in a joint-stock company is not subject to registration with the Commercial Register. However, acquisition of all the shares in a joint-stock company by a single shareholder would also require such publication. Publication of other mandatory information can indicate the change of the ownership, such as change of the members of the boards, invitations and decisions of the shareholders, etc.

Transactions of considerable economic impact must also be notified to and receive approval by the Competition Protection Commission, effectively making such transactions public (except for any confidential information, specified by the parties). Notification requirements also apply to acquisition of minority stakes, where acquisition would afford the acquirer negative control (i.e. veto rights, appointment of managers, etc.).

Acquisition of voting rights in a public company are subject to notification to the FSC if such acquisition reaches or exceeds 5% or any other percentage, divisible by 5, of the total voting rights in the target public company. The notification must contain (i) the total number of voting rights, owned by the acquirer as a result of the acquisition, (ii) the subsidiaries (if any), through which the acquirer exercises their voting rights, (iii) the date of acquisition and (iv) information regarding the acquirer. The notification can be prepared and submitted in the English language. The target public company is then obliged to publicize the information, contained in the notification.

16. At what stage of negotiation is public disclosure required or customary?

Commercial Register registration is effected post-completion, unless in the event of a

corporate reorganization or increase of the capital with an in-kind contribution. CPC notifications are to be submitted after signing of a share/quota purchase agreement or an equivalent binding documentation, but before implementation of the transaction.

For private companies, there is no general obligation to disclose acquisition negotiations in public. In acquisition involving a public company, the disclosure obligations are regulated by the applicable securities market legislation and anti-market manipulation rules, and depending on the circumstances, the disclosure may become required. For example, an issuer must make a public announcement through the regulated market (i) when the issuer's board is advised or otherwise becomes aware that a buy side is being sought for a transaction that involves a substantial shareholding; (ii) when the issuer's board is advised or otherwise becomes aware of a firm intention to acquire a substantial shareholding in it; or (iii) when an offer has been made to acquire a substantial shareholding.

17. Is there any maximum time period for negotiations or due diligence?

There is no maximum period for negotiations or due diligence regulated by virtue of law. However, it is commonly accepted that (depending on the transaction) standard deals should be able to be completed in a reasonable timeframe of two to three months (excluding administrative approvals, as the case might be).

18. Are there any circumstances where a minimum price may be set for the shares in a target company?

While the parties are free to decide on the terms of the contract, from a tax law perspective, the price has to be at fair market value. If the acquisition involves a tender offer to the shareholders of a public company, where the price must be justified and may not be lower than an applied fair value; the average weighted market price of the shares on a regulated market for a certain period, the highest price paid by the tender offeree for a past period. In such cases a price justification mechanism has to be applied, by virtue of a special ordinance, issued by the Financial Supervision Commissions, which also governs the applicable price valuation methods.

Is it possible for target companies to provide financial assistance?

The Bulgarian Commercial Act prohibits joint-stock companies from granting loans or providing security for acquisition of their own shares by a third party. The Commercial Act does not impose similar explicit prohibitions with respect to limited liability companies.

Provision of financial assistance is also regulated at the EU level through the Second Company Law Directive 2012/30/EU, which imposes a stricter prohibition regime and offers an avenue for domestic courts to take a more conservative approach to financial assistance.

20. Which governing law is customarily used on acquisitions?

Bulgarian law is generally used for acquisition of Bulgarian companies, however, it is not uncommon for structuring transactions or some aspects of transactions under the laws of the country in which holding companies are registered or other key elements of the transaction are based. Generally, corporate law aspects of the transaction must be governed by Bulgarian law, where the target is a Bulgarian company, thus share transfer, mergers, spin-offs and other corporate reorganizations are perfected under local rules.

21. What public-facing documentation must a buyer produce in connection with the acquisition of a listed company?

General rules regarding public announcements of significant corporate events must be followed. The tender offer for acquisition of a listed company must contain general information on the buyer (name, seat and management address, etc.), the targeted shares (number, type, offered price), and the post-acquisition plans of the buyer for the target listed company. The tender offer must also include copies of (i) any existing shareholders' agreements, which govern voting rights of the shareholders of the buyer and (ii) documents, evidencing the means of financing the tender.

19.

What formalities are required in order to document a transfer of shares, including any local transfer taxes or duties?

The share transfer agreement with respect to a limited liability company must be in writing, with notary certification of the content and the signatures of the parties. The share transfer must be registered with the Commercial Register.

Materialised shares are transferred by way of endorsement for transfer and the transfer must be entered into the shareholders' book of the target company. The transfer of dematerialised shares must be registered with the Bulgarian Central Depository. Bearer shares must be physically handed over to the acquirer. In most cases, a preliminary share purchase agreement is signed in writing.

23. Are hostile acquisitions a common feature?

Hostile acquisitions are not common in Bulgaria. Although the law does not forbid the practice, the make-up of the shareholding in public companies, which predominantly includes a majority shareholder with over 50% of the voting rights, makes a hostile bid rather unlikely. This is because a majority shareholder would most likely have appointed most of the members to the company's board of directors, which renders the board's opposition to a bid highly unlikely.

There are several means to effect a hostile acquisition of a private company. Equity dilution, as a form of a hostile acquisition of shares, is possible, when a significant amount of equity increase is voted and some shareholders receive disproportionally more shares than the rest of the shareholders. However, the law provides for protective mechanisms, such as required majorities for adoption of a decision for increase of the capital and pre-emption rights for the existing shareholders.

A hostile acquisition could also take the form of a sale of shares through enforcement of a share pledge, of imposed distraint over the shares or in the context of general enforcement proceedings against a shareholder in the target company.

22. Shareholders in a limited liability company may expel other shareholders for alleged violations of the latter, including nonfulfillment of decisions of the general meeting of the shareholders, acting against the interest of the company, etc

24. What protections do directors of a target company have against a hostile approach?

The target company's management, which resists to an acquisition, may opt to share only publicly available information with the acquirer. This would increase the risk for the latter to acquire unwanted debt and other problems due to the limited knowledge and insufficient information.

Furthermore, resignation of the key officers and management could destabilise the target company and threaten the smooth continuance of its operations.

In addition, the management agreements, which govern the relationship between the company and the respective director, may contain certain clauses, protecting the director's interest during change of control over the target company, such as a "golden parachute" clause, which ensures payment of compensation to the director. Given that such clauses may constitute a significant financial cost for the target company, typically the potential acquirer would investigate key management agreements in the course of the due diligence process.

25. Are there circumstances where a buyer may have to make a mandatory or compulsory offer for a target company?

The acquisition of a public company gives rise to the mandatory submission of a tender offer by the buyer, where the buyer acquires more than (i) one third (only where no single shareholder holds a majority of the voting power), (ii) half or (iii) two thirds of the voting power in the general shareholders' meeting of a publically traded company.

The shareholders of a private company may have agreed to certain arrangements, such as tag along, drag along rights and put/call options or similar mechanisms. Such restrictions and obligations relating to share transfer are often used; however, they are valid only between the parties and are not easily enforceable. If case of default the non-defaulting party would have only contractual rights/ penalty claims against the defaulting party but no specific performance is available under Bulgarian law.

If an acquirer does not obtain full control of a target company, what rights do minority shareholders enjoy?

Minority shareholders' rights vary, depending on the type of company:

1. Limited liability company – minority shareholders, which hold more than 25% of the quota in the company have blocking rights with respect to decisions on the amendment of the company's articles of association, accession and expulsion of quotaholders, permission to an existing quotaholder to transfer quota to a third party, additional monetary contributions. Regardless of the amount of quota held, any minority shareholder can block a decision on the increase or decrease of capital.
2. Joint-stock company – minority shareholders, which hold more than a third of the shares in the company, have blocking rights with respect to decisions on the amendment of the company's articles of association, increase/decrease of the capital, reorganization and liquidation of the company. Additionally, any shareholder with at least 5% share ownership has the right to convene a general shareholders' meeting. Any shareholder with at least 10% share ownership may claim liability against a director of the company for inflicted damages to the company. Additional rights may be provided to minority shareholders on the basis of a shareholders' agreement.

27. Is a mechanism available to compulsorily acquire minority stakes?

As mentioned above, a compulsory acquisition can result from agreed drag-along/tag along rights or call/put options.

In the context of an acquisition of a public company, any acquirer, who, as a result of a tender offer (as described in Question 5), obtains ownership of 95% or more of the voting rights in the target, has the right

to purchase the remaining shares and squeeze out remaining minority shareholders. The minority shareholders have the reciprocal right to force the acquirer to purchase their shares.

26.